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The Rule of Law in the Nicaraguan Revolution

Alejandro Serrano Caldera

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The Rule of Law in the Nicaraguan Revolution*

ALEJANDRO SERRANO CALDERA

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* Editors' note: In recognition of Dr. Serrano's substantial role in the drafting of the Nicaraguan Constitution, the Journal has endeavored to present his thoughts with as little editing as possible. This work is a subjective, primary resource. It is not an objective essay.
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The Rule of Law in the Nicaraguan Revolution

ALEJANDRO SERRANO CALDERA

PREFACE

BY ROBERT W. BENSON*

The Sandinista Revolution in Nicaragua, one of the momentous social events of our time from any political viewpoint, entered a new phase with the birth of the Nicaraguan Constitution in 1987. Whatever understanding, or misunderstanding, anyone had of the embryonic phase of the Revolution, which began in 1979 with the victory of the Sandinista Front and the exit of the Somoza dictatorship, must now be revised in light of the new Constitution. The Constitution is the charter not only for the elections of 1990, but also for the entire structure of public life in Nicaragua for the foreseeable future.

A constitution, like any other legal text, acquires its meaning from both context and application. Words alone mean nothing; constitutions are mere black marks on paper, signifying nothing but a haze of language over reality. In fact, however, the words are charged with powerful meaning because they are never alone. They are always embedded in a context and as applied are used as potent instruments of government. The better conclusion, then, is that we should pay close attention to a constitution's words—in context and as applied.

The historical context in which the 1987 Nicaraguan Constitution was drafted and adopted is extraordinary. Nicaragua was a small society engaged in revolutionary reorganization while, at the same time, defending itself against aggression which was financed and directed by one of the world's superpowers. More fundamentally, the context from which any constitution arises is what the Spanish philosopher Ortega y Gasset, in defining a nation, called a people's "life

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† Dr. Serrano served as President of the Supreme Court of Justice of Nicaragua between 1985 and 1988 and is currently serving as the Nicaraguan Ambassador to the United Nations. Dr. Serrano was also a professor of legal philosophy at the National Autonomous University of Nicaragua between 1965 and 1974. He served as Nicaragua's Ambassador to France beginning in 1979, as well as Ambassador to UNESCO and other organizations of the United Nations. In addition, Dr. Serrano was a specialist in labor law at the University of Rome and is currently a doctoral candidate at the University of Paris.

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project in common." A constitution is the project's guiding plan. How have the Nicaraguans planned their common life project? Why, what, and whose ideas competed? What compromises were made? Most importantly, how does all this charge the words of their Constitution with certain meaning at the moment of its birth? With regard to application, further questions arise: what meaning does the text gather when applied in specific instances over the course of time? Is it possible for the Constitution's text to be applied impartially in a revolutionary society or in time of war? Can the liberal western democracies' concept of the Rule of Law exist in Nicaragua today?

The pages that follow provide direct and indirect evidence of some answers to these questions from an important source. The work is a collection of essays, lectures, and speeches by the man who was President of Nicaragua's Supreme Court of Justice between 1985 and 1988 and who presently serves as Nicaraguan Ambassador to the United Nations, Dr. Alejandro Serrano Caldera.

Dr. Serrano, together with his judicial colleagues and others, discussed, debated and drafted ideas which significantly influenced the final constitutional text, particularly with regard to the role of the judicial branch. Then, after the Constitution was promulgated in January 1987, he and his colleagues began the work of transforming the judiciary and proposing significant modifications of existing law to conform to the new charter. As head of the Judicial Branch during this formative period immediately before and after Nicaragua adopted the Constitution, Dr. Serrano analyzed, negotiated, articulated, and administered these changes. The works collected here reflect his labors during that period.

Published in Spanish as two books, they are combined here for publication in the Loyola of Los Angeles International and Comparative Law Journal under a title that states their unifying theme: The Rule of Law in the Nicaraguan Revolution. Scholars and lawyers in the United States customarily look to the writings of James Madison, Chief Justice John Marshall, and others for evidence of their own Constitution's formative context. Dr. Serrano's works will hopefully serve the same important function in understanding the Nicaraguan Constitution. Moreover, the works will be indispensable for any seri-

ous study of one aspect of the Nicaraguan Revolution that, to date, has been virtually overlooked. That aspect is the emergence of the Judicial Branch as a center of power.

Readers should keep in mind that Dr. Serrano’s chapters are prime source documents: speeches and essays delivered to audiences involved in developing the Constitution. They are not after-the-fact academic analyses. Therefore, their style is discursive, wide-ranging, and designed for particular audiences. While this sometimes makes for difficult reading, it increases the value of the chapters as mirrors of historical reality at a key moment in Nicaraguan politics. To see what is reflected in those mirrors, one must not only look to the ideas expressed, but also to the composition of the audiences, to Dr. Serrano’s position as President of the Supreme Court, and to the wider political and international struggles that were taking place at the same time.

It was good fortune that, during this period, the Supreme Court President was a scholar in legal philosophy rarely found in public servants, even those in the judiciary. Dr. Serrano was professor of legal philosophy at the Autonomous National University of Nicaragua between 1965 and 1974 and General Secretary of the University from 1968 to 1974. Beginning in 1979, he served as Nicaragua’s Ambassador to France, Ambassador to Italy, as well as Ambassador to UNESCO and several other specialized United Nations organizations. He has been a specialist in labor law at the University of Rome and is currently a doctoral candidate at the University of Paris. Dr. Serrano is the author of several other books, including Subdesarrollo, Dependencia y Universidad (1971), Derecho del Trabajo (1972), Introducción al Pensamiento Dialéctico (1976), Dialéctica y Enajenación (1979), Existe Una Crisis del Racionalismo? (1982), La Permanencia de Carlos Marx (1983), Filosofía y Crisis (1984), and Entre la Nación y el Imperio (1988).

To understand how Dr. Serrano’s commentaries influenced both the Constitution and the rise of the new legal system, the reader should have a sketch of the pre-existing legal framework and of the lengthy discussion and drafting process the Nicaraguans followed to arrive at the 1987 Constitution.

On July 19, 1979, as the revolution triumphed, the Governing Junta of National Reconstruction issued a basic Governing Program. The Governing Program separated the executive, legislative, and judicial powers. Legislative power was vested in a Council of State composed of representatives of the various forces that had toppled the
The Somoza regime. The Program guaranteed political pluralism, a mixed economy, non-alignment in foreign policy, and protection of human rights recognized in a number of international treaties. Within days, these principles were formally reiterated and reinforced by the Fundamental Statute for the Republic and The Statute of Rights and Guarantees of Nicaraguans. Together they filled the role of a constitution. During the next several years, the Junta and the Council of State issued thousands of laws which resulted in profound changes in the economic, social, and political life of Nicaragua. In March 1982, while facing counterrevolutionary guerrillas and other interventions financed by the United States government, the Junta issued a state of emergency decree suspending the press’ right to be free from censorship and other important rights.

The Fundamental Statute had promised general elections for a National Assembly in accordance with an electoral law to be promulgated as soon as conditions permitted. A Political Parties Law was approved in 1983 and the Electoral Law in 1984. The Electoral Law, which went through several drafts during negotiations between Sandinista (“FSLN”) and opposition parties, placed control of elections in a fourth, autonomous government branch—the Supreme Electoral Council. Elections were scheduled for November 1984. Close to ninety-four percent of eligible voters, age sixteen and older, registered. The turnout on election day was seventy-five percent. Although the election was boycotted at the last minute by the candidates supported by the United States, it was viewed as fundamentally fair and legitimate by most non-partisan international observers. In this election, the FSLN received sixty-seven percent of the vote while six opposition parties divided the remaining thirty-three percent. A FSLN President and Vice-President were elected. Under the system of proportional representation, which assures minority party representation, opposition parties took thirty-five seats (including six seats guaranteed to their losing presidential candidates) in the ninety-six-seat National Assembly.

In April 1985, the Assembly President appointed a Special Constitutional Commission (“Commission”) to draft the new constitution. The Commission was made up of twenty-two Assembly members, twelve from the FSLN and ten from the six opposition parties. The Commission was divided into three subcommittees: foreign consultation, national consultation, and drafting. The Subcommittee on Foreign Consultation sought information from approximately six Latin American countries, the Soviet bloc, Western Europe and the
United States. The Subcommittee on National Consultation heard proposals from nine political parties and numerous interest groups in every sector.

In February 1986, the Commission presented a first draft of the Constitution to the National Assembly and broadly circulated it through the media for discussion. Over a two-month period, the draft was discussed at seventy-three town-hall style forums in communities across Nicaragua. The forums drew 100,000 people, as well as 2,500 oral, and 1,800 written comments. The National Assembly then debated and modified the draft over another two-month period. Finally, the Constitution was adopted in December 1986, to take effect in January 1987. Dr. Serrano's essays cover this entire period as well as the initial implementation period through March 1988. The essay does not cover, however, the 1989 peace process initiated by the five Central American presidents which resulted in a political accord between the Sandinistas and opposing political parties. They also do not cover the promised dismantling of counter-revolutionaries financed by the United States who were operating from Honduran soil, or the agreement for internationally-supervised elections to take place in February of 1990.

In 1986, the Supreme Court of Justice, after seminars and consultations of its own with Nicaraguan jurists, domestic and foreign legal scholars, Executive Branch officials, and others, sent the National Assembly a proposal for the constitutional text on the Judicial Branch. The proposal, which significantly influenced the adopted Constitution, is included here along with the Constitution itself.

There are several crucial issues which the Judicial Branch confronted and which thread themselves throughout these pages. They include:

1. The power of the Supreme Court to review laws for unconstitutionality, and whether judicial review should be confined to overturning only the application of the law in individual instances, or overturn the entire law itself;

2. The elimination of Anti-Somoza People's Courts and other specialized tribunals created outside of the existing judiciary;

3. The commitment to popular or lay participation in the justice system;

4. Judicial independence;

5. The appropriateness of separation of powers doctrine in a revolutionary state;
(6) The reserve of law doctrine (non-delegation of legislative power to the executive branch);

(7) Reorganization of the Judicial Branch; and

(8) Rewriting the Code of Criminal Procedure and other pre-revolutionary codified law in order to conform to the new order.

Transcending all of these issues is the question of what the Rule of Law means in revolutionary Nicaragua. This is a leitmotif running through Dr. Serrano's work. Without doing a disservice to the modulations he gives the theme, it is fair to say that, for Dr. Serrano, the Rule of Law is neither the mechanical application of abstract, universal norms of law to social facts (the dominant version of Rule of Law in western liberal democracies), nor is it merely a legitimating mask for the exercise of political power (the version advanced by the liberal Anglo-American and European legal scholarship). To be sure, Dr. Serrano breaks sharply with the classic liberal version:

[The] Rule of Law, is not a logical-rational construction, outside of time and space, but rather a body of rules rationally articulated to respond to reality. The law, thus understood, is social engineering. Each country has full power to grant unto itself a system of standards which best responds to its concrete necessity . . . .

At the same time, Dr. Serrano preserves a concept of law as not merely superstructure but also a reality that, although it does not deny the influence of the infrastructure, has its own specificity and exercises at the same time its reciprocal influence upon the forms of production and social phenomena in general. The law is a formal fabric, with a logical structure and methodology. The danger of interpretive laxity and arbitrary application of law in the name of social

3. Some scholars have defined the Rule of Law as:

... a rare and protean principle of our political tradition. Unlike other ideals, it has withstood the ravages of constitutional time and remains a contemporary clarion-call to political justice. Apparently transcending partisan concerns, it is embraced and venerated by virtually all shades of political opinion. The Rule of Law's central core comprises the enduring values of regularity and restraint, embodied in the slogan of "a government of laws, not of men."


5. Infra p. 360.

6. Id.

7. See infra Part I.

8. Id.
reality must be avoided. "We are obliged to comply with the laws: they must be applied and applied correctly."

From a North American legal scholar's point of view, I think two factors are striking about this work, beyond its fundamental importance for understanding specific issues of Nicaraguan law. First, the way the evidence presented in this work conflicts with the picture the administration in Washington, D.C. has painted of Nicaragua's government since the Revolution. Rather than the monolithic, authoritarian, Marxist dictatorship, portrayed by Washington and uncritically accepted by the mainstream North American media, we see here a polycentric, politically pluralistic society which openly debates a wide range of ideas in order to build a constitution and transform a legal system. Remarkably, this is taking place in the midst of United States aggression against Nicaragua.

Second, there is nothing in the concept of the Rule of Law, as it is presented here, that should make North American or European lawyers uncomfortable, regardless of their political persuasions. The classic liberal version of the Rule of Law as a mechanical application of universal neutral rules has been discredited since at least the turn of the century. For example, in the United States, Holmes, Pound, and the Legal Realists, Geny in France, and other scholars involved in modernist, pragmatic, sociological study of law, long ago arrived at a conception very close to Dr. Serrano's. Holmes declared that law is "not a brooding omnipresence in the sky," and that legal principles emerging from litigation were "traceable to views of public policy in the last analysis." He added:

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.

The translation consists of two parts. Part I was primarily translated by Fernando E. Perez Peña, a North American lawyer working at the Supreme Court in Managua. The translation of Part II is mine.

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9. See infra Part I, Section 4.2.
10. Id.
13. Id.
The Constitution in the appendix is the official English version issued by the Nicaraguan government.
PART I - LAW IN THE REVOLUTION (1985-86)

Introduction

These collected works are the fruit of some personal reflections from several of my presentations and lectures delivered both in Nicaragua and abroad between September 1985 and June 1986.

The fundamental nucleus of these works consists of themes dealing with the Rule of Law, justice, and the judicial branch. They are all within the context of the Sandinista People's Revolution and the National Assembly's process of drafting our Constitution. Other themes involve the search for a theory and practice of the Rule of Law within the Revolution. The search includes the need to develop, if only partially, the categories of the Rule of Law which would be valid for the historic moment in which we live.

I am not suggesting that these works offer an answer to such a challenge. Rather, I am merely emphasizing the necessity of considering this specific problem because the unique characteristics of the Revolution demand that different systems be studied and adapted as closely as possible to legal and judicial reality. I am referring particularly to the nature, concept, and structure of the judicial branch. The objective is to produce a coherent synthesis for our own historical reality.

These works, born of reflection as well as legal and judicial practice within the Revolution, sketch the theme. Moreover, although they are written in order to fulfill immediate needs within my assigned role, in a deeper sense they are motivated by the inescapable imperative of reforming our judicial institutions. This imperative arises from both our historical experience and our socio-political reality. In some measure, these works point out the temporary nature of the classical liberal concept of the Rule of Law. They are a critique of the universality and eternity of that concept, which is derived from other realities, and which, while valid for a specific system at a specific time, should not be imposed as an absolute model. One should not make the formal institutional legitimacy of a state depend upon its total compliance with the classic liberal model.

It is important to keep the popular roots of the Revolution in mind since this is the source of power from which all powers of the state emanate. There is a need for deeper reflection on the specific content which the separation of powers assumes in light of those popular roots. In order to comprehend this issue, one must study how separation of powers in our draft Constitution acquires its own con-
tent and meaning and differs from the classical concept given to us by Montesquieu. Montesquieu's notion of separation of powers will be discussed in greater detail in Part II of this work.

A proposed draft for the new Constitution regarding the judicial branch is included at the end. It was presented by the Supreme Court of Justice to the National Assembly. In it, the Supreme Court of Justice presented not only the broad principles on which the judicial branch should rest within the Revolution, but also draft language and an explanation of the Court's reasoning. Once the Constitution is approved and the bases of the fundamental principles have been established, the next step is to reform the Court Enabling Law and modify codified law to conform to constitutional standards.

1. Rule of Law, Justice and the Judicial Branch

The themes of the Rule of Law, justice and the role of the judicial branch will be an important part of the various commissions' debates and of the National Assembly's own plenary sessions regarding our future Constitution.

The Supreme Court of Justice is in the process of organizing a seminar to take place in October 1985. The topic will be justice and the role of the judicial branch in preparation for the new Nicaraguan Constitution. The object of the seminar is to define the proper structures for the judicial branch regarding both jurisdiction and the role of the judicial branch in its relationship to other institutions. To that end, the high court plans to consider all contributions from justices and judges of the Republic, as well as contributions from the Ministry of Justice, the Ministry of the Interior, lawyers' associations, university law school faculties, and mass organizations. At that time, a specially appointed commission will extract the major themes from the results of the seminar. The special commission will then proceed to draft the Supreme Court of Justice's proposal for the National Assembly by the end of 1985.

This process will insure that the National Assembly will have our contribution to the national and historic effort to give Nicaragua, and the Revolution, a new Constitution. The Constitution will take us to the highest phase of institutionalization, express the country's political and social reality, and form the basis for its future legal and institutional development. Let the ideas discussed here form a work-

1. La Salle Colbert of the National Assembly of France, September 16, 1985.
ing paper for the exchange of opinions and points of view and serve as a stimulus for reflection and discussion.

1.1 The Relation Between Society and Law in the Revolution

Every revolution represents a break between political, social, and economic reality, on the one hand, and law and institutional order, on the other. It creates the necessity of deciding how the relationship between political reality and legal order is to be established and conducted. A revolution must consider the structural change as well as the difficulty of reconciling two universes which have been separated and are potentially antagonistic to one another. What is to be done in the face of this inevitable reality? There are three possible alternatives. First, to force dynamic, changing reality into a legal system that expresses a different reality. Second, to completely replace the old law with new law contained in emergency decrees. Third, in some mixed fashion, to reconcile old codified law with the law emanating from executive decrees and special jurisdictions.

The first alternative would introduce a contradiction whose foreseeable consequence would be the breakdown of the legal system by the expansive force of revolutionary changes. In addition, this alternative would delay the process of change and revolution, or possibly create a socio-legal syncretism and a perverted legal order.

The second alternative, discarding all old law, might create a hole into which the great guiding forces of the revolution would fall. In reality, old law can not be substituted overnight by the new. There is an inevitable coexistence between the legal order which survives the system overthrown by the revolution and the society which is reborn in the rubble of the old regime. The double orphaning, law without the society which produced it and society without law to regulate it, gives rise to a difficult double adoption, which is also a double adaptation: old law to a new society and new law to an old society. Thus, both the first and second alternatives are unacceptable.

I believe that in six years of revolution, practice itself has responded to the fundamental problem by moving toward what is presented as the third alternative. This solution is to make code law coexist with the law emanating from executive decrees and make special separate revolutionary jurisdictions coexist with the jurisdiction of the judicial branch.

I do not mean that all problems have been solved, nor that this type of response has not generated new problems and new conflicts. I
merely want to indicate which alternative has been chosen. I do so because I believe the situation we are addressing gains a special importance at this time since we are coming face to face with the development of our Constitution. It is particularly so for the judicial branch, because we are entering into a new dialogue on law and justice.

The goal of the judiciary is to articulate what most concerns us: the legal universe and the universe of socio-political reality. Reality is where the task of the judicial branch becomes a difficult issue, since we deal with applying the law in a concrete reality, but also struggle to keep the context of socio-political circumstances in mind. Furthermore, the job of integrating, interpreting and applying the law becomes even more difficult since, in addition to codified law, law is also produced by the executive branch and by special jurisdictions created to avoid judicial congestion in those areas particularly sensitive for the Revolution. Thus, judges, with their mastery of code law and legal skill, must also possess adequate knowledge to foster integration of old standards with a new society through their judicial interpretation.

This transitory situation exists until a new code law slowly emerges. The new code will be reorganized on the basis of decrees issued in accordance with the new reality, which eventually, will faithfully express the socio-political reality and its values. Finally, the law will become what it should be—the form for social forms.

The task, then, consists of defining and consolidating the Rule of Law in the Revolution within a determinate period, in accordance with circumstances. It is a historical necessity for the Revolution, born of a heroic deed of liberty, justice and power, to be consolidated into law and into the institutions which express it.

1.2 Justice and the Judiciary

Justice is an essential condition of life in society. It is an implicit consensus in the historical development of communities and a rule of coexistence which arises from social context. Justice is the substance that binds and unites a community because it creates a foundation of stability, security and solidity. Without justice, the social edifice cannot be erected or will collapse if it already exists.

The concept of justice might be left alone in a fundamental field of social and moral values in a revolutionary process such as ours, which is harassed by other urgencies. But, justice is, nonetheless, a
condition for stability and consolidation. The concept of justice therefore must be brought together with the practice of legal justice. Justice's invisibility as an immediate necessity is much like a foundation which supports a building, or the roots from which the tree grows. Like air for one's existence, justice is essential for society. In human life, individually or collectively, and in social relations, what stands out is not justice but injustice, just as what causes an impact is not the normal but the abnormal. People react to abuses. For these reasons, justice is necessary, as a solid, unquestionable presence so that life can go on in a dignified and serene manner.

Justice is, above all, a value. It is the value of law, intrinsic and essential for individual and collective life. From the earliest precepts in Roman Law, through Ulpian, who defined justice as giving each his due, not harming others and living honestly, and even before Roman Law defined it, justice has been the condition of life in society.

In all societies, but above all in a revolutionary one like ours, it is necessary to make law and justice identical, for there are laws that are unjust and just acts which are illegal. Equilibrium is reached when law is just and justice is legal; when prescribed standards correspond to what society considers necessary for itself and for each of its components, and when social aspirations are thoroughly expressed in its legal order.

The Judicial Branch, as the organ charged with preserving justice, and for which the Supreme Court is the vortex, is a structure and a system. The Judicial Branch is a structure in that judges and tribunals, are tiered hierarchically as to authority, form, and matter. It is a system as far as its decisions and resolutions form a dynamic stability which contributes, in an important way, to the creation of law in a historical and geographical determinate medium.

Law is the result of the interaction of principles which nourish it (legal fundamentalism), the universal values to whose realization it aspires (legal axiology), the empirical reality which penetrates it and from which it forms a part (legal sociology), and the legal standard which it prescribes and sanctions (Hans Kelsen's normativism or Theory of Pure Law).² Law is shaped by the rulings of judges and tribunals which interpret and apply positive law.

Without pretending, as the sociological school of Carlos Cassio seemed to establish, that law begins and ends in a judicial decision, I feel that case law is an important formal source of laws, both socially

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and historically. While the Supreme Court of Justice has the last word, that last word is usually said within the context of decisions made by judges and tribunals of lesser rank. The Supreme Court of Justice also exercises a jurisdictional role when it overturns errors of law by appellate courts and other judges.

The jurisdictional role, always important in a reality such as ours, is especially important since this function needs to be creative. There are good and bad creations and, in reality, the jurisdictional role is a difficult task. It is besieged by dangers whose extremes might be an automated judiciary or a lax interpreter. On the one hand, mechanistic application of the law, would transform the judge into an automaton, alien to the spirit of the law and social reality. On the other hand, an interpretative latitude and arbitrary application of the law in the name of that reality could also be the resulting danger. Neither one nor the other is required. The objective is to interpret law in light of the process we are undergoing.

Society is obligated to comply with laws and the judiciary must properly apply these laws. This presupposes a collective effort on the part of the entire judiciary. It also requires rejecting the false alternative of choosing between the factual situation or the law. The options are not merely to violate the law by recognizing consummate facts nor to maintain law as a sacred object in order to perpetuate obsolete values. The judicial mission does not put social reality into a systematic confrontation with the law. I believe that the juncture requires the abolition of the false contradiction between "factism" and legalism, which suggests that law can only be respected by halting the Revolution.

Our legal system must be the expression of the socio-political reality we are building, which in turn should take on substance and be carried out in law. The transformation of legislation is a challenge which must be faced in order to avoid the contradiction between reality and law. This transformation will give our process a unitary, homogeneous coherence, in which the legal order incorporates and legitimizes in historical reality, the great principles upon which our Revolution is nourished. In short, the legal order must contribute in order to make the balanced realization of both justice and liberty possible.

1.3 The Rule of Law and Revolution

Ultimately, as a state, we are trying to consolidate the Rule of
Law in the Revolution. The Rule of Law governs the exercise of political power and civil society. It is also born in the modern state and is founded, above all, upon the definition of institutional functions regulated by public law. It is founded upon the establishment of a body and a procedure for administrative law to protect the Constitution by declaring any laws opposing the Constitution illegitimate.

In private law, the fundamental principles characterizing the Rule of Law are composed of contracts and their essential elements such as purpose, subject, intent, concepts of individual interest, subjective rights, and legal relationships.

The extreme expression of the Rule of Law is stated in Kelsen's Theory of Pure Law.\(^3\) He posits a natural relationship between the state and the law, so that every act of the state is legal and all legal acts occur only within the state. Further, Kelsen explains that law is a system founded upon a basic norm, which is the Constitution. The purity of Kelsen's theory depends on the concept of the cloistered system of the law's existence. That system uses a self-feeding function of the standards which comprise it, and brushes aside whatever is not a norm. The consequence of Kelsenian normativism is the divorce of law's theory and nature from all social and political reality, including historical elements that influence law. Excesses that violate the state are assumed to be lawful and are now justified not only in the name of the state but also in the name of the law.

We are not proposing Kelsen's interpretation of Rule of Law. Nor are we proposing a more generalized version of legal theory that developed into the classical liberal concept of the Rule of Law. Attempts have been made to propose the definitional Rule of Law, outside of which no other subordination of the state to law is acknowledged. There we face the phenomenon of the idealization of the concept, which presumes to freeze a specific model with general characteristics and universal values in time and space in a mechanical and demonstrable form. The definitional Rule of Law does not take into account possible variations due to historically and geopolitically determined circumstances. The Rule of Law should not be an immutable archetype, which is fixed in time and space and outside of history. Law is not an abstract metaphysical value, but rather the particular specific event of bringing together a historical, social, and political reality within a determinate legal order. At the same time, it must regulate the behavior of the state and society and be the formal ex-

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3. See supra note 2.
pression, derived from, and a product of, the underlying reality which it governs.

Here we have taken a position on a fundamental philosophical question: what constitutes the Rule of Law? The Rule of Law is not a logical-rational construction, outside of time and space, but rather a body of rules rationally articulated to respond to reality. The law, thus understood, is social engineering. Each country has full power to grant unto itself a system of standards which best responds to its concrete necessity. Speculative, theoretical comparisons should not have the force of logic, either legal or philosophical, and should not deny legitimacy by referring to some absolute system or universal model of law.

Private law and its fundamental principles, until recently considered immutable, have also begun to change in societies of liberal political theory and market economics where they were produced and developed. For example, changes have occurred in private law in the traditional system of contracts based on Bentham’s and Dicey’s nineteenth century philosophical ideal. The changes include the use and enjoyment of property in industrial society, freedom of trade, power of corporations, development of administration, discretionary administrative authority, economic law, and the rising influence of the contract of adhesion in the general theory of contracts. Perhaps the most significant of these changes is the appearance of collective labor law, in which unions are recognized as legal entities with the capacity to enter into labor contracts as parties. The participation of unions in labor contracts gives rise to collective bargaining which alters the classical rules of contract with respect to the parties, elements and effects. Beyond the effects of a collective bargaining agreement on the parties, there may be a general regulatory effect on working conditions for an entire industry or an entire professional category. The effect is to create standards for individual contracts even though the labor contracts were entered into within the sphere governed by the collective bargaining agreement. In this way, freedom of contract, an essential element in the civil doctrine of contracts, is limited or discarded in favor of fundamental provisions in the collective bargaining agreement which are incorporated ipso jure into the principal clauses of individual contracts.

The above discussion clearly indicates that the foundations of the classical theory of the Rule of Law are evolving.

1.4 Legal Equality and Economic Inequality

I consider it important to clarify two concepts that are currently confused in the traditional concept of the Rule of Law. First is the belief that it is necessary to have a legal order and an institutional system which regulate and standardize civil and political society. Second, is that the Rule of Law is nourished by the principle of general equality, and that it exists only when constituted on that model of legal equality.

We acknowledge the first as a fundamental principle of the Rule of Law. As to the second, mixed feelings arise. On the one hand, we accept the principle and model for the type of society in which it was created; that is, we accept it as a historical reply to specific needs arising in a determinate time and space. On the other hand, we reject it as a presumption of universality or a necessary archetype. The second concept refers to a dichotomy between legal equality and economic, social inequality. It must be pointed out that equality cannot exist on the legal plane if it does not exist in the economic or social planes.

The creation of the realm of equality in legal matters not only ignores real inequality but accentuates it by placing subjects who are on different planes on the same plane. In effect, when the law prescribes equal treatment for beings who are unequal in their socio-economic situation, it preserves the inequality at the outset, and maintains the distance, accepting as a given that very different economic situation. Furthermore, the inequality is accentuated by its own dynamics within the framework of social production and by reiteration of legal relationships which systematically confirm an unequal socio-economic starting point. At least in slavery and in serfdom, inequality which existed in the socio-economic order was explicitly proclaimed by law. The law did not pretend to hide a concrete inequality with an abstract equality.

With the coming of industrialized society, the existing law announced equality of human beings without paying attention to economic and social inequalities. For the first time in history, a real inequality was hidden by an ideal equality. Luigi Ferrajoli wrote that in this relationship, one is a subject-object (subject who decides voluntarily to sell himself), labor person, and merchandise; whereas the
other is person-property, person and privatized means of production, capital, modern privilege. In such a fashion, he said, the equivalence of the exchange, or equal law is carried out as the appropriation of work, exploitation and accumulation of capital, and abstract equality materializes as an inequality.\textsuperscript{5}

The dichotomy between legal equality and economic inequality is the consequence of the separation between political and civil society produced by the coming of industrial society. Once the political sphere is situated within the limits of the state and the economic sphere is within the limits of private society, two situations arise. First is the supposed depolitization of economics, whose structure within capitalist society pretends to become objective, apolitical, universal, and permanent. The other is an abstract definition of the state, separate from private society’s contradictions, which, according to the theory, are overcome in the state.

This concept underlies the institutions of capitalist societies. It is the historical-political translation of Hegel’s philosophy of the state and the law. In defending the concept and action of the Prussian state in the face of the decomposition of the European bourgeois states, Hegel, created the abstraction of the state as a logical-rational product which places it above civil society and economics. Hegel’s separation of society and politics makes production relationships in the new industrialized society purely economic, in contrast to feudal society in which production relationships were also political. The effect of the break between political society and civil society within capitalism’s production relationships, produces a dissociation between the economic individual and the legal individual. By contrast, in feudalism and in prior societies they were unified. The economic subject is situated in an economic sphere with all of its inequalities. The legal subject is in a legal and political sphere, a realm of equality. “This separation between the legal subject and the real economic man represents,” says Luigi Ferrajoli, “the most specific characteristic of modern law and, at the same time, its most authentic indicator of class.”\textsuperscript{6}

In a revolutionary process such as ours, this dichotomy serves no purpose. The law should be unmasked and should be the direct expression of the reality which produces the law. The relationship be-
tween law and society gives us a legal order in which fundamental principles permit legal mechanisms to compensate for structural inequalities. These fundamental principles also contribute to the process of social justice and equilibrium in Nicaraguan society.

In sum, law should aim towards equality, acting as a regulatory mechanism and compensating for real inequalities that arise on an economic plane. Law should not formulate some abstract equality which, in the last analysis, favors and accentuates concrete inequality.

1.5 The Judicial Branch

On speaking of the Judicial Branch, a series of themes and problems arise. The focus is on defense of the Constitution which entails jurisdictional matters as well as the nature and efficacy of judicial actions holding the supremacy of the Constitution above ordinary laws. However, before proceeding with the discussion of constitutional defense, it is necessary to consider some changes required within the Judicial Branch. The following sections constitute our preliminary suggestions.

a. Strengthening the Judicial Branch is a Condition Precedent

Strengthening the Judicial Branch must begin with material, financial improvement and the strengthening of its function in society. To this end, a fundamental requisite is to maintain and strengthen the independence of the Judicial Branch. This does not imply that the judicial branch should be made into an organism alien to the revolutionary process or outside of history. Rather, it means inserting it definitively within the flow of changes and clearly establishing the powers, functions, fields of competence, and limits of the institutional and legal definitions existing in our country.

Article 29 of the General Act of the National Assembly already confers upon the Supreme Court of Justice the initiative of creating law in matters within its authority. This includes the possibility of proposing reforms to code law. Based upon article 29, work has already been initiated and a Commission composed of the Supreme Court, the Ministry of the Interior, and the Ministry of Justice has been created. Their work on the Criminal Procedure Code, to substitute for the old Criminal Instruction Code, is well under way. A pilot plan which includes the technical training of judicial personnel who will have to apply the new standards will be instituted shortly in Region IV. In addition, the Supreme Court of Justice has the enormous
challenge of reviewing other areas of current codified law which it will undertake without undue haste or delay.

The maintenance and strengthening of the independence of the Judicial Branch is not in order to isolate it from the Revolution. Rather, it is to acquire strength in order to permit the Judicial Branch to bring a genuine and effective contribution to the Revolution.

b. Jurisdictional Unity

We recognize the necessity which caused the fragmentation of the judiciary’s jurisdiction when special jurisdictions were created. I refer to the Popular Anti-Somoza Tribunals, the National Institute for Social Security, the Regional Committees for Human Settlements and the Agrarian Court. The fragmentation was a measure adopted as a short range alternative to leave the judicial branch and a good part of codified law in place while giving particularly sensitive aspects of the Revolution’s development to special jurisdictions. However, this fragmentation of regular jurisdiction cannot be considered definitive. An appropriate unification of the courts should be contemplated.

c. Training Judicial Officers

Technical and ethical guarantees of the correct application of justice depend upon the training of judicial officers. The Supreme Court, conscious of this need, has been developing courses to train local judges with continuing long distance education. With the goal of widening and bettering what already exists, an agreement with the National Autonomous University of Nicaragua has been reached to establish a specialized program in judicial matters for graduates of the Law School. This program, whose fundamental ideas are still being worked out, will perhaps begin with the training of district judges currently on the bench and a move to encourage lawyers to consider the judiciary as a career.

We think that independence, jurisdictional unity, systematic training and development of skill among the judiciary will contribute to the structuring of a strong judicial branch. This in turn will guarantee equilibrium and institutionalized legal stability.

d. Labor Jurisdiction

It would be well to add one point which in our judgment is important. That is the establishment of a special labor jurisdiction. Its
purpose would be to maintain the uniqueness of the labor law industry and keep it from being assimilated within civil law. Moreover, as long as there is appellate review, uniform case law can be developed within it.

1.6 The Judicial Branch and Constitutional Defense

Within the great theses which define justice, the Judicial Branch, and its powers, Constitutional defense is a fundamental issue.

Legislative decree, No. 417, approving reforms to *amparo* law\(^7\) by the Council of State in regular session number four, May 21, 1980, in title I, chapter I, article I, states:

This law establishes the legal means of exercising the right of *amparo*, in order to maintain the validity and effectiveness of the Fundamental Act of the Republic, issued by the Governing Council on the 10th of July, 1979 and the Nicaraguans' Rights and Guarantees Act, issued on the 21st of August, 1979. Consequently, this writ may be taken against any disposition, act or resolution, and in general, against any act or omission of officer, entity or agent who has violated, is violating or threatens to violate, those rights.

The general declaration of decree No. 417, article I, clearly establishes a defense against unconstitutional statutes through protection of individual guarantees. However, in all of the rest of *amparo* law there is no provision for the specific case of a violation of the Constitution, or for a law that conflicts with the Fundamental Act or the Rights and Guarantees Act. Nor is there a provision which guarantees the general *erga-omnes* effect of a judgment declaring a law unconstitutional. All effects are limited to specific cases, and the question of unconstitutionality has to be decided anew in each case even if the matter presented refers to the same law that has already been declared unconstitutional. In Latin America, what is called judicial review of the question of constitutionality has been significantly influenced by the constitutional legal system of the United States. This system was broadly influenced by Alexis de Tocqueville's work, *Democracy in America*.

In the American system, judicial review is exercised through an extraordinary writ for unconstitutionality, and the final decision rests with the federal Supreme Court. That system applies to some legislation in Latin America, generally in the systems having double federal-

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\(^7\) See infra SECTION 6.3 for a more extended discussion of the right of *amparo*. 
local jurisdictions. The writ for inapplicability is used in unitary systems and the final issue is resolved by the high tribunal. However, the effect of judicial decisions in the American system is limited to the specific case before the court.

Central American and the majority of Latin American constitutions are influenced by the American system, although not exclusively. The principal characteristics of the American system are the claim of unconstitutionality of the law by the affected party, and the ruling’s effect being limited to the specific case. In contrast, the Austrian system is characterized by the existence of a specific tribunal which determines unconstitutionality of legislative acts, and by the general effect of its rulings as opposed to the effect being limited to the specific case. The so-called “mixed system” incorporates elements of both: the American system, with the possibility of appealing before an ordinary judicial body, and the Austrian system, with general and future effects being produced by the judicial ruling.

Latin American constitutional law is, for the most part, mixed in this manner. A jurisdictional body, generally the Supreme Court of Justice, at the insistence of one of the parties, decides the constitutionality of a law. The ruling then has an erga-omnes effect which preserves its effect for other cases. Latin American constitutional law is further mixed in that sometimes judicial decisions are limited to the parties in some cases and have a general effect in others.

From my point of view, it is very important to establish judicial review with erga-omnes effect because it guarantees constitutional defense and democratic equilibrium. The general rationale declaring laws unconstitutional has been given by jurists, Jorge Carpizo and Hector Fix Zamudio. Essentially, they favor an erga-omnes effect for these reasons:

(1) It reinforces the principle of equality of all before the law;
(2) It protects those who do not seek redress for unconstitutionality of the law by protecting them ipso jure from the application of an unconstitutional law;
(3) It lessens court congestion by avoiding hearing cases on the same matter; and
(4) It reinforces the legal and social cohesion sought by the constitution.

In our Constitution, the power of the Supreme Court should be broadened to include the authority to resolve questions of constitutionality of a law, with general effect.
1.7 The Right to Sue as a Public Right

Considering justice, the law, and the Judicial Branch, imposes the challenge of rethinking some issues considered up to now as universal, immutable principles of civil and procedural law. Classical private law has flourished on theories of subjective law, legal duty, legal relationship, freedom to contract and individuality and subjectivity in the right to act. We have already seen the changes that collective labor law has introduced. For example, the union has become a legal entity with the right to sue and the right to collectively bargain. The labor contracts have a general effect comparable to regulatory acts which become formal sources of labor law.

These legal transformations lay the foundation for qualitative change in law even if their field of activity is limited to labor, a limit which is perfectly explainable by historical and political reasons. Collective labor law has survived as an exceptional case in law. It is an exception which proves the general rule, the inevitable concession of a system to socio-political pressures from the labor movement.

One cannot lightly propose changes. Every change in the law should respond to real situations. But in a country such as ours in which a revolutionary change has been produced, the issue should be raised in light of these changes, as ideas reflecting a new reality. As we try to bring social reality and law together, we can only proceed after a profound analysis and meditative, careful study. This does not preclude, however, our raising some issues and laying them out as concerns. Returning to the theme of private law, subjective law is the law of one party confronted by another party where both are obligated by a legal duty. The legal relationship is between subjective law and legal duty, and the right to sue is an individual subjective right—the consequence of a legal interest of the holder of that right. The nature and mechanics of the law of action, conceived by private, individual, and subjective law, sanctifies and universalizes its exercise in an individual manner.

However, if we assume that the right to sue is different from the substantive right it embraces, the latter is a right, not as to another person, but as to the state which is obligated to grant jurisdiction, independent of whether the underlying claim is legitimate. Action, instead of being a subjective private right, becomes a public right. This public right may or may not be individual. It can also be collective because it is not exercised by a private individual but by the state.

In addition, the right to redress can exist without the right to sue.
For example, natural obligations in which a substantive right exists, can occur without action to make the right effective. And, similarly, the right to sue can exist unfettered by the right of redress, as in the case of someone who appears before the state and obtains a negative decision to a substantive claim. The right to sue is then, an autonomous abstract public right, which can be exercised individually or collectively.

On the basis of these reflections about the right to sue, perhaps it would be appropriate to ask if the following would be legitimate:

1. To seek to establish normative judicial oversight over collective interests;
2. To develop a theory of the collective subject;
3. To nourish a theory of procedural legitimization of collective subjects;
4. To design new procedural models; and
5. To identify collective interests, bearers of those interests and means of oversight.

Perhaps it would be wise to genuinely consider some legal changes which bring our law and our institutions closer to the social and political reality our Revolution encompasses.

2. Justice in the New Constitution

2.1 Institutionalizing the Constitutional Drafting Process

The seminar ending today has permitted an open discussion of ideas on justice and the judicial branch. That fact is even more important if we place it within its historical context. Nicaragua continues its process of change, impelled by the Sandinista Popular Revolution and by national political dialogue. Governing principles that will have to support the new Constitution of the Republic, which is the expression of the reality in which we live and the fruits of majority opinion and choice of our people, are emerging from the process.

This notable effort to institutionalize takes on greater significance if we consider the aggression coordinated and acknowledged by the present United States government. Our country is continuing to define its institutions and legal order while defending its sovereignty, territorial integrity, and right to self-determination.

In the Assembly, the Constitutional Commission has heard from seven political parties. The Commission has published a work schedule to include national consultation in order to enrich the criteria and integrate opinions which cover a wide range of points of view. This will make the Constitution a genuine synthesis of national will.

In the meantime, the Supreme Court of Justice calls upon the national judiciary to reflect on its nature, structure, and role. The Supreme Court organized this Seminar, with the participation of the Ministries of the Interior and Justice, the Military Judge Advocate's office, delegates from the parties represented in the Assembly, law schools, lawyers' organizations, and mass organizations. The regional appellate courts and judges from each region in the country also participated. In addition, our esteemed friends, the distinguished jurists from different countries who have contributed considerably in our deliberations and who have shared friendship and solidarity with us, deserve special mention.

With all the material collected here, including presentations, reference documents, and conclusions, the Supreme Court of Justice will, at its next session, nominate a Commission to edit the document. After the document has been approved by the Supreme Tribunal, it will be put into the hands of the National Assembly near the end of this year. This will be our contribution to the process of institutionalizing and deepening the Rule of Law within the revolution; a Rule of Law which, from our point of view, should be the formal expression of the underlying reality which it governs, rather than an abstract metaphysical value, outside of time and space.

2.2 Law as Social Engineering

Here we touch upon a sensitive vantage point, where it is appropriate to stop, even if only briefly. The law is not a logical, rational construction, outside of time and space, but a group of rules articulated to respond to a reality. The law, thus understood, is social engineering, and each country and each revolution has the full power to grant unto itself the system of standards which best respond to its concrete necessity in a legitimate form.

This does not preclude the fundamental legal principles which have an influence in regulating socio-political reality. We are not proclaiming the consecration of factual arbitrariness; rather we are warning of the danger of presuming law to be an ideal entity.

We consider the problem in a dialectical relationship. While the
facts are permeated by fundamental legal and moral principles, there is no human act which is not accompanied by specific values. Law should necessarily represent the economic, social, political, cultural, and historical reality from which it springs. Thus, law will be the form for social forms. The Rule of Law then, will be the manner, mode, or form in which that reality is embodied in its institutions. Reality produces its own legal ordering. Law, as well as the society which it governs, inevitably tends to take on a group of values which, although universal, are not any less historical, immediate or direct.

2.3 Justice and Social Reality

The law strives toward its principal value—justice. Thus, law should reflect justice's value in a revolutionary society. In addition, the integration between law and justice should correspond to law and reality. The National Assembly and the Supreme Court of Justice are coming to grips with a double challenge; the Assembly must develop and approve our Constitution and must propound its points of view on the constitutional chapter corresponding to the judicial branch. In turn, under article 29 of the General Act of the National Assembly, the Supreme Court has the authority to initiate legislation on matters within its jurisdiction.

2.4 Revising the Code Law

On the issue of initiating law, codified law lies within the authority of the Judicial Branch. Code law should have content and form appropriate to represent the society we are trying to build. Changes should start from the present moment and include both accomplishments and contradictions. Any changes should therefore be treated flexibly as transitional provisions, but should also point firmly and solidly towards the future. Security for institutions and legal order are indispensable in order to build a stable character for future Nicaraguan society.

Perhaps the best example of this idea is found in the Supreme Court of Justice's work on the proposed Criminal Procedure Code. Presently, the Code is being studied by a commission in which the National Assembly, the Ministry of the Interior, and the Ministry of Justice are participating. Our proposal replaces the present Criminal Instruction Code of 1879 which was based on rigid procedures of written law and modeled on the Latest Spanish Restatement of 1805, with improvements introduced by Royal Decree in 1835. Prior to the
Spanish Criminal Procedure Act of 1872, the Criminal Instruction Code of 1879 was characterized by secret proceedings and the absence of any defense at preliminary hearings. The same judge handled preliminary hearings, the trial, drafted findings of guilt, and passed sentence. In addition, confessions were in the same language as the indictment, thus avoiding exculpatory presumptions. Presumptions were elevated to the same level of proof as other properly-established legal proofs.

In Latin America, the renovating current in penal procedural law does not principally come from the Code Napoleon, the French model. Rather, it comes from German or Italian procedural law which was developed at the end of the nineteenth century through the first third of the twentieth century, such as the German Procedural Ordinance of 1924 and the Italian Penal Procedure Code of 1930, or the Manzini Code.

Our proposed Criminal Procedure Code incorporates popular participation in the administration of justice. It is based on principles of oral proceedings, reduction of procedural steps, publicity, flexibility, speedy trial, officiality, and proofs based on sound judgment. Moreover, it will affect the current structure of the Criminal Courts by incorporating lawyers and laypersons in the same judicial body.

In this proposal, two elements are manifest. The proposal considers present reality because it is being proposed as a pilot plan for Region IV. At the same time, it is structured upon principles which permeate its content with a permanent and stable character. Constitutional legitimacy of the system is assured by a transitory article in the Constitution. This transitory article obviates problems which arise when it is placed into effect in only a single region. This situation will be considered through transitory provisions, because Nicaragua is not a federal state with local legal systems. Rather, it is a unitary state for which a uniform national legal system is appropriate. The proposed Criminal Procedure Code reflects an integration of flexibility, an association with reality, and a projection towards the future with stability, security, and permanence as goals.

2.5 Tasks of the Judicial Branch

The Judicial Branch's activity, particularly that of the Supreme Court of Justice, revolves around three principal tasks. First is the classical activity of case decisions. Deciding cases requires integrating justice, law, and reality. It requires keeping political context and cir-
cumstances in mind. Given our circumstances, this is a uniquely important and particularly difficult task. Integration, interpretation, and application become even more difficult because law emerges from both the executive branch and special jurisdictions, which were specially created to avoid congestion and delay in judicial activity in areas particularly sensitive to the development of the Revolution. In such a situation, a judge, besides being familiar with code law, must also have sufficient understanding to assist in the integration of old standards to a new society through interpretation. However, not all old law is outdated and not everything emerging in society is new. Shadowy, empty, and overlapping zones are produced between society and law and reflected in case decisions.

The second principle task is to define the nature, structure, and role of the Supreme Court and the Judicial Branch in the new Constitution. The third task is to transform codified law in order to bring the legal order together with reality.

Along with these three basic tasks, the following measures will be placed into effect:

(1) Judicial Branch Commissions. One Judicial Branch Commission for each region of the country will be established and each will be coordinated by the President of the Supreme Court of Justice. It will be composed of one Justice of the Supreme Court, the Presiding Justice of the corresponding Regional Court of Appeals, and a judge from the region. Each Commission is responsible for all the internal problems of the Judicial Branch in its region. The Commissions investigate inter-institutional relationships related to the administration of justice. They also deal with materials within the facilities, such as transportation, equipment, and other necessities.

(2) Commission on Judicial Statistics. This body will create technical statistical mechanisms. Its simplest task will be to make a central file in the Supreme Court of Justice, where each entry corresponds to a prisoner's case. The purpose is to determine the status of cases, thus avoiding injustices sometimes committed when elementary mechanisms used to determine the judicial status of prisoners are not available.

In short, we are seeking, permanent, instrumental forms within the revolutionary process. The following can be considered the basic thrusts: strengthening the Judicial Branch, institutionally as well as materially; strengthening its autonomy and independence; making code law conform to the socio-political reality; unifying jurisdiction
and case in labor law; defining mechanisms for constitutional defense; studying the right to act by collective subject; reorganizing judicial organisms; and reestablishing jurisdictional unity when the circumstances which gave rise to its dismemberment have disappeared.

2.6 Judicial Review for Unconstitutionality: German and French Practices

Along with studying our own legal and social reality, we are studying comparative constitutional law on the question of constitutional defense. The purpose of the study is to structure a solid and realistic proposal to present to the National Assembly.

In a recent trip to the Federal Republic of Germany and France, with Justices Dr. Rodolfo Robelo Herrera and Dr. Santiago Rivas Haslam, we studied their judicial and constitutional systems. In both countries, the constitutional issue is assigned to a constitutional court and the finding on the constitutional issue is a general declaration with erga-omnes effect. The German and French systems, however, differ as to who has standing to file the appeal and the time for its filing.

In Germany, the appeal may be filed directly, by anyone who feels a law has adversely affected a constitutionally protected right. There is no need for legal advice or representation. Conversely, in France, only the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, one of sixty Deputies, or one of sixty Senators may do so. Further, the appeal must be filed after the passing of a law but before its effective date. Thus, in France, emphasis is placed directly on the violation of the Constitution and indirectly on protection of individual rights guaranteed by the Constitution. In Germany, on the other hand, appellate procedure handles the violation of individual interests immediately by granting appellate standing directly to the individual.

In Germany, ninety-eight percent of the appeals filed are denied a hearing and never make it to the Constitutional Tribunal. The high percentage of denials is generally due to formal error, or to the error of the appellant in considering the appeal. An appeal for unconstitutionality could be filed even against the decisions of the Supreme Court of Justice if the law in question not only affects a private interest but also violates the Constitution.

The purpose of mentioning the German and French Constitutional systems is not to propose the uncritical mechanical adoption of
either of them. Whatever suggestion on the question which the Supreme Court of Justice makes to the National Assembly should come from our own reality. Rather, the purpose of mentioning them is to keep those systems in mind, among others, as points of significant reference as far as the nature of appeal and the limits of its filing are concerned.

2.7 Judicial Review for Unconstitutionality: Possible Ideas for Nicaragua

Three positions have been considered on this theme. The first would deny appeal for unconstitutionality because it may act as an obstacle to legislative development. If used for political purposes, the appeal would hamper the legislative function, and with it, the institutionalization of the revolution. The second view would establish not only the right of appeal for unconstitutionality, but also a specific constitutional body to stand guard over constitutional defense and to safeguard the fundamental principles to which every legal system should adhere. Finally, there is the view of granting constitutional review to the Supreme Court of Justice, where the Supreme Court of Justice's decision would have a general declaration with *erga-omnes* effect, but without retroactive effect. Such a mixed system exists in the majority of countries in Latin America and Switzerland. In this last possibility the same arguments can be adduced: risk of using the appeal for political purposes, paralyzing legislative functioning, dulling the revolutionary process in its institutional phase, and clogging the Supreme Court's work.

All of these observations are valid in light of our own reality. However, certain questions arise:

1. Would it help to continue to think about the subject and to go deeper into its study?
2. Might it be interesting to think about forms and mechanisms which would permit constitutional defense without abusive, chilling use of the right?
3. Could we consider two institutions to decide two types of appeal?
4. In questions of constitutional defense, should we limit filing of appeals only to the President of the Republic, the President of the Assembly and a determinate number of deputies (similar to the French system which limits filings to the time after the passing of a law and before its effective date), or should the direct violation of indi-
Individual rights and fundamental guarantees of individuals protected by the Constitution be better protected through an improved writ of amparo?

(5) Would it be appropriate to enlarge the Supreme Court of Justice to include four departments: civil, penal, labor and constitutional?

These are questions to consider. Our suggestions to the National Assembly should not be determined solely by technical or conceptual purity in constitutional legal order, but rather be based on what our history and the particular moment we are living through demands. Indeed, we need to try to perfect our system and consolidate the Rule of Law to the fullest. These and all propositions should be approved by the full Supreme Court of Justice and presented formally to the National Assembly, where the final decision rests.

2.8 Other Themes of the Seminar

I shall briefly try to address some important themes dealing with questions of justice and the Judicial Branch.

The use of the term judicial branch and powers of the state compel us to add Montesquieu to the list of influences in our meeting. The spirit of this French sage, appearing from behind his The Spirit of the Laws, has troubled us with its proposition on the separation of powers. At the time Montesquieu wrote The Spirit of the Laws, behind each branch stood real power, with effective interests maintaining them as the spearhead of real forces in struggle. Perhaps with the reunification of forces into a more unitary and homogeneous popular power, the institutional expression of that sole power in three or four branches of the state may be the more legitimate expression of that unitary power. That the branches are functions of the state is logical since all institutionally-regulated power becomes explicit through its organs and functions. The theory that separation is utopian because it does not correspond to actual practice, is not an absolute argument. The fact that something has not been does not mean it should not be.

The important issue is the necessity for institutional equilibrium through the functions and attributes of those powers or organs which together form the state. It is the same historical root, people's power, with the same etymological root, democracy (demos—people, cratos—power). Of course democracy to the Greeks, who had slavery, is not the same as Rousseau's, or classical liberalism's. It is qualitatively different in sense and practice, but in a revolutionary process,
such as we are undergoing, is much less comparable. Institutional equilibrium is a permanent aspiration of man through the centuries.

As to independence and impartiality of the judiciary, the expositions and debates have been rich. Both forms of independence, internal and external, take on their true meaning when they are integrated in the historical situation which is their true dimension, rescued from the abstract universe where some would want to place them.

Institutional independence, equal dignity of judges, direct relationship between judges and law, and independence in the exercise of their judicial role at each level, are very important. Knowledge of the role of case decisions is also crucial. In addition, impartiality is an irrevocable principle regarding the parties. In a like manner, judges should not make a mechanical application of the law, as if the judges were automatons with no commitment to determinate values which every human being possesses. Righteousness and indispensable ethics in the administration of justice does not exclude humanity and the ethical judge cannot devoid himself from his vital, existential reality as a participant in a determinate society in history.

We have already talked about judicial role and the defense of legal order, with respect to constitutional defense and legality in the face of administrative acts. We spoke of the right of appeal for unconstitutionality through *amparo*, which refers to administrative and governmental acts affecting an individual's rights which are protected under the Constitution.

Human rights are an essential question because their protection is deeply woven into the formal fabric through which the entire legal, constitutional system operates. Human rights protection is guaranteed by the Constitution through defense against illegal administrative acts and by the guarantee of due process. More specifically, they are protected by the concrete dispositions where the Constitution and laws protect human rights directly. They are guaranteed procedurally by nondiscriminatory treatment, by protecting fundamental rights, by regulating preventive detention and by abolishing discriminatory practices. In addition, they are protected by incorporating ratified legal documents on human rights into national legislation at the constitutional level. This includes the rights protected by the Agreements on Civil and Political Rights of the United Nations. Also guaranteed are rights to education, to health, to organize, and to participate in social life at different levels, consecrated by the United Nation's Agreements on Economic, Social and Cultural Rights. The right to
the free determination of peoples should also be mentioned which is guaranteed by article I of the two agreements mentioned above.

The judicial role and the guarantee of due process are very important. The concept of due process is a conduit or medium for liberty. The crucial principles of the democratic process are: legality, independence, jurisdictionality, neutrality, speed, integration of the judiciary into social life, adversary proceedings, and the incorporation of critical analysis into the judicial role.

The problems of unity and exclusivity of the state's judiciary are important elements in the creation of the Rule of Law. While the dismemberment of jurisdiction that occurred in our revolutionary process has responded to peremptory objective necessities, jurisdictional unity should be a legitimate aspiration whose restoration should occur once the cause which produced the creation of special jurisdictions has disappeared.

Popular participation in the administration of justice is important through the integration of laypersons into judicial organs; but its starting point is respect for the principle of legality, unity, exclusivity of state jurisdiction and easily understood procedures. I think the proposed Criminal Procedure Code draft is a good example of what popular participation in the administration of justice should be. It deals with the integration of laypersons and lawyers into judicial bodies and incorporates the following important principles: oral proceedings, concentration, publicity, flexibility, speed, officiality, inviolability of defense, economy, and the weighing of evidence by sound judgment.

I wish to conclude these reflections by thanking the eminent jurists from France, Italy, Spain, the Soviet Union, the United States, and Cuba for their most worthy contributions that enlightened our deliberations. I also thank the speakers from the judicial branch, the Ministry of the Interior, the Ministry of Justice, the Association of Jurists, and the universities. They have given us their focus, opinions, and points of view. Although they do not obligate the Supreme Court in the formulation of its own criteria, they constitute a gold mine from which the Supreme Tribunal can draw upon in its work.

I also wish to thank the President of the National Assembly, Comandante de la Revolución, Carlos Nuñez Téllez, for his presence at this closing session. He has come to terms with all the legislators in the historic, exemplary task of drafting a Constitution to carry the Rule of Law in the revolution to the highest plane. I also wish to
thank the presence of the President of the Supreme Electoral Council, Dr. Mariano Fiallos Oyanguren, the Minister of Justice, Dr. Rodrigo Reyes and the representative of the Ministry of the Interior, Brigade Commander Omar Cabezas Lacayo.

As far as we, the Judicial Branch, and the Supreme Court of Justice are concerned, we are conscious of the difficult task we yet have to accomplish. We have stated some of the broad outlines in these words. We hope to fulfill our responsibility and rise to the challenge.

3. Message to the Second Graduating Class of Lawyers in the Revolution\(^9\)

3.1 Revolution and Legal Change

From this very dear rostrum, which I have used so many times as a student, as a teacher, and lately as a guest of the University, I wish to express some thoughts to you on the occasion of the graduation of the second class of lawyers to emerge in these six years of revolutionary life.

To start, it would be well to remember that every revolution is a transformation of political, economic, social, and moral changes, followed by a reaccommodation in the same areas. Inevitably, a readjustment in institutions and in the legal order is required. At the time you graduate, the Revolution is settling its values. This is a consequence of its own action and of the specific gravity of history which has its own laws of attraction and gravitation. The Revolution's deeds and ideas leave themselves like a footprint having passed the wake of history.

However, we are still living in an era of transition; although there has been considerable change, the transition is difficult since the structure for the newly conquered land is unfinished. While we left the darkness of the dictatorship behind us, the new institutional structure is not complete. The base for the state and the whole nation will be revolutionary Nicaragua's future Constitution. Its body will be the legislation to follow it.

The Revolution, during its struggle for liberation, was made legitimate by its deeds, by the moral content of its actions and by the justice of its objectives. After coming to power, the Revolution be-

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comes the source of law inasmuch as it produces institutions and a legal order. The institutions and legal order, in turn, collect and embody the values and ethical content of the Revolution itself.

As a political power, the Revolution enters into another phase of its historical life. Now it is the real source of law, not because its acts are formally legitimated a priori through the mere fact of being produced. Rather it is because the Revolution has created its own institutional, normative fabric within which it acts. This is not a sudden act that happens from one day to the next. It is a slow, difficult process. It is especially difficult in our circumstances when we take into consideration the foreign aggression we suffer at the hands of the United States which is reaching qualitatively newer levels and unprecedented gravity.

For these reasons, the effort to build the Rule of Law more elaborately within the Revolution demands greater effort, conviction and will. The Revolution's attitude in discussing and drafting the Constitution while having to defend sovereignty and territorial integrity is exemplary. In this regard, we must work for greater coherence between decrees and code law and then relate that coherence to the future Constitution. Two very important issues must be reconciled: changing reality, and the necessary stability institutions and legal order should have.

3.2 The Supreme Court's Proposals

The creation of the Constitutional Chapter on the Judicial Branch is an immense challenge which should be approved in the next few days by the Supreme Court of Justice en banc before being sent to the National Assembly for consideration. This work is the preamble to all the code revision work the Supreme Court of Justice will be undertaking.

In our preliminary text, the structure of the judiciary is reaffirmed as a branch of the state along with three other traditional branches, the executive, legislative, and the electoral branch. Independence and impartiality in the judiciary is consecrated from the internal point of view since each judge or justice is autonomous as far as his authority to judge and decide. Judicial hierarchy refers only to the gradual tiering of hearings and appeals. It does not affect the freedom of conscience and the personal autonomy of the trier in each case.

Independence of judicial bodies is likewise postulated from an external point of view which consecrates independence and interde-
The preliminary text does not reproduce the historical framework in which Montesquieu proclaimed the separation of powers in *The Spirit of the Laws*, nor does it contradict the principle of "people's power." People's power is the basis of democracy (demos—people, cratos—power). It is expressed in a constitutional, legal framework which defines, legitimizes and gives content to the branches.

In labor matters we are recovering jurisdictional and decisional unity within the judicial system. Labor matters today are dispersed through fragmented areas of civil jurisdiction. However, civil law does not correspond to the substance, nature, or values of labor matters. Nor can fragmentation be cured through appellate procedures. Due to their number and their possible differences of opinion, appeals courts could eventually produce contradictory judicial decisions on the same issue. We think a possible alternative would be to create a Labor Department in the Supreme Court of Justice, where appeals would lie from trial judges' rulings, thereby eliminating the appeal to regional appellate courts.

The foregoing takes us to another matter: the restructuring of the Supreme Court of Justice. As the Court Enabling Act might later provide, since it should also undergo corresponding reforms immediately after the approval of the Constitution, the Court would be organized into departments and work within a department or *en banc*. The departments would then maintain specialization in particular disciplines. In principle they would include civil-administration, criminal, labor and constitutional law.

The mention of constitutional law brings us to the next stop within the logical development of the system, as conceived by the Supreme Court of Justice. Although there is a difference of opinion on this, we think that constitutional review should be established through appeal for unconstitutionality. The purpose is to assure the supremacy of the Constitution over any law, decree, or regulation violative of a constitutional concept. I believe it should be the Supreme Court of Justice that rules on appeals for unconstitutionality, although there is still no official single opinion reached by the Court on this issue. If a court holds that a law violates a constitutional concept, the holding should have an *erga-omnes* effect, which is a general declaration effectively derogating any law repugnant to the Constitution. One view is to create another branch of the state, such as a
constitutional council or tribunal for this purpose. But some prefer a body, emanating from the Assembly itself, to carry out constitutional review.

The argument which favors the Supreme Court of Justice on matters of constitutional review is as follows. Constitutional review should be exercised by a body different from the one that wrote the law. Therefore, it should be outside the Assembly itself. Granting the function to the Supreme Court of Justice, experienced in constitutional matters because of amparo appeals, would avoid increasing bureaucracy. Creating a new body would weaken the judicial branch while granting constitutional review would affirm the principal of jurisdictional unity and exclusivity of the Court.

3.3 End of the Specialized Courts

Here we touch upon the fundamental problem of the dismemberment the Judicial Branch caused by the creation of extraordinary jurisdictions. The dismemberment was motivated by the exceptional situations which the Revolution has lived through. Nevertheless, we believe, to the extent the exceptional causes which gave rise to special jurisdictions begin to disappear, the special jurisdictions should be progressively reintegrated into the Judicial Branch.

To illustrate, we have made a proposal for the reform of the Rental Act. The proposal is to transmit rental matters to the judicial branch to prescribe and regulate them. This matter is now in the hands of the National Assembly. In effect, the Regional Human Settlement Committees ("CRAH") would become part of the judicial branch. The Supreme Court of Justice would appoint the President of the Regional Committee and his alternate directly. According to the proposed reform they would be lawyers. The Supreme Court of Justice would also appoint the non-lawyer members of the Regional Committees from a list proposed by the Sandinista National Defense Committee. Appeal from determinations of the CRAH would be heard and resolved by the Regional Appellate Courts in the judicial branch. It is expected that the full Assembly will reach a decision on this matter in the next few weeks, so that, starting in January 1986, administrative work can begin to define the actual transfer and its date.

3.4 The Role of Lawyers

These great thrusts on judicial reform now being initiated will
contribute to giving law professionals, whose graduation we are celebrating this evening, a fuller vision of our legal reality. Within these reforms, the role of the lawyer in our society becomes a historic one. If today’s lawyers participate in our transforming society, they may contribute, in various forms, to the forging of new institutions and to the development of new law.

Perhaps one might say the immediate problem lawyers face, among others, is the derogatory manner in which they are treated and the generalized feeling that they are useless in the revolutionary process, or have become a devalued profession within the process. I should answer thus: true, but we are looking for solutions to these problems; we are trying to recover the dignity of the judicial process; we want lawyers and judicial officers to be treated with respect; we want compliance with judicial rulings. To that end, in these last few months, a series of mechanisms have been designed. They include regular contacts with the Ministry of the Interior, the Ministry of Justice and the Chief Justice of the Supreme Court of Justice. In addition, we proposed the establishment of Judiciary Commissions for each region of the country. An example of our efforts is the National Justice Commission. The Justice Commission is made up of the Presidency of the Republic, the Ministry of the Interior, the Ministry of Justice, the Comptroller General of the Republic, the General Secretary of the National Assembly, and the President of the Supreme Court of Justice. Its purpose is to design adequate mechanisms to coordinate what a judicial system should be.

What degree of responsibility does each of us have in the crisis this profession is undergoing? What responsibility do justices, judges, officers of the Ministry of Justice, the Ministry of the Interior and the Sandinista Police have? We also have to ask, what responsibility do the lawyers themselves have?

Because this is not a matter of allocating blame, but of resolving problems, we have to find immediate answers. We must not, however, lose sight that the central issue demands a structured response, and lawyers themselves must not remain alien to the responses. An integral problem requires an integral solution, which presupposes everyone’s participation. A fundamental prerequisite to elevating the dignity and worth of the lawyer’s profession is having everyone’s participation in discussing and bringing about legal changes in the country. Specifically, the University cannot remain on the sidelines because it plays a predominant role in society and the Revolution.
Of course I haven't come here to tell the University what to do; it knows it better than anyone. Yet were I permitted but one observation on this matter, within the same constructive spirit that has been underlying my previous considerations, I should only say the following. The Law School should continue to deepen its ties to state institutions as it has already been doing with the Assembly and will soon do with the Supreme Court of Justice. The curriculum should raise the level of importance of constitutional, administrative, agrarian and labor law to that of clerical, civil, and criminal laws and their respective procedures. Then, greater association with reality will be achieved. The emphasis should be on academic rigor as well as innovation. And, above all, let academic rigor in the innovations themselves be exemplary and let the importance of basic courses, such as the History of Law, Roman Law, Theory of the State, Introduction to Law and the Philosophy of Law never be forgotten.

The same theory applies to a rigorous study of the institutions of code law. Theoretical instruction is what truly permits the law professional to understand changes. Never forget that a genuine change is not the annulment of the past but an overcoming of it, for historical dialectics teaches us that the world progresses among contradictions. If today we have the Revolution, it is because yesterday we suffered a dictatorship. Please understand that what I want least is the nostalgic remembrance of that brutal dictatorship. Yet, in a contradiction, the revolutionary movement and a University emerged from the bleakest hours of the dictatorship. Because of the lessons it contains and because it helps us to understand the present, one must have the foresight to learn from the past.

Do not refrain from the study of Roman Law simply because Rome was an empire. On the one hand, it subjugated peoples and conquered nations, but on the other, it created institutions which have survived through the centuries, notwithstanding the changes particular historical characteristics and the passage of time demanded.

The study of liberal bourgeois law must also be continued. Although the development of capitalism has engendered the most inhumane injustices in the name of an abstract legal equality which hides and perpetuates economic inequality, this is only true in light of phases of capitalistic development. It is not true in the light of the philosophy of Enlightenment, the encyclopedists, the age of light, and the French Revolution: they all sought to abolish the privileges of a
feudal corporate society in which servitude, enfeoffment, and other
privileges were consecrated by the legal order.

If we don't understand each change in its time, and all of them in
their totality, we will not understand this moment in our history. We
cannot see the future if we do not know the past. Therefore, do not
forget that this Revolution is continuing. Today we are engaged in
thinking about the terms and content of our Rule of Law and of legality
in the Revolution. Lawyers should undoubtedly know laws, codes,
terms and procedures in order to practice the profession competently.
They should also know, however, the sources of their science, its roots
and its past in order to project themselves creatively towards the fu-
ture. Those who know the theoretical foundations of their science
will better understand changes than those who focus only on the tech-
nical command of legislation. A revolutionary teaching of law places
humans at the roots of knowledge and fosters an understanding of the
Rule of Law within the revolutionary process with all the changes and
permanence it contains.

My congratulations on behalf of the Supreme Court of Justice to
you graduates of the Second Graduating Law Class. May your inte-
gration into the revolutionary process be fruitful. May you contem-
plate the rigors of the impending journey with optimism and
determination. Lastly, may your efforts benefit our Revolution and
the fundamental values that should always inspire it: peace, justice,
and liberty.

4. Law in the Revolution: A Constitution for the New Nicaragua

4.1 The Law - Habitat of the Revolution

I am grateful for the invitation which the Association of Demo-
cratic Jurists of Masaya has granted me to speak before lawyers and
judicial officers of Region IV, about law in the Revolution. The
theme is very broad and goes beyond strict legal matters. It also in-
cludes the philosophical plane and the sociology of law.

The revolution is, as Proudhon said, the supreme act of sover-
eignty. But upon becoming a state and a government, the revolution
inevitably also becomes the formal source of the law. In this way, the
revolution crystallizes its values into reality.

10. Lecture delivered before the lawyers and judicial officers of Region IV, at the
invitation of The Association of Democratic Jurists of Masaya, January 1986. The same
lecture was also delivered at La Salle Colbert of the National Assembly of France, July 2,
1986.
In terms of the historical philosophy, the revolutionary process is the dialectic that runs between civil society and political society. Civil society revolts against the political society subjugating it. With the revolution, a civil society turns into a revolutionary state and makes its requests permanent in new laws and institutions. In this manner, the law, normally resistant to change, is changed into one of the many points of arrival of the revolution. From such a point of view, law becomes a reference. But law is much more than that. It is the fabric the revolution tears apart in order to place itself within it.

An immense effort is necessary in order for the revolutionary process to take place. The historical reality created by the revolution and the legal, institutional order must be made to accommodate one another. Correct knowledge of this relationship is essential for the proper understanding of the social nature of law, whose values are eminently historical (with the exception of human rights and principles, which, once won, are acknowledged as having universal validity). The new law is the rational, legal architecture by which a determinate society is articulated at a given moment in history. When the collective will for tomorrow decreases, the nation built on determination of the collective will goes into a phase of disintegration, if the effort developed was not yet sufficient to sustain it. A nation falls when it exhausts the force which impels it forward without a renewal in the determination of the collective will.

Latin America’s dilemma, besides being the imperialist project of the United States, is that it has lacked the necessary vigor to give body to the Latin Americanist ideal of Bolívar and Sandino. The result is a project with insufficient strength to form a Latin American Nation. The project should constitute a synthesis of the individual nationalities. If Latin America today has no unitary past, it is because it has not had the necessary vigor for the future.

History is a paradox. Not only does it show us that there can be no future without a past, but that there can be no past without a future. Designing a tomorrow from today on the basis of a communion of wills, sets the stage for what will be a common past in which to recognize ourselves, as our face before a mirror. Tomorrow, proposed as a future, will become fact and will be the present of our future generations. Renan tells us: “the existence of a nation is a daily plebiscite” and Ortega y Gasset reminds us that “on defending the nation

11. Quoted in J. ORTEGA Y GASSET, supra p. 346 note 1, at 64.
we are defending our tomorrow, not our yesterday.”12 I think we are defending both.

In Nicaragua, because every authentic revolution is always a proposal to build a future, there is always a program to be carried out. Law plays an integral role in this process. The law should be the architecture slowly expressing the new conquered reality. Legal standards should be the objective expression of the revolution’s values. The new Constitution is called upon to embody the essential features and values of what is Nicaraguan and to serve as a proposal for a future society. The Revolution is, above all, a project for the future, a program for identity, and the reality of the Nicaraguan being.

Within this undertaking, law is charged with being the objective expression of the project for a nation. There lies its greatness and its difficulty.

4.2 Bringing Law and Reality Together

There are many problems associated with the administration of justice and the practice of the legal profession. The major question is, what is the principal cause of the difficulties the administration of justice faces in a revolutionary process? Facing this question, we have been leaving facile, general answers aside and have slowly tried to get to the heart of the problem. We have tried to look at this difficult reality face-to-face. We have encountered, and we say so honestly, the understanding and willingness to help on the part of other institutions. They have made the solution of numerous problems possible, and relations with judicial branch officers have improved.

Clearly these inter-institutional relationships, however valuable and useful, can only contribute to solving joint problems. The problem of law in the revolution is, above all, a structural problem. It consists of reconciling the different nature of the revolution’s socio-political dynamics with the static character of law. The degree of this problem sharpens if the comparison is made, not only between reality and law, but between Nicaraguan revolutionary reality and the pre-revolutionary legal order.

Again Ortega y Gasset gives us a magnificent thought on the matter:

The law, in effect, is static. Humans have not yet succeeded in creating a form of justice which is not circumscribed by the clause rebus sic stanibus.

12. Id. at 41.
But the fact is that human affairs are not res stantes. On the contrary, historical things are only movement, perpetual motion. Traditional law is only the regulation of paralyzed reality. And since historical reality changes radically periodically, it clashes inevitably with the stability of law, which becomes a straightjacket.\(^{13}\)

Starting from these observations, the nature and depth of the problem is better explained. We do not want to erase certain individual attitudes or ignore non-observance of the law, its procedures, and judicial rulings. But neither do we want to attribute the origin and breadth of the problem only to such conduct which may have its origin in the law-reality contradiction.

The solution then, regardless of how enormous it seems, is clear and simple: make law conform to reality. But the logical transparency of the matter does not exclude the many difficulties implied in putting these ideas into practice. Besides, the law and reality are not homogeneous. We are dealing with reconciling entities, heterogeneous in their own right, and having their own internal contradictions.

Supposing that the difficulties involved in revising code law and the body of laws and decrees produced through the revolutionary process can be overcome, despite the serious limitations of human, material, and financial resources, it would not suffice to create a formal body of new law, although it would certainly be a gigantic step. This step would require training for technical personnel capable of applying it. We would require weaving a network of commonly shared legal values to which legal changes would be referred since the changes reflect the collective intent of the Nicaraguan nation.

For example, consider the new Criminal Procedure Code which the Supreme Court is about to finish and put into effect in Region IV as part of the judicial transformation. To apply the Code, the judicial personnel must be trained, and financial and technical resources must be acquired. Then the concrete results of the Code’s implementation and its value to society must be evaluated. In addition, the possibility of its gradual extension to other regions in the country must be analyzed, assuming there are no other practical, educational, or cultural difficulties. And this is only the beginning. Projecting this concept to other areas of the law, we have a rough overview of the seriousness of the task, a task which must be completed over a period of many years.

\(^{13}\) J. Oretgay Gasset, La Rebelión de las Masas 215 (1986).
In any case, the proposed legal changes respond to a shared necessity which represents the Revolution's fundamental values. These values are common to Nicaraguan society and are not a unilateral formulation by the Supreme Court of Justice with which the majority of the population would not feel any identity or participation. This is reflected in the fact that we are now discussing the proposed Criminal Procedure Code with judicial officers and lawyers. We shall also begin seminars throughout the entire country on a bill which the court has sent to the National Assembly regarding the judicial branch in the new Constitution.

To conclude, I want to underscore two ideas: a problem and a program. The problem is the reality-law contradiction. The program is the proposal to overcome the contradiction. The reality-law contradiction is expressed daily with no reference to persons or specific cases. A problem having basic characteristics of a historical nature appears before our very eyes, with a structural foundation. Proper treatment of the matter demands a historical and a structural frame of mind.

4.3 Judicial Transformation: Participation of the Legal Profession

There can be different perceptions of a single fact. Thus, the role of the administration of justice within the Revolution can have different views, depending on the observer, his immediate expectations, and his priorities within the revolutionary process.

Perspective is a property of reality, be it physical, natural, or historical. Before a landscape, we appreciate the part which our visual angle permits us to see. Another person, situated at another vantage point, will see another part of the landscape and if his gaze rests on the same piece of nature, he will see things arranged differently and therefore, with a different expression. Obviously, the opinion of both observers of the same thing will also be different.

A similar phenomenon occurs with historical facts. The evaluation of capitalism currently held is quite different from what was held in the mid 18th century during the Industrial Revolution, which leveled the feudal system, the corporative regime, and privileges consecrated in law. Besides the historical perspective of a fact, perspective also varies with the subject. For example, the ideology of the analyst or the location (time and place included) from which observations are made can also create a different opinion. In a similar way, facts in daily life are influenced by our personal position and the
context of events influencing our daily existence. Thus, concerning
the administration of justice, one can have a different perception, de-
pending on who the observer is.

Therefore, there can be no other alternative but to seek the struc-
tural solutions jointly, with all the institutions involved in justice, un-
til a result is reached which takes all points of view into account.

I invite you to meditate on the role lawyers can play within the
Revolution. I am not referring to the personal position that each one
of you assumes in the Revolution, which of course is extremely impor-
tant. Rather I refer to the possibility of translating individual polit-
cal attitude into a contribution to the common cause. A collective
proposal for the Rule of Law within the Revolution is an idea needing
everyone’s contribution in order to be consolidated and deepened. I
invite you to become decidedly involved in the seminars on the draft
of the Criminal Procedure Code that the Supreme Court of Justice is
conducting. Give us your ideas, suggestions, and criticisms on the
draft’s content. The draft is a first effort to conform to reality. I also
invite you to participate in the seminars that the Supreme Court of
Justice plans to conduct in all regions of the country concerning the
draft of the constitutional chapter on the Judicial Branch.

I think all justices, judges, and lawyers in the Republic should be
associated with the effort to make Nicaragua a national school for
legal pedagogy in this year of 1986.

4.4 The Constitution - Supreme Act of Legal
and Political Creation

What is a constitution? From the formal, organic point of view,
since the Declaration of the Rights of Man in 1789, a constitution is
the guarantee of fundamental rights and the determination to separate
the powers of the state.

In effect, article 16 of the Declaration points out that in all socie-
ties in which the guarantee of rights is not secure nor the powers sepa-
rate, there is no constitution. Such a definition is certainly excessive
since it has been surpassed in history. One cannot deny constitutional
character simply because Montesquieu’s separation of powers does
not exist.

Regarding separation of powers, I see no contradiction between
the existence of people’s power in the Revolution and the constitu-
tional recognition of the organization of the state into branches which
are independent and interdependent among one another. The consti-
tution is the form for expressing the power rooted in the people, organically and institutionally.

Allesandro Pizzorusso in his *Lessons on Constitutional Law* said that in this sense—with the term that was used all through the 19th century—the constitution did not just mean a text with certain legal formal characteristics but also, above all, a document whose dispositions collected in some measure, at least, what at that time was the liberal movement's political program. Of course that ideological need has no justification at this time. In Pizzorusso, we always find the reference to McIlvain saying, "[t]he constitution of the state should be understood as that complex of identifying principles of the form of State and Government, such as will be applied in a specific state society, no manner what it may be."

Let us now analyze our own legal and historical conception of the constitution. In the first place, one might say there is a bundle of fundamental standards which act as the basis of the legal system. These standards validate or invalidate the legal system, depending on whether they meet or contradict constitutional provisions.

Without going to the extent of Hans Kelsen's theory of pure law, for we have always maintained that law has a historical foundation, law is a system which has its own rules and an intrinsic rationale tied to constitutional concepts. From the point of view of legal technique, then, a constitution is not only the basis and foundation of legal order but also the spinal column binding together and making sense of the system of standards within a determinate legal universe. Above all, a constitution is a consensus of wills fixed in time.

For the state, the constitution is the foundation and the program, the organization of the state, the consensus of a society, and the definition of power. It is a foundation and a program, in that it establishes legal order and proposes future development. It is, and should be, both reality and possibility. It is organization of the state, to the degree that it establishes and legalizes structure and function. It is the consensus of a society because, in order to be historically representative, the constitution should express national reality. As a result, a constitution should be a common ground, a point of convergence, and center of force and equilibrium for the society it deals with. In short, it should express historical reality.

Do not think, however, that consensus is the reason for society,

15. Id.
as Rousseau thought the "social contract" was. On the contrary, consensus is the consequence or the effect of a historical, socio-political, pre-existing reality. Law is generally a rational formulation and a formal legitimization of the facts, not the other way around.

Finally, the constitution is the definition of power. It is not only the articulation of legal principles which contain an express popular will, it is also a political text, as the very name suggests. To define power is to express it legally, which does not mean to create it. Whatever power is created is always created as a historical fact before it became a legal act. The legitimization of power in law, however, is not only a legal necessity but a political one. The dialectics of the facts demand formal expression and standardized translation as an intrinsic necessity. Only then does the legitimization of power in law acquire breadth and maturity.

The law, with the constitution as its maximum expression, is the conduit and program of power. From that, laws, the constitution, and legality, are not merely artificial formalisms but the natural destiny of historical processes.

4.5 The Proposal for the Constitutional Chapter on the Judicial Branch

The National Assembly is dedicated to the historic task of giving revolutionary Nicaragua a constitution. If every process of constitutional drafting has a great importance and is, in a sense, a founding act, the significance is even greater when it occurs within a revolution. The Constitution acts as a self-encounter for the Revolution, realizing the fundamental steps to what might be an inventory of realities and possibilities.

The political parties comprising the National Assembly have expressed their support and agreement, in differing degrees, on some fundamental points. That is to say, even if no one is in agreement on all points, nevertheless there has been support from some of the political parties within the Assembly on the first basic points to be taken into consideration.

The basic points in question are the following: political pluralism; mixed economy; non-alignment; organizing the state under the rule of democratic, unitary, representative law constituted in executive, legislative, judicial and electoral branches; social assistance; anti-imperialism; self-determination; and democratic exercise of national sovereignty. These are among the most important.
National consultation and the open town meetings will then take place according to a calendar previously drawn up by the Assembly. Opinions on the constitutional proposal from different sectors of the Nicaraguan people will be collected. The Supreme Court of Justice, for its part, has tried to present its contribution to the National Assembly by sending the latter a text which contains the draft of constitutional chapters and corresponding arguments for them. In that document, the Supreme Court of Justice suggests a series of basic points that should be the foundation of the judicial apparatus in the Nicaraguan state.

The nature, structure and role of the Judicial Branch is defined with increasing support for the Rule of Law in the Revolution. By virtue of that imperative, the Supreme Court of Justice's proposal draws the basic lines of the judiciary in the following ways.

a. **Popular Participation by Integrating the People into Tribunals Through an Appropriate Mixture of Laypersons and Lawyers**

We hope the combination of people's wisdom and the technical handling of the rules of law will enrich the administration of justice in general, through reciprocal and self-nourishing action. The proposed new Criminal Procedure Code is a first step in that direction. The principle of continuing reforms of law in the future will be established in the Constitution.

b. **Unity and Exclusivity of Jurisdiction**

The Constitution should grant unity in structure and exclusivity of jurisdiction. Concerning special jurisdictions, created to respond to specific imperative situations demanding particular treatment, the Supreme Court of Justice deems that they should be fully reincorporated into the orbit of the Judicial Branch when the causes that gave rise to them cease to exist.

c. **Independence**

Independence is expressed in a double sense; externally, with respect to other State powers and internally, with respect to the function of tribunals and judges in their respective areas and levels. Therefore, the hierarchical organization of the Judicial Branch does not affect the principle of independence, since, in this instance, hierarchy deals only with lawsuits and appeals.
d. Reserve of Law

A law reserve constitutionally guarantees that certain matters considered particularly important will be regulated by legislative procedures within the Assembly. This avoids the possibility that regulation will occur through administrative rulings. In judicial matters, modern constitutions usually contain a law reserve regarding the creation of courts, their authority, judicial proceedings and invisibility and non-removal of judges.

e. Constitutional Control

Constitutional review is one of the themes of greatest interest, not only for the Supreme Court of Justice, but also for the different political parties making up the National Assembly. Constitutional review is the mechanism which permits preserving the supremacy of the Constitution through appeal for unconstitutionality of a law. A ruling on an appeal leaves an unconstitutional law ineffective if the ruling has a general effect.

This appeal is different from *amparo*, at least in two principal aspects. First, an appeal of *amparo* protects an individual interest directly. It covers acts emanating from a governmental or administrative authority, acting according to a law, decree or rule, or simply a de facto measure without reference to any legal provision. Appeal for unconstitutionality of a law, on the other hand, is addressed directly against the law, violative of a constitutional provision, the individual interest thus being protected by the Constitution rather than directly.

The second aspect refers to the effects of the ruling. In an appeal on *amparo*, the holding does not transcend the specific case, and therefore the law is not derogated by the judicial holding. Further, *amparo* is directed against the act of an officer who prejudices a constitutionally protected interest rather than the legal standard which authorizes the administrative or governmental conduct. Appeal for unconstitutionality of the law, on the other hand, is a general declaration and derogates any law repugnant to the Constitution.

This was one of the two points on which there was no unanimity of opinion in the Supreme Court of Justice. The rest of the document was approved unanimously in all details. Even though the decision of the Supreme Tribunal was to approve constitutional review and to grant this function to the Supreme Court of Justice, there were dissident opinions. These were also forwarded to the National Assembly in order to provide them with various points of view. For brevity's
sake, in this exposition we will not include every argument submitted during the course of the many sessions of the commission entrusted with preparing the text submitted to the Court. We shall, however, briefly state those we adopted.

There were three arguments recommending the Court as the body to hear appeals for unconstitutionality: (1) the necessity of strengthening the Supreme Tribunal and the Judicial Branch, debilitated by the separation of special jurisdictions; (2) the Court's experience in matters of appeal and amparo; and (3) the cumbersomeness of creating a new body, considering material and financial limitations.

\[ f. \text{ Reorganizing the Supreme Court of Justice into Specialized Departments} \]

In the opinion of the Supreme Tribunal, this responds to a progressive division and subdivision of law into new legal disciplines. Civil, administrative, criminal, labor, and constitutional departments were considered. In the latter, it should be mentioned that those who did not agree with the establishment of constitutional review in the Court also disagreed here.

Perhaps it is advisable, only as a brief reference, to mention the recommendation of establishing a labor department. This responds to the necessity of creating labor case law so that appeals in this area, today fragmented in different regional courts of appeal, will be unified with the Supreme Court of Justice as the final arbiter.

4.6 Creative Participation in the Construction of the Country and Our Own Identity

The relationship between the Revolution and the Judicial Branch is expressed as a reciprocal act, consisting of integrating the reality of the Revolution in the judicial branch's structure. The Judicial Branch is then at the very heart of revolutionary changes.

There is a challenge in creating a Constitution in a revolutionary process and in the midst of a war of aggression. Let us rise to the status of what the times demand. Each one of us is a protagonist, either positively or negatively, in his own circumstances. Each one, through action or omission, is an indispensable and untransferable subject in his own historic moment.

As members of a profession being modified in the midst of a country also being changed, we are subject to the exigencies and imperatives of the times, which are common to us all. Let us participate
creatively, responsibly and in full awareness of our duties and rights in building our country. By doing so, we are constructing our history, our future and our own identity.

5. **Inaugural Address to the Seminar on Mixed Economy in Nicaragua**

Before all else, I wish to thank the organizers of this event, the Friedrich Ebert Foundation and CINASE, for their invitation to address you with these personal reflections which make the gentility and benevolence of the organizers even more evident.

5.1 The Economy and the War of Aggression

Mixed economy has been considered a characteristic element of the Popular Sandinista Revolution, along with political pluralism and non-alignment. These three elements help to define our revolutionary process, particularly if one considers that all of them are related and express a specific conception of political and economic democracy. They respond to specific needs of Nicaraguan society and historical national and international requirements. Furthermore, and to a lesser degree, they respond to a theoretical definition or to the adherence to a previously established model. Their relationship, in agreement of theory and practice, is not whimsical. It permits one to perceive that, in a moment determined by the Revolution, society produces political economic forms through daily, difficult, and contradictory practice. The moment creates a conceptual legal formulation which should reach its maximum expression in the Constitutional text going into effect by January, 1987.

The common dominant characteristic of these three elements, which are an expression of society, is the participation of all sectors in the preservation and reconstruction of the nation. This occurs within the historical current and the frame of reference the Revolution has been developing. This multiplicity of the three elements manifests itself in the plurality of parties, in the variety of economic forms, and in the diversification of international relations.

From my point of view, the specificity that these elements bestow upon the Revolution is related to their development and consolidation at the nucleus of revolutionary change. The reaffirmation of the Nicaraguan nation is related to recouping an identity dispersed and

adulterated by different forms of foreign domination, and conquering and reaffirming the rights and dignity of the people as the protagonist in the revolution and as the beneficiary of their own history.

In order to achieve a mixed economy, political pluralism and non-alignment, the Revolution must face the principal contradiction between itself and the empire. The following events are significant: the National War in 1856, Zeledon's resistance in 1912, Sandino's struggle from 1926 to 1933, the revolutionary struggle by the Sandinista National Liberation Front against the dictatorship from 1961 to 1979, and the Nicaraguan people's resistance against the war of aggression imposed by President Reagan's government via the counter-revolution since 1981.

The consolidation of identity and nation, inevitably and painfully, continues to confront the empire. I say inevitably because it is difficult to avoid a war when one is attacked on the threshold of the twentieth century in the name of concepts such as the Monroe Doctrine of 1823 and "America for Americans," restated throughout history as The Big Stick, Dollar Diplomacy, John Quincy Adams' Manifest Destiny, John Foster Dulles' National Security, and President Reagan's Fourth Frontier Doctrine.

Nicaraguan history has been the Nation's struggle against the Empire and the vindication of an identity in the face of those who only consider our people as their strategic frontiers. Imperialism has been part of Latin American and Caribbean history, shadowed by many aggressions from the beginning of the century. Interventions in Cuba, Mexico, the Dominican Republic, and Haiti, among others, have marked the period in which two interventions occurred in Nicaragua; one in 1912 and one in 1926. The intervention in Grenada in 1983 reaffirms the vocation of hegemony by force.

Since 1823, the Monroe Doctrine has been applied in permanent form. In order to justify interventions, the national security argument has been maintained by the United States, through presidents William Taft, Woodrow Wilson, Warren Harding, Calvin Coolidge and Herbert Hoover, with slight variation in tone. Today the cries from the White House curse any effort at liberation as international communist expansion, thereby identifying any effort by oppressed people as a symptom of the East-West conflict.

At this time Nicaragua is being publicly attacked by the present administration in the United States. Losses of millions of dollars between 1980 and 1985, a commercial embargo, a closing off of private
and official financial resources, a blocking of international loans, a sabotaging of prices for our products and a closing of traditional markets are expressions of a war of economic attrition. It is designed to provoke social and political destabilization. The war produces serious distortions in the economy, which is why it is used as a destabilizing factor. In addition, the loss of human life which the war causes is imponderable.

This reference is indispensable to understanding the moment we are living through. Things are what they are due to the time and circumstances in which they are being produced. National and international historical facts have become one in a moment in history which represents the unity of multiple determinants. The conflicts and contradictions of the present hour would not be understood if one did not keep in mind that the nation-empire contradiction crisscrosses our entire history, uniting and dividing political frontiers in our country, while at the same time defining and circumscribing the drama of a people's history of revolution and struggle.

5.2 Capitalism, Socialism, and Mixed Economy

In article 6 of the proposed Constitution, a mixed economy is defined as an economic model where different types of property exist and are combined. The property includes state, private, mixed and cooperative, and has the people's welfare as the primary objective without prejudicing the establishment of reasonable profits.

Two elements are essential in the proposed Constitution: (1) coexistence of different forms of property and (2) the property's tie to a specific common goal; the people's welfare. The proposed Constitution states an express historical reality which is the coexistence of different forms of property.

Generally, a mixed economy carries characteristics associated with market economics as well as state economics. That double role is evidenced in social production relationships, whereby the means of production determines the character of the property. The state's role in the whole system is economic regulation. Different degrees of state participation may vary according to the greater or lesser preponderance of either market or state economics.

It is also important to bear in mind that variations can function in mixed economic forms with respect to the goals of the national economy. Should the mixed economy consist of superimposed forms, independent of one another, without a unifying logic to explain their
differences? Or should a common denominator exist to govern the types of consumption, the types of investment, specific policies of supply, social services, employment, pricing, and income? In other words, should one look for a logic in the system of mixed economy in the state or should economics be left alone to self-regulating mechanisms such as price and production equilibrium and the law of supply and demand, as in the free market system?

It is clear that mixed economy systems present different modalities, not only because of state participation, but also because of monopoly relationships over mechanisms of free competition. We are combining the capitalist and socialist economic systems, with respective components having greater or lesser degrees of participation. From the capitalist system we adopt decentralization of economic decisions: Adam Smith's invisible hand, the law of supply and demand, private property, private enterprise, consumer sovereignty, free pricing system, and free competition. From the socialist system we adopt centralized economy: collective interest, state ownership of the means of production, socialization of natural resources in the production phase as in the distribution phase, central planning, distribution of production, the application of the principle from each according to his ability and to each according to his need, accommodation of capital understood to be destined to resources for the production of production goods, price control, public interest, and integral vision of economics and planned economy.

With regard to the capitalist system, the total set of principal characteristics are fully valid at the initial stages of free competition. Later, capitalism begins the process of economic concentration towards monopoly, with only one firm dominating productive activity; or towards oligopoly, where some firms dedicate themselves to the same activity in order to dominate a sector of production (i.e. trusts, cartels, and holding companies). The process of capitalism's economic concentration has carried a double centralization and accumulation of capital and production. The process leads to the monopoly-imperialist phase of capitalism bursting into multinational capitalism. The elementary logic of the process of concentration arises from the necessity of overcoming competition, lowering costs, and accumulating profits. Inevitably, a monopoly projects itself beyond national frontiers and inserts itself in the heart of underdeveloped societies. The capitalist process accentuates dependence qualitatively and consequently causes the modification of center-periphery relationships. It
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affects economies in dependent countries and alters the structure of international trade.

These characteristics of world capitalism, particularly the process of monopoly-imperialist concentration, clash with a revolutionary process' very foundation and reason for being. While the Revolution seeks to forge an identity and structure a nation, capitalism's multinational expansionist process dissolves into exporting capital and surplus goods. This limits the characteristics of a people, of a history, and an identity. This phase of capitalism submerges all the distinctive traits of the nation into the undifferentiated universe of multinationals, into the world of data processing and cybernetics, and creates a technological superstructure of which a supernation without borders is founded.

The Sandinista Popular Revolution, consequently, can only define an economic system framed outside the direct logic of multinational capitalism. This does not mean isolation from the relationships determining international and geopolitical economic conditions. Rather, it means trying to define a framework for respectful and just economic relationships; a framework to unite efforts and expectations with other countries of Latin America and the Third World. It means struggling for the application of a new international economic order and in particular, to seek policy treatment of foreign debt that favors a just convergence between the creditor nations, international finance organizations, and debtor countries.

The quest for real world peace involves acknowledging poor peoples' right to justice, liberty and dignity. Peace is not merely the absence of war, but the reality of a dignified free life, respect for moral values, and respect for self-determination and sovereignty. Peace is the application and compliance with the new international economic order and the absolution of usurious mechanisms in international relationships making foreign debt an instrument of exploitation. By means of that usury, not only is our wealth mortgaged, wealth that was usurped for centuries by the dominators, but our future, our identity, and our historical possibility are also mortgaged and alienated.

Mixed economy, in some way, permits recognizing a reality founded on different forms of property, including private as well as state property. It permits the state's participation, to a greater or lesser extent, in the regulation of economic activity. Mixed economy responds to a determinate reality. Article 6 of the proposed Constitution consecrates that reality and tries to perfect the mechanisms for
legal regulation through the Constitution and corresponding ordinary laws.

Reflection on the economy, the war of aggression and our attempts at response will bring us closer to the theory and practice of mixed economy in our revolutionary process. It is advisable to look next into the most effective mechanisms for state, private, mixed, and cooperative property participation, while paying close attention to the requirements of our national reality so as to achieve the greatest benefit from our existing resources. These mechanisms are as follows:

(1) Considering state regulatory and control mechanisms over economics; analyzing the feasibility of controls to be established for the purpose of improving them and avoiding eventual distortions and anomalies in a productive and distributive apparatus. This includes lowered production, hoarding, speculation, artificial scarcities of goods, and excessive prices.

(2) Evaluating the establishment of investment policies on a short and middle term basis and the opportunity to create investment law.

(3) Establishing a set of provisions to create the most appropriate legal framework to strengthen and develop constitutional concepts which consecrate the principles and draft the great general lines.

(4) The necessity of establishing and developing policies and mechanisms oriented toward increased productivity of labor and improved use of existing resources.

(5) The advisability of doing comparative studies of other historical realities and experiences.

These are strictly personal reflections. If they awaken some interest and if they give rise to certain elements of discussion, I shall be satisfied for having contributed to the efforts of the organizers and the participants of this event. We hope and trust that this meeting will be fruitful and that the highest spirit of cooperation, analysis, and profound reflection will always prevail, consistent with the high level of the institutions and their participants.

6. The Judicial Branch

6.1 The Role of the Judiciary in the Nicaraguan State

The Sandinista Popular Revolution, like any genuine revolution,
has produced a rupture between socio-political reality and legal, institutional order. From that fact, it is imperative to reconcile law and institutions with the historical reality that is the Revolution, in order to permit law and the judiciary to express the full revolutionary process.

The Supreme Court of Justice, under article 29 of General Act of the National Assembly, has the right to initiate laws in matters within its jurisdiction. Under this power, the Court prepared a draft of the new Criminal Procedure Code to be substituted for the current Criminal Instruction Code. The Court expects to submit the draft in the near future to the National Assembly for consideration. Today, the Supreme Court of Justice wishes to present, at this historic moment, this draft of the chapter on the Judicial Branch. Within the limits of legal order and in response to the reality of the revolutionary period, the Judicial Branch has attempted to express justice's true values, and adhere to the laws and rights of the majority of our people, which have been won and defended by the Sandinista Popular Revolution.

However, in order to make judicial practice consonant with this historic moment, it is necessary to conform the Nicaraguan State's judiciary to Nicaraguan reality and to redefine the concept to include the principle of popular participation.

The Supreme Court of Justice has urged judicial reform along with other State institutions since the Silvio Mayorga Legal Seminar. Reform is imperative in light of the historical antecedents of the administration of justice in our country. At first, the judicial system was linked to justifying colonial exploitation. Later, during various forms of domination installed in our country after our independence from Spain, the legal judicial system was oriented toward justifying usurpation of indigenous communities and appropriating labor forcibly. Finally, during the Somocista dictatorship with its ties to imperialism, the judiciary's power was at the service of Somocista interests. This resulted in a grave deterioration of fundamental values and justice. This deterioration extended to sectors affected by the arbitrary attitude of those who had a duty to preserve values, and to the loss of prestige of institutions, including the entire Judicial Branch.

In order to end the deterioration, the Revolution emerged as the only historical possibility. As a result of deposing the exploiting class, new standards were promulgated. The new standards included the Fundamental Statute and the Statute of Nicaraguans' Rights and Guarantees. Laws of an economic-social nature, international agree-
ments, and the appointment of new people to take charge of government functions brought about a new, just, and better functioning judicial system in spite of the economic crisis and aggression the country is suffering. The judiciary should act in accordance with, and reflect the popular, democratic, anti-imperialist character of the revolutionary process. The administration of justice must merge with independence, with the necessity of guaranteeing revolutionary legality, and with the protection and oversight of human rights, through the creative application of law in the matters under its jurisdiction.

6.2 Unity and Exclusivity

The principle of unity can be defined as the judicial function exercised by a unitary system of bodies which together comprises the judicial organization which the Constitution generically grants. It is a structural concept since it is carried out through the ordering of its elements into levels leading up to a common vertex. This implies, as a corollary, the incorporation of the special courts, now part of the Executive Branch, into the judicial system, once the causes that gave rise to them disappear.

The principle of exclusivity refers to the role and not the structure of the judiciary. It can be explained through the following proposition: only judicial bodies can exercise judicial functions.

There obviously exists a close tie between the principle of unity and exclusivity, but they should not be confused. Exclusivity could be granted (all jurisdiction in the hands of judges) without unity (absence of a single vertex) as has already occurred in Nicaragua with labor jurisdiction.

6.3 Constitutional Review

In any state, the process of drafting and developing law has three fundamental steps: its creation by the legislative branch; its application by the Judicial Branch; and the implementation of acts prescribed by law or by judicial decisions by the Executive Branch. The Executive Branch has the responsibility of seeing that all citizens do what they are obligated to do by law and that judges’ and appellate courts’ decisions are obeyed. The mechanism of reciprocal action around the law generates a mutual, correlative autonomy in the role of the branches of state.

The Judicial Branch is entrusted with hearing and resolving all controversies which come within its courts’ jurisdiction, including
those which are the object of *amparo* appeals. *Amparo* applies when a
law, decree, regulation, mandate, or governmental or administrative
decision violates an individual's constitutionally-protected interests.
The Supreme Court of Justice exercises, through *amparo* appeals, indi-
direct control of constitutional order every time it restores individual
rights. *Amparo* appeals can be sought in criminal matters, when deal-
ing with freedom and personal safety, or in civil matters when dealing
with damages or threats to property. Within the revolutionary pe-
period, the right to *amparo* is preserved in the Amparo Act for Freedom
and Personal Safety and the Amparo Act itself. The constitutional
text needs only to confirm the validity of these Acts, because the pro-
cedures contained in them are sufficiently swift and effective to guard
the rights provided. One should point out that the reach of judicial
rulings in *amparo* appeals only applies to the specific case.

These standards are the foundation of revolutionary legality, of
which the principal objective is to maintain the supremacy of constitu-
tionally ranked statutes now, and the supremacy of the new Consti-
tution later. In order to faithfully comply with that revolutionary
aim, it is appropriate to establish a fully defined *amparo* appeal in the
future Constitution. *Amparo's* principal objective is the protection of
human rights. Human rights are fully recognized by the Sandinista
Popular Revolution in the Fundamental Statute and the Statute of
Rights and Guarantees of Nicaraguans, as well as in the signing and
ratification of all international treaties devoted to the protection of
human rights.

This represents a permanent attitude on the part of the Revolu-
tion. It changes substantially the mere public relations fanfare about
human rights, which took place during the dictatorship, to an authen-
tic revolutionary commitment to respect and observe the rights of
human beings. All of this occurs within the atmosphere generated by
the Revolution, in which all manner of foreign exploitation and de-
pendency have been eliminated and in which a new social, political,
economic and cultural order is produced.

In addition to the constitutional protection through *amparo* ap-
peals, the Supreme Court of Justice will establish a mechanism of con-
stitutional rank for direct protection against unconstitutionality.
Consider the following: the Fundamental Law of the Republic is the
Constitution, since it was drafted by a body created for that very pur-
pose. The drafting of our future Constitution to structure the Nicaraga-
uan state has been turned over to the National Assembly. The
Assembly then has a double mission: drafting the constitutional text, and legislating in the ordinary sense. The Assembly, then, fulfills the functions belonging to every Legislative Branch. Once it is drafted and promulgated, the Constitution becomes the supreme standard, which no law, decree, regulation, act, mandate, order, act or omission of any officer or authority, may contradict. Its precepts must be duly adhered to in order to achieve a constitutional state which makes human rights paramount.

In order to accomplish the above, it is necessary to exercise constitutional control from different angles and dimensions, so that supremacy of the Constitution is guaranteed. At the same time, interdependence of the branches of the state is made a reality. Interdependence, without prejudice to the principle of independence, should favor close coordination and collaboration between the branches, for the purpose of attaining harmonious compliance with the ultimate purpose for which they were created. For this reason, in addition to self-constraint which each branch should exercise to avoid running afoul of the Constitution, it is necessary to have appropriate controls available to permit the maintenance of constitutionality. Those controls can be the *amparo* appeals, to which we have already referred, and appeals for unconstitutionality of a law, discussed below.

In our national system, we aspire to exercise constitutional control because we consider it healthy and beneficial to safeguard the Constitution, and to adjust it to our national reality and our own Nicaraguan characteristics. In that sense, constitutional review should be exercised by the Supreme Court of Justice, an institution which has been, by definition, the one entrusted with hearing claims of conflict with the national Constitution's precepts. For this reason, we reaffirm our opinion that the judiciary should be the branch entrusted with the authority to hear and resolve all controversies arising from damage to individual civil or political rights or from conflicts with the supremacy of the Constitution. Review for unconstitutionality is essentially the province of the Supreme Court of Justice for it is part of the intrinsic, characteristic role it plays, independent of the nature or rank of the body which commits an infraction.

Therefore, it should be the Judicial Branch that exercises constitutional review. We do not think it advisable for control to be in the Assembly itself, since it is more appropriate and effective for the Supreme Court of Justice to hear the appeal due to the intrinsic rea-
sons alluded to previously and due to the advisability of review to rest in a different body than the one in violation of the Constitution.

6.4 The Necessity of Dividing the Supreme Court into Specialized Departments

Due to growth of knowledge and the necessities of social development, the various branches of the law have become progressively more subdivided. The subdivision has led to specialization, due to the necessary division of labor, especially when work is done by a collegial group. For example, in criminal law, specialized study is required in order to produce judicial experts capable of reaching accurate conclusions in the conflicts presented by society. The same is true in constitutional law, administrative law, civil law, labor law and other fields. This has obligated legislators in almost all countries to divide their supreme courts into different divisions, sections or departments.

It is equally important to point out that national case decisions need to be uniform, and higher converging vertices need to be created for that purpose. Uniformity is accomplished when hearings on different cases reach the ultimate authority through proper channels. These channels are extraordinary appeal for unconstitutionality, amparo appeal, ordinary appeal, and in labor cases, final appeal to the Supreme Court of Justice.

All of the above illustrate the necessity of constitutionally establishing specialized work on the part of the Supreme Court of Justice, in order to achieve swifter, more uniform and better administration of justice.

6.5 Reserve of Law: Non-Delegation of Legislative Power

The principle of "reserve of law," developed initially in German doctrine at the end of the nineteenth century, means that certain particularly important matters can only be regulated through a statute enacted by the National Assembly.

Reserve of law is normally established in the Constitution, so that only by amending the Constitution can the reserve be eliminated. The practical effect is to block reserved matters from administrative control. In judicial matters, modern constitutions usually contain a reserve of law concerning the creation and organization of the courts (Court Enabling Act), governing areas such as judicial authority, judicial procedures, and non-removal or revocation of judgeships.
6.6 Popular Participation

Popular participation in the administration of justice has been a constant preoccupation and aspiration of the Nicaraguan people. The above affirmations are corroborated by the “civil jury” practice, even though rules were never established for it. They are corroborated by the appointment and existence of lay judges to hear cases involving lesser amounts in civil matters and for misdemeanors in criminal matters. The presence of a “jury” in criminal matters is also evidence of these affirmations. The jury was incorporated into our legal system beginning with the Criminal Instruction Code of 1879, which is still in effect.

Although it is not possible to determine precisely the sources which inspired legislators of that period, the insertion of the “jury” in the Code, which has a strong inquisitorial tendency, is a fact accepted by national scholars. It reveals, directly or indirectly, a liberal tendency inspired by the Criminal Instruction Code of France of 1806, or by the Constitution of Cadiz (Spain) in 1812. The jury is a democratic aspiration and expression. If the people participate in the legislative branch, it is incoherent to deny them participation in the exercise of the judicial branch. Besides, the conscience of the judge or trier should be founded on collective conscience. However, in spite of these solid theoretical foundations, the jury did not fulfill its promise in the earlier system, which was a system rotten from within and which, of course, the jury did not escape.

With the triumph of the Revolution, the institution of the jury underwent substantial changes. In some departments, mass organizations were called upon to propose candidates for the elections of jurors. Jurors have acquired a greater consciousness of their responsibility in the administration of justice, so much so that “juror absenteeism,” a frequent vice in the past, has disappeared. However, the field of jury application under the Criminal Procedure Reform has been limited to five types of felonies: aggravated murder, endangerment, patricide, infanticide and rape when the victim is over fourteen years of age. Although we are aware of the imperfection in human institutions, after six years of Revolution, we have had positive experiences in the creation and workings of the courts with effective popular participation.

In any event, the participation of the people in the administration of justice, by actively integrating popular elements in the courts, as well as by passively permitting public attendance at trial, assures
"revolutionary legality." Additionally, it has been a key factor in the democratization of the judiciary. Consequently, in order to guarantee the permanent application of popular participation in the administration of justice, we deem it advisable to state it in the Constitution.

6.7 Proposed Text: The Judicial Branch

Organization of the Administration of Justice

Article 1

The Administration of Justice guarantees revolutionary legality and the protection and oversight of human rights, through the creative application of the law in matters and cases within its authority.

Article 2

The Administration of Justice shall be organized and shall function with popular participation. Appropriate laws shall determine that participation.

The Judicial Branch is composed of the Supreme Court of Justice and other tribunals as established by law.

Article 3

With the exception of the Supreme Court of Justice, which shall be composed entirely of lawyers, justice tribunals, in the actions within their jurisdiction, shall be collegial and shall be made up of lawyers and non-lawyers representing popular sectors. The Court Enabling Act shall determine the qualifications of their members.

Article 4

The term of office of the justices of the Supreme Court of Justice and of the lawyer members of regional tribunals shall be the same as that of the members of the National Assembly. The term of office of the members of other tribunals shall be determined by law.

Article 5

The members of the Supreme Court of Justice and the tribunals, may be removed from their office during their tenure only for just cause, duly proven.
Appointment of Justices and Judges

Article 6

The National Assembly is charged with election of the members who comprise the Supreme Court of Justice and with the determination of its internal organization.

The National Assembly is also charged with election of the lawyer members of the Regional Tribunals and with their internal organization.

The lawyer members comprising the zone and municipal tribunals shall be appointed by the Supreme Court of Justice.

Article 7

Non-lawyer judges representing popular sectors shall be appointed at Popular Assemblies by the corresponding mass organizations within their respective areas. The form of the election shall be governed by law.

Judicial Democracy and the Principle of Impartiality

Article 8

The members of the justice tribunals, be they lawyers or not, have equal rights in the exercise of their judicial duties.

Article 9

Rulings and decisions of the justice tribunals shall be adopted by simple majority of votes.

Article 10

Trials shall be public. However, certain trials or proceedings may be in closed session if required by morality, security and public order.

Article 11

Justice is free.

Article 12

Justice emanates from the people and shall be administered with the people's participation, and in the name of the people through the judicial bodies provided by law.
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Article 13

The equality of persons, consecrated by law, must be guaranteed in the judicial process in real form by the judicial body.

Law Reserve

Article 14

What is not stipulated in this Constitution regarding the composition, functions and powers of tribunals and judicial proceedings may be regulated only by duly enacted statute.

The Principle of Independence and Legality

Article 15

The Judicial Branch is independent of any other branch of the State. Within the judicial structure tribunals are also independent in the exercise of their duties. The hierarchy established by law exists only with respect to suits, appeals, and discipline.

Article 16

Tribunals and judges comprising the Judicial Branch shall be subject in their duties only to the Constitution and the law. The Enabling Act shall prescribe their organization.

Unity and Exclusivity

Article 17

Justice tribunals comprise a unitary system, whose highest body is the Supreme Court of Justice. They alone are charged with the exercise of jurisdiction.

Military tribunals are regulated by special act.

The Supreme Court of Justice shall hear, in a manner prescribed by law, appeals from decisions they issue in second instance.

Departments

Article 18

The Supreme Court of Justice, the number of whose justices may not be less than at the present time, is the highest Tribunal of the
Republic and shall be divided into departments. Matters to be heard by the departments or the Full Court shall be prescribed by law.

Supremacy of the Constitution

Article 19

The present Constitution of the Republic is the Fundamental Law; no other law, decree or regulation may contradict it.

Constitutional Review

Article 20

Appeal is established for unconstitutionality of a law, decree or regulation that opposes what is prescribed by the Constitution.

Article 21

The Full Supreme Court of Justice is the authorized body to hear appeals for unconstitutionality. Procedures shall be prescribed by law.

Article 22

Amparo appeal is also established, against any disposition, act or resolution and, in general, against any action or omission of any officer, authority or agent of those who violate or attempts to violate rights and guarantees consecrated in the Constitution. Procedures shall be prescribed by law.

External Relations

Article 23

All other authorities of the Republic shall lend such collaboration to the judges and tribunals as they may need for the better fulfillment of their duties.

Article 24

State authorities, organizations, legal institutions and individuals must comply with the verdicts and resolution of the judges and tribunals.
Transitory Articles

Article 25

Judicial transformation may be set into motion, by means of special projects, in accordance with what the law establishes.

While the judicial transformation contemplated in this Constitution is being carried out, tribunals' structures and duties shall continue to be governed according to existing law.

Article 26

Special jurisdiction tribunals shall continue to function as long as the causes which gave rise to them continue.
PART II - THE JUDICIAL TRANSFORMATION IN NICARAGUA (1986-88)

Introduction

This section incorporates a number of written works, lectures, and speeches given in Nicaragua and abroad between December 1986 and April 1988. As with Part I, this section expresses the genesis and development of the principal ideas of justice, the judicial branch, and the Rule of Law in the Nicaraguan revolutionary process.

These essays are oriented both towards designing and implementing legal institutions and provisions for transforming the judicial system, and towards resolving structural and related problems in the daily exercise of the Supreme Court of Justice. The ideas and the concrete decisions are the fruit of the collective work of the Supreme Court of Justice and other judicial officials. These essays reveal the severe time constraints placed on the Judicial Branch due to the volume and demands of official obligations. At the same time, they allow a glimpse of the process that requires the President of the Supreme Court to explain the dominant ideas in various forums. What has prevented a more coherent linking of the different essays to improve the general architecture of this article has, on the other hand, permitted some glimpse of the movement that flows behind the more visible ideas and actions. The search for a concept and practice of the Rule of Law in the Revolution is, in the final analysis, the fundamental objective of all the essays.

In Part I, the search was for preliminary and fundamental concepts of the Rule of Law, with a view towards elaborating the political Constitution through the lens of the Judicial Branch. For that reason, the principal themes of Part I revolved around the proposed bill for a new political Constitution presented to the National Assembly by the Supreme Court of Justice in January 1986.

The basic points of the bill were: jurisdictional unity, constitutional control, independence of the judicial branch, and popular participation in the administration of justice. The Assembly adopted the Court's entire bill. This was the basis for chapter V of title VIII of our political Constitution promulgated in January 1987.

In this second part, the theme of the Rule of Law is again present throughout the various essays and lectures. It appears in the essays on the concept of state, law and justice, and amparo—particularly with respect to appeals for unconstitutionality. It is also present in the reflections on separation of powers and on reform of criminal pro-
cede. Finally, the Rule of Law is an essential part of our study on
the judicial transformation. The Rule of Law is, in short, the com-
mon proposition underlying all the essays, without detracting from
the purposes and specific propositions of each one. While Part I ex-
pressed the principal ideas of the Judicial Branch pertaining to the
political Constitution, Part II focuses primarily on the legal reforms
which will bring ordinary legislation into conformity with the Consti-
tution, and develop constitutionally-based regulatory laws.

We must point out that we are discussing Parts I and II in this
introduction because they unite a theory and an experience tied to the
process of judicial transformation in Nicaragua. Both sum up the ju-
dicial transformation expressed in the Constitution and the subse-
quent judicial reform process, thereby articulating a completed stage.
The transformation represents a theoretical formulation and a polit-
ical implementation. This stage is expressed fully with respect to its
theoretical formulation, and partially with respect to its practical
implementation.

The Judicial Branch’s theoretical foundations are now part of the
constitutional text in force. The following are constitutionally estab-
lished: jurisdictional unity, constitutional control, the appeal for un-
constitutionality, independence of the Judicial Branch, the Supreme
Court of Justice’s authority to organize and direct the Judicial Branch
according to article 164, subsection 1 of the Constitution, decrees 299
and 303 (which give the Court the power to create, eliminate, and
merge courts of the first instance), organization of Appellate Courts,
and establishment of jurisdiction by subject matter and amount on the
basis of agreements with the Supreme Court of Justice itself without
National Assembly approval.

The Court, incorporating the views of the former Ministry of
Justice, completed the bill for a new Constitutional Act of Amparo.
This Act includes a chapter which establishes and regulates proce-
dures for the exercise of appeals for unconstitutionality, pending ap-
proval by the National Assembly.

The Assembly has already approved the first part of the criminal
procedure reforms, on the basis of a joint bill prepared by the General
Prosecutor of Justice, the Supreme Court of Justice and the Ministry
of the Interior. The most important part of the reform is the abolition
of the General Prosecutor’s monopoly on criminal prosecution. How-
ever, the General Prosecutor retains the exclusive right to prosecute
for crimes against national security, economic crimes and heinous murder.

The Judicial Branch has been expanded by the Constitution and by statutes, providing the foundation for judicial transformation. In this process, the abolition of the Popular Anti-Somoza Tribunals was the first and perhaps most important step in the concrete implementation of article 159 of the Constitution (recognizing jurisdictional unity). The transfer of the jurisdiction of the Regional Committees on Housing Affairs ("CRAH") to the Judicial Branch is also about to take place. This means that an appeal in this area will have to be taken, after approval of the relevant statute, to the appropriate Regional Court of Appeal.

Additional jurisdictional matters are still pending. The reunification of the jurisdiction of Custody and Protection of Minors, now in the hands of the Nicaraguan Institute of Security and Social Welfare ("INSSBI"), and the jurisdiction of the Agrarian Tribunal, must be brought within the Judicial Branch in order to complete the process of implementing article 159 of the Constitution. The continuation of the reform of criminal procedure, and putting into practice judicial policies adopted to reduce the delay of justice, are among the greatest problems still facing us.

These are all important, central themes of Part II. We have also deepened and developed Montesquieu's theme of the separation of powers, as was promised in Part I.

This Part completes the full vision of transformations which have taken place between 1985 and 1988. We trust that this text presents, with sufficient clarity, the fundamental ideas and the conceptual framework in which the ideas have developed.

1. Closing Address at the International Seminar on Law and Justice in the Nicaraguan Constitution

1.1 Fundamental Principles of the New Constitution

In 1987, the National Assembly gave revolutionary Nicaragua its first Constitution. This Constitution attempts to express, on an institutional level, the social, economic, and political realities of our country. In addition, the Constitution attempts to insure that the current of history that crosses our land flows through an increasingly coherent legal system.

Every true constitution is established by the dialectic that entwines the ebb and flow of history. A constitution is therefore, both a point of arrival and a point of departure, since at the moment that it gathers the experience of these difficult and luminous years into a synthesis, it immediately opens the tasks of the future, and lays before us the future as a task. In this way, the Constitution synthesizes the institutional labor that began on the first days of the triumph, appearing in the Fundamental Statute and the Statute of Rights and Guarantees of Nicaraguans. The labor continued throughout the numerous decrees issued by the Junta of the Government of National Reconstruction, carrying out profound transformations of our society. This labor was then translated into statutory law in the Council of State, into popular will, the presidential and legislative elections of 1984, and finally into text and context of our revolutionary reality in the Political Constitution of the Republic.

The Constitution also opens the furrows of new work. Ordinary codes and statutes must be changed to conform to the newly changed Constitution. Thus, the Constitution requires a legal effort to impose the content and essence of the constitutional norm upon the ordinary laws.

Without falling into either the logical-rational abstractions of Kelsen’s theory of law, or the overvaluation of the norm of legal positivism, we think that law is not merely superstructure without identity, unilaterally determined by the infrastructure. Law is a reality that, although it does not deny the influence of the infrastructure, has its own specificity and exercises, at the same time, its reciprocal influence upon the forms of production and social phenomena in general. There is, thus, a two-way movement of feedback and dialectic between the economic sphere and the legal sphere.

The Constitution is simultaneously the base and the pinnacle of the legal system. It provides the foundation for ordinary laws and, at the same time, allows these laws to carry out the Constitution’s values, principles, and formal content. This “base-pinnacle phenomenon” has become a necessary condition of legality under the principle that the Constitution is the supreme law. The law is not only based on constitutional principles, but carries out those principles. Thus, the law in its logical structure and methodology, emanates from the Constitution and returns to it.

In this sense, Kelsen’s theory has some value because it contrib-

2. See supra Part I note 2.
utes to an explanation of the logical structure of the system and of each individual norm as a piece of the whole. When Kelsen’s theory establishes the hierarchy and interaction of norms, it also establishes a valid methodological principle. But this is true only when it does not pretend to exhaust the real content of law, which is always a historical content.

When we say historical, we mean to affirm that the law must express its reality and, at the same time, be an instrument of that reality. Bourgeois law has achieved this proposition quite fully, reproducing real inequality in the name of the declaration of formal equality. Someone has said that true equality is equal treatment to equals and unequal treatment to unequals, since equal treatment to unequals only serves to perpetuate inequality. Equality is the first fiction that bourgeois law passes off as reality. The next is to deny its historical character by attributing to law an exclusively rational nature. The effect of this, as we have seen, is the reproduction of the historical picture of capitalism founded upon inequality between individuals and classes.

The law is and always has been an instrument for the reproduction of the social system that produces it. It builds within the dialectic of society a reciprocal movement of influence and double direction that goes from the base to the peak and likewise from the peak to the base.

A constitution, to the extent that it is the fundamental norm, is a mediating mechanism between civil society and political society. To be successful, a constitution must develop a system of capillaries and communicating arteries between all the particulars that make up the structure of society, giving them fluidity and coherence. In our case, the Constitution and the legal and judicial transformation that has to take place to fulfill what it prescribes, must be a channel for change and cause of future transformations. It must also be the formal framework and instrument to carry out the objectives of the Revolution. It must, in short, reproduce the reality which exists in the social and economic base, in ideology and in revolutionary values.

This transformation requires an equilibrium between the text and the context, between the framework and the reality it contains, and between the norm and the sociopolitical reality. Every constitutional framework, either by excess or defect, distances itself from its circumstances. Thus, a constitution either lives in the kingdom of utopia by being a metaphysical abstraction that transcends the objective world,
or else it lags behind social changes. It impedes those changes and ends up coming apart as the final result of the contradiction between the productive forces and the social relations of production.

Our recently approved Constitution incorporates the fundamental elements of the revolutionary transformation in Nicaraguan society. Those elements are based on principles of political pluralism, mixed economy, and non-alignment. Beginning with title I, chapter I, the fundamental principles announced do not provide an empty and rhetorical declaration, but rather the daily, historic, and epic reality of the Nicaraguan people. Article 1 provides that

Independence, sovereignty and self-determination are inalienable rights of the Nicaraguan people and the foundation of the Nicaraguan nation. It is the right of the people and the duty of all citizens to preserve and defend, with arms if necessary, the independence of the Nation, its sovereignty and national self-determination.\

Rarely have these words embodied such a dramatic and glorious reality, making the legal norm a living and throbbing body, expressing the will and the practice of liberty and dignity of the Nicaraguan people.

The Constitution recognizes basic and inalienable individual rights such as the rights to life, dignity, liberty, the family, community, country, humanity, equality under the law and due process. It also enshrines political and social rights, labor rights, agrarian reform, defense, the economy, education, culture, the rights of the Atlantic Coast communities, and the organization of the State and the defense of the Constitution.

These principles and constitutional provisions cover the most permanent values of the historic life of the Nicaraguan nation, while at the same time incorporating the great transformations of the Revolution. For example, the agrarian reform has given land to thousands of farmers, the educational reform has attacked illiteracy at its roots and has made education a phenomenon for the masses, and the cultural transformation has made poetry, painting, song and dance flourish like the miracle of a rose that sprouts in the hands of the people.

1.2 The Judicial Branch in the New Constitution

Title VIII, chapter V, of the political Constitution refers to the Judicial Branch. This is the first step in the judicial transformation.

3. Nicaraguan Const. art. 1.
A series of general principles outline the framework of this reform. The first principle is that the Constitution establishes that justice emanates from the people and shall be imparted through the Judicial Branch. In so doing, the popular essence of justice is enshrined. Implicitly, the lines of axiological content are prescribed, tied strictly to the historical values of the Revolution to which the people are both the purpose and the protagonists.

The Judicial Branch is recognized as the delegate of the people in whose name it will impart justice. This confers a different sociological and political sense upon the organization of the state than that which Montesquieu attributed to it in *The Spirit of the Laws* in 1748.

Originally, the separation of powers doctrine responded to the upheaval in European society of the eighteenth century and to the division of political and economic power between different social classes. However, the necessary content which it acquires in our constitutional text and in our own reality which that text formally expresses, is a concept of popular cohesion as the dominant expression of Nicaraguan society.

Montesquieu’s separation of powers was designed to produce an alliance between the bourgeoisie—the economically dominant class which exercised the legislative and executive functions—and the King. Historically, this alliance was confronted by the landholding aristocracy. This manifested itself in the struggles of feudal society for territorial and legal reunification of sovereignty in the nation-state. But the application and meaning of separation of powers in our social and legal reality is directed in every case to aiding the people. As established in article 2 of the Constitution, the people are the locus of national sovereignty, the source of all power, and the forgers of their own destiny.

The Judicial Branch, in Montesquieu’s division of powers, remained a stronghold of the landholding aristocracy, displaced from other functions by the bourgeoisie and the monarchy. The historical reality of our country stands in contrast. Far from effecting a distribution of the functions of state among different social classes, we have a distribution of abilities, attributes, or powers which issue from one solitary power—the people.

It is true that labels express determinate contents, but it is also true that contents change in spite of their labels and that there is no word, however precise, that can express all the richness of change and action. For us, the separation of powers is a label, pulled from the
West and integrated into the legal and political tradition of Latin America. It responds to a new content, with different objectives, and with different subjects. The separation of powers must reproduce, in spite of its origins, the values of the Revolution. Separation of powers will neither take revolutionary force from our process by its absence, nor add transforming power by its absence.

Article 166 of the Constitution establishes popular participation in the administration of justice by indicating that “[t]he administration of justice shall be organized and shall function with popular participation as determined by the law.”

The Supreme Court of Justice and the full Judicial Branch is presently studying the draft bill for a Code of Criminal Procedure, in which the application of this constitutional provision shall be considered. We have approved a calendar of work. It contemplates analysis and discussion of the draft bill by all the judges and magistrates of the Republic, and by the Ministry of Justice and Ministry of Interior. In addition, it calls for consulting with the law faculty at the National Autonomous University of Nicaragua and the Central American University, CONAPRO Heroes and Martyrs, and the Association of Democratic Jurists.

The Supreme Court of Justice will issue its opinion on the draft bill, incorporating the suggestions of all these groups. Modifications will be made to improve it and make it more responsive to the necessities of Nicaraguan society. In addition, the principles of public trials, oral proceedings, direct examination, sound discretion (sana crítica) and other elements are incorporated. These elements will result in modern instruments that benefit the principles and values of the administration of Nicaraguan criminal justice.

Upon an agreement between the Ministry of Interior, the Ministry of Justice and the Supreme Court of Justice, the latter will present the bill to the National Commission of Justice, so that the Commission may proceed with its study. Once approved, the Commission will send it to the National Assembly. The Commission is presided over by the Vice President of the Republic, and is composed of the Minister of Interior, the Minister of Justice, the Controller General of the Republic, the Secretary General of the National Assembly, and the President of the Supreme Court of Justice. According to the schedule, the bill for the Code of Criminal Procedure will be presented to the full Assembly in the second half of 1987.

With regard to constitutional review, article 164 mentions that

4. *Id.* art. 166.
“[t]he functions of the Supreme Court of Justice are to . . . [r]eview and decide on writs challenging the constitutionality of a law, filed in conformity with the Constitution and the Law of Amparo.” In addition, title X, chapter II, also establishes constitutional review.

Article 187 states:

Any citizen has the right to seek judicial review of the constitutionality of any law, decree or regulation that is inconsistent with the Political Constitution.

With the appropriate constitutional requirements established, the chapter on the Law of Amparo remains to be drafted, in which corresponding procedures shall be established and very important questions not treated in the Constitution will be resolved. Among other things, it will be necessary for these specific propositions to clearly define what the character of the Constitution is, not only as a superior programmatic norm, but also as a norm that can be directly applied. Likewise, it will have to be decided if all judges may declare laws unconstitutional in specific cases before them, or whether consideration of the case ought to be suspended immediately and sent to the Supreme Court, to be continued once the problem of unconstitutionality has been resolved.

While the judge must apply the Constitution over any other law, its application does not transcend the specific individual case. Only the Supreme Court of Justice has the power to issue decisions on constitutional subjects with effects that extend to everyone or that overturn the unconstitutional law. To get Supreme Court review the person affected might have the immediate option of bringing the question of unconstitutionality or may make a timely appeal. The periods in which an appeal may be brought after the law has been promulgated will have to be established. However, a judge may at any time bring up the problem of unconstitutionality of a law in a case before the court. Clearly, there are a number of possibilities and options which will have to be decided and specified very concretely in the statute on the subject.

There are other questions that will have to be identified and resolved in the statute. For example, the suspending or retroactive effects of an appeal or of a decision may need to be resolved. It is our unofficial opinion that the appeal should not have a suspending effect. In France, for example, an appeal may be directed against a law that

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5. Id. art. 164.
6. Id. art. 187.
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has been approved, but not yet promulgated. This has the effect of preventing the law from entering into force. We think the appeal should only be allowed against a law that has already been promulgated and is legally in force. This way, it is possible to avoid use of the appeal for purposes of weakening the legislative function of the National Assembly.

With regard to the retroactive effect on laws in force, we believe laws should not be affected if they were promulgated prior to the promulgation of the unconstitutional statute. Such retroactivity ought to be sacrificed in favor of legal certainty and institutional stability.

Additional concerns which have been expressed and discussed in this seminar must be addressed. These concerns include resolving the nature of the decision to identify contradictions of a logical-abstract nature between the Constitution and the law. Other concerns include the interpretation of a law when its unconstitutionality is predicated upon one interpretation given to it by a court, and the expansive nature of the decision with suggestions to the Legislative Branch about a specific law.

The Supreme Court of Justice has a very delicate task in the preparation of the bill, which shall be proposed to the National Assembly on this subject. The Constitution confers upon this Court the duty to initiate laws on matters within its jurisdiction.

The Constitution also addresses the unity of jurisdiction and the appointment of the magistrates and judges of the Republic within the judicial branch. With regard to unity of jurisdiction, article 159 states: "The Courts of Justice form a single system, headed by the Supreme Court of Justice. The exercise of judicial powers falls under the authority of the Judicial Branch." Article 199, referring to special jurisdictions, states: "The special courts shall continue to function until such time as they come under the jurisdiction of the Judicial Branch." Under these articles, the Constitution encompasses the principle of unity of jurisdiction and establishes the transitory character of the special courts. In addition, military jurisdiction is regulated by statute and is subject to appeal to the Supreme Court.

The nomination of magistrates and judges is provided for by article 138, subpart 7, which authorizes the National Assembly to appoint the magistrates of the Supreme Court of Justice. They are to be

7. Id. art. 159.
8. Id. art. 199.
9. Id. art. 159.
selected from slates presented by the President of the Republic. The 
President of the Supreme Court of Justice is appointed by the Presi-
dent of the Republic from among the magistrates appointed by the 
National Assembly, as provided by article 163 of the Constitution. 
The appointment of other judicial personnel is provided for by article 
164. It states that one function of "the Supreme Court of Justice is 
. . . to appoint the judges of the Appeals Courts and the Courts of the 
Republic in accord with procedures established by law." 10

1.3 Protection of Rights and Supremacy of the Constitution

The principal provisions of the Constitution regarding the Judi-
cial Branch are the protection of rights and supremacy of the Consti-
tution. They embrace two fundamental questions. First, what 
procedures can be established to facilitate judicial mechanisms capa-
bile of guaranteeing effective protection of the rights of the citizens? 
The Constitution grants every citizen the right to invoke an appeal for 
unconstitutionality, an appeal for amparo, and a writ of habeas 
corpus. These three mechanisms form a solid defense of the 
supremacy of the Constitution as well as guaranteeing individual 
rights. But the importance of the other ordinary and extraordinary 
appeals should not be minimized, since they can be brought before the 
courts and the Supreme Court of Justice in each case.

Second, and closely related to the protection of individual rights 
and the safeguard of the supremacy of the Constitution as guarantee 
of the Rule of Law, is the position of the Judicial Branch within the 
constitutional scheme that regulates the social and political life of the 
nation. These powers are conferred upon the Supreme Court of Jus-
tice, which is a vital body for the equilibrium between civil and polit-
ical society. It acts as an organism capable of contributing effectively 
to the permanent regeneration of the social fabric and is indispensable 
in every politically and legally organized human community.

The Court's powers include constitutional control together with 
all the other ordinary and extraordinary writs, the reaffirmation of the 
independence and obligatory nature of judgments and decisions of the 
Court, and the power to initiate laws on matters within its jurisdic-
tion. This comes at a time when the process of judicial transforma-
tion is being encouraged. Thus, the Court is called upon to be a 
prominent organism within the institutional body of the Republic. 
However, these considerations cannot and should not remain solely

10. Id. art. 164.
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on a theoretical level. Constitutional development reflects the existence of a political reality determined by the Revolution. In the Revolution, these Constitutional provisions acquire their true meaning and content. There, revolutionary legality and the Rule of Law receive specific meaning, not as abstract labels responding to an archetype of principles and norms immutable in time and space, but as concrete historic experiences reflecting a specific political will. This makes it possible to endow the people with a Constitution and carry forth legal reform and judicial transformation in the midst of an unjust and immoral war imposed upon our people by the current administration in the United States. This process of organization and institutional development initiated on July 19, 1979, reached a high point with the approval of our Political Constitution.

1.4 Future Reforms

The approval of the political Constitution, particularly the chapter on the Judicial Branch, concluded an important stage of the Court's work. This work consisted of discussion, preparation, and approval of the document before finally going to the National Assembly. Its fundamental content is today part of our political Constitution. From this point onward, the Judicial Branch faces an intense but fertile labor of drafting the bills to assure legal and judicial conformity with the norms and provisions contained in the Constitution.

The Court will soon begin work on three fundamental objectives: discussion, refinement, and approval of a bill for a Code of Criminal Procedure; the editing of the chapter on the Act of Amparo; and the reform of the Court Enabling Act. The Court continues work on administrative reform of the Judicial Branch and the development of a methodology to manage studies on the structure, function, and possible modification of the Judicial Branch.

The Court must also investigate delinquency in the country. Such an investigation should be designed to determine its causes, quantitative burden on the judiciary, possible alternatives, and inter-institutional cooperation in dealing with the problem. The Court plans also to finish the Ministry of Justice's study on developing a document which contains the design of a harmonious, more coherent judicial system, and the development of proposals for national policies on judicial matters. When completed, the study will be jointly submitted to the National Commission on Justice.

Beyond this, the Court will continue to deal with, and resolve if
possible, the serious economic, infrastructural, and transportation problems which plague the Judicial Branch throughout the country.

This three day International Seminar on Law and Justice in the Constitution succeeded in gathering all of the magistrates and judges of the Republic, delegates of the Ministries of Interior and Justice, representatives from the National Autonomous University of Nicaragua and the Central American University, the CONAPRO Heroes and Martyrs, and the Association of Democratic Jurists of Nicaragua. Eminent jurists from the United States, Cuba, Spain, France, Italy, the Federal Republic of Germany, Ecuador, Mexico and Costa Rica participated. They came from different parts of the world, different jurisprudential schools, and even different political systems. We thank them for their presence, their solidarity, and their contributions. We are secure with the knowledge that they are true friends of the Nicaraguan people and the Sandinista People's Revolution, and that we can count on them for advancing the cause of justice, self-determination, dignity, and Rule of Law. We give our friendship and our fraternal embrace, and acknowledge their contributions with the hope of seeing them again in revolutionary Nicaragua on a future occasion of a new conference for consolidation and deepening of our efforts for justice, peace, and Rule of Law.

We especially wish to thank the Friedrich Ebert Foundation, represented in Nicaragua by Clement Rhodes, for its constant cooperation with the Judicial Branch and particularly with this seminar. A few weeks ago we presented to them part of our work program for which we are requesting economic support. This program contains three particularly noteworthy activities: initiating the Judicial School, holding regional seminars and holding the new International Seminar on the Bill for a New Code of Criminal Procedure.

We also wish to thank the personnel of the Judicial Branch who have worked tirelessly to prepare this event. To all who have participated in this seminar, coordinators, reporters, general reporter, translators, and collaborators in general, our thanks.

We wish to acknowledge before the authorities of the nation what we said in the inauguration of this event: the self-sacrifice of the Supreme Court of Justice and all the magistrates and judges of the Republic in fulfilling their duty in the midst of extremely difficult economic and material situations provided an inspiration to all of us.

We are especially grateful for having with us our friend the Vice President of the Republic, Doctor Sergio Ramírez Mercado, whose
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presence is an encouragement to us all. His understanding and good faith towards our difficulties and his help in the solution of our material problems has been invaluable to us.

In concluding this seminar, we have evaluated the ideas and concepts debated in the October 1985 seminar which are today Constitutional law. These seminars are not isolated events, but are an organic part of a work plan in which ideas are debated, discussed and analyzed. Similarities and differences with our own and fellow magistrates are set out and incorporated dialectically in the development of our work and internal discussions. As we proceeded with the seminar of 1985 and with the process of development of our draft on the Judicial Branch, so we shall proceed now with a view to the immediate future.

We are left with a new experience and a series of ideas and suggestions that we shall bear in mind when we initiate our work to conform the laws and judicial structures to the lines laid down by the Constitution.

In conclusion, we invite all the members of the Judicial Branch to join enthusiastically in the tasks ahead; to carry them out with conviction, with unity and a fraternal spirit of solidarity, with unshakable faith and hope in the future of our country and our Revolution.

2. Remarks at UNESCO on the Occasion of the Fortieth Anniversary of the International Association of Democratic Jurists.

2.1 The Foundations of World Peace

In making use of the honored forum of UNESCO at this inaugural ceremony commemorating the fortieth anniversary of the founding of the International Association of Democratic Jurists, I want to express my country’s and my personal gratitude to all those who fight for the cause of peace and law in a world surrounded by the fire of war. This world event takes place under the eaves of UNESCO and is, above all, a significant message and a symbol of hope and faith. Both the organization which celebrates this event and the place at which it is held give life to this message of hope. The International Association of Democratic Jurists is an example of perseverance and devotion in the search for peace and persistent action from different parts of the world. This group stands for the supremacy of funda-

mental values of individuals and peoples and for the supremacy of law and justice.

UNESCO serves as the world’s stage for solidarity among peoples, and continues to be the meeting point toward which the roads of the world converge. Last year, in October, the United Nations celebrated the fortieth anniversary of its founding. We all recall four decades ago, some because they were contemporaries of the tragedy, others because they are the inevitable heirs of the memories of terror, the Holocaust. Today, forty-one years after putting out the last bonfires of the Second World War, peace continues to be an aspiration and a point of reference for a better future. We continue to hear the blasts of cannon fire and witness the devastation of war.

The future is uncertain. New hallucinations of power place the human species once again at the edge of the abyss. While people in many parts of the earth have neither food nor shelter, while many people fight for their liberation and others for the defense of liberty already won, while sickness and hunger erase the smiles from the lips of children, and trees and flowers die of pollution from industries, we are threatened not only by having the earth usurped, but also by a sky in which stars will no longer be points of light in the blue cover of the heavens, but points of fire and death.

There has been no new world war, to be sure, and this is the best justification for the United Nations. If humanity turns its eyes to the past, it contemplates the history of the last forty-one years. Flowers are reborn in Hiroshima and Nagasaki, and in spite of the threats and dark possibilities, a new sun nurtures life from among the lethal horrors of the atomic bomb. However, the world lives on the edge of a conflagration whose destructive effects, it is feared, this time will be final.

Peace is not the absence of war, but the reality of a free and dignified life with respect for the moral values of being human, as well as respect for the self-determination and sovereignty of peoples. It is the application and fulfillment of the new international economic order, and the abolition of usurious mechanisms in international relations that make external debt an instrument of exploitation which not only mortgages our secular riches but also transfers to others our destiny, our identity, and our historic possibilities as people.

Peace is recognizing that despite fundamental differences, the people of the north and south share a common destiny, that the recognition of our countries, the reformulation of international relations
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and external cooperation, are neither charitable acts nor gracious con-
cessions. They are unavoidable historical necessities. Without our
development, the industrialized countries will succumb, and our col-
lapse will be the collapse of a total system. Hence, there exists the
necessity, today more evident than ever, of treating humanity as a
whole.

Rich countries, therefore, must significantly invest their re-
sources to further develop the poor countries. Such contributions
would be a grand gesture of world solidarity, and would serve as com-
pensation for the constant usurpation that has victimized the Nicara-
guan people throughout history.

According to a 1983 report to the Secretary General of the
United Nations, $800 million are invested annually in arms. While
two thirds of humanity suffers hunger, misery, sickness, and malnutri-
tion, the world is preparing for war, not peace. This spectre of war
remains ever present as colonial and neo-colonial countries refuse to
recognize the oppressed peoples’ legitimate right to independence.

Peace can be accomplished by founding a society based upon the
Rule of Law. The Rule of Law recognizes the intrinsic dignity and
equal and inalienable rights of the human family, the hope of a world
free from fear and misery, and the universal and full respect for the
fundamental rights and liberties of humans. All people possess the
right to self-determination, and the right to freely establish their polit-
cal conditions and likewise provide for their own economic, social
and cultural development. These rights are proclaimed in article 1 of
the International Agreement on Economic, Social and Cultural
Rights, and in article 1 of the International Agreement on Civil and
Political Rights.

2.2 U.S. Aggression and the Decision of the World Court

There exists the right to live free of external aggression, without
mined ports, economic blockades, or threats of invasion. Currently,
the United States organizes and finances such aggressions against our
country and the Popular Sandinista Revolution. The moral and his-
torical obligation to respect the international judicial process and in-
ternational judiciaries, such as the International Court of Justice at
the Hague, involves reestablishing the dialogue of Manzanillo and ef-
fektively supporting the efforts of Contadora. Furthermore, there is a
moral obligation to halt aggression against people who desire and
should be given the opportunity to live in peace. Such opportunity
should be offered without more deaths, without more tears, without more destroyed homes, and without more mothers' sorrows.

War burns in Central America. The United States directs and finances an immoral war which violates the norms of International Law and its own domestic law. Additionally, the United States violates the principles of ethics, and the basic rules that govern the civilized co-existence of peoples. The entire world has seen that arms are supplied to the Contras by means of airplanes that violate the air space of our country. The North American aircraft downed while transporting arms to the Contras is irrefutable proof of the United States' support for the Contras. The Nicaraguan government has denounced these actions by the United States.

Furthermore, procedures openly violating the United States' own laws have been used to finance the war in Central America. The recent diversion of funds to Contra bank accounts, as a result of the sale of arms to Iran, serves as an example of these violations.

The December seventh bombing of Nicaraguan citizens in Wiwili and Murra, twenty-five kilometers from the border, demonstrates a disrespect for sovereignty and territorial integrity. It constitutes an intolerable aggression carried out to justify a direct invasion of North American troops in our country. Furthermore, military exercises are carried out by North American troops in Honduran territory which lies just fifteen kilometers from the Nicaraguan border. Given these facts as well as the direct evidence of the Contra raids from Honduran territory, the most important aspects of the Reagan Administration's plan of aggression against Nicaragua and its Sandinista Revolution become clear.

The people of Nicaragua want peace. They want to dedicate their energies to the fruits of their work in this land that they love so much. This is the land of our ancestors, and of our children; our own land charged with history, sacrifices, struggles, and desires. We also wish to reaffirm our willingness to defend our land at all costs and with the most permanent values of liberty and dignity.

The decision of the International Court of Justice at the Hague recognizes that the United States has violated customary law through a series of acts which we characterize as state terrorism. The use of force is proscribed by the United Nations Charter and by customary law. Respect for the principles of self-determination, national sovereignty, non-aggression, and the right of people to maintain their own
identity and development together constitute the axis of the philosophy of both the United Nations and international law.

The Constitution of the United States provides that treaties ratified by that country become part of the fundamental charter itself.\textsuperscript{12} We think that the intention of such a provision is to recognize that the international law contained in international treaties is not limited to being characterized as a universal declaration of principles or an ordinary statute within the North American legal system. The provision has the character of an obligatory constitutional norm and elevates international law into the domestic law of the country at its highest level. The United States' reservations to the provisions proscribing the use of force and protecting the self-determination of people, and its failure to sign the Agreement on Economic, Social and Cultural Rights and the Agreement on Civil and Political Rights of the United Nations, ten years after these Agreements entered into force, expose its intention to evade the obligations imposed by international law as an essential condition for peaceful co-existence of peoples.

The United States' disregard of the decision of the International Court of Justice reveals, in the clearest possible fashion, a lamentable attitude. It rejected the Court's 1984 decision on precautionary measures requested by Nicaragua and authorized by the Court and it unilaterally rejected the jurisdiction of the Court.

The United States' violation of both international law and its own domestic law has potentially grave consequences since the country is one of the most powerful on earth, with an enormous influence in the development of world affairs. This should cause everyone concern. Of course, Nicaraguans suffer from an incalculable aggression and an unjust war imposed upon us by the imperial will of the current United States government. We are daily obliged to engage in armed defense of our nation, of our sovereignty and our revolution.

Respect for international law and the United Nations system is a requirement for peace. The United Nations system expresses Rousseau's idea of the social contract. But unlike Rousseau's time, we live in a more vast, complex society, with diverse complicated judicial systems, and with ideologically distinct political, economic, and social conceptions. The delegation of natural liberty to a civil liberty born

\textsuperscript{12} Translator's note: Article 6 of the U.S. Constitution provides that "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2.
of consensus becomes necessary for the co-existence of nations in the contemporary world. The social contract that Rousseau conceived, a rational supposition giving origin to the basis of co-existence among humans, society, and the state, becomes a historical imperative among nations in today’s world of high technology.

Whoever uses force, disregarding the law and the fabric of international relations upon which rests the precarious balance of our times, attacks humanity itself and takes us back to the pre-Rousseau state of communal war. Whoever arrogantly offers us powerful brute force, submerges humans into the night of time. Although he conquers space, he loses his own world. Whoever abuses physical, numerical, and military superiority, acts like a primitive being, erasing the human value of science and technology and increasing the contradiction between the progress of objects and the retrogress of the human condition. Whoever transforms abuses into actions and nourishes the myth that might makes right, leaves as an alternative only radioactive caverns. If he does not lose his life totally, he will have lost his sense of life.

The law is not a superfluous artifact. It is the cohesive substance of national and international society. Law is the maker and product of history. In a dialectical relation, the synthesis becomes a new thesis, a pathway and horizon of future actions. International law is necessary to maintain peace between nations. But it also must be the cause and channel of peace, reflecting the highest values of the international community.

2.3 Nicaragua’s Adherence to International Law and Human Rights

We have come here to proclaim our unshakable faith in law. The war that we are obliged to wage in order to defend the principal right of all people, the right of free self-determination, should not detract from that goal. From the first day, the Popular Sandinista Revolution has maintained an unwavering institutional commitment. Thus, dedication has remained constant in the midst of a war without boundaries. There are several manifestations of this commitment. Among these are: the Fundamental Statute, the Statute of Laws and Guarantees of Nicaraguans, the Council of State, the presidential and legislative elections of 1984, and the recent approval of the first political Constitution of Nicaragua.

Nicaragua adheres to the tenets of international law and to the
Rule of Law in the Nicaraguan Revolution

United Nations system for the peaceful resolution of conflicts. The decisions of the International Court of Justice have shown approval for Nicaragua’s actions. However, Nicaragua does not limit its faith in law to the international sphere. If a serious effort to consolidate and develop the Rule of Law, respect for laws, and the strengthening of judicial institutions and the legal order did not exist internally, then Nicaragua’s external adherence to international law would lose all value.

The recently approved political Constitution has incorporated fundamentally all of the propositions that the Supreme Court of Justice submitted for consideration. Thus, Nicaragua has enshrined at the constitutional level several principles. First, the judiciary is independent from other branches of government. Second, all state authorities, individually and collectively, must comply with all judicial orders and decisions. Third, jurisdiction is unified, thus special courts are only temporary and will be dismantled when the needs which gave rise to them disappear. Fourth, the Supreme Court of Justice has constitutional control through the appeal for unconstitutionality of law. In addition, appeals can be initiated by any citizen, through the *amparo* appeal and the writ of habeas corpus. Finally, full procedural guarantees were adopted.

Due to the adoption of the Constitution, in the coming months, a complete process of judicial transformation will take place. The Nicaraguan people will carry out that transformation at the same time that they are defending their sovereignty, liberty, dignity, and Revolution.

We wish to conclude this statement by thanking the International Association of Democratic Jurists for the opportunity to address the jurists of the world in the inaugural session of this commemorative meeting. From this forum, we issue a fraternal call to judges, justices, lawyers, law professors, and students of the United States. We ask that they contribute toward persuading the United States government to respect international law as well as its own domestic law by ceasing its aggression against the Nicaraguan people. We issue the same call to all people of good will in that nation who feel the lofty ideals of the founders of the North American nation, and who share the values of law, justice, and liberty that those pioneers sought during their struggle for independence.

We ask from this forum that the International Association of Democratic Jurists continue supporting the cause of justice in the world and the right of small nations to construct their history and
defend their identity. We wish your voices would multiply and carry to the world the message of the Nicaraguan people who wish to live in peace and to consolidate and develop the Rule of Law. The International Court of Justice decision defends not only the rights of a small country under attack, but also the principles of international law, which is the foundation of civilized co-existence among states and peoples of the world.

3. On the Separation of Powers in Montesquieu

3.1 The Controversy Over Montesquieu

The political Constitution of the Republic of Nicaragua specifies the distribution of power among four branches: legislative, executive, judicial, and electoral. This distribution is based on Montesquieu's principle of separation of powers. Accordingly, this new structure has attracted attention as it deals with the organization of the revolutionary state. The Constitution's theme was not arbitrarily decided. The theme was discussed throughout the period when the Constitution was formed. Nicaraguan and foreign jurists exchanged opinions during the development of the document on the Judicial Branch. During the seminars on the roles of law, justice, and the Judicial Branch in the Constitution, held in October 1985 and December 1986 by the Supreme Court, Montesquieu and his theories were debated. The core discussions focused principally on the following themes:

a) Montesquieu was a bourgeois thinker who defended the interests of the bourgeoisie of his time;

b) The separation of powers produces a fragmentation of a single power recognized by the Sandinista Popular Revolution as rooted in the people;

c) The separation of powers produces a fragmentation of real power, but also reproduces a pre-existing separation in reality;

d) The European society in which Montesquieu wrote The Spirit of the Laws, was different from the reality of the structure of revolutionary Nicaraguan society.

3.2 Conditions Necessary for a Critique

We must be cognizant of the revolutionary reality in which Nicaraguan society is living, the organizational levels of the people (both quantitative and qualitative), and the levels of popular participation in

civil and political society. This is fundamental and constitutes the essence of the political Constitution which gathers and reproduces that particular social reality. We do not overlook, of course, the legal and institutional forms in which reality is framed and which the Constitution itself establishes. In analyzing power, it is important to focus on the political-social, rather than on the legal-institutional.

Given the foregoing, a theory of separation of powers in the Constitution must analyze the foreseeable function of separation of powers within revolutionary Nicaraguan society. It cannot be developed in the abstract. Words by themselves do not provide sufficient force to transform society by simply conjuring up its conceptual contents. Obviously, the theoretical position, starting from a consideration of intrinsic goodness or evil, ought not to defend or attack Montesquieu's theory of separation of powers. First, the problem must be posited correctly. The problem must be situated historically, referring to specific conditions of a certain society, and not be rejected a priori on the basis of prejudices or of ideological sanctifying or sanctifying.

3.3 Montesquieu: Nobleman, Bourgeois, or Revolutionary?

Having established the general condition necessary for a theoretical critique, it will be helpful to refer to the specific points of the discussion mentioned before. Some have said that Montesquieu was a bourgeois thinker or, more precisely, a bourgeois who thought. It has been affirmed that Montesquieu defended the interests of the bourgeoisie of his time. I do not know up to what point I could agree with the propriety of the foregoing. That Montesquieu was a bourgeois in origin is easily refuted since his social class was in fact of the aristocracy. Montesquieu was a nobleman. He was born one year after the triumph of the English Revolution and one year before Locke was to publish his essay on civil government.

The idea that Montesquieu was a bourgeois thinker, defending the interests of the bourgeoisie as a social class with a certain economic and political destiny, deserves closer examination. We begin by affirming the most visible fact: the theory of separation of powers favored the bourgeoisie. The bourgeoisie of his time used and defended this theory and carried it to the category of universal principle. Everything said until now confirms the thesis that a nobleman by origin thinks like a bourgeois and thinks for the benefit of the bourgeoisie of his time and of Europe. If this had been the case, it could be concluded that Montesquieu fought in his time for the revolutionary
ideas of Europe. Bear in mind that, though *The Spirit of the Laws* was published in 1748, Montesquieu began work on it in 1728.\(^{14}\) It was written between the two revolutions, the English of 1688 and the French of 1789, a period in which the mentality of the bourgeoisie was changing, stimulated by the triumph of the English Revolution. But to assume by syllogism that Montesquieu was a revolutionary and to accept his theory for that reason would be to place ourselves precisely in the position of a critical, ideological beatification. In other words, although Montesquieu may have acted as a revolutionary in his time, this would be insufficient reason to accept his theory in our times.

Possibly, then, Montesquieu was not a revolutionary at all, at least with respect to flying the banners of the bourgeoisie. Does this disqualify his teachings from the time and circumstances in which we live? Should revolutionary Nicaraguans who are now organizing their state and elaborating their constitution disregard Montesquieu's *The Spirit of the Laws* and his theme of separation of powers? To reject his theory because he may not have been part of the revolutionary tendencies of his time is to hold the very same a critical attitude of accepting his theory on the assumption that he was a revolutionary on the side of the revolutionary bourgeoisie of his time. It would assume the same abstract and metaphysical attitude which we criticized earlier.

Moreover, according to one of the most penetrating studies on Montesquieu, by Louis Althusser, his position was based on completely different reasons from those of the bourgeoisie—not the bourgeoisie of his time between 1728 and 1748, but the later bourgeoisie which made the French Revolution. The different reasons, suggests Althusser in *La Politique et L'Histoire*, are not only different but actually opposed. The bourgeoisie fought against the monarchy in order to gain power for itself. Montesquieu, on the other hand, opposed absolute monarchy for the purpose of restoring a share of power to the feudal aristocracy which was being lost to an absolute monarchy in what then seemed to be a process of irreversible decadence. The principal clash, however, was not between the absolute monarchy and the feudal nobles, nor between nobles and a bourgeoisie which flocked en masse to overcome the regime of feudal exploitation. The principal clash was actually between the feudal regime and the great popular

masses subjected to its exploitation. Althusser indicates that Montesquieu could not identify with the revolutionary bourgeoisie. First, he maintained feudal ideals. Secondly, at the time of The Spirit of the Laws, no revolutionary bourgeoisie existed. Instead, there was a bourgeoisie interested in accommodating itself ever more to the benefits derived from the system of feudal exploitation. However, this did not prevent later bourgeoisie, who supported the revolution, from imposing limitations on absolute monarchy through the theory of separation of powers.

Montesquieu had the Constitution of England in mind when he developed the theory of separation of powers. Chapter VI of book XI deals with laws that form political liberty with regard to the Constitution. It carries a subtitle, “On the English Constitution” and is based upon the “Essay on Civil Government” by John Locke. The English Constitution conferred important powers upon the feudal nobility. For example, it gave judicial powers to nobility’s peers, thus removing this aspect of the judicial function from the King. This prevented the King from acting through judicial powers against the feudal nobility and, consequently, protecting them against the monarch.

Althusser’s realistic analysis, permits us to escape the appearances of history and in particular the illusion that Montesquieu was the herald, although disguised, of the bourgeois cause that was to triumph in the revolution . . . . For a single return to history, that which looked to the past seemed to open the doors of the future . . . and it is because he fought for the cause of a decrepit order that he became the adversary of the existing order that others had to overcome . . . others before him had left for the east . . . and discovered for us the West Indies.15

3.4 Does Separation of Powers Fragment the Power of the People?

The statement that the Separation of Powers would fragment a single power, which for the Sandinista Revolution is rooted in the people, seems to imply that the base of power is anchored in its own formal structure. Generally, a foundation of this nature would invert the pyramid, making the peak the base and the base the peak. This would be unstable both for solid bodies and political bodies and is an unsupported theory. Real power in any society is rooted in a combi-

nation of structural and conjoining factors. Some of those include economic, social, political, and cultural factors which are expressed in the forms and control of production, distribution systems, trade, the banking system, finance, organization, the levels of participation of the various sectors of society, and access and control of the mechanisms of the state. These factors are mentioned to the extent they represent different economic and social means.

The state is the peak of actual power when it is supported by a solid base. The concurrence of various powers exercised in civil and political society, which come together at a point of crystallization and consolidation, forms the base of state power. The state is clearly the consequence of a specific power. However, it is a source that generates power from its own functioning. It has a dynamic that works to strengthen the original source of power within the very structure of society.

Laws, judicial decisions, and institutions with their own characteristics, tend to form a part of a homogeneous system of an organic whole with a specific logic and rationality between the parts and the whole. When this does not occur, maladjustments, conflict, and contradictions appear inside the system. Therefore, every power should seek coherence among all of its parts on the basis of clear policies to establish priorities, objectives, goals, structures and tactics. I do not refer to arbitrary or despotic procedures to guarantee the interests of the power itself but rather coherence between objectives and the instruments to carry them out and between causes and the channels through which power is exercised. For this reason, law, institutions, and judicial decisions are not artificial or deceptive, nor are they mere superstructures belonging to an exclusively formal world, disconnected from reality. They are living entities which are indispensable for the survival of the social and political body and in which are the flesh of the economic, social, and political life of a nation. Society must obey the laws and the laws must respond to the needs of society. There must exist unity between the nature of government and its principles, as Montesquieu proposes in The Spirit of the Laws.\textsuperscript{16}

It is clear that the state is not a reflection of the economy, nor a subproduct of the productive forces. It is a reality in itself, with its own character.

But all this supposes the integration of different social and political forms and levels into a coherent system. This means that the

\textsuperscript{16} C. Montesquieu, supra note 14.
unity formed by the gathering of social differences actually works and harmonizes. Thus, as the system does not presuppose homogeneity, nor a single nature for all of its parts produced and determined by one exclusive cause, neither should the heterogeneity and particularity of each part signify conflict and contradiction. Coherence and functionality of different parts of a whole that interrelate and feed back on themselves are the necessary conditions of a system of power.

Everything said until now includes a relationship of precedence and foundation. The economic, social, and political structures are the foundations of the state and not the reverse. The separation of powers at the state level causes the fragmentation of power in society. In contrast, the type of power that exists in society is reproduced at the level of the state, from which it feeds back, recomposes and consolidates itself. For example, the structure of French society of the eighteenth century was composed of the feudal aristocracy, the bourgeoisie, and the people. In the midst of these, the monarchy played out its destiny; first against the feudal aristocracy, which it conquered in order to impose absolute monarchy, then against the bourgeoisie, to which it fell in the French Revolution.

The theory of separation of powers is not the cause of this grouping of classes, but rather its consequence. This consequence, however, is not the product of a historical law which declares that, given a specific composition of classes, a specific form of government will arise. Rather, this consequence is a legal refinement which seeks to save part of the lost power of the aristocracy by limiting the function of the monarch.

In the case of our revolutionary society, the situation is different. Obviously, comparisons of class composition between French society of the eighteenth century and ours of the twentieth century is unnecessary. However, comparing the two societies is important to the extent that the legal categories of the eighteenth century are operating among us, whose true meaning, past and present, can be understood as a matter of class structure and not as a matter of exclusive legal analysis.

In our society, the composition of classes has been different. A quick characterization demonstrates that an authentic class structure of the eighteenth and nineteenth centuries, as a result of quantitative and qualitative growth in the industrial means of production, has not appeared in our society.

Our first social relationship between the classes consisted of the
agricultural production relationship between the owners of land and livestock, and their salaried workers. Later, social and economic positions brought about by commercial activity and development of the liberal professions marked membership in a certain social status. An incipient industrialization occurred but never materialized into an actual industrial workers' movement with a specific class formation. Finally, in the last two decades of the dictatorship, there was an incipient financial capitalism fed by the capital of liberals and conservatives, the two dominant political ideologies before the triumph of the Revolution.

Parallel to these socioeconomic characterizations, there was artisan activity running through the length and breadth of the social structure. In this picture, a true aristocracy never appeared. For that matter, neither did a true bourgeoisie or a true industrial workers' movement. Because industrialization did not emerge, a class structure based upon the means of production of companies, or a contradiction, or class struggle determined by social relationships of production never appeared.

In this social structure the division between rich and poor was brutal and dramatic. Although it was not determined exclusively by the means of industrial production, it nevertheless defined economic, social, cultural, and political position. The leaders of the liberal and conservative parties were drawn from those dominant sectors. The dominated sectors, above the broad masses of peasants, were victims of interminable rebellions that filled the roads of our history with blood and fire at the service of the lords of the manor.

With the triumph of the Revolution, the people took power through their vanguard, the Sandinista National Liberation Front. Although the economic claim in favor of those marginalized by the dictatorship is one of the basic points of the Revolution, the principal contradiction is political, and the essential claims revolve around it. The popular claims constitute one of the important objectives of the Revolution. The efforts of many Nicaraguans of different economic and social backgrounds move toward that objective. This is exemplified in the struggle for liberation, which includes the reconstruction of the country from the bottom to the top. Political power has a populist content because its objective is directed particularly towards workers and peasants. Thus, it also has a class content. Its class content is determined by the objective of economic and social claims directed and implemented by the state and by the appropriation of the
means of production to a specific social class. There have nevertheless been changes in social relationships having to do with production. This was brought about, for example, by the establishment of state property, a cooperative sector, and an area of people’s property.

People exercise power through their numerous structures of organization and participation. At the state level, while it is true that power is not exercised by groups of people by virtue of their origin and membership in a specific social class, it is nevertheless exercised by virtue of populist, united, and common objectives. Consequently, the separation of powers established by the Constitution, need not produce a fragmentation of the power base. It does not affect, in any way, its principal articulations, nor does it affect its essential structure. On the contrary, it represents a particular form of organization and technical division of labor that does not carry any implication of a social division of power.

3.5 Does the Separation of Powers Reproduce a Pre-existing Social Separation?

Some believe that the separation of powers does not produce a fragmentation of social power so much as it reproduces a pre-existing separation in social organization. This does not describe our reality. What does not exist at the base, cannot exist at the peak.

Institutional and legal organization is a mechanism that has a double function. First, it acts as a reproducer of the socioeconomic organization. Second, it influences the general system of society. The Constitution, for example, by establishing a mixed economy, reproduces the modality of the Nicaraguan economy. The creation of laws influences the system and establishes the specific modalities of the practice. These specific regulations include medium and short range policies for investment law, policies and mechanisms designed to increase productivity of labor, better utilization of resources, and the linking together of each part of the economy (private, state, cooperative, people’s) with the objectives of the economy in general. In this way, legal mechanisms, set forth in the Constitution and regulatory laws, embrace the form of practical economic functioning, and strengthen the implementation and development of the economy and set forth the rules of its functioning. Thus, every law must achieve this double function: to both express reality and to reproduce it. The institution or law that does not reproduce its reality, conflicts with its reality. If the conflict is profound, it is possible that the institution or
law—and not the social or economic reality—will fall into a crisis. If the contradiction is not profound, mutual and partial accommodations, joint solutions and specific alternative policies may permit each problem to be resolved for the moment, even though the problems may return from the persistent cause in which they originate. Most important, the separation of powers contributes to the reproduction of the society and its values.

3.6 Other Objections to Separation of Powers

Beyond the three questions analyzed above, three other questions remain. First, does the separation of powers block the development of society? I think not, since the societal, economic and political transformations can be expressed within the institutions organized into separated powers. But these institutions must be capable of responding to reality by conforming themselves to it conceptually, organically and functionally.

Second, does the separation of powers block the exercise of power at the state level? It depends upon what type of power. If one is referring to sole, hegemonic, and centralized power, conceived vertically from the peak to the base, it is possible that the answer is yes. However, the contrary is true if power is conceived and structured as a rational and workable state apparatus. This does not mean a fragmentation of popular power, but rather a balanced distribution of popular power. This implies that power is conceived as a means and not as an end in itself.

At the base, through the separation of powers, the branches act inter-dependently. For example, the executive branch has legislative functions (executive decrees), the legislative branch has judicial functions (in some countries, the trial of the president of the republic, representatives and judges) and the judicial and the electoral branches have legislative functions (the power to initiate bills on matters within their jurisdiction). The tacit but concrete objective is to limit the powers of the monarchy in favor of the feudal aristocracy. Beyond that immediate and historically specific political end, the separation of powers creates an end in itself since it can be valid in any political organization in which it is applied. This end is the creation of a system of countervailing powers to avoid the excessive growth of one power alone. Specifically, this refers to the controls exercised by the legislative and judicial branches over the executive branch, which by
its own nature of command and implementation, tends to develop hegemonic attitudes.

From 1748 to the present, Montesquieu's theory of separation of powers has been used for various political purposes. First, Montesquieu subtly wrapped concrete political objectives into a refined legal abstraction: the legal, institutional balance of the state. Later, the bourgeoisie used the theory during the struggle that led to the French Revolution, to the extreme of incorporating Article 16 in the Declaration of the Rights of Man of 1789 which provides that "every society which lacks the Separation of Powers has no constitution."\(^7\)

Currently, the value of separation of powers is not the absolute one given by article 16 of the Declaration of the Rights of Man. Today, no one can pretend that there is no constitution, and therefore no Rule of Law, without the separation of powers. Today it is universally accepted that the Rule of Law consists essentially in the subordination of power to law, regardless of whether the bodies and functions of the state are organized in separated powers.

3.7 The Spirit of the Laws as a Revolutionary Work

Aside from the theory on the separation of powers, Montesquieu's *The Spirit of the Laws* was a revolutionary work despite its tacit defense of the feudal nobility's political interests. To overcome this apparent contradiction, we must distinguish two dimensions: the political interests of class, which by design are conservative; and the scientific project of *The Spirit of the Laws*, including its object and method, which is profoundly revolutionary.

Following *La Politique et L'Histoire*, Montesquieu's intention of studying all the customs and laws of all the people of the world distinguishes him from all authors before him who wanted to make a science out of politics,\(^18\) because he sought the science in all concrete societies. Montesquieu's project of building a science of politics and history, assumes that science and history can be the object of a science, that is, that they contain a necessity that science should discover.\(^19\)

This necessity possessed no theological or moral aspirations, and obeyed historical laws exclusively. In the preface of his work, *The Spirit of the Laws*, Montesquieu says:

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18. *Id.*
19. *Id.*
In order to understand the first four books of this work, one must note that what I call *virtue* in a republic is love of the homeland, that is, love of equality. It is not moral virtue or Christian virtue; it is *political* virtue, and this is the spring that makes republican government move, as *honor* is the spring that makes monarchy move. Finally, the good man discussed in book 3, Chapter 5, is not the Christian good man, but the political good man who possesses the political virtue I have just mentioned. He is the man who loves the laws of his country and who acts from love of the laws of his country.

Here we have the first identification of the new political science, the establishment of its political rather than moral objective. This does not mean, however, that Montesquieu is proposing amorality in political science. He is merely establishing its object with precision. He says in the preface:

> It should be observed that there is a very great difference between saying that a certain quality, modification of the soul, or virtue is not the spring that makes a government act, and saying that it is not present in that government. If I were to say that a certain wheel, a certain gear is not the spring that makes this watch move, would one conclude that it is not present in the watch? Far from excluding moral and Christian virtues, monarchy does not even exclude political virtue. In a word, honor is in the republic though political virtue is its spring; political virtue is in the monarchy though honor is its spring.

It is also interesting to note Montesquieu’s position with respect to the contract theory. In chapter III, dealing with positive laws, Montesquieu says: “As soon as men begin to live in society, they lose their sense of weakness, but then equality among them ends and the state of war begins.”

Villemain, in his *Eulogy of Montesquieu*, cited chapter III saying that as an interpreter and admirer of the social instinct, Montesquieu is not afraid to confess that the struggle, the state of war, begins for man at the moment he constitutes society. But from this sad truth, which Hobbes would abuse in order to celebrate the tranquility of despotism, and Rousseau to praise the independence of life in nature, the true philosopher deduces the healthy necessity of laws, which are

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21. *Id.*
22. *Id.* at 7.
which are a truce between states and a peace treaty between citizens.\textsuperscript{23}

Unlike the social contract theorists, Montesquieu believed that society is the true state of nature and the true object of investigation which ought not to be the reason why men associate, but why at one time they lived isolated; outside of society. It is obvious to Montesquieu that the social instinct is the natural tendency of man. Furthermore, he believed that every contract assumes the existence of society; society is the cause and the contract is the effect, not the other way around.

Althusser indicated that what unites natural law philosophers is the problem of figuring out the origin of society, and the resolution of the problem by the state of nature and the social contract. For example, to Hobbes and Spinoza, the state of nature is war, the triumph of the strong over the weak. For Locke, it is a state of peace, and for Rousseau, it is isolation and absolute society. Thus, the social contract, for contractarians, is a step out of the state of nature, which each characterizes differently, into the state of society.

We have already seen how Montesquieu rejected the social contract and reaffirmed feudal tendencies. Althusser states:

Social contract theory, turns feudal convictions upside down: his belief in the natural inequality of men, in the necessity of the social orders and of the state. It begins with a contract among equals, with a human work of art, for what feudal theoreticians would attribute to nature and the natural society of man. . . . The doctrine of natural sociability or social instinct is a theory of feudal inspiration, and a doctrine of social contract is a theory of bourgeois inspiration, even when it is in the service of absolute monarchy (as in Hobbes).\textsuperscript{24}

Here Montesquieu reaffirms the underlying conservative position which contradicts his revolutionary method to which we referred above.

Montesquieu's concept of law is noteworthy. "The laws," he says, "are the necessary relations deriving from the nature of things."\textsuperscript{25} Use of the term "relation" to define laws implies, according to Althusser, a theoretical revolution. "It assumes that it is possible to apply to the materials of politics and history a Newtonian category of law." Aside from referring to the concept of law as one of

\textsuperscript{23} Quoted in C. Montesquieu, Del Espírita de las Leyes book 1, Ch. 3 (N. Estévanes trans. (1971)).
\textsuperscript{24} L. Althusser, supra note 15.
\textsuperscript{25} C. Montesquieu, supra note 14, at 3.
relation, it is important to note the connection of a previous historical value to this concept. This implicitly leads to the necessary conformity of law to social fact.

Montesquieu defines the law as social relation, although the social relation has not yet acquired a formal and positive expression. The legal norms or rules of law, are only law to the extent that they formally contain the reality that is expressed as a relation. The social relation has intrinsic value that law merely recognizes. The laws exist, although there is no written norm, since the spirit of the law is not in positive law, rather in the social relation that precedes it. Montesquieu eloquently reveals that:

Particular intelligent beings can have laws that they have made, but they also have some that they have not made . . . . Before laws were made, there were possible relations of justice. To say that there is nothing just or unjust but what positive laws ordain or prohibit is to say that before a circle is drawn, all its radii were not equal.

Therefore, one must admit that there are relations of fairness prior to the law that establishes them.26

This “relation” is then the “spirit of the laws.” Montesquieu in dealing with “positive laws,” states:

As I am not going to deal with the laws but with the spirit of the laws that consists in the relations that various things may take, I must follow not the natural order of laws but the order of their relations and of those things.27

In the chapter on the dialectic of history, Althusser underscores the innovating and revolutionary positions of Montesquieu with regard to the dialectical chain of the laws. Each individual law is linked to the next, depending upon some more general law. Likewise, Althusser emphasizes the relation that Montesquieu establishes between nature and the principle of each government. Nature is what makes nature be what it is; principle is what makes it act. The nature of republican government is sovereignty exercised over the people. The nature of monarchy is government by one person alone conforming to fixed laws. The nature of despotism is government of one person alone without law or rules. The principle, on the other hand, is the correspondence between the political form of the government and the willingness of the people to accept it. In this idea of the totality of

26. Id. at 4.
27. Id.
nature and the principle of government, Montesquieu establishes what is the law's necessity. The law's necessity is the law's concordance with historical reality, of which the law is the summary, expression and channel. Thus, we have arrived at one of the initial propositions of this work.

Althusser stated:

Before Montesquieu this idea was entertained only for the construction of an ideal state. With Montesquieu, the totality that was an idea becomes a scientific hypothesis designed to give an account of the facts. It becomes the fundamental category that permits thinking no longer about an ideal state but about concrete diversity, and, until that moment, unintelligible institutions of human history.  

Here Montesquieu is an innovator and revolutionary by putting history upon a foundation of the concrete whole, understood as a dynamic category.

3.8 Conclusions

The following can be concluded from our essay:

a) Separation of powers, by itself, neither favors nor impedes any reproduction of the socioeconomic structure of the country and its development, any more than any other form of state organization. That reproduction depends upon the precise and efficient conformity of the institutional system or the legal order to reality;

b) The theory of separation of powers, excluding the areas exclusive to each power, ought to be understood as a horizontal interrelation and coordination among the powers of the state;

c) The theory of separation of powers ought to be understood as the state's expression in its pinnacle of power. This power is born and develops through the organization and participation of the people in the various instances of national life. The people are the depository of sovereignty which they exercise constitutionally through the powers of the state.

The ideological value assigned to the theory of separation of powers ought not be determined with a mechanical attitude. Complex and critical analysis demonstrates that in spite of Montesquieu's position favoring feudal nobility, his theory contains profoundly revo-
olutionary elements with respect to the object, method, and program of political science and concept of law.

The concept of law is a device that is produced in society to which the positive norm and formal law must conform. The concept of law is particularly useful in a moment of legal and judicial transformation because what is sought, is that law be coherent with reality; to express and to reproduce it. The law here loses that formal abstract sense to become what it must be: reality made into positive norm. Seen this way, we can deduce that, as Villemain said in his *Eulogy for Montesquieu*, "the healthy necessity of laws ... are a truce between states and a peace treaty between citizens."29

4. Law and Justice30

I again have the privilege of addressing a graduation of lawyers from this law school under whose eaves my student life and an important part of my intellectual and academic life took place. This time, I address this message to the fourth graduating class of lawyers in these nearly nine years of revolution. I begin with the warmest congratulations and the most fraternal greeting.

On the previous occasions in which, as President of the Supreme Court of Justice, I have occupied this rostrum, I discussed two topics. First, I discussed the concept of the judicial branch proposed by the Court for Nicaragua during the preparation of the new Political Constitution. I also discussed the Supreme Court's marked role in the process of judicial reform which began to conform ordinary legislation to the grand principles fixed in the Constitution. The Supreme Court has had a special role in that process.

Today, I would like to present, in a personal way, some themes on law, justice, and the legal profession.

4.1 Reciprocal Influence of International and Domestic Law

On the international level, the interaction between law and society occurs today in a complex atmosphere. The complexity does not come so much from the nature of the conflicts that afflict the contemporary world, because there have always been economic, ideological, and religious wars. Instead, it comes from the spread of the knowledge of conflicts and the possibility of the spread of destruction be-

cause of nuclear arms. The conflict is a product of the media, which has created a sort of universal ideology of war and has produced a tragic sense about the limits of life on earth.

Moreover, the complexity of the law-society relation increases against the background of the following paradox: while individual nations grow with the geography of their historical, social, and political reality, the universal dimension of the world contracts because the media puts all countries and people on the same plane and in the same compact nucleus, shrinking time and space, and longitude and latitude of the universe. This only seems to be a paradox because, in reality, what we have is a dialectical relation between the universal and the particular. The universal is particularized when it becomes part of the internal life of nations, and the particular is universalized when it crosses borders and travels around the world by means of the media.

In such a world, the possibility of conflict increases not only because of economic, ideological, and religious causes, but because of the universalization of crisis that this two-fold process of expansion and contraction produces. Such a situation objectively polarizes and accentuates the hegemonic tendencies of the powers in the world.

These tendencies have made it necessary to gradually rebuild the nucleus of international law in an attempt to guarantee a basic law for all nations. That is why international agreements and organizations like the United Nations are equivalent to a sort of new social contract. The United Nations defines new civil and political rights in the international sphere. International law is a type of universal consensus on the rules of the game among states which defines and regulates the sphere in which freedom of states may be exercised. It also limits their rights on the basis of a series of basic principles. These principles are: sovereignty, self-determination, non-interference in the internal affairs of other states, non-use of force to settle conflicts, and respect for individual human rights. They must be universally observed, independent of the power of the state in question, the size of its territory, the number of its inhabitants, the strength of its military arsenal, or its economic capacity.

International law, caught between the competing interests of hegemonic centers, power blocs, zones of influence, and geopolitical strategies, is called upon to strike a balance. This balance must be made with respect for all international treaties, norms, and customs, which are, or ought to be, the foundation of the community of na-
The failure to observe this balance distorts the system and accentuates disequilibrium. Above all, this failure renders ineffective the mechanism charged with maintaining the consensus.

Domestic law is not foreign to international law. The latter progressively contributes form and content to the former. International treaties and agreements become domestic law upon ratification. The majority of them are mentioned in constitutional texts of the states that have ratified them, or at least their content is incorporated in provisions of national law, whether constitutional or ordinary legislation. The internal changes of society as well as external changes in the international community are important to consider. Both international and domestic law are changing and a reciprocal influence exists between the two that carry the contemporary world to new common norms of universal value. This, of course, is without prejudice to the proper details of each society and individual legal order. One must therefore be alert to these transformations in social, political, and legal reality in order to face with intellectual clarity the threats and challenges they pose.

4.2 Is Justice Immutable?

Justice is almost universally accepted as a value of law. Because legal philosophers have studied the theme in depth, I shall not examine it exhaustively on this occasion. I will instead focus this brief reflection on the question whether justice is immutable, which is to say perennial or historical, and will make references to some principal philosophical currents and to a few of the most important philosophers who have dealt with the issue.

Plato is perhaps the leading figure within classical idealism. For Plato, justice as a value is eternal and exists in an ideal world, the topos uranus, different from the sensory world, and can be captured only through intellectual intuition.

The theory of Edmond Husserl is perhaps closer to our day. His intuition captures objects because they exist in the conscience. This includes the emotional intuition theory of Nicolai Hartmann and Max Scheller; that the value of justice is generated and lives in the conscience.

For Roman law, justice is rerun natura, a value that is found in the very order of nature. For Grotius, the most important natural law theorist, justice is apetitus societatis, that is, the natural tendency to live in society and order. For Kant, within a rationalist formulation,
every action is just that in itself or in its maxim is such that the free-
dom of the will of each can coexist with the freedom of any other,
according to a universal law. With Marx, law expresses the interests
of the dominant class. Long before Marx, Thrasymachus said that
justice is the interest of the strongest. However, I agree with Guis-
seppe Lumia who said that Thrasymachus probably and Marx cer-
tainly intended to describe what in fact occurs rather than to evaluate
what ought to occur in a world governed by justice.

Legal positivism excludes all values, including justice as such,
from the law, although one of its expressions, ethical formalism, iden-
tifies just law with existing law. Meanwhile, in logical positivism,
whose principal figure is Wittgenstein, factual declarations are the
only ones that have meaning.

In this brief consideration of different philosophical schools,
there exists a diversity of criteria for the value of justice. The same
diversity exists in other schools, whether we are dealing with distribu-
tive justice, which concerns public law, or with corrective justice
which concerns private law. If we continue this reflection, we will see
that justice is the most important value of law and it is toward justice
that law is directed. It is, in fact, values that give meaning and justifi-
cation to the existence of law. A system of norms that did not have as
its objective justice, order, and protection of citizens, would be useless
and inexplicable.

When a community aims toward an objective in a given time and
place, the objective is a historical value whose content and meaning
are subject to change. For Ulpian, justice consisted of giving each one
his due, living honestly, and not injuring others. The content and
meaning of these three conditions of justice, however, have differed in
time and space. For the Greeks and Romans, slavery was an institu-
tion through which the law of property, of one person over another
was exercised. Therefore, in that case, justice consisted of giving each
one the slave that was his and not injuring anyone who had this right
in other persons, and by respecting these rules, fulfilling the three con-
ditions of justice. Surely, in this example as in others, the value of
justice as well as laws designed to implement and guarantee it, repre-
sented the dominant ideological values of a given social structure.

In contrast, in the last century, Abraham Lincoln paid his life for
the abolition of slavery. This occurred because he changed the privi-
leges and rules of social life in the United States, establishing a con-
cept of justice based upon equal dignity of human beings.
For Manchesterian capitalism and the social values that it generated, unrestricted freedom of production and contract defined justice. That base established the concept of legal equality, a concept that has a dual nature: one positive, one negative. The positive overturns the privileges and inequalities legally established in Greek, Roman, and medieval law. The negative masks, behind the announcement of a formal, abstract equality, an actual, concrete inequality. In this negative aspect lies one of Manchesterian capitalism's principal contradictions. It legally proclaims a universal principle of equality while the totality of its legal order guarantees a practice of inequality and helps reproduce and prolong the system that carries out an injustice.

The violation of a freedom is an injustice. However, at times declarations of freedom cover up fundamental injustices. For example, freedom of contract, upon which a good part of the concept of justice of Manchesterian capitalism was based, accepted the existence of great masses of impoverished unemployed on the one hand, and owners of industry on the other. In that case, freedom of contract was the freedom of the fox in the chicken coop, producing in practice one of the major injustices in the history of mankind.

Freedom and justice are legitimate values as long as the integrity and dignity of the human being is protected universally. This protection exists when everyone has a right to goods, health, education, culture, and respect for his or her integrity and dignity. In other words, we believe that true justice is always a social, moral, and whole justice. It is not the privilege of sectors or of groups, but of the entire society. We believe that freedom is not just a declaration to cover privileges of minorities, but a real choice for all. Above all, freedom for those who have always been marginal, discriminated against, or exploited, is to have the pleasures and advantages of the material, cultural, and spiritual goods of society. The law should guarantee those values and the respective bodies of the state should guarantee the fulfillment of law.

4.3 Careers for Law Graduates

You now leave the University and depart upon professional lives in a society which has experienced profound changes; changes with respect to which the lawyer cannot remain at the margin, even if that were his or her wish. New societal needs will open additional fields of practice to the law graduates. This will be particularly true with respect to the practice of civil and criminal law. The Nicaraguan state
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will need the services of advisers to give legal form to its administrative acts, as well as indicate and explain the national and international framework of rules in which public entities must act.

The judicial system will continue to need professionals to assume the difficult responsibility of the administration of justice. For these individuals, we have the hope of one day creating a judicial school to perfect and strengthen the development of state personnel. The school will prepare graduates for a judicial vocation which requires dedication to this high and difficult service.

Each day, the judicial function in administrative, constitutional, criminal, agricultural, and labor law grows in direct proportion to the needs of our society. In criminal law, reform in substantive and procedural fields is increasingly important. In the field of procedure, the Supreme Court of Justice is completing the reform with the assistance of the Ministry of Justice and the Ministry of Interior. In criminal law, we have to eliminate the penal philosophy of repression and punishment as well as the Manichean concept of crime as the bad against the good. In their place, we must substitute a concept of social consideration which seeks to address the causes of crime and not just its effects. This concept begins with the principles of crime prevention and reeducation in order for the delinquent to be returned to our society. It would use measures of solidarity, not of vengeance, and would reform the values and criteria currently in our legislation.

The revolution offers a historic challenge to law graduates: the opportunity to participate actively in our new society at the height of the dreams and sacrifices of the Nicaraguan people.

5. State, Law, and Indigenous Peoples

5.1 Individual and Collective Human Rights

In the name of the government of Nicaragua, I welcome the participants to this seminar and wish at the outset for the greatest of successes for the future of indigenous peoples in various parts of the world. The theme of this meeting—peace, autonomy, and human rights—is full of hope. It is a theme which poses not only a watchword, but a message, a reflection, a possibility, and a faith.

Nicaragua is convulsed by a war of aggression. It is a peace that is surely vulnerable to war but that represents much more than the absence of it. War nullifies peace. Yet the nullification of war does

not fully restore the reality of peace. That reality is the fundamental condition for a full, dignified, and hopeful peace to be brought about in our land and history. Peace is respect for the right of all peoples to self-determination and their right to dignity. It is the consideration of rights and liberties specific to indigenous peoples; the possibility of a fraternal nation in which different cultural expressions converge to sow seeds of new hope, faith, and the possibility of living together in a multi-ethnic and multi-linguistic society. Autonomy, which is not at all distant from the concept of peace, is part of the global and structural concept of peace and brings its own content to it.

Respect for human rights is another condition for peace. Human rights are understood not only as individual guarantees, but also as social and economic rights that permit individuals access to the material and cultural goods of society in order to reach the levels of dignity that humanity demands. The historical subjects of human rights are the community, ethnic groups, and indigenous peoples who demand their essential rights, their identity, and their place in history with nobility and courage. Without that necessary complement of community rights to individual rights, the fullness of human rights is divided. Once divided, it would be possible to attribute the complete concept to only one expression of human rights, to the detriment of the other. It is not possible, for example, to respect collective human rights without respecting the human person, just as it is not possible to protect and develop individual rights amidst an exploited and alienated community.

5.2 Perspectivism and the Indigenous Problem

The theme of this seminar permits reflection on peace, autonomy, and human rights. Additionally, it presents the perspective of a concrete and global analysis. This is true because historical events do not occur in a metaphysical sky, but in a reality with problems and contradictions. For that reason, the perspective of this meeting is a specific one. It is not just any point of view, nor all points of view. Rather, it is the perspective of the specific situation of the indigenous peoples. It is from this perspective, which is always a perspective of reality, that the history you are going to analyze acquires its perspective. Each person has his or her own perspective which is his or her own truth. This truth becomes integrated and unified when the various partial perspectives of reality become integrated and unified. Thus, history and reality are moved by contradictions as well as by
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concrete situations. There is also the concrete perspective of the indigenous problem from which we begin to see history; our history and that of others. From this specific vision, we integrate a universal vision articulating situations and linking problems together.

This brings me to a first affirmation: problems in history have neither a sole perspective, nor a unilateral solution. This does not mean that specific problems ought to be diluted into some abstract and ambiguous totality. Rather, problems only acquire their true specificity to the extent that they are not isolated or dissected from that totality, nor placed outside of that unity. Something is specific only when the characteristics of a reality are linked to a totality. Likewise, unity is only obtained by making differences compatible. Unity does not mean homogeneity in a vacuum, but rather the convergence of multiple decisions and diverse expressions, each of which preserves its own identity, in a unitary vision of historical situations and objective realities.

With this in mind, I would like to raise some considerations about the indigenous peoples. These considerations are presented modestly, as one can only do when speaking of problems to the protagonists of their history. I do not intend to give lessons. Giving lessons is not my motive in addressing those whose words of practice, action, suffering, and daily experience make and remake the fabric of their life and history.

5.3 The Historical Context

The problem of the indigenous peoples is two-fold. First, there is the structural problem which is related to the problems posed by the concept of domination-dependence. Second, there is also an ethnocultural problem that, while specific, is part of the structural problem. The two problems are inter-related. The structural problem is one that the neo-colonial and imperial efforts along with the western concepts of nation-state have caused and deepened. The nation-state has not resolved the indigenous problem. Rather, it has helped entrench it. In Latin America, the identity of indigenous peoples has been hidden behind an ethno-centric practice of the dominant nation with its general legal pronouncements.

The concept of the nation-state, as well as the archetypes of the dominant nations, have been mechanisms, in most cases, for the assimilation, integration, dissolution, and erosion of the identity, law, and reality of the indigenous peoples. We cannot forget the historical
analysis of the nation-state which the ethnic communities must con-
front. The ethno-centric nation-state arose in post-Renaissance Eu-
rope as an expression of sole power, reunifying territory, population,
and power that had been spread apart in the medieval wars between
the three sectors of power (state, church, and feudalism). It was pre-
cisely in this fight between sacerdotium e imperium that the ideas were
sown for a power that reunifies through a concept of sovereignty. In
the epoch of the birth of the modern state, the state meant nothing
more than the reunification of power in order to exercise it fully over
a territory and a specific population. During that period, sovereignty
signified the possibility of defense in the face of the other internal sec-
tors which held power with the crown.

That is a different concept of sovereignty from today's legal and
political value. Today, in international law and relations, sovereignty
is the protecting shield of territorial integrity and internal rights. Sov-
ereignty is organized in the face of aggression from other states that
attempt to weaken these fundamental principles of national and inter-
national life.

Sovereignty, at its origin, was not what is justly claimed by na-
tional states today, especially the small states which confront the phe-
nomenon of imperialist expansion. That model of nation-state was
transferred to our latitudes, and was embodied in our history, begin-
nning in the nineteenth century. The model suffers from congenital
and acquired vices; from congenital vices in that the new nation-state
that is established in our lands really is not the result of a specific
internal historic situation as it was in Europe. What has occurred has
been a mechanical and historical transfer of the European model,
whose objective was to homogenize through the establishment of ab-
solute monarchies in France, Spain, Portugal, and England. The Eu-
ropean model represents colonialism, the original accumulation of
capital, and later expansion of capital through imperial mechanisms.
This generates a new international relationship of domination,
namely, the relationship of imperialism, dependence, and underdevelopment.

In the case of Nicaragua, the structure, nature, and functions of
this legal-political apparatus develop like vectors, like a transmission
belt for imperial interests without even having formulated a national
bourgeois project that would support and run the organization of the
nation-state. The only active attempt to develop a national project for
the Nicaraguan bourgeoisie was that of Zelaya from 1893 to 1909,
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which was overthrown by the government of the United States through the famous Knox Note of December 1, 1909.

In the case of Nicaragua, the United States did not permit Nicaragua what it had already permitted and supported in other Latin American countries, namely, that the national states sustain themselves upon a real possibility of a project of the bourgeoisie. What was valid for various Latin American countries was heresy in Nicaragua. It was a dangerous challenge because Nicaragua was always seen as a strategic geopolitical enclave in which the supervening interests of the empire were not only economic, but strategic—as was the case with the canal project visualized in 1848 by Vanderbilt and the Transit Company.

The Nicaraguan nation-state, until the triumph of the Revolution, played the role of vector, a simple transmission belt of imperial interests, with no possibility of developing its own national bourgeoisie.

With regard to our indigenous peoples, the basic problem at this moment and in this analysis is that of the Atlantic Coast. In 1633, the English occupied the Misquito area. In 1687, the coronation of the Mosco King, Jeremias I, took place. There is a series of colonial and material contradictions within this specific problem of identity. Spain, the United States, and England fought for control of the Caribbean Sea. The United States and England had an interest in a possible canal. The indigenous peoples, the Misquitos, became contractually allied with the English, and fought with the English against the Spaniards for control of the Caribbean, as well as for economic and commercial interests in the sixteenth and seventeenth centuries.

In 1849, the Moravian missionaries arrived in Bluefields. In 1850, the Clayton-Pulwer Treaty was signed between the United States and England. In 1860, the Treaty of Managua was signed between Nicaragua and England. There, the English recognized for the first time the formal sovereignty of Nicaragua over the Atlantic Coast. This treaty reaffirmed the hegemony of the United States, as seen through the lens of the relations of the superpowers with our ethno-cultural problems and indigenous peoples, and signified the transfer of colonial power from one empire to another.

Between 1880 and 1890, there was an economic boom brought about by the export of bananas to New Orleans. As a result, the hegemony of North American capital displaced that of the English. As of 1894, North American capital investment amounted to four million
dollars, controlling ninety percent of business. That same year, the
government of Nicaragua put an end to the Misquito reservation, oc-
cupying it militarily and incorporating it into the nation as a depart-
ment. A decree was also issued which incorporated the Misquitos
and the Criollos, who controlled the government of the coast, into the
government as a whole. Their power was replaced by the Nicaraguan
bourgeoisie under the liberal government. In historic and structural
terms, this reincorporation represented a transfer from English to
United States colonialism.

The Liberal Constitution of 1894 created the Municipal Council
which excluded the Criollos and set up a new dependency between the
superpowers and communities through legal instruments that pur-
poded to legitimatize the situation. In 1905, the Harrison-Al-
tamirano treaty which confirmed the incorporation of the Misquito
territory into Nicaragua, was signed between Nicaragua and England.

These facts and events serve to explain part of the problem we
posed at the outset. Certainly there is a structural problem as well as
an important ethno-cultural problem. There is an identity problem
that is surely affected by the controversies between England and the
United States.

The national states that followed were, as I already indicated,
伺服ants of the empire. When circumstances demanded, legal meas-
ures were adopted to recognize some rights of indigenous peoples, but
the measures were always part of the overall strategy favoring the
hegemonic power. The predominant standards were those of integra-
tion, incorporation, and assimilation.

These concessions established certain rights like the exemption
from military service, from taxes and rates, and the right to occupy
certain lands. However, the possibility was left open that, at some
point in the future, the incorporation and assimilation would be total.

The state, the nation, and law were intertwined in these imperial
contradictions. The laws, treaties, and decrees legitimated a process
that was nothing more than the displacement of domination by one
power for another. A series of agreements were entered into whose
purposes were not to seek recognition and strengthen the dignity of
the indigenous peoples or recognize their legitimate rights. Rather,
they favored transactions between the private and dominant interests
of the empires.

That is, in my view, a rapid historical sketch which justifies the
initial hypothesis from which we began these reflections. The indige-
nous problem, however, is not our problem alone.

5.4 The Inadequacy of International Law

We cannot avoid the problem of international law which has yet
to adequately focus on the essence of the matter. Specifically, we need
parameters of integration, incorporation, assimilation, and the global-
ization and generalization of the problem by recognizing common
rights which should be extended to workers. The treaties address the
problems of the capital-labor relationship, generating some agree-
ments that permit recognition of people as sectors or factors of pro-
duction, but fail to recognize indigenous peoples or groups with their
own specific rights. International agreements and laws try to inte-
grate these people into the more equitable treatment given to workers
in other parts of the world.

The following are the five principal international instruments:

(1) The International Convention on elimination of all forms of
racial discrimination of December 21, 1965. Article 2 condemns all
forms of discrimination. Article 3 condemns racial segregation and
apartheid;

(2) The charter of the Organization of American States, article
29, subsection (a), proclaims that all human beings without distinc-
tion of race, nationality, sex, creed, or social condition, have the right
to achieve material well-being and spiritual development in conditions
of liberty, dignity, equality of opportunity, and economic security.
Article 74, subsection (c) embodies in law the right to education of all
population groups, and subsection (b) permits the creation and devel-
opment of special programs;

(3) The American Convention on Human Rights, known as the
Pact of San José of November 22, 1969, in article 1, protects rights
and liberties without any discrimination based on race, color, sex, lan-
guage, religion, political or other opinions, national or social origin,
economic position, birth or any other social condition. Article 4, sub-
section (a), declares the need to stimulate consciousness of human
rights in the American people;

(4) The United Nations Charter of 1945, in article 55, establishes
the free determination of peoples, universal respect for human rights,
and fundamental liberties of all without regard to race, sex, language,
or religion. Article 13 of the Charter of San Francisco of July 25,
1945 is perhaps the most important aspect of the Charter. It is a dec-
laration to make effective the human rights and fundamental liberties of all people;

(5) Convention 107 of the World Labor Organization, dated July 5, 1957, relates to the protection of indigenous and other tribal or semi-tribal peoples in matters of contracts, conditions of employment, social security, health, education, and means of information. Under convention 107, the protection of identity is subsidiary and exists only to the extent that it is compatible with national values.

5.5 The New Constitution and Autonomy

Our Political Constitution and Statute of Autonomy goes beyond international treaties and pre-revolutionary legislation on the subject. The concepts of assimilation, integration, or incorporation, which the internal sub-imperialisms of pre-revolutionary nation-states offered as an alternative, have disappeared. In our Constitution and the Law of Autonomy, the treatment of the problem is through the conviction that it is impossible to create a qualitatively new nation-state and develop a profound, revolutionary process, except from a nation built on the convergence of indigenous peoples with other social and cultural expressions of Nicaragua.

We do not propose to integrate them into a dominant platform, or assimilate them into a hegemonic culture. Rather, it is a matter of forging this multi-ethnic and multi-linguistic nation, whose main objective is to favor the people as the basic unit of the nation, into a new nation-state, which fairly reproduces the values of the many entities in our history. This is essential because it marks a qualitative break with the past. It defines the possibility of a new nation-state and establishes revolutionary change as a condition. Here the values of independence and national sovereignty, a prerequisite within this new concept of nation-state, are integrated with the value of autonomy of ethnic groups.

The Nicaraguan state does not intend, therefore, to absorb different ethnic groups, but rather to build the nation on the units of differences; to respect them and bring them to a point of historical convergence. This is because the nation should not look backwards, but should project toward the future. The nation is constantly becoming more than what it has been. Nicaragua now has a future, rather than a past of denied values, injured peoples, and confiscated dignities.

In this respect, the Statute of Autonomy and the political Consti-
tution take an important collective leap in the definition of the new nation-state. They recognize political rights and incorporate them at the constitutional level by strengthening the concept of national unity and territorial integrity. They also represent an extraordinary experience: a new step which is both fundamental and significant in the process of building new Nicaraguan law. This step involves questioning criteria which are absolute, universal, and abstract in the law of domination. It means that the Law of Autonomy is the consequence of a historical reality. This is because, although the law does not create indigenous communities, it gives expression to them. Though it is not the cause of society, it is nevertheless, its causeway.

In this Law of Autonomy, we have direct, transparent examples of what has been affirmed so often. The law is a social fact and the consequence of a historical process. The Law of Autonomy is the consequence of a series of historical facts, which evolved from discussions with indigenous communities of the Atlantic, to elevation as a principle of law.

There is a legal principle whose value is undeniable when it emerges at the dawn of liberalism and has, at its back, the inequalities instituted by medieval law. It is the principle of legal equality. The development of this principle in capitalist society has been used as a pretext to cover economic and social inequalities. Beneath a general, abstract declaration of equality before the law, capitalist societies have tried to hide a concrete inequality in the opportunity for participation in the economy, politics, and society. The possibility of access to material, cultural, and spiritual goods has been blocked.

Of course, we all share equality before the law with regard to due process. But it is necessary to note that treating unequals as equals has amounted to a cover up. For that reason, the new law should try to be more than egalitarian and homogenizing. It should be an unequal, leveling force, that accounts for concrete economic and social inequalities.

Contact with the indigenous communities has given our concept of democracy a concrete content. We see democracy not as formal democracy, since a democracy defined solely in such terms is incomplete. Rather, democracy is formal in the sense of the electoral processes and suffrage, but also institutional to the extent that the laws and institutions incorporate the dynamic reality. This is the case with the Law of Autonomy and the constitutional articles which have gathered that experience. We also conceive of democracy in an eco-
nomic and social sense that permits participation by those who have traditionally been marginalized from history. Nation-state, law and democracy, are not empty elements, or mere declarations. They are the working hypotheses of a revolutionary process with a specific content.

The indigenous peoples are indispensable factors for peace in Central America. I reiterate what I have already stated: peace is not only the absence of war, but also the participation of all in the material, social, and spiritual community of the nation.

5.6 Homage to the Indigenous Nicaraguans

I want to end with a dedication to the indigenous person of our land. This is a dedication to the indigenous person who for centuries traveled the old roads of the country as a friend of the ancient trees and eternal volcanos, seas, lakes, forests, and plains. The indigenous person is a part of the countryside where he cradled his dreams under the stars of a warm tropical night and where he forged his life and his history in this land of light, fire, and love. The indigenous person is our past; the past that we understand not as nostalgia for a murmur of wings that hover in flight above melancholy, but as seeds of the present and future.

6. The Judicial Transformation in Nicaragua

6.1 Break with the Past

The changes produced by the Sandinista Popular Revolution provoked a break between political, economic, and social reality on the one hand, and legal and institutional order on the other. This break, inevitable in every revolutionary process, left behind the legal-institutional system in general and the judicial machinery in particular. At the same time, it produced the bases for the new institutional system and generated a process for adjusting institutions and law to the changing reality in Nicaragua. This transforming process, which will continue until reality and legal order reach a point of equilibrium, has passed through three stages.

The first stage included such events as the passing of the Fundamental Statute, the Statute of Rights and Guarantees of Nicaraguans, the Law of Political Parties, the Law Creating the Council of State, and the Electoral Law. In addition, the National Assembly was cre-

ated, the General Statute was approved, the Implementation of the Assembly was passed, and finally, the presidential and constitutional-legislative elections of November 1984 were held.

The second stage consisted of the process of discussion and approval, culminating in the promulgation of the political Constitution between 1985 and January 9, 1987. The third stage is characterized by the initiation of legislative work by the National Assembly, having finished its constitutional period. In this stage, the Assembly initiated the process of legal adjustment to implement the Constitution and to conform ordinary legislation to the constitutional text. The most important steps in this stage consisted of the approval of the Law of Autonomy, which implemented constitutional provisions on the rights of indigenous peoples; the forthcoming parliamentary works that should conclude with the approval of the Procedural Law on Dissolution of Marriage, which implemented article 72 of the Constitution; the Law of Municipal Elections; the Law of Amparo; the Law of Emergency; and the Law of Criminal Procedure Reform.

The Esquipulas Accords are important as a Central American legal and political framework and have affected the institutional process in Nicaragua. They neither created nor initiated the legal and institutional formation of the country, but they do support its development. From the judicial point of view, the most important consequence of the Accords was the dissolution of the Popular Anti-Somoza Tribunals and the concommitant transfer of their jurisdiction to the judicial branch, as established by article 159 of the Constitution.

6.2 The New Judiciary

With the triumph of the Revolution, various specialized jurisdictions were separated from the judicial machinery and distributed among the Popular Anti-Somoza Tribunals, the Agrarian Tribunal, and Regional Committees of Housing and Protection and Care of Minors. The latter Committees are within a department of the Nicaraguan Institute of Social Security and Welfare (INSSBI).

In addition, the Ministry of Justice and police courts were created, the monopoly on criminal prosecutions was established in the Attorney General’s Office, and a series of decrees were promulgated to deal with specific judicial questions. The existing code law was left in force for the remaining fields of law.

The judiciary was traditionally organized to consist of local
judges, district judges, Appeals Courts (which later were transformed into Regional Appeals Tribunals), and the Supreme Court of Justice. Appeals to the Regional Tribunals and extraordinary appeals to the Supreme Court remained in place for civil and criminal matters as they had existed before the revolutionary triumph. In the labor area, the Superior Court of Labor was abolished and Labor Judgments now end with appeal to the Regional Tribunals. The Fundamental Statute maintained habeus corpus and amparo.

This judicial system was established with great difficulty due to the congenital contradictions which existed within the system. Among these contradictions, the following should be mentioned: the old code law and the new law by decrees; the old, slow and rigid law and the dynamic social reality; the concepts of the Ministry of Justice and the Supreme Court of Justice; the monopoly on criminal prosecution and the actual capacity of the Attorney General's Office to prosecute due to explicable limitations; and the monopoly on criminal prosecution and actual functioning of the criminal process drawn in old models of rigid written law. Many of these contradictions are due to the fact that our current Code of Criminal Instruction dates from 1879 and was inspired by the New Spanish Compilation of 1805.

Inside the Judicial Branch there was also an absence of clear objectives about the role of the judiciary in the revolutionary process. This led to the adoption of contrasting points of view. Under the traditional and formalist point of view, a judge must limit himself exclusively to apply the law without previous or subsequent considerations concerning reality. This emphasizes the mechanical activity of a judge and discards the integrating function so necessary in a historical moment such as ours. Behind this traditional attitude, there is a series of underlying and implicit values which are founded upon a scheme that considers law as a universal, absolute, and abstract value. This scheme ignores the social moment and the law's value as a historical and cultural product.

Opposed to this traditional focus is a point of view oriented toward a "paradigm shift," based upon certain judicial models thought to be more advanced and modern. Without depreciating the value of certain legal and judicial models, it is unavoidable that every legal and judicial system must necessarily be part of the social reality to which it belongs. Between the judicial system and its reality, there should be coherence and integration, not imposition and contradiction. A complex process does exist for the establishment of a more coherent and
better coordinated relationship among the various institutions within the judicial system. But there are serious problems derived from the war of aggression which have translated into budgetary, human, and material limitations in the judicial machinery. However, problems of inter-institutional coordination are being overcome to the extent that their objectives have been defined with a view toward greater coherence and harmony of the judicial system as a whole.

Furthermore, the increase in the number of trials, the scarcity of tribunals and prosecutors, the antiquity and rigidity of the criminal laws and procedures, and the concentration of more than forty percent of the trials in the capital city, have resulted in a severe delay of justice. These problems have existed since the first years of the Revolution. The delay is worsening due to the cumulative effects of the mere passage of time. To remedy this delay, we devoted special attention to this problem in our Report to the First Assembly of the Judicial Branch issued on October 16, 1987.

In addition to the delay in the administration of justice, one must focus on the excessive incapacity of the judges to impose sanctions for common crimes. According to statistics of the Ministry of the Interior, less than two percent of the common criminals brought before judicial authorities receive penal sanction. Of course, it would be important to determine the percentages of those persons released due to the responsibility of the judges, and those released due to other structural or procedural limitations.

There are also extra-judicial problems, which though diminished, still persist. Among these are inattention to release orders, carelessness of examining judges and, in some cases, failure to carry out judgments. There is also a need for the Appeals Tribunals to effectively supervise the examining judges, who are the representatives of those Tribunals in proceedings of personal exhibition or habeus corpus.

On a different topic, the Supreme Court of Justice, during the drafting of the political Constitution, urged unity of jurisdiction and judicial review as fundamental to the consolidation and deepening of the Rule of Law. The Supreme Court made the above proposals in its draft of the Chapter on the Judicial Branch and in the bill presented by the Supreme Court to the National Assembly in 1986.

6.3 Constitutional Changes and New Policies

Long and short term objectives of the Judicial Branch, and their implementing policies, are defined within the revolutionary process.
Among the objectives are the readjustment of the judiciary to social reality, the consolidation of the Rule of Law, the elimination of delay of justice, and the harmonization of the judiciary with the other branches of the government. Among the implementing policies being developed to reach the judiciary's objectives are the following: giving the Supreme Court of Justice the constitutional and legal instruments to organize and direct the judicial machinery, establishing the unity of jurisdiction and judicial review with implementing laws where necessary, broadening the judicial machinery, establishing mechanisms for internal and external coordination with the other bodies of the judicial system, and above all, reforming criminal procedure.

Article 164, subsection (1) of the Constitution authorizes the Court to organize and direct the administration of justice. Decrees 299 and 303 provide the Court with the authority to create, eliminate, and transfer courts, broaden and organize the Appellate Tribunals, and determine the jurisdiction of judges by subject matter and amount. These powers, together with the constitutional power to name all the judicial administrators of the country, give the Court the real possibility of managing judicial adjustment and transformation. This power strengthens the constitutionally guaranteed independence of the Judicial Branch.

Judicial review for unconstitutionality, considered by the Court as necessary for the consolidation of the Rule of Law, was incorporated into the Constitution. At the same time, implementation was left to a new constitutional Law of Amparo which shall contain a chapter on "Appeal for Unconstitutionality." The Supreme Court of Justice prepared the draft of the new Law of Amparo, which later incorporated the comments presented by the Ministry of Justice. The last point upon which the Court and the Ministry disagreed was the effect of a law that is declared unconstitutional. The Ministry of Justice considered the declaration limited to the concrete case, while the Court found it inconsistent to leave valid any law that had been declared unconstitutional. However, both institutions reached an agreement when the focus was placed on the fate of the law considered unconstitutional.

On the basis of the new perspective and in accord with the letter and spirit of the Constitution, it was established that (a) the nature of the judgment was not a decision with *erga-omnes* effects, but rather was limited to the concrete case, and (b) the law declared inapplicable by the Court to the concrete case had no validity at all in light of
article 182 of the Constitution. From this point of view, the judgment of the Court does not overturn the law, but it identifies the contradiction between the law and the Constitution. The law then becomes inapplicable to all other cases and, in accordance with what the Constitution itself provides, it is up to the Assembly to proceed with derogation of the law. The draft of the new Law of Amparo establishes that the appeal for unconstitutionality may be interposed against any law whose effective date is later than the enactment of the Law of Amparo.

This fertile interchange of legal opinions between both institutions completes a new stage within the discussion of the appeal for unconstitutionality. The first of these stages began in the Supreme Court in the final months of 1985. Primarily, the discussion revolved around whether the Court should suggest that the Assembly create this appeal and, what body would undertake review for unconstitutionality—the Court, a specific Constitutional Tribunal, or a commission of the Assembly itself.

The Assembly established in the Constitution the appeal for unconstitutionality and conferred jurisdiction on the Supreme Court, thus adopting the draft that the Supreme Court had approved by a majority in December 1985. As is appropriate, the Assembly will have the last word on the bill for the new Law of Amparo, which incorporates the unanimous views of the Supreme Court and the Ministry of Justice.

In order to reduce and, if possible, eliminate the delay of justice, we hope to expand the judiciary and reform criminal procedures. Expansion of the Judicial Branch is dictated by two circumstances. First, there is the progressive increase in the number of common law trials, particularly in criminal matters. Criminal trials overload the courts in Managua since approximately forty-five percent of all trials for crimes committed in the country are held there. Secondly, expansion is required by the dissolution of the Popular Anti-Somoza Tribunals and the consequent transfer of their jurisdiction to the Judicial Branch. In Managua alone, the Judicial Branch has received about 4,000 files. The creation of new courts will not solve the problems discussed above, however, we know that a solution is not possible without those courts.

The Supreme Court, on the general authority of article 164, subsection (1) of the Constitution, in accord with the provisions of decrees 299 and 303, has recently agreed to create fifteen new criminal
courts. Ten of these will be in the city of Managua to reinforce the current eight. An additional court will be situated in each of the following cities: Matagalpa, Juigalpa, Siuna, Bonanza, and Nueva Guinea. The Supreme Court has also decided to increase the number of justices on the Appellate Tribunals as follows: two in Region II, one in Region III, and two in Region IV.

All of these steps were taken in coordination with the dissolution of the Ministry of Justice. The steps included the transfer of new parts of the Ministry to various agencies of the state and the reduction of cases at the Attorney General's Office as a consequence of the loss of the monopoly of criminal prosecution. This permitted a number of Ministry personnel to be integrated into the reorganization of the judicial branch. Within that process, twenty-three new officers came into the Judicial Branch as judges and justices, three as consultants, and about one hundred as administrative or para-judicial support personnel.

Linked to this process, the Ministry of Justice, the Supreme Court, and the Ministry of the Interior have developed a bill for the Law of Criminal Procedure Reform. This bill overturns decree 1130 and seeks to make the Criminal Prosecutors' Offices function more practically as well as make the judicial function in criminal matters more flexible.

The monopoly on criminal prosecution no longer exists. The state does have the exclusive power to prosecute those crimes in which it has a special interest because of social repercussions. These would include graft, heinous murder, and crimes against the national security. However, crimes have been redefined according to whether they carry only correctional penalties or more than correctional penalties. Now, local judges have jurisdiction over the former. Although the mandatory conference and trial by jury have been eliminated, sound discretion, sana critica, and participation of victims have been established. Minor conflicts have been left to the local judges. This will divert approximately forty to fifty percent of the current workload away from the district judges.

These reforms, of course, will require a special, urgent program to train local judges in methods and procedures of criminal law. This can be accomplished by working with the authorities of higher education and the law schools in order to establish social service for the graduates. Such a measure would permit the creation of a source of
judges and will permit them, while the social service lasts, to act as appointed defense counsel where there are no lawyers available.

The proposed reforms will be considered soon by the National Assembly and after their approval, the Supreme Court, the Ministry of the Interior, and the Attorney General's Office will come together again to continue the reform of criminal procedure. This reform will be conducted in light of the restructuring and growth of the Judicial Branch, the abolition of the Ministry of Justice, and the creation of the Attorney General's Office.

6.4 The Future

With the description of these various accomplishments, I do not pretend to present an idealized vision of reality. Nor do I pretend that everything is resolved. The truth is that very serious problems survive. They include the delay of justice, the training of judicial personnel, the creation of funds for salaries of officers and employees, transportation, lack of offices, and others.

My purpose has been to present an objective balance of accomplishments and limitations, not just a quantitative inventory of what has been done and what remains to be done. My purpose has been to present the logic of these transformations and their conceptual support, illustrating them with concrete cases. It is very important to make clear not only what has been done but why it has been done, and to explain the full vision of the judiciary, with its objectives, policies, needs, limits, and actions. Facts must be evaluated as part of a unity, a logic and a development.

So far, it has been possible to formulate a conceptual and legal framework to carry out the legal and organizational reforms already mentioned. This is not enough. The results produced remain to be seen. Only time will tell us if we have substantially reduced the delay of justice. Reducing the delay demands permanent training programs until a judicial school can be created. There are preliminary plans for a judicial school, but the necessary resources are lacking.

The past work has been difficult, as will be the work of the future. The results of the objectives and policies already adopted must be examined again in light of new needs and situations. This requires the unity of all the members of the Judicial Branch, constant self-sacrifice, permanent communication among judicial officers, the Association of Jurists, lawyers, professors, and students of law. In order to institutionalize our revolution, it is also important to improve interna-
tional relations so that our plans and programs are explained and understood abroad.
APPENDIX - THE NICARAGUAN CONSTITUTION OF 1987

THE PRESIDENT OF THE REPUBLIC

hereby makes known to the people of Nicaragua that the Constituent National Assembly after consulting with the people, has discussed and approved the following Political Constitution:

PREAMBLE

WE,
The Representatives of the People of Nicaragua, united in the Constituent National Assembly,

INVOKES

The struggles of our Indian ancestors;
The spirit of Central American unity and the heroic tradition of our people who, inspired by the exemplary actions of General JOSE DOLORES ESTRADA, ANDRES CASTRO and ENMANUEL MONGALO, destroyed the dominion of the filibusters and the United States intervention in the National War;
BENJAMIN ZELEDON’S anti-interventionist deeds;
AUGUSTO C. SANDINO, General of Free People and Father of the Popular and Anti-imperialist Revolution;
The heroic action of RIGOBERTO LOPEZ PEREZ, who initiated the beginning of the end of the dictatorship;
The example of CARLOS FONSECA, the greatest perpetrator of Sandino’s legacy, founder of the Sandinista National Liberation Front and Leader of the Revolution;
The generations of Heroes and Martyrs who forged and carried forward the liberation struggle for national independence.

IN THE NAME OF

The Nicaraguan people; the democratic, patriotic and revolutionary political parties and organizations of Nicaragua; the men and women; the workers and peasants; the glorious youth; the heroic mothers; those Christians who moved by their faith in GOD committed and dedicated themselves to the struggle for the liberation of the oppressed; the patriotic intellectuals; and all others who through their productive labor contribute to the defense of the Nation;
Those who guarantee the happiness of future generations by offering their lives in the struggle against imperialist aggression.

FOR

The establishment of the legal framework to protect and preserve the achievements of the Revolution and the building of a new society dedicated to the elimination of all forms of exploitation and to the achievement of economic, political and social equality for all Nicaraguans and absolute respect for human rights.

FOR THE HOMELAND, FOR THE REVOLUTION, FOR THE UNITY OF THE NATION AND FOR PEACE.

WE HEREBY PROCLAIM THE FOLLOWING

POLITICAL CONSTITUTION OF THE REPUBLIC OF NICARAGUA

TITLE I

FUNDAMENTAL PRINCIPLES

Chapter I

Article 1

Independence, sovereignty and self-determination are inalienable rights of the Nicaraguan people and the foundation of the Nicaraguan nation. Any foreign interference in the internal affairs of Nicaragua or any attempt to undermine these rights is an attack upon the life of the people.

It is the right of the people and the duty of all citizens to preserve and defend, with arms if necessary, the independence of the Nation, its sovereignty and national self-determination.

Article 2

National sovereignty rests with the people, the source of all power and forgers of their own destiny. The people exercise democracy by freely deciding upon and participating in the construction of the economic, political and social system which best serves their interests. The people exercise power both directly and through their representatives elected by universal suffrage; equal, free, and direct elections and secret ballot.
Article 3

The struggle for peace and the establishment of a just world order are unrenounceable national commitments of the Nicaraguan nation. We therefore oppose all forms of colonialist and imperialist domination and exploitation. The Nicaraguan people are in solidarity with all those who struggle against oppression and discrimination.

Article 4

The Nicaraguan people have created a new state to promote their interests and guarantee their social and political achievements. The state is the principal instrument through which the people eliminate all forms of exploitation and oppression, promote material and spiritual progress of the nation, and ensure that the interests and rights of the majority prevail.

Article 5

The state guarantees the existence of political pluralism, a mixed economy and non-alignment.

Political pluralism assures the existence and participation of all political organizations in the economic, political and social affairs of the nation, without ideological restrictions, except for those who seek a return to the past or advocate the establishment of a political system similar to it.

A mixed economy assures the existence of different forms of property: public, private, associative, cooperative and communal; these forms of property must serve the best interests of the nation and contribute to the creation of wealth to satisfy the needs of the country and its inhabitants.

Nicaragua's international relations are based on the principle of non-alignment, the search for peace, and respect for the sovereignty of all nations; therefore, Nicaragua opposes all forms of discrimination and is anti-colonialist, anti-imperialist, and anti-racist. Nicaragua rejects the subordination of any state by another.
TITLE II

THE STATE

Chapter I

Article 6

Nicaragua is an independent, free, sovereign, unitary and indivisible state.

Article 7

Nicaragua is a participatory and representative democratic republic. It has four branches of government: Legislative, Executive, Judicial and Electoral.

Article 8

The people of Nicaragua are multi-ethnic and are an integral part of the Central American nation.

Article 9

Nicaragua is a firm defender of Central American unity. It supports and promotes all efforts to achieve political and economic integration and cooperation in Central America. It also supports the efforts to establish and preserve peace in the region.

Nicaragua, inspired by the ideals of Bolivar and Sandino, strives for the unity of the people of Latin America and the Caribbean.

Consequently, Nicaragua will participate with other Central and Latin American countries in the creation and election of the bodies necessary to achieve such goals. This principle shall be regulated by appropriate legislation and treaties.

Article 10

The national territory is located between the Atlantic and Pacific Oceans and the republics of Honduras and Costa Rica. It includes the adjacent islands and keys, soil and subsoil, territorial waters, continental platform, continental rise, airspace and stratosphere.

The precise boundaries of the national territory are defined by laws and treaties.
Article 11

Spanish is the official language of the state. The languages of the Communities of the Atlantic Coast shall also have official use in the cases established by law.

Article 12

The city of Managua is the Capital of the Republic and the seat of government. In exceptional circumstances these can be established elsewhere in the nation.

Article 13

The symbols of the nation are the National Anthem, the Flag and the Official Seal, as established by the law that defines their characteristics and use.

Article 14

The state has no official religion.

TITLE III

NICARAGUAN NATIONALITY

Chapter I

Article 15

Nicaraguans are either nationals or nationalized.

Article 16

Nationals are:

1. Those born in Nicaraguan territory, excepting children of foreigners in diplomatic service, children of foreign officials serving international organizations or those sent by their government to work in Nicaragua, unless they choose to solicit Nicaraguan nationality.
2. Children of a Nicaraguan father or mother.
3. Children born abroad to fathers or mothers who originally were Nicaraguan, if and when they apply for citizenship after reaching legal age or independence.
4. Infants of unknown parents found in Nicaragua, subject to
correction in accordance with the law should their filial identity become known.

5. Children born to foreign parents on board a Nicaraguan aircraft or vessel, if and when they solicit Nicaraguan nationality.

Article 17

Native born Central Americans who reside in Nicaragua have the right to apply for Nicaraguan nationality from the competent authorities without renouncing their previous nationality.

Article 18

The National Assembly may grant nationality to foreigners deserving this merit by virtue of extraordinary service rendered to Nicaragua.

Article 19

Foreigners who have renounced their nationality may be nationalized by applying to the competent authorities when they have fulfilled the requirements and conditions established by law.

Article 20

No national may be deprived of nationality except upon voluntary acquisition of another; nor shall a national be deprived of Nicaraguan nationality because of having acquired that of another Central American country or any country with which Nicaragua has an agreement of dual nationality.

Article 21

The granting, loss and recuperation of nationality shall be regulated by law.

Article 22

Cases of dual nationality shall be treated in conformity with treaties and the principles of reciprocity.
TITLE IV

RIGHTS, DUTIES, AND GUARANTEES OF THE NICARAGUAN PEOPLE

Chapter I

Article 23

The right to life is inviolable and inherent to all persons. There is no death penalty in Nicaragua.

Article 24

All persons have duties to their families, the community, the Homeland and humanity. The rights of each person are limited by the rights of others, the collective security and the just requirements of the common good.

Article 25

All persons have the right to:
1. personal freedom;
2. security;
3. seek legal redress.

Article 26

All persons have the right to:
1. privacy and the privacy of their family;
2. the inviolability of their home, correspondence and communications;
3. respect for their honor and reputation.

A private home may be searched only with a warrant from a competent judge or expressly authorized official to prevent a crime from being committed or to avoid damage to persons or goods, in accordance with the procedures established by law.

The law shall determine the cases and the procedures for an examination of private documents, fiscal records and related documents, when such is indispensable for the investigation of matters before the Courts or for fiscal reasons.

Illegally seized letters, documents and other private papers shall be null and void in legal proceedings or, elsewhere.
Article 27

All persons are equal before the law and have the right to equal protection under the law. There shall be no discrimination for reasons of birth, nationality, political belief, race, gender, language, religion, opinion, national origin, economic position or social condition.

Foreigners have the same rights and duties as Nicaraguans, with the exception of political rights and other rights established by law; foreigners may not intervene in the political affairs of the country.

Article 28

Nicaraguans who are temporarily out of the country have the right to enjoy amparo\(^1\) and protection by the state through its diplomatic representatives.

Article 29

All persons have the right to freedom of conscience and thought and to profess or not to profess a religion. No one shall be the object of coercive measures which diminish these rights, or be obligated to declare his or her creed, ideology or beliefs.

Article 30

Nicaraguans have the right to freely express their beliefs in public or private, individually or collectively, in oral, written or any other form.

Article 31

Nicaraguans have the right to travel and to establish their residence in any part of the nation and to freely enter and exit the country.

Article 32

No one is obligated to do what is not required by law, or barred from doing what is not prohibited by law.

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1. In Nicaragua, *amparo* is a legal procedure used to seek review of administrative acts, similar to writs of prohibition, mandamus, and habeas corpus in the United States judicial system. It is originally a Mexican constitutional concept.
Article 33

No one may be arbitrarily detained or imprisoned, or be deprived of liberty except in cases established by law and in accordance with legal procedures. Therefore:

1. An individual may be detained only by a warrant issued from a competent Judge or an official expressly authorized by law, except when apprehended in the act of committing a crime.

2. All detained persons have the right to be:
   2.1. Informed in detail without delay of the reasons for their detention and the charges against them, in a language they understand; to have their family informed; and to be treated with respect in accordance with the dignity inherent in human beings.
   2.2. Brought before a competent legal authority within seventy-two hours.

3. No one shall be detained after a release order has been granted by the appropriate authority or once the sentence imposed has been completed.

4. The responsible authority shall be liable for any illegal detention.

5. The appropriate authorities shall attempt to maintain those awaiting trial apart from those who have been sentenced.

Article 34

All those awaiting trial have equal rights to the following minimum guarantees:

1. To be presumed innocent until proven guilty according to the law.

2. To be tried without undue delay by a competent court established by law.

3. Not to be removed from the jurisdiction of a competent judge except in cases provided for in this Constitution or by law.

4. To be guaranteed the right to a defense, to participate personally from the start of the proceedings and to adequate time and means to prepare their defense.

5. To be represented by a public defender when legal counsel has not been selected by the time of the first hearing, or in the event that no prior call was decreed. The accused shall have the right to communicate freely and in private with his or her legal counsel.
6. To have the assistance of an interpreter free of charge if they do not understand or speak the language used by the court.

7. Not to be obligated to testify against themselves or against a spouse or a partner in a stable de facto union, or a family member within the fourth level of consanguinity or the second of marital relations, or to admit their own guilt.

8. To be found guilty or not guilty within the legal time period, by each of the relevant courts.

9. To have the right to appeal to a superior court upon conviction of any crime and not to be retried for any crime for which a final judgment of conviction or acquittal has been issued.

10. Not to be brought to trial or sentenced for acts or omissions which at the times committed had not been unequivocally established by law as a punishable crime, and not to be given a sentence which has not been previously established by law.

Criminal proceedings are open to the public, but in some cases the press and the general public may be excluded for moral considerations or for matters of the public order or national security.

Article 35

Minors shall not be subjected to nor the object of judgment nor shall they be submitted to any legal proceeding. Minors who violate the law cannot be taken to penal rehabilitation centers. They shall be attended in centers under the responsibility of a specialized institution, as provided by law.

Article 36

All persons shall have the right to respect for their physical, psychological and moral integrity. No one shall be subjected to torture, nor inhumane, cruel or degrading treatment. Violation of this right constitutes a crime and shall be punishable by law.

Article 37

The penalty shall not extend beyond the accused. No sentence may independently or consecutively total more than thirty years.
Article 38

The law is not retroactive except in penal matters that favor the accused.

Article 39

In Nicaragua, the penitentiary system is humane, its fundamental objective is to transform the detainee into a person capable of reintegration into the society. In the progressive stages, the penitentiary system shall promote family unity, health care, educational and cultural advancement and productive occupation with financial compensation. Detention has a reeducational character.

Women and men serving prison sentences shall be held in separate penal centers. Women shall be provided guards of the same sex.

Article 40

No one shall be subjected to involuntary servitude. Slavery and slave trade in any form are prohibited.

Article 41

No one shall be detained for indebtedness. This principle does not limit the powers of competent legal authorities to issue warrants for the non-fulfillment of support or alimony orders. All national and foreign citizens have the duty to pay their debts.

Article 42

Nicaragua guarantees asylum to those persecuted for their struggle for democracy, peace, justice and human rights. The granting of political asylum shall be determined by law in accordance with international agreements ratified by Nicaragua. If a political refugee or exile is expelled from Nicaragua, that person may not be sent back to the country in which he or she was persecuted.

Article 43

Extradition from Nicaragua will not be permitted for political crimes or common crimes committed in conjunction with them, at Nicaragua's own discretion. Extradition for other common crimes is regulated by law and international treaties.
Nicaraguans shall not be extradited from Nicaragua.

Article 44

Nicaraguans have the right to the personal property and necessary goods that is essential for the integral development of each person.

Article 45

Persons whose constitutional rights have been violated or are in danger of violation have the right to present writs of habeas corpus or amparo, according to the circumstances and the Law of Amparo.2

Article 46

All persons in Nicaragua shall enjoy protection and recognition by the state of the rights inherent to human beings, as well as unrestricted respect, promotion and protection of human rights, and the full benefit of the rights set forth in the Universal Declaration of Human Rights; the American Declaration of the Rights and Duties of Man; the International Pact of Economic, Social and Cultural Rights and the International Pact of Civil and Political Rights of the United Nations; and the American Convention of Human Rights of the Organization of American States.

Chapter II

Political Rights

Article 47

All Nicaraguans who have reached sixteen years of age are full citizens.

All citizens enjoy the political rights set forth in the Constitution and in other laws, without limitations other than those established for reasons of age.

A citizen's rights may be suspended when serious corporal or specific related punishments are applied and when a final judgment of civil injunction is decreed.

2. See supra note 1.
Article 48

Unconditional equality among Nicaraguans in the enjoyment of political rights is established. In the exercise of these rights and in the fulfillment of these responsibilities and obligations, there exists absolute equality between men and women. It is the obligation of the state to remove obstacles that impede effective participation of Nicaraguans in the political, economic and social life of the country.

Article 49

In Nicaragua workers in the cities and countryside, women, youth, agricultural producers, artisans, professionals, technicians, intellectuals, artists, religious persons, the Communities of the Atlantic Coast and the population in general have the right to form organizations in order to realize their aspirations according to their own interests, without discrimination, and to participate in the construction of a new society.

Such organizations may be formed by the voluntary participation and free will of their members. They shall have social function and may have a partisan character, according to their nature and objectives.

Article 50

Citizens have the right to participate under equal condition in public affairs and in state management.

Effective participation by the people at local and national levels shall be guaranteed by law.

Article 51

Citizens have the right to elect and be elected in periodic elections, and to vie for public office.

Article 52

Citizens have the right, individually or collectively, to petition, denounce irregularities and make constructive criticisms to the branches of government or to any authority, and obtain a quick resolution or response and to have the result made known within the time period established by law.
Article 53

The right to peaceful assembly is recognized; the exercise of this right does not require prior permission.

Article 54

The right to public assembly, demonstration and mobilization in conformity with the law is recognized.

Article 55

Nicaraguan citizens have the right to organize or affiliate with political parties with the objective of participating in, exercising or vying for power.

Chapter III
Social Rights
Article 56

The state shall grant special attention in all of its programs to those who defend the dignity, honor and sovereignty of the nation, and to their families, as well as to the families of those fallen in defense of the nation, in accordance with the laws.

Article 57

Nicaraguans have the right to work in keeping with human nature.

Article 58

Nicaraguans have the right to education and culture.

Article 59

Every Nicaraguan has an equal right to health care. The state shall establish the basic conditions for the promotion, protection, recuperation and rehabilitation of the health of the people.

The organization and direction of health care programs, services and activities is the responsibility of the state, which shall also promote popular participation in support of health care.

Citizens are obliged to respect stipulated sanitary measures.
Article 60

Nicaraguans have the right to live in a healthy environment and it is the obligation of the state to preserve, conserve and reclaim the environment and the natural resources of the country.

Article 61

The state guarantees Nicaraguans the right to social security for protection against the social contingencies of life and work, in the manner and conditions determined by law.

Article 62

The state shall strive to establish programs for the physical, psycho-social and professional rehabilitation of disabled people, and for their job placement.

Article 63

It is the right of all Nicaraguans to be protected against hunger. The state shall promote programs which assure adequate availability and equitable distribution of food.

Article 64

Nicaraguans have the right to decent, comfortable and safe housing that guarantees familial privacy. The state shall promote the fulfillment of this right.

Article 65

Nicaraguans have the right to sports, physical education, relaxation and recreation. As part of their integral development, the state shall promote sports and physical education, through the organized and mass participation of the people and specific programs and projects.

Article 66

Nicaraguans have the right to accurate information. This right includes the freedom to seek, receive and disseminate information and ideas, be they spoken or written, in graphic or any other form.
Article 67

The right to provide information is a social responsibility and shall be exercised with strict respect for the principles established in the Constitution. This right cannot be subject to censorship, but may be subject to retroactive liability established by law.

Article 68

The mass media is at the service of national interests.

The state shall promote the access of the public and its organizations to the means of communication, and shall prevent the media from responding to foreign interests or to any economic power monopoly.

The existence and functioning of public, corporate or private means of communication shall not be the object of prior censorship. It shall be subject to the law.

Article 69

All persons, either individually or collectively, have the right to practice their religion in public or private, through worship, practice and teaching.

No one may disobey the law or prevent others from exercising their rights and fulfilling their duties by invoking religious beliefs or inclination.

Chapter IV
Family Rights

Article 70

The family is the fundamental nucleus of society and has the right to protection by society and the state.

Article 71

It is the right of Nicaraguans to form a family. The law shall regulate and protect this right.

Article 72

Marriage and stable de facto unions are protected by the state; they rest on the voluntary agreement between a man and a woman,
and may be dissolved by mutual consent or by the will of one of the parties, as provided by law.

Article 73

Family relations rest on respect, solidarity and absolute equality of rights and responsibilities between the man and woman.

Parents must work together to maintain the home and provide for the integral development of their children, with equal rights and responsibilities. Furthermore, children are obligated to respect and assist their parents. These duties and rights shall be fulfilled in accordance with the pertinent legislation.

Article 74

The state grants special protection to the process of human reproduction.

Women shall have special protection during pregnancy and shall be granted maternity leave with pay and appropriate social security benefits.

No one may deny employment to women for reasons of pregnancy nor dismiss them during pregnancy or the post-natal period, in conformity with the law.

Article 75

All children have equal rights. There shall be no discrimination for reasons of filial relations. In ordinary legislation, dispositions or classifications that reduce or deny equality among children shall be null and void.

Article 76

The state shall promote programs and develop special centers for the care of minors; minors have the right to protection and education from their family, the society and the state, according to their needs.

Article 77

The elderly have the right to protective measures from their family, society and the state.
Article 78

The state shall protect responsible paternity and maternity and establish the right to investigate paternity and maternity.

Article 79

The right of adoption based on the best interests of the child is established, as regulated by law.

Chapter V

Labor Rights

Article 80

Work is a right and a social responsibility. The labor of Nicaraguans is the fundamental means to satisfy the needs of society and of the individual, and is the source of the wealth and prosperity of the nation. The state shall strive for full and productive employment under conditions that guarantee the fundamental rights of the individual.

Article 81

Workers have the right to participate in the management of their enterprises, through their organizations and in conformity with the law.

Article 82

Workers have the right to working conditions that guarantee:

1. Equal pay for equal work under identical conditions, suitable to their social responsibility, without discrimination for political, religious, social, gender or other reasons, which assures a standard of living compatible with human dignity;
2. Payment of legal tender in their work place;
3. Minimum wage and social security payment shall not be legally attached except for support of the family and only by the terms established by law;
4. Work conditions that guarantee physical safety, health and hygiene and minimize work hazards to guarantee the worker's occupational health and safety;
5. An eight-hour work day, weekly rest, vacations, remunera-
tion for national holidays and a thirteenth month bonus, in conformity with the law;
6. Work stability in conformity with the law and equal opportunity to be promoted, subject to length of service, capacity, efficiency and responsibility;
7. Social security for protection and subsistence in case of disability, old age, occupational hazards, illness or maternity; and for family members in case of death, according to the conditions established by law.

Article 83
The right to strike is recognized.

Article 84
Child labor that can affect normal childhood development or interfere with the obligatory school year is prohibited. Children and adolescents shall be protected against any form of economic and social exploitation.

Article 85
Workers have the right to cultural, scientific and technical development; the state shall facilitate this through special programs.

Article 86
All Nicaraguans have the right to choose and exercise freely their profession or trade and to choose their place of work with no requirements other than requisite schooling and that the work serve a social purpose.

Article 87
Full labor union freedom exists in Nicaragua. Workers may organize voluntarily in unions, which shall be constituted in conformity with the law. No workers are obligated to belong to a particular union, nor to resign from the one to which they belong. Full union autonomy is recognized and the legal rights of organized labor are respected.

Article 88
In defense of their individual or organizational interests,
workers are guaranteed the inalienable right to negotiate with their employers, in conformity with the law:
1. Individual contracts;
2. Collective bargaining agreements.

Chapter VI

Rights of the Communities of the Atlantic Coast

Article 89

The Communities of the Atlantic Coast are indivisible parts of the Nicaraguan people, enjoy the same rights and have the same obligations as all Nicaraguans.

The Communities of the Atlantic Coast have the right to preserve and develop their cultural identities within the framework of national unity, to be granted their own forms of social organization, and to administer their local affairs according to their traditions.

The state recognizes the communal forms of land ownership of the Communities of the Atlantic Coast and their enjoyment, use and benefit of the waters and forests of these communal lands.

Article 90

The Communities of the Atlantic Coast have the right to the free expression and preservation of their languages, art and culture. The development of their culture and values enriches the national culture. The state shall create special programs to enhance the exercise of these rights.

Article 91

The state is obligated to enact laws promoting and assuring that no Nicaraguan shall be the object of discrimination for reasons of language, culture or origin.

TITLE V

National Defense

Chapter I

Article 92

It is the duty and right of Nicaraguans to struggle for the de-
fense of life, homeland, justice and peace for the full development of the nation.

Article 93

The Nicaraguan people have the right to arm themselves in defense of their sovereignty, independence and revolutionary gains. It is the duty of the state to direct, organize and arm the people to guarantee this right.

Article 94

The defense of the homeland and the Revolution rests on the mobilization and organized participation of all the people in the struggle against their aggressors. The state shall promote mass incorporation of the people into the various structures and tasks of the country's defense.

Article 95

The Sandinista Popular Army has a national character and must protect, respect and obey this political Constitution.

The Sandinista Popular Army is the military arm of the people and direct descendant of the Army in Defense of National Sovereignty. The state prepares, organizes and directs popular participation in the armed defense of the homeland through the Sandinista Popular Army.

No armed groups may exist in the national territory other than those established by the law, which shall regulate military organizational structure.

Article 96

Nicaraguans have the duty to bear arms to defend the homeland and the gains of the people against the threats and aggressions of a foreign country, or of forces directed or supported by any country. Patriotic military service is established in accordance with the terms of the law.

Article 97

The struggle against externally promoted actions to undermine the revolutionary order established by the Nicaraguan people and the confrontation with criminal and anti-social actions are in-
Integral to the defense of the Revolution. The state creates the internal security forces, whose functions are determined by law.

TITLE VI

NATIONAL ECONOMY, AGRARIAN REFORM AND PUBLIC FINANCES

Chapter I

National Economy

Article 98

The principal economic function of the state is to promote the country's material development, overcome the inherited backwardness and dependence of the economy, improve the country's standard of living and create a more just distribution of wealth.

Article 99

The state directs and plans the national economy to guarantee the protection of the interests of the majority and the promotion of socio-economic progress.

The Central Bank, the National Financial System, insurance and foreign commerce, instruments of the economic system, are irrevocable responsibilities of the state.

Article 100

The state shall promulgate a Foreign Investment Law that contributes to the socio-economic development of the country, without damaging national sovereignty.

Article 101

Workers and other productive sectors have the right to participate in the creation, execution and control of economic plans.

Article 102

Natural resources are national patrimony. Preservation of the environment, and conservation, development and rational exploitation of natural resources are responsibilities of the state; the state may formalize contracts for the rational exploitation of these resources when required by the national interest.
Article 103

The state guarantees the democratic coexistence of public, private, cooperative, associative and communal property; all these form parts of the mixed economy, are subject to the overriding interest of the nation and fulfill a social function.

Article 104

Enterprises organized under any of the forms of ownership established in this Constitution enjoy equality before the law and the economic policies of the state. The economic plans of enterprises must be prepared with the participation of the workers. Free economic initiative exists.

Article 105

The state is obligated to fairly and rationally regulate the supply and distribution of basic consumer goods, both in the countryside and in the cities. Speculation and hoarding are incompatible with the socio-economic system and constitute serious crimes against the people.

Chapter II

Agrarian Reform

Article 106

Agrarian reform is the fundamental instrument for achieving a just distribution of land and an effective means for revolutionary transformation, national development and the social progress of Nicaragua. The state guarantees the development of the agrarian reform program in order to fulfill the historic demands of the peasants.

Article 107

Agrarian reform shall abolish landed estates, rentism, inefficient production and the exploitation of peasants. It shall promote forms of ownership compatible with the economic and social objectives of the nation, as established in this Constitution.

Article 108

Land ownership is guaranteed to all those who productively
and efficiently work their land. The law shall establish specific regulations and exceptions in conformity with the goals and objectives of agrarian reform.

Article 109

The state shall promote the voluntary association of peasants in agricultural cooperatives, without sexual discrimination. Subject to resources, it shall provide the material means necessary to raise their technical and productive capacity in order to improve the standard of living of the peasants.

Article 110

The state shall promote the voluntary incorporation of small and medium scale agricultural producers, both individually and in associations, into the economic and social development plans of the country.

Article 111

The peasants and other productive sectors have the right to participate, through their own organizations, in establishing the policies of agrarian transformation.

Chapter III
Public Finances

Article 112

The annual General Budget of the Republic shall regulate public income and expenditure. The Budget must show the distinct sources and recipients of income and expenditure, which must balance, and shall determine the spending limits of the state institutions. Extraordinary spending may only be authorized by law and financed through the simultaneous creation and assignment of resources.

Article 113

The Budget shall be prepared by the President of the Republic and approved by the National Assembly in the Annual Budget Law, in conformity with this Constitution and the law.
Article 114

The taxation system must take into consideration the distribution of wealth and income, as well as the needs of the state.

Article 115

Taxes must be created by laws that establish their frequency and type and the rights of taxpayers. The state shall not require payment of taxes that have not been previously established by law.

TITLE VII

EDUCATION AND CULTURE

Chapter I

Article 116

Education seeks the full and integral development of Nicaraguans; to stimulate them with a critical, scientific and humanist way of thinking; to develop their personality and sense of dignity and to prepare them to assume the tasks of common interest necessary for the progress of the nation. Therefore, education is fundamental to the transformation and development of the individual and society.

Article 117

Education is a single, democratic, creative and participatory process, which promotes scientific research and links theory with practice and manual with intellectual labor. It is based on our national values; on the knowledge of our history and reality and of national and universal culture; and on scientific and technological advances; it cultivates the values of the new Nicaraguan in accord with the principles established in this Constitution, the study of which must be promoted.

Article 118

The state promotes the participation of the family, community and individuals in education and guarantees the support of the public means of communication for this purpose.
Article 119

Education is an unrenounceable responsibility of the state, including planning, direction and organization. The national educational system functions in an integrated fashion and in accordance with national plans. Its organization and functioning are determined by law.

It is the duty of the state to develop and train the technical and professional personnel at all levels and disciplines necessary for the development and transformation of the country.

Article 120

The creative application of educational plans and policies is a fundamental role of the national teaching profession. Teachers have the right to living and working conditions in accord with their dignity and with the important social function that they perform; they shall be promoted and given incentives in accord with the law.

Article 121

All Nicaraguans have free and equal access to education. Basic education is free of charge and obligatory. The Communities of the Atlantic Coast have access in their region to education in their native language up to the levels set by national plans and programs.

Article 122

Adults shall be offered educational opportunities and training programs. The state shall continue its programs to eradicate illiteracy.

Article 123

Private education centers may function at all levels, subject to the terms established in this Constitution.

Article 124

Education in Nicaragua is secular. The state recognizes the right of private educational centers with a religious orientation to teach religion as an extracurricular subject.
Article 125

Higher education enjoys financial, organic and administrative autonomy in accordance with the law. Academic freedom is recognized. The state promotes free creation, research and dissemination of the sciences, arts and letters.

Article 126

It is the duty of the state to promote the recovery, development and strengthening of national culture, sustained by creative popular participation.

The state shall support national culture in all its diversity, whether collective or individual.

Article 127

Artistic and cultural creation is completely unrestricted. Cultural workers have full freedom to choose their forms and styles of expression. The state shall strive to provide them with the means necessary to create and present their works, and to protect their rights of authorship.

Article 128

The state protects the archeological, historical, linguistic, cultural and artistic patrimony of the nation.

TITLE VIII

ORGANIZATION OF THE STATE

Chapter I

General Principles

Article 129

The Legislative, Executive, Judicial and Electoral branches of government are independent of one another and coordinate harmoniously, subject only to the overriding national interest and to the provisions established in this Constitution.
Article 130

No office holder may exercise functions other than those conferred upon the office by the Constitution and the laws.

All state officials must declare their financial status before assuming and upon leaving public office, as regulated by law.

Article 131

Elected and appointed officials of the four branches of government are publicly accountable for the proper fulfillment of their duties and must inform the public of their work and official activities. They must be receptive to problems presented by the people and strive to resolve them. Official duties must be exercised in the public interest. All officials must efficiently and honestly carry out their duties; they shall be responsible for their acts and omissions. Civil service shall be regulated by law.

Chapter II

Legislative Branch

Article 132

The National Assembly exercises legislative power through representative popular mandate. The National Assembly is composed of ninety Representatives with their respective Alternates, elected by universal suffrage; equal, free and direct elections, and secret ballot in regional districts by means of a proportional representation system, as regulated by the Electoral Law. The number of Representatives may be increased in accord with the general census of the population in conformity with the law.

Article 133

Unelected Presidential and Vice Presidential candidates who participated in the election also form part of the National Assembly as Representatives and Alternates respectively if they have received a number of votes equal or superior to the average number of votes necessary to win the election in each regional electoral district.

Article 134

A Representative in the National Assembly must be:

1. A Nicaraguan national;
2. In full enjoyment of political and civil rights;
3. Over twenty-one years of age.

Article 135

No Representative to the National Assembly may obtain any concessions from the state or be the proxy or agent of public, private or foreign enterprises which have contracts with the state. Violation of this provision annuls the concessions or advantages obtained and terminates the person's representative status.

Article 136

Representatives to the National Assembly shall be elected for a period of six years, starting from the date of inauguration, which shall be the ninth of January of the year following the election.

Article 137

Representatives and Alternates elected to the National Assembly shall be sworn in by the President of the Supreme Electoral Council.

The National Assembly shall be inaugurated by the Supreme Electoral Council.

Article 138

The functions of the National Assembly are to:
1. Draft and approve laws and decrees, as well as amend or repeal existing ones.
2. Officially interpret the law.
3. Decree amnesty and pardons, as well as commute or reduce sentences.
4. Solicit reports through the President of the Republic from the Ministers or Vice Ministers of the state and Presidents or Directors of autonomous and governmental institutions. Request by the same means their personal appearance and explanation or consultation.
5. Grant and cancel legal status to entities of a civil or religious nature.
6. Consider, discuss and approve the General Budget of the Republic in conformity with the procedures established in the Constitution and by law.
7. Elect Judges to the Supreme Court of Justice and Mem-
bers and their Alternates to the Supreme Electoral Council, from slates of three candidates proposed by the President of the Republic.

8. Elect the Controller General of the Republic from a slate of three candidates proposed by the President of the Republic.

9. Consider, acknowledge and decide on the resignations or permanent absences of Representatives to the National Assembly.

10. Consider and acknowledge the resignations or dismissals of Judges of the Supreme Court of Justice, of Members of the Supreme Electoral Council or the Controller General of the Republic.

11. Ratify or reject international treaties.

12. Regulate all matters related to symbols of the nation.

13. Create honorary orders and distinctions of national character.

14. Create and grant its own orders of national character.

15. Receive the President or the Vice President of the Republic in formal session to hear the annual report.

16. Delegate the legislative faculties to the President of the Republic when the National Assembly is in recess in accord with the Annual Decree of Delegating Legislative Functions. Matters relating to the codes of the Republic are excepted.

17. Elect the National Assembly’s Executive Board.

18. Create permanent, special and investigative committees.

19. Propose grace pensions and grant honors for distinguished service to the homeland and to humanity.

20. Determine the political and administrative division of the country.

21. Consider the economic and social development plans and policies of the country.

22. Fill permanent vacancies of the Presidency or Vice Presidency of the Republic.

23. Authorize foreign visits of the President of the Republic which last longer than one month.

24. Review and resolve complaints presented against officials who enjoy immunity.

25. Decree the General Statute and Internal Rules of the National Assembly.

26. Fulfill other functions conferred by the Constitution and the laws.
Article 139

Representatives shall bear no legal responsibility for their opinions and votes cast in the National Assembly and enjoy immunity in conformity with the law.

Article 140

Representatives to the National Assembly and the President of the Republic may initiate bills, as may the Supreme Court of Justice and the Supreme Electoral Council in matters pertaining to their respective jurisdictions. This right of initiative shall be regulated by the General Statute and Internal Rules of the National Assembly.

Article 141

Quorum for sessions of the National Assembly is half the number of its members plus one. To be approved, bills shall require a favorable vote by a simple majority of the Representatives present.

Once a bill is approved, it shall be sent to the President of the Republic for authorization, promulgation and publication.

Article 142

The President of the Republic may partially or totally veto a bill within 15 days after receiving it. If the President does not veto the bill and fails to authorize, promulgate and publish it, the President of the National Assembly shall order the law to be published.

Article 143

A bill partially or totally vetoed by the President of the Republic must be returned to the National Assembly with the reasons for the veto specified. The National Assembly can reject the veto with a vote of half plus one of its Representatives, in which case the President of the National Assembly shall order the law to be published.
Chapter III

Executive Branch

Article 144

The President of the Republic, who is the Head of State, Head of Government and Commander in Chief of the Defense and Security Forces of the Nation, exercises executive power.

Article 145

The Vice President of the Republic carries out the functions delegated by the President and shall substitute in that position during the President's temporary or permanent absence.

Article 146

The election of the President and Vice President of the Republic is by universal suffrage, equal, free and direct elections, and secret ballot. The Candidates who receive the largest number of votes will be elected.

Article 147

The President and Vice President of the Republic must be:
1. Nicaraguan nationals;
2. In full enjoyment of civil and political rights;
3. Over twenty-five years of age.

Article 148

The President and Vice President shall exercise their functions for a period of six years, starting from their inauguration on January 10 of the year following the election; they shall enjoy immunity during their term of office.

Article 149

In case of the temporary absence of the President of the Republic, the Vice President shall assume the Presidential functions. When the absence is permanent, the Vice President shall assume the position of the President of the Republic for the remainder of the term and the National Assembly must elect a new Vice President.

In case of the temporary and simultaneous absence of the
President and Vice President, the President of the National Assembly, or whoever is serving in that position in accord with the law, shall assume the functions of the President.

In case of the permanent absence of the Vice President of the Republic, the National Assembly shall appoint a substitute.

If the President and Vice President of the Republic are permanently absent, the President of the National Assembly or whoever is next in order of succession under law shall assume the functions of the President. The National Assembly must appoint substitutes for the President and Vice President within seventy-two hours after their positions have become vacant. Those appointed shall exercise their functions for the remainder of the term.

Article 150

The functions of the President of the Republic are to:

1. Comply with and enforce the political Constitution and the laws.
2. Represent the nation.
3. Initiate legislation and exercise the right to veto, in accordance with this Constitution.
4. Enact executive decrees with the force of law in fiscal and administrative matters.
5. Prepare the General Budget of the Republic and promulgate it upon approval or review by the National Assembly, depending on the case.
6. Appoint and remove Ministers and Vice Ministers of State, Delegate Ministers of the Presidency, Presidents or Directors of autonomous and governmental institutions and other officials whose appointment or removal is not otherwise determined in the Constitutions and the laws.
7. Assume the legislative faculties delegated by the National Assembly during its recess period.
8. Conduct the international relations of the Republic, formalize international treaties, agreements or accords and appoint the heads of diplomatic missions.
9. Decree and put into effect the State of Emergency in circumstances defined by this political Constitution and forward the decree to the National Assembly for ratification within a period of no more than forty-five days.
10. Adopt regulations to give effect to the laws.
11. Grant honorary orders and decorations of a national character.
12. Organize and conduct the government and preside over Cabinet meetings.
13. Administer the economy of the country and determine socio-economic policies and programs.
14. Propose slates of three candidates to the National Assembly for the election of Judges to the Supreme Court of Justice, Members to the Supreme Electoral Council and the Controller General of the Republic.
15. Present the annual and other reports and special messages to the National Assembly personally or via the Vice President.
16. Fulfill the other functions conferred by this Constitution and the laws.

Article 151

The President of the Republic determines the number, organization and jurisdiction of the government ministries and autonomous and state institutions. The ministers, vice ministers and presidents or directors of autonomous and governmental institutions enjoy immunity.

Article 152

Ministers, vice ministers or presidents of autonomous or governmental institutions must be:
1. A Nicaraguan national;
2. In full enjoyment of political and civil rights;
3. Over twenty-five years of age.

Article 153

Ministers, vice ministers and presidents or directors of autonomous and governmental institutions are responsible for their acts in conformity with this Constitution and the laws.

Chapter IV

Office of the Controller General of the Republic

Article 154

The Office of the Controller General of the Republic is the governing body which controls public administration and the "Area of People's Property" (public property).
Article 155

The Controller General of the Republic has the following responsibilities:

1. The establishment of a system which controls the proper use and prevents abuses of funds.
2. Ongoing supervision of the management of the General Budget of the Republic.
3. Control, examination and evaluation of the administrative and financial management of public institutions, those subsidized by the state and the public or private enterprises which receive investments of public capital.

Article 156

The Office of the Controller General of the Republic shall enjoy functional and administrative autonomy and shall be directed by the Controller General of the Republic, who shall give annual reports to the National Assembly and enjoy immunity.

Article 157

The law shall determine the organization and functioning of the Office of the Controller General of the Republic.

Chapter V
Judicial Branch

Article 158

Justice emanates from the people and shall be carried out in their name as their proxy by the Judicial Branch, composed of the Courts of Justice established by law.

Article 159

The Courts of Justice form a single system, headed by the Supreme Court of Justice. The exercise of judicial powers falls under the authority of the Judicial Branch. Military jurisdiction is established, and its exercise is regulated by law.

Article 160

The administration of justice guarantees the principle of legal-
ity and protects and promotes human rights through the application of law in the matters within its jurisdiction.

Article 161

A Judge of the Supreme Court of Justice must be:
1. A Nicaraguan national;
2. A lawyer;
3. In full enjoyment of political and civil rights;
4. Over twenty-five years of age.

Article 162

Judges shall serve for a term of six years and may be dismissed from their position only for reasons determined by law.
Judges enjoy immunity.

Article 163

The Supreme Court of Justice shall be composed of at least seven Judges, selected by the National Assembly, from slates of three candidates proposed by the President of the Republic.
The Judges shall take office after being sworn in before the National Assembly.
The President of the Supreme Court of Justice shall be appointed by the President of the Republic from among the Judges selected by the National Assembly.

Article 164

The functions of the Supreme Court of Justice are to:
1. Organize and direct the administration of justice;
2. Review and decide ordinary and extraordinary appeals presented against the judgments of the Courts of Justice of the Republic, in accord with the proceedings established by law.
3. Review and decide on writs of amparo claiming violations of rights established in the Constitution, according to the Law of Amparo.
4. Review and decide on writs challenging the constitutionality of a law, filed in conformity with the Constitution and the Law of Amparo.

3. See supra note 1.
5. Appoint the Judges of the Appeals Courts and the Courts of the Republic, in accord with procedures established by law.
6. Draft its internal rules and appoint its personnel.
7. Fulfill other functions conferred on it by the Constitution and the laws.

Article 165

In their judicial activity Supreme Court Judges and other judges are independent and are subject only to the Constitution and the law; they shall be governed by, among others, the principles of equality, public proceedings and the right to a defense. In Nicaragua justice is free of charge.

Article 166

The administration of justice shall be organized and shall function with popular participation as determined by the law. The members of the Courts of Justice, be they lawyers or not, have equal authority in the exercise of their legal functions.

Article 167

State authorities, organizations and legal institutions and individuals must comply with the verdicts and resolutions of the Courts and Judges.

Chapter VI

Electoral Branch

Article 168

The organization, management and oversight of elections, plebiscites and referendums are the exclusive responsibility of the Electoral Branch.

Article 169

The Electoral Branch is composed of the Supreme Electoral Council and other, subordinate electoral bodies.

Article 170

The Supreme Electoral Council is composed of five Members
with their respective Alternates, elected by the National Assembly from slates of three candidates for each position proposed by the President of the Republic. The National Assembly shall select the President of the Supreme Electoral Council from the elected Members.

**Article 171**

The Members of the Supreme Electoral Council must be:

1. Nicaraguan nationals;
2. In full enjoyment of political and civil rights;
3. Over twenty-five years of age.

**Article 172**

The President and other Members of the Supreme Electoral Council shall exercise their functions for a term of six years starting from the date on which they take office; during this period they enjoy immunity.

**Article 173**

The functions of the Supreme Electoral Council are to:

1. Organize and conduct the elections, plebiscites or referendums convoked in accordance with the Constitution and the law.
2. Appoint the members of the other electoral bodies, in accordance with the Electoral Law.
3. Establish the calendar for elections.
4. Apply the constitutional and legal provisions that refer to the electoral process.
5. Serve as the final arbiter of resolutions enacted by subordinate electoral bodies and of the claims and disputes presented by political parties.
6. Issue relevant measures in accordance with the law to ensure that the electoral process develops under conditions of full legal guarantees.
7. Ensure that the appropriate bodies provide security for the political parties participating in the elections.
8. Make the final check of the votes cast in the elections, plebiscites and referendums, and present the final declaration of the results.
10. Fulfill other functions conferred on it by the Constitution and the laws.

Article 174

The Members and alternates of the Supreme Electoral Council shall take office after being sworn in by the President of the National Assembly.

TITLE IX

POLITICAL ADMINISTRATIVE DIVISION

Chapter I

Municipalities

Article 175

The national territory shall be divided for administrative purposes into Regions, Departments and Municipalities. The laws regarding this matter shall determine the size, number, organization, structure and operation of the various districts.

Article 176

The Municipality is the basic unit of political administration in the country. The law shall determine their number and size.

Article 177

The government and administration of Municipalities is the responsibility of the municipal authorities, who enjoy autonomy without abrogating the authority of the central government.

Municipal governments shall be elected by the people, by universal suffrage; equal, free and direct election and secret ballot, in conformity with the law.

Article 178

Municipal authorities shall serve six-year terms, beginning from the day they are sworn in before the Supreme Electoral Council.
Article 179

The state shall promote the integral and harmonious development of the diverse parts of the nation.

Chapter II

Communities of the Atlantic Coast

Article 180

The Communities of the Atlantic Coast have the right to live and develop under the forms of social organization that correspond to their historic and cultural traditions. The state guarantees these communities the benefits of their natural resources, the legitimacy of their forms of communal [sic]. Furthermore, it guarantees the preservation of their cultures and languages, religion and customs.

Article 181

The state shall implement a law which establishes autonomous governments in the regions inhabited by the Communities of the Atlantic Coast to guarantee the exercise of their rights.

TITLE X

Supremacy of the Constitution, Its Reform, and Constitutional Laws

Chapter I

Political Constitution

Article 182

The political Constitution is the fundamental charter of the Republic; all other laws are subordinate to it. Any laws, treaties, orders or provisions that oppose it or alter its provisions shall be null and void.

Article 183

No branch of government, governmental body or official shall have any authority, faculty or jurisdiction other than those conferred by the political Constitution and the laws of the Republic.
Article 184

Once written, the Electoral Law, Emergency Law and Law of Amparo will have constitutional status under the political Constitution of Nicaragua.

Article 185

The President of the Republic may suspend the rights and guarantees consecrated in this Constitution within part or all of the nation in case of war or when demanded by national security, economic conditions or a national catastrophe.

The President's decree shall put the State of Emergency into effect for a specified renewable time period. The law of Emergency shall regulate its forms. During a State of Emergency, the President of the Republic is authorized to approve the General Budget of the Republic and forward it to the National Assembly for its review.

Article 186

The President of the Republic can not suspend the rights and guarantees established in articles 23; 24; 25, no.3; 26, no.3; 27; 29; 33, nos. 2.1 (final part), 3 and 5; 34, except nos. 2 and 8; 35; 36; 37; 38; 39; 40; 41; 42; 43; 44; 46; 47; 48; 50; 51; 56; 57; 58; 59; 60; 61; 62; 63; 64; 65; 67, first paragraph; 68, first paragraph; 69; 70; 71; 72; 73; 74; 75; 76; 77; 78; 79; 80; 81; 82; 84; 85; 87; 89; 90 and 91.

Chapter II

Constitutional Control

Article 187

Any citizen has the right to seek judicial review of the constitutionality of any law, decree or regulation that is inconsistent with the political Constitution.

Article 188

The Writ of Amparo may be used to challenge any provision act or resolution and any action or omission of any official or authority or his or her agent violating or attempting to violate the right and guarantees affirmed in the political Constitution.
Article 189

The Writ of Habeas Corpus may be used by anyone whose freedom, physical integrity or security is violated or is in danger of being violated.

Article 190

The Law of Amparo shall regulate the remedies established in this chapter.

Chapter III

Constitutional Amendment

Article 191

The National Assembly is empowered to partially amend this political Constitution and to review and approve its total revision. The President of the Republic or one-third of the Representatives to the National Assembly can initiate a partial reform. Half plus one of the total number of Representatives to the National Assembly are necessary to initiate a total reform.

Article 192

A proposal for partial reform must specify the article or articles to be reformed with a statement of the reasons for the modification. The proposal must be sent to a special commission which shall render an opinion within no more than sixty days; the initiative shall then follow the same process as for the creation of a law.

A proposal for partial reform must be discussed in two sessions of the National Assembly.

Article 193

A proposal for total reform shall follow the same process as in the previous article, except that upon its approval, the National Assembly shall establish a time period for holding elections for a Constituent National Assembly. The National Assembly shall retain jurisdiction until the installation of the new Constituent National Assembly. Until a new Constitution has been approved by the Constituent National Assembly, this Constitution shall remain in effect.
Article 194

Approval of a partial reform shall require a favorable vote by sixty percent of the Representatives. Two-thirds of the total number of Representatives are required to approve a total revision. The President of the Republic must promulgate the partial amendment which is not subject to veto.

Article 195

The reform of constitutional laws shall follow the procedure established for partial reform of the Constitution, with the exception of the requirement of discussion in two legislative sessions.

TITLE XI

FINAL AND TRANSITIONAL PROVISIONS

Article 196

This Constitution shall govern from the time of its publication in La Gaceta, the official daily legal publication, and shall annul the Fundamental Statute of the Republic, the Statute of Rights and Guarantees of Nicaraguans and all other legal provisions inconsistent with it.

Article 197

This Constitution shall be widely disseminated in the official language of the country. It shall also be disseminated in the languages of the Communities of the Atlantic Coast.

Article 198

All aspects of the existing legal order that do not contradict this Constitution shall remain in effect, until such time as they may be modified.

Article 199

The special Courts shall continue to function until such time as they come under the jurisdiction of the Judicial Branch. The appointment of their members and their procedures shall be determined by the established laws.

Furthermore, the Common Courts shall continue to function in their present form, until a system with popular representation is
established. This principle shall be implemented gradually in accord with the circumstances.

**Article 200**

The current political administrative division shall be preserved until the law governing it is promulgated.

**Article 201**

The President and Vice President of the Republic and the Representatives to the National Assembly, elected November 4, 1984, shall exercise their functions during the term that ends January 10 and 9, 1991, respectively. The members of the Supreme Court of Justice and the Supreme Electoral Council and other authorities and officials of the diverse branches of government shall continue to exercise their functions until such time as their successors take office in accordance with the Constitution.

**Article 202**

Four official copies of this Constitution shall be signed by the President and Representatives to the National Assembly and by the President of the Republic. These copies shall be kept in the offices of the Presidency of the National Assembly, the Presidency of the Republic, and the Presidency of the Supreme Electoral Council. Each one shall have the force of the authentic text of the Political Constitution of Nicaragua. The President of the Republic shall cause it to be published in La Gaceta, the official daily publication.

**GIVEN IN THE MEETING HALL OF THE NATIONAL ASSEMBLY, IN THE CITY OF MANAGUA, NOVEMBER 19, 1986.**

“FOR 25 YEARS, ALL ARMS AGAINST THE AGGRESSION”

**EXECUTIVE BOARD OF THE NATIONAL ASSEMBLY**

**CARLOS NUNEZ TELLEZ**

**PRESIDENT**

**LETICIA HERRERA**

**VICE PRESIDENT**

**MAURICIO DIAZ DAVILA**

**VICE PRESIDENT**
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LUIS SANCHEZ SANCHO

THEREFORE, LET BE IT PUBLISHED

DANIEL ORTEGA SAAVEDRA
PRESIDENT OF THE
REPUBLIC