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# Criminal Justice in Revolutionary Nicaragua: Intimations of the Adversarial in Socialist and Civil Law Traditions

Richard J. Wilson

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## ARTICLES

**CRIMINAL JUSTICE IN  
REVOLUTIONARY NICARAGUA:  
INTIMATIONS OF THE ADVERSARIAL IN  
SOCIALIST AND CIVIL LAW  
TRADITIONS**

RICHARD J. WILSON\*

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## I. INTRODUCTION

For more than a decade, Nicaragua has been a lightning rod for intense political and legal debate in the United States. The 1979 revolutionary victory and subsequent governmental control by the *Frente Sandinista de Liberación Nacional* (FSLN or "Sandinistas") preceded Ronald Reagan's election as President of the United States by just over a year. During the Reagan years, Nicaragua was a key component of that administration's campaign

against what it saw as a pure Marxist regime.<sup>1</sup>

When the United States provided funding, at first covertly, to create an armed counterrevolutionary force (the "contras"), both the U.S. Congress and legal scholars questioned the legality of this intervention in Central America.<sup>2</sup> Nicaragua received further attention in the U.S. legal community when it brought suit against

1. Politically, Nicaragua has assumed less importance, at least overtly, during the administration of U.S. President George Bush. Interest by non-legal academics in the changes affected by the Sandinista revolution has produced an immense literature on post-revolutionary Nicaragua which is remarkably devoid of discussion of law and legal institutions. I have found a number of books particularly helpful in deepening my own understanding of Nicaragua's historical, political, and social developments.

For the best analyses of U.S. foreign policy regarding Nicaragua's relationship to the United States, see ROBERT A. PASTOR, *CONDEMNED TO REPETITION: THE UNITED STATES AND NICARAGUA* (1987); see also KARL BERMAN, *UNDER THE BIG STICK: NICARAGUA AND THE UNITED STATES SINCE 1848* (1986) (a distinctly progressive account of history, revolution, and U.S.-Nicaragua relations); GEORGE BLACK, *THE GOOD NEIGHBOR: HOW THE UNITED STATES WROTE THE HISTORY OF CENTRAL AMERICA AND THE CARIBBEAN* (1988) (a penetrating and entertaining exposé of the sordid history of U.S. policy in Central America); SHIRLEY CHRISTIAN, *NICARAGUA: REVOLUTION IN THE FAMILY* (1986) (a thorough, though essentially conservative, account of Nicaragua's historic and contemporary experience); ROY GUTMAN, *BANANA DIPLOMACY: THE MAKING OF AMERICAN POLICY IN NICARAGUA, 1981-1987* (1988).

My personal favorites in politics and society, however, are the powerful personal stories of the experience of Nicaragua's revolutionary transformation. See OMAR CABEZAS, *FIRE FROM THE MOUNTAIN: THE MAKING OF A SANDINISTA* (1985) (an account of a Sandinista guerrilla who later became involved in the government); see also DORIS TIJERINO, *INSIDE THE NICARAGUAN REVOLUTION (AS TOLD TO M. RANDALL)* (1978) (the personal account of the woman who eventually was to head the Sandinista police, the first woman ever to head a national police force in the hemisphere). For accounts from foreign visitors, see PETER DAVIS, *WHERE IS NICARAGUA?* (1987); SALMON RUSHDIE, *THE JAGUAR SMILE* (1987).

2. For a myriad of treatments of the legality of recent U.S. intervention in Central America, see ARMS CONTROL AND FOREIGN POLICY CAUCUS, *U.S. POLICY IN CENTRAL AMERICA: AGAINST THE LAW?* (Sept. 11, 1984); MARK V. TUSHNET, *CENTRAL AMERICA AND THE LAW: THE CONSTITUTION, CIVIL LIBERTIES, AND THE COURTS* (1988); Christopher C. Joyner & Michael A. Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT'L L. 621 (1985); Jules Lobel & Michael Ratner, *Is United States Military Intervention in Central America Illegal?*, 12 HUM. RTS. 22 (1984); Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986); John N. Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43 (1986); John N. Moore, *The Secret War in Central America—A Response to James P. Rowles*, 27 VA. J. INT'L L. 273 (1987); *Panel Discussion: Options for a Law-Abiding U.S. Policy in Central America*, 10 B.C. THIRD WORLD L. J. 215 (1990); John M. Rogers, *Domestic Legal Challenges to U.S. Policy in Nicaragua*, 6 ST. LOUIS U. PUB. L. REV. 77 (1987); James P. Rowles, "Secret Wars," *Self-Defense and the Charter—A Reply to Professor Moore*, 80 AM. J. INT'L L. 568 (1986); Daniel C. Harms, Note, *The Legality of the United States Trade Embargo Against Nicaragua: The Unfettered Exercise of Presidential Emergency Power in Peacetime*, 12 T. MARSHALL L. REV. 171 (1986); John Mabie, Note, *The Legitimacy of United States Intervention in Nicaragua*, 6 N.Y.L. SCH. J. INT'L & COMP. L. 135 (1984); Keith T. Schulz, Note, *The Legal Implications of United States Policy Toward Nicaragua: A Machiavellian Dilemma*, 22 SAN DIEGO L. REV. 895 (1985).

the United States in the International Court of Justice (ICJ), alleging U.S. responsibility for contra crimes and other improper interventions in its domestic affairs. The United States withdrew from the ICJ's jurisdiction, and a decision was rendered in favor of Nicaragua in 1986.<sup>3</sup> Domestic U.S. legal actions also sought government accountability for contra wrongdoing.<sup>4</sup> There were, of course, extensive Congressional hearings and ongoing prosecutions of U.S. government officials and private individuals for their illegal activities in the Iran-Contra arms transfers and for their participation in illicit payments to the contras.<sup>5</sup>

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3. The ruling of the International Court is reported as *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 4. That case, from which the United States withdrew jurisdiction prior to a ruling on the merits, held that the United States had violated international law by training, arming, equipping, financing, and supplying contra forces that engaged in military and paramilitary activities against Nicaragua. The I.C.J. also condemned U.S. armed attacks on Nicaraguan territory, unauthorized overflights, mining of Nicaraguan harbors, and encouragement of illegal acts by the publication of a manual for psychological warfare. See *THE CIA'S NICARAGUA MANUAL: PSYCHOLOGICAL OPERATIONS IN GUERRILLA WARFARE* (1985). For a discussion of the Nicaraguan case, see TERRY GILL, *LITIGATION STRATEGY AT THE INTERNATIONAL COURT: A CASE STUDY OF THE NICARAGUA V. UNITED STATES DISPUTE* (1989); David Bernstein, *International Court of Justice—Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. — (*Judgment on Merits of June 27, 1986*), 28 HARV. INT'L L.J. 146 (1987); Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985); Farooq Hassan, *A Legal Analysis of the United States' Attempted Withdrawal from the Jurisdiction of the World Court in the Proceedings Initiated by Nicaragua*, 10 U. DAYTON L. REV. 295 (1985); John N. Moore et al., *Debate—The ICJ Case on the Merits: Legal and Moral Implications of U.S. Aid to the Contras*, 6 ST. LOUIS U. PUB. L. REV. 85 (1987); *World Court Sides with Justice*, 5 ENV'TO 22 (July 1986); Keith Highet, Note, *Litigation Implications of the U.S. Withdrawal from the Nicaragua Case*, 79 AM. J. INT'L L. 992 (1985). One interesting political consequence of the case has been the U.S. request for Nicaragua's new government to forgive the money judgment ordered by the ICJ, now estimated at as much as \$17 billion, as a condition for receipt of much-needed U.S. economic assistance. See Mark A. Uhlig, *U.S. Urges Nicaragua to Forgive Legal Claim*, N.Y. TIMES, Sept. 30, 1990, at A18.

4. Domestic litigation based on wrongdoings by contra forces or leaders has generally been unsuccessful, but raises significant legal and political questions. See, e.g., *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985); *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988); discussed in Mark Gibney, *Suing for Death, Suffering and Peace*, 12 HUM. RTS. Q. 415 (1990); see also *Linder v. Portocarrero*, No. 90-5862 (11th Cir. 1990) (Initial Brief of Appellants on file with author)(complaint dismissed by the Southern District of Florida in an unreported decision).

5. On the Congressional hearings, see, e.g., COMMITTEE ON FOREIGN AFFAIRS, U.S. HOUSE OF REPRESENTATIVES, STAFF REPORT: STATE DEPARTMENT AND INTELLIGENCE COMMUNITY INVOLVEMENT IN DOMESTIC ACTIVITIES RELATED TO THE IRAN/CONTRA AFFAIR (Sept. 7, 1988); THE TOWER COMMISSION REPORT (1987); L. COCKBURN, *OUT OF CONTROL: THE STORY OF THE REAGAN ADMINISTRATION'S SECRET WAR IN NICARAGUA, THE ILLEGAL ARMS PIPELINE, AND THE CONTRA DRUG CONNECTION* (1987); David J. Scheffer, *U.S. Law and the Iran-Contra Affair*, 81 AM. J. INT'L L. 696 (1987); Gary J. Schmitt, *The Rule of Law and "Perfect Secrecy"*, 11

Close attention and hope for peace in the region recurred when the Central American presidents, including Nicaragua's Daniel Ortega, signed the Central American Peace Plan in 1987, and this virtually without participation by the United States.<sup>6</sup> The peace plan pressured both the Sandinistas and the U.S. to end the contra war. It is in this environment that the Nicaraguan people prepared for the 1990 national elections, one of the most heavily observed campaigns in history.<sup>7</sup> The surprising victory, in February 1990, of the National Opposition Union (UNO) coalition over the Sandinista slate in both Presidential and National Assembly elections brought new attention to the country, not only in the United States but throughout the world.<sup>8</sup>

The victory of the UNO coalition was widely associated with what is seen as a world-wide "democratization" movement. More open elections have taken place in many Central and South American Countries,<sup>9</sup> but democratization's most profound and tumultu-

Hous. J. INT'L L. 255 (1988). For a good summary of the focus of the prosecutions and the several defendants, see Fred Strasser, *Iran - Contra Scorecard*, NAT'L L.J., May 27, 1991, at 1; George Lardner, Jr., *Abrams Pleads Guilty in Iran - Contra Affair*, WASH. POST, Oct. 8, 1991, at A1.

6. Guatemalan Agreement for Peace in Central America, DEP'T. ST. BULL., Oct. 1987, at 56. On the inability of the U.S. to influence decision-making in the region, see Stephen Kinzer, *Two Latin Nations Rebuff U.S. Effort Against Nicaragua*, N.Y. TIMES, July 31, 1988, at A1. The Central American leaders met again in 1989 to update the Peace Accords. See Richard Boudreaux, *5 Latin Leaders Agree on Disbanding Contras*, L.A. TIMES, Feb. 15, 1989, at 1; *Text of Agreement by Central American Presidents*, N.Y. TIMES, Feb. 16, 1989, at A14.

7. Mark A. Uhlig, *Nicaragua Approaches an Election That May Rise or Fall on Its Fairness*, N.Y. TIMES, Jan. 28, 1990, at A3.

8. The UNO coalition, heavily supported by U.S. funding and organization, was made up of 14 separate parties ranging from the far right-wing Popular Conservative Alliance Party (PAPC) to the Communist Party of Nicaragua. See KENT NORSWORTHY, *NICARAGUA: A COUNTRY GUIDE* 10-15 (1989)[hereinafter COUNTRY GUIDE]; *UNO's Balance of Power—On a Tight Rope*, 9 ENVTO 26 (June 1990). Within the first month of the new administration, the coalition had begun to splinter, deeply divided over the issue of leadership in the National Assembly. See *The New Players*, 9 ENVTO 24-25 (May 1990).

On the election generally, see Richard Boudreaux, *Requiem for a Revolution?*, L.A. TIMES, Apr. 24, 1990, at H1; William Branigin, *Election Shattered Many Sandinista Myths*, WASH. POST, Mar. 2, 1990, at A26; Mark A. Uhlig, *Nicaraguan Opposition Routs Sandinistas: U.S. Pledges Aid, Tied to Orderly Turnover*, N.Y. TIMES, Feb. 27, 1990, at A1; *Whither Central America? Coopted Negotiation or Participatory Democracy*, 9 ENVTO 10, 14-15 (May 1990). The U.S. administration reacted with an historically typical account: "In the Western Hemisphere, the election and inauguration of a democratic government in Nicaragua left the repressive dictatorship of Fidel Castro the only Marxist-Leninist regime in the region." DEPARTMENT OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990 IX* (Feb. 1991).

9. I have briefly summarized the fragile transformation of twelve Latin American and Caribbean governments—Argentina, Bolivia, Brazil, the Dominican Republic, Ecuador, El

ous impact took place in the Soviet Union<sup>10</sup> and in those countries of Eastern Europe which were part of the Soviet bloc.<sup>11</sup> That im-

Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru, and Uruguay—which, since 1979, have democratically elected civilian presidents after military or *caudillo* governments. See Richard J. Wilson, *Testing a New Constitution*, 16 HUM. RTS. 44, 49 (1989).

Chile and Haiti have held open elections since 1989. See *A Medio Camino: The Road Toward Democracy, A Report on the 1989 Chilean Elections*, INT'L HUM. RTS. L. GRP. (Mar. 1990); Howard W. French, *Haitians Overwhelmingly Elect Populist Priest to the Presidency*, N.Y. TIMES, Dec. 18, 1990, at A1. See also Robert Barros, *The Left and Democracy: Recent Debates in Latin America*, 68 TELOS 49 (1986); Tom J. Farer, *Elections, Democracy, and Human Rights: Toward Union*, 11 HUM. RTS. Q. 504 (1989); Eduardo Viola & Scott Mainwaring, *Transitions to Democracy: Brazil and Argentina in the 1980s*, 38 J. INT'L AFF. 193 (Winter 1985); James Brooke, *Latin Armies Are Looking for Work*, N.Y. TIMES, Mar. 24, 1991, § 4, at 2; Doyle McManus, *Central America Turns to Democracy: Can It Work?*, L.A. TIMES, Feb. 28, 1990, at 1; A.S. Ross, *New Era for Latin Democracy*, S.F. EXAMINER, Sept. 17, 1989, at 1.

Cuba continues to resist change from pure socialism, primarily due to the strong leadership of Fidel Castro. See, e.g., Don Podesta, *Cuba's Buffalo-and-Bicycle Approach to Life in a Post-Communist World*, WASH. POST, Apr. 5, 1991, at A12; Don Podesta, *As Castro Grays, So Does Revolution*, WASH. POST, Apr. 14, 1991, at A18.

10. The events in Eastern Europe, the Soviet Union and newly-reunified Germany are far too extensive and ongoing to even begin to document here. They were extensively yet concisely summarized in late 1990 in a four-part series in *The New York Times: Evolution in Europe: One Year Later*, N.Y. TIMES, Nov. 9-12, 1990 (Serge Schmemmann, *For Eastern Europe Now, A New Disillusion*, N.Y. TIMES, Nov. 9, 1990, at A1; Steven Greenhouse, *Eastern Europe Finds Pain on Journey to Capitalism*, N.Y. TIMES, Nov. 10, 1990, at A1; Stephen Engelberg, *Poland Faces Choices on Economic Austerity and the Character of the State*, N.Y. TIMES, Nov. 11, 1990, § 1, at 16; Celestine Bohlen, *Ethnic Rivalries Revive in Eastern Europe*, N.Y. TIMES, Nov. 12, 1990, at A1). For another theoretical discussion of the democratization process in Europe, see Andrew Arato, *Some Perspectives of Democratization in East Central Europe*, 38 J. INT'L. AFF. 321 (1985). For compelling literary perspectives, see William McPherson, *In Romania*, 33 GRANTA 9 (Summer 1990); *The State of Europe: Christmas Eve, 1989*, 30 GRANTA 125 (Winter 1990)(materials by a number of prominent authors). The impact on legal systems is well-documented in the materials cited *infra* note 12.

11. As a recent report on human rights stated:

The year 1989 may very well go down in history books as a watershed year regarding the worldwide cause of human rights. The revolutionary changes in Bulgaria, Czechoslovakia, the German Democratic Republic, and Romania left Albania as the only totalitarian regime left intact in Europe by year's end. . . . The Soviet Union's acceptance of these changes was undoubtedly a significant factor in the peaceful character of the transition, as was the orderly and democratic spirit of the popular movements themselves.

DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1989 2 (Feb. 1990).

Literature on the legal changes in Eastern Europe is sparse, due primarily to the spotlight on events in Russia and the Soviet Union. See, e.g., Inga Markovits, *Law and Glasnost: Some Thoughts About the Future of Judicial Review Under Socialism*, 23 LAW & SOC. REV. 399 (1989)(canvassing developments during the 1980s in Poland, Hungary, and East Germany); Sophia Kaminski, *The Polish Legal System—Continuity and Change*, 33 THE ADVOC.: IDAHO ST. BAR 16 (Oct. 1990); *The Criminal Justice Reform: Possible Solutions, Guarantees and Prospects*, 2 BULLETIN OF THE HUMAN RIGHTS COMMITTEE IN THE PEOPLE'S



pact has reached deeply into the established socialist legal tradition; democratization has led to a profound reexamination of the premises, institutions, and processes of criminal justice.<sup>12</sup> The premise of Soviet legality, without oversimplification, has shifted from "everything which is not permitted by law is prohibited" to "everything not prohibited by law is permitted."<sup>13</sup>

Notwithstanding the vast literature, scholars have given little attention to the development of law and legal institutions in Nicaragua, before or after the Sandinista revolution.<sup>14</sup> This Article is a

REPUBLIC OF BULGARIA 14 (June 1989); Czechoslovakian Constitutional Act on Fundamental Rights and Freedoms (unpublished draft on file with the author).

12. There is a developing literature on the changes to legal systems brought on by the advent of *perestroika*, a Russian term originally coined to refer to reform of the Soviet economy, but coming to mean broad social reconstruction. See, e.g., WALTER LAQUEUR, *THE LONG ROAD TO FREEDOM: RUSSIA AND GLASNOST*, 163-179 (1989); Anne-Marie Burley, *Revolution of the Spirit*, 3 HARV. HUM. RTS. J. 1 (1990); W. E. Butler, *Towards a Rule of Law?*, in *CHRONICLE OF A REVOLUTION* 72 (Abraham Brumberg ed., 1990) [hereinafter *CHRONICLE*]; Doriane Lambelet, *The Contradiction Between Soviet and American Human Rights Doctrine: Reconciliation Through Perestroika and Pragmatism*, 7 B.U. INT'L L.J. 61 (1989); John Quigley, *The New Soviet Law on Appeals: Glasnost in the Soviet Courts*, 37 INT'L & COMP. L. Q. 172 (1988); John Quigley, *Will the Inquisitorial System With Away? Perestroika in the Soviet Lockup*, 8 ST. LOUIS U. PUB. L. REV. 121 (1989) [hereinafter *Quigley, Soviet Lock-Up*]; Albert J. Schmidt, *Law and Perestroika*, 9 U. BRIDGEPORT L. REV. 295 (1988); David M. Simmons, *Recognition of Illegalities, Proposals for Reform, and Implemented Reforms in the Soviet Criminal Justice System Under Gorbachev, Glasnost, and Perestroika*, 5 AM. U.J. INT'L LAW & POL'Y 921 (1990); Gordon B. Smith, *The Procuracy, Citizen's Rights and Legal Reform*, 28 COLUM. J. TRANSNAT'L. L. 77 (1990); Vaksberg, *Legal Reforms and Basic Principles*, in *CHRONICLE*, *supra* at 188. See also *infra* notes 475-79 and accompanying text; Allan Norrie, *Locating the Socialist Rechtsstaat: Underdevelopment and Criminal Justice in the Soviet Union*, 18 INT'L J. SOC. L. 343 (1990); Valerii Savitskii, *Selected Problems of Judicial Reform, Criminal Justice and the Protection of Individual Rights in the USSR*, 2 CRIM. L.F. 269 (1991).

13. Butler, *supra* note 12, at 80. The Russian articulation is found in V.K. Zabigailo, *Perestroika, Glasnost and Law Reform in the Soviet Union Today*, 12 DALHOUSIE L.J. 165, 171 (1989).

14. For the single scholarly study in English on criminal justice in post-revolutionary Nicaragua, see Beth Stephens, *A Developing Legal System Grapples with an Ancient Problem: Rape in Nicaragua*, 12 WOMEN'S RTS. L. REP. 69 (1990) [hereinafter *Stephens, Rape in Nicaragua*]. For Ms. Stephens' account of the development of family law see Beth Stephens, *Changes in the Laws Governing the Parent-Child Relationship in Post-Revolutionary Nicaragua*, 12 HASTINGS INT'L & COMP. L. REV. 137 (1988). A number of authors have briefly written on the development of law in post-revolutionary Nicaragua, touching on issues of criminal law and procedure. See, e.g., Nancy Blodgett, *Nicaragua: The Trials of Post-Revolutionary Justice*, 12 STUDENT LAW. 10 (1984); Beverly M. Carl, *How Marxist Is Nicaragua? A Look at the Laws*, 21-22 CRIME & SOC. JUST. 116 (1984); John T. Philipsborn, *Nicaragua: A Legal System Developing in Difficult Times*, 71 JUDICATURE 211 (Dec.-Jan. 1988); Jerry Pyle, *The Law in Nicaragua—Seeing Justice Done*, 7 ENVFO 8 (Oct. 1988).

A translation of a speech given by former Nicaraguan Supreme Court Vice-President Vilma Núñez de Escorcía is the most extensive, informative and insightful treatment on the subject. Vilma Núñez de Escorcía, *Justice and the Control of Crime in the Sandinista Pop-*

study of the criminal justice system in Nicaragua. It begins with the institutional roots of criminal justice structures and processes in the late nineteenth century and ends with the newest post-election developments of 1990. Post-revolutionary developments in criminal justice took place in the context of a vast shift in the legal culture from the traditional civil law model to a largely socialist model. While the focus is on Nicaragua, a close examination of the development of the criminal justice system in that country has much to offer in the general understanding of legal systems and culture outside of the common law.

The Central and South American countries generally are part of the Roman or civil law tradition which flows from colonial dominance of the region by Spain and Portugal; this tradition is shared by most of contemporary Western Europe.<sup>15</sup> In the area of criminal law and procedure, the civil law was highly influential in the legal development of the socialist criminal process in Eastern Europe.<sup>16</sup>

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*ular Revolution*, 23 CRIME & SOC. JUST. 5 (1983). See also *Interview with Dra. Vilma Núñez de Escorcía, Justice in Nicaragua*, 8 CAN. CRIMINOLOGY F. 53 (1986). Finally, there have been three studies which focus almost exclusively on the extraordinary (and now abolished) procedures of the Popular Anti-Somocista Tribunales (TPA), which will not be discussed in depth here. For a discussion of the studies, see Robert S. Steinberg, *Judicial Independence in States of Emergency: Lessons from Nicaragua's Popular Anti-Somocista Tribunals*, 18 COLUM. HUM. RTS. L. REV. 359 (1987); LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, NICARAGUA: REVOLUTIONARY JUSTICE (April 1985) [hereinafter REVOLUTIONARY JUSTICE]; INT'L LEAGUE FOR HUMAN RIGHTS, INTERNATIONAL LEAGUE NICARAGUA REPORT: POPULAR ANTI-SOMOCISTA TRIBUNAL (1986).

One of the most important developing sources for information on the operation of the criminal justice systems of Central America is the reports prepared by international non-governmental human rights groups such as Americas Watch, the Lawyers Committee for Human Rights, and Amnesty International. These reports will be referred to throughout this Article. It has been noted, however, that reporting on human rights in Nicaragua is not without its own shortcomings, political interests, and institutional and cultural biases. See Tom J. Farer, *Looking at Nicaragua: The Problematique of Impartiality in Human Rights Inquiries*, 10 HUM. RTS. Q. 141 (1988); *The Politics of Human Rights Reporting in Nicaragua*, 5 ENVÍO 14 (June 1986).

15. The civil law tradition is covered extensively but succinctly in John Henry Merryman's classic, *THE CIVIL LAW TRADITION* (2d ed. 1985); see also RENÉ DAVID & JOHN E. C. BRIERLY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* (1968); *LEGAL TRADITIONS AND SYSTEMS: AN INTERNATIONAL HANDBOOK* (Alan N. Katz ed., 1986). On the civil law in Latin America, see generally HENRY P. DE VRIES, *CASES AND MATERIALS ON THE LAW OF THE AMERICAS: AN OUTLINE OF LATIN AMERICAN LAW AND SOCIETY* (1980); PHANOR J. EDER, *A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN-AMERICAN LAW* (1950); KENNETH L. KARST, *LATIN AMERICAN LEGAL INSTITUTIONS: PROBLEMS FOR COMPARATIVE STUDY* (Jane R. Trapnell ed., 1966); KENNETH L. KARST & KEITH S. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA: A CASEBOOK STUDY* (1975); JOSEF L. KUNZ, *LATIN-AMERICAN PHILOSOPHY OF LAW IN THE TWENTIETH CENTURY* (1950); JOHN HENRY MERRYMAN & DAVID S. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* (1978).

16. Mirjan Damaska, in his extensive and insightful study of comparative criminal pro-

Nicaragua's legal system thus shares much in common with its Central and South American neighbors, as well as with most of Western Europe. It has been influenced also by socialist legal models which dominate in Cuba and, until recently, in the Soviet Union.

A second focus of this Article is a close examination of the premises, ideology, and historical development of Nicaraguan criminal procedure. History puts current changes into appropriate context and may, in a broader context, give a sense of future directions. The sharp break in political and legal philosophy after the 1979 revolution meant profound institutional and societal change during the subsequent decade. A similarly dramatic shift occurred with the unexpected UNO victory in the 1990 Presidential elections. An understanding of the distinct premises of the civil and socialist criminal justice systems in Nicaragua provides a context from which to correctly interpret the strengths and weaknesses of the Nicaraguan system, separate and apart from the mud-slinging of the political arena.

Civil and socialist law premises initially may feel strange, incongruent, or even inimical to those who share our common law tradition. Even more subtly and seductively, the experience may seem absolutely congruent when, in fact, it is not, because of language, culture, or custom and practice. Analysis of the ideologies which came into conflict during these sharp breaks illuminates not only the Nicaraguan experience, but also that of the other civil law countries of Latin America. It permits speculation on the effects of similar sharp breaks from traditional socialist law structures in the many countries now in that process.

The operative code governing criminal procedure today in Nicaragua is more than a century old.<sup>17</sup> By the time of the 1979 Nica-

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cedure, states that, "many important aspects of [European socialist] legal process, when compared to puzzling common-law arrangements and institutions, appeared to exhibit a strong resemblance to conventional Continental systems. The essential structure of trials was similar, and so were the basic outlines of the preliminary and the appellate process, modes of proof, and a great number of more specific arrangements." MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 7 (1986) [hereinafter *THE FACES OF JUSTICE*]. See also W. E. BUTLER, *SOVIET LAW* 351 (2d ed. 1988); *Soviet Lock-Up*, *supra* note 12, at 121.

17. The most complete version of the Code of Criminal Instruction of 1879, and the most used for reference in Nicaragua, is the version annotated by Professor Manuel Escobar, produced in 1956. MANUEL ESCOBAR, *CÓDIGO DE INSTRUCCIÓN CRIMINAL DE NICARAGUA: CON TODAS LAS REFORMAS*, (Edición Oficial 1956). The most current and accurate version, however, is an edition produced by the Nicaraguan Supreme Court in 1988 for use as a desk

raguan revolution, criminal procedure in most of Central and South America had achieved a significant measure of reform and modernization.<sup>18</sup> With some minor changes, Nicaragua's criminal procedure was, in 1979, similar to that established one century earlier. Changes in criminal procedure and, more generally, in criminal justice policy and administration in revolutionary Nicaragua, were not nearly as profound nor as ideologically based as those which occurred following the Cuban revolution of 1959.<sup>19</sup> Now, twelve years later, at the end of the first year of the Chamorro government, some amendments have occurred, but no new codes of criminal law or procedure are planned for Nicaragua in the near

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copy by judges. CORTE SUPREMA DE JUSTICIA, CÓDIGO DE INSTRUCCIÓN CRIMINAL [CÓD. INST. CRIM.] (Managua, Nicaragua, 1988). This edition incorporates post-revolutionary amendments. All references to specific code provisions will be to the 1988 edition, unless otherwise noted.

18. ESCOBAR, *supra* note 17, at 7. Despite movement toward what is generally perceived as salutary reform, Western Europe and Latin America have vacillated on certain central issues. These include orality, consolidation of proof-taking, the use of jury trials, and restrictions on the judge's inquisitorial powers. Cf. MERRYMAN, *supra* note 15, at 128. Both Spain and Argentina, for example, have gone through several versions of oral versus written trial proceedings. ALEJANDRO D. CARRIÓ, *THE CRIMINAL JUSTICE SYSTEM OF ARGENTINA: AN OVERVIEW FOR AMERICAN READERS* 12-14 (1987).

19. During the first decade after the 1959 revolution, the Cuban system was modeled after the Soviet system. A Fundamental Statute granted almost total power to the Executive, or party ruling structure, and almost none to the Judiciary. Both distrust in the rulings of the bourgeois courts of the Batista era, and strong intervention in judicial processes through specific decrees or executive interventions, assured the "revolutionary correctness" of judicial rulings. INTERNATIONAL COMMISSION OF JURISTS, *CUBA AND THE RULE OF LAW* (1962) [hereinafter *CUBA AND THE RULE OF LAW*]. By 1966, Cuban courts were extensively injected with lay, or "popular," participation in the style of the Soviet Comrades' Courts. Jesse Berman, *The Cuban Popular Tribunals*, 69 *COLUM. L. REV.* 1317 (1969); Harold S. Berman & James W. Spindler, *Soviet Comrades' Courts*, 38 *WASH. L. REV.* 842 (1963). But for the brief duration and limited jurisdiction of Nicaragua's Popular Anti-Somocista Tribunals, there has been no popular participation in the courts, although the 1987 Constitution calls for "popular participation" in the administration of justice. NICAR. CONST. art. 166.

Typical of executive intervention in judicial processes in Cuba was the trial, begun in 1959, of air force pilots who had supported the Batista regime in its final days. The pilots, accused of genocide, were initially acquitted by a military tribunal, but were later sentenced to 30 years imprisonment by a higher court appointed by Fidel Castro (after his public expression of dissatisfaction with the lower court verdict). *CUBA AND THE RULE OF LAW*, *supra* at 181-90; Francisco José Moreno, *The Cuban Revolution v. Batista's Pilots*, in *POLITICAL TRIALS* 94 (Theodor L. Becker ed., 1971).

Moreover, since 1973, the legal profession in Cuba, unlike Nicaragua's, was entirely socialized, in the style of the Soviet model. In the Cuban system, the private practice of law was abolished. Luis Salas, *The Judicial System of Postrevolutionary Cuba*, 8 *NOVA L.J.* 43, 52 (1983). In the Soviet system, state supervision of the *advokatura*, or colleges of lawyers, means severely limited independence, although the private practice of law is not technically abolished. BUTLER, *supra* note 16, at 80-95; DINA KAMINSKAYA, *FINAL JUDGMENT: MY LIFE AS A SOVIET DEFENSE ATTORNEY* 24 (Michael Glenny trans., 1982).

future.<sup>20</sup>

There were, to be sure, dramatic developments during the Sandinista government in such diverse areas as land reform, literacy and education, health care, and women's rights.<sup>21</sup> Significant time was also devoted to the elections of 1984 and to the 1988 reform of the electoral laws.<sup>22</sup> Perhaps the biggest single change in the conception of revolutionary law came with the adoption of a new Constitution in January of 1987.<sup>23</sup>

The Nicaraguan experience with criminal justice provides an opportunity to examine how closely revolutionary reality was able to approximate revolutionary aspirations. As the analysis here suggests, changes in legal institutions reflected adherence to socialist ideals, while changes in criminal procedure after the revolution largely reflect a tendency toward what is seen as modernization under the civil law model rather than wholesale conversion to the socialist model.

Nicaragua has moved from traditional Latin American *caudillismo* under the Somoza family, which had ruled from the late 1930s with heavy U.S. intervention,<sup>24</sup> through the socialist-democratic model embodied in the policies of the Sandinista government, and now to the new policies of the UNO government. These abrupt transitions in Nicaraguan society give the legal comparativist the opportunity to examine the influence in Nicaragua of all of the dominant legal traditions: common law, civil law, and socialist law. At bottom, criminal procedures are an accurate reflection of a society's commitment to due process and equal protection of

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20. Interview with Manuel Cano, attorney and advisor to the National Assembly on criminal legislation, in Managua, Nicaragua (Jan. 5, 1989); interviews with Lino Hernández, Executive Director of the non-governmental Nicaraguan Permanent Human Rights Commission, in Managua (June 7, 1990) and Victor Ordóñez, Vice-Dean and Professor of Criminal Law and Procedure, Central American University Faculty of Law, in Managua (June 6, 1990).

21. See generally NICARAGUA: THE FIRST FIVE YEARS (Thomas W. Walker ed., 1985); and JOSEPH COLLINS, WHAT DIFFERENCE COULD A REVOLUTION MAKE? FOOD AND FARMING IN THE NEW NICARAGUA (1986). See also GEORGE BLACK, TRIUMPH OF THE PEOPLE: THE SANDINISTA REVOLUTION IN NICARAGUA 223-330 (1981).

22. JOHN A. BOOTH, THE END AND THE BEGINNING: THE NICARAGUAN REVOLUTION 215-24 (2d ed. 1985). *Nicaragua Writes a New Election Law*, 7 CENTRAL AMERICA UPDATE, No. 30 (Sept. 21, 1988).

23. CONSTITUCIÓN POLÍTICA DE NICARAGUA [NICAR. CONST.] (Managua: Editorial El Amanecer, 1987).

24. DEPARTMENT OF THE ARMY, NICARAGUA: A COUNTRY STUDY 27-43 (Area Handbook Series, James D. Rudolph ed., 1982) [hereinafter COUNTRY STUDY]; BERMANN, *supra* note 1, at 219-74; CHRISTIAN, *supra* note 1, at 27-39.

the law, the protection of the rights of the individual, and the vengeance or compassion of that society toward those whose conduct is considered criminally aberrant. Each of the three dominant Western legal traditions offers a different vision of these notions.

Part II of the Article puts the code of criminal procedure, and other aspects of Nicaraguan criminal justice, into appropriate historical perspective, explaining their origins in order to better understand their jurisprudential premises, as well as the influence of these premises on current practice. Part III provides a picture of practical aspects of criminal justice in Nicaragua on the eve of the 1979 revolution. Part IV identifies, in some depth, the most important post-revolutionary changes in criminal justice institutions or procedures, while Part V analyzes the ways in which these changes conflict with the original operational premises of criminal practice and procedure. Part VI suggests that Nicaragua's experience, when combined with the experiences of modernization in Western Europe and the Soviet Union, is part of a general trend toward a more adversarial model in Western societies, a trend which may be unhealthy for criminal process. A concluding section focuses on the new Nicaraguan government's ideas for the administration of criminal justice.

## II. ANTIQUES INHERITED BY THE REVOLUTION: NINETEENTH CENTURY JUDICIAL STRUCTURES AND CRIMINAL PROCEDURE

The study of the civil law is the study of codes. No other source of law—judicial decisions, treatises, regulations, custom, or practice—carries the central significance of the code as the correct, organized, coordinated, unified expression of governing principles. Despite the continuing emergence of new schools of legal philosophy in Latin America, no system of thinking has achieved the centrality and staying power of state positivism, with its ideology expressed through codification.<sup>25</sup> In its efforts to achieve certainty

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25. State positivism asserts that law is the expression of the will of organized government through people acting in history. Positivism searches for unifying principles, and believes that these principles can be expressed through a coherent scheme which, when complete in the form of the code, creates a new legal order. MERRYMAN, *supra* note 15, at 19-33; cf. KUNZ, *supra* note 15, at 8-9. The Critical Legal Studies movement has identified the dominant ideological objective of the civil law, indeed of all law, as the installation of a new order of hierarchy—capitalism, free will and market-place autonomy. David Fraser, *The Day the Music Died: The Civil Law Tradition from a Critical Legal Studies Perspective*, 32 *LOV. L. REV.* 861, 866-68 (1987).

and predictability, the civil law purports to render the judge a bit player while giving the legislature, as drafter of the code, the lead role. The judge, in this ideology, need only find and apply the right solution, as contained in the code.

Precedent plays little role whatsoever in the civil law. In Nicaragua, for example, the common custom is that three decisions by the Supreme Court which reach the same conclusion on a legal issue should be seen to have some influence, though non-binding, on the subsequent deliberations of the lower courts.<sup>26</sup> This was as true in the last century as it is now.

During a brief historic period in the last quarter of the nineteenth century, Nicaragua adopted three comprehensive codes which delineated police and court structures and criminal procedure; with some amendments, these are the codes in operation today. The most important for our purposes is the *Código de Instrucción Criminal*, the Code of Criminal Instruction, adopted in 1879. Also of significance are the *Ley Orgánica de Tribunales*, or Organic Law of Courts,<sup>27</sup> and the *Reglamento de Policía*, or Police Regulations,<sup>28</sup> adopted in 1894 and 1880, respectively.

#### A. *Politics and Jurisprudence in Late Nineteenth-Century Nicaragua*

The period from 1869-1900, during which the current codes dealing with criminal justice were drafted, does not stand

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26. Interview with Umberto Obregón, Magistrate of the Court of Appeals for Region III (Managua), in Managua (Jan. 4, 1989). Similar use of previous decisions on the same point of law is found in Argentina, CARRIÓ, *supra* note 18, at 1-2, and is recognized in the civil law tradition generally. See MERRYMAN, *supra* note 15, at 47. The war-time economy in post-revolutionary Nicaragua has made it almost impossible to use case decisions by higher courts for any purpose. This is attributable to the inability to reproduce, due to the lack of paper, sufficient copies of the decisions of the Nicaraguan Supreme Court. During three months of work in Nicaraguan courts, libraries and law offices, I never saw a lawyer or a judge refer to a decision except upon my specific request, and even then, only by reference to a "slip-sheet" copy of the opinion. At the time of my 1990 visit, the *Boletín Judicial*, official organ for decisions of the Supreme Court, was about to complete work on its volume of 1985 decisions.

27. *Ley Orgánica de Tribunales de 1894, Concordada por Dr. Modesto Valle* (1928) [hereinafter *Ley de Tribunales*].

28. *Reglamento de Policía de la República de Nicaragua de 1880* (1919) [hereinafter *Reglamento de Policía*]. During my visit in 1988, I noted that the Nicaraguan Criminal Code, although last adopted in 1974 and amended several times prior to that, is essentially a product of the late 19th century, having taken its shape and direction from the Criminal Code of 1897. Interview with Víctor Ordóñez, Vice-Dean, Central American Law School, Managua, Nicaragua (July 27, 1988).

out in Nicaraguan history.<sup>29</sup> The drafting and adoption of the codes largely occurred during a prolonged period of political domination by the Conservative party. The adoption of both the code of criminal procedure and of the police code were sandwiched, historically, between the war for domination of the country by Tennessee filibuster, William Walker, in the 1850s,<sup>30</sup> and the failure, in 1885, of the U.S. Senate to adopt the Freylinghuysen-Zavala Treaty. This Treaty would have committed the United States to the construction of a trans-oceanic canal in Nicaragua.<sup>31</sup> Joaquín Zavala, whose public career is undistinguished except for his negotiation of the canal treaty, was President at the time that the codes of procedure and police were adopted.<sup>32</sup>

Zavala was followed, fourteen years later, by the Liberal leader and national hero, José Santos Zelaya. After assuming power, Zelaya reformed the constitution to include provisions abolishing the death penalty, limiting foreigners' rights to diplomatic immunity and incorporating anticlerical provisions. The codes of the courts and of criminal law were adopted during the Zelaya era, which lasted until 1909.<sup>33</sup>

Little is known of the jurisprudential influences on these codes because a fire destroyed the Nicaraguan National Archive during the earthquake of 1931, leaving the country virtually without any written legal history before that date.<sup>34</sup> A more recent commentator to the Code of Criminal Instruction identifies influences from both revolutionary France and Spain, and describes the current system as "mixed," with elements of both the "inquisitory" system of the civil law tradition and the "accusatory" system of the common law.<sup>35</sup>

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29. Richard Millett notes that there is no general history of Nicaragua, and that the period from 1860-1910 "remains a relatively neglected area of Nicaraguan history." Richard Millett, *Historical Setting*, in COUNTRY STUDY, *supra* note 24, at 59.

30. Walker was the subject of a recent movie carrying his name. Both he and the movie are doomed to historic obscurity in this country. Walker was arrested and executed in Honduras in 1860. *Id.* at 13. Walker, however, is well known to Nicaraguans, and is seen as a prominent historic example of repeated U.S. aggression, intervention, and imperialism.

31. BERMANN, *supra* note 1, at 115.

32. ESCOBAR, *supra* note 17, at 5.

33. Millett, *supra* note 29, at 15-16.

34. ESCOBAR, *supra* note 17, at 8.

35. *Id.* at 25. Criminal process in the civil law generally is described as "mixed." MERRYMAN, *supra* note 15, at 128-29. I find that these terms have distracting pejorative connotations, particularly among U.S. practitioners. I prefer, and will use throughout this Article, the terms "adversarial" and "non-adversarial." There has been enough cross-breeding in the systems that modern criminal procedure in Europe and North America hardly resembles the



Contemporary Nicaraguan criminal procedure is a solid, historical product of the mainstream civil law tradition of the European continent, and has largely continued in that direction even after the revolution. While some Germanic influence can be found, the Code of Criminal Instruction, as originally adopted, virtually copies the structure of the *Code d'Instruction Criminelle*, adopted by the Napoleonic Commission for the Codification of Criminal Procedure in France in 1808.<sup>36</sup> The code appears to have traveled intact from France to Spain, during and after the Napoleonic conquests, and hence to most of Central and South America through the Spanish motherland.

*B. The Historical Structure of the Police: El Reglamento de Policia de 1880*

The 1880 Police Regulations,<sup>37</sup> adopted contemporaneously to the procedural code, organized the police into various administrative units and included the creation of Police Instructional Judges (*Jueces de Instrucción Policial*), an institution which survives today. Police judges were an adjunct to the judicial branch for the speedy resolution of certain minor offenses (*infracciones*).<sup>38</sup> The

caricatures represented by the use of the terms so often relied upon to describe them. Other authors have attempted to avoid this terminology by substituting other terms or by thinking of other ways to define criminal processes. DAMASKA, *supra* note 16, at 16-46 ("hierarchical" and "coordinate" models, which are most recognizable to the Continental criminal courts, including some socialist regimes, and the Anglo-American system, respectively); John Griffiths, *Ideology in Criminal Procedure, or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1970) ("battle" and "family" models); Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964) ("due process" and "crime control" models). I do not think it necessary to resolve the issue here, but I will seek to avoid the use of terms which only further distort cultural misperceptions.

36. The writings of Alejandro Serrano Caldera, former President of the Nicaraguan Supreme Court, U.N. Ambassador, and now Rector of the National Autonomous University of Nicaragua, suggest that the Code was inspired by *la Novisima Recopilación Española de 1805* [the Newest Spanish Law Compilation of 1805]. Alejandro Serrano Caldera, *The Rule of Law in the Nicaraguan Revolution*, 12 LOY. L.A. INT'L & COMP. L.J. 341, 462 (1990). My own exploration of that source reveals little to support this view, while other scholars seem to support my position. See Morris Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433, 462-64 (1935); Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131 (1983); MERRYMAN, *supra* note 15, at 32-33. The French scholar, Adhermar Esmein, asserts that no good history of Spanish law existed as of 1913, the time at which he summarized and synthesized Continental criminal procedure. ADHERMAR ESMEIN, *A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE, WITH SPECIAL REFERENCE TO FRANCE* xi (1913).

37. *Reglamento de Policia*, *supra* note 28.

38. *Id.* art. 5. See also *infra* text accompanying notes 371-80 (discussing instructing police chiefs).

use of police judges for the administrative adjudication of minor offenses is also a descendant of Continental criminal procedure, and such courts are still found there and in other Latin American countries.<sup>39</sup>

The original police code gave wide authority to the police to impose minor penalties for lesser violations ranging from minor criminal conduct to violations of public health laws.<sup>40</sup> The objective of the code was "the preservation of public order, the security and welfare of the inhabitants and the control of its customs,"<sup>41</sup> and the procedures in such cases were summary and administrative. The judges in such cases were the local chiefs of police, who need not have been trained in the law, but only have an "understanding" of it. The judge had power to sentence to terms of imprisonment of up to 180 days, or could replace the sentence by a fine. The proceedings were "hearings and rulings without the form or figure of a trial" and the decision of the judge could be based on "any means of proof established by the laws."<sup>42</sup>

In cases involving the arrest of the offender *in flagrante delicto*, the normal summary proceedings were even more abbreviated and simplified. The judge could render a decision without the need to swear an oath or support the charges with witnesses. Police court judges were to be solely responsible for their rulings, and were "prohibited from consulting a lawyer." By law, the prisoner was entitled to contact a lawyer prior to a hearing in these proceedings, and to present a defense. Appeals from adverse rulings

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39. Esmein sets the time for the original creation of police courts as "Year IX" of the French Revolution. During this period, new laws vested jurisdiction in both a Court of Correctional Police and a municipal police court. In the former, jurisdiction could be invoked by the accused, the public accuser or the civil party and was limited to hearing only "correctional" offenses. Municipal courts were for very minor offenses, from which there was no appeal. ESMEIN, *supra* note 36, at 435. According to this author, police courts had been used in London and other cities of England during the 1800s. *Id.* at 349.

Such courts still exist in France as *tribunaux de police*, which may impose sentences of up to two months and fines of 6,000 francs or less. Tomlinson, *supra* note 36, at 142-43. One North American observer of the police courts of Nicaragua has aptly analogized their use to the kind of swift and administratively simple "safety valve" of plea bargaining in the United States, at least in high-volume, low-penalty cases. Pyle, *supra* note 14, at 15-16.

Police courts are also found in Argentina, where they have been described as a "filter" for minor criminal charges which would otherwise congest the criminal justice system. CARRIÓ, *supra* note 18, at 24-25, 36.

40. See generally *Reglamento de Policía*, *supra* note 28.

41. ORGANIZATION OF AMERICAN STATES, REPORT ON THE SITUATION OF HUMAN RIGHTS IN NICARAGUA 61 n.10, OEA/Ser.L/V/II, OAS Doc. 16 rev. 1 (Nov. 17, 1978) [hereinafter 1978 OAS REPORT].

42. *Id.*

went first to the Political Chief (*Jefe Político*) in the department in question, and subsequently to the Supreme Court.<sup>43</sup>

C. *The Historical Structure of the Courts: La Ley Orgánica de Tribunales de 1894*

The Organic Law of Courts of 1894 was adopted shortly after the police and procedural reforms as a way to go beyond the broad constitutional parameters in detailing the selection, attributes, and powers of the Nicaraguan judiciary.<sup>44</sup> Again, the essential structure of the 1894 code has been maintained in contemporary Nicaragua.

At the level of general trial court jurisdiction, two courts exercise primary jurisdiction. The district judge (*juéz de distrito*) exercises jurisdiction over serious felony matters at the trial stage, and may impose the most serious sentences. Such judges, then as now, are selected by the Supreme Court.<sup>45</sup> They serve a two-year term and are not required to be lawyers.

The second court is that of the local judges (*jueces locales*) which have two primary responsibilities. First, they exercise plenary jurisdiction in a range of minor offenses to impose sentence in expedited or summary proceedings. Appeals from their rulings lie to the district judge through trial de novo. Second, they are given primary responsibility of the investigative stage of more serious offenses, unless the district judge assumed the investigation himself. Local judges, under the original law, were popularly elected in their municipalities to one-year terms, and were required only to be literate, lay citizens.<sup>46</sup>

The Organic Law provided for two levels of appellate review, generally called second and third instance (*segunda y tercera in-*

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43. This composite of the powers and procedures in the police courts is taken from 1978 OAS REPORT, *supra* note 41, at 61-62; AMNESTY INTERNATIONAL, THE REPUBLIC OF NICARAGUA 19-20 (May 10-15, 1976) [hereinafter 1976 AMNESTY REPORT]. The extraordinary powers vested in police and the courts by virtue of the *in flagrante* capture of the defendant are also a practice which dates to the earliest origins of the civil law. An individual caught in the act of committing certain serious offenses during the reign of Charlemagne (800-814 A.D.) could be executed on the spot. Ploscowe, *supra* note 36, at 441.

44. *Ley de Tribunales*, *supra* note 27. The prologue to the Organic Law states that its primary influence was the Chilean scheme of court structure.

45. *Ley de Tribunales*, *supra* note 27, art. 117; NICAR. CONST. art. 164(5).

46. *Ley de Tribunales*, *supra* note 27, arts. 28, 30. While the *Ley de Tribunales* contained some other classifications of judges, such as the *jueces de mesta*, the local and district courts were and are the most important trial courts in criminal matters. See *infra* note 209 and accompanying text.

*stancia*). Appeals from the district court were taken to the Court of Appeals (*Tribunal de Apelaciones*), where the judges were named by the Supreme Court to terms of four years, and were required to be attorneys.<sup>47</sup> Such appeals were of right, and were open to both factual and legal review. Appeals to the Supreme Court lay only at the discretion of the reviewing court on limited jurisdictional grounds.<sup>48</sup>

*D. The Design of Criminal Process: El Código de Instrucción Criminal de 1879*

Summary proceedings (*juicio sumario*) are prescribed for those minor offenses (*faltas*) which carry a maximum sentence of one year imprisonment. The process for their resolution has remained virtually unchanged.<sup>49</sup> Because the consequences of the offense are minimal, the offenses are heard on an expedited schedule by local or municipal court judges (*jueces locales*) who need not be attorneys. In lesser offenses, the proceedings are conducted orally and are designed to take no more than ten days. These proceedings do not include a statutory right to counsel.<sup>50</sup> Unfavorable decisions by the local judge are appealable to the district court. After hearing evidence, if necessary, the district judge renders a final, nonappealable decision in the matter.<sup>51</sup>

A number of courts with criminal jurisdiction existed both before and after the revolution, most importantly the instructing police courts and the military courts. The district courts, however, heard the most cases involving criminal conduct, and their proceedings are typical not only of the other courts, but of courts throughout Latin America. Thus, the remainder of this section focuses in some detail on their operation and animating premises.

For serious offenses the criminal process originally was divided into three distinct phases: The investigative or instructive phase

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47. *Ley de Tribunales supra* note 27, arts. 54, 74, 76, 117.

48. *Id.*

49. *Faltas* are found in *Libro III [de la faltas y sus penas]* of the Criminal Code and are too numerous to list here. They include such offenses as minor assaults, threats, petty theft, receiving stolen or forged money, disturbing the peace, etc. One interesting *falta* is the interpretation of dreams, or the making of predictions for money. CÓDIGO PENAL Y LEGISLACIÓN COMPLEMENTARIA [CÓD. PEN.] art. 555(9) (1988) (Nicar.). The *juicio sumario* is set forth in the CÓD. INST. CRIM. art. 330 *et seq.* The maximum penalty for *faltas* is set at one year. CÓD. PEN. arts. 115, 118.

50. CÓD. INST. CRIM. art. 335.

51. *Id.* arts. 340-41, 345-49.

(*la instrucción*), the examining or plenary phase (*el plenario*), and the jury trial (*el jurado*).<sup>52</sup> All phases of the criminal process were conducted in written pleadings or through statements made before the judge, except for the jury trial.

## 1. The Instruction

The initial, investigatory phase of any criminal proceeding (*la instrucción*) was written and secret, even from the defendant.<sup>53</sup> It permitted the judge to undertake a factual investigation with minimal interference while protecting the privacy of both the victim and the accused. The municipal court judge (*juéz local*) presided at the investigatory stage unless the district judge chose to assume jurisdiction.<sup>54</sup>

### a. Starting the Process: The Key Role of the Court

The criminal process could be commenced in one of three ways: *ex officio*, by *denuncia*, or by *querrela*. Most often, the judge commenced *ex officio*, based on either a private complaint (*queja*) or any extrajudicial information, even hearsay or rumor, provided to the judge.<sup>55</sup> This procedure, while consistent with the then-prevalent notion of absolute judicial control, contributed to serious abuse by politically motivated judges because there were no restraints on, and no review of judicial overreaching in the unilateral decision to proceed with criminal charges. Criticism on these grounds led to elimination of the *ex officio* commencement of process after the revolution.<sup>56</sup>

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52. ESCOBAR, *supra* note 17, arts. 3, 4, 22.

53. *Id.* art 25. As early as 1914, the code was amended to permit a role for the defendant in this phase, which continues in the current system. *Id.* One commentator notes that, in France, development of the same right took 50 years after adoption of the code on which Nicaragua's was based. Ploscowe, *supra* note 36, at 462.

54. ESCOBAR, *supra* note 17, art. 6.

55. CÓD. INST. CRIM. arts. 30, 31.

56. Ley No. 37, 79 LA GACETA, art. 13 (Apr. 13, 1988). LA GACETA is the official publication of Nicaraguan laws. At times, however, the shortages of paper and demand for certain editions made the official laws unavailable. The most frequently used local source for post-revolutionary laws is the multiple-volume work of two Managua lawyers. The first eleven volumes are called DECRETOS—LEYES PARA GOBIERNO DE UN PAÍS A TRAVÉS DE UNA JUNTA DE GOBIERNO DE RECONSTRUCCIÓN NACIONAL (Dr. Ronaldo D. Lacayo & Martha Lacayo de Arauz eds., 1979); the subsequent volumes are called DECRETOS—LEYES Y LEYES DE LA REPÚBLICA DE NICARAGUA [hereinafter DECRETOS—LEYES, vol. —, Decree No. (or Law No.) —, at —].

The *denuncia* and the *querella* are still used. The *denuncia* begins the process by the conveyance to the judge of a charge of the commission of a crime, without a requirement that the complainant name the defendant or come forward with proof.<sup>57</sup> The code did not specify, at least before the revolution, who would convey that complaint to the judge, but this might have been done either by the police or by direct intervention of citizens. Once the complaint is filed, the judge takes over the investigation and other proof-taking; the complainant has no further required role in the proceedings.<sup>58</sup> The *querella* (or *acusación*, as it is also referred to in the code) is distinguished from the *denuncia* primarily by the requirement that the complainant, in making the charge, commits to prove the offense. Thus, the *denuncia* is a public action while the *querella* is private.

Police were empowered to arrest when they had notice based on the declaration of a witness or a strong presumption (*presunción vehemente*) of the commission of an offense for which proceedings *de oficio* were permitted.<sup>59</sup> Presentment to a competent judicial authority was governed both by the Constitution, which permitted no more than twenty-four hours in 1974,<sup>60</sup> and the code, which permitted only twelve hours.<sup>61</sup> The charging decision, then, is based on information from the police, the prosecutor, or a citizen and resulted in the judicial decision known as the *cuerpo del delito*; that is, what offense has been committed and whether to investigate the matter.<sup>62</sup>

The key to charging in the Nicaraguan system was the judge. All decisions as to what charges would be made and investigated, as well as who would be charged, lay in the hands of the instructing judge, whose decision to proceed would set into operation

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57. Cód. INST. CRIM. art. 32.

58. ESCOBAR, *supra* note 17, at 50.

59. *Id.* art. 83. Exceptions were made for homicide, theft, robbery, arson, and perjury, for which any presumption was sufficient if the accused was unknown or without roots in the community.

60. NICAR. CONST. of 1974, art. 41, *quoted in* 1976 AMNESTY REPORT, *supra* note 43, at 21. The 1987 Constitution permits up to 72 hours. NICAR. CONST. art. 33, par. 2.2. *See infra* note 374.

61. Cód. INST. CRIM. art. 83. Presumably, the constitutional limit was a ceiling and the more explicit language of the code would be followed in those circumstances in which it applied. A later article subjects the official to possible charges of illegal detention for failure to present the accused within the time limits prescribed by the code. *Id.* art. 87.

62. The *cuerpo del delito* is discussed more fully under the section on burdens of proof. *See infra* notes 170-73 and accompanying text.

the investigation under judicial supervision. While the police obviously would continue to play a role in the detention of defendants in cases committed in the presence of the officer, or other variations of *in flagrante* conduct, the role of the police in arrest and detention of the accused was all triggered by judicial action.

b. The Role of the Defendant—The Right to Counsel, Bail, Confession, Search and Seizure, and Identification

Under the code's original conception, the defendant could not take part in the investigation stage, even through counsel, and was frequently held in custody and incommunicado. The right to counsel evolved very slowly over the life of the code. Even now, code provisions for the right to counsel do not appear in the code until the sections regarding the plenary stage, strongly suggesting that the code conceived of no right to counsel before that stage.<sup>63</sup> While this notion is inimical to common law defense attorneys who know the importance of early client contact,<sup>64</sup> the role of defense counsel has never been given as much importance in the non-adversarial system. There, the judge was expected to balance and protect the rights of all parties to the criminal process.

The accused went unrepresented by counsel unless able to afford a privately retained lawyer. This was true until the code was amended to create a system of appointed counsel (*defensores de oficio*) who were assigned by the court from a list, on the request of any accused who wished to be represented. Poverty is not a criterion for assignment, as it always has been in the United States. These appointed counsel could be "lawyers, notaries, judicial procurators or law students."<sup>65</sup> The appointed lawyers, as well as

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63. The chapter of the code dealing with "Defense of Prisoners" (Chapter IV) immediately follows the chapter on "The Plenary" (Chapter III). Despite this seemingly limited role for counsel, it should be born in mind that well into the 1800s on the Continent, lawyers were not merely unmentioned but were actually prohibited from representing the accused; the original Nicaraguan code immediately followed that era. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 282 (1978).

64. See, e.g., NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, EARLY REPRESENTATION TEST DESIGN (1981) (empirical study of benefits of intervention by public defenders in criminal process immediately after arrest, primarily in the early disposition of cases by negotiated pleas of guilty).

65. ESCOBAR, *supra* note 17, art. 235. A 1950 revision of this law was more explicit in allowing representation by all of the above, but further provided that the law student must be in at least the third year of study (of five), or that the accused could be represented by any citizen, where there were neither lawyers nor students in the locality. Cód. INST. CRIM. art. 235.

their private counterparts, were also given greater access to the results of the investigation as a result of amendments to the code some time after its enactment.

Today, as at the time of the code's conception, once the decision is made that an offense has been committed and that there is sufficient nexus between the accused and the offense, the act of imprisonment (*auto de prisión*) is issued. The *auto de prisión* is one of the points in the process where the rights of the defendant come into conflict with the long-standing traditions of the civil law. This continues to contribute strongly to the perception, not only in Nicaragua but throughout the civil law world, that there is no presumption of innocence in an "inquisitorial" system. By definition, the issuance of the *auto* results in immediate custody for the defendant.<sup>66</sup> Custody is likely to continue until trial. This is made clear by the severe limitations on pre-trial bail.

Bail provisions, which remain unchanged, provide that bond can be posted by the defendant himself (*caución juratoria*) or through a bondsman (*fianza de la hász*), who may be a personal acquaintance or a professional.<sup>67</sup> Both statutory and practical aspects make the likelihood of bail virtually nonexistent. First, the code provides that bail is prohibited in all cases where a term of imprisonment of more than one year could be imposed.<sup>68</sup> This effectively eliminates from consideration all but the least serious crimes.<sup>69</sup> Moreover, the level of poverty in Nicaragua makes it virtually impossible that the great majority of criminal accused will have either the personal assets or collateral to make bail at all, or to make them secure financial risks for bail bondsmen. More fundamental, however, is a notion pervading the civil law tradition in Latin America that once the evidence is sufficient to justify issuance of the *auto de prisión*, there is no further need to justify pre-trial incarceration; justification is given by law.

If in custody, the defendant appeared before the judge at the

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66. Cód. INST. CRIM. arts. 92-94.

67. *Id.* arts. 105-06. In practice, the professional bail bondsman is a common occurrence. Interview with Ramón Rojas Méndez, Fourth District Criminal Judge for Managua, in Managua, Nicaragua (Aug. 17, 1988).

68. Cód. INST. CRIM. art. 108.

69. One appellate court judge stated that the interpretation of these narrow provisions has been to make the defendant eligible if the possible penalty can be one year or more, which includes a fairly wide range of offenses in which the actual penalty could be substantially more. Interview with Umberto Obregón, Judge of the Court of Appeals for Region III (Managua), in Managua, Nicaragua (Jan. 4, 1989).



commencement of the investigation to give a *declaración indagatoria*, or investigative declaration.<sup>70</sup> The closest common law counterpart to the *indagatoria* is the arraignment. The Nicaraguan defendant, even today, is brought before the judge immediately after the judge obtains jurisdiction over the matter and is questioned by the examining judge without requirement of oath. The oath is omitted in order to encourage the defendant to speak with candor and without fear of reprisals through subsequent prosecution for perjury.<sup>71</sup> Questions asked must include at least the following: Whether the defendant is aware of the cause and source of the complaint, where and with whom the defendant was at the time of the offense, and, if the defendant admits the offense, an inquiry into motive and accomplices.<sup>72</sup>

There is no "entry of a plea of guilty or not guilty" at this stage, as at common law. The defendant's confession cannot be accepted as the basis for the entry of a plea of guilty; there is no plea bargaining and the proceedings go forward regardless of a full admission of guilt. Nor does the defendant have a right to silence in this context, since it is assumed that the questions asked here do not raise the risk of inculcation, and that the lack of an oath would protect the defendant from any risk of later perjury charges.<sup>73</sup> It is not hard to imagine the psychological pressures on the unrepresented defendant at this stage of the proceedings, particularly when the *indagatoria* may follow a prolonged period of police custody and interrogation.

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70. Cód. INST. CRIM. art. 171.

71. The pre-trial absence of oath is explicit in the code. *Id.* art. 172. At trial it is implicit; it is mentioned for all other new witnesses, but not for the defendant. *Id.* arts. 294-95, 297. In the United States, no such protection exists. The defendant, who always testifies in court under oath, is subject not only to subsequent prosecution for perjury, but to enhanced sentence due to the judge's negative assessment of credibility during the defendant's trial testimony. *United States v. Grayson*, 438 U.S. 41 (1978). The U.S. Supreme Court has also taken a strong view in favor of the ethical obligation of defense counsel to reveal to the court the lawyer's belief that the defendant would commit perjury if permitted to testify. *Nix v. Whiteside*, 475 U.S. 157 (1986). These decisions undermine the attorney-client relationship and the premises of the adversarial system. Monroe Freedman, *The Aftermath of Nix v. Whiteside: Slamming the Lid on Pandora's Box*, 23 CRIM. L. BULL. 25 (1987); see generally MONROE FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* (1975).

72. Cód. INST. CRIM. art. 171. The next article clarifies that the sole purpose of the *indagatoria* is to "clarify the facts and verify the truth." The judge is not to use "threats or promises" and is not permitted to use "suggestive or leading" questions. *Id.* art. 172.

73. Professor Langbein notes that a similar procedure was used, based on similar premises, in the Old Bailey sessions during the 17th and 18th centuries, prior to the appearance of lawyers and the development of the adversarial trial. Langbein, *supra* note 63, at 281.

Behind this system was a strong need for state control of crime, with heavy trust in the state to fully, fairly, and objectively prove the offense, even with a confession. The code nonetheless places a high reliance on confessions as the principal source of that proof; confessions were and continue to be "queen of proofs," ultimately sufficient by themselves to convict.<sup>74</sup>

Extensive rules still surround the quality, type, and admission of confessions. These rules grow out of the perceived importance of the confession as a basis for guilt. All extrajudicial confessions are implicitly insufficient evidence of guilt. Full proof occurs only when the confession is given "freely and spontaneously . . . in the presence of the judge."<sup>75</sup> Confessions given involuntarily can therefore be admissible if repeated in court, but the use of coercion, promises of leniency, or threats can be admitted to destroy the confession's quality as full proof.<sup>76</sup> This provision seems to put a premium on obtaining a confession, even if it is the product of degrading physical circumstances or torture, because there is a heavy burden on the accused to rebut the illegal confession by full proof of the absence of coercion.

This striking of the evidentiary balance on the state's side is more understandable in the historical context of the early nineteenth century, when the French drafted the code upon which the Nicaraguan code was based. Even at that time, the use of torture was considered legitimate in some circumstances or had only recently been formally eliminated from codes of criminal procedure on the Continent.<sup>77</sup> One must question, even with the possible rebuttal of a coerced confession, the message which was conveyed to the custodial authorities: they knew that a coerced confession, even

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74. A discussion of burdens of proof and tests for admissibility is found *infra* notes 158-69 and accompanying text. Whole and partial proof are explained there. In pre-revolutionary France, the existence of partial proof other than a confession permitted the use of torture to obtain a confession as a means of elevating the quality of the evidence to a level of sufficient reliability for conviction. Ploscowe, *supra* note 36, at 458 n.68. Professor Langbein has written persuasively about the ideology of torture and its modern parallels in the United States system of plea bargaining. John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

75. Cód. INST. CRIM. art. 253.

76. *Id.* art. 255.

77. Langbein suggests that the phenomenon receded into history during the middle of the eighteenth century. Langbein, *supra* note 74, at 3. The recent demise of formal provisions permitting torture should not be so shocking to us in the United States. It was not until late 1990 that the U.S. joined 51 other countries in ratification of or accession to the U.N. Convention on Torture. 136 CONG. REC. S17,486 (daily ed. Oct. 27, 1990).

one extracted through torture, was admissible as evidence if the defendant could be intimidated into repeating it in open court.

The original scheme for the analysis of confessions continues today. Confessions can be "simple" (a complete admission of the truth), "explained" (given with a recognition of the truth of the facts, but with circumstances which modify or restrict the use of the confession's probative force) or "divided" (the facts are admitted and other circumstances surrounding its taking are unrelated, or divisible, from the voluntary giving of the statement).<sup>78</sup> When the confession is offered to establish a defense or is in some other fashion favorable to the accused, the judge can admit that part which favors the defendant after an examination of the accused's and the accuser's sex, age, social position, prior conduct, and prior relationships.<sup>79</sup> It is not hard to imagine how the wealthy or prominent accuser might fare against the impoverished defendant in a system where these factors were explicitly permitted to be considered.

One further aspect of the use of confessions is noteworthy: that of the *confesión con cargos*, literally the "confession with charges," which is required to occur within seventy-two hours after the *auto de prisión*, the imposition of formal charges. Accused are brought before the judge, questioned as to their identity, and the investigating declaration is read back, as are all charges. After this reading, which is conducted only in the presence of the accused, the judge, and the secretary, the accused is given an opportunity to respond to the allegations.<sup>80</sup> Silence at this point creates a presumption against the accused, and there is no statutory requirement that the defendant be advised of this fact.<sup>81</sup> Statements given are included in the file after being read to the defendant and signed in the presence of the judge.<sup>82</sup>

The code also provides detailed rules for search and seizure of both the defendant and his or her personal effects or correspondence, although the extent of these rules is not nearly as broad as those governing the use of confessions. As to the arrest of the defendant, a search of his dwelling or that of another is permitted

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78. Cód. INST. CRIM. arts. 256-57.

79. *Id.* art. 258.

80. *Id.* arts. 193, 196.

81. *Id.* art. 194. German criminal procedure in the 18th century had similar features. Ploscowe, *supra* note 36, at 463.

82. Cód. INST. CRIM. art. 196.

when the defendant is hidden in the home and there exists at least partial proof of his or her commission of an offense.<sup>83</sup> With an order from the judge and the presence of two witnesses, the prosecutor is permitted to enter to effect an arrest. If the door is closed and no one answers after three knocks, forced entry is permitted.<sup>84</sup>

Personal possessions of the defendant can be seized either as evidence<sup>85</sup> or in order to satisfy monetary obligations which arise from the criminal proceedings.<sup>86</sup> Personal papers or correspondence are "inviolable" unless they rise to the level of partial proof by virtue of content which constitutes evidence, data, or presumptions.<sup>87</sup> In such case, the judge may take steps to secure the material, including removal from the mail.<sup>88</sup> The code is not more explicit in the use or limits on the use of inculpatory physical evidence in the defendant's possession. This seems anomalous when it is considered that the judge, who was to be the servant of the code, had no discretion in the admission of physical evidence or the value to be given to it in the system of formal legal proofs.

One final issue is that of pre-trial identification of the defendant. While there is no formal provision defining the identification procedure, a practice developed which allows for the complaining witness, usually at the first appearance, to make a visual identification of the defendant from a lineup. This procedure took place in the absence of counsel, and was informal enough that no rules now surround its use.<sup>89</sup>

It is easy to see that code structures themselves do not favor the uncounseled defendant in preliminary proceedings, either in

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83. *Id.* arts. 136, 137.

84. *Id.* arts. 139, 141.

85. *Id.* arts. 64-66 (proceeds); art. 69 (arms or instrumentalities); arts. 77-82 (personal papers or correspondence). In the former two classes of evidence, the statute provides that such objects may become the basis for proof of the *corpus delicti* without giving explicit rules as to how the objects are to come within the knowledge of the judge.

86. *Id.* arts. 100-04.

87. *Id.* art. 77.

88. *Id.* art. 79.

89. I observed a few of these lineups at the Managua District Courts during my visits. About six or seven prisoners, dressed alike in prison clothing and of roughly equal size, would stand in line in the courtyard while the alleged victim would stand inside of the building, looking out through a window ordinarily obscured from outside observation by curtains or other informal shields. The judge observed the identification process and documented the conclusions of the witness; all proceedings were conducted *ex parte*. Lawyers and judges there indicated that such procedures had been in use for many years. In some Latin American countries, provision for pre-trial identification is made a formal part of the code. See, e.g., CARRIÓ, *supra* note 18, at 63 (Argen.).

the last century or today. The most serious problem is the strong potential for abuse of the defendant's rights in the use of both judicial and extrajudicial confessions given without access to or advice from counsel.

c. The Role of the Victim: The Private Action

Under the code's design, the victim or accuser—the citizen making a criminal complaint—had a right to personal representation in the criminal process, both to advance the criminal prosecution and to pursue civil damages against the accused. However, the victim was unrepresented in the process until the conclusion of the first stage, and even then, under the code's initial conception, was represented by retained private counsel, a kind of private prosecutor.

Counsel for the victim pursued the private criminal action. There are two primary distinctions between the public and private action. In the private action, only the victim may commence the proceedings. No action by any public official, despite public knowledge of the commission of an offense, can set the criminal process in motion. Similarly, the private complainant can terminate the action at any point prior to judgment for or against the accused. This can be accomplished by forgiveness or "pardon" of the offender by the complainant, which results in the mandatory dismissal of charges by the judge. In the case of sexual offenses, a contract of marriage between the victim and the offender is sufficient at law to demonstrate forgiveness.<sup>90</sup> A common ground for dismissal is marriage by a male to the underage female with whom he has had intercourse, thus triggering a willingness by the female's family to desist from charges of *estupro*, a form of statutory rape, or *rapto*, kidnapping for purposes of carnal knowledge.<sup>91</sup> Because of this level of party control, the private criminal action is like a combina-

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90. Cód. PEN. art. 208.

91. Interview with Reynaldo Vega, private criminal lawyer, Managua, Nicaragua (Aug. 1, 1988); interview with Víctor Ordóñez, Vice-Dean of the Central American University Law School, in Managua, Nicaragua (July 27, 1988).

*Estupro* involves "carnal knowledge of a virgin obtained through fraud or misrepresentation;" fraud is presumed when the virgin is between 12 and 18 years of age. Cód. PEN. art. 197, para. 1. *Rapto* involves kidnapping for carnal knowledge; if the victim is under 12 years old, her consent is irrelevant. If the victim is a woman of "good fame," the punishment is between two to four years imprisonment. Penalties for *rapto* with intent to marry are significantly lower than those without that intent. *Id.* art. 197, para. 2. See Stephens, *Rape in Nicaragua*, *supra* note 14, at 75-76.

tion of the contemporary civil tort claim at common law and the public criminal prosecution.

The private action is further subdivided between actions in which the complainant is merely required to make the accusation for the process of judicial investigation to start, and those in which the complainant is required to carry the burden of proving the charge, usually through the services of a privately retained attorney. The former is known as *instancia privada* while the latter is the *acción privada*. The *instancia privada* was limited to a small group of offenses: *Violación* (rape), *estupro* (a type of statutory rape), and *rapto* (kidnapping with intent to have carnal knowledge).<sup>92</sup> The *acción privada* was also very limited, applying only to *adulterio* (adultery), *amancebamiento* (the keeping of a mistress), offenses against freedom of religion (*libertad de culto*), and *injurias y calumnias* (criminal libel and slander).<sup>93</sup>

The unifying premise for this disparate treatment of sexual offenses appears to be the highly personal and private nature of the alleged wrongdoing and susceptibility of exposure of the victim or the accuser to public embarrassment or ridicule. There are also none too subtle notions of paternalism and sexism in the protection of women from the sully of their reputations due to any supposedly illicit sexual activity. This is most blatantly demonstrated by the limited protection of the law to women of "good reputation." The net effect of making these offenses private, however, was to preclude them from consideration as crimes against society as a whole, and to render them both marginal in importance and invisible to the public.

Moreover, literal enforcement of the law ran the serious risk of discrimination against women. *Amancebamiento*, for example, is the criminal offense of keeping of a mistress. It is gender-specific by virtue to its statutory definition: the keeping of a *manceba*, a "mistress or prostitute." The penalty, however, is *diminished* by half if the affair is "scandalously public,"<sup>94</sup> thereby encouraging men to publicly display their extramarital partners, undoubtedly

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92. Cód. PEN. arts. 195-97, 207.

93. *Id.* art. 212. This section refers only to adultery. The requirements of private action for the remainder of the offenses listed are not codified, but were generally agreed to by a number of persons interviewed. Their substantive provisions are found in Cód. PEN. arts. 216, 251-54, and 169-94. Again, these distinctions in procedure and the limited number of offenses to which they apply continue today, with the exception of rape, which is explicitly treated in the most recent reform of Nicaraguan procedural law. See *infra* note 382.

94. Cód. PEN. art. 216.

at risk of the women's own reputations. By law, an openly kept woman is not as risky for society as the secret partner. Another example is adultery, which permits, as a complete defense, abandonment of the illicit partner or "procurement of the corruption of the woman."<sup>95</sup> This defense assumes both a male offender and the very real incentive to ruin the allegedly adulterous woman's reputation in order to establish the defense. No suggestion is made that similar consequences may be attendant upon the man's participation in the offense, nor is there any suggestion of the potential "corruption" of the male adulterer.

The treatment of slander and libel as private actions could be due either to the protection against further spread of untruths about reputation or character or the recognition that these accusations were likely to be of such a personal and emotional nature that the state wanted no role in even a preliminary decision as to the truth or falsity of the alleged defamation or slander.<sup>96</sup>

There are further limitations on the right to commence a private action. Except when the action is personal, the most important limits are that complainants cannot be women, minors, criminal accused, or totally destitute persons.<sup>97</sup> Thus, the private action is effectively allowed, at least on the books,<sup>98</sup> only to males with property, or at least to those who can afford the cost of retention of an attorney or are willing to proceed with their complaint pro se. The double standard is also maintained here.

#### d. The Passive Role of the Prosecutor

The notion of a public official playing the role of society's representative in criminal proceedings emerged with the creation of

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95. *Id.* art. 213, para. 2. This is true even though adultery itself is clearly capable of commission by either spouse. *Id.* art. 211.

96. The latter seems more probable, given the fact that the code criminalizes broad categories of speech and permits retraction to terminate the proceedings. Cód. PEN. arts. 169-93. Attorneys whom I interviewed stated that innumerable petty political squabbles and accusations were the basis for the filing of charges under these sections of the code. Interview with Reynaldo Vega, private criminal practitioner, Managua, Nicaragua (Aug. 1, 1988).

97. Cód. INST. CRIM. art. 38.

98. The several provisions discussed here in text may be good examples of laws to which the Sandinistas appropriately applied the concept of "revolutionary interpretation." See *infra* notes 222-30 and accompanying text. When I read the gender-based limitations of the right to private actions and those regarding adultery and the keeping of mistresses to a number of lawyers and judges, they laughed and said they would never be enforced as written, and asserted that these were mere pre-revolutionary artifacts.

the office of Public Ministry (*Ministerio Público*), acting through the *fiscal*, or prosecutor, the representative of public vindication (*representante de vindicta pública*).<sup>99</sup> Municipal trustees (*síndicos municipales*), were designated to carry out the function of prosecutor, and need not have been attorneys. The prosecutor's role was almost entirely passive from its conception, due in large part to the strong powers of the investigating judge in controlling the direction and duration of the investigation. As with defense counsel, the prosecutor is not mentioned in those code provisions dealing with the investigation stage.

## 2. The Plenary

At the close of the investigative stage the judge is given three choices: the issuance of the *auto de prisión*, which causes the case to continue to trial, or provisional or definitive dismissal (*sobreseimiento*).<sup>100</sup> Provisional dismissal leaves the case open for a specified period of time for the receipt of additional proofs, while definitive dismissal closes the case.<sup>101</sup>

The trial, or plenary stage (*juicio plenario*), originally was partially written and partially oral; the plenary concluded in a public jury trial. Unless the investigation was conducted by the district judge, the local judge who conducted the investigation handed over the results to the district court. After additional written proof-taking, if requested by the parties, the district judge presided at the determination of guilt by a jury. The code does not prohibit a district court judge from assuming jurisdiction over both the investigation and the trial stages because the actual determination of guilt was made by the jury, thus preventing the judge from undue influence in the determination of criminal culpability.<sup>102</sup> At this stage the parties (originally the complainant and defendant themselves, and later their representatives) are finally permitted to intervene to review the evidence acquired by the judge during the

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99. Cód. INST. CRIM. art. 244. It is impossible to determine if these offices existed at the time of the original adoption of the code. They probably did not, since a 1901 law created the Municipal Trustees. ESCOBAR, *supra* note 17, at 137. Public prosecutors, however, were long in existence as a concept, having been introduced in Spain as early as 1387 to assure the representation of the interests of the victim. CARRIÓ, *supra* note 18, at 19 n. 33.

100. Cód. INST. CRIM. arts. 189, 191.

101. *Id.*

102. With the abolition of juries after the revolution, this has become one of the problematic areas for the maintenance of judicial neutrality. See *infra* text accompanying note 446.



investigative stage.

At the outset of the plenary, after the formal naming of defense counsel and the first appearance of the representative of the Public Ministry, or prosecutor, these parties were given four days to examine the files after the issuance of the *auto de prisión*.<sup>103</sup> After this examination, the parties were given the opportunity to offer additional proofs prior to trial and to publicly and formally "depose" witnesses.<sup>104</sup> The accused, his lawyer, the prosecutor, and the accuser, if there was one, were to be present at all of these public sessions.<sup>105</sup> Witnesses were to be examined out of the presence of one another, and the questioning by the defendant or his counsel could include anything thought to be necessary to the defense.<sup>106</sup> Questions put by the prosecutor, the accuser, or witnesses against the accused could not be suggestive or deceitful, nor could countercharges be made which were "subtle or beyond the capacity" of the witness.<sup>107</sup> A form of impeachment through flaws (*tachas*) in a witness's statement could be proven within three days after the witness's testimony.<sup>108</sup> If this process could be accomplished without the commission of an error which raised a nullity (*nullidad*) in the proceedings,<sup>109</sup> the case proceeded to trial by jury.

The qualification of witnesses, whether giving testimony before the investigating judge, the trial judge, or the jury, is generally governed by the Code of Civil Procedure.<sup>110</sup> Under the Civil Code, a witness is qualified to testify if that person was "capable of responding freely and with knowledge of the facts about which the questioning occurs."<sup>111</sup> Other limits on witnesses include age<sup>112</sup> and physical impediments.<sup>113</sup> Some witnesses are declared incompetent

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103. Cód. INST. CRIM. art. 203.

104. *Id.* art. 209.

105. *Id.* art. 211.

106. *Id.* art. 215.

107. *Id.* art. 218.

108. *Id.* art. 226.

109. *Id.* arts. 228-29. This is not the only point in the proceedings where the nullity is relevant. It forms the primary basis for appealable grounds by either party at the conclusion of the trial court proceedings. See *infra* text accompanying notes 146-47.

110. Cód. INST. CRIM. art. 260.

111. CÓDIGO DE PROCEDIMIENTO CIVIL DE LA REPÚBLICA DE NICARAGUA [Cód. PROC. CIV.] art. 1308 (1980).

112. The witness must be 16 or "declared an adult." *Id.* art. 1311. Those under 12 are *per se* incompetent. *Id.* art. 1312.

113. *Id.* art. 1309. Those excluded are the blind, the deaf-mute, or those with "habitual sickness impeding reason." *Id.* art. 1313.

for lack of integrity: the fraudulent bankrupt, the vagrant, the habitual drunk, the forger, and one who has borne false witness, perjured, or suborned perjury.<sup>114</sup> Because "vagrant" is defined as one who is either unemployed or without means of self-support, classism emerges in the plain language of the code.

Under the code, the use of the rules of measured proof played a strong part in the value of witness testimony. "Legal truth," and thus full proof, occurred when two qualified witnesses testified to the same fact.<sup>115</sup> Hearsay was explicitly permitted if the witness named the person from whom the fact in question was heard, so long as the person testifying was of good reputation and financial credit.<sup>116</sup>

Special witnesses rules in criminal proceedings allow the testimony of witnesses found to be biased (*testigos inhábiles por falta de imparcialidad*) when their testimony would be favorable to the party against whom their declarations were originally offered.<sup>117</sup> They also allow attachment of a "family privilege" which prohibits the declaration of any individual against his or her spouse or companion, ascendant, descendants, or siblings.<sup>118</sup> In special instances the code permits the use of witnesses who would ordinarily be challengeable (*tachable*) when the offense is committed in custody or involves gaming, offenses committed in stores with government monopolies (*estancos*), or by habitual drunkards or vagrants.<sup>119</sup> Challengeable witnesses can also appear in cases of rape, *estupro* or *rapto*, when no other witnesses are available.<sup>120</sup>

Another notable limitation on the defendant's pre-trial rights is that of confrontation of witnesses; the accused is explicitly forbidden to question witnesses until the plenary stage and even then is barred if the witness previously has been examined in the defendant's presence.<sup>121</sup> After the parties offered any additional witnesses, new evidence, or procedural challenges, the case moved on to trial by jury.

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114. *Id.* art. 1316.

115. *Id.* arts. 1354, 1359. For a discussion of the rules of measured proof, see *infra* text accompanying notes 158-69.

116. CÓD. INST. CRIM. art. 1355.

117. CÓD. INST. CRIM. art. 261.

118. *Id.*

119. *Id.* art. 262.

120. *Id.* For a discussion of these private offenses, see *supra* text accompanying note 92.

121. CÓD. INST. CRIM. art. 168.

### 3. Jury Trial

Trial was before a jury of seven in serious cases. Each side was given two peremptory challenges during jury selection, and the judge could recuse additional jurors for cause.<sup>122</sup> The use of jury trials should not surprise the common law attorney. While most of Latin America and Europe have rejected the use of lay juries, at least as they are commonly composed in the United States, the jury is not unknown in these countries and is still used in both El Salvador and Panama.<sup>123</sup>

Jury trials were required to be public.<sup>124</sup> With all parties present and the jury properly selected, including a president and secretary, the trial commenced with the reading of all prior proceedings and documents in the file to the jury, followed by oral testimony from the accused, the witnesses, and the experts, in that

122. *Id.* arts. 274, 277.

123. The French Procedural Code of 1808 adopted the jury as one of the useful innovations of the much-admired English system, and today uses a form of jury proceeding in the mixed panel of three professional and nine lay judges who participate in the *cour d'assises*. Tomlinson, *supra* note 36, at 143. Professor Merryman notes the tenacious mythology of the non-existence of juries in the civil law. MERRYMAN, *supra* note 15, at 131-32. See also Hans-Heinrich Jescheck, *Principles of German Criminal Procedure in Comparison with American Law*, 56 VA. L. REV. 239, 243-51 (1970). Langbein, however, notes the use of lay judges in Germany. JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 63 (1977). Spain moved to an oral non-jury trial in 1872. ESCOBAR, *supra* note 17, at 26, and juries were used there extensively before the Franco era. Michael G. Burros, Note, *The Spanish Jury: 1888-1923*, 14 CASE W. RES. J. INT'L L. 177 (1982). Though abolished by Franco, the Spanish Constitution of 1978 calls for a jury in criminal cases. MERRYMAN, *supra* note 15, at 131; Ploscowe, *supra* note 36, at 461-63.

A recent study of criminal justice in El Salvador notes, without any description, the use of juries and calls for reform of the system. FLORIDA INTERNATIONAL UNIVERSITY, *DIAGNÓSTICO SOBRE EL ÓRGANO JUDICIAL EN EL SALVADOR* 70-71 (1987). In 1986, jurors failed to report for duty in 47% of all cases. *Id.* This should not be surprising in light of the disruptions of stability caused by the protracted civil war there. In Panama, a 1943 law requires the use of juries in a limited number of serious offenses unless waived by the accused. FLORIDA INTERNATIONAL UNIVERSITY, *LA ADMINISTRACIÓN DE JUSTICIA EN PANAMÁ (INFORME FINAL)* 239-40 (1986). The study states that the vote is by majority rule through a standard of "conscience" but does not indicate the size of the jury. *Id.* There are no juries in Argentina. CARRIÓ, *supra* note 18, at 7.

Even in the United States, the commitment to the use of juries sometimes falters when they are accused of bending to emotional appeals based on race, as in the recent trial of Washington, D.C. Mayor Marion Barry, who was largely exonerated of drug and perjury charges in a jury trial. Micheal Kinsley, *Trial by Jury: There's Got to Be a Better Way*, WASH. POST, Aug. 16, 1990, at A23. This phenomenon, called "jury nullification," is a well-recognized aspect of jury use in the United States. WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 913 (Student ed. 1985).

124. CÓD. INST. CRIM. art. 292.

order.<sup>125</sup> The president of the jury, as well as other members of the jury, could ask such questions as would assist them in ascertaining the truth, and other parties could also put questions if directed through the president of the jury.<sup>126</sup> The parties could, through the president, make objections to or observations on witness testimony as long as they were made "with due moderation and without interruption of the deponent in the act of testifying."<sup>127</sup> Strict procedural rules controlling the questioning of witnesses in the common law process were absent in these jury trials in the interest of hearing the most open and unhindered version of the evidence.

At the conclusion of the testimony, the prosecutor and the accuser made their allegations and arguments, followed by the defense. A brief rejoinder could be offered, if necessary.<sup>128</sup> The jury then retired for its secret deliberations. The written form in which the verdict was rendered was rigid and formalistic, and required an explicit finding of guilt or innocence.<sup>129</sup>

The law theoretically permitted jury trials to consume no more than eight hours in total,<sup>130</sup> after which arguments were presented by the parties and the jury retired for deliberations.<sup>131</sup> A simple majority of four votes, taken in secret from the public but not from each other, was sufficient to convict, and the jury's function was limited to the determination of guilt.

Unlike in the United States, where a verdict of not guilty is non-appealable, the absolving verdict of a jury in Nicaragua is reviewable at the appellate level. This is true throughout the civil law.<sup>132</sup> In Nicaragua, however, appeal originally required the em-

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125. *Id.* arts. 291, 294.

126. *Id.* arts. 295, 296. The practice of active jury questioning of witnesses, while very rare in U.S., was also a regular feature of juries in England in centuries past. Langbein, *supra* note 63, at 288.

127. Cód. INST. CRIM. art. 298.

128. *Id.* art. 301.

129. *Id.* art. 309.

130. *Id.* art. 301.

131. The code contains strict language governing deliberations, stating that the jurors were to be kept under lock and key, and that no food, only water, could be kept in the room with them. *Id.* art. 304. Several attorneys and judges whom I interviewed said this was not observed in practice in either pre-revolutionary or post-revolutionary Nicaragua, and that the more common (though obviously improper) procedure was for the judge to openly join in the jury's deliberations.

132. The review of all criminal verdicts is conceived as a routine adjunct to the trial process, and is also comprehensive as to fact, law, and logic. DAMASKA, *supra* note 16, at 48-49.

paneling at that level of a reviewing jury, or *jurado de revisión*.<sup>133</sup>

#### 4. Sentencing

Within eight days after a jury's determination of guilt, the judge was required to deliver a highly formal and stylized written document which summarized the proceedings and imposed a sentence of a fixed number of years within the range set by the criminal code.<sup>134</sup>

The written sentence of the trial judge is still required to contain both an expository text and a formal sentence. The former requires an explanation of the jury's deliberations, the aggravating or extenuating circumstances surrounding the offense, and the legal questions required to be resolved by the judge.<sup>135</sup> The resolution of the case originally could fall into one of several degrees of severity: death, imprisonment (called *presidio* for sentences from three to thirty years and *prisión* for those from one to twelve years),<sup>136</sup> various levels of loss of rights,<sup>137</sup> internal exile (*confinamiento*),<sup>138</sup> security measures (*medidas de seguridad*),<sup>139</sup> probation (*condena condicional*) of two to five years where the pen-

133. *Ley de Jurado de Revisión de 17 de mayo de 1917*, cited in ESCOBAR, *supra* note 17, at 174-76. Under the operation of the reviewing jury, composed of 20 lay citizens chosen much like a trial jury, the defendant was not freed pending appeal if acquittal was for an offense with a punishment of greater than two years. *Id.* The reviewing jury went out of existence with the general abolition of juries in 1988. See *infra* text accompanying note 387.

Further prosecution of a case in which the jury acquits has been barred by constitutional concepts of double jeopardy in the United States since as early as *Ball v. United States*, 163 U.S. 662 (1896).

134. Cód. INST. CRIM. art. 322.

135. *Id.* art. 323.

136. Cód. PEN. art. 56. All penalties except death are still available. There was a great deal of confusion about the operative sentencing law at the time of my visits. I asked questions on the operation of the penalties to virtually all lawyers and judges, and received as many answers in return. Many responses differed from the code structure described here. This may be an example of "revolutionary interpretation," or a resistance on the part of post-revolutionary judges to be bound by pre-revolutionary concepts of punishment, which frequently conflicted with revolutionary views of criminality, whether harsher or more lenient. See *infra* text accompanying notes 226-34.

137. These included house arrest (*arresto*) and absolute or special disabilities (*inhabilitación absoluta o especial*). House arrest required the condemned to choose some type of work, while disabilities carried penalties of loss of employment or other privileges. Cón. PEN. arts. 59, 65, 66.

138. *Id.* art. 67.

139. *Id.* arts. 96-102. This penalty was reserved for the physically or mentally ill, the alcoholic or drug addict, persons over 70, or minors, and consisted of close supervision in an institutional setting. *Id.*

alty for the offense did not exceed three years,<sup>140</sup> monetary fines, and civil judgments of damages when the complainant raised a civil claim.<sup>141</sup> Simple formulae existed for calculation of the punishment of accessories, concealers and those who attempted but did not complete offenses.<sup>142</sup> The judge maintains jurisdiction over the matter during the time of incarceration and makes all decisions as to parole (*libertad condicional*) after service of a certain portion of the sentence, assuming all conditions are met.<sup>143</sup>

## 5. Appeals and Extraordinary Writs

Direct appeal, referred to as second instance (*la segunda instancia*) flows automatically from the trial court to the Court of Appeals, and is available to the convicted defendant, the accuser or the prosecutor. Review is both factual and legal, and might result in the taking of new evidence. Appeals can result in a new outcome of conviction or acquittal which is not further appealable.<sup>144</sup> In cases of acquittal of the defendant in the trial court, the dictation of the *auto de prisión*, the dismissal of charges or the seizure of the defendant's assets, appeal lies, and reversal results in remand for new proceedings in the trial court in accordance with the judgment.<sup>145</sup>

Either the trial or appellate court is able to declare the proceedings void as the result of the commission of certain listed substantial nullities (*nullidades sustanciales*).<sup>146</sup> These include technical but very common sense issues such as the failure to prove the *corpus delicti* or the refusal to accept evidence without legal cause. "Accidental" nullities do not void the proceedings.<sup>147</sup> Errors not listed among statutory nullities are not appealable.

Cases currently can be appealed from second to third instance in the Supreme Court by petition (*súplica*) and by cassation (*casa-*

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140. *Id.* art. 103.

141. *Id.* arts. 34-52.

142. *Id.* arts. 77-83.

143. *Id.* arts. 108-13.

144. *Id.* arts. 459-71.

145. *Id.* art. 449. In 1988, the law was amended to eliminate appeal following the *auto de prisión*, following a Supreme Court decision to that effect. Ley No. 37, 79 LA GACETA art. 15 (Apr. 13, 1988).

146. CÓD. INST. CRIM. art 443.

147. *Id.* art. 445. This anomalous concept is not further explained in the code. It appears to be something akin to the U.S. concept of "harmless error." Chapman v. California, 386 U.S. 18 (1967).

*ción*).<sup>148</sup> Petition lies only in extremely narrow circumstances<sup>149</sup> and cassation is the functional equivalent of the U.S. writ of certiorari.<sup>150</sup> Review at the Supreme Court level is extremely unusual; the case is over for all intents and purposes after review in the Court of Appeals.

Human rights instruments uniformly call for a "simple and brief" procedure for citizen access to the courts to challenge official acts which violate fundamental constitutional rights.<sup>151</sup> This would normally encompass both the traditional writ of habeas corpus and the writ of *amparo*, a well-established historical writ in Latin America which encompasses both illegal administrative acts and relief from illegal detention.<sup>152</sup>

Both habeas corpus and *amparo* existed in Nicaragua before the revolution. They can be found as an annex to the Constitution of 1974.<sup>153</sup> Little is known, however, about the extent of their pre-revolutionary use.

## 6. Time Limits

The one-day statutory limit on the conduct of a jury trial was typical of short code time limits which encouraged speed and efficiency. Because of judicial control and the non-adversarial nature

148. A third remedy, *revisión*, existed in the 1974 Constitution, but was inadvertently omitted from the available remedies in the 1987 Constitution. Unlike the other remedies, revision permits the court to receive newly discovered evidence. The remedy was declared unavailable in a 1987 Supreme Court ruling, and legislation to remedy the oversight is in the process of submission from the Supreme Court to the Assembly. Interviews with Rafael Chamorro Mora, Magistrate of the Supreme Court of Justice, in Managua, Nicaragua (Sept. 5, 1988 and June 5, 1990).

149. Cód. INST. CRIM. arts. 472-81.

150. *Ley de Tribunales*, *supra* note 27.

151. See, e.g., *American Declaration of the Rights and Duties of Man*, art. XVIII, in HUMAN RIGHTS SOURCEBOOK 545, 548 (Albert P. Blaustein et al. eds., 1987).

152. See generally RICHARD BAKER, *JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT* (1971); Pedro P. Camargo, *The Right to Judicial Protection: "Amparo" and Other Latin American Remedies for the Protection of Human Rights*, 3 LAW. AM. 191 (1971); Diana S. Donaldson, *The Costa Rican Amparo in the Period 1950-1962*, 8 LAW. AM. 371 (1976); Hector Fix Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CAL. W. INT'L L.J. 306 (1979); Hector Fix Zamudio, *The Writ of Amparo in Latin America*, 13 LAW. AM. 361 (1981). See also H.H.A. Cooper, *Habeas Corpus in Peru: Myth and Reality*, 20 CLEV. ST. L. REV. 603 (1971).

153. The earliest *amparo* law in Nicaragua was enacted in 1894. Fix Zamudio, *supra* note 152, at 377. Habeas corpus provisions can be found in NICAR. CONST. OF 1974, art. 42. The *amparo* provisions were adopted in a separate law accompanying the constitution. *Id.* 1978 OAS REPORT, *supra* note 41, at 26 n.2.

of the proceedings, many of the time-consuming aspects of discovery and of the courtroom questioning of witnesses, which characterize the common law, did not occur. Proof-taking was very streamlined and discovery was completely open, since the parties had little control over the reception of proof or the value to be accorded to the evidence, as will be demonstrated.

Each stage in the process was statutorily limited to a fixed number of days. The instruction was limited to between eight and twenty days, depending on the presence or absence of the defendant.<sup>154</sup> The parties were then given four days to examine the entire accumulated evidence, after which the proofs were opened in the plenary stage for a period ranging from sixteen to thirty days.<sup>155</sup> The one-day trial was followed by an eight day period during which the judge prepared to formally enter sentence.<sup>156</sup> The whole process, from start to finish, was thus statutorily limited to a maximum period of just over two months, with the exception of possible interlocutory appeals, particularly after the decision as to the *auto de prisión*.

## 7. Evidence and Burdens of Proof

The standards governing the receipt of evidence in the course of the trial, as well as the amount of such evidence which would satisfy a legal burden of proof, were governed by highly formal and rigid legal standards. These "objective" measures were, in part, influenced by the German scientific school of criminal law, which sought, as others have before and since, to remove the judge from the vagaries of subjectivity, or worse, the influence of emotion.<sup>157</sup> The judge was to apply the law, not interpret or make it.

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154. Cód. INST. CRIM. art. 177. The longer period applied when the accused was not detained. "Not in detention," as the code defined this concept, meant that the defendant was either not in custody or beyond the jurisdiction of the court. Thus, trials in absentia were, and still are, not uncommon. Interview with Víctor Ordóñez, Vice-Dean of the University of Central America Law School, in Managua, Nicaragua (July 27, 1988). This common practice, which I also found in my consultations with defense attorneys in Costa Rica in 1988, is another example of the excessive rigidity and formality of the criminal processes of the region.

155. Cód. INST. CRIM. arts. 203, 204.

156. *Id.* art. 322.

157. MERRYMAN, *supra* note 15, at 61-67.



### a. Measured Proof

The taking of proof was controlled by the measured proof, or *prueba tasada*, standard.<sup>158</sup> The system of measured proof was what the name implies; all evidence was given a quantitative value, and only a certain quantum of proof was sufficient to carry a burden. The following evidence was admissible to prove a crime, in order of preference: The confession of the accused; testimony of witnesses; instruments or fruits of the crime; personal eye-witness inspection of the crime scene by the judge; reports from experts; and presumptions.<sup>159</sup> The most interesting aspects of this hierarchy are the great weight afforded to the defendant's confession and the distrust accorded to expert testimony.

The confession of the defendant was considered to be the "queen of proofs;" this is no less true today than in 1879.<sup>160</sup> While many modern proceduralists would question the validity of heavy reliance on the use of confessions as the primary or exclusive means of proof,<sup>161</sup> reliance on that means in 1879 is not surprising.

First, the Church still heavily influenced legal matters, and the idea of the expiation of sin through confession had a powerful impact on the criminal law. Second, the technology of criminal investigation was primitive. Because modern means of crime detection and apprehension, and the judicial apparatus to support them, were non-existent then (or now) in Nicaragua, use of the defendant

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158. On the Continent, and throughout the civil law system, this standard is more normally referred to as the system of "legal proof." *Id.* at 117-19; ESMEIN, *supra* note 36, at 620-30. The word "measured" better captures the sentiment of the term in Spanish, and it will be used throughout this Article.

159. Cód. INST. CRIM. art. 251. The meaning of "presumption" in Nicaragua includes not only a fact which is assumed to be true, but extends to what we would normally call circumstantial evidence: a fact or circumstance from which another fact may be deduced, e.g., bloodstains, finger or footprints, etc. Interview with Francisco Fletes, private criminal practitioner, in Managua, Nicaragua (Aug. 8, 1988).

160. Interview with Reynaldo Vega, private criminal lawyer, in Managua, Nicaragua (Aug. 1, 1988). This heavy reliance on confessions was a hallmark of the early development of criminal procedure in France and Germany. Ploscowe, *supra* note 36, at 450-51, 463. See the fuller discussion of confessions, *supra* notes 75-82 and accompanying text.

161. For example, in the United States, the premises underlying procedural protection of the defendant's Fifth Amendment right to silence and Sixth Amendment right to counsel assume that the confession should not be the primary source of evidence against the accused, as it tends to corrupt the system by encouraging interrogational abuses. *Escobedo v. Illinois*, 378 U.S. 478, 488-491 (1964) ("[A] system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."). See also *Miranda v. Arizona*, 384 U.S. 436 (1966).

as the principal source of proof was a simple, pragmatic necessity. This same notion of the distrust or non-existence of scientific evidence probably accorded the expert witness low status on the totem pole of measured proof. Third, and most important, is the civil law tradition itself, in which the rights of the accused to silence and against self-incrimination were not nearly as developed as they subsequently became in the common law. As early as the thirteenth century, the secret examination of the accused, accompanied by torture if necessary, was a hallmark of the normal inquisitorial process.<sup>162</sup> Even today, the civil law attaches great importance to the interrogation of the accused, on the premise that criminal procedure is "a judicial inquiry which should neglect no source of information on the facts surrounding the commission of a crime . . . . [The accused] is the man who knows most about the issues, the truth or falsity of the charges."<sup>163</sup>

Proof sufficient to meet a burden was either whole (*prueba plena*) or partial (*semi-plena prueba*). Each type of evidence was given a specific value, and only a certain quantum of each type is sufficient to constitute partial or total proof. It was as though each "piece" of evidence or proof was given a tangible and strictly delimited spacial quality, like a brick. So many bricks could construct a wall of proof. For example, the "free and spontaneous" confession given before a judge was total proof,<sup>164</sup> while the extrajudicial confession, sworn to by two witnesses, constituted partial proof.<sup>165</sup> Two or more presumptions constituted full proof, while only one constituted partial proof,<sup>166</sup> and so on. One commentator has acidically characterized this as the "adding and subtracting" of evidence, rather than the weighing of it.<sup>167</sup>

The system attempted to be rational, but left many of the same gray areas which exist in systems vesting extensive discretion in the judge, as is the case in the U.S. system. There is nothing in the code, for example, to guide the judge's inevitable application of discretion in deciding which of the various types of "presump-

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162. Ploscowe, *supra* note 36, at 447-48.

163. *Id.* at 434. This statement, of course, is only true if the accused is the person who committed the offense. One who is falsely accused has no more reason than anyone else to know "most about the issues," and may know nothing whatsoever about the offense or the offender.

164. Cód. INST. CRIM. art. 253.

165. *Id.* art. 272.

166. *Id.* arts. 271, 272.

167. Ploscowe, *supra* note 36, at 452.

tions" to apply, or what quantum of testimony from a witness is to be considered sufficient to constitute "proof by testimony," or whether a person meets the statutory definition of "unchallengeable witness."

There is, in short, no objective system of proof. Despite the proliferation of codes of evidence in the United States, all purporting to protect supposedly suggestible jurors from prejudicial evidence by providing them with "objective" evidence, the court, at bottom, is vested with wide discretion in admission of relevant, reliable or even hearsay evidence.<sup>168</sup> The same is true in the civil law. All proof-taking is, in significant measure, subjective, and requires extensive exercise of human judgment, not only in the admission or evaluation of evidence, but also in the more basic concept of what constitutes a "fact."<sup>169</sup> The idea that such an objective system existed, however, was a strong premise of the measured proof system, and underlies much of the criticism of the more discretionary system adopted in the post-revolutionary period.

b. Burdens of Proof: the *Cuerpo del Delito*, the *Auto de Prisión*, and the Determination of Guilt or Innocence

There were three critical determinations in the criminal process, as originally conceived. These were, and continue to be: (1) whether the defendant should be charged; (2) whether the evidence was sufficient to proceed from the investigative to the trial stage; and (3) whether the defendant should be found guilty. Each of these determinations was governed by explicit burdens of proof.

Evidence of the commission of a crime, the first crucial determination in the criminal process, was governed by the presence of full or partial proof. The initial decision to proceed with the case lay solely in the hands of the judge, based on the existence of the *cuerpo del delito*, or its Latin cognate, the *corpus delicti*. The

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168. The Federal Rules of Evidence, for example, provide that no error occurs in the erroneous admission of evidence unless "a substantial right of the party is affected" and appropriate objections are interposed. FED. R. EVID. 103(a) (1989).

169. The question of what constitutes a historical fact is itself subjective. If that is true, then both the perceptive abilities and the credibility of witnesses to events must be interpreted through the prism of discretion. John D. Jackson, *Theories of Truth Finding in Criminal Procedure: An Evolutionary Approach*, 10 CARDOZO L. REV. 475 (1988) ("It is therefore impossible to know the whole truth about anything and one central tenet of the classical scientific method—that we must gather all the information we can about a matter—appears to be impracticable. Another tenet, the value of detachment, also becomes untenable.") *Id.* at 515.

term is used here in its classic sense of "the body of a crime."<sup>170</sup> The *cuerpo del delito* is the foundation of the criminal trial, and the investigative stage, or instruction, cannot begin without it.<sup>171</sup> It is tautologically defined as "the existence of a crime," as measured by the elements delineated in the statute and as elaborated upon for certain offenses in the sections on *corpus delicti*.<sup>172</sup> Thus, the judge need only find the existence of a crime in order to proceed to the prosecution of a specific defendant. There is no requirement of a judicial determination of the equivalent of probable cause to connect the defendant to the *cuerpo del delito* until the close of the investigative stage. While there was a provision which permitted the private citizen to arrest the defendant when caught *in flagrante*,<sup>173</sup> procedure was no different in terms of the requirements of proof.

At the close of the investigation, the judge was required either to dismiss the charges or dictate the *auto de prisión*, literally the act of imprisonment. This was the second critical decision in the process. The act resulted in issuance of a warrant for the arrest of the defendant or an order for his continued detention.<sup>174</sup> This determination is the closest equivalent to the determination in the United States of probable cause to bind the defendant over for trial following a preliminary hearing or grand jury proceedings. For this determination to be made, the judge must conclude that the *corpus delicti* is totally proven (*plenamente comprobado*) and that there exists at least partial proof or a strong presumption (*semi-plena prueba o presunción grave*) that the accused has committed the offense.<sup>175</sup> Normally, this determination will result in the de-

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170. Cód. INST. CRIM. art. 54. This is the appropriate technical meaning of the term, not the popular misconception of reference to the body of the victim in a homicide.

171. *Id.* art. 55.

172. *Id.* art. 54 *et seq.* One Nicaraguan theoretician asserted that the task of defining the *cuerpo del delito* was "totally enraging," and then proceeded to discuss the subject for several pages without significant illumination. ESCOBAR, *supra* note 17, at 69-78.

173. Cód. INST. CRIM. art. 85. The notion of capture in the act was broad; it could include capture of the defendant with "arms, instruments, effects or papers," which made one presume him to be the perpetrator, so long as this was done within 24 hours of the offense. *Id.* Ploscowe notes a similarly extended meaning of capture "in the act" in France as early as the 13th century. Ploscowe, *supra* note 36, at 443-44.

174. Cód. INST. CRIM. arts. 94, 184.

175. *Id.* art. 184. Since this was the last point in the proceedings at which an evaluation of the legal sufficiency of proof was made by the judge, it had great importance, and would take on even more significance in the post-revolutionary context, after the elimination of juries and the adoption of the *sana crítica* standard of proof. See *infra* notes 389-97 and accompanying text. In one interview in Nicaragua, it was said that this determination re-

tention of the accused until the completion of the trial, the equivalent of preventive detention, a relatively recent though increasingly common practice in the United States.<sup>176</sup>

The determination of guilt by the jury was the third critical juncture in a trial. The governing standard was that of *intima convicción*, or inner conviction, of the members of the jury.<sup>177</sup> The distinction was made between the judge's obligation to rigorously apply the legal standards of proof discussed above, while the jurors' duty was moral; they were asked to apply the "impression in their soul."<sup>178</sup> The charge to the jury was concluded by the statement, "the law does not tell you that you must take as the truth a certain fact sworn to by a certain number of witnesses; it requires only that you ask yourself a single question, which summarizes all of your duties: 'Do you have an inner conviction?'"<sup>179</sup> This was not an appeal to rationality but to communal wisdom, to common sense, to the "gut reaction." The shift in consciousness from the taking of proof to the finding of guilt, then, was a radical swing from the totally rational and mechanical application of rules in deciding the admissibility of evidence to the intensely emotional and subjective decision by the jury as to guilt or innocence.

quired that the judge find either the certainty of the fact (*la certeza del hecho*) or a level "higher than simple human presumption" (*mas allá de la simple presunción humana*) in order to meet the legal burden of proof required for a criminal case at this point in the proceedings. Interview with Reynaldo Vega, private criminal practitioner, in Managua, Nicaragua (Aug. 1, 1988).

176. Cód. INST. CRIM. art. 94. The use of preventive detention has come into increasing use in the United States since its approval by the U.S. Supreme Court for juveniles in *Schall v. Martin*, 467 U.S. 253 (1984) and later for adults in *United States v. Salerno*, 107 S.Ct. 2095 (1987) (upholding the constitutionality of the federal Bail Reform Act of 1984). See also Thomas E. Scott, *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1 (1989) (concluding that detention, after bail reform, is being ordered on a "large scale" with "a corresponding increase in facilities, personnel and expense"). *Id.* at 30.

177. Cód. INST. CRIM. art. 305. This articulation of the jury's duties is virtually identical to that articulated in contemporary France. See George W. Pugh, *Administration of Criminal Justice in France: An Introductory Analysis*, 23 LA. L. REV. 1 (1962). However, it differs dramatically from the pre-revolutionary standard in France, which called on the jury to be "thoroughly convinced," a test which more closely approximates the U.S. requirement of proof of guilt beyond a reasonable doubt. ESMEIN, *supra* note 36, at 628.

178. Cód. INST. CRIM. art. 273. This may be one of the factors which contributed to the ultimate demise of the jury system, although it has not been articulated in this fashion; the jury was simply perceived as too lenient. Interview with William Frech, private criminal practitioner, in Managua, Nicaragua (Aug. 2, 1988). A similar attack was mounted in France after the Revolution of 1789, where the jury was initially seen as an instrument of popular power and participation. ESMEIN, *supra* note 36, at 467-70.

179. Cód. INST. CRIM. art. 305.

This, then, was the original structure and concept of the criminal process for serious offenses. The process was relatively brief, controlled by the judge, mostly secret, largely written, gave few rights to the prosecution or defense, and balanced concepts of law and common sense in the determination of guilt. While the code may not be familiar territory for the common law practitioner, the animating principles were understandable, and the document was entirely rational in its historical context.

*E. The Ideological Premises of the Historical Civil Law Criminal Process*

Judicial role was central to the conception of the criminal process as it existed before the revolution. As the above summary suggests, the court is vested with broad control and power in the direction of the proceedings, but the primary conception of the judicial role in civil law ideology was that of servant, or secondary player, to the primary role of the legislature as law-giver and vessel of the popular will. The judge was, under this ideology, not to use discretion, but simply to apply, rigidly and formally, the rules for the existence of sufficient proof to charge, for the submission of evidence, or for imposition of sentence, as set forth by the legislature. Discretion in charging, proof-taking, and sentencing, at least conceptually, did not exist.

In practice, the court, particularly in the investigative stage, was given the sole power to charge, to seek out proof, to receive, screen, and admit all evidence so long as it met the legal standards for measured proof and appeared to be relevant. These powers, despite the supposed primacy of the legislature in law-giving, converted the judge, at least in the context of each individual adjudication, from passive vessel through which legislative judgments passed into a high priest of procedure.<sup>180</sup> This power was tempered only by the injection into the otherwise "sterile" process of proof-taking of the highly subjective and emotional jury deliberation,

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180. Cf. CARRIÓ, *supra* note 18, at 5. The term "priest" here connotes the strong connection between the origins of the powers of the judge in the criminal proceeding and the early European venue for criminal proceedings, the ecclesiastical courts. Ploscowe, *supra* note 36, at 446. Images of the Grand Inquisitor and the Star Chamber here are not coincidental. This powerful shift in the conception of the judicial role is acknowledged implicitly in MERRYMAN, *supra* note 15, at 124-32, and in CARRIÓ, *supra* note 18, at 4-5. For other critics, the power and role of judges in interpreting text is central, whether or not in the criminal process. Fraser, *supra* note 25, at 872-76.

before which jurors were exhorted to rely on their hearts rather than their minds, on moral wisdom rather than dry fact.

The roles of judge and jury in the civil law, at least conceptually, were thus quite different than those in the common law. In the United States, the parties, not the judge, determine before trial what evidence will be offered and in what order. The jury is adjured not to let emotions influence their deliberations, which are, because of preliminary screening of legal issues by the judge and rulings excluding irrelevant or immaterial facts from their consideration, limited to the rational determination of the facts of the case at hand.<sup>181</sup>

Other premises arise from the role of the defendant in the criminal process. The assumption in the civil law, still operative today, is that the defendant is a legitimate source of information.<sup>182</sup> He or she is more important than other witnesses, including the victim, if one measures importance by the procedural detail which surrounds the taking of statements from defendants and other witnesses during the critical first stage of the case. That stage was highly secretive and directed by the investigating judge, whose duties as a representative of the state required the protection of the interests of all the actors in the process: victim, witness, and defendant.

At least five important consequences of the defendant's role can be identified in the conception of civil law criminal procedure. First, the defendant was not protected through the advise of counsel because counsel was deemed systematically unnecessary.<sup>183</sup> Second, the defendant's confession was a key component of the process, but was not sufficient, in itself, to stop the process from full investigation, since there is no plea bargaining and it is not presumed that the confession is valid and true in all circumstances. Third, as a formal matter of process in the "confession with charges," the defendant was formally presented before the judge

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181. The clear exception, which may destroy the rule, is jury nullification. That concept, as old as the jury itself, permits the jury to ignore the facts as applied to the law and rule by collective will to acquit without risk that their verdict can be questioned as to its integrity. This is because the jury verdict of not guilty is not subject to any review. Ironically, the weight of authority is that the jury should not be told that it has this power. *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

182. See also CARRIÓ, *supra* note 18, at 5-6.

183. It is noteworthy that a common and related feature of many civil law codes, that which permits the incommunicado detention of the defendant during the investigation, is not found in the Nicaraguan code. *Id.* at 54-55.

with the right to hear the charges and respond. The defendant's response carried adverse consequences if he or she did not speak. Silence inferred guilt. Fourth, neither at this stage nor later at trial was the defendant required to testify under oath, thus providing protection against possible perjury charges. Finally, as is noted above, the defendant testified first at trial, indicating the centrality of the defendant to the proceedings.<sup>184</sup> Each of these consequences would be addressed and affected, though hardly resolved, by the post-revolutionary conception of the criminal process.

The role of the defendant makes sense, at least conceptually, when one looks at the overall goals of civil law criminal process. The philosophical scheme of the civil law criminal process, the central function of the process itself and of the judicial role, is the determination of truth—the finding of guilt or innocence. This notion is rooted not only in the law but in the ancient and profound connections of state and church which continue to influence policy-making in Central and South America.

Even the term "guilty," as it is used in that system, takes on a different meaning than in the U.S. adversarial system, where the jury's task is a determination of "guilty" or "not guilty," not "guilty" or "innocent." The prosecutor's burden is to prove the existence of a crime beyond a reasonable doubt, and failure to do so should result in acquittal. The defendant's factual innocence is theoretically irrelevant in the U.S. system. In this system, the state, at least in theory, is put to this test in order to honor the concept of a burden of proof "beyond a reasonable doubt" and to give meaning to the presumption of innocence. In short, it is designed to even the odds of vast state power against individuals.<sup>185</sup>

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184. See *supra* text accompanying note 125.

185. Many of the strongest critics of the adversarial system are quick to note that its failure to elevate truth-seeking to the ultimate goal inevitably leads, through the clash of parties who control evidence production, to the intentional hiding of truth. See, e.g., Kenneth Pye, *The Role of Counsel in the Suppression of the Truth*, 1978 DUKE L.J. 921; MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975). Ironically, the United States Supreme Court's conservative trend is conceptually grounded in a characterization of the criminal process as a "search for truth," rather than a process with normatively effective rules of burdens of proof and presumptions of innocence, thereby shifting the paradigm of the Court to one more congruent with the civil law conception of criminal process. Professor Grano writes an introduction to a series of articles on the subject of the U.S. Justice Department's "Truth in Criminal Justice Series" which best typifies the trend: Joseph D. Grano, *Introduction—The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22



The adversarial conception of guilty—not guilty stands at odds with the determination of the “truth” of guilt or innocence. In both the civil law and socialist law conceptions of state power, the court, as the state’s sole representative, charges and investigates crimes. The state, through the court, is seen as protector of the rights of society and of the individual, capable of mechanically applying rules to sort truth from falsity and guilt from innocence.<sup>186</sup> The judge’s role, in these systems, is not neutral or symbolic but central to the definition of state power. The differences in the systems are not semantic but conceptual.

The central role of the court in truth-finding, particularly during the investigative stages, leads to different conceptions of the role and rights of the accused in the process. These conceptions intrinsically put a lesser value on the risk of overbearing state intervention and rights of privacy, and even dignity, in the service of the greater goal of the search for truth. It is in this area that the greatest clashes of values were to emerge in the post-revolutionary context.

Two noteworthy points must be made about the historical context of the French procedural code on which the Nicaraguan code was based. First, the French code, like the Nicaraguan code, stood the test of time. French criminal procedure endured few significant structural changes in the 150 years since its adoption in 1808 until its abandonment in 1958, and even then the new code maintained the organization of offenses and courts.<sup>187</sup> Nicaragua, and most of Latin America, modeled itself on a code of criminal procedure which showed endurance and flexibility in its country of origin.

Second, and perhaps more importantly in light of the ideology of truth-seeking, the French code was adopted in reaction to the

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U. MICH. J.L. REF. 395 (1989); see also Yale Kamisar, *Remembering the “Old World” of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REF. 537 (1990) (“Grano bemoans the fact that the Warren Court seemed to forget that the search for truth is the primary goal of American criminal procedure. I would put it somewhat differently—the Warren Court remembered that the ascertainment of truth is not the *only* goal of American criminal procedure.”)(emphasis in original) *Id.* at 541-42.

186. Damaska seeks, from the start of his comprehensive classification scheme of criminal process, to eliminate socioeconomic organization of the state from the relevant factors which should be considered in arriving at an effective analytical tool. DAMASKA, *supra* note 16, at 6-8. He ultimately includes both the civil and socialist legal systems within his “hierarchical” system of criminal process. *Id.* at 12.

187. Tomlinson, *supra* note 36, at 142.

liberalization of French criminal procedure immediately after the French Revolution. Broad reforms completed in 1791 were perceived to be too favorable to the accused, and in the wake of the revolution "liberty became of less importance than social security."<sup>188</sup> The newer code of 1808, while initially retaining the jury trial as a salutary influence of English criminal procedure, was essentially a vehicle for crime control which provided few procedural rights for the accused, particularly in the critical preliminary stages.<sup>189</sup> The balance of procedural rights for the accused and the maintenance of "social security" in post-revolutionary Nicaragua is as much an issue now as it was at the opening of the nineteenth century.

### III. CRIMINAL JUSTICE IN PRACTICE IN THE YEARS PRIOR TO THE 1979 REVOLUTION

This Article's discussion of criminal justice in Nicaragua before the revolution has been thus far largely theoretical. Reference has been made to the codes themselves, and not to their daily application in the criminal courts. There are some documented criminal justice practices in the later years of the Somoza era. Many of these practices, such as political assassination, disappearances, and torture, fell outside acknowledged rules but nonetheless occurred with alarming frequency prior to and during the revolution. The "gap" between criminal justice in the codes and its application in the Nicaraguan cities and countryside are the subject of this section.<sup>190</sup>

As with Nicaraguan jurisprudence, there is remarkably little

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188. Ploscowe, *supra* note 36, at 461-62 n.75.

189. *Id.*

190. I do not subscribe to the notion that the "gap" renders the study of the legal system in Nicaragua less valuable or even unreliable. I conclude, as others have before me, that the gap is the beginning of the analysis, not the end. It is as real here as in any country, and models for how the system works must be developed with the reality of the gap in mind. See Elliot M. Burg, *Law and Development: A Review of the Literature and a Critique of "Scholars in Self-Estrangement,"* 25 AM. J. COMP. L. 492, 511-12 (1977). Alternatively, the gap can be seen as typical of the Latin American development process, not as an aberration. As such, the ideal model is not the appropriate focus for study, but rather the "crazy-quilt patterns" of the gaps and lags. See Howard J. Wiarda, *Law and Political Development in Latin America: Toward a Framework for Analysis*, 19 AM. J. COMP. L. 434, 460-63 (1971).

The reality in Nicaragua, both before and after the revolution, subjects itself more to "political" interpretation and attack than theory. Theory, however, remains at least as important as it is in any other society, since statutes are idealized, while law as it is practiced is more dynamically linked to the reality of the legal culture.

written about criminal justice in pre-revolutionary Nicaragua, particularly during the decades of control by the Somoza family. Given the widespread reputation of the Somozas for brutality and corruption, this is not surprising, as it can be assumed that abuses would not be ballyhooed by the regime itself or by the press of its strongest ally, the United States. The object of repression is to prevent the dissemination of accurate information, making abuses of individual liberties extremely difficult to document. Another factor which might contribute to the absence of extensive or accurate data is that the area in question, criminal procedure, is formal and legal; general levels of understanding and interest are limited unless lawyers take the time to explain the abuses of process, a highly unlikely prospect when the bar in pre-revolutionary Nicaragua was generally part of the privileged bourgeois and not the object of abuses.<sup>191</sup> The abused were the poor and the politically active. The former never had a political voice, and the latter were largely marginalized "subversives" in the eyes of the privileged, a nasty interruption to the routine of daily life.

Existing information on criminal practice during the closing years of the Somoza regime primarily comes from human rights organizations. These included some information on the operation of the criminal courts in their reports on political freedom in Nicaragua.<sup>192</sup> International human rights accords incorporate extensive provisions on the fundamental guarantees of the criminal pro-

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191. This was not true for all of the revolutionary leaders. Both Carlos Fonseca and Tomás Borge, founders of the FSLN, were trained in law. Fonseca, one of the powerful thinkers and writers of the Sandinista movement in Nicaragua, studied law during the early days of his political activism. RÍUS, CARLOS PARA TODOS 36-38 (1987). He was imprisoned several times and was ultimately killed in combat on Nov. 8, 1976. *Id.* at 106. Borge began his student activism during his tenure as a law student. CHRISTIANITY AND REVOLUTION: TOMÁS BORGE'S THEOLOGY OF LIFE 7 (Andrew Reding ed., 1987).

192. The country reports of non-governmental human rights organizations have become an indispensable source for a broad range of information on the operation of the criminal courts. The systematic collection of data on operation of legal and extra-legal criminal procedures was nascent during the pre-revolutionary era in Nicaragua. Thus, only the years immediately prior to the fall of the Somoza regime provide any documentation, and that information is limited in its detail. See 1978 OAS REPORT, *supra* note 41; 1976 AMNESTY REPORT, *supra* note 43; see also INTERNATIONAL COMMISSION OF JURISTS, HUMAN RIGHTS IN NICARAGUA, YESTERDAY AND TODAY (July 1980) [hereinafter 1980 ICJ REPORT].

There are a few accounts of political life in Nicaragua prior to the revolution, but while these histories are replete with accounts of the effects of the judicial system through jailing and imprisonment of political dissidents, they are virtually devoid of detail as to the actual operation of judicial machinery. See, e.g., TIJERINO, *supra* note 1; RICHARD MILLET, THE GUARDIANS OF THE DYNASTY (1977); NEILL MACAULAY, THE SANDINO AFFAIR (1985).

cess.<sup>193</sup> The failures of the regime thus were extensively documented and tested against international norms.

The Inter-American Commission on Human Rights, sponsored by the Organization of American States, wrote to the Nicaraguan government in February, 1978, following the January assassination of the well-known journalist and political figure, Pedro Joaquín Chamorro, and asked for a report on the present status of human rights in Nicaragua. The Minister of Foreign Affairs of Nicaragua, Julio C. Quintana, promptly replied:

I am pleased to state to you that the Nicaraguan people enjoy full freedom and the exercise of the rights guaranteed by our Constitution and other law of the Republic, which incorporate and enforce human rights law as part of our juridical tradition, in accordance with the Nicaraguan political reality based on a representative democracy. These guarantees and rights have not been suspended, in spite of violent events and subversive actions of extremist groups which threaten the peace of the Republic.<sup>194</sup>

Despite the assurances of Minister Quintana, the subsequent visit by the Commission in October, following a major military offensive by the Sandinistas, revealed deeply alarming violations of human rights by the Nicaraguan government. The Commission found that the Government had repressed the September insurrections "in an excessive and disproportionate manner," including the indiscriminate aerial bombing of civilian populations; that the Government was responsible for the death, torture, and arbitrary and prolonged detention of peasant groups and the young, particularly "any male youth between 14 and 21 years of age"; and that the police and military courts had utilized their powers, estab-

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193. The International Bill of Rights, the oldest of the multi-lateral human rights accords among the modern nations, contains several guarantees relating to criminal procedure. One of the Bill of Rights documents, the Universal Declaration of Human Rights, was adopted in 1948 and contains the following protections: art. 3 (right to life, liberty, and security of person); art. 5 (protection against torture and cruel, inhuman, or degrading treatment or punishment); art. 9 (protection against arbitrary arrest and detention); art. 10 (right to full and public hearing by independent and impartial tribunal on criminal charges); art. 11 (presumption of innocence and protection against *ex post facto* laws or punishments); art. 12 (protection against arbitrary interference in privacy, family, home, or correspondence). U.N. DECLARATION OF HUMAN RIGHTS *in* HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 1, U.N. Doc. ST/HR/1/REV.3, U.N. Sales No. E.88.XIV.1 (1988) [hereinafter HUMAN RIGHTS COMPILATION]. Other later declarations, conventions, protocols, and treaties elaborate and expand on these rights. See also ILANUD, LAS GARANTÍAS PENALES Y PROCESALES EN EL DERECHO DE LOS DERECHOS HUMANOS (1988).

194. 1978 OAS REPORT, *supra* note 41, at 4.

lished in emergency circumstances, in such a manner as to arbitrarily deny due process and the right to an adequate defense.<sup>195</sup>

Article 197 of the Nicaraguan Constitution of 1974 permitted, in certain circumstances, the suspension of certain constitutional guarantees and the declaration of a state of siege and martial law by presidential decree.<sup>196</sup> As early as December of that year, the suspension of constitutional guarantees was decreed and the state of siege declared.<sup>197</sup> This would be the case for three and a half of the last four and a half years of the presidency of Anastasio Somoza Debayle, who was "re-elected" in late 1974.<sup>198</sup> Despite constitutional limitations, the continuous suspension of rights gave virtually unlimited power to military and police courts over both ordinary and political crimes.<sup>199</sup>

The military courts, which under martial law subsumed the jurisdiction of the ordinary criminal courts, were of two types: the Permanent Military Court of Investigation (*Corte Militar de Investigación Permanente*) and the Extraordinary Council of War (*Consejo de Guerra Extraordinario*). The former conducted investigations in order to bring charges while the latter passed judgment on the convicted. Operation of the courts was governed by a complex set of executive orders whose validity was tested and approved by the Supreme Court.<sup>200</sup> For the most part, and altogether apocryphally, these regulations were direct translations of the U.S. Navy codes of the 1920s, applied during one of several U.S. occupations of Nicaraguan territory.<sup>201</sup> The codes were alien to the Nicaraguan legal tradition.

Abuses under martial law were legion. A document prepared by a group of Nicaraguan lawyers at the time described the situation in the following terms:

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195. *Id.* at 77-78.

196. 1976 AMNESTY REPORT, *supra* note 43, at 6.

197. *Id.* This action was taken after the dramatic assault by FSLN troops on the home of a Nicaraguan government minister hosting a party for the U.S. ambassador, who never arrived. High ranking government officials were held as hostages until 14 political prisoners were freed, a ransom was paid, and a plane provided to fly to Cuba. *Id.* The success of the embassy party operation brought the FSLN international attention as well as financial and moral support.

198. 1980 ICJ REPORT, *supra* note 192, at 21. The report notes that the elections of 1974, which kept Anastasio Somoza in power, were "rigged." *Id.* at 13.

199. See 1978 OAS REPORT, *supra* note 41, at 29.

200. See 1976 AMNESTY REPORT, *supra* note 43, at 8-12.

201. 1980 ICJ REPORT, *supra* note 192, at 22; 1978 OAS REPORT, *supra* note 41, at 9.

Martial law and the state of siege have been used by Somoza to suppress any citizen dissent in the political, business, cultural, and social fields. Repression is widespread, characterized by indiscriminate persecution and imprisonment, censorship of the mass media, banning of political and labor organizations, surveillance of the mail, raiding of homes, torture, illegal trials and sentences, and the razing of small farms, compelling an exodus of peasants to the mountains.<sup>202</sup>

The military courts and their close companion, the police courts, colluded to systematically deny citizens basic procedural rights. Detention without trial, torture while in custody, and wholesale "disappearances" were the rule.<sup>203</sup> Many citizens were charged with offenses against the internal security of the state, offenses which carried such vague names as "illegal association" (a form of conspiracy), "attempted destruction of the constitution" or "incitement to non-observance of the constitution."<sup>204</sup> The police courts, using their summary powers, were staffed by members of the National Guard. The National Guard acted as both police force and army in Nicaragua and was strictly controlled through the office of Anastasio Somoza himself.

Amnesty International found that the Guard used its police court powers in "a pattern of harassment or political reprisal."<sup>205</sup> While law provided for access to counsel prior to sentencing and the opportunity to present a defense, Amnesty found that most prisoners sentenced by the police courts were incommunicado and never physically appeared before a judge.<sup>206</sup> One of the most heinous practices uncovered by Amnesty involved the reported practice by prosecutors of adding charges of perjury to those defendants who alleged that they were tortured instead of first requesting an investigation of the allegations.<sup>207</sup> Review of illegal detention or improper convictions was provided by law, but the Supreme Court "did not exercise this power. It took no action in relation to many trials in which there had been errors of law or fact."<sup>208</sup>

Judges and police under Somoza were notorious for their ex-

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202. Quoted without attribution in 1980 ICJ REPORT, *supra* note 192, at 13.

203. See 1976 OAS REPORT, *supra* note 43, at 15, 23-30; 1978 AMNESTY REPORT, *supra* note 41, at 55-64.

204. 1976 OAS REPORT, *supra* note 43, at 16-17.

205. *Id.* at 19.

206. *Id.* at 20; see also 1978 OAS REPORT, *supra* note 41, at 61.

207. 1976 AMNESTY REPORT, *supra* note 43, at 14.

208. 1980 ICJ REPORT, *supra* note 192, at 22.

trajudicial activities, including assassination, disappearances, and torture. The now-abolished *jueces de mesta* were the sole judicial authority in the rural *comarca* (the smallest administrative divisions). They were given jurisdiction over theft of livestock and firearms. Their qualifications and functions were roughly equal to that of a U.S. justice of the peace. They were accused by peasants of resorting to murder and other abuses, acting in association with the National Guard.<sup>209</sup> In 1977, a report published by Capuchin priests accused a National Guard patrol, accompanied by seven *jueces de mesta*, of the assassination of forty-four men, women, and children in the village of Varilla.<sup>210</sup>

During what it called "mopping up" operations, the Guard itself was charged with the systematic massacre of anyone between the ages of fourteen and twenty in certain areas. In León, the country's second largest city, for example, the mission of the International Commission of Jurists met residents in one street 300 meters long where thirty children had been executed.<sup>211</sup> The atrocities of the Guard, committed in the company of the Somoza judges, were grotesque. A survivor of a "mop up" operation gave the following account:

On August 30, [1978] at approximately 11:30 in the morning in Matagalpa, some thirty soldiers shot their way into my house, known as Hotel Soza, and said they belong to the EEBI [School of Basic Infantry Training], and ordered all of us in the house towards the back, with our hands in the air, in the direction of the principal room in the house. In the house there was my elderly mother, Tina Arauz de Soza, my brother-in-law Harold Miranda, the maid Nubia Montegro, and a guest, Alfredo Lacayo Amador, and the undersigned. As they were coming out they were also being machine-gunned. I was behind my mother and I jumped to the neighboring house and I was able to hide in the trash bin, hidden by the body of my mother.

I spent the whole day hidden in the trash bin, that is 24 hours, hiding behind some rotten beams a few feet from the soldiers who continued shooting to break down the doors. I

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209. *Id.* at 11 n.1.

210. *Id.* at 13. This account was reported by *Time* magazine, which also noted that after the death of Carlos Fonseca in battle, an "unpublicized trial" in Managua resulted in sentences ranging from 18 months to 129 years in prison for 36 captured guerrillas and 74 of their compatriots tried in absentia. *Somoza's Reign of Terror*, *TIME*, Mar. 14, 1977, at 29, 30.

211. 1980 ICJ REPORT, *supra* note 192, at 15.

could hear them shouting "there were five, where is the other one?" And I could see how my mother was butchered after they machine-gunned her, opening her abdomen with a bayonet. My brother-in-law had his genitals cut off and put in his mouth.<sup>212</sup>

#### IV. POST-REVOLUTIONARY REFORMS

This, then, was the inheritance of the new government in Nicaragua when it assumed power in July of 1979: a "justice system" which provided neither. Criminal justice was, like every social institution, scrutinized by a post-revolutionary government which had taken power by force. The abrupt change in governments left a vacuum of public policy; criminal justice policy was defined by theoretical debate and by the emerging reality of political events.

The new government faced the immense task reinventing the criminal justice system. It had to recreate public order in a country in which most of the men carried guns and had fought a war which taught that sometimes violence was the only solution to social problems. Atrocities by General Somoza's National Guard were a grizzly precedent, one which was absolutely rejected by the new regime. The criminal justice structures in neighboring Honduras, El Salvador and Guatemala certainly provided no sound models for implementation at home. Hostility to many North American ideas and institutions, combined with a totally distinct legal history, made the conversion to an adversarial model of justice un-

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212. 1978 OAS REPORT, *supra* note 41, at 44. For a reference to "EEBI," see *id.* at 39. These stories of cruelty and degradation, repeated at length and in detail in the style of human rights reporting, achieve a curious numbing quality after prolonged reading. This is not to deny their brutal reality but to acknowledge that our minds are all too capable of becoming conditioned to accept even the most cruel of human behavior analytically and rationally, even with boredom. If this is true in the reading of such accounts, it must be commonplace for those who struggle to cope with the brutal everyday reality in countries where such oppression occurs. The struggle for human rights is an effort to focus our collective consciousness to resist this numbing quality of human brutality, to fight our subconscious desire to forget. The Polish poet, Zbigniew Herbert, has poignantly captured the need to remember:

And yet in these matters  
 Accuracy is essential  
 We must not be wrong  
 Even by a single one  
 We are despite everything  
 The guardians of our brothers  
 Ignorance about those who have disappeared  
 Undermines the reality of the world.

Quoted in L. WESCHLER, A MIRACLE, A UNIVERSE 191 (1990).



likely. Reform was also slowed by the limited financial and human resources and the natural inertia of law and legal institutions.

The new regime adopted two basic documents governing the structure and principles under which Nicaraguan government would operate until the adoption of a formal constitution in 1987. These documents were the first public statement of the vision of a post-revolutionary society. The first was The Fundamental Statute (*Estatuto Fundamental*), adopted the day after the revolutionary victory. It abolished the 1974 Constitution and set out the structure of government.<sup>213</sup> The second was The Statute of Rights and Guarantees of the Nicaraguan People (*Estatuto sobre Derechos y Garantías de los Nicaragüenses*), adopted in August of 1979.<sup>214</sup> The Statute added a basic bill of rights for the Nicaraguan nation.<sup>215</sup>

The structure of government, which held until the 1984 elections, was tripartite: a governing Junta made up the executive branch, the legislative branch was a Council of State, and the third branch was the Courts of Justice.<sup>216</sup> The ruling Junta, originally five members,<sup>217</sup> changed membership in the first two years of the new government, emerging as a three-person body in March 1981.<sup>218</sup> The FSLN National Directorate, the Sandinista leadership, was dominant in the Junta and the Council of Government, a consultative "cabinet" to the Junta, and the Sandinista's blend of Marxist, social democratic, and Christian ideas guided government policy in the coming years.<sup>219</sup> The Council of State, with forty-seven members, played a co-legislative role with the Junta, and was made up largely of representatives from mass organizations, the so-called *poder popular*, or popular power, of the revolution.<sup>220</sup>

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213. DECRETOS—LEYES, vol. 1, *Estatuto Fundamental*, at 1.

214. DECRETOS—LEYES, vol. 1, Decree No. 52, at 66.

215. *Id.* at 67-72. Individual rights, including those dealing with the conduct of criminal trials, were contained in 25 articles of Title II of the Statute of Rights and Guarantees.

216. *Estatuto Fundamental*, *supra* note 213, art. 9.

217. The original members of the Junta were Daniel Ortega (later elected President in 1984), Moises Hassán (who was to become Mayor of Managua), Sergio Ramirez (later Vice-President under Ortega), Alfonso Robelo (who later became a leader in the contra opposition), and Violeta Chamorro (elected President in February, 1990). COUNTRY GUIDE, *supra* note 8, at 162.

218. *Id.* at 161-62.

219. *Id.* at 147-48, 150, 162.

220. *Id.* at 163-64. Jules Lobel calls this a "hegemonic position" for the working class and the peasantry, a key feature of the new government and the new constitution. Jules Lobel, *The Meaning of Democracy: Representative and Participatory Democracy in the New Nicaraguan Constitution*, 49 U. PRIT. L. REV. 823, 842, 845-53 (1988).

From the outset of the new government, the Courts played a key role. The Fundamental Statute called for the creation of a Supreme Court, Courts of Appeal, and a Supreme Labor Tribunal.<sup>221</sup> The day after the adoption of The Fundamental Statute, the Junta named seven Magistrates, or Justices, to the Supreme Court. The new members of the Court, acting under the still-operative Organic Law of the Courts of 1894, chose members of the Courts of Appeal, district and local judges.<sup>222</sup> Judicial independence, guaranteed by The Fundamental Statute, was further advanced by the adoption, in the same year, of the American Convention of Human Rights, and, in March of 1980, the United Nations Covenant on Civil and Political Rights and its Optional Protocol.<sup>223</sup>

With such an antiquated criminal justice system, it might be assumed that the priorities of the revolutionary government would include the drafting of new codes of criminal law and procedure, as well as modern versions of codes for the police and the courts. They did not. Lawyers and institutionalized law were not held in high esteem by the revolution.<sup>224</sup> Revolutionary priorities focused on more urgent needs, such as the decimated infrastructure and economy, land reform, health, education, and protection against the historically real threat of U.S. intervention. The contra war, a continuous lack of material resources, and fundamental contradictions in the vision of revolutionary justice also conspired to slow consideration of new codes. Post-revolutionary judges thus struggled with interpretation of existing codes rather than drafting comprehensive new legislation. That struggle continues today; no new codes have been adopted.

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221. *Estatuto Fundamental*, *supra* note 213, arts. 4, 21.

222. REVOLUTIONARY JUSTICE, *supra* note 14, at 16.

223. DECRETOS—LEYES, vol. II, Decree No. 174, at 266 (American Convention); DECRETOS—LEYES, vol. II, Decree No. 255, at 79 (U.N. Covenant and Optional Protocol). A report of the Lawyers Committee for International Human Rights notes that these two instruments contain provisions insuring the right to trial by an independent and impartial tribunal, which differs from the Statute of Nicaraguan Rights, requiring only that courts be "competent." REVOLUTIONARY JUSTICE, *supra* note 14, at 17-18.

224. Lawyers were called "mercenaries," applying "mechanical rules" to further client interests at the expense of society. REVOLUTIONARY JUSTICE, *supra* note 14, at 140. The same phenomenon occurred in the early post-revolutionary periods in Russia, China, and Cuba, with a resurgence of the legal profession in all of these countries after the initial aversion to legality. Harold J. Berman & Van R. Whiting, *Impressions of Cuban Law*, 28 AM. J. COMP. L. 475, 477 (1980). Aversion to law and lawyers also occurred in radical movements in U.S. history. See Victor Rabinowitz, *The Radical Tradition in the Law*, in THE POLITICS OF LAW, 310-11 (David Kairys ed., 1982).

*A. Conflicting Conceptual Values in the Evolution of the New Legality: Revolutionary Justice and the Rule of Law*

For revolutionary lawyers and intellectuals the central issue for post-revolutionary justice in Nicaragua was broader than whether the criminal process would be preventive or remedial, community-based or court-based. The central issue was the problem of law and legality itself. The resolution of this dilemma is embodied in the debates, during the first years of the revolutionary era, of the concept of "revolutionary interpretation."

The notion of revolutionary interpretation arose from the immediacy of post-revolutionary reality. Vilma Núñez, one of the original Magistrates named to the Nicaraguan Supreme Judicial Court, framed the question as follows:

How, then, does a judge guarantee revolutionary legality while applying codes and laws which predate the Revolution, but which the Revolution has left in effect? Can those laws which in a multitude of cases were conceived and promulgated during the infamous and prolonged regime of the Somozas, can these be applied without invalidating revolutionary legality because of the nature of their origin?<sup>225</sup>

Post-revolutionary judges, often drafted with no experience, had no choice but to bring their life experience in revolutionary struggle to the newly formed legal system. The complex code structures, with formalistic legal rules, differing burdens of proof, and detailed, century-old treatment of subjects such as witnesses and confessions, were, to judges who not infrequently had been peasant farmers or soldiers for most of their lives, as intimidating as the streets of downtown Managua. Attempts at application of old codes by revolutionary judges were, in short, no more effective than attempts to fly an airplane solo after reading the mechanic's manual.

One answer was to reject the entire pre-revolutionary legal order: people, rules, structures, and underlying philosophy. These precepts could be replaced with a new vision of society and a new, revolutionary personhood. Another of the most important Nicaraguan revolutionary theorists, Tomás Borge,<sup>226</sup> bluntly proposed the

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225. Vilma Núñez de Escorcía, *Justice and the Control of Crime in the Sandinista Popular Revolution*, 23 CRIME & SOC. JUST. 5, 9 (1985).

226. Tomás Borge was one of the founders of the FSLN. See CHRISTIANITY AND REVOLUTION, *supra* note 191, at 7.

following solution:

Beccaria's [eighteenth century] dictum that laws are to be applied, not interpreted, is an obsolete axiom even in erudite and elegant bourgeois law, not to mention in the legal system in revolutionary Nicaragua. It is to act like the Pharisees of the Bible to demand progressive laws in order to be in a position to resolve problems, and to argue that without such laws we cannot respond to contradictions. Laws can't be plucked out of a magician's hat, and so long as we do not have a body of revolutionary laws we insist that we must interpret every law on the basis of the politics of the revolution.<sup>227</sup>

Borge's solution assumed that pre-revolutionary law worked to protect the rich, male-dominated society of the Somoza era, and against the interests of the poor and landless.<sup>228</sup> His solution was to interpret pre-revolutionary laws "in exactly the opposite way, so that in the last analysis these laws, like rifles, become an extension of the political consciousness of men."<sup>229</sup>

But what was "the politics of the revolution"? What was interpretation "in the exact opposite way"? For Borge, the concept of law itself was moribund.<sup>230</sup> In the same speech, he rejected as bourgeois concepts the separation of powers, unitary court jurisdiction,

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227. Tomás Borge, *Justice in Nicaragua Is No Longer the Same*, in NICARAGUA: THE SANDINISTA PEOPLE'S REVOLUTION, SPEECHES BY SANDINISTA LEADERS 269 (1985) [hereinafter SPEECHES].

228. *Id.* at 267. I have noted some concrete examples of this phenomenon in the text of the Code of Criminal Procedure. See *supra* note 94 and accompanying text (discussion regarding consideration of the defendant's social position in deciding the admissibility of confessions); *supra* notes 93-95 and accompanying text (limitations on the protection of the criminal law to women of "good reputation," and reduction of penalties for men who keep "corrupt" women as mistresses); *supra* notes 97-98 and accompanying text (limits on women and the poor as private criminal complainants); *supra* note 114 and accompanying text (disqualification of witnesses based on poverty).

229. *Id.* Quoted, in slightly different translation, in REVOLUTIONARY JUSTICE, *supra* note 14, at 22.

230. In this sense, Borge's views are consistent with the Marxist vision of the withering away of law, legal institutions, and the state itself in idealized communist society. R. W. MAKEPEACE, MARXIST IDEOLOGY AND SOVIET CRIMINAL LAW 24-26 (1980). In Soviet law, although there was sporadic development in the early years after the revolution, the criminal law began to take on a coherent shape and embody a central policy direction. See W.E. BUTLER, SOVIET LAW 299 (2d ed. 1988) ("In Soviet criminal law the statement of purpose has been central to the course of criminal policy."). Professor Michael Tigar notes the same process in Cuba and asserts that the development of the criminal law there was able to respond, through the dynamic use of the popular tribunals, with flexible structures which permitted Cuba to "renew institutional norms with revolutionary experience." Michael E. Tigar, *Socialist Law and Legal Institutions*, in LAW AGAINST THE PEOPLE 344 (Robert Lefcourt ed., 1971).

and any positivist, natural, or realist vision of law.<sup>231</sup> Instead, he called for a "scientific, dialectical concept" which allowed an understanding of the class interests which lay beneath legal norms.<sup>232</sup>

Borge's vision of society infused his vision of law. In that view, influenced heavily by the other founders of the FSLN, Christian social thought played a central role. Respect for life and human dignity played important roles, best exemplified in the Sandinista motto, "[u]ncompromising in battle, generous in victory."<sup>233</sup> The notion of the prevalence of mercy over vengeance,<sup>234</sup> of law as an instrument of education and persuasion rather than punishment or coercion, was to influence the articulation of post-revolutionary constitutionalism, criminal law and procedure, and penology.

In the development of new legal institutions, however, another voice ultimately proved more persuasive than that of Borge. Alejandro Serrano Caldero, a lawyer who has distinguished himself as a member of the Nicaraguan Supreme Court, as Ambassador from Nicaragua to France, UNESCO and the United Nations, and, most recently, as Rector of the National Autonomous University, emerged with a call to what he called "the rule of law in the revolution."<sup>235</sup>

Serrano's vision called for the application of concepts of judicial independence and supremacy through the power to review for unconstitutionality, unitary jurisdiction, the separation of powers, and the need for popular participation in the justice process while urging control by a professional judiciary, all in the name of the re-establishment of a revolutionary rule of law.<sup>236</sup> To advance these

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231. Borge, *supra* note 227, at 265-66.

232. The exposure of the intrinsic value judgments made in all legal decision-making, the revelation of the myth of an ostensibly objective law and of the dominance of capitalist premises in codes and opinions, has been most ardently pursued in the United States by proponents of the Critical Legal Studies movement, and has followed much the same progression. First, the attack was widespread and profound, and was articulated as a rejection or negation of dominant modes of legal reasoning. Then, after its fuller articulation, it was viciously attacked by the academy. See, e.g., Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984), and Louis B. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 34 STAN. L. REV. 413 (1984). And despite repeated attempts, the movement has proven itself remarkably incapable of articulating a viable alternative vision of law and lawyering.

233. COUNTRY STUDY, *supra* note 24, at 169.

234. For Borge's views on human rights, and those of the FSLN, see DAN HODGES, *INTELLECTUAL FOUNDATIONS OF THE NICARAGUAN REVOLUTION* 264-68 (1986).

235. Serrano's writings between 1985 and 1988 have been collected in an excellent compilation and translation. Serrano *supra* note 36.

236. See Robert W. Benson, *Preface to Serrano Caldera*, 12 LOY. L.A. INT'L & COMP.

causes, Serrano also called for the re-writing of codes and the institutionalization of reforms, particularly the code of criminal procedure.<sup>237</sup> He supported the Central American peace process<sup>238</sup> and the codification of an autonomy law for the indigenous peoples of the Atlantic Coast.<sup>239</sup> His writings, in short, are replete with the urgency of the task of consolidation of the revolutionary rule of law.

For Serrano, like Borge, the central problem was structural: "It consists of reconciling the different nature of the revolution's socio-political dynamics with the static character of the law."<sup>240</sup> However, he rejects, at least implicitly, Borge's view that the "dynamic, changing reality" of the revolution can be superimposed on the existing legal order, or that all "old law" must be discarded and replaced by new.<sup>241</sup> To do this, he asserts, is to risk creation of "a hole into which the great guiding forces of the revolution would fall."<sup>242</sup>

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L.J. 349-50. These themes began to emerge through a struggle for reform-drafting power between the Ministry of Justice, closely aligned with the Sandinista Directorate, and the Supreme Court, during a seminar held in May of 1981 called "Justice in the Revolution." Two U.S. law professors, Joseph Page of Georgetown, and Dennis Lynch formerly of Miami and now at Denver, were invited to attend, as did representatives of many of the Eastern Bloc countries, Cuba, and Latin America. The struggle for definition of revolutionary legality was joined throughout the conference presentations. See Dennis O. Lynch, "Justice in the Revolution," *A Conference Sponsored by the Nicaraguan Supreme Court* (unpublished memo and accompanying conference papers, on file with author).

237. Serrano, *supra* note 36, at 370-71.

238. *Id.* at 461.

239. *Id.* at 451-60. Although the great coastal plains of the Atlantic make up about half of the national territory, the population of the region comprises only about 10% of the all Nicaraguans. Of that number, something under half make up the five indigenous groups of the Atlantic Coast: the Miskitos, Ramas, and Sumus make up the Indian population, while Creoles and Garifunas make up the English-speaking Afro-American and Afro-Indian populations of the coast. COUNTRY GUIDE, *supra* note 8, at 85.

Traditional geographic and political separation of these groups made the first years of their relationship to the revolutionary government extremely difficult. Relations between the government and a mass organization of the region, MISURASATA, formed in 1981, deteriorated so completely that the two factions fell into total war during the next three years. *Id.* at 85-86. Out of the ashes of this early relationship, the warring factions were able to fashion not only an end to hostilities, but a full legal recognition of the autonomy of the region while integrating it into the national family. During 1987, the government and the peoples of the coast were able to negotiate provisions dealing with rights of native people in both the Constitution and an Autonomy Statute. NICAR. CONST. arts. 180-181; DECRETOS—LEVES, vol. XIV, Law No. 28 (*Estatuto de la Autonomía de las Regiones de la Costa Atlántica de Nicaragua*), at 195.

240. Serrano, *supra* note 36, at 386.

241. *Id.* at 355.

242. *Id.*

Serrano recognizes that revolutionary interpretation may be called for on a "transitory" basis, but insists upon the development, slowly and over time, of "a new codified law, organized on the basis of emitted and properly decreed laws and the evolved normative reality." That task could only come about through establishment of the rule of law, which must be "defined and consolidated in a determined period of time."<sup>243</sup> That new law, in turn, must be capable of interpretation and review by the judiciary.<sup>244</sup>

Serrano's call was for the development of a kind of revolutionary positivism. His vision seems to incorporate elements of the Soviet "rule-of-law state" or "socialist legality," as it has evolved in recent years,<sup>245</sup> and, ironically, the liberal legalist view which Serrano himself purports to reject.<sup>246</sup> His greatest departure from liberal thought is his view of how law is to come about, not how it is to be administered once it exists, his vision of which is not radical at all, but reflective of the general trends of Western legal thought.

These arguably competing visions of law—one invoking revolutionary interpretation and one calling for a rule of law in the revolution—would see themselves reflected throughout the next

243. ALEJANDRO SERRANO CALDERA, *EL DERECHO EN LA REVOLUCIÓN* 18 (1986).

244. Serrano, *supra* note 36, at 355.

245. One of the best articulations of the ongoing struggle for articulation of a Soviet "rule-of-law state" is W.E. Butler, *Towards the Rule of Law? in CHRONICLE*, *supra* note 12, at 75-76. See also R.W. MAKEPEACE, *MARXIST IDEOLOGY AND SOVIET CRIMINAL LAW* 223-25 (1980) (asserting that it is "commendable" that the Soviets have concluded that "[i]f there is to be law, and this seems to be both practically the case, and acceptable in theory, then that law should not be arbitrary and its application badly organized." *Id.*); *ENCYCLOPEDIA OF SOVIET LAW* 706 (F.J.M. Feldbrugge et al. eds., 2d rev. ed. 1985) defining "socialist legality" as "a strict observance of law by all agencies of the state, social organizations, institutions, government officials, and citizens," *quoted in* Simmons, *supra* note 12, at 921, 923 n.12.

246. Serrano purports to reject liberal legalism: "Nor are we proposing a more generalized version of legal theory that developed into the classical liberal concept of the Rule of Law." Serrano *supra* note 36, at 359. His vision, however, seems to replicate much of liberal instrumental theory of law as a response to social demands, particularly of the functional needs of society. Robert W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 281, 284-85 (David Kairys ed., 1982). One of the fullest and most devastating articulations of liberal legalism is found in David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 *WIS. L. REV.* 1062, 1071-72 (1974). Like the liberal legalists, Serrano seems to believe that the state exercises control over individuals through law, by which the state itself is also constrained; that courts are the central institutions of the legal order, and that social actors will tend to conform to the rules, while official enforcement of the law will guarantee conformity. Trubek & Galanter conclude that this paradigm of law is not only inappropriate as a structure for solution of the legal problems of the Third World, but that it has been assumed to apply in the United States when, in fact, it does not. *Id.* at 1081.

decade of the revolution, most prominently in the failed calls for code reform and the articulation of the new constitutional order. As these legal ideologies clashed, however, the reality of defense of revolutionary gains and their institutionalization through new or reformed structures would consume the time and energy of revolutionary theorists and practitioners.

*B. The Devastation of the Contra War and the Need for States of Emergency*

The threat of external armed aggression toward Nicaragua during the first two years of the new government was real and immediate. History showed that the U.S. government defended its interests in the hemisphere by military action; U.S. military forces had intervened at least eleven times over the past century in Nicaragua alone.<sup>247</sup> The United States Department of Defense and State contributed actively to fears of invasion through a "perception management" program involving the staging of military maneuvers in neighboring Honduras and spy plane overflights of Nicaraguan territory which created sonic booms.<sup>248</sup>

The Statute of Rights and Guarantees set up a structure permitting the imposition of states of emergency during periods of international or civil war, disaster, or other situations "which put the life or stability of the Nation into danger."<sup>249</sup> Saber rattling by the United States, combined with the 1982 commencement of attacks by contras on civilian populations in Nicaraguan territory, led to the imposition of states of emergency lasting almost continuously from March 1982 through January of 1988.<sup>250</sup> The last was im-

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247. COUNTRY GUIDE, *supra* note 8, at 131-32.

248. BERMAN, *supra* note 1, at 283. These and other illegal military activities were part of the basis for the World Court judgment against the United States in 1986. See discussion *supra* notes 2-3. History also shows that the U.S. carried out threats through overt or covert military operations in several countries in the hemisphere which attempted to carry out radical social change since World War II: Guatemala in 1954, Cuba in 1961, the Dominican Republic in 1965, Chile in 1973, and Grenada in 1983. These operations, along with wartime limitations on civil liberties in the U.S., are documented, seemingly for the first time, in MICHAEL LINFIELD, FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR 157-58 (1990). Extensive portions of Linfield's work, which compares the U.S. experience with that in Nicaragua, were excerpted in a series of articles in the Nicaraguan press. *Los Derechos Humanos en Tiempos de Guerra*, BARRICADA, May 4-6, 1988, at 3.

249. DECRETOS—LEYES, vol. I, Decree No. 52, art. 49, at 77. Non-suspendable rights were enumerated in art. 50, and include the right to life, physical integrity, and other basic guarantees of international human rights.

250. The first declaration of a national state of emergency actually came three days



posed after the adoption of the new Constitution, and was lifted as part of the Central American peace process.<sup>251</sup> These states of emergency suspended important individual rights relating to the criminal justice process, particularly the rights to habeas corpus, protection from arbitrary arrest and various due process rights.<sup>252</sup>

These suspensions of rights are notable in several respects. First, the Nicaraguan government never opted for the adoption of provisions permitting the imposition of states of siege, a more comprehensive measure found in many contemporary constitutions, and regularly invoked in neighboring countries of Latin America.<sup>253</sup> Such provisions permit the imposition of martial law and the supremacy of military jurisdiction over civilian courts. Nicaragua adopted a system of post-revolutionary military courts, but clearly delimited their jurisdiction and accountability to the civilian court system.

Second, the effects of the state of emergency were not visible nor intrusive in the lives of the average Nicaraguan citizen. There was no curfew, and although soldiers and police were everywhere, it did not create a sense of life in a police state. It was the U.S.-sponsored war, not the state of emergency, which most profoundly affected the lives of Nicaraguans.<sup>254</sup>

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after the assumption of power by the government, on July 22, 1979. That decree set up Special Tribunals whose principal duty was the prosecution of former members of the Somoza National Guard. DECRETOS—LEYES, vol. I, Decree No. 9, at 15. For a discussion of the Special Tribunals, see *infra* notes 351-57 and accompanying text. The major declarations of states of emergency came in the time period delineated in the text. DECRETOS—LEYES, vol. VI, Decree No. 996, at 186, to DECRETOS—LEYES, vol. XIV, Decree No. 244, at 57. See generally AMERICAS WATCH, NICARAGUA: A HUMAN RIGHTS CHRONOLOGY, JULY 1979 TO JULY 1989 6-9 (July 1989) [hereinafter HUMAN RIGHTS CHRONOLOGY]; COUNTRY GUIDE, *supra* note 8, at 133-34, for brief chronologies of the nature and extent of the states of emergency.

251. The new Constitution carried over the emergency powers contained in the Statute of Rights and Guarantees. NICAR. CONST. arts. 185-186. The peace process began with the signing by the Presidents of Guatemala, El Salvador, Nicaragua, Honduras, and Costa Rica of the *Esquipulas II* document in October 1987. *Guatemalan Agreement for Peace in Central America*, 87 DEPT. OF STATE BULL. 56 (Oct. 1987).

252. AMNESTY INTERNATIONAL, THE HUMAN RIGHTS RECORD: 1986-1989, at 11-12 [hereinafter 1986-1989 AMNESTY REPORT]; Pyle, *supra* note 14, at 12.

253. In Colombia, for example, a state of siege has existed virtually continuously during the past decade, vesting the military and the military courts with wide discretion. AMERICAS WATCH, THE CENTRAL-AMERICANIZATION OF COLOMBIA? HUMAN RIGHTS AND THE PEACE PROCESS 17-18, 112-14, 127-34 (Jan. 1986).

254. LINFIELD, *supra* note 248, at 207. I visited Nicaragua in the Summer of 1986, lived there for three months during the summer of 1988, and returned three times since that visit. I was never requested to show documents to any police or military officer in the streets; even in government office buildings, I was only asked to show a photographic identification. I

Third, and most important, the need for states of emergency has disappeared with the settlement of the contra war. None has been imposed since early 1988, and the new government will doubtlessly live up to its campaign promises guaranteeing that, pursuant to the regional peace plan and efforts towards national reconciliation, such states of emergency will be unnecessary.<sup>255</sup>

Then-President Ronald Reagan used the states of emergency in part to justify his assertions that Nicaragua was a "totalitarian dungeon."<sup>256</sup> This assertion, in turn, justified his request for increased funding of contra forces. The administration argued that whatever openness existed on the part of the Nicaraguan government occurred because of its desire to win international support for resistance to the contras. This standard was never applied to the neighboring governments of El Salvador, Guatemala, and Panama, whose regimes brutally suppress dissent, but which are seen as friendly to United States interests in the region.

The strict standard to which the U.S. held Nicaragua cannot be said to have been applied at home. A report by Americas Watch, as well as other sources, notes the long and sorry experience of the United States own treatment of civil liberties during time of war. From the Revolutionary War through the Viet-Nam era, the U.S. government has enacted laws or policies permitting slavery of African Americans, genocide of Native Americans, press and other media censorship, limits on free speech through seditious libel laws, illegal suspension of habeas corpus, the creation of special tribunals and military courts, restrictions on travel, domestic spying, loyalty oaths, confiscation of property, and internship of Japanese citizens during World War II, and limitations on labor organizing which might affect war efforts.<sup>257</sup> The U.S. government hypocritically applied a standard against Nicaragua which it could not meet itself in times of war.

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traveled freely throughout the country, including some areas very close to the armed conflict. I was never stopped on the road for any purpose.

255. See *National Reconciliation of the Nicaraguan Family, Acceptance Statement by President-Elect Violeta Barrios de Chamorro*, Feb. 27, 1990, reprinted in 9 ENVÍO 38 (March/April 1990). The peace accords call for the abolition of states of exception in each of the participating countries. See 1986-1989 AMNESTY REPORT, *supra* note 252, at 8-10.

256. See Philip Taubman, *New Effort to Aid Nicaragua Rebels*, N.Y. TIMES, July 19, 1984, at A6.

257. AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA: REAGAN, RHETORIC AND REALITY 8-9 (July 1985) [hereinafter REAGAN, RHETORIC AND REALITY]. The report concludes that the Administration's characterizations were "deceptive and harmful." *Id.* at 2.

### C. *Early Structural Changes in Legal Institutions*

In the first years of post-revolutionary Nicaragua, the new government was faced with the fundamental issue of whether and how to utilize the imposition of state power in the lives of its citizens for violations of the criminal laws. One way to conceive of that intervention is through the remedial use of law, enforced by representatives of the government who impose the commensurate penalties. Another conception, that of participatory democracy and popular hegemony,<sup>258</sup> is educative and preventive. In this conception, government encourages the creation of popular, grassroots, mass-based organizations to deter and prevent crime through civic education and the development of civic pride, through local vigilance, and through alternative, informal means of dispute resolution which avoid courts, lawyers, and law altogether.<sup>259</sup>

The revolutionary movement in Nicaragua was successful, at least for a time, in the use of mass organizations as a means of crime prevention and control through participation and direct popular action. At the same time, institutional reform largely failed to touch the basic organization of legal education and the law profession. Moreover, the apparatus of state security police carried out, in the invidious name of "national security," operations which cannot be justified under conceptions of universal human rights to which Nicaragua subscribes. Military courts, however, proved equal to the task of discipline of police and military personnel for violations of the criminal laws.

#### 1. Mass Organizations: The Role of the Sandinista Defense Committees and Women's Organizations in Crime Control

By 1984, Sandinista mass organizations had reached deeply into the roots of Nicaraguan society. The principal formal structures of these organizations were the popular militia, local neighborhood groups, labor unions, peasant farmers, women, and young

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258. See Lobel, *supra* note 220, at 842-44.

259. In Cuba, this was the dominant direction during the first decade of the revolution. James Brady, *The Revolution Comes of Age: Justice and Social Change in Contemporary Cuba*, in CRIME, JUSTICE AND UNDERDEVELOPMENT 248, 261-67 (Colin Sumner ed., 1982). It was, however, able to accomplish extensive reform of court structures during the same period, unlike Nicaragua. Max Azicri, *Change and Institutionalization in the Revolutionary Process: The Cuban Legal System in the 1970s*, 6 REV. SOCIALIST L. 164, 168-70 (1980).

people.<sup>260</sup> The Sandinista Defense Committees (*Comités de Defensa Sandinista*, or "CDSs") and AMNLAE (*Asociación de la Mujer Nacional "Luisa Amanda Espinosa"*), the women's organization, played the strongest roles in criminal justice.

The CDSs were the largest of the grassroots groups, reaching a peak membership of nearly 600,000.<sup>261</sup> Originally founded during the insurrection as a support structure for the Sandinista combatants, the organizations became a key factor in mobilizing popular participation around community needs, delivering essential services, and policing neighborhoods for counterrevolutionary activities and the ever-present possibility of invasion.<sup>262</sup>

One of the benefits of alert vigilance against counterinsurgency by the CDSs was a dramatic drop in common crime during the years 1981-1984.<sup>263</sup> These local bodies provided a kind of "neighborhood watch" program in local communities, particularly poor urban *barrios*, which resulted in dramatically lower crime rates as a consequence of day-and-night watches against invasion or other domestic counterrevolutionary activity.<sup>264</sup> Post-revolutionary pride, fostered by participation in the Committees, led the

260. DENNIS GILBERT, *SANDINISTAS: THE PARTY AND THE REVOLUTION* 64 (1988). I include the popular militia (*Milicias Populares Sandinistas*) among the mass organizations both because of its size and because of the socializing influence of participation in the organization, even if it was to be mobilized only in the case of national emergency. See COUNTRY STUDY, *supra* note 24, at 148-49. The use of mass organizations, including the use of neighborhood committees and women's organizations, was also a feature of the first decade of the Cuban Revolution. Brady, *supra* note 259, at 248, 261.

261. GILBERT, *supra* note 260, at 64.

262. COUNTRY GUIDE, *supra* note 8, at 60.

263. The drop in crime over the period mentioned has been noted in a number of sources. See generally COMISIÓN NACIONAL DE PROMOCIÓN Y PROTECCIÓN DE LOS DERECHOS HUMANOS (CNPPDH), *INVESTIGACIÓN ACERCA DEL DERECHO A LA DEFENSA EN MATERIA PENAL EN NICARAGUA* 6 (1989) [hereinafter *DERECHO A LA DEFENSA*]; Núñez, *supra* note 225, at 12-14; Stephens, *Rape in Nicaragua*, *supra* note 14, at 80. But see COUNTRY STUDY, *supra* note 24, at 224 (indicates that crime rates went up due to general availability of arms to popular militia).

Tomás Borge, then Minister of the Interior and thus directly in charge of police operations, said in a speech in 1984 that crime rates had dropped in the relevant time period due to increased police efficiency and the flexibility provided by the ability of police judges to impose short sentences for minor crimes. Borge, *supra* note 227, at 264, 267-68 (1985); see also Tomás Borge, *The Organized People Are the Backbone of the Sandinista Police*, in SPEECHES, *supra* note 227, at 375, 377.

Crime rates turned upward in 1984 and continued to rise through 1988. *Derecho a la Defensa*, *supra* at 6.

264. A case study of the CDSs in Matagalpa's Barrio Sandino, notes that crime virtually disappeared as a by-product of night watches conducted as counterrevolutionary vigilance. GILBERT, *supra* note 260, at 67.

populace to believe that better times were at hand; there was no need to commit crime when all needs would be provided for through the revolution.<sup>265</sup>

The CDSs began to lose favor with the populace, however, when they took on a more formal structure and became a measure of party loyalty and advancement. When the Committees became a means for enforcement of the military draft and took on extensively reporting any dissident activities, however innocent, they fell from popular favor<sup>266</sup> and by 1987, the Sandinista Defense committees "had virtually ground to a halt in many neighborhoods."<sup>267</sup>

The women's movement in Nicaragua has not suffered a similar fate. Prior to the overthrow of the Somoza government, over ninety percent of rural women were illiterate, and only twenty percent of teenage girls attended school.<sup>268</sup> Women took up the challenge of the revolution, were active in guerrilla fighting during the insurrections of 1977-79, and actively took up the challenge of full and equal participation in the new society, challenging traditional *macho* values.

Now, women comprise forty-five percent of all people in the work force,<sup>269</sup> and, particularly due to the increased burden of the war during 1983-1985, women stepped into "male" jobs in government, political parties, and the countryside.<sup>270</sup> By 1987, women held thirty-one percent of all managerial positions in government, and within the FSLN, women constituted twenty-five percent of the membership and held twenty-seven percent of the leadership positions.<sup>271</sup> Women make up thirty-five percent of the year-round salaried agricultural work force, about half of the seasonal workers, and forty-four percent of the cooperative movement.<sup>272</sup>

Revolutionary women took up the challenge of criminal law

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265. Vilma Núñez de Escorcía, a member of the Supreme Court and later director of the government's human rights office, attributed the drop in crime rates after the revolution to economic, ideological, and institutional factors. Núñez de Escorcía, *supra* note 225, at 13-25. Similar views were expressed by Beth Stephens, a U.S. lawyer who worked at the human rights commission's offices for several years after the revolution. Interview with Beth Stephens, in Managua (July 29, 1988).

266. GILBERT, *supra* note 260, at 70-71.

267. COUNTRY GUIDE, *supra* note 8, at 59.

268. Stephens, *Rape in Nicaragua*, *supra* note 14, at 70.

269. COUNTRY GUIDE, *supra* note 8, at 81.

270. Stephens, *Rape in Nicaragua*, *supra* note 14, at 73.

271. Martha I. Morgan, *Founding Mothers: Women's Voices and Stories in the 1987 Nicaraguan Constitution*, 70 B.U. L. REV. 1, 12 (1990).

272. COUNTRY GUIDE, *supra* note 8, at 81.

reform immediately after the revolution.<sup>273</sup> AMNLAE, the National Women's Association, grew out of a former organization set up to oppose the dictatorship and was named for the first woman to die in opposition to Somoza.<sup>274</sup> Shortly after its founding, AMNLAE created a Women's Legal Office, which was set up explicitly to handle women's legal problems; in the criminal area these were mostly focused on problems of domestic abuse (*maltrato*), rape and other sexual crimes against women, as well as abortion, the performance of which continues to carry heavy penalties for both the woman who undergoes it and the performing physician.<sup>275</sup>

Through aggressive education campaigns, frequent meetings and an active role in political life, the Association and other feminist organizations have helped to increase the reporting of rape. AMNLAE also profoundly affected debate on the 1987 Constitution on issues of sexual equality, personal violence, prostitution, use of women's images in the media and reproductive freedom.<sup>276</sup>

Ironically, the election of Violeta Barrios de Chamorro itself is an indication of the continuing impact of women in the Nicaraguan revolution. The revolutionary involvement of women in the politics of Nicaragua continues.

## 2. The Legal Profession and Popular Education in the Law Schools

In the first years after the revolution, as in revolutionary socie-

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273. Positions supporting the role of women in the revolution, sexual equality, and women's rights, can be found in platforms of the FSLN before the assumption of power in 1979. See Morgan, *supra* note 271, at 11, 49 n.196.

274. *Id.* at 12.

275. The provisions on criminalization of abortion are contained in Cód. PEN. arts. 162-165. No person I interviewed could recall a prosecution for violation of the abortion laws, and many women told me they "knew someone" on whom an illegal abortion had been performed. One reason for the lack of prosecution may have been a female national police chief. Comandante Doris Tijerino, who now serves as Executive Director of AMNLAE, was quoted in *Barricada* as proclaiming, "I am for abortion, not only as a woman but also as a police officer." See Morgan, *supra* note 271, at 53 n.215.

Since the election of Violeta Barrios de Chamorro, the AMNLAE budget allocation from the government has been severely cut, leaving its focus primarily on the legal office in Managua. In addition to the AMNLAE legal office, several women's support centers now operate on an autonomous basis in the larger cities throughout Nicaragua. In addition to free legal services, the centers offer counseling and gynecological services, as well as training courses. Interview with Silvia Carrasco, former Staff Member of AMNLAE and Vice-President of the Board of Directors of *Casa de la Mujer*, in Managua (June 6, 1990).

276. Morgan, *supra* note 271, at 44-65.

ties before it, Nicaraguans put little faith in law and legal institutions.<sup>277</sup> Many judges who had been part of the Somoza regime were either arrested and tried for their complicity in revolutionary repression, or fled the country in order to protect property or person.<sup>278</sup> Many lawyers who were part of the pre-revolutionary bourgeois, particularly those in law firms, also fled the country, leaving the new legal profession young, inexperienced, largely a product of the working class, and almost all sole practitioners.<sup>279</sup> Lawyers who continued to practice were not highly regarded by the revolution; they were criticized as "mercenary," applying rules only "to further the interests of their clients at the expense of society."<sup>280</sup> One report by an international lawyer's human rights organization noted that these pressures, combined with attacks by the judiciary on vigorous representation of unpopular causes, led to the withdrawal from practice by even more lawyers.<sup>281</sup>

The organized bar, never a particularly strong institution in Latin America, quickly divided itself along ideological lines. Those who supported the Sandinistas joined the Association of Democratic Jurists (*Asociación de Juristas Democráticas*) while those who aligned themselves with the opposition stayed with the tradi-

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277. See *supra* note 224 and accompanying text.

278. One of the most unique experiences I had in all my visits to Nicaragua was at the *Granja Abierta*, or open prison farm, known as "Twenty-Three and a Half" (named for its distance, in kilometers, from Managua). On that occasion, the Dean of the Law School at the Central American University arranged, during a tour of the facility, for a few of us to meet Ricardo Vargas, a lawyer and prisoner there. Mr. Vargas, who had been a classmate of the Dean's in law school, had practiced as a criminal lawyer before the revolution, and had served as a member of General Somoza's Council of War during the years just prior to the revolutionary victory. Vargas had been captured and sentenced, at an age over 50, to the maximum term of 30 years imprisonment. He had served something over five years at the time of our visit. After engaging us in polite conversation for some time about favorable conditions in the prison facility, Mr. Vargas closed the interview by turning to the Dean and saying, "You always taught, in your classes, that lawyers have an obligation to know the difference between law and justice. You chose justice; I chose the law." To the students who were part of the group, he advised, "You've memorized the criminal code so that you now have it imprinted on your minds. Now, hold it next to your hearts and remember to administer it with conscience." Interview with Ricardo Vargas, prison inmate, *Granja Abierta* Veintitres, Nicaragua (Aug. 15, 1986).

279. 1980 ICJ REPORT, *supra* note 192, at 38-39; Núñez, *supra* note 225, at 6-7.

280. REVOLUTIONARY JUSTICE, *supra* note 14, at 140. Borge, in his 1984 speech, asserted that one of the goals of the revolution was "to do away with those lawyers, fortunately less numerous each day, who were trained to exploit the unwary and to share the gains of robbers and thieves who were inevitably found not guilty . . ." Borge, *supra* note 227, at 267.

It is not coincidental that there is very little in the post-revolutionary literature, despite its extensive treatment of the bourgeoisie and popular education, on lawyers or legal education. Both were, for the most part, irrelevant to revolutionary change.

281. REVOLUTIONARY JUSTICE, *supra* note 14, at 141.

tional Bar Association (*Barra de Abogados*).<sup>282</sup> The state, however, did not intervene in the organization of the bar through organization into colleges, the establishment of fixed fees for certain recipients of legal services, and the abolition of the private practice of law, as it has in other socialist regimes.<sup>283</sup> The failure of the Sandinistas to take this action can be seen either as a conscious decision to ignore a profession already broken by revolution, or as another of the choices made by default through focus on other revolutionary priorities.

Law schools went through a period of post-revolutionary schizophrenia. While the revolution made possible broader access to legal education, through a revolutionary philosophy of government subsidization of tuition for higher education, enrollments declined from the general loss of interest in legal careers.<sup>284</sup> Thus, although law was more available for study by a wider segment of the population, fewer students made it their first choice.<sup>285</sup>

Nicaragua's two law schools, the Central American University (UCA) and the National Autonomous University of Nicaragua (UNAN), choose their student bodies based on geographic proximity to the cities of Managua and León, respectively.<sup>286</sup> Under new direction, the law schools added new courses to the curriculum with such titles as "Dialectical and Historical Materialism" and "History of the Sandinista Popular Revolution."<sup>287</sup> Students in the law schools, most of whom were women because of the demand for men in the military, performed mandatory social service of 200 hours per year, beginning in the first year of enrollment. During the first two years of law school, students performed social service through physical labor, oftentimes helping with the coffee or cotton harvest, while in the last three years, service was likely to take the form of internship in a government office.<sup>288</sup>

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282. *Id.*

283. Jean C. Love, Comment, *The Role of Defense Counsel in Soviet Criminal Proceedings*, 1968 WIS. L. REV. 807, 812-20 (1968); Salas, *supra* note 19, at 52.

284. See generally Deborah Barndt, *Popular Education*, in NICARAGUA: THE FIRST FIVE YEARS 317 (1985).

285. The Dean of the UNAN Law School told me that the law school seriously considered closing its doors when enrollments fell to about 25-30 new students per year during the first few years after 1979, as opposed to pre-revolutionary applications of nearly 200. Interview with Francisco Valladares, Dean, UNAN Law School, in León, Nicaragua (Aug. 25, 1988).

286. *Id.*

287. *Id.*

288. Interview with Elizabeth Manich-Campos, Fourth Year Law Student, UCA Law



In 1988, the UNAN created a course of study entitled "Encounters" (*Encuentros*) in order to attract larger enrollments and to augment the professional training available to people already employed in the understaffed and inexperienced justice system. Students attended classes all day on Saturdays for a period of two years, and were likely to include high numbers of judges, prosecutors, police, and even political figures. After finishing course requirements, the student wrote a "monograph" in place of the more rigorous and traditional thesis, and was licensed to practice upon its successful completion and defense.<sup>289</sup>

Compared to the profound impact of the revolution in the encouragement and underwriting of mass organizations, their support for popular education produced no fundamental changes in legal education during the decade after 1979. The courses and structure of legal education did not change. Law schools followed the classical Latin American model of a highly structured curriculum based in a five-year course of study pursued by largely part-time students and taught by largely part-time faculty in lecture format, without texts.<sup>290</sup> While a mandatory clinical component was included in the last two years, the content of the program did not differ much from what had been required before the new government assumed power, and also reflected the traditional structure of such clinics in Latin American legal education.<sup>291</sup>

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School, in Managua, Nicaragua (July 29, 1988). In later years, the requirement of physical labor had been replaced almost totally by office work. Interview with Victor Ordóñez, Vice-Dean, UCA Law School, in Managua, Nicaragua (June 6, 1990).

289. Interview with Dean Valladares, in León, Nicaragua (Aug. 25, 1988). Many other lawyers with whom I subsequently spoke were highly critical of this course of study, suggesting that it would lower the level of professionalism of the Bar and lead to lower quality legal work.

290. Walter Antillón, a law professor in neighboring Costa Rica, spent several years in Nicaragua, and was one of the principal draftspersons of the Pilot Project Code of Criminal Procedure which was "tabled" in 1984. See *infra* part IV.D. Professor Antillón asserted that he and a number of other young Marxist professors had suggested reform efforts for the curriculum at the UCA Law School, but had been soundly rebuffed by the older, pre-revolutionary faculty there. Interview with Walter Antillón, Law Professor, in San José, Costa Rica (Sept. 1, 1988). For a general analysis of legal education in Latin America, see Richard J. Wilson, *The New Legal Education in North and South America*, 25 STAN. J. INT'L L. 375, 379-85 (1989).

291. The curriculum of the UCA can be found in *Facultad de Ciencias Jurídicas y Sociales, Universidad Centroamericana* (1990). The course of study at the UNAN is found in *Plan de Estudios "87," Universidad Nacional Autónoma de Nicaragua, Facultad de Ciencias Jurídicas y Sociales* (received from Dean Valladares Aug. 25, 1988). Legal services to the poor in Nicaragua, just as in all of the neighboring countries of Central America, are provided almost exclusively by law students working through the law schools' legal clinics (*bufetes populares*). In theory, any lawyer can be named as counsel for the accused, if that

### 3. State Security and the Military Courts

Under the reorganization of state functions, there were close relationships between the military and newly formed civilian police forces, which primarily included the Sandinista Police (*Policía Sandinista*) and the department of State Security (*Dirección General de Seguridad del Estado*, or "DGSE"). Functions of the DGSE included intelligence, counterintelligence, immigration control, prisons, discipline within the armed services, special forces, and political direction.<sup>292</sup> Both police forces were under the jurisdiction of the Ministry of the Interior.<sup>293</sup> Prosecutions for violations of military law or by employees of the Ministry of the Interior are handled by military courts under the direction of the Military Auditor.<sup>294</sup>

The national policy toward issues of internal security was driven by the reality of war, espionage, and subversion by U.S. agents,<sup>295</sup> as well as by a desire to consolidate the gains from armed struggle. As in all contemporary societies, counterespionage, counterintelligence, and other activities on behalf of national security required secrecy and discretion on the part of the Ministry of Interior, particularly as the contra war intensified. Secrecy, on the other hand, prompted international human rights organizations to question many DGSE policies. Secrecy by police agencies

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person makes a request. NICAR. CONST. art. 34(5). In fact, students fill that role almost exclusively, and then only in the geographic areas around the two cities with law schools. The same is true generally in Latin America. See Fernando Rojas, *A Comparison of Change-Oriented Legal Services in Latin America with Legal Services in North America and Europe*, 16 INT'L J. Soc. L. 203 (1988).

292. COUNTRY STUDY, *supra* note 24, at 226.

293. General organization of the Ministry of the Interior is set forth in the Organic Law of the Ministry of the Interior, found at DECRETOS—LEYES, vol. III, Decree No. 485, at 38. The more general structure of military and police is set forth in Stephen M. Gorman & Thomas W. Walker, *The Armed Forces*, in NICARAGUA: THE FIRST FIVE YEARS 91, 96-102 (1985).

Some sources report the existence of a corps of "Auxiliary Police," said to number about 2,000 in 1981, who assisted the *Policía Sandinista* in law enforcement activities. COUNTRY STUDY, *supra* note 24, at 226. Tomás Borge, the former Interior Minister, put the number at 8,000 in a 1984 speech. Tomás Borge, *The Organized People Are the Backbone of the Sandinista Police*, in NICARAGUA: THE SANDINISTA PEOPLE'S REVOLUTION 375, 377 (1985).

294. Organization of the military courts is extensively set forth in DECRETOS—LEYES, vol. III, Decree No. 591, at 225.

295. Such activities are well documented in the CIA's manual of operations for Nicaragua. CIA's NICARAGUA MANUAL: PSYCHOLOGICAL OPERATIONS IN GUERRILLA WARFARE (1985). They are also condemned in the decision of the World Court in 1986. See *supra* note 3.

had serious impact on the conduct of investigations of criminal activity by members of the military, as well as private citizens.

The most serious failures of due process in post-revolutionary Nicaragua occurred during investigations conducted by the DGSE during the next decade, all in the name of national security. International human rights organizations persistently documented DGSE arrests followed by prolonged detention in severe conditions and without charges, as well as harsh interrogation techniques.<sup>296</sup> The DGSE consistently refused access of human rights organizations to some of the detention facilities reputed to be most often used for these activities.<sup>297</sup> From 1987 to 1989, Americas Watch documented what it described as a "pattern of killings" of contras and contra supporters in northern Nicaragua by military and DGSE personnel.<sup>298</sup>

What is most notable about these violations, however, is not their occurrence; physical aggression against real and perceived political opponents is, regrettably, common practice not only throughout Central America, but in the United States.<sup>299</sup> What is most noteworthy is the response by the mechanisms of state power to abuses by its own forces. The Nicaraguan government, unlike some of its neighbors, showed a consistent record of prosecutions and convictions of its own police and military wrongdoers through

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296. AMERICAS WATCH, ON HUMAN RIGHTS IN NICARAGUA 15-16 (May 1982) [hereinafter 1982 AMERICAS WATCH REPORT]; AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA 27-29 (1984) [hereinafter 1984 AMERICAS WATCH REPORT]; REVOLUTIONARY JUSTICE, *supra* note 14, at 119-23; AMNESTY INTERNATIONAL, NICARAGUA: THE HUMAN RIGHTS RECORD 19-23 (March 1986) [hereinafter 1986 AMNESTY REPORT]; AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA: 1985-1986 21-45 (1986) [hereinafter 1986 AMERICAS WATCH REPORT]; 1986-1989 AMNESTY REPORT, *supra* note 252, at 34-37 (this report also raised questions as to three deaths of prisoners in custody, at 39-41); AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA: AUGUST 1987 TO AUGUST 1988 50-56 (Aug. 1988) [hereinafter 1987-1988 AMERICAS WATCH REPORT].

297. See, e.g., 1986-1989 AMNESTY REPORT, *supra* note 252, at 37-39; 1987-1988 AMERICAS WATCH REPORT, *supra* note 296, at 57-60.

298. See generally AMERICAS WATCH, THE KILLINGS IN NORTHERN NICARAGUA (Oct. 1989). The report also documented and condemned reports of killings by contra forces in the same region. *Id.* at 51.

299. During the Viet-Nam era in the United States, student protests resulted in police or military shootings on the campuses of Kent State University in Ohio and Jackson State University in Mississippi. In a demonstration on May Day 1971 in Washington, D.C., 12,000 demonstrators were met by 5,000 police and 10,000 soldiers. Over 7,000 people were arrested in huge sweeps, and detention facilities were crowded and unsanitary. Of the more than 12,000 people ultimately arrested that day, fewer than 100 were convicted of any offense. The FBI engaged in a covert program, called COINTELPRO, to undermine, harass, and ultimately assassinate leaders and members of the Black Panther Party. LINFIELD, *supra* note 248, at 113-56.

the Military Auditor's office.<sup>300</sup>

There have been numerous trials and convictions of military personnel by the Military Auditor's office in the past several years. One of the most publicized involved military abuses of suspected contra sympathizers in the area of Pantasma in 1984. That investigation and prosecution led to the conviction of a regional army commander for murder and torture, as well as that of twelve subordinates.<sup>301</sup> In the case of the 1989 killings in northern Nicaragua, Americas Watch noted that, although belatedly, the government had responded "vigorously, launching a number of investigations."<sup>302</sup> As of August 30, 1988, there were 294 ex-military personnel and 150 military or police related offenders in Nicaragua's prisons.<sup>303</sup>

These trials of military and security officers may not seem unusual to readers in the United States accustomed to a military justice system known for its rigor, structure, and discipline. In Central America, however, the prosecution of military personnel is nearly unknown. In El Salvador, for example, there has been only one successful prosecutions of military officers for criminal offenses committed in the course of duty. While the suspected involvement of the armed forces in the murder of four U.S. nuns in 1980 has remained unpunished, two Salvadoran officers were recently con-

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300. Despite the intense, almost microscopic attention given by human rights monitoring groups over the last decade, it is noteworthy that neither the Military Auditor's office itself nor the procedures established for operation of the military courts have come under serious criticism by human rights organizations over the last decade. Office organization and procedures are set forth in *DECRETOS—LEVES*, vol. III, Decree No. 591, at 225. A study conducted by three recent graduates of the UCA Law School in Managua examined nearly 200 files of cases handled by the Military Auditor during 1987 for compliance with the due process provisions of the 1987 Constitution. The authors conclude, based in empirical data, that deviations from constitutional norms are "extremely minimal." Gilberto R. Cuadra, Martín A. Arcia & José D. Cano, *Vigencia de las Garantías Procesales Constitucionales en el Proceso Penal Militar* 60 (thesis for graduation from the Central American University Law School, submitted Oct. 28, 1989; on file with the author).

One criticism voiced about the military courts after the February 1990 elections is that its jurisdiction is too extensive, since it includes jurisdiction over civilians who may be involved in criminal activity where either a co-defendant or the victim is a serviceperson. Interview with Lino Hernández, Director of the National Commission on Human Rights (CNDH), in Managua, Nicaragua (June 7, 1990). This is not borne out by statistics. The study above indicates that in a sample of 178 cases studied during the calendar year 1987, there were 219 accused, of whom only 24, just over 10%, were civilians. Cuadra, *supra* at 60.

301. 1986 AMNESTY REPORT, *supra* note 296, at 25.

302. AMERICAS WATCH, *THE KILLINGS IN NORTHERN NICARAGUA* 2 (Oct. 1989).

303. *Comisión Nacional para la Protección y Promoción de Derechos Humanos* (CNPPDH), *Población Penal Nacional* (Aug. 30, 1988) (copy with author); interview with Mirna Santiago, Staff Member of CNPPDH, in Managua, Nicaragua (Sept. 9, 1988).

victed for the execution of six Jesuit priests, their cook, and her daughter at the Central American University of San Salvador.<sup>304</sup> In Guatemala, a recent report by the International Human Rights Law Group concluded that military control of the civilian government left open the question of the establishment of the rule of law and respect for human rights in the civilian criminal justice system.<sup>305</sup>

Finally, the actions of the military and state security personnel are as notable for the absence of certain abuses as they are for the reported wrongdoing. In its 1985 report on Nicaragua, Americas Watch concluded that:

there is no systematic practice of forced disappearances, extrajudicial killings or torture—as has been the case with the “friendly” armed forces of El Salvador . . . . Nor has the Government practiced elimination of cultural or ethnic groups, as the Administration frequently claims; indeed in this respect, as in most others, Nicaragua’s record is by no means as bad as that of Guatemala, whose government the [U.S.] Administration consistently defends.<sup>306</sup>

#### *D. An Abandoned Attempt at Comprehensive Reform of Criminal Procedure: The Region IV Pilot Plan of 1984*

In 1984, the government proposed and adopted legislation which approved the concept of the creation of an experimental Pilot Project in the Fourth Region (Masaya—Granada).<sup>307</sup> The genesis of this decree was a desire to provide for popular participation in the administration of justice, and to eliminate old “formalistic

304. Clifford Krauss, *Salvadoran Defense Chief Linked to Jesuit Killings by House Panel*, N.Y. TIMES, Nov. 17, 1991, sec. 1, pt. 1; Shirley Christian, *Colonel Guilty in Jesuit Deaths in El Salvador*, N.Y. TIMES, Sept. 30, 1991, at A1; Majorie Miller, *2 Salvadoran Officers Get 30 Years for Slaying Priests*, L.A. TIMES, Jan. 25, 1992, at A1. See also AMERICAS WATCH, CARNAGE AGAIN: PRELIMINARY REPORT ON VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN THE NOVEMBER 1989 OFFENSIVE IN EL SALVADOR 14-19 (Nov. 24, 1989).

305. KENNETH ANDERSON, MAXIMIZING DENIABILITY: THE JUSTICE SYSTEM AND HUMAN RIGHTS IN GUATEMALA (a report of the International Human Rights Law Group, July 1989); see also WASHINGTON OFFICE ON LATIN AMERICA, THE ADMINISTRATION OF INJUSTICE: MILITARY ACCOUNTABILITY IN GUATEMALA (Dec. 1989). As in El Salvador, the U.S. administration cut off \$3.3 million in military aid when the Guatemalan government dragged its feet in the investigation of the murder of Michael DeVine, a U.S. citizen whose death suggests military involvement. Clifford Krauss, *American’s Killing in Guatemala Hurts Drug Fight*, N.Y. TIMES, Apr. 7, 1991, at A7.

306. REAGAN, RHETORIC AND REALITY, *supra* note 257, at 3-4.

307. DECRETOS—LEYES, vol. X, Decree No. 1441, at 149.

and slow" procedures with a "more agile and flexible justice."<sup>308</sup>

The principal features of the new system were four: (1) the creation, in Zone IV, of Zone Courts (*Tribunales Zonales*) in each of six cities, composed of one professional judge and two lay judges, and a Regional Court (*Tribunal Regional*) in Masaya with two professional judges and one lay judge to review the decisions of the Zone Courts, all judicial personnel to be named by the Supreme Court; (2) jurisdiction by these new courts to hear all criminal matters, as well as labor and worker's compensation disputes; (3) the creation of a Judicial and Legal Coordination Center, whose functions were to be the recommendation of slates of candidates for judgeships to the Supreme Court, the recommendation of removal of judges to the Supreme Court, if necessary, and the recommendation to the government of new courts, if necessary; and (4) a new code of procedure for the operation of the Pilot Plan.<sup>309</sup>

The adoption of this legislation was followed, in 1986, with a completely redrafted code of criminal procedure for the Pilot Project.<sup>310</sup> This code was to have been the product of a commission made up of representatives of the National Assembly (the national legislature after electoral reform in 1984), and the Ministries of Justice and the Interior, and had been highly touted by Magistrate Serrano as part of his package of proposed reforms.<sup>311</sup>

The one international human rights organization to make note of the proposal was more skeptical.<sup>312</sup> Principal criticisms focused on the similarity of the mechanisms and procedures of the proposed courts to the Popular Antisomocista Tribunals (TPAs), which were then under strong criticism.<sup>313</sup> Another line of criticism came from within the Nicaraguan bar and from foreign observers,

308. *Id.* pmb., arts. III, IV.

309. *Id.* *passim*.

310. *Anteproyecto de Código de Procedimientos Penales para el Plan Piloto de Transformación Judicial* (undated; received Jan. 1987; on file with author).

311. See Serrano, *supra* note 36, at 370-71, 387; *DERECHO EN LA REVOLUCIÓN*, *supra* note 243, at 63-64.

312. *REVOLUTIONARY JUSTICE*, *supra* note 14, at 87-94.

313. *Id.* The TPAs, founded in 1983, were still in full swing at the time of the wider proposed reform. *DECRETOS—LEVES*, vol. VIII, Decree No. 1233, at 110. See also Steinberg, *supra* note 14. Further discussion of the TPAs can be found *infra* note 359-66 and accompanying text. The Lawyers Committee also seemed to take a very dim view of the fact that the drafting committee had examined procedures used in Eastern Bloc countries before beginning work on the reformed code. *REVOLUTIONARY JUSTICE*, *supra* note 14, at 87-88. All of my interviewed sources, and Serrano himself, indicate that the new code's inspirations were primarily German and Italian procedure. Serrano, *supra* note 36, at 371.

such as the Argentine law professor, Julio Maier, whose country was also drafting reform legislation in this area at the time.<sup>314</sup> The focus of these criticisms was on technical drafting flaws and difficulties in the operation of the proposed code.

The code was never adopted and the Pilot Plan never came into operation. By the end of 1987, the plan had been effectively abandoned without further action. The primary author of the proposed code, Professor Walter Antillón of the University of Costa Rica Law School, suggested that the plan died because of the loss of support from its backers on the Supreme Court, a group of progressive judges who left for other posts in mid-1984.<sup>315</sup> Others suggested bad drafting, bad timing, bad international image in the wake of the criticisms of the TPA's, or lack of adequate resources due to the increased war effort. The latter was the most often mentioned, but the cumulative effect of all of these factors no doubt contributed in some measure.

The defeat of the code also was a defeat for both the Borge and the Serrano visions of revolutionary justice.<sup>316</sup> For the Borge forces, the revised code incorporated a central notion of lay participation and informal structures, a strong step away from lawyers and legalism and toward more informal interpretation of facts and law. For the followers of Serrano, the move toward codification of the new revolutionary order was dealt a serious setback.

*E. The Constitution of 1987: An Integrated Structure and Aggravated Conflicts with the Code of Criminal Procedure*

If the Pilot Plan was a defeat for Serrano, the judicial articles of the new Constitution were his most significant (and surely more lasting) success. Virtually all of the reforms proposed by the Supreme Court, under his leadership, were adopted as part of the ju-

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314. Interview with Víctor Ordóñez, Vice-Dean of the Central American Law School, in Managua, Nicaragua (July 27, 1988); Julio Maier, *Análisis del Proyecto de Código de Procedimientos Penales para el Plan Piloto a Llevarse a Cabo en la Cuarta Región de la República de Nicaragua* (San José, Costa Rica 1986)(unpublished manuscript on file with ILANUD and the author). Maier's revision to the Argentine code of criminal procedure is discussed *infra* note 467 and accompanying text.

315. Interview with Walter Antillón, Professor at the Law School of the University of Costa Rica, in San José, Costa Rica (Sept. 1, 1988). This view is shared by Vilma Núñez, who had been on the Supreme Court at the time the draft was written, and had been supportive of the new direction taken in the code, but lost support from some potential allies. Interview with Vilma Núñez, Director of CNPPDH, in Managua, Nicaragua (Aug. 8, 1988).

316. See *supra* notes 226-46 and accompanying text.

dicial articles in the national charter.<sup>317</sup> Its adoption in January of 1987 signaled the institutionalization of important norms of state organization, protection of individual rights in the criminal process, and reeducative objectives in penology.

The document divides the structure of government into four branches: Executive (President), Legislative (a unicameral National Assembly), Judicial, and Electoral.<sup>318</sup> The document, taken as a whole, reflects a tendency found in most Latin American constitutions to focus power in the Executive branch.<sup>319</sup> For the Serrano forces, however, the new charter featured several concepts said to advance the adoption of the rule of law: judicial supremacy through review for unconstitutionality;<sup>320</sup> powers of the courts to issue writs of habeas corpus and *amparo*;<sup>321</sup> the establishment of

317. There are several English translations available of the 1987 Nicaraguan Constitution. See CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein et al. eds., 1987); Audrey H. Baker, *Recent Developments, Political Constitution of the Republic of Nicaragua*, 28 HARV. INT'L L. J. 547 (1987); Serrano, *supra* note 36, at 469. Extensive academic analyses of the document were written during and after its adoption. See THE NICARAGUAN CONSTITUTION OF 1987: ENGLISH TRANSLATION AND COMMENTARY (Kenneth J. Mijeski ed., 1991); Christopher P. Barton, *The Paradox of a Revolutionary Constitution: A Reading of the Nicaraguan Constitution*, 12 HASTINGS INT'L & COMP. L. REV. 49 (1988); Jules Lobel, *The Meaning of Democracy: Representative and Participatory Democracy in the New Nicaraguan Constitution*, 49 U. PITT. L. REV. 823 (1988); Morgan, *supra* note 271, at 1; *The New Constitution—Revolutionary Realism*, 6 ENVIO 3 (1987); *New Nicaraguan Constitution: Parliamentary Debate Broadens Civil Liberties*, 5 UPDATE, No. 39 (Central American Historical Institute, Oct. 27, 1986); Andrew Reding, "By the People": *Constitution Making in Nicaragua*, CHRISTIANITY AND CRISIS 434 (Dec. 8, 1986); Andrew Reding, *Nicaragua's New Constitution*, 4 WORLD POL'Y J. 257 (1987); *Towards a New Constitution*, 4 ENVIO 1b (1985); Richard J. Wilson, *Testing a New Constitution*, 16 HUM. RTS. 44 (1989). The reaction of the U.S. government to adoption of a new Nicaraguan charter was predictably negative. Elliot Abrams, *A Constitution Bows to Repression*, L.A. TIMES, Jan. 26, 1987, § 2.

318. NICAR. CONST. tit. VIII.

319. Barton, *supra* note 317, at 66. See generally Scott B. MacDonald, *Latin America, in LEGAL TRADITIONS AND SYSTEMS: AN INTERNATIONAL HANDBOOK* 189-218 (Alan M. Katz ed., 1986).

320. Judicial supremacy is explicitly provided for in NICAR. CONST. art. 167: "Authorities of the state, organizations and affected legal institutions and individuals must comply with the verdicts and resolutions of the Courts and Judges." One puzzling aspect of the new constitution is the potential conflict of this power with that vested in the Assembly to "officially interpret the law." *Id.* art. 138(2). Given the penchant of the Constitution toward concentration of power in the executive branch, the vesting of the Assembly with this power is somewhat odd.

321. The right of citizens to seek *amparo* or habeas corpus for violation of constitutional rights, or where such rights are in danger of violation, is found in article 45. The judicial articles are in NICAR. CONST. arts. 164(4), 187 (providing for right of any citizen to challenge unconstitutionality of any law, and providing review for unconstitutionality); *id.* art. 189 (habeas corpus); *id.* art. 188 (recourse of *amparo*). Each of these remedies is discussed *infra* notes 406-16 and accompanying text.



unitary jurisdiction,<sup>322</sup> and the guarantee of popular participation in the judicial process.<sup>323</sup>

The crown jewel of the accomplishments of those who favored the concept of the revolutionary rule of law, however, was the centrality of the doctrine of separation of powers. Serrano invoked the classical theories of Locke and Montesquieu to mount his arguments that separation of power, with its tendencies to provide checks and balances between competing branches and to limit the ability of the majority to impose its will on the minority, should govern the structure of government in Nicaragua. These theories have been in existence in the constitutions of most of the Western world since the French Revolution.<sup>324</sup>

The concept of separation of powers fought with a competing vision of governmental organization which could have provided a constitutional model. The socialist vision of the organization of state power calls for the rejection of the doctrine of separation of powers exactly because of its tendency to thwart the will of the majority. Socialism instead opted for the principle of unitary power, found as a central component in the constitutions of the socialist sphere.<sup>325</sup>

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322. NICAR. CONST. art. 159. One of the transition articles to the charter, however, provides that special courts may continue to function "until such time as they come under the jurisdiction of the Judicial Branch." *Id.* art. 199. All of the existing special courts were abolished before the Sandinistas left office in 1990, and at present, none operate.

323. NICAR. CONST. art. 166. Again, the transition articles permit the courts to operate in current form, "until a system of popular representation is established." *Id.* art. 199. At present, the abolition of jury trials has left Nicaragua with no popular participation. See *infra* notes 444-47 and accompanying text.

324. Serrano, *supra* note 36, at 432-36. The constitutions of Latin America reflect a pattern of rigid separation of powers. Richard J. Wilson, *The Constitution and Crime in the New Nicaragua*, in *THE NICARAGUAN CONSTITUTION OF 1987: ENGLISH TRANSLATION AND COMMENTARY* 219, 222-23 (Kenneth J. Mijeski ed., 1991). Jules Lobel notes that these same theories found their strongest expression in the U.S. Constitution through the views of Madison. Lobel, *supra* note 317, at 829. See also JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* § 3.5 (1986). Christopher Barton, on the other hand, notes that the strict separation of powers in the Nicaraguan Constitution is tempered by the requirement, that the branches "coordinate harmoniously." NICAR. CONST. art. 129. He asserts that coordination "strengthens the control of the political party in power and inhibits internal government dissent," and notes that there is no suggestion as to how coordination is to take place. Barton, *supra* note 317, at 65-66.

325. Lobel, *supra* note 317, at 835. The centrality of communist party power became the animating focus of popular attack on the constitutional order of the countries of Eastern Europe and Russia during the past year. A summary of the Gorbachev era in the Soviet Union recounts "fierce objections of hard-liners" to action by the Central Committee to end the guaranteed monopoly of power by the Communist Party. *The Gorbachev Era up to Now: Five Explosive Years*, N.Y. TIMES, Dec. 21, 1990, at A16; see also *Gorbachev Explains*

The new Constitution reiterated and expanded many of the individual rights for the accused criminal which had been contained in the Statute of Rights and Guarantees. All persons are guaranteed the equal protection of the law, as well as due process.<sup>326</sup> There is protection against double jeopardy,<sup>327</sup> provision for speedy trial,<sup>328</sup> a right for accused persons to know the nature and cause of the charges "in a language they understand,"<sup>329</sup> and protection against ex post facto laws.<sup>330</sup>

The rights to counsel and against self-incrimination are central to the constitutional scheme of protection for the accused. The charter guarantees a right to counsel "from the outset of the proceedings,"<sup>331</sup> and guarantees the right to fully prepare a defense.<sup>332</sup> To achieve this end, it also guarantees free and private communication between lawyer and client, and the right to the appointment of counsel upon request, regardless of means, with automatic appointment if counsel has not been named by the time of the first hearing.<sup>333</sup> A limited privilege against self-incrimination is provided for in testimonial contexts, but the same article elevates the spousal privilege to a constitutional right and extends it to partners "in a stable de facto union," as well as to family members "within the fourth level of blood relations."<sup>334</sup>

The Constitution makes explicit many due process rights in the criminal process which are not found in the United States Constitution, including the abolition of the death penalty<sup>335</sup> and a cumulative limit to incarceration of thirty years maximum.<sup>336</sup> Also present are: a constitutional presumption of innocence,<sup>337</sup> the right to present oneself before appropriate authorities within seventy-two hours of detention,<sup>338</sup> the right to a pro se defense,<sup>339</sup> the right

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*Proposed Union Pact to Party*, N.Y. TIMES, Dec. 11, 1990, at A11 (proposed treaty on the Soviet Union substitutes the word "sovereign" for the word "socialist" throughout).

326. NICAR. CONST. arts. 27, 33(1).

327. *Id.* art. 34(9).

328. *Id.* art. 34(2), (10).

329. *Id.* art. 33(2.1).

330. *Id.* art. 34(10).

331. *Id.* art. 34(4).

332. *Id.*

333. *Id.* art. 34(5).

334. *Id.* art. 34(7).

335. *Id.* art. 23.

336. *Id.* art. 37.

337. *Id.* art. 34(1).

338. *Id.* art. 33(2.2).

339. *Id.* art. 34(4).

to assistance by an interpreter free of charge,<sup>340</sup> the right to appellate review of convictions,<sup>341</sup> and the right to retroactive application of the law when it favors the accused.<sup>342</sup>

The new Constitution thus provides a viable framework for the protection of individual and collective rights in the criminal process by refusing to adhere to a particular political regimen or system. The document takes the most appropriate concepts from various legal traditions and blends them into a structure for a newly emerging society. The systematic elucidation of a new constitution, however, outstripped the ability of antiquated codes, even as amended, to maintain an integrated and consistent vision of the goals of criminal justice. The statutory structures of courts and police, as well as the code of criminal procedure itself, were all to be affected by post-transition anomalies. This was aggravated by the urgency of resolution of revolutionary crimes and the need for national reconciliation and reconstruction, even in the face of serious external hostility and the increasing tempo of the contra war.

#### *F. Major Post-Revolutionary Legal Reforms in Criminal Justice*

There have been significant post-revolutionary reforms of criminal procedure and the judiciary in Nicaragua. These were designed to remedy some of the greatest shortcomings of pre-revolutionary procedures, and to consolidate revolutionary institutions. While these reforms have further evolved over the post-revolutionary era, this and the following section will first discuss their status before the national elections of February 1990.<sup>343</sup>

##### 1. Reorganization of the Judicial Branch: Normal and Special Criminal Courts

Under the 1987 Constitution, Magistrates of the Supreme

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340. *Id.* art. 34(6).

341. *Id.* art. 34(9).

342. *Id.* art. 38.

343. All significant reform of criminal justice took place during the Sandinista regime. There have been only a few reforms of structures for the administration of justice, and no proposals for code reform in criminal law or procedure, since the election of Violeta Barrios de Chamorro who took office in April of 1990. The few changes are discussed in the Conclusion, *infra* note 489 and accompanying text.

Court are chosen by the National Assembly from slates of three proposed by the President.<sup>344</sup> The Court is to be composed of at least seven members.<sup>345</sup> The President of the Republic selects the President of the Supreme Court,<sup>346</sup> the Supreme Court, in turn, names all members of the Courts of Appeals and all trial judges.<sup>347</sup>

Courts of Appeal, with twenty-eight judges, are organized in six numbered geographic Regions and in the North and South Autonomous Regions of the Atlantic Coast.<sup>348</sup> Trial courts continue to be divided into the traditional district courts and the local courts which existed under the old Organic Law of 1879. The fifty district judges hear matters for which the sentence is more than three years and all offenses governed by expedited procedures under Decree No. 896.<sup>349</sup> The 150 local judges continue to hear correctional

344. NICAR. CONST. art. 138(7) (selection by the Assembly); *id.* art. 150(14) (nomination by the President).

345. *Id.* art. 163.

346. *Id.*

347. *Id.* art. 164(5). There was considerable debate and confusion during my visits as to the applicability, after the revolution, of the terms of office for all judges in the appellate and trial courts. I have found no language in post-revolutionary decrees which suggests limits other than the terms provided in the *Ley de Tribunales*. However, it was repeatedly asserted to me by opponents of the government that the judges named by the Supreme Court had exceeded the statutory term without any question as to their renomination or approval. Decree No. 299 of February 3, 1989 permits the Supreme Court to create, eliminate, or combine trial courts, and to name judges to them. The decree contains no language as to the term of office for those judges. Decree No. 299, 23 LA GACETA (Feb. 3, 1989).

One appellate court judge in Esteli told me that she recalled receiving a memorandum from the Supreme Court, shortly before my visit, advising judges that statutory terms were no longer applicable and that nominations to judgeships were to be considered indefinite and at pleasure of the Court. Interview with Blanca Sobeida Espinoza, President of the Appellate Court for Region I, in Esteli, Nicaragua (Aug. 26, 1988).

348. DECRETOS—LEYES, vol. VII, Decree No. 1153, at 150. In this decree, the Atlantic Coast areas were referred to as "Special Zones." That terminology was abandoned with the adoption of the Autonomy Law of 1987. DECRETOS—LEYES, vol. XIV, Law No. 28, art. 6, at 200.

Figures on the number of appellate, district, and local judges come from the Administrative Secretariat of the Supreme Court, as reported in, LUIS G. SOLIS AND RICHARD J. WILSON, POLITICAL TRANSITION AND THE ADMINISTRATION OF JUSTICE IN NICARAGUA Table No.2, at 40 (Center for the Administration of Justice, Florida International University, Apr. 1991) (monograph in the possession of the author).

349. Law No. 37, 79 LA GACETA art. 12 (Apr. 13, 1988). The data provided here on court operation applies only to criminal jurisdiction. In the district courts, there are sometimes separate judges for criminal and civil matters, and sometimes both are heard by the same judge, depending on population in the area. There are also special labor courts in Managua and León which will not be discussed here.

Procedures under Decree No. 896 call for an expedited time table for disposition of the case. This process was used most prominently in prosecutions under the now-abrogated Law for the Maintenance of Public Order. The law repealing the Public Order Law is Law No. 66 of 1989. Law No. 66, 244 LA GACETA (Dec. 26, 1989).

offenses of less than three years and criminal faults with a maximum of six months imprisonment in summary trials, as well as investigations in district court trials, when delegated to them.<sup>350</sup> Under current law, district judges are required to be licensed lawyers, while local judges may be any citizen, student, or person who understands the area.<sup>351</sup>

At present, there are no extraordinary or special courts for criminal prosecutions in Nicaragua; all crimes are prosecuted through the court system described above, using procedures under the Code of Criminal Instruction, as amended. In the early years of the revolution, however, the government struggled with the issue of the treatment of prisoners captured during the popular insurrection, and later with the issue of criminal trials for contras and contra supporters. The primary mechanisms created to deal with these alleged offenders were the Special Tribunals and the Popular Anti-Somocista Tribunals. Each was controversial, and their abolition contributes to international respect for due process and the independence and integrity of the Nicaraguan judicial system.

The Special Tribunals operated from December of 1979 until their dissolution in February of 1981.<sup>352</sup> They were created explicitly to bring criminal charges against members of the National Guard and civilian sympathizers of the Somoza regime.<sup>353</sup> All charges were to be brought under the ordinary criminal statutes.<sup>354</sup> The Tribunals came under almost immediate criticism in the international human rights community, primarily because their procedures allegedly did not comport with due process by failing to per-

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Under Decree No. 896, the process commences by *denuncia* from the prosecutor, to which the accused may respond within two days. Proof is taken for the eight following days, and sentence is passed within the following two days. DECRETOS - LEYES, vol. V, Decreto No. 896, at 248. Law No. 66 leaves in place all offenses prosecuted under these special procedures except the Public Order Law. Law No. 66, *supra* art. 3. This refers to only a few remaining offenses, such as extortion, fraud, or graft by a public official (Decree No. 922) and customs fraud (Decree No. 942). See DECRETOS—LEYES, vol. VI, Decree No. 922 and Decree No. 942, at 24, 49, respectively.

350. Law No. 37, 79 LA GACETA art. 12 (Apr. 13, 1988).

351. Decree No. 299, 23 LA GACETA (Feb. 3, 1989).

352. The Special Tribunals were created by Decree No. 185. DECRETOS—LEYES, vol. I, Decree No. 185, at 281. They were abolished by Decree No. 643. DECRETOS—LEYES, vol. IV, Decree No. 643, at 130.

353. The decree creating the tribunals uses language suggesting a lack of objectivity in their creation. It calls for swift resolution of offenses committed by the "genocidal and tyrannical regime of the Somocista dynasty," all "for the benefit of the best popular interests." DECRETOS—LEYES, vol. IV, Decree No. 184, prologue, I, II.

354. *Id.* art. 1.

mit review in the normal court system. Human rights groups further voiced their disapproval because of the many untried abuses committed by citizens after the fall of the Somoza government and because trials under provisions of the new Law for the Maintenance of Public Order, passed on the day after the government took power, might lead to conviction for offenses involving the free expression of ideas.<sup>355</sup>

A report by Amnesty International found that the legislation creating the Special Tribunals "provided the necessary guarantees for a proper dispensation of justice."<sup>356</sup> The Tribunals tried 6,310 defendants. Of those, 1,760 had their cases dismissed or were pardoned. Of the remainder, 229 were acquitted and 4,331 received prison sentences. By 1988, it was estimated that a special clemency law enacted by the government had resulted in the release of approximately 2,500 of those convicted by the Tribunals. As a result of the Sapoá cease-fire agreement with the contras in March of 1988, 1,649 prisoners were released in early 1989, leaving only thirty-nine particularly heinous offenders in custody as of that time.<sup>357</sup> Those thirty-nine individuals were released as part of a more general amnesty in early 1990.<sup>358</sup>

The Popular Anti-Somocista Tribunals (TPAs) were created in April of 1983 and abolished in January 1988 as part of the peace process.<sup>359</sup> The primary jurisdiction of these courts was the trial of suspected contras and contra sympathizers. The primary criminal statute under which they operated was the Law for the Maintenance of Order and Public Security, itself abolished in 1989.<sup>360</sup> Its

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355. This critique comes from the first and most comprehensive study of the Tribunals, though certainly not the only criticism. Amnesty International sent three missions to Nicaragua shortly after the new government took power. The Special Tribunals were the focus of the Amnesty missions' report. AMNESTY INTERNATIONAL, REPORT OF THE AMNESTY INTERNATIONAL MISSIONS TO THE REPUBLIC OF NICARAGUA 13-40 (Aug. 1979, Jan. 1980, and Aug. 1980) [hereinafter MISSION TO NICARAGUA]. The new government responded fully to the Amnesty criticisms, to which Amnesty responded by expressing its appreciation for the cooperation. *Id.* at 41-68, 70. See Law for the Maintenance of Public Order, DECRETOS—LEYES, vol. I, Decree No. 5, at 11.

356. MISSION TO NICARAGUA, *supra* note 355, at 35.

357. 1986-1989 AMNESTY REPORT, *supra* note 252, at 18-20.

358. Anne-Marie O'Connor, *Nicaraguan Government Frees Political Prisoners*, AUSTIN AMERICAN-STATESMAN, Feb. 10, 1990, at 1E.

359. The TPAs were established in Decree No. 1233. DECRETOS—LEYES, vol. VIII, Decree No. 1233, at 110. Their abolition is documented in 1987-1988 AMERICAS WATCH REPORT, *supra* note 296, at 65-68.

360. The Public Order Law is found at DECRETOS—LEYES, vol. VII, Decree No. 1074, at 11. It was abolished by Law No. 66 of 1989, 244 LA GACETA (Dec. 26, 1989).

procedural mechanism was the expedited process adopted in 1981 under Decree No. 896.<sup>361</sup> The TPAs came under intense scrutiny when they became the venue for the trial of U.S. flyer Eugene Hasenfus, who was captured and pardoned almost immediately after conviction.<sup>362</sup> Documents and other information from his capture led to revelations of extensive clandestine involvement in contra funding and the Iran-Contra Congressional hearings and trials.

Criticism of the TPAs focused on their convocation under the Public Order Law, which, because of vaguely defined provisions, lent itself to conviction for vocal political opposition. This, combined with the accelerated procedures of Decree No. 896, suggested a risk to due process and to the ability to effectively defend against charges.<sup>363</sup> They also operated outside of the normal judicial system, with no right to appeal to the normal courts. Of some concern to later proposed reforms, these courts were also criticized for their use of lay judges and for their adoption of the *sana critica* evidentiary standard.<sup>364</sup> The use of lay judges was a key component of the doomed Region III Pilot Program, and may have contributed to its demise.<sup>365</sup> The *sana critica* standard, despite its criticism, has now been adopted for general use in criminal trials.<sup>366</sup>

All prisoners tried under the Public Order Law have now been released. In November of 1987, the government released 985 prisoners or persons awaiting trial as part of the Central American peace process.<sup>367</sup> More than 1,500 additional prisoners were released in March of 1990, under a general law of amnesty adopted in the name of national reconciliation.<sup>368</sup>

In all, prosecutions under special tribunals constituted about four percent of the average reported criminal activity between 1980 and 1988.<sup>369</sup> The constitutional provision which permitted the con-

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361. See *supra* note 349 (description of Decree No. 896).

362. Richard Halloran, *American Is Captured After Plane Is Downed in Nicaraguan Territory*, N.Y. TIMES, Oct. 8, 1986, at A1; Stephan Kinzer, *Nicaraguan Court Convicts American Over Aid to Rebels*, N.Y. TIMES, Nov. 16, 1986, at A1; Stephan Kinzer, *Hasenfus Is Freed by Nicaraguans and Heads Home*, N.Y. TIMES, Dec. 18, 1986, at A1.

363. 1986-1989 AMNESTY REPORT, *supra* note 252, at 20-24.

364. *Id.*

365. See *supra* Part IV.D.

366. See *infra* notes 389-97 and accompanying text (discussing the critique of the *sana critica* standard).

367. 1986-1989 AMNESTY REPORT, *supra* note 252, at 24.

368. Law No. 81, 53 LA GACETA (Mar. 15, 1990).

369. This figure is based on an average rate of 18,795 reported offenses during the period from 1980 to 1988. See *DERECHO A LA DEFENSA*, *supra* note 263, at 6.

tinuation of special courts strongly suggests that having been abolished, no new special courts may be created constitutionally.<sup>370</sup> It must therefore be assumed that these courts, arguably a product of the necessities of war-time conditions, are a minor historical footnote in the administration of criminal justice in Nicaragua.

## 2. Initial Screening by Instructing Police Chiefs of Cases Involving Detained Defendants

Under current law, the initial determinations of charges involving detained defendants are made by the Instructing Police Chief, not the Instructing Judge, as called for in the original scheme of the code of criminal procedure.<sup>371</sup> The office of Instructing Police Chief has evolved, through several amendments, from the pre-existing Police Regulations of 1880.<sup>372</sup> During the Sandinista government, Instructing Police Judges were selected by the Minister of the Interior, and need not have been lawyers to hold their positions, although there was a preference for lawyers or law students.<sup>373</sup>

In all cases where the defendant is in custody, the Instructing Police Chief is required to take action within six days.<sup>374</sup> The accused is entitled to representation by counsel during this time period, but counsel may not seek any judicial remedy, nor "tend to hinder the investigations."<sup>375</sup> At the close of this time period, the

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370. NICAR. CONST. art. 199 states, in part, "The Special Courts shall continue to function when this Constitution is put into effect, *until such time* as they come under the jurisdiction of the Judicial Branch." (emphasis added).

371. Law No. 65, 244 LA GACETA art. 3 (Dec. 26, 1989).

372. *Id.* Law No. 65 significantly amended the provisions for police judges passed during the second year of the revolutionary government, which specifically acknowledged that the police judges were to sentence under the provisions of the Police Regulations. DECRETOS—LEYES, vol. III, Decree No. 559, art. 10(2), at 146.

373. The lines of review and qualifications for police judges are taken from DECRETOS—LEYES, vol. III, Decree No. 559, arts. 4-5.

374. Critics argue that this time period, which actually can be extended by two days when additional review of charges is undertaken by the prosecutor, violates the constitutional requirement that the defendant be brought before a judge within 72 hours of detention. NICAR. CONST. art. 33(2.2). Interview with Lino Hernández, Director of the Permanent Commission on Human Rights, in Managua (June 7, 1990).

Law No. 65, 244 LA GACETA art. 8 (Dec. 26, 1989) specifically requires that the detained defendant be brought before the Instructing Police Chief within the required 72 hour period. That provision seems to meet the constitutional requirement of presentment, which does not explicitly call for appearance before a judge, but only "an authority expressly authorized by law." NICAR. CONST. art. 33(2.2).

375. Law No. 65, LA GACETA art. 8 (Dec. 26, 1989).



judge has a number of alternatives, depending on what the evidence shows.

If the evidence shows a sufficiently serious offense, the police must remit the case to the prosecutor, if that office has exclusive jurisdiction over the matter. If not, the case is referred to the appropriate local or district judge for prosecution, depending on the seriousness of the offense.<sup>376</sup> If the evidence shows no offense, the judge must free the detainee. Until late 1989, if the offense was one of the police misdemeanors (*faltas policiales*) traditionally falling within the scope of powers of the police judges, the judge could sentence the defendant to up to 180 days in jail. The offenses over which the police maintained sentencing jurisdiction were very limited: disturbing the peace (*alteración del orden público*), habitual vagrancy (*vagancia habitual*), and habitual drunkenness (*ebriedad consuetudinaria*).<sup>377</sup> Appeals from adverse rulings of the Instructing Police Judge were to the Regional Delegate of the Ministry of the Interior or, in Managua, to the National Chief of the Sandinista Police, and rulings on appeal were final.<sup>378</sup>

The sentencing powers of Instructing Police Judges came under strong criticism by international human rights groups, due to their alleged unconstitutionality, their selection by the Interior Ministry, abbreviated proceedings, and the denial of the right to appeal directly to the ordinary appellate courts.<sup>379</sup> Partly in re-

376. *Id.* arts. 12 and 13; Law No. 37, 79 LA GACETA art. 3.

377. 1987-1988 AMERICAS WATCH REPORT, *supra* note 296, at 19. This source is the most reliable available, since the code itself did not originally contain the offenses to which police judges' jurisdiction extended, and subsequent legislative amendment is difficult to ascertain. See 1976 AMNESTY REPORT, *supra* note 43, at 19. A 1978 OAS investigation in Nicaragua also refers to the offenses of gambling and "bearing of prohibited arms" as falling within the traditional police court jurisdiction. Other powers of the police courts included the discovery of "plots against the internal and external security of the State" as well as the duty to inform superiors of such plots and to capture the alleged offenders. 1978 OAS REPORT, *supra* note 41, at 61 n.10.

A January 14, 1987 "Communique," entered into between the Supreme Court, the Ministry of Justice, and the Ministry of Interior, states that post-revolutionary provisions of law which permitted police judges to sentence for the offenses of drug trafficking, cattle rustling, and violations of consumer protection laws were void, being in "evident contradiction" with several provisions of the 1987 Constitution. MINISTERIO DE JUSTICIA, COMUNICADO (Jan. 14, 1987)(unpublished Communique in the possession of the author).

378. DECRETOS—LEYES, vol. III, Decree No. 559, art. 6, at 147.

379. NICAR. CONST. art. 159 provides that all courts "form a unitary system, whose superior organ is the Supreme Court of Justice." The Police Courts were criticized as falling outside of that process of orderly judicial review, and for their failure to comply with a series of procedural guarantees enumerated in article 34 of the new Constitution. 1987-1988 AMERICAS WATCH REPORT, *supra* note 296, at 19-20. This criticism was at its peak following

sponse to this pressure, and as part of an August, 1989 political agreement with opposition political parties, the government agreed to introduce legislation in the National Assembly which would remove sentencing jurisdiction from the police. Police sentencing power was eliminated by Law No. 65, adopted on Dec. 26, 1989, and all police judges became the local chiefs of police.<sup>380</sup>

### 3. Consolidation of Prosecutorial Screening and Investigation Powers in the Procurator General's Office

After review by the police, some cases are referred to the public prosecutor, or Procurator General. Law No. 37 of 1988 provides that the Procurator shall exercise exclusive jurisdiction over the determination to prosecute many of the most serious public offenses.<sup>381</sup> The most important of these are certain types of murder, rape, robbery, theft, and fraud. Under the new law, rape is the only one of the offenses traditionally considered to be "private" which is included among those offenses in which exclusive jurisdiction is

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the use of the Police Courts to sentence opposition demonstrators arrested in Nandaime in July of 1988, an event which provoked strong adverse response in the international community. The decision of the police judge in the Nandaime cases was overturned on appeal to the National Police Chief as inappropriate, and the cases were remanded for prosecution in the criminal courts. See, e.g., *Clash Between Demonstrators and Police in Nandaime*, 7 UPDATE No. 24 (Aug. 6, 1988); 1987-1988 AMERICAS WATCH REPORT, *supra* note 296, at 14-15. Despite heavy pressure, many of the Nandaime defendants were eventually convicted, although many of their convictions were overturned on appeal, or the defendants were amnestied. A case study of the Nandaime case is provided in Richard J. Wilson, *The Constitution and Crime in the New Nicaragua*, in THE NICARAGUAN CONSTITUTION OF 1987: ENGLISH TRANSLATION AND COMMENTARY 219, 237-241 (Kenneth J. Mijeski ed., 1991).

The police courts were defended by the previous government both on the basis that they were an inherited tradition which had a long history in Latin America and elsewhere, and as administrative bodies whose structure and functions fall outside the Judicial branch, and within the Executive. Interview with Omar Cortéz, Procurator General of Nicaragua, in Managua, Nicaragua (Aug. 13, 1988). This defense comports with my own review of the use of police courts in Latin America and Europe. See *supra* note 39.

380. *Political Agreement* (Aug. 4, 1989) (unofficial translation in the possession of the author). Law No. 65, 244 LA GACETA arts. 12, 17.

381. Law No. 37, 79 LA GACETA art. 1 (Apr. 13, 1988). In its original conception in 1982, the Procurator's office had exclusive jurisdiction to proceed in all public and private criminal complaints except those begun by *querrela*. DECRETOS—LEYES, vol. VII, Decree No. 1130, art. 1, at 93. The shift from judicial screening to exclusive jurisdiction in the prosecutor's office was justified at the time on several bases: the new system would give order to citizen's complaints, it would remove motives of passion in the filing of private charges, it would remove possibilities of extortion, bribery or blackmail involving judges or attorneys, and it would render the judge more impartial in the review of proofs. Eduardo Ruiz, *Comentarios a la Ley de Reforma Procesal Penal*, in 2 MONÉXICO: REVISTA DEL CONSEJO DE ESTADO 36 (Apr. 1983).

vested in the prosecutor. The amendment also includes provision for expedited medical examination of the alleged victim, once a complaint is made, in order to "establish the fact [of the offense] with certainty." After this examination, the Procurator is given discretion in the disposition of the action.<sup>382</sup> All offenses not handled by the prosecutor are handled by the courts, if public, or by private parties, all according to the traditional structure of the code.

Once within the Procurator's jurisdiction, the office has three days to make a decision as to whether to prosecute the offense. A decision not to proceed is appealable to the Court of Appeals by those adversely affected by the decision. That appeal is final.<sup>383</sup> Additionally, the Procurator's office is empowered to participate as a party in all proceedings in the trial courts, from the moment of the commencement of police investigation, and regardless of exclusive jurisdiction.<sup>384</sup> Finally, the prosecutor's timely request for extension of the terms, as permitted by law, is automatic, not discretionary with the trial judge as provided by prior law.<sup>385</sup> The civil party, or victim, is permitted to assist the procurator in prosecutions, but the principal parties are the accused and the Procurator when exclusive jurisdiction lies.<sup>386</sup> These powers represent significant departures from prior law, under which the judge maintained exclusive jurisdiction over the commencement of charges. The prosecutor is now vested with virtually total control over the direction and continuation of a wide range of the most serious offenses.

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382. Law No. 37, 79 LA GACETA art. 6 (Apr. 13, 1988). For a discussion of the public-private distinction, see *supra* notes 90-98 and accompanying text. Manuel Cano, legislative counsel, said that the legislative intent was that the medical examination be dispositive as to the existence of a rape, and that a negative test should result in non-filing of charges. He acknowledged that a rape could occur without dispositive medical evidence to that effect, but asserted that the new statute was designed to protect against the woman who complains of rape as a means of revenge when thwarted in the relationship. Interview with Manuel Cano, attorney and counsel to the National Assembly for criminal justice matters, Managua, Nicaragua (Jan. 5, 1989). In her recent examination of the rape laws of Nicaragua, Beth Stephens concludes, based on interviews with prosecutors as to current practice, that rape is, in effect, both a private and a public offense, in that either the victim or the prosecutor may commence proceedings, but the victim still has the right to pardon and dismiss, as under the private offense categories. Stephens, *Rape in Nicaragua*, *supra* note 14, at 76 n.84.

383. Law No. 37, 79 LA GACETA arts. 7, 9 (Apr. 13, 1988).

384. *Id.* arts. 2(2), 3.

385. *Id.* art. 20.

386. *Id.* art. 5.

#### 4. Abolition of the Jury Trial

The availability of jury trials gradually diminished over the decade, and in 1988 they were totally abolished.<sup>387</sup> The reasons given for abolition were the time and cost involved in the required use of juries, the lack of sufficient training and understanding on the part of laypersons, and the tendency of juries to acquit, under the *íntima convicción* standard.<sup>388</sup>

#### 5. The *Sana Crítica* Evidentiary Standard and New Burdens of Proof

Current law adopts the use of the *sana crítica* evidentiary standard in all criminal trials. The new standard replaces the highly rigid legal or measured proof system for the evaluation and admission of evidence, as well as the standard which governed the jury's deliberations, the *íntima convicción*, or innermost belief. The *sana crítica* standard, literally a "sound criticism" of the offered proof by the judge, is often translated in the civil law context as the "free evaluation of evidence" standard.<sup>389</sup> Under current law, all reference to "complete proof," "partial proof," and other terms used in the measured proof system is abolished.<sup>390</sup>

The new standard is statutorily defined as "the discretionary appraisal of proofs without limits as to type, but respecting the irrevocable rules of scientific, technical, or artistic character, or of common experience; and observing the elemental principles of jus-

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387. Law No. 37 of 1988, 79 LA GACETA art. 16. Under Decree No. 1130 of 1982, juries had been abolished for all but five serious offenses: parricide, infanticide, aggravated murder (*asesinato atroz*), rape, and exposure of persons to danger. DECRETOS—LEYES, vol. VII, Decree No. 1130, art. 8, at 94. One early decree had reformed the composition, qualifications, and oath for potential jurors. DECRETOS—LEYES, vol. I, Decree No. 129, at 197.

388. The tendency to acquit was one of the reasons offered for reform of the legislation. Ruíz, *supra* note 381, at 37. One lawyer whom I interviewed asserted that the amendments limiting the use of juries were influenced, in no small part, by his successful defense, before a jury, of four young men from a poor neighborhood in Managua who were charged with the brutal murder of two married women of some wealth. Interview with William Frech, Private Attorney, in Managua, Nicaragua (Aug. 8, 1988). The case was known popularly as the "Panzyma" case, for a commercial building near the location of the alleged homicide, and received a good deal of public attention through newspaper accounts at the time. *Id.* The dates correspond; the group was acquitted on Sept. 25, 1982 and Decree 1130 was passed by the government on Oct. 5, 1982.

389. The standard is given several different names, all roughly synonymous. MERRYMAN, *supra* note 15, at 119 ("free evaluation of the evidence"); Fraser, *supra* note 25, at 873 ("a free objective search for rules").

390. Law No. 37 of 1988, 79 LA GACETA art. 19 (Apr. 13, 1988).

tice and sound logic.”<sup>391</sup> Thus, under current law, the factfinder, who is always the judge, is given wide discretion in the evaluation of evidence, a standard which would be somewhat akin, in the common law, to making admission of all evidence subject only to a judicial determination of relevancy and reliability.<sup>392</sup> The adoption of this new standard brings Nicaragua into conformity with many other civil law jurisdictions.<sup>393</sup> It nevertheless has been much criticized in its application by both Nicaraguan lawyers and human rights organizations, who unjustifiably see it as an invalid invitation to abuse in criminal trials.<sup>394</sup>

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391. *Id.* referring to Decree No. 644 of 1981. LEYES—DECRETOS, vol. IV, Decree No. 644, art. 4, at 132-33.

392. Even within the civil law system, this concept is not entirely understood. It has been pointed out that the free proof standard does not have to do with the admission of evidence, but only with the evaluation of its probative weight. Evaluation, logically, comes into play only when the evidence is produced. Karl H. Kunert, *Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil Law System of 'Free Proof' in the German Code of Criminal Procedure*, 16 BUFF. L. REV. 122, 155 (1967). Thus, if the standard is correctly applied, no evidence is inadmissible by supposedly neutral application of strict rules, as it frequently is in the common law through hearsay rules, opinion rules, best evidence rules, character rules, privilege rules, as well as the now-criticized exclusionary rules for physical evidence. *Id.* at 155. *See, e.g.*, United States v. Leon, 468 U.S. 397 (1984) (applying a “good faith” exception to the exclusionary rule for physical evidence seized by police under judicially issued warrants ultimately found to be defective).

393. By the turn of the twentieth century, the system of legal or measured proof had been abandoned almost everywhere on the Continent. ESMEIN, *supra* note 36, at 630.

Guatemala, for example, has adopted the *sana critica* standard. CÓDIGO PROCESAL PENAL art. 638 (Guatemala, 1973). However, it still retains the concepts of full and “semi-proof,” permitting the latter to reach full proportions when “several semi-proofs . . . concur, in a coordinated manner, against the same person.” *Id.* arts. 641, 642. *But see* CARRIÓ, *supra* note 18, at 57-58 n.54 (“[M]any Argentine procedural rules still reflect a strict adherence to the system of legal proof.”).

394. The primary critic of the use of this standard was the Lawyer’s Committee for Human Rights, which asserted, in a 1985 report criticizing the use of the Popular Anti-Somocista Tribunals for their use of *sana critica*, that the standard “in practice . . . places virtually no rigid constraints on the [one judge and two lay person] panels’ ability to infer guilt from the facts.” REVOLUTIONARY JUSTICE, *supra* note 14, at 77. This assertion was reiterated less strongly in a more recent report which called the standard “less vigorous” than the measured proof standard then used in the regular criminal courts. LAWYERS COMMITTEE FOR HUMAN RIGHTS, HUMAN RIGHTS IN NICARAGUA: 1987, at 11 (Nov. 1987) [hereinafter 1987 LAWYERS COMMITTEE REPORT]. This criticism was also leveled by an early Amnesty International mission to Nicaragua, where, during its use as part of Decree No. 896 proceedings, the measure was characterized as one of the “personal conviction” of the judge, which leaves “judges completely free to reach a decision based upon any item of evidence, without having to ensure its authenticity or reliability.” *Cited in* Steinberg, *supra* note 14, at 375 n.78. Americas Watch, although critical of the use of the TPAs on several other grounds, not only did not attack the *sana critica* standard used there, but backhandedly defended it. 1984 AMERICAS WATCH REPORT, *supra* note 296, at 31; 1986 AMERICAS WATCH REPORT, *supra* note 296, at 44-45; *but see* 1987-1988 AMERICAS WATCH REPORT, *supra* note 296, at 54 (standard

Burdens of proof are appropriately changed under the new evidentiary standard. The *corpus delicti* must be proven "with certainty," and the act of imprisonment may occur only when there are "at least rational indications of the delinquency of the prisoner."<sup>395</sup> In order to convict, the court must conclude that "there is proof of the existence of a punishable act and of the culpability of the accused."<sup>396</sup> While these burdens do not rise to the level of the "beyond a reasonable doubt" standard required at common law, they comply with the requirements of human rights conventions.<sup>397</sup>

## 6. Protection of the Accused: Procedural Rights and the Remedies of *Amparo*, Habeas Corpus, and Unconstitutionality

Post-revolutionary law concerned itself with procedural rights and procedural remedies for the defendant in the criminal process. The new Constitution contains a number of explicit procedural guarantees for the defense, including the requirement of a judicial order for the search of a private home of any person and an exclusionary rule as to letters, documents, and other personal papers illegally obtained.<sup>398</sup> Detention is permitted only on order of a judge, by authorities under express legal mandate, or when an accused is captured *in flagrante*,<sup>399</sup> and the accused must be presented before an authority within seventy-two hours of detention.<sup>400</sup> Officials who illegally detain a person are subject to crimi-

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is "more liberal"). A Sandinista Procurator General acknowledged problems with the new evidentiary standard, but suggested practical shortcomings rather than any intrinsic flaw in the concept. He suggested that the standard would be more evenly applied when the corps of new judges was better trained and equipped to use more scientific means of evidence. Interview with Omar Cortéz, Procurator General of Nicaragua, in Managua, Nicaragua (Aug. 9, 1988).

These editorial characterizations of the standard of evidence now used in all of Nicaragua's trial courts are deeply troubling because they attack, without acknowledgment of its widespread use, a standard of evidence respected in most of Latin America and Europe since before the turn of the century. The comments demonstrate much about the risks of criticism out of cultural or historical context.

395. Law No. 37 of 1988, 79 LA GACETA art. 21 (Apr. 13, 1988).

396. *Id.* art. 23.

397. The only requirements of human rights instruments, as relates to this aspect of due process in a criminal trial, are those of the impartiality of the judge and the presumption of innocence. See, e.g., *American Declaration of the Rights and Duties of Man*, *supra* note 151, art. XXVI, at 545, 551. There is nothing to suggest that the use of the *sana critica* standard, on its face, violates these concepts, and a good deal of evidence to suggest that it complies with the requirements in practice.

398. NICAR. CONST. art. 26.

399. *Id.* art. 33 (1).

400. *Id.* art. 33 (2.2). This provision has caused problems with police judges, who have

nal or civil responsibility.<sup>401</sup>

Procedural rights are protected through a number of procedural mechanisms. Prominent among these are the provision of counsel at trial and the appellate remedies discussed above.<sup>402</sup> Most significant, however, is a comprehensive package of legislation adopted in late 1988 which gives efficacy to a collection of constitutional guarantees to protect the individual citizen.

The constitutional remedies are three: the recourse of unconstitutionality, the traditional writ of habeas corpus, referred to in the Constitution as personal exhibition (*exhibición personal*), and the writ of administrative *amparo*.<sup>403</sup> While the latter two remedies were embodied in earlier post-revolutionary decrees,<sup>404</sup> the remedy of unconstitutionality is much more comprehensive, innovative, and far-reaching in its potential impact. In habeas corpus, any person may file, on behalf of any other person or herself, an original writ with the appropriate Court of Appeals, and may allege illegal detention or threat of same by any state official, improper restrictions of freedom by any person, or illegal imprisonment by a trial judge.<sup>405</sup> The Court then appoints an Executory Judge (*Juéz Ejecutor*), preferably but not necessarily a lawyer, to investigate the petitioner's claims. The Executor is given broad powers to produce and examine the defendant, wherever that person may be held, and may order immediate relief, including release

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statutory powers to detain for up to 10 days before presentation to a magistrate, thereby subjecting themselves to strong criticism from international human rights organizations. 1987-1988 AMERICAS WATCH REPORT, *supra* note 296, at 55-56; 1986-1989 AMNESTY REPORT, *supra* note 252, at 14-16.

401. NICAR. CONST. art. 33 (4). For the procedural rights of the accused which are unaffected by the adoption of the Constitution, see *supra* notes 63-85 and accompanying text.

402. See *supra* notes 63, 144-53 and accompanying text.

403. NICAR. CONST. art. 187 (unconstitutionality); *id.* arts. 188 (*amparo*) and 189 (personal exhibition). Article 45 guarantees protection of these rights. *Id.* art. 45. Law No. 49 of 1988 was a comprehensive legislative package of implementing legislation. Law No. 49 of 1988 (unpublished copy in possession of the author).

404. The right to *amparo* was recognized in art. 50 of the Statute of Rights and Guarantees of the Nicaraguan People. DECRETOS—LEYES, vol. I, Decree No. 52, art. 50, at 77. The laws of *amparo* were detailed and amplified in Decrees No. 232 (personal exhibition, or habeas corpus) and Decree No. 417 (administrative *amparo*). DECRETOS—LEYES, vol. II, Decrees No. 232 and 417, at 27, 391, respectively.

405. Law No. 49, *supra* note 403, tit. IV. The principal amendments to the writ of habeas corpus were designed to eliminate the possibility of its technical application in situations which would result in the "abuse" of the writ by applicants who could achieve freedom, however temporary, through application of the strict time limits applied in the criminal process. Interview with Manuel Cano, Attorney and Legal Advisor to the National Assembly, in Managua, Nicaragua (Jan. 5, 1989).

of the defendant under bail or without restrictions, removal of incommunicado restrictions, or liquidation of monetary penalties.<sup>406</sup> Failure to comply with the order of the Executor or with that of the Court of Appeals can result in a heavy fine, potential loss of employment, and potential criminal or civil prosecution, although the official under order from the Executor may petition for a hearing before the Court through the Procurator's office.<sup>407</sup> Failure of a member of the executive branch to comply with an order is more problematic. Such failure ultimately results in publication by the Supreme Court of that fact with notice to the National Assembly and referral of the delinquent individual to the Procurator for appropriate prosecution; the Court itself has no enforcement powers in this instance.<sup>408</sup> Practical problems also occur frequently. The Executor is required to perform his or her required duties "immediately," which is understandable from a legal standpoint, but impractical given the large numbers of such filings and the unpaid nature of the Executor's job.<sup>409</sup>

Administrative *amparo* is a civil remedy which can be filed only by the aggrieved individual in the civil chamber of the appropriate Court of Appeal.<sup>410</sup> It would seem to have less relevance in the criminal area, but has been utilized extensively by citizens to protect procedural rights in criminal matters through allegations of failure by an administrative official, such as a jail official, to honor a specific court order.

The remedy of unconstitutionality was new with legislation adopted in 1988, and gives legal effect to aspirational provisions of the 1987 Constitution.<sup>411</sup> The remedy allows any citizen to chal-

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406. Law No. 49, *supra* note 403, art. 61(1) to (5).

407. *Id.* arts. 66-67.

408. *Id.* art. 68.

409. The numbers of petitions were daunting. A study by the National Commission for the Promotion and Protection of Human Rights found that, in Region III (Managua) alone, almost 2,500 petitions were filed between July 1, 1987 and June 30, 1988. COMISIÓN NACIONAL DE PROMOCIÓN Y PROTECCIÓN DE LOS DERECHOS HUMANOS, INVESTIGACIÓN PRELIMINAR SOBRE: LA EFECTIVIDAD DEL HABEAS CORPUS EN LA REGIÓN III - MANAGUA 4 (Nov. 4, 1988).

The new law is more lenient than the old, which required that the Executor perform his or her functions within three days when the person affected was in prison or under restriction. DECRETOS—LEYES, vol. II, Decree No. 232, art. 15, at 31.

410. *See generally* Law No. 49, *supra* note 403, tit. III.

411. *Id.* tit. II. Relevant provisions of the Constitution are articles 164(4) and 187. I use the term "aspirational" because, unlike under the U.S. Constitution, constitutional guarantees were not self-executing until the mechanism permitting attack on constitutionality was created. This is true in general in the development of modern concepts of judicial supremacy, which have come about more through constitutional concession than through



lenge, by original writ to the Supreme Court, a law, decree, or regulation which "directly or indirectly prejudices" his or her constitutional rights.<sup>412</sup> The action may be filed within sixty days after the effective date of the new law, or may be filed by any person against whom a law is unconstitutionally applied, after its allegedly unconstitutional application.<sup>413</sup> Once admitted as properly filed, the Supreme Court must declare the inapplicability of the law or other disposition, if the declaration is partial.<sup>414</sup> The potential impact of this law cannot be underestimated, especially since, although limitations were suggested, the law has retroactive effect when laws are unconstitutionally applied.<sup>415</sup>

## 7. Reeducation and Forgiveness: Prisons, Amnesties, and Pardons

The final area of post-revolutionary reform lies in the interstices of criminal process and penological theory. This area plays as significant a role in the theoretical design of criminal justice reform in revolutionary Nicaragua as it has in conservative reform of criminal justice in the last decade in the United States.

The 1987 Constitution contains a number of explicit articles on criminal punishments and imprisonment. Most important, the death penalty is abolished, prison sentences are limited to a maximum of thirty years, and torture, inhumane, cruel, or degrading punishments are prohibited.<sup>416</sup>

The prison system and penological theory are the areas in which socialist models of justice, tempered by the moral values of the liberation church, were to have the greatest influence in the development of post-revolutionary criminal justice. In keeping with socialist models of justice, the Constitution emphasizes the "reeducational" nature of incarceration by providing for "humane" conditions with "a fundamental objective [of] the transformation

the assertion of the right by the judiciary itself, as occurred in the United States in *Marbury v. Madison*, 5 Cranch 137 (1803). MAURO CAPPELLETTI & WILLIAM COHEN, *COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS* 12-16 (1979).

412. Law No. 49, *supra* note 403, art. 6.

413. *Id.* arts. 10, 20.

414. *Id.* art. 18.

415. *Id.* art. 2. The draft law contained a provision which would have limited the remedy to laws or decrees promulgated after the effective date of the newly created remedy. *Ley de Amparo: Exposición de Motivos*, art. 16 (undated draft law received July, 1988, on file with the author).

416. NICAR. CONST. arts. 23, 36, 37.

of the inmate in order to reintegrate him or her into society."<sup>417</sup>

The penitentiary system is to provide rehabilitation in progressive stages, and must "promote family unity, health care, educational and cultural advancement and productive occupation with financial compensation" for inmates.<sup>418</sup>

The correctional system met with mixed success. The Ministry of Interior's Security Force (DGSE) was the most consistent focus of international criticism for its use of prolonged detention without charges, improper interrogation in detention facilities, and even some reports of torture.<sup>419</sup> Even at their worst, however, the abuses of the DGSE in security crime investigations and detention compare favorably to the repressive tactics used in neighboring Central American countries.<sup>420</sup>

At its best, the Nicaraguan penal system provided a model for rehabilitative use of prisons. Prisoners convicted of serious crimes pass through five stages of imprisonment, from maximum security to an "open" stage, at which they are permitted to go home for a full week's leave every six months.<sup>421</sup> Inmates in the lesser security institutions are housed in a series of *granjas abiertas*, or open prison farms, making possible a level of comfort, education, and useful labor for prisoners that is virtually unknown in other Latin American countries. These minimum security institutions use no fences at all, a minimum number of unarmed guards, and work

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417. Soviet penology emphasizes the principle of "socialist humanism" in activities of reform, re-education, and re-socialization into society. BUTLER, *supra* note 16, at 88; John Quigley, *The Function of the Criminal Sanction in Socialist Law: Implications for the United States*, 12 *LÉgal Stud. F.* 175, 177 (1988). While based on the idea of reform, even the most recent drafts of Soviet criminal law retain the death penalty in some circumstances, while abolishing the penalties of exile and banishment. See Leonard Orland, *Soviet Justice in the Gorbachev Era: The 1988 Draft Fundamental Principles of Criminal Legislation*, 4 *CONN. J. INT'L L.* 513, 519-23 (1989).

Cuban theory, in the early years of the revolution, also presupposed the perfectibility of human beings and the use of penal system which combined repression of dissent with service and re-education. LUIS SALAS, *SOCIAL CONTROL AND DEVIANCE IN CUBA* 127 (1979); Brady, *supra* note 259, at 248, 277.

418. *Id.* art. 39. On socialist correctional theory, see BUTLER, *supra* note 16, at 279-81.

419. Even late in the decade, after numerous reforms, criticism of the DGSE tactics continued. See 1986-1989 AMNESTY REPORT, *supra* note 252, at 34-44; HUMAN RIGHTS CHRONOLOGY, *supra* note 250, at 10.

420. Comparative data was made available in measuring compliance with the Central American Peace Accords. AMERICAS WATCH, *COMPLIANCE WITH THE HUMAN RIGHTS PROVISIONS OF THE CENTRAL AMERICAN PEACE PLAN 13-14, 27-31, 40* (Jan. 1988) [hereinafter AMERICAS WATCH PEACE PLAN REPORT].

421. *Jails and Justice in Nicaragua*, 5 *ENVÍO* 14, 16-17 (1986); 1986-1989 AMNESTY REPORT, *supra* note 252, at 42.

incentives which permit inmates to earn wages, conjugal visits, and home leave.<sup>422</sup>

Frequent amnesties of war prisoners helped to keep down the prison population, particularly after the adoption of the Central American Peace Plan, which contained explicit provisions on amnesties.<sup>423</sup> At the close of the decade, before the national elections, Nicaragua had an average prison population of between 4,500 and 5,000 prisoners, thus maintaining incarceration rates about four times lower than those of the United States during the same period of time.<sup>424</sup>

The question of forgiveness through amnesties or pardons for criminal conduct has two important and distinct dimensions in Nicaragua. First, there were a series of amnesties of convicted contras and National Guardsmen from the Somoza era during the final years of the Sandinista government. These releases, all part of the Central American Peace Plan, totaled about 3,000 individuals, and far surpassed the generosity of neighboring countries in the treatment and release of real or supposed enemies of the government.<sup>425</sup>

The more controversial amnesty issue was an amnesty law passed after the defeat of the Sandinistas at the polls in February of 1990, and before the government was handed over to the opposition. The text of this "self-amnesty" law grants amnesty for offenses committed between July 19, 1979 (the date of the Sandinista revolutionary victory) through March 13, 1990.<sup>426</sup> Amnesty is granted to three groups of citizens: all Nicaraguans convicted of security and public order offenses, civilian and military

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422. *Jails and Justice in Nicaragua*, *supra* note 421, at 16. See also Rosa del Olmo, *Remaking Justice and Rehabilitation in Revolutionary Nicaragua*, 18 CRIME & SOC. JUST. 99 (1982).

423. The favored reading of the amnesty provisions of the Peace Plan suggested that they were "intended to apply to members of the political opposition as a means of achieving national reconciliation." See AMERICAS WATCH PEACE PLAN REPORT, *supra* note 420, at 5.

424. At the rates given, Nicaragua's incarceration rate is approximately 125 per 100,000 citizens. The United States has the highest incarceration rate in the world: 426 per 100,000 persons. MARC MAUER, AMERICANS BEHIND BARS: A COMPARISON OF INTERNATIONAL RATES OF INCARCERATION 4-5 (The Sentencing Project, Washington, D.C., Jan. 1991).

425. The first pardon occurred in March of 1989, when 1894 ex-National Guardsmen were released. LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRITIQUE OF THE DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1989 155-156 (July 1990). The second release, on the eve of national elections, resulted in the pardon of 1,190 people charged as contra rebels or under national security laws. O'Connor, *supra* note 358, at 1E.

426. *Ley de Amnistía General y Reconciliación Nacional*, Law No. 81, 53 LA GACETA (Mar. 15, 1990).

personnel who may have committed offenses in the investigation of security and public order crimes, and public employees who may have committed any of a number of criminal offenses involving embezzlement, fraud, or other state-related misconduct.<sup>427</sup>

Similar self-amnesties were passed in the neighboring countries of Guatemala and El Salvador, the former by the military government in 1986, and the latter as part of the Central American Peace Plan.<sup>428</sup> Both were strongly criticized by human rights monitors who believed that the intent of the Plan was subverted to avoid culpability by government officials and the military.<sup>429</sup>

In South America, amnesties of military governments for gross human rights violations have occurred in Uruguay and Argentina.<sup>430</sup> Delicate amnesty discussions are underway in Chile following the recent issuance of the report of the National Commission on Truth and Reconciliation.<sup>431</sup> These governmental acts take on

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427. *Id.* art. 1.

428. For a comparison of the Nicaraguan experience with that of El Salvador, see John J. Moore, Jr., *Problems with Forgiveness: Granting Amnesty Under the Arias Plan in Nicaragua and El Salvador*, 43 STAN. L. REV. 733 (1991). See also AMERICAS WATCH PEACE PLAN REPORT, *supra* note 420, at 17-19, 24-25; Hillary Richard, *The Salvadoran Amnesty Bill*, 12 HUM. RTS. INTERNET REP. 7 (1988).

429. AMERICAS WATCH PEACE PLAN REPORT, *supra* note 420, at 4-6; Richard, *supra* note 428, at 7-9; AMERICAS WATCH, A YEAR OF RECKONING: EL SALVADOR A DECADE AFTER THE ASSASSINATION OF ARCHBISHOP ROMERO 135-141 (1990); WASHINGTON OFFICE ON LATIN AMERICA, THE ADMINISTRATION OF INJUSTICE: MILITARY ACCOUNTABILITY IN GUATEMALA 2-4 (1989).

430. In Uruguay, the passage of an amnesty law was followed by a national referendum on its validity. AMERICAS WATCH, CHALLENGING IMPUNITY: THE LEY DE CADUCIDAD AND THE REFERENDUM CAMPAIGN IN URUGUAY (1989). In Argentina, the ruling junta passed a "Law of National Pacification" in 1983. The then newly elected civilian president, Raul Alfonsin, ordered the trial of military personnel, including the ruling generals, for human rights violations. Many were convicted. The historic occasion gave rise to a substantial literature. Emilio Fermia Mignone et al., *Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina*, 10 YALE J. INT'L L. 118 (1984); AMNESTY INTERNATIONAL, ARGENTINA, THE MILITARY JUNTAS AND HUMAN RIGHTS: REPORT OF THE TRIAL OF THE FORMER JUNTA MEMBERS (1987); AMERICAS WATCH, TRUTH AND PARTIAL JUSTICE IN ARGENTINA (1987); Paula K. Speck, *The Trial of the Argentine Junta: Responsibilities and Realities*, 18 U. MIAMI INTER-AM. L. REV. 491 (1987); Anne Marie Latchman, Comment, *Duty to Punish: International Law and the Human Rights Policy of Argentina*, 7 B.U. INT'L L. J. 355 (1989); Kathryn Lee Crawford, *Due Obedience and the Rights of Victims: Argentina's Transition to Democracy*, 12 HUM. RTS. Q. 17 (1990). All of the convicted generals have since been amnestied by the government of President Carlos Menem. Shirley Christian, *Argentina Frees Ex-Junta Leaders*, N.Y. TIMES, Dec. 30, 1990, at A9. Popular opinion on the amnesty was deeply divided. Shirley Christian, *In Echo of the "Dirty War," Argentines Fight Pardons*, N.Y. TIMES, Dec. 28, 1990, at A3; *Argentine Defends Release of "Dirty War" Leaders*, N.Y. TIMES, Dec. 31, 1990, at A4.

431. See Nathaniel C. Nash, *Chile: Most Want the Past to Sleep, A Few Still Live in Nightmares*, N.Y. TIMES, Apr. 7, 1991, at E2. See also Naomi Roht-Arriaza, *State Responsi-*

importance because of the implications, in those countries, of transition from military to civilian governments, and because they raise important questions of social policy. The argument for amnesty suggests forgiveness for prior human rights offenses, however horrible, in the name of national reconciliation and healing. The argument against suggests that, at the very least, the full truth about prior offenses be made public, thus allowing the victims of human rights crimes to achieve some measure of public vindication and justice.<sup>432</sup>

The Nicaraguan amnesty is distinguishable from the other amnesties described above on several grounds. First, unlike the Salvadoran amnesty, the Nicaraguan law was passed after the release of all political prisoners, and was not a means to subvert the intent of the Central American Peace Plan. Second, the amnesty was targeted to a small group of public employees and military personnel, unlike the other laws, which gave total impunity to all military personnel. Third, and most important, the Nicaraguan law does not amnesty those people involved in the most serious of human rights abuses—disappearance, torture, and assassination—as did the amnesty laws in Guatemala, El Salvador, and Uruguay. While the law may be justifiably criticized, as may any self-amnesty, the hysteria which the law provoked in the United States was vastly disproportionate to the impact of the law as enacted.<sup>433</sup>

## V. THE CLASH OF THE CLASSIC AND THE MODERN

The provisions of the old codes conflict in several significant respects with the new Constitution and post-revolutionary laws and decrees. More importantly, the premises of the old codes frequently clash with modern concepts of criminal justice. The election of a new government which promises to shift direction from

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bility to Investigate and Prosecute Grave Human Rights Violations in International Law, 78 CAL. L. REV. 449, 460-62 (1990).

432. See generally Roht-Arriaza, *supra* note 431; Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?* 12 HUM. RTS. Q. 1 (1990); Jose Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints*, 13 HAMLINE L. REV. 623 (1990); Robert K. Goldman, *International Law & Amnesty Laws*, 12 HUM. RTS. INTERNET REP. (1988); HUMAN RIGHTS WATCH, SPECIAL ISSUE: ACCOUNTABILITY FOR PAST HUMAN RIGHTS ABUSES (1989).

433. The law was misreported in the U.S. press, where it was said to grant "blanket" immunity for all past offenses of any government or military personnel. See, e.g., Mark A. Uhlig, *Sandinistas Move to Claim Property and Immunity*, N.Y. TIMES, Mar. 9, 1990, at A1.

the highly heterodox prior regime suggests possibilities for greater clarity in the unification of theory; yet it also threatens to reverse in the name of "democratization," any modernization of criminal justice which might have been accomplished by the Sandinistas. This section will explore some of these theoretical and practical clashes.

#### A. *Pre-Trial Detention of the Defendant*

The new Constitution contains a general right to individual liberty,<sup>434</sup> a presumption of innocence,<sup>435</sup> a guarantee of speedy trial,<sup>436</sup> and a remedy for illegal detention against the responsible official.<sup>437</sup> As noted earlier in the review of code provisions, however, the right to bail and its practical availability are extremely narrow.<sup>438</sup> Increasingly long periods of detention have coincided with rising crime and arrest rates and stagnant or declining judicial resources. High levels of detention without any criminal charges have been the subject of repeated criticism by human rights organizations. All of these phenomena have lent force to the argument that there was no serious effort to honor the presumption of innocence in revolutionary Nicaragua.<sup>439</sup>

High rates of pretrial incarceration are a widespread phenomenon throughout Latin America, and reflect similar practices in Europe.<sup>440</sup> While this does not excuse its use in Nicaragua, it does provoke some questions as to why the practice has enjoyed such widespread practice for so long in such wide areas of the world.

434. NICAR. CONST. art. 25(1).

435. *Id.* art. 34(1).

436. *Id.* art. 34(2).

437. *Id.* art. 33(4).

438. *See supra* notes 63-65 and accompanying text.

439. *See, e.g.,* 1987 LAWYERS COMMITTEE REPORT, *supra* note 394, at 15; 1987-1988 AMERICAS WATCH REPORT, *supra* note 291, at 55, 79.

440. A recent study sponsored by ILANUD, for example, shows that the pretrial incarceration rate in 18 civil law countries in this hemisphere averages about 69% of all prisoners, while the rate for 11 countries adhering to the "Anglo-Saxon" model averages about 23% of the total population. ELIAS CARRANZA ET AL., *EL PRESO SIN CONDENA EN AMÉRICA LATINA Y EL CARIBE* 26-27 (ILANUD: San José, Costa Rica, 1983). This is apparently not the case on the Continent, where the highest pre-trial incarceration rate in a 1961 study was France, with 44% pending trial. GERHARD O.W. MUELLER & FRÉ LE POOLE-GRIFFITHS, *COMPARATIVE CRIMINAL PROCEDURE* 102 (1969). But the practice of preventive detention was common and much-criticized in France 30 years ago. George W. Pugh, *Administration of Criminal Justice in France: An Introductory Analysis*, 23 *LA. L. REV.* 1, 21 (1961). It appears likely that continental practice may have had an influence on the adoption of preventive detention here. *See* MUELLER & LE POOLE-GRIFFITHS, *supra*, at 85-111.

The explanation may lie in the tenacity of historical inertia.<sup>441</sup> The long practice is consistent with premises of nineteenth century criminal procedure in which the *auto de prisión* was tantamount to a determination of guilt. Moreover, the entire process from arrest to adjudication, as originally contemplated, was only about two months long, meaning that the eventually acquitted defendant would not be incarcerated for long periods of time.

Whatever may be the reasons for the practice, data show incarceration of inmates without sentence in South American countries at more than twice the rate of those in North American countries following the common law tradition.<sup>442</sup> These rates of incarceration provoke reflection as to whether a presumption of innocence has efficacy if large numbers of persons are jailed over many months before their guilt or innocence has been formally determined in a court of law. Heavy use of pretrial detention is not likely to change with the election of the Chamorro government, since the tradition of pretrial detention is deeply rooted in the entire civil law system.

### B. *Popular Participation in the Criminal Process*

The new Constitution explicitly calls for both organization and function of the judiciary "with popular participation,"<sup>443</sup> while it reserves the right of the current system to operate until popular representation can be established.<sup>444</sup> Even with the transitional caveat, the absence of popular participation in the selection of judges or in the administration of the criminal justice system creates serious theoretical and practical problems.

No suggestion is offered as to how to accomplish the constitutional requirement of "organization" of the administration of justice through popular participation, since all judicial selection is now controlled by the Constitution and is by appointment rather than by popular election. Because of the abolition of jury trials and the failure of the Pilot Program proposal to adopt a system of lay judges, there is currently no popular participation at all.

Nicaraguan lawyers and judges are quick to admit that the current system fails to meet the constitutional requirement of pop-

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441. CARRANZA, *supra* note 440, at 29-36.

442. *Id.* at 48.

443. NICAR. CONST. art. 166.

444. *Id.* art. 199.

ular participation. Speculation about directions during the Sandinista government tended to focus on the adoption of a lay judge model similar to that which was abandoned with the TPAs, but which is widely used in both European and socialist law countries.<sup>445</sup> While these models seem unlikely in the Chamorro government, no other alternatives have been proposed.

A serious practical problem also arises from the abolition of juries. Their elimination leaves the district judge as the finder of both fact and law at the close of the plenary stage of the trial, applying the same evidentiary standard to all phases of the proceedings, as will be discussed in the next section. This has two major effects. It undoes the symmetry of evidentiary rules and burdens of proof which could be found previously in the balance of strict legal standards of formal proof before trial with the common sense standard of "inner conviction" applied by the jury. Moreover, it makes the second phase of trials largely superfluous, since the facts known to the judge at the close of the plenary stage are largely the same as those known at the close of the investigation stage, and the legal test for their consideration is virtually the same at both points.<sup>446</sup>

### *C. Reliance on Confessions and the Role of the Defendant in the Criminal Process*

An issue closely related to that of the provision of defense counsel is the heavy reliance in the criminal process on the use of confessions from the defendant and lack of protection for the accused through notice of either the right to remain silent or the consequences of making an extrajudicial statement.<sup>447</sup> Interrogation in

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445. JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 61-62 (1977); Tomlinson, *supra* note 36, at 142-45 (France); SALAS, *supra* note 417, at 232-35 (Cuba); Berman & Spindler, *supra* note 19 (Soviet Union).

446. While petit juries generally have been abolished on the Continent, some judicial official other than the examining judge reviews the record of proceedings and exercises independent judgment at trial. MERRYMAN & CLARK, *supra* note 15, at 701-07. In the U.S., this is true in the normal process of a serious criminal charge, where preliminary matters are normally heard by a lower court judge, a determination of probable cause is made, and the matter is passed on for trial before a second judge in a court of general jurisdiction. WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 23-26 (2d ed. 1992).

447. Such warnings are, of course, required in the United States. *Miranda v. Arizona*, 384 U.S. 436 (1966). Invocation of the right to counsel requires that the police desist until the opportunity to consult counsel has occurred. *Edwards v. Arizona*, 451 U.S. 477 (1981). This does not mean that the problem of police abuse has been cured. The debate on the efficacy of *Miranda* as a deterrent to police misconduct rages on. See Office of Legal Policy,



the absence of counsel is the norm, and has been the focus of criticism from human rights groups, particularly in light of new constitutional protection guaranteeing that no defendant is "obligated to declare against oneself . . . nor to confess oneself culpable."<sup>448</sup>

As noted above, the confession has been and continues to be, in a practical sense, the "queen of proofs." Despite the relaxation of evidentiary standards, the confession is still the most pragmatic source of information about the offense in question. Modern methods of crime detection and apprehension are virtually unknown in Nicaragua or the rest of the Third World, not only in the use of sophisticated techniques known to the United States, such as the newly developing field of DNA "fingerprinting," but even well-accepted and common techniques such as blood or drug testing.

Nicaragua, like most of its neighbors, lacks technology beyond even the most rudimentary systems for fingerprinting and photographing, and the systems for maintenance of central, accurate records of prior criminal conduct are marginally functional. This is neither to encourage or condone the use of these crime detection techniques, which create their own set of problems in U.S. society,<sup>449</sup> nor to encourage or condemn the use of confessions as a valid means of crime-solving, but only to recognize the force of custom and practice and the realities imposed by the absence of resources on developing countries everywhere.

Those traditional premises suggest that the defendant's confession is not only a valid source of information, but logically, the most appropriate of all. The U.S. concern with the voluntariness of confessions, which are screened by the court before their presentation as evidence of guilt to the jury to protect against their prejudicial impact,<sup>450</sup> is made a matter of weight, not admissibility, in the civil law tradition. Thus, the psychologically or even physically coerced confession is not per se inadmissible in the Nicaraguan court. The circumstances surrounding the taking of the evidence are to be carefully weighed by the investigating judge in determining the credibility to be afforded to the extrajudicial confession. This con-

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U.S. Dep't of Justice, *Report to the Attorney General on the Law of Pretrial Interrogation*, 22 U. MICH. J. L. REF. 437 (1989); Kamisar, *supra* note 185, at 584-89.

448. NICAR. CONST. art. 34(7). For a discussion of allegedly improper interrogations by Nicaraguan security police, see *supra* note 296 and accompanying text.

449. See, e.g., DIANA GORDON, *THE JUSTICE JUGGERNAUT: FIGHTING STREET CRIME, CONTROLLING CITIZENS* (1990).

450. *Jackson v. Denno*, 378 U.S. 368 (1964).

fession must, in any case, be freely and openly adopted by the defendant in court before it is permitted to be used as the sole proof of guilt.

#### D. *The Role of Defense Counsel*

One of the best examples of the clash of old and new values is found in the code's traditional limit on the participation of defense counsel in the investigative stage of the proceedings.<sup>451</sup> The new Constitution guarantees that the defendant will have the assistance of counsel "from the commencement of the process."<sup>452</sup> Human rights organizations have criticized the Nicaraguan courts for failure to fully comply with this constitutional mandate.<sup>453</sup> Principal among these criticisms is the practice of late appearance of defense counsel in the proceedings, the interrogation of the accused without the assistance of counsel and the provision of an ineffectual *defensor de oficio* when the accused cannot afford privately retained counsel.<sup>454</sup>

The right to defense counsel has developed slowly based primarily on the differences between the role of the process of adjudication in the non-adversarial context of the civil law, versus the "rights-based" adversarial process of the U.S. common law, which is in theory the most sensitive of any modern society to the rights of the accused. Moreover, in the U.S., at all critical stages of a prosecution, counsel is provided at state expense if the accused is legally indigent.<sup>455</sup>

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451. See *supra* notes 63-65 and accompanying text.

452. NICAR. CONST. art. 34(4).

453. The most recent example of this was in 1987-1988 AMERICAS WATCH REPORT, *supra* note 296, at 19-20, which criticizes the operation of the Police Courts.

454. Lawyers in Nicaragua frequently complained to me of the continued practice of denial of counsel until the plenary stage. In the legal clinics, because of resources and historical practice, the student appointed as *defensor de oficio* frequently does not appear until the investigation is over. Interview with Nora Pérez, Assistant Director of the Legal Clinic [*Bufete Popular*] of the Law School of Central American University, in Managua, Nicaragua (Aug. 4, 1988).

A 1989 study of the provision of defense services, conducted by the government's National Commission for the Promotion and Protection of Human Rights, found that retained lawyers filed six times as many pleadings as *defensores de oficio*, and that the *defensor* makes no written allegations in the case other than the general allegation of innocence and a request for sentencing. *DERECHO A LA DEFENSA*, *supra* note 263, at 14. The study, nonetheless, does not recommend the adoption of a paid appointed counsel system, or of public defenders, but only more rigor and enforcement of the current system of *defensores de oficio*. *Id.* at 24-26.

455. Every defendant, regardless of poverty, is entitled to counsel at state expense in all

Traditionally, in the civil law, the accused was not presumed to need the protection of counsel in the early procedural stages, as the investigating judge, an avowedly neutral power, takes on the role of accurately ascertaining the salient facts of the offense from all sources, including the accused. If rights were to be protected, the judge would do the protecting. The injection of defense counsel (and counsel for the state, through the *ministerio publico*, and later, the procurator) into the early stages of the proceedings change not only the dynamics of the proceedings, but the entire premise of trust in judicial authority upon which the former system was based. It is not unusual, then, that a legal system which puts strong emphasis on the integrity and formal power of the judiciary is ambivalent and slow in relinquishing that concentration of power.

As to the role of the appointed defense attorney provided by the state, there is little doubt that the promise of a lawyer for all accused, regardless of economic means, and guaranteed in human rights accords, is as hollow in Nicaragua as it is in the rest of Central and South America, with the sole exception of Costa Rica.<sup>456</sup>

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but the least serious offenses. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Counsel must be reasonably effective. *Strickland v. Washington*, 466 U.S. 668 (1984). The right to counsel extends to all critical stages of a criminal prosecution, including the earliest stages of charging through appeal. *Mempa v. Rhay*, 389 U.S. 128 (1967), and *Douglas v. California*, 372 U.S. 353 (1963). Upon arrest, the defendant must be informed of the right to counsel and the potentially adverse implications of making statements to state authorities. *Miranda v. Arizona*, 384 U.S. 436 (1966). Theoretically scrupulous adherence to the right to counsel is counterbalanced, however, by complete abandonment of the adversary system through disposition of the overwhelming majority of even the most serious charges by negotiated pleas of guilt, a practice which is unknown to the civil law. See, e.g., Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C.L. REV. 531, 547 n.113 (1988) (noting that in the New York City Criminal Court in 1985, only .5% of a total of 266,500 cases filed resulted in a trial verdict).

456. Systems of publicly financed defense counsel in criminal cases are very rare in Latin America. The most comprehensively funded and organized services are found in Costa Rica, where a nationwide staff of over 80 attorneys serves anyone who requests their services. Outside of Costa Rica, state funding provides defense services only in Uruguay, Peru, and Argentina. ILANUD, *Curso Regional: Defensa Pública* (San José, Costa Rica, Aug.-Sept. 1988) (course materials on file with the author); CARRIÓ, *supra* note 18, at 151-54. In Cuba, all criminal defense attorneys (indeed, all attorneys) must be members of lawyers' collectives, whose membership and salary are controlled by statute and party leadership. Adele Van der Plas, *Cuban Criminal Procedure: An Overview*, 6 REV. SOC. L. 31, 36 (1980). In Colombia, the office of the public defender exists statutorily, but is still in the planning stages. CÓDIGO DE PROCEDIMIENTO PENAL, art. 131, Decreto 1153 de 1987 (Medellín: Editora Jurídica de Colombia 1987). The provision of defense counsel throughout the remainder of Latin America is by means of the unpaid *defensor de oficio*. See generally Rojas, *supra* note 291, at 206-11.

The system of *defensores de oficio* has not functioned, and will not until the government is willing and able to invest in the resources necessary to provide counsel to all accused at state expense as a right, and not as part of the profession's obligation to provide such services on a pro bono basis.<sup>457</sup>

*E. Judicial Powers and the Emerging Authority of Police and Prosecution*

The traditional powers vested by the Code of Criminal Instruction in the investigating judge are eroded, since the locus of all initial referrals and screenings is in the police. Likewise, review of some of the most serious charges are made by the prosecution. Both the police and the prosecution are part of the executive branch by virtue of their control by the Ministry of Government.

The reasons for this change and its implications are difficult to assess. One explanation is purely historical. Because the operative code of criminal procedure was adopted in the last century, it is possible that the change was effected for modernization; the efficient processing of increasing numbers of cases can best be accomplished outside of the judicial machinery. This view is consistent with changes made in the European civil law countries,<sup>458</sup> within the common law tradition,<sup>459</sup> and in other Latin American nations

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<sup>457</sup> The right to defense counsel in the United States, despite significant state support, is not without significant criticism. See, e.g., GREGG BARAK, IN DEFENSE OF WHOM? (1980); Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474 (1985); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986). Standards promulgated by the American Bar Association, as well as a growing body of cases in the U.S., conclude that the state cannot constitutionally impose upon lawyers the obligation to assume the uncompensated defense of the legally indigent defendant without risking a violation of the client or the lawyer's constitutional rights. AMERICAN BAR ASSOCIATION, STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE, Standard 5-1.6 (3d ed. 1990) ("Government has the responsibility to fund the full cost of quality legal representation for all eligible persons. . . ."). For a summary of the states which have reached the question and held that free indigent defense services are not an enforceable duty of the private bar, now a majority of court which have reached the issue, see *State ex rel. Stephan v. Smith*, 747 P.2d 816, 835 (Kan. 1988).

<sup>458</sup> Tomlinson, *supra* note 36, at 150 (France); LANGBEIN, *supra* note 445, at 87 (Germany).

<sup>459</sup> Prosecutors in the United States are probably vested with more discretion than their counterparts in either of the other dominant traditions. For a discussion and comparison of prosecutorial powers see, Vera Langer, *Public Interest in Civil Law, Socialist Law, and Common Law Systems: The Role of the Public Prosecutor*, 36 AM. J. COMP. L. 279 (1988). Powers in the U.S. are "usually quite broad." *Id.* at 296.

which have adopted or proposed reforms.<sup>460</sup>

However, the socialist law countries, principally Cuba and Russia, have also adopted reforms which put the locus of screening, charging, and investigative power in criminal trials in the procuracy, and hence closer to central party machinery located in the executive branch.<sup>461</sup> This could be seen as either a move toward greater administrative efficiency or as a means of more direct control over judicial independence, particularly in criminal cases involving politically sensitive charges.

Lest there be some suggestion that greater prosecutorial discretion brings the Nicaraguan criminal process closer to the socialist model, it must also be recalled that the U.S. model of criminal justice also reposes virtually unlimited discretion within the prosecutorial branch. In the federal system, prosecutorial positions are filled by the leader of the party in power, the President, and closely monitored by that President's Department of Justice, which is part of the executive branch. Here too, the investigative machinery of crime is largely vested in the Federal Bureau of Investigation and carried out by U.S. marshals, all of which is controlled within the executive and not the judicial branch, as is increasingly the case in civil law reforms. Similar systems exist at the level of the individual states.

It appears most likely that the shift in powers away from the judiciary in criminal cases was a pragmatic, modernizing action and was not motivated primarily out of ideological concerns. First, the shift has not been so dramatic as to repose the kind and extent of control vested in the Russian and Cuban procuracies, which retain wide investigatory and extensive arrest powers throughout a criminal case.<sup>462</sup> In Nicaragua, the procuracy in fact reviews the case and hands it over to the judiciary once the initial screening and charging decisions are made. The judiciary also has the power to review and amend decisions made by the police in charging. Second, the complete loss of judicial personnel after the revolution and the utilization of untrained laypersons in many criminal courts

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460. See *infra* notes 464-69.

461. In the Soviet Union, the Procuracy directs investigation of criminal complaints through various independent agencies. Quigley, *Soviet Lock-Up*, *supra* note 12, at 125-26; Simmons, *supra* note 12, at 927-28; BARTON L. INGRAHAM, *THE STRUCTURE OF CRIMINAL PROCEDURE: LAWS AND PRACTICE OF FRANCE, THE SOVIET UNION, CHINA, AND THE UNITED STATES* 52-53, 63-64 (1987). The same is true in Cuba. SALAS, *supra* note 417, at 245-48.

462. INGRAHAM, *supra* note 461.

has made it necessary to grant discretion within the more experienced and better trained offices of the police and prosecution. Third, the amendment of prosecutorial powers in 1988, which removed the procuracy's exclusive jurisdiction in a wide range of cases, is a practical recognition that the rising rates of crime and the limited resources of the procuracy itself did not permit the careful and thorough review of cases by that office.

#### VI. THE IDEOLOGY OF "MIXED" PROCESS: INTIMATIONS OF THE ADVERSARIAL MODEL IN CIVIL AND SOCIALIST LAW

Changes in Nicaragua, then, suggest that it has moved, over time, to what is often referred to in the civil law as a "mixed" model of criminal process. The judge controls the early stages of the proof-production and screening, in classic inquisitorial style, while party control occurs at the decisional stage with more adversarial characteristics.<sup>463</sup>

Increased police and prosecution participation in initial investigation, the potential, if not the actuality, of increased party control of proof production, the greater sharing of files, and earlier intervention of defense counsel in the process all suggest that Nicaragua continues to strengthen its commitment to a "mixed" system and has enthusiastically embraced many of the essential components of adversarial process. If there is a trend, it is toward the use of the adversarial model at both the pre-trial and trial stages.

This transition to a "mixed" but increasingly adversarial system parallels changes which have occurred recently in criminal process in Latin America and Western Europe and, even more spectacularly, in socialist law countries throughout the Soviet bloc during the last two years. This trend toward more adversarial processes has implications for the administration of criminal justice throughout the Western world.

##### *A. Changes in Latin America: Mexico, Colombia, Argentina, and Guatemala*

The typology of the adversarial model is most represented in the concept of party control of fact-gathering and fact-offering,

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463. The term "mixed" is used throughout Latin America and Europe. See *supra* note 36 and accompanying text.

rather than a reliance on judges (or any other entity of state power, such as an independent investigative branch of the judiciary) for that function. By this measure, the trend in Latin America toward adversarial process seems well-advanced, particularly in the most industrialized countries.

New codes have recently been adopted in Mexico (1987),<sup>464</sup> and Colombia (1987),<sup>465</sup> while significant code reforms have been proposed in Argentina<sup>466</sup> and Guatemala.<sup>467</sup> In each of these revisions, the investigating judge is relegated to a lesser role. The police and prosecutor are given greater roles in independent fact-gathering during the initial stages of the case, and the defense lawyer is given both a right to early entry into the criminal process and open access to the files of the case. In each, the code's ideology adheres strongly to the presumption of innocence and the privilege against self-incrimination.

This is not to say that these governments have in fact improved the administration of criminal justice through more adversarial and accusatorial systems. Each of these countries has, in the last decade, been racked with the reality of brutally oppressive and often corrupt military or police forces which themselves have been implicated in the commission of serious and gross human rights violations.<sup>468</sup> This movement toward a more adversarial model, however, is accompanied by stronger and more agile mechanisms for the protection of both judicial independence and judicial review throughout Latin America and the Western world. These are further indications of the trend toward distrust in concentrated state power and toward a more individual and adversarial

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464. CÓDIGO PENAL Y DE PROCEDIMIENTOS PENALES PARA EL ESTADO DE MÉXICO, REFORMADO (1987); F. GARCÍA CORDERO, *LA REFORMA PROCESAL PENAL: 1983-1987* (1987).

465. CÓDIGO DE PROCEDIMIENTO PENAL, CONCORDADO (1987)(Colom.); P. VARGAS, *CUATRO TEMAS FUNDAMENTALES DEL NUEVO CÓDIGO DE PROCEDIMIENTO PENAL* (1987); H. GÓMEZ ARISTIZÁBAL, *NORMAS BÁSICAS DE PROCEDIMIENTO PENAL* (5th ed. 1987).

466. JULIO MAIER, *EL PROYECTO DE CÓDIGO PROCESAL PENAL DE LA NACIÓN* (1987).

467. PROYECTO DE CÓDIGO PROCESAL PENAL, REPÚBLICA DE GUATEMALA (1990)(unpublished draft in possession of author).

468. See, e.g., MINNESOTA LAWYERS INTERNATIONAL HUMAN RIGHTS COMMITTEE, *PAPER PROTECTION: HUMAN RIGHTS VIOLATIONS AND THE MEXICAN CRIMINAL JUSTICE SYSTEM* (July 1990); John Burstein, *U.S., Mexican Free Trade Pact? Not at Expense of Human Rights*, *ORLANDO SENTINEL*, Apr. 1, 1991, at A11; AMERICAS WATCH, *THE KILLINGS IN COLOMBIA* (Apr. 1989); MINNESOTA LAWYERS INTERNATIONAL HUMAN RIGHTS COMMITTEE, *JUSTICE SUSPENDED: THE FAILURE OF THE HABEAS CORPUS SYSTEM IN GUATEMALA* (Oct. 1990). For other reports on Guatemala, see *supra* note 305, and for a discussion of the conviction of the Argentine military leadership for human rights violations, see *supra* note 430.

process.<sup>469</sup>

### B. Changes in Europe: Italy and Spain

Significant steps toward an adversarial process have occurred in Italy and Spain. The most recent and significant criminal procedure revision, the Italian code of 1988,<sup>470</sup> is seen to take on the "soul" of the adversarial system, defined there as "the parties' initiative in collecting and producing evidence and the corresponding role the judge has to play as the referee in a dispute in which the public prosecutor is fully responsible for the burden of defending society by suppressing criminal behavior."<sup>471</sup> In the new code, both the state and the accused are permitted to produce evidence, call witnesses, and examine them.<sup>472</sup> The new code introduces a limited notion of plea bargaining.<sup>473</sup>

In Spain, amendments to criminal procedure since the 1987 post-Franco Constitution provide for the involvement of defense counsel within the first seventy-two hours of detention. Furthermore, the accused is to be advised of the facts leading to arrest, the right to remain silent, the right to designate a lawyer and to ask for the lawyer's presence, the right to notify family or friends of one's detention, and the right to be examined by a medical doctor upon detention.<sup>474</sup> On the Continent, then, there is movement toward a strongly adversarial system—arguably *exclusively* adver-

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469. In Nicaragua, this topic is addressed in INDEPENDENCIA DEL PODER JUDICIAL (Vilma Núñez de Escorcía ed., 1990). See also U.N. ECONOMIC AND SOCIAL COUNCIL, COMMITTEE ON CRIME PREVENTION AND CONTROL, IMPLEMENTATION OF THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, U.N. Doc. E/AC.57/1988/4 (1988); SHIMON SHETREET & JULES DESCHENES, JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE (1985); Centre for the Independence of Judges and Lawyers, *Universal Declaration on the Independence of Justice*, 12 CIJL BULL. 27 (1983); Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1 (1987); Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989).

470. Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 TEMP. L. REV. 1211 (1989); Lawrence J. Fassler, Note, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, 29 COLUM. J. TRANSNAT'L L. 245 (1991).

471. Amodio & Selvaggi, *supra* note 470, at 1213.

472. *Id.* at 1220.

473. *Id.* at 1219; Jeffrey J. Miller, *Plea Bargaining and Its Analogues Under the New Italian Criminal Procedure Code and in the United States: Towards a New Understanding of Comparative Criminal Procedure*, 22 N.Y.U. J. INT'L L. & POL. 215 (1990).

474. Henry W. McGee, Jr., *Counsel for the Accused: Metamorphosis in Spanish Constitutional Rights*, 25 COLUM. J. TRANSNAT'L L. 253, 268-70 (1987).



serial in Italy.

### C. *Changes After Perestroika in Eastern Europe and Russia*

Similar changes have occurred in Russia under *perestroika*, where reform proposals reflect a belief in the efficacy of the adversarial model and propose to take Soviet procedure toward adversarial styles of dispute resolution. Former General Secretary Gorbachev explicitly called for the adoption of an adversary process and a strong presumption of innocence in 1988.<sup>475</sup>

The Soviets are proposing to move toward a more adversarial system through the adoption of significant elements of the adversarial model, such as the early involvement and greater independence of defense counsel,<sup>476</sup> greater discretion and independence for the procuracy and criminal investigators,<sup>477</sup> and a general strengthening of the presumption of innocence.<sup>478</sup> Likewise, in the Soviet Union and Eastern Europe, the courts themselves are given more independence and power of review, bringing them ever closer to the civil and common law models.<sup>479</sup>

### D. *The Emerging Dominance of the Adversarial Process*

Why, it must be asked, do civil and socialist law reformers seem to regard the adversarial procedural model as a more effective means to achieve truth or justice<sup>480</sup> than the inquisitorial methods of the past? Why, indeed, is there an inclination for more

475. Simmons, *supra* note 12, at 941.

476. Eugene Huskey, *The Politics of the Soviet Criminal Process: Expanding the Right to Counsel in Pre-Trial Proceedings*, 34 AM. J. COMP. L. 93 (1986); Peter H. Solomon, *The Role of Defence Counsel in the USSR: The Politics of Judicial Reform Under Gorbachev*, 31 CRIM. L. Q. 76 (1988-89). For an excellent account of the traditional role of defense counsel in Soviet criminal proceedings, see Jean C. Love, Comment, *The Role of Defense Counsel in Soviet Criminal Proceedings*, 1968 WIS. L. REV. 806.

477. John Quigley, *Soviet Courts Undergoing Major Reforms*, 22 INT'L LAW. 459, 467-68 (1988); Quigley, *Soviet Lock-Up*, *supra* note 12, at 126-29; Simmons, *supra* note 12, at 934-38.

478. John Quigley, *The Soviet Conception of the Presumption of Innocence*, 29 SANTA CLARA L. REV. 301 (1989).

479. See Markovits, *supra* note 11, at 402-03 (Poland, Hungary and East Germany); Quigley, *supra* note 477, at 460-62; Simmons, *supra* note 12, at 930-31, 947-48.

480. Whether justice or truth should be the objective of process, and the different structures needed to accomplish either goal, are the subject of John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978). See also Wilfried Botke, *Rule of Law or "Due Process" as a Common Feature of Criminal Process in Western Democratic Societies*, 51 U. PITT. L. REV. 419 (1990).

adversarial processes, a key feature of the U.S. system, when throughout the last two decades, common law scholars turned to Continental and even socialist systems for potential solutions to what was perceived as an unstable, weakened, or even bankrupt U.S. adversarial system?<sup>481</sup> The inquiry seems even more compelling because recent U.S. attempts to export variations of the adversary system to the region have been almost unmitigated failures.<sup>482</sup> The U.S. Agency for International Development's Administration of Justice program, inaugurated in the early 1980s, initiated programs in most of Central America other than Nicaragua, as well as some South American and Caribbean countries.<sup>483</sup> Total cost of the program approached \$100 million by the end of the decade.<sup>484</sup> While failure can be attributed in part to the lack of political will in these countries, and not to the flaws of adversarial process itself, resistance to the adoption of more adversarial styles cannot be

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481. The literature is large and growing despite the contrary trend in the law. See MUELLER & LE POOLE-GRIFFITHS, *COMPARATIVE CRIMINAL PROCEDURE* (1969)(suggestions for reform of U.S. criminal procedure, using European models); LLOYD WEINREB, *DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES* (1977)(presenting alternative mechanisms based on the continental model); Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How the French Do It, How We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 542 (1990); Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1974)(pointing out the salutary aspects of assumption of "inquisitorial" aspects by the U.S. adversarial and accusatory system); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979); John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195; Rudolph B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFF. L. REV. 361 (1976); Thomas Weigend, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, in 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 381 (Norval Morris & Michael Tonry eds., 1980).

Another line of criticism of adversarial criminal process emerges from the Critical Legal Studies movement. David O. Friedrichs, *Critical Legal Studies and the Critique of Criminal Justice*, 11 CRIM. JUST. REV. 15 (1986); David Rudovsky, *The Criminal Justice System and the Role of the Police*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 314 (2nd rev. ed. 1990); Mark Tushnet & Jennifer Jaffe, *Critical Legal Studies and Criminal Procedure*, 35 CATH. U. L. REV. 361 (1986).

482. The programs have been the target for unrelenting criticism from human rights groups, both because of their failed attempts at reform of criminal process and because they miss the central question in the regimes in which they work: the impunity of the military and police themselves for repeated human rights crimes of the most violent and repressive nature. ANDERSON, *supra* note 305, at 60; LAWYERS COMMITTEE FOR HUMAN RIGHTS, *UNDERWRITING INJUSTICE: AID AND EL SALVADOR'S JUDICIAL REFORM PROGRAM* (Apr. 1989); WASHINGTON OFFICE ON LATIN AMERICA, *ELUSIVE JUSTICE: THE U.S. ADMINISTRATION OF JUSTICE PROGRAM IN LATIN AMERICA* (May 1990)[hereinafter *ELUSIVE JUSTICE*].

483. *ELUSIVE JUSTICE*, *supra* note 482, at 14.

484. *Id.* at 17.

denied.

Moreover, the adversarial process has given rise to ever-increasing calls for reform on grounds that the criminal practitioner is unable to ethically balance the issues of client loyalty with the competing interests of candor to the tribunal and protection of the public.<sup>485</sup> This debate continues in a system which has a vigorously debated and strongly enforced set of codes of professional conduct. In Nicaragua, there is no code of ethics, and disciplinary proceedings are virtually unheard of. The same is true with many other countries in the civil law tradition, where the lawyer and judge are seen as mere instruments of the law and legislature.<sup>486</sup> Without self-conscious attention to the ethical dilemmas of adversarial process, and the means to enforce lapses in ethical responsibilities, the risks to systemic integrity are high, and the invitation to overt corruption is open.

Many critics have justifiably charged that the U.S. adversarial "model," is nothing more in practice than an assembly line for the private bargaining of justice.<sup>487</sup> Why, then, do foreign systems seek to emulate its mechanisms? The inquiry into the integrity of premises thus implicates not only Nicaragua's justice system but the foundations of the entire civil and socialist law in criminal process.

There are a number of potential explanations for the historical and ongoing progression toward a more adversarial criminal process. One arrogant and ethnocentric but obvious explanation is that adversarial process is, in fact, intrinsically better. This seems highly unlikely, given the thrashing which the adversary system regularly takes at the hands of its own participants, observers, and analysts. If anything, the modern civil law systems seem to function better than the mechanisms of the adversarial model. The simple fact is that plea bargaining, not criminal trials, is the norm in the U.S. adversary system; a shift toward private bargaining of criminal justice can hardly be called a step up the evolutionary ladder to justice.

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485. Freedman, *supra* note 71; William H. Simon, *The Ideology of Advocacy*, 1978 WIS. L. REV. 29; Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301 (1989); David Wasserman, *Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation*, 49 MD. L. REV. 392 (1990).

486. See, e.g., Olga M. Pina, *Systems of Ethical Regulation: An International Comparison*, 1 GEO. J. LEGAL ETHICS 797 (1988) (comparing U.S. ethical codes and disciplinary machinery with those of Spain and France).

487. See, e.g., Langbein, *supra* note 74; Malcolm M. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338 (1982).

It seems more likely that the adversarial model carries sway because of its pervasive image of efficacy, an imagery purveyed by the television model of articulate combat between equally armed adversaries, of the prosecution's burden of proof beyond a reasonable doubt, of the defendant's protection by the presumption of innocence, of popular participation through trials by jury, and of the many procedural safeguards which balance the individual interests of the accused against those of a powerful state. That these images prevail despite the reality of adversarial process is testimony to the power of the popular media and of fictional accounts which project that image through focus on the occasional drama of the jury trial rather than the sordid reality of bargained-for justice.

Another possible explanation lies in the growth of power in the nation-state and the commensurate growth in distrust on the part of its citizens in the ability of the judge, as representative of the state, to exercise state authority, the most essential component in the non-adversarial equation, in a balanced and neutral manner. If this is true, however, one must wonder why the shift is toward the vesting of enormous and largely unreviewable discretion in the police and prosecution for the effective resolution of cases. Unless it is possible that we have not calculated the consequences of this shift in the locus of state power, this explanation loses its persuasive power.

The most likely explanation may lie with the exigencies of numbers and the growth of administrative bureaucracies. As the rates of reported crime and arrests have risen consistently throughout the industrialized world in the late twentieth century, no system which relies heavily on the slow, methodic, neutral use of state bureaucratic machinery provides for efficient resolution of the case. The processing of enormous numbers simply has proven unequal to the task of fairness. Perhaps the numbing frequency of criminality forces systems away from prolonged fact-gathering and fact presentation, at the conclusion of which a neutral judicial officer will determine guilt or innocence. Instead, police and prosecutorial bureaucracies become the locus of unfettered discretion in screening for the existence of a crime and resolution of guilt through private negotiation.<sup>488</sup>

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488. This assumes, of course, that the greater political system will continue to allocate resources to the police and courts in their current proportions. The former garner the vast majority while the latter receive only a pittance, even when combined with the resources allocated to the most common representatives of the parties in judicial proceedings, the

## VII. CONCLUSION: NO NEW DIRECTIONS IN THE CHAMORRO ADMINISTRATION

These, then, are the changes in law and the conflicts in structural integrity which faced the newly elected government in Nicaragua in 1990. That government purports to offer not only national reconciliation and an end to U.S.-sponsored intervention but also a distinct philosophical shift from the heterodox Marxism of the prior administration to "democratization and reconciliation." It aims at a society more open to public debate and decision-making, with a concomitant commitment to a more privatized, free-market-controlled economy. Thus far, the actions of the Chamorro government have focused much more on private markets than on free debate.<sup>489</sup>

The contra war continued through the 1990 elections; international attention was focused again on Nicaragua when religious workers from the United States were attacked by contra forces in December 1990 and two nuns were killed.<sup>490</sup> The most important accomplishments of the new administration were the termination of the contra war, the demobilization of the contras, and a reduction by two-thirds of the Sandinista army.<sup>491</sup> The human rights climate has improved markedly for free speech and the right of assembly. On the other hand, the Sandinistas, while cooperative in the electoral process and the subsequent transition of power, have

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prosecutor and the public defender. In 1990, the total budget of the judicial branch in Nicaragua, for example, was reportedly only .45% of the national budget, while neighboring Costa Rica's judiciary is constitutionally required to receive 6% of the national budget. SOLIS & WILSON, *supra* note 348, at 44 n.164. If those proportions were to change, the premises of the text would no longer hold.

489. Mark A. Uhlig, *In the Democracy of Nicaragua, Control Is Still from the Top*, N.Y. TIMES, Sept. 23, 1990, at E2; *After 100 Days: Same Economic Script, New Lead Actors*, 9 ENVÍO 14, 19 (Aug.-Sept. 1990).

490. Some opposition members initially suggested that the attack on the U.S. nuns was a ploy by the Sandinistas to cast blame on the contras and their UNO allies just before the national elections. Americas Watch, which conducted a thorough investigation of the event, concluded that the contras had indiscriminately attacked the travelers. "In Nicaragua the army and the MINT do not have a track record of killing priests or nuns, however testy relations with the church have been." AMERICAS WATCH, THE NEW YEAR'S DAY KILLINGS OF THE NUNS IN NICARAGUA: A REPORT ON AN INVESTIGATION 50 (Jan. 1990).

491. Antonio Lacayo, *Good Things Are Happening in Nicaragua*, WASH. POST, Mar. 6, 1991, at A19; Oscar Arias, *An Invasion from Within*, WASH. POST, Mar. 24, 1991, at C5. There have been alarming signals, following the assassination of former contra leader Enrique Bermúdez, that a new "re-contra" force is emerging in the northern mountains. Edward Cody, *Up to 200 Disenchanted Contras Take Up Arms Again*, WASH. POST, Apr. 9, 1991, at A15.

managed to keep a firm hold on control of both the army and the police. Troubling reports also have emerged of Sandinista army involvement in previously undisclosed wrongdoing.<sup>492</sup> Crime is at its highest level since 1980.<sup>493</sup> However, despite U.S. economic assistance, the new administration still fights to avoid total collapse of the economy.<sup>494</sup>

Changes in the Soviet Union and Eastern Europe profoundly affected the economic relationship between that region and Nicaragua,<sup>495</sup> as well as the political theory of the Sandinista leadership.<sup>496</sup> The FSLN still controls forty-two percent of the seats in the National Assembly until the next national elections in 1996,<sup>497</sup> and holds a narrow majority of the Supreme Court through at least 1993.<sup>498</sup> A Sandinista-controlled Supreme Court will play a strong role in any attempts at a criminal justice reform because all such proposals are subject to review for constitutionality. Because control of the Supreme Court also means the ability to name all judicial appointees in the lower court, the Chamorro government has choked off the court by reducing the judiciary's budget to about one-half of one percent of the entire national budget.<sup>499</sup>

Pre-election promises of the UNO coalition in the area of criminal justice reform were few. They focused on the protection of human rights and full implementation of the Constitutional guarantees for individual protection in criminal procedure, including the adoption of the jury trial.<sup>500</sup> This hardly meant that the Con-

492. AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT: 1990, at 175-79 (1990); U.S. Department of State, *Nicaragua*, in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990, at 701 (1991); Paul Berman, *Neckties and Mass Graves*, VILLAGE VOICE, Mar. 5, 1991, at 33; Mark A. Uhlig, *Sandinistas Accused As Burial Sites Are Unearthed*, N.Y. TIMES, Aug. 5, 1990, at A22.

493. Jan Howard, *Worst Crime Wave in 10 Years Affecting Postwar Nicaragua*, MIAMI HERALD, Nov. 4, 1991, at A12.

494. William Branigan, *Sandinista Hold on Army, Police, Haunts Chamorro*, WASH. POST, Aug. 7, 1990, at 8A; Shirley Christian, *Nicaragua Devalues Money to Stem Economic Collapse*, N.Y. TIMES, Mar. 5, 1991, at A3; Mark A. Uhlig, *In Nicaragua's Police, Sandinistas Are Dug In*, N.Y. TIMES, Nov. 4, 1990, at A14.

495. It is estimated that Soviet economic aid during the years from 1979 to 1988 totaled approximately \$3 billion. COUNTRY GUIDE, *supra* note 17, at 108. This situation has already changed with the increasing domestic instability in the Soviet bloc. See, e.g., Mark A. Uhlig, *Uniting the Germans, in a Latin American Setting*, N.Y. TIMES, Sept. 29, 1990, at A2.

496. *FSLN Discussion Papers*, 9 ENVÍO 48 (Aug.-Sept. 1990); Mark A. Uhlig, *Sandinista Leadership Rethinking Its Ideology*, N.Y. TIMES, Aug. 10, 1990, at A4.

497. SOLIS & WILSON, *supra* note 348, at 26.

498. *UNO's Court-Packing Plan*, 10 ENVÍO 15 (Jan.-Feb. 1991).

499. *After 100 Days: Still Three Roads Ahead*, 9 ENVÍO 3, 5 (Aug.-Sept. 1990).

500. UNIÓN NACIONAL OPOSITORA (UNO), PROGRAMA DE GOBIERNO 5-7 (Aug. 1989).

stitution was sacred; a fourteen-point reform program was proposed which included proposals to guarantee judicial independence, to create a national Procurator for Human Rights, and to adopt a separate high court limited to review of constitutional questions.<sup>501</sup>

The UNO coalition has yet to mount any serious effort to amend the 1987 Constitution, largely because the Sandinistas still control forty-two percent of the Assembly, and processes by which the Constitution can be amended require a two-thirds majority of that body.<sup>502</sup> Mrs. Chamorro, however, has taken a few small steps to revise the structure of her administration's treatment of crime and criminal process. Most significantly, consistent with campaign promises, she has dismantled the Ministry of the Interior and with it the structures of the DGSE, the state security police. In addition, she has created a powerful new Ministry of Government, which controls all criminal justice functions of the executive branch with the exception of the office of the Procurator General, which continues to operate independently.<sup>503</sup> Finally, Mrs. Chamorro has renamed the Sandinista Police the National Police and has agreed, in her successful efforts to disarm the contras, to the creation of a "Rural Police" made up of former members of the contras who are permitted to guard the land areas given to the contras for resettlement.<sup>504</sup>

One struggle within the government ironically lies between the executive and the judiciary and focuses on judicial independence, an issue part of the opposition critique in the pre-election reforms of the UNO opponents to the 1987 Constitution. The Supreme Court, Sandinista-controlled and in office until 1993 because elected to six-year terms in 1987, holds enormous sway over governmental policy-making through the existence of the newly-created power to review laws for constitutionality.<sup>505</sup> The power takes on even more significance when it is noted that the Chamorro ad-

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501. *Id.* at 7-8. The basis for constitutional reforms by the opposition is found in the work of Managua attorney RÓGER MIRANDA GÓMEZ, *FAZ Y ANTIFAZ: ESTUDIO DE LA CONSTITUCIÓN SANDINISTA* 179-87 (1988).

502. SOLIS & WILSON, *supra* note 348, at 24, 26.

503. Decree No. 1-90 of April 25, 1990 both abolished the old ministry and created the new Government Ministry. *Decreto de Ley Creadora de Ministerios de Estado*, No. 1-90, arts. 3, 15, Apr. 25, 1990 (unofficial version in the files of the author). The new law, however, also creates, within the Government Ministry, a "Civil Intelligence Service," whose duties are otherwise unarticulated. *Id.* art. 3(7).

504. *Crece Incertidumbre por Policía Contra*, BARRICADA, June 7, 1990, at 1.

505. See *supra* notes 411-15 and accompanying text.

ministration has acted frequently through the use of executive and administrative orders which permit bypass of the National Assembly.

During the summer of 1990, the government proposed to augment the number of magistrates on the Court from the constitutional minimum of seven to fifteen, which would give the UNO forces a clear voting majority on the high court. This proposal is similar to efforts in the United States, during the administration of Franklin D. Roosevelt, to "pack" the Supreme Court with Justices who would more likely be sympathetic with his radical reforms of government which focused on the greater assumption of executive power.<sup>506</sup>

The Nicaraguan Supreme Court responded with its own internal restructuring. It divided itself into three chambers—criminal, constitutional, and labor/agriculture—each composed of three members, and asked the legislature to begin the process for adding two new members to its number.<sup>507</sup> After extensive infighting, the Sandinista majority stands.

These institutional changes are the only steps taken in criminal justice by the new administration. There are no proposals for new codes and none planned in the immediate future. This fact, perhaps more than any other, indicates that the changes made by the Sandinistas to criminal procedure for common crimes were part of a general modernization of an essentially civil law justice system like that of its Central American neighbors, not one marked by strong indicia of socialist law structures or theory, as those to which Cuba struggles to adhere.

Challenges for the new government are awesome and perhaps insurmountable. Two major strikes by public workers within the first few months of the new government's assumption of power do not bode well for the promised reconciliation.<sup>508</sup> The biggest factor in its favor is the simple fact that the U.S. now aligns itself in favor of the government rather than unalterably opposed to it. Only time will tell whether the Nicaraguan people will accept or reject the agenda for change with which they are now faced.

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506. *UNO's Court-Packing Plan*, *supra* note 498, at 11-12.

507. *Acuerdo No. 50*, June 8, 1990, reprinted in *BARRICADA*, June 9, 1990, at 4.

508. Tim Coone, *Nicaragua Still Unsettled by Strike Aftermath*, S.F. EXAMINER, July 29, 1990, at 10A; Mark A. Uhlig, *Sandinistas, Ending Strike, Declare Victory*, N.Y. TIMES, May, 18, 1990, at A4.