1-1-1988

Changes in the Laws Governing the Parent-Child Relationship in Post-Revolutionary Nicaragua

Beth Stephens

Follow this and additional works at: https://repository.uchastings.edu/hastings_international_comparative_law_review

Part of the Comparative and Foreign Law Commons, and the International Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol12/iss1/3

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings International and Comparative Law Review by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
Changes in the Laws Governing the Parent-Child Relationship in Post-Revolutionary Nicaragua

By Beth Stephens*

B.A. Harvard University; J.D. 1980, University of California, Berkeley.

I. INTRODUCTION

The laws governing family relations, more than those in any other legal field, affect people's most personal and intimate lives. Inevitably, they tend to reflect changing societal values about the nature of the family and the relationships among its members. Indeed, family law is a discipline which allows judges and lawyers to demonstrate their awareness of modern social patterns. Whether the law is a mere reflection of new societal mores or actually contributes to social change is a subject of debate. Most analysts agree, however, that there is a reciprocal relationship, that law both reflects changing social realities and also helps to spur societal change.

Nicaragua, a small country that experienced a sudden, revolutionary change in government in July 1979, provides an example of the response of family law to social change. This Article focuses on the laws

---

* Beth Stephens has lived in Nicaragua since 1983. Currently she works as a legal advisor to the Nicaraguan National Commission for the Promotion and Protection of Human Rights.

1. Family law "is a field of law which, unlike so many, gives judges and practitioners a chance to demonstrate their modern social attitudes, or at least their awareness of social trends." The Course of Change in Family Law 1978-1979, 5 Fam L. Rep. 4013, 4013 (1979).

2. I. Leitinger, Women's Legal Status and Role Choices in Six Latin American Societies: A Cross-Cultural, Longitudinal Analysis (1950-1970) and a Single-Case Update (1980) 1 (Women in International Development, Michigan State University Working Paper No. 91, 1985). "There is widespread support for the idea that the legal system affects people's behavior. . . . There is also support for the notion that social behavior influences or shapes the law. . . . Most social scientists and legal experts, however, agree that the relationship is reciprocal, that lawmakers respond to stimuli from society and in turn produce stimuli for the actions and reactions of the members of society. . . ." Id.

3. Id.

governing relations between parent and child, comparing those in effect before and after the overthrow of the old regime. Comparisons will be drawn to general trends in family law during the same time period, both in the United States and elsewhere.

Initially, the Article describes the family structure in Nicaragua pre-1979. It then reviews the legislation in effect at the time, focusing on five issues: the definition of the family; parental authority over children; the treatment of illegitimate children; custody and child support obligations; and termination of parental rights. It next examines these laws both in their international context and as they applied to Nicaraguan society pre-1979. Finally, the factors which limited legislative reform in Nicaragua at that time are discussed.

Part Two explains the effect of the 1979 overthrow of the Nicaraguan government on law and legislation in general. It then describes the most important new legislation affecting the parent-child relationship, with special emphasis on the 1982 law regulating family relationships and on the family law provisions of the 1987 Constitution. It concludes by comparing the current state of the law with that in effect pre-1979, for each of the areas discussed in Part One.

Part Three analyzes the Nicaraguan reforms in the context of the relevant international standards and the general trends in family law in other countries. It also examines the sources of the post-1979 legal reforms and the relationship between these legal changes and social patterns.

II. NICARAGUAN FAMILY LAW PRE-1979

Nicaraguan family law cannot be understood without first obtaining a general understanding of the idiosyncratic Nicaraguan family. The law in effect in 1979 will be reviewed after a brief discussion of the Nicaraguan family structure. Family structure and family law will be analyzed to examine the impact of the law on the reality experienced by the majority of Nicaraguans, and to discern why a relatively anachronistic legal system survived in Nicaragua until 1979.

A. Family Structure in Nicaragua

The traditional notion of the nuclear family common in the United States—mother, father, and children living together without other relatives—is not the dominant pattern in Nicaragua. Although it is difficult

5. "In Nicaragua, as in most Latin American countries, when we talk about the family, we cannot think just in terms of father, mother, children, what sociologists call the nuclear
to obtain precise statistics about Nicaraguan families, two characteristics stand out: most households include an array of relatives, and fathers are often absent from the home. Grandparents, aunts, uncles, cousins, and other relatives commonly live in the same household, particularly among the poor and working classes. Families are large, having an average of almost six children born to each woman.

One study found that only twenty percent of women living in a poor neighborhood had been raised by their mothers and fathers living together; fifty-seven percent had been raised by their mothers alone. Other studies have found the father absent in thirty-four percent of the families, rising to sixty percent in Managua, the capital city. In 1985, over half of all Nicaraguan children were born to unmarried mothers. According to an earlier study, approximately half of all Managua households were headed by women. Many couples live together without marrying.

We all know that the family in our countries is an extended family, that is, a family made up of different components: one or both grandparents; the children and their children, and perhaps their spouses or de facto companions; single women; older brothers and sisters taking care of their younger siblings.
Despite indications of a matriarchal Nicaraguan family, the presence and authority of the father is strongly felt, even in his absence. The father dominates the household, making the final decisions regarding child-rearing, the number of children to have, and where to live. This combination has led analysts to describe the Nicaraguan family as a blend of the patriarchal model inherited from the Spanish colonizers and the matriarchal model of the indigenous tribes. It is a common pattern in Latin America, especially among the poor.

Families are also marked by an endemic instability, reflected in the statistics about the absent father. In rural areas, men traditionally have migrated toward cities or large estates in search of work. In urban areas, overcrowded housing and poverty produce tensions which undermine the family. Over half of the women with children in a 1974 survey of a poor and working class Managua neighborhood were not married. Many men develop relationships and produce children with two or more women, often simultaneously. The social upheaval of the last twelve years has contributed to family instability: the insurrection of 1977-79, the 1979 change in government, and the counterrevolutionary war which began in 1982.

B. Pre-1979 Law Governing the Parent-Child Relationship

Nicaragua is a civil law country, tracing its laws back to the 1804 Napoleonic Codes. Law is defined by detailed statutes or codes; judi-
cial decisions in individual cases do not set precedent. In theory, every case is decided from an analysis of the codes. In practice, both lawyers and judges in Nicaragua look to higher court decisions and attempt to determine how the higher courts would decide the case.

The current Nicaraguan Civil Code, enacted in 1904, relies heavily on the codes of other Latin American countries, which were also patterned after the Napoleonic Codes. The Civil Code family law provisions reflected the civil law concept of the family as an indivisible, patriarchal unit.

1. The Definition of the Family

The only family recognized by pre-1979 Nicaraguan law was headed by a married couple and intended to last forever, producing and raising children. The 206 articles of the Civil Code dealing with family law made no provision for the children of unmarried couples, unless their fathers chose to recognize them. Neither did the Code mention single mothers nor extended families.

Matrimony was defined as a "solemn contract through which a man and a woman unite for the rest of their life; its purpose is procreation and mutual assistance. ..." The law considers matrimony as a contract, their model. K. Karst, Latin American Legal Institutions: Problems for Comparative Study 128 (1966).

24. Id. In Latin America and other civil law jurisdictions, judges see their role as applying the law as written and avoiding law-making, which is the province of legislators; judges rely more on scholarly analyses of the law than on prior judicial decisions, although the latter may be consulted for their reasoning. Clagett, The Administration of Justice in Latin America 123-26 (1952), reprinted in K. Karst, supra note 23, at 106-07.

25. Id.

26. Interview with Mariano Barahona, Justice of the Nicaraguan Supreme Court from 1980-87, in Managua, Nicaragua (May 13, 1988) [hereinafter Barahona].

27. R. Davila-Boza, La Investigacion de la Paternidad Ilegitima 37 (thesis published by Universidad Nacional Autonoma de Nicaragua, Facultad de Ciencias Juridicas y Sociales 1971). The 1904 Civil Code was drawn heavily from the codes of other Latin countries, particularly Mexico and Argentina.

Since the 1979 revolution, few laws have been repealed outright. New statutes overrule inconsistent provisions of the old codes, which remain in effect. Large sections of the Civil Code have been superceded, particularly those referring to the family. See infra notes 109-10.

28. See infra notes 80-87.

29. CODIGO CIVIL DE LA REPUBLICA DE NICARAGUA [COD. CIV.] arts. 92-297, [encompassing Titles II (De la Familia), III (Paternidad y Filiacion), and IV (De los Alimentos)]. See infra notes 43-64.

30. COD. CIV., supra note 29, arts. 92-297.

31. Id. art. 94 (B. Stephens trans.). Compare to the 1804 Code Napoleon: "Husband and wife contract, by the mere fact of marriage, the obligation to maintain and bring up their children," quoted in Connell-Thouez, The Family in Contemporary Civil Law—Comparative Developments in Alimentary Obligations and Parental Authority Linking Traditional Rights
nothing else." Underlying the definition of the family as a lifetime contract to raise children was the concept of the family as a means to produce children whose status as legitimate heirs was beyond dispute. The emphasis on matrimony as a contract focused state interest on the economic repercussions of the union; little attention was paid to the emotional or social ramifications of marriage.

2. Parental Authority

The Nicaraguan Civil Code defined patria potestad, or parental authority, as the right to control and protect minor children and to administer their property. This authority was explicitly assigned to the father to whom "it especially corresponds during the marriage, as head of the family, to control, represent and defend the interests of the minor children." The Code provided that the mother "participates in the paternal power and should be listened to in everything that concerns the interests of the children," but she actually exercised paternal authority over her children only if the father was absent or otherwise incapacitated. Nonmarital (illegitimate) children who had been recognized by their biological father fell under the father's authority.

and Responsibilities to Create an Integrated Structure for Solving the Child Care Dilemma, 60 Tul. L. Rev. 1135, 1136 n.8 (1986).
32. Cod. Civ., supra note 29, para. 1 (B. Stephens trans.).
33. The Nicaraguan Civil Code conceived of the family as a closed nuclear grouping, an economic unit that was difficult to dissolve. Interview with Rosa Marina Zelaya, legal counsel to the Nicaraguan Women's Association, in Managua, Nicaragua (Sept. 29, 1988) [hereinafter Zelaya]. The purpose of the family as defined by the old laws was reproduction. Interview with Angela Rosa Acevedo, member of the National Assembly, representative of the Women's Association to the old Council of State (1980-86), in Managua, Nicaragua (Oct. 3, 1988) [hereinafter Acevedo]. The main purpose of the old family laws was to guarantee the inheritance rights of legitimate children. Interview with Maria Lourdes Bolanos, Head of the Masaya Women's Center, formerly Director of the Women's Association's Women's Legal Office (1983-86), in Managua, Nicaragua (Aug. 13, 1988).
34. The old Civil Code was based upon a materialistic, commercial view of marriage. See M. Vargas-Escobar, supra note 5, at 28. Marriage under the old laws has been described as a company in which the husband administers the property. J. Baca Somarriba, La Pension Alimenticia y la Proteccion de los Menores de Edad 21 (November 1986) (unpublished thesis).
35. Cod. Civ., supra note 29, art. 244.
36. Id. art. 245 (B. Stephens trans.). See also id. art. 151, para. 2 "The husband is the representative of the family, and the wife in his absence," and art. 152, para. 1 "The husband must live with his wife; she must live with her husband and follow him wherever he moves." (B. Stephens trans.).
37. Id. art. 245 (B. Stephens trans.).
38. Id. arts. 246, 248.
39. Id. art. 263. An exception was made when the father denied paternity but was forced to recognize the child by a judicial order. In those cases, the mother exercised parental authority. Id. art. 264.
ercised paternal authority only over nonmarital children who had not been recognized by their father.\textsuperscript{40}

These provisions afforded the father virtually total control over the key decisions affecting his children—residence, education, and health care—regardless of whether or not he actually participated actively in their care and upbringing. Although a father was legally bound to support his legitimate and acknowledged children,\textsuperscript{41} his paternal authority could not be limited even if he failed to live up to his obligations.\textsuperscript{42}

3. Illegitimacy

The 1974 Constitution declared that "no privileges are to be granted on the basis of birth . . ."\textsuperscript{43} and that parents owed the same level of care to children born in or out of wedlock.\textsuperscript{44} Nevertheless, the Civil Code was replete with distinctions based on birth status.

All children were defined as legitimate or illegitimate, with children conceived during the matrimony presumed to be legitimate.\textsuperscript{45} The distinction between legitimate and illegitimate was so important, however, that the Civil Code followed the relatively straightforward presumption with 20 articles defining the status of children born within 180 days of the marriage, more than 300 days after the separation of the married couple, when the husband could prove adultery or was impotent, and when a second marriage followed closely after the dissolution of the first.\textsuperscript{46} The Civil Code also provided the procedures governing suits over legitimacy.\textsuperscript{47}

Illegitimate children were those born out of wedlock who had not

\begin{footnotes}
\item[40] \textit{Id.} art. 266.
\item[41] \textit{Id.} art. 288, §§ 2-3.
\item[42] Paternal authority could be terminated if a father "abandoned" or severely mistreated his children. \textit{Id.} arts. 262, 269, § 4.
\item[43] The Nicaraguan Constitution in effect in 1979 contained no equal protection provision applicable to sex discrimination and thus provided no obstacle to this sex-biased scheme. See \textit{Constitucion Politica} (Nicar. 1974) [hereinafter \textit{Constitucion Politica 1974}] superceded by \textit{Estatuto Fundamental Leyes de la Republica de Nicaragua: Epoeca Revolucionaria} art. 3 (Aug. 22, 1979) [hereinafter \textit{Estatuto Fundamental}].
\item[44] Between independence in 1821 and the 1979 revolution, Nicaragua had been governed by eight separate constitutions, plus at least three drafts of new constitutions that did not take effect because of sudden political changes. See Chamorro Mora, \textit{Las Constituciones Politicas de Nicaragua} (Jan. 16, 1986) (unpublished paper).
\item[45] \textit{Cod. Civ.}, supra note 29, art. 199.
\item[46] \textit{Id.} arts. 200-19. Note that a woman was barred from remarrying within 300 days of the dissolution of a prior marriage. \textit{Id.} art. 112, § 2.
\item[47] \textit{Id.}
\end{footnotes}
been legitimated.\textsuperscript{48} The only way in which a child born to an unmarried couple could be legitimated was through the subsequent marriage of his or her parents.\textsuperscript{49} An illegitimate child could be recognized by his or her father, but remained illegitimate.\textsuperscript{50} Recognition by the father requires an entry in the Civil Registry, a notarized document, a will\textsuperscript{51} or a judicial decree.\textsuperscript{52} With recognition came many of the rights of legitimate children, including the right to receive support\textsuperscript{53} and to partial intestate inheritance.\textsuperscript{54}

In a key section, the Civil Code narrowly limited the ability of either a woman or a child to force an unwilling father to recognize his biological child.\textsuperscript{55} Investigations of paternity were restricted to three situations: when the father had acknowledged his paternity in writing, when the mother was raped during the probable period of conception or when the father had openly assumed a parental relationship with the child.\textsuperscript{56} Maternity, on the other hand, could be investigated by the child or his or her descendants and proven by any of the standard means of evidence.\textsuperscript{57}

A child who was acknowledged by the father came under his parental authority,\textsuperscript{58} unless a judicial decision forced the father to recognize the child.\textsuperscript{59} The parental authority over unacknowledged nonmarital children fell to the mother.\textsuperscript{60}

The legal consequences of being labeled "illegitimate" were extreme, mitigated only if the father chose to recognize his child. Unacknowl-

\begin{footnotesize}
\begin{itemize}
\item 48. Id. art. 220.
\item 49. Id. art. 236; See also id. arts. 237-43 (explaining in detail how legitimation takes place).
\item 50. Id. art. 222. Article 221 of the Civil Code provided for recognition by the mother as well as the father. In relation to the mother, however, an illegitimate child was automatically entitled to all of the rights that accrued to an acknowledged child, even if the mother did not expressly recognize him or her. Id. art. 235, para. 2.
\item 51. Id. art. 222.
\item 52. Id. art. 232.
\item 53. Id. art. 288, § 3.
\item 54. Id. arts. 1001, 1008-09.
\item 55. See id. art. 225.
\item 56. Id. The third element translates literally as when the child was in "notorious possession of the status." Id. (B. Stephens trans.). This term was defined in articles 570 and 571 of the Civil Code as requiring that the father treat the minor as a child; provide for his or her education and care; present the minor to his relatives and friends as his child; and that the father's relatives, friends, and neighbors all consider him to be the minor's father—all for a minimum of 10 years.
\item 57. Id. art. 226.
\item 58. Id. art. 263.
\item 59. Id. art. 264.
\item 60. Id. art. 266.
\end{itemize}
\end{footnotesize}
Parent-Child Relationship in Nicaragua

edged nonmarital children did not inherit intestate from their fathers,\(^6\) were owed no duty of support,\(^6\) and could not claim social security benefits through the father.\(^6\) In addition, several Nicaraguan administrative schemes made life difficult for the nonmarital child. To leave the country or undergo a serious operation, for instance, the permission of both parents was required; nonmarital children had to file a notarized document declaring that they had no father in order to be exempted from the requirement. This was a time-consuming and expensive procedure.\(^6\) Finally, Nicaraguan (and Latin American) law and custom assign the surnames of both parents to their children, the father's first, followed by the mother's. Nonmarital children were legally entitled to only one surname—their mother's—a situation which labeled them as illegitimate for life.\(^6\)

The legislative scheme defining children as legitimate or illegitimate, limiting the rights of illegitimate children, and placing sharp restrictions on their ability to prove their paternity all contributed to the reduction of incentives toward responsible fatherhood. A man had the entire legal arsenal of the government behind him if he chose to maintain (1) one "legitimate" family, which would define his heirs and legal responsibilities; (2) one or more additional families to which he contributed something or nothing, as he saw fit; and (3) a scattering of children conceived in transitory affairs. Full legal responsibility for children born out of wedlock fell on the mother, unless the father voluntarily—and unilaterally—decided to recognize his children.

4. Child Support and Custody

According to the old Civil Code, marriage imposed upon both spouses the obligation to support, guide, and educate the children of their

---

61. Id. art. 1001. "Natural" children (defined as illegitimate children who had been recognized, Id. art. 1017) received a share of the intestate estate, but the formula assigned at least three-quarters of the estate to the legitimate children and a maximum of one-quarter to the "natural" children, after the widow's share had been deducted. Id. arts. 1008, 1009, 1207.

62. Id. art. 288.

63. See Reglamento del Instituto Nacional de Seguro Social, art. 126 (only legitimate children were eligible for a pension upon the death of an insured parent), in Ley Organica de Seguridad Social y Reglamento General del Instituto Nacional de Seguridad Social 106, 168 (3d ed. 1965). The authorizing statute for the Social Security Institute provided such pensions to economically dependent illegitimate children if there were no legitimate offspring (Ley Organica de Seguridad Social, art. 111, printed in Id. at 85-86) but the administrative regulations did not enforce even this limited exception.

64. Zelaya supra note 33.

union. All parents owed the same level of support and care to their marital children and their acknowledged nonmarital children, but a father owed nothing to a nonmarital unacknowledged child. In practice, however, even those children who had a legal right to support often found the right hard to enforce. The child's rights had to be asserted in a costly and time-consuming legal process, attempted by only a small percentage of those entitled to support. Those who won judgments found it just as difficult to enforce them. Even marital or acknowledged children remained subject to the whim of their fathers. Rarely could they obtain support from a father who chose not to pay.

Custody, including both legal authority over the child and physical control, was one of the attributes of the parental authority. Custody was exercised by the father over marital or acknowledged children, while the mother had custody of unacknowledged children born out of wedlock. After a contested divorce, a rebuttable presumption served to award custody of children over seven years old to the innocent spouse. After a divorce by mutual consent, if the parties had not arrived at an agreement, the presumption served to assign custody of boys over seven years old to the father and girls over seven years old to the mother. Custody of children under seven was awarded to the mother under the presumption. Both parents remained obligated to contribute to the support of their minor children in proportion to their resources.

66. COD. Civ., supra note 29, art. 158.
67. Id. art. 288, §§ 2, 3.
68. See id.
69. Silva, supra note 21. Under the old Labor Code, an Office of Family Protection functioned within the Ministry of Labor. Requests to garnish wages to enforce support orders were heard by that unit. Its jurisdiction was limited, however, to a small group of the higher echelon of salaried workers, their wives, and legitimate children. All others faced the usually insurmountable hurdle of a costly and time-consuming court battle. J. Baca Somarriba, supra note 34, at 28, 31-36.
70. Interview with Maria Auxiliadora Flores, Director of the Women's Legal Office, a project of the Nicaraguan Women's Association, in Managua, Nicaragua (Sept. 30, 1988) [hereinafter Flores].
71. See supra notes 35-40.
72. COD. Civ., supra note 29, art. 261, art. 169. The Civil Code permitted divorce on the petition of one party only for prior, undisclosed pregnancy of the woman, attempted murder of one spouse by the other, cruelty, adultery by the woman, the flagrant establishment by the man of another woman in his own home or another house, abandonment or absence for more than five years, id. art. 161, after two years of judicially authorized separation or five years actual separation, id. art. 163, or by mutual consent, id. art. 174.
73. Id. art. 260, §§ 1, 2.
74. Id. art. 169; art. 260, § 2; art. 261.
75. Id. art. 169, § 3. These obligations were no easier to enforce than those of the absent father. See supra notes 68-69.
5. Termination of Parental Rights

Termination of parental rights was governed by the old Civil Code and by the Guardianship of Minors Act. The Civil Code provided for termination of parental rights for habitual abuse, endangering the child’s life, causing the child serious harm, abandonment or falling into a state of “depravation” rendering the parent unfit to retain parental authority. The Guardianship of Minors Act established the judicial procedure for protecting abandoned or abused children, authorizing the juvenile courts to remove children from their homes temporarily or permanently.

In practice, however, the juvenile courts rarely intervened to protect children at risk. With no psychological, medical or sociological staff to assist the judges, the juvenile system focused almost exclusively on its role in prosecuting juvenile offenders, thereby virtually abandoning its guardianship responsibilities. Thus as of 1979, Nicaragua had no functioning system to protect children who were abused or abandoned by their parents.

C. Family Law and Family Structure: An Analysis

The old Nicaraguan family law was based on a concept of the family as a permanent, nuclear unit governed by the father. The state’s purpose in enacting family legislation was clearly limited to defining and regulating this nuclear group. Persons not in a nuclear family were left unprotected and treated as virtually nonexistent. This structure did not account for children born out of wedlock (unless the father voluntarily chose to recognize them), for extended families or families headed by women or single mothers.

This legal structure closely followed traditional family law in both civil and common law jurisdictions. From ancient Rome until the nineteenth century, children were “legally little more than chattels of their fathers.” Although the father’s life and death control over his children

---

77. Cod. Civ., supra note 29, art. 269, §§ 3-5; see also id. art. 262 “Parents who expose or abandon their children in infancy lose their parental rights.” (B. Stephens trans.).
78. Ley Tutelar de Menores, supra note 76, arts. 26, 27, 40, 61; Interview with Maria Isabel Munoz, Legal Counsel to the Minors’ Guardianship Office of the Institute of Social Security and Welfare, in Managua, Nicaragua (Nov. 6, 1988) [hereinafter Munoz].
79. Munoz, supra note 78. When the new staff took over in 1979, six years after the passage of the Guardianship Law, they found just a handful of files concerning cases of child protection or termination of parental rights. Id.
80. Id.
81. Bennett, A Critique of the Emerging Convention on the Rights of the Child, 20 COR-
lessened over the centuries, the notion of the father as the head of the family lingered in many jurisdictions well into the twentieth century.

The basic purpose of traditional family law was to protect the integrity of a patriarchal family order. Alternative family structures such as parenting by unmarried couples or single women were severely penalized. A nonmarital child legally was “no one’s child.” The harsh consequences imposed on children born out of wedlock safeguarded this rigid family model, “protect[ing] a man from his lover and their nonmarital child.” Although laws such as those in effect in Nicaragua before 1979 mitigated these harsh provisions somewhat, nonmarital chil-


83. "Early on, parental authority developed beyond the extreme and abusive power of the father over the child. Today, fortunately, it has become a set of rights and obligations aimed at protecting the person and the property of nonemancipated minor children.” Tejera, Bienestar del Menor: Senalamientos en Torno a la Patria Potestad, Custodia y Adopción, 54 REV. JUR. U.P.R. 409, 410 (1985) (B. Stephens trans.).

84. In Louisiana, the law still empowers the father to make the ultimate decision when the parents cannot agree. Connell-Thouez, supra note 31, at 1151. In the United States, the states started eliminating married women’s disabilities in the mid-nineteenth century, but it was not until last 10 to 20 years, with the passage of equal rights amendments, that the last barriers have fallen. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 289-93 (2d ed. 1988).

85. "Under the common law a non-marital child was filius nullius, no one’s child, not the mother’s, not the father’s. Neither parent had a right to custody or a duty to support the child.” Case Comment, Parental Rights: For An Unwed Father Five Days is Forever: Shoecraft v. Catholic Social Services Bureau, 20 CREIGHTON L. REV. 647, 648 (1987) [hereinafter Parental Rights]. “Generally, in the civil law, concubines and children born of unmarried parents have been severely penalized. ... Article 238 of the Louisiana Civil Code expresses what was the philosophy in many civilian jurisdictions: ‘Illegitimate children, generally speaking, belong to no family and have no relations...’” Cornell-Thouez, supra note 31, at 1139 n. 14.

86. "During the nineteenth century and at the beginning of the twentieth century the legal category of illegitimacy operated as one of the major bulwarks of the family.” Smart, supra note 84, at 132.
dren continued to have no claim on a father who chose to ignore them. The laws posed virtually insurmountable burdens on any attempt to prove paternity against a recalcitrant father.\textsuperscript{88}

What was the effect of this traditional legal structure on the Nicaraguan family in 1979? Whatever problems this traditional structure may have posed in a society with a stable social structure were greatly aggravated by the characteristics of the Nicaraguan family. In a large portion of families in Nicaragua, the parents were not married. Although some unmarried couples lived together in stable family units, the law did not recognize them as legally constituted families. If the father did not formally recognize the children, they were ineligible for social security benefits, could not inherit intestate, and had no right to support.

For the large number of unmarried women who were the primary caretakers of their children, recognition by the father presented a different problem. Since a father exercised the ultimate decision-making power, the parental authority, over his acknowledged children, he could overrule the unmarried mother’s decisions regarding the acknowledged child. In an all too common pattern, a father who was not living with the family would appear suddenly and take his child away with him, often to be raised by another female relative, or refuse permission when the mother sought to take the child out of the country.\textsuperscript{89} A large number of women and children, perhaps a majority, thus fell into one of two undesirable legal situations: illegitimacy, with its legal stigmas and financial disadvantages, or recognition, with the danger that an absent or otherwise irresponsible father would have final control over children that the mother was in fact raising and supporting.

The sector of the population that was protected by the law could not efficiently enforce their rights because the judicial system was slow and expensive. Only the rich could afford to fight support or custody battles. Similarly, the cumbersome litigation process made protection of abused or abandoned children virtually nonexistent. The pre-1979 Nicaraguan family law system was characterized by the lack of legal proceedings accessible to the poor and uneducated majority.

D. Movements for Change

By 1979 many jurisdictions had undertaken major reforms of their family laws, particularly in the United States and Europe.\textsuperscript{90} Spurred by

\begin{itemize}
\item[88.] Cod. Civ., supra note 29, art. 225.
\item[89.] Flores, supra note 70.
\item[90.] See generally H. Clark, supra note 83, at xvii (trends in the United States over the
the women’s rights movement, distinctions between the rights of mothers and fathers were eliminated in areas such as custody, support, and parental authority. The high divorce rate led to a recognition of the potential impermanence of the marital couple, which forced increased legal flexibility when marriage and parent-child relationships were dealt with. Heightened respect for individual rights led to a greater tolerance of varying family models and many of the distinctions based on illegitimacy were eliminated. Although these trends were less pronounced in Latin America during the same time period, a clear movement was nonetheless underway toward equality for women and nonmarital children and flexibility in the treatment of divorce and varying family structures.91

Largely because of the tight grip the Somoza dictatorship maintained on the government and the legal system,92 Nicaragua’s traditional, sexist family laws survived intact until 1979. Somoza’s political party controlled a predetermined percentage of the national legislature. Elections were widely acknowledged to be fraudulent.93 His party and government represented narrow family and class interests, ignoring issues of importance to women or the poor majority.94 The only changes undertaken in the family law structure were cosmetic. One “reform” eliminated the classification “illegitimate” or “legitimate” from the birth certificate without changing the substantive legislative discrimination against nonmarital children.95

Nicaraguan feminists, who in other societies would have been leading movements for family law reform, found their time and energy drawn

last two decades); The Course of Change in Family Law 1978-1979, supra note 1, at 4013; Thery, “The Interest of the Child” and the Regulation of the Post-Divorce Family, 14 INT’L J. SOC. L. 341 (1986) (France); Smart, supra note 84, at 130-31 (Great Britain); Ullrich, Parents at Law, 11 VICTORIA U. WELLINGTON L. REV. 95 (1981) (New Zealand and other common law jurisdictions).

91. A study of changes in women’s legal status in six Latin American countries between 1950 and 1970 showed improvements in all but one country. I. LEITINGER, supra note 2, at 35. Nicaragua scored second lowest among the six in 1970. Id. In 1974, Costa Rica introduced a new family code which “includes, for example, the redefinition of the purpose of the family, the mutual obligation of the spouses, the introduction of mutual consent divorce, ... [and] the rights of children born outside of wedlock . . . .” Id. at 21. Cuba also has a modern family code, approved in 1976. See Serrano-Geyls, Los Codigos de Familia de Costa Rica y Cuba, 45 REV. JUR. U.P.R. 84, 84 (1976).

92. “Throughout Somoza’s rule the Nicaraguan Constitution was a hollow sham, to be alternately flouted, rewritten or given lip service, as circumstances demanded.” G. BLACK, supra note 4, at 28.

93. Id. at 32, 58; Report of the Latin American Studies Association Delegation to Observe the Nicaraguan General Election of November 4, 1984, LASA FORUM 1, 4 (spec. ed., Nov. 1984).

94. G. BLACK, supra note 4, at 62-64.

to more urgent "life and death" problems. The brutality and repression of the Somoza regime made its overthrow the first and foremost priority for politically active women. In 1977, some of these women joined together and founded the Association of Nicaraguan Women Confronting the National Problem. AMPRONAC's main goal was opposition to the dictatorship. Women's concerns were used as a means of organizing women. In a list of eight demands issued in March 1978, the first five related specifically to government repression, while the last three involved "women's" issues, including the repeal of discriminatory legislation. As the battle against Somoza became increasingly brutal, the women in AMPRONAC set aside all nonurgent demands to dedicate themselves to resolving the most pressing issue at hand—the end of the dictatorship.

III. POST-1979 NICARAGUAN FAMILY LAW

A. A Revolution in Law and Society

On July 19, 1979, the Somoza government officially resigned, handing power over to the Government of National Reconstruction, led by a five-member council representing various factions which had contributed to the overthrow of the dictatorship. On the following day, the new governing council issued the Fundamental Statute, which derogated the last of the Somoza constitutions. Along with the Statute of Rights and Guarantees issued the following month, the Fundamental Statute served in lieu of a constitution until January 1987.

A complete overhaul of the inherited body of laws was—and contin-

97. Id.
99. J. DEIGHTON, supra note 97, at 41, quoting an AMPRONAC document issued in Managua in 1978. The association called for an end to the repression, freedom of association, freedom for political prisoners, punishment of those guilty of crimes and barbarities, no increases in the cost of living, repeal of laws discriminating against women, equal pay for equal work, and no more commercialization of women. Id.
100. M. RANDALL, supra note 98, at 17-18.
101. ESTATUTO FUNDAMENTAL, supra note 42, art. 11; G. BLACK, supra note 4, at 171, 179-80.
102. ESTATUTO FUNDAMENTAL, supra note 42, art. 11.
103. Id. art. 3.
104. Estatuto sobre Derechos y Garantías de los Nicaraguenses, LEYES DE LA REPUBLICA DE NICARAGUA: EPOCA REVOLUCIONARIA, Decreto No. 52 (Sept. 17, 1979) [hereinafter Derechos y Garantías].
105. CONST. POLITICA reprinted in 91 LA GACETA (Nicar.) 33 (1987) [hereinafter CONST.
ues to be—beyond the capacity of the new government. Along with the executive branch, the legislature, the judiciary, the police force, and the army had to be replaced.\textsuperscript{106} The resulting vacuum in the government during the transition period made all but the most essential functions impossible. The country was governed at first by the five-member council, which issued more than 200 decrees in the remaining five months of 1979.\textsuperscript{107} A new legislative body, the Council of State, was appointed the following year and took office in May 1980.\textsuperscript{108} It shared legislative power with the executive branch. Both bodies were competent to approve new statutes and to veto each other's enactments.\textsuperscript{109} Most of the new statutes were written in a piecemeal fashion, repealing some sections of the old laws but making no attempt at comprehensive reform. The old civil law codes remain in effect, except when superceded by a newer statute.\textsuperscript{110} The result is a patchwork of legislation, in which it is not always clear how to apply the general principles of the new laws to the detailed provisions of the old code system. Judges are expected to harmonize conflicting provisions, deducing the status of older provisions from the intent of the new laws.\textsuperscript{111} Family laws have not been immune to the resulting confusion. The Statute of Rights and Guarantees, for instance, proclaimed the "absolute equality of rights and responsibilities between man and woman" in family relations.\textsuperscript{112} It was not until November 1981, however, that the old statutes assigning parental authority to the father were replaced by gender neutral provisions.\textsuperscript{113} Likewise, the Civil Code article limiting investigations of paternity has never been overruled or replaced, even though the Statute of Rights and Guarantees and the

\textsuperscript{106} See Estatuto Fundamental, supra note 42, arts. 4, 23. All were dissolved by the Estatuto Fundamental. \textit{Id.}

\textsuperscript{107} Leyes de la Republica de Nicaragua: Epoca Revolucionaria, (213 Decrees between Aug. 1979 and Dec. 1979) [hereinafter Leyes].

\textsuperscript{108} Consejo de Estatuto Convocatorias, Leyes, Decreto 389, see Estatuto Fundamental, supra note 42, art. 16.


\textsuperscript{110} Estatuto Fundamental, supra note 42, art. 22.

\textsuperscript{111} Barahona, supra note 26.

\textsuperscript{112} Derechos y Garantias, supra note 104, art. 34, para. 3 (B. Stephens trans.).

\textsuperscript{113} See Ley Reguladora de las Relaciones entre Madre, Padre e Hijos, Leyes, supra note 107, Decreto 1065, arts. 1, 15 [hereinafter Family Relations Act].
1987 Constitution both guarantee the right to investigate paternity.\textsuperscript{114}

The new government entered with a firm commitment to reform a legal system that had been designed to protect the power of a single-family dictatorship.\textsuperscript{115} More specifically, both women's rights and the pledge to help strengthen the family had long been part of the Sandinista agenda.\textsuperscript{116} Women were active in the overthrow of the dictatorship to an extent unheard of in traditional Nicaraguan society, serving as members of the Sandinista Front, guerrilla fighters, and urban organizers and providing crucial support to sons, daughters, and neighbors who were on the front line.\textsuperscript{117} When the new government came to power, many of these women dedicated themselves to the task of rebuilding the country, and in particular to addressing the critical problems of women and their families.\textsuperscript{118} They found a government willing to consider fundamental changes in the inherited family legal structure.\textsuperscript{119}

B. The New Legislation Governing the Parent-Child Relationship

The Statute of Rights and Guarantees (the Statute) enacted by the executive in August 1979, defined the basic civil, political, social, economic, and cultural rights which would be defended by the new government.\textsuperscript{120} It included several extensive reforms governing the parent-child relationship. Initially, the importance of the family and its role in the education, training, and civic preparation of children was stressed,\textsuperscript{121} in comparison with the pre-1979 emphasis on the economic consequences of marriage and child-bearing. Next, the statute contained a strong statement of the equality between mother and father: "in family relations, there is absolute equality of rights and responsibilities between man and

\textsuperscript{114} Compare COD. CIV., \textit{supra} note 29, art. 225 with Derechos y Garantias, \textit{supra} note 104, art. 35, para. 2 and \textsc{Const. Política}, 1987,\textit{supra} note 105, art. 78.

\textsuperscript{115} See \textsc{Programa de Gobierno}, issued by the council one month before the collapse of the Somoza regime, in \textit{LEYES, supra} note 107, at 9, 11-14, for the commitment to eliminate the abuses of the old legal system; see also \textit{El Programa Histórico del FSLN}, a reprint of the 1969 program of the Sandinista National Liberation Front, published by the \textsc{Departamento de Propaganda y Educación Política del FSLN} (1981), §§ 1 (Un Gobierno Revolucionario), 5 (Honestidad Administrativa), \textit{reprinted in Sandinistas Speak 13} (B. Marcus ed. 1982).

\textsuperscript{116} See \textit{El Programa Histórico del FSLN, supra} note 115, § 7.

\textsuperscript{117} See M. RANDALL, \textit{supra} note 98, at iv, vii-viii, 66.

\textsuperscript{118} See \textit{id. at 34, 39; Zelaya, supra} note 33.

\textsuperscript{119} Zelaya, \textit{supra} note 33; Munoz, \textit{supra} note 78.

\textsuperscript{120} Derechos y Garantias, \textit{supra} note 104.

\textsuperscript{121} \textit{Id. art. 34, paras. 1, 5. All citizens were guaranteed the right to choose their own residence, ending the wife's legal obligation to follow her husband wherever he moved. Id. art. 15.}
woman."

The statute repeated both the old Constitution's ban on discrimination based on birth and its declaration that parents have the same obligations to children born in or out of wedlock. The Statute, however, adds a statement of children's equal right to protection by the family and the state and an explicit ban on "personal distinctions based on legitimacy." A crucial final sentence establishes the right to investigate paternity, which had been strictly limited under the old law.

A few key administrative reforms, enacted soon after the ouster of the old regime, had a far reaching impact on the right to support and to paternity investigations, and on government protection of abandoned or abused children. Within two weeks of the overthrow of the dictatorship, an Office of Family Counseling and Protection was created within the new Social Welfare Ministry and was authorized to consider support requests from families covered by social security. At the same time, social security coverage was expanded dramatically to include all salaried workers. Since judicial support demands remain as expensive and time-consuming as they were before 1979, this office has become a major forum for deciding support issues. By garnishing wages, the office is effective in enforcing support orders, but it is without recourse when a salaried worker leaves his or her job.

Accepting all relevant evidence, the Office of Family Counseling and Protection also conducts paternity investigations as part of its resolution

122. *Id.* art. 34, para. 3 (B. Stephens trans.).
123. *Id.* art. 3, para. 1.
124. *Id.* art. 35, para. 2.
125. *Id.* art. 35, para. 1.
126. *Id.* art. 35, para. 2 (B. Stephens trans.).
127. *Id.*
128. This transfer was ratified retroactively by statute in 1981. Ley de Reformas al Código de Trabajo y a los Reglamentos de Protección a la Familia, *LEYES*, supra note 107, Decreto 855. The parallel office in the old Ministry of Labor was transferred to this new Social Welfare Ministry, see *supra* note 69; Silva, *supra* note 21; Ley Creadora de los Ministerios de Estado, 1 *LEYES*, supra note 106, Decreto 6, art. 3(n) (Aug. 22, 1979).
129. *La Nueva Ley de Seguridad Social en la Revolución Popular Sandinista* 7, 13-14, 159-60 (Mar. 1982); Munoz, *supra* note 78.
130. The attorney's fees for a support demand could cost as much as twice an average professional's monthly salary, equivalent to ten times an unskilled worker's monthly wage. Munoz, *supra* note 78. The Women's Legal Office represents women free of charge, but its resources are limited and its cases take as much as a year to be resolved. *Id.*
131. Silva, *supra* note 21. The administrative proceedings, in addition to being free, are conducted by personnel with more experience in family proceedings than the average judge, and are not bound by the strict rules which govern civil proceedings.
132. *Id.*
of support demands.\textsuperscript{133} Although these investigations have no legal effect outside of administrative procedures, they provide the only channel for investigating paternity besides the limited provisions of the old Civil Code, which have not been replaced.\textsuperscript{134} All administrative decisions taken by this office can be appealed to the trial courts, either by starting a separate procedure or through an extraordinary writ claiming that the administrative procedure violated a litigant's rights.\textsuperscript{135}

Just three months after the change in government, the Guardianship of Minors Act was amended, eliminating the juvenile court system and transferring its functions to the Minors' Guardianship Office, also within the newly formed Social Welfare Ministry.\textsuperscript{136} This new office defined its task as social and psychological as well as legal and began to take an active role in protecting abandoned and abused children.\textsuperscript{137} The large majority of its cases are resolved through consent decrees worked out with the parents, thus avoiding the expense and delay of bringing suit in the judicial system.\textsuperscript{138}

Most of the new family rights established by the Statute of Rights and Guarantees, however, remained up in the air for over two years in the absence of enabling legislation. Judges were authorized to apply the new principles when interpreting old statutes. In practice, however, many were unsure of how to use their broad discretion.\textsuperscript{139} Lawyers reported a general confusion as to the state of the law, with some judges eagerly applying their own interpretation of the general principles enunciated in the Statute on Rights and Guarantees, while others stuck more closely to the letter of the written law.\textsuperscript{140}

The Nicaraguan Women's Association set as one of its first priorities the reform of the gender biased legal system.\textsuperscript{141} The campaign to revise

\begin{itemize}
\item \textsuperscript{133} Id. The old office in the Ministry of Labor was also authorized to investigate paternity (Reglamento del Articulo 73 del Codigo del Trabajo, arts. 10, 13 in MINISTERIO DEL TRABAJO, TOMO II, DE LEYES, REGLAMENTOS Y OTRAS DISPOSICIONES DE CARACTER LABORAL 113, 116-17) but did not do so. Silva, supra note 21.
\item \textsuperscript{134} Silva, supra note 21.
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Reformas a la Ley Tutelar de Menores y su Reglamento, 1 LEYES, supra note 107, Decreto 111 (Oct. 24, 1979).
\item \textsuperscript{137} See id. introduction, paras. 2-5; Munoz, supra note 78.
\item \textsuperscript{138} Munoz, supra note 78.
\item \textsuperscript{139} Zelaya, supra note 33.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Acevedo, supra note 33. In addition to the laws discussed in this Article, the Women's Association was involved in the passage of a series of measures of importance to women, including a ban on the use of women as sex objects in the media, a new adoption law, statutes protecting women's right to participate in agricultural cooperatives, and a law promoting breast feeding. See Vargas-Escobar, supra note 96, at 8-10.
\end{itemize}
the family laws was based upon a series of open meetings around the country to discuss the existing legal structure and receive suggestions for reforms. Over 170 meetings involved more than 7500 men and women in debates about the shape of the future legislation. The most important result was the Law Governing Relations Among Mother, Father and Children (Family Relations Act), passed by the Council of State in November 1981. Its stated goals are to make possible the full equality of women and to promote responsible parenthood, providing protection, care and education for minor children. The law provoked heated debates in the public forums and in the Council of State. However its central point, that mother and father should share in the decision-making concerning their children, was accepted by the legislature.

In the first article, the law states that the care, upbringing, and education of minor children are the joint responsibility of mother and father, as is the administration of any property belonging to the minor. Care of the child is defined broadly to include not only material support and formal education, but also the development of decision making capacity, a sense of responsibility, the ability to serve as worthy members of society, participation in domestic chores, and preparation for useful work. The second article establishes the child's obligation to cooperate with the parents and to care for them in case of disability or illness.

The following articles provide more detail about the participation of mother and father in the exercise of their parental authority. When the parents live together, they share that authority equally so long as they are able to reach joint decisions. In case of disagreements over serious matters, the issue can be brought before a court for resolution. When the child lives with only one parent, that parent alone exercises the pa-

143. Family Relations Act, supra note 113.
144. Id. introduction, paras. I-V.
145. Many men “didn't accept it. There were many assemblies, very tough arguments, very subjective, coming from the soul and the guts, but we managed to put forth this new idea that parents should decide together about the lives of their children.” (Interview with Milú Vargas-Escobar, legal counsel to the old Council of State and now to the National Assembly), WOMEN'S INTERNATIONAL RESOURCE EXCHANGE, NICARAGUAN WOMEN: UNLEARNING THE ALPHABET OF SUBMISSION, 3 (1985).
146. Family Relations Act, supra note 113, art. 1, para. 1.
147. Id. art. 1, paras. a, b.
148. Id. art. 4, para. 1.
149. A judge will resolve disputes over “issues which affect the development of the children or threaten family stability,” reaching a decision based upon the best interest of the children. Id. art. 5 (B. Stephens trans.).
rental authority.\footnote{Id. art. 4, para. 2. When a decision requires judicial authorization (e.g. in order to mortgage property belonging to a minor, see id. art. 7), the absent parent should be heard. In all other cases, the parent living with the child is authorized to act alone. Id. art. 4.} If the parents divorce or separate, whether or not they were married, and they are unable to reach an agreement about custody of their children, a judge will decide based on the best interests of each child.\footnote{Id. art. 6, para. 1.} If both parents are equally fit, however, custody of children under seven will be awarded to the mother. Children over the age of seven will have their preferences taken into account.\footnote{Id.}

A series of provisions govern when parental authority will be limited or terminated in the interests of the child. The old Civil Code provision that denied parental authority to a parent whose paternity was proven after an adversarial court proceeding is restated. However, it now serves as only a presumption which can be rebutted to protect the minor’s interests.\footnote{Id. art. 9.} In addition, a parent who repeatedly and maliciously fails to comply with his or her obligations to the child, has been declared mentally incompetent or has dangerous habits or customs which may traumatize the child is also excluded from the exercise of parental authority.\footnote{Id. art. 10.}

Finally, the law effectively incorporates the United Nations Declaration of the Rights of Children. It instructs “competent authority” to guarantee that the rights the Declaration enunciates not be violated.\footnote{Id. art. 14. See infra, note 218.}

The Women’s Association viewed the Family Relations Act as one of a series of measures necessary to revise the country’s family laws.\footnote{Zelaya, supra note 33; Acevedo, supra note 33.} The countrywide open meetings which proceeded the drafting of this law developed the concept of a broad support law.\footnote{Proyecto de la “Ley de Alimentos Intoducida por la Representante de “AMNLAE,” 3 MONEXICO 42, 42 (Apr. 1983).} The law provided more detail on some of the rights and responsibilities already outlined in the Family Relations Act. Its most controversial provisions called for all members of the family—male and female—to participate equally in domestic work.\footnote{Id. art. 4. See infra, notes 4, 6, 7.} It imposed a uniform obligation to support all children (born in or out of wedlock) and all companions (married or not).\footnote{Id. arts. 3-4, 6, 7.} Debates in the Council of State were heated, with some male and female
representatives arguing that the bill went against nature, violating the natural division of labor between the sexes.\(^{160}\) Although approved by the legislature in November 1983,\(^ {161}\) the Support Law was "pocket-vetoed" by the executive branch.\(^ {162}\) One member of the governing council justified the decision by arguing that Nicaragua was not yet ready for such a major legislative restructuring of intrafamiliar relations.\(^ {163}\)

Another proposed reform was delayed at the same time—a bill that expanded the procedure for investigating paternity.\(^ {164}\) The Women's Association's decision not to proceed with a paternity investigation law was due in part to the loss of momentum caused by the veto of the Support Law. But to a greater extent it reflected an important change in Nicaragua making it increasingly difficult to consider major, potentially divisive legal reforms: the war. Nicaragua was under attack by a counterrevolutionary force funded and guided by the United States. Large sections of the country lived in a state of war, suffering high casualties.\(^ {165}\) The women who had been spearheading the drive for family law reforms agreed with the executive branch's decision that attention should not be diverted from the war effort to potentially divisive campaigns to change family values.\(^ {166}\)

It was not until two years later in 1985, when discussions about the drafting of Nicaragua's new Constitution began, that the issue of family law reform again surfaced in Nicaragua. The Women's Association submitted a set of proposals to the new National Assembly, asking that family rights be given their own section in the new Constitution\(^ {167}\) and that many of the provisions of the Family Relations Act be raised to a constitutional level.\(^ {168}\) Chief among these provisions was the expanded notion of the purpose of the family and the equal rights and responsibilities of

---

160. During the debates, "[t]heir hair stood on end like a cat hissing at a dog." Zelaya, supra note 33.
161. Proyecto de la Ley de Alimentos, supra note 157.
162. Although never formally vetoed, it was never approved by the governing council, a necessary prerequisite to its enactment into law. See ESTATUTO FUNDAMENTAL, supra note 42, arts. 13, 17.
163. Zelaya, supra note 33.
164. Id. The old Civil Code provisions limiting paternity investigations have never been repealed or replaced and continue to govern judicial resolutions of paternity suits. COD. CIV., supra note 29, art. 225. The Office of Family Counseling and Protection conducts paternity investigations in order to resolve support demands, but its conclusions are not binding outside of its own proceedings. (See supra notes 132-34).
166. Zelaya, supra note 33 ("The timing was wrong; the country's priority was defense.").
167. Acevedo, supra note 33.
husband and wife in the care of children and the completion of domestic work. During the round of open town meetings to discuss the first draft of the Constitution, many women put forth the demand that extended families and those headed by women or by unmarried couples be given the same constitutional protection as nuclear families.

Chapter IV of Title IV of the new Nicaraguan Constitution is entitled "Family Rights." The most important new provision in the area of the parent-child relationship is the raising of "stable de facto unions" to the legal status of marriages. In addition, the definition of the purpose of the family, while based on that given in the Family Relations Act, is developed further. It clarifies that marriages and de facto unions are based upon mutual, voluntary agreement and as such can be dissolved through mutual or unilateral choice. Family relations are said to rest upon respect, solidarity, and absolute equality. Deserving of a right to protection, families are defined as the fundamental nucleus of society. The right to form a family is stated but not defined. This postpones for the future a discussion of a broad definition of the family, which was demanded in the public debates over the draft of the Constitution.

The Constitution also raises to constitutional stature the following projections: equality of rights and responsibilities between parents; the child's obligation to "respect and assist" his or her parents; equality of rights among children; and the right to investigate paternity.

Both the 1987 and 1988 sessions of the legislature were occupied with the enactment of the basic structural laws necessary to implement the new Constitution. The only law affecting family relations to be passed during those sessions was a divorce law, which regulated the constitutional right to dissolve a marriage upon the request of either

169. Id.
170. Id. at 16.
171. CONST. POLITICA 1987, supra note 105, arts. 70-79.
172. Id. art. 72.
173. Id. art. 72.
174. Id. art. 73, para. 1.
175. Id. art. 70.
176. Id. art. 73, para. 2.
177. Id. art. 73, para. 2.
178. Id. art. 75.
179. Id. art. 78.
180. These have included laws governing autonomy for the Atlantic Coast, elections, municipal government, habeas corpus, constitutional challenges, and the definition of a state of emergency. Acevedo, supra note 33.
spouse. Major family law issues remain pending, including the definition of the family and of a "stable de facto union." The Women's Association is currently involved in a study of the legal situation of women and anticipates introducing new proposals during the 1989 session of the legislature. The Association foresees the possibility of moving forward on some long-stalled family law issues, in part because the legislature will have finished consideration of the structural laws, but also because the anticipated winding down of the war makes it more feasible to resume consideration of the delicate issues of family relations.

C. The Current State of the Law

While far from complete, the legal reforms enacted since 1979 in the area of parent-child relationships have nonetheless resulted in major changes in each of the areas analyzed in the discussion of pre-1979 law.

1. The Definition of the Family

A broad redefinition of the family to include extended families and those headed by single mothers or other adults has yet to be undertaken. The Constitution, however, explicitly leaves the door open for such legislation by stating that the right to form a family will be regulated and protected by law. This was viewed by the legislators during the constitutional debates as a call for a broad statutory definition of the family. Other provisions of the Constitution have taken the preliminary steps towards such a redefinition by placing stable de facto unions on the same
footing as marriages and declaring men and women, as well as legitimate and illegitimate children, to be on an equal legal footing within the family. At the same time, the legally recognized purpose of the family has been altered. The Civil Code emphasized the role of marriage as a contract designed to produce legitimate heirs, within a carefully regulated economic unit. In contrast, post-1979 law focuses on marriage as a voluntary union of equals. In the words of the Nicaraguan legislative counsel, the vertical family has been replaced by a horizontal family based on cooperation and respect. This newly defined family unit in turn plays a key social role in raising responsible citizens capable of taking their place in society as adults. Children who were considered legally significant only because of their role as their father's heirs have thus been replaced by children who are members of society in their own right, in the care of a family which is expected to concern itself with their full, well-rounded development.

2. Parental Authority

The concept of patria potestad, which assigned the father complete legal authority over his legitimate or acknowledged children, has been eliminated from Nicaraguan law. Both the Statute of Rights and Guarantees and the Constitution declared the equality of man and woman within the family, while the Family Relations Act spelled out how this legal equality was to function in practice. Parental authority is now exercised jointly by the parents while they live together with their children, and by the parent living with the children if the parents separate. Disagreements between the parents over significant issues can be taken to court for resolution.
As a result of this new legal structure, mothers who serve as either the primary or only caretaker of their children now have legal protection when faced with absent fathers who suddenly return to impose their decisions upon the children or seek to take the children away with them. Nicaraguan analysts stress the importance of this change in a society in which the majority of children are born to unmarried parents, many of whom do not live together. Indeed, they call this the single most important family law reform enacted since 1979. Single mothers now have full legal authority over the children they are raising alone and need not fear losing them to their absent fathers.199

3. Illegitimacy

The post-1979 reforms in the laws governing nonmarital children have also been striking. Nicaragua has moved from a legal structure which ignored and marginalized unacknowledged nonmarital children,200 to one which guarantees complete equality among children, whatever their status at birth.201 Most importantly, nonmarital children now have a statutory right to receive support from their fathers and to collect social security benefits if their fathers die. Although the nondiscrimination clauses of the Statute of Rights and Guarantees and the Constitution should have guaranteed their right to inherit intestate from their fathers, the restrictive Civil Code provisions have not been replaced and inheritance remains a problem.

The newly recognized right to investigate paternity gives the mothers and children the option of forcing fathers to acknowledge paternity, thus taking the paternity decision out of the hands of the fathers.202 Still lacking, however, is a statute regulating this right. The old procedure governing judicial investigations of paternity places limitations on the relevant proof. Only in administrative procedures to decide support claims is a broader paternity investigation undertaken.

4. Child Support and Custody

Under the law in effect before 1979, fathers were bound to support their marital and acknowledged children.203 The Statute of Rights and

199. Zelaya, supra note 33; Flores, supra note 70.
200. See supra notes 43-64.
201. Derechos y Garantias, supra note 104, arts. 3, 35; CONST. POLITICA 1987, supra note 105, arts. 27, 75.
202. Derechos y Garantias, supra note 104, art. 35, para. 2; CONST. POLITICA 1987, supra note 105, art. 78.
203. See supra notes 66-68.
Guarantees and the Constitution extended that obligation to nonmarital children. In the past, even marital and acknowledged children had found it virtually impossible to enforce their rights under the old law, unless their parent was one of the small subset of salaried workers who fell within the jurisdiction of the Ministry of Labor. The most significant changes in support law, then, were the creation of a broad administrative channel to decide support demands and its expansion to cover all salaried workers.

The definition of "support" has also been expanded. The Civil Code defined support as including a minimal, indispensable level of food, housing, clothing, and medical attention, as well as an undefined requirement that "guidance and education" be provided to minors. The Family Relations Act, however, holds parents responsible for providing the material support necessary for the "physical development and health" of the children, as well as their "formal education." It continues to require that parents "[o]versee the behavior of their children and promote the development of their decision-making capacity and sense of responsibility[,] [t]rain their children to participate in domestic work and in family decisions," and "[p]repare their children for socially useful work and to be worthy members of society." The legal definition of what the state and children can demand of parents is thus expanded dramatically to include not just a minimum level of physical sustenance and training, but also a complex role in the preparation of the future citizens of the republic.

Custody law has been radically altered by the elimination of patria potestad, which had given the father the right to custody of his marital or acknowledged children. Custody disputes are now decided based upon the best interests of the children. If both parents appear to be equally fit to care for their children, a "tender years" presumption is applied to assign custody of children under seven to the mother, while those over seven are consulted about their wishes.

204. Derechos y Garantías, supra note 104, art. 35, para. 2; CONST. POLITICA 1987, supra note 105, art. 75.
205. See supra note 69.
206. See supra notes 128-31.
207. COD. CIV., supra note 29, art. 283.
208. Family Relations Act, supra note 113, art. 1(a) (B. Stephens trans.).
209. Id. art. 1(b) (B. Stephens trans.).
210. Id. art. 6, para. 1.
211. Id.
5. Termination of Parental Rights

In this area, as in the area of support awards, the biggest change has been the creation of an administrative procedure to enforce the law. Although still limited by inadequate resources—which have grown scarcer as the effects of the war have intensified—the Guardianship of Minors Office plays an active role in protecting children who are abandoned or abused by their parents.\(^{212}\)

IV. A REVOLUTION IN FAMILY LAW?

The legal framework governing the parent-child relationship in Nicaragua has changed dramatically since 1979. What spurred such rapid change? Were the legal reforms the result of revolutionary changes in Nicaraguan society and government—or did they reflect a drive to modernize the legal system, similar to the reform movements in many other countries? Part III will analyze the post-1979 legal reforms in light of governing international standards, the trends in other jurisdictions, and the social and political changes underway in Nicaragua.

A. International Standards

Several international documents define rights and responsibilities within the parent-child relationship,\(^{213}\) including the Declaration of the Rights of the Child, which is the only declaration aimed specifically at children.\(^{214}\) Also of interest is the draft of the Convention on the Rights of the Child, currently under discussion within the United Nations Commission on Human Rights.\(^{215}\)

\(^{212}\) Munoz, supra note 78.


Some of the post-1979 reforms in Nicaraguan law in this area were mandated by these international instruments, all of which are in effect in Nicaragua. Nicaragua’s obligations under international law were taken into consideration by the legislature when drafting family law reforms. The Family Relations Act specifically incorporates a commitment to protect the rights defined in the Declaration of the Rights of the Child.

As far back as 1948, the Universal Declaration of Human Rights stated that men and women have equal rights and responsibilities during marriage. This language is repeated in the International Covenant on Civil and Political Rights and the American Convention on Human Rights. At least when applied to the children of married couples, the Nicaraguan Civil Code provisions which granted the father final authority over his wife and children clashed with this straightforward declaration of equality.

Current Nicaraguan law guarantees the full equality of men and women within the family, specifically including equality of rights and responsibilities toward their children regardless of whether the parents are married. In this respect, Nicaragua complies not only with the general international standards guaranteeing equality within marriage, but also with the proposed text of the Children’s Rights Convention, which refers specifically to the equal responsibilities of parents for the upbringing of their children.

---

1347 (1979). For a full text of the draft convention, see id. at 53. In March 1986, after eight annual sessions, the Working Group was nearing completion of a first draft of the Convention. Bennett, supra note 80, at 1, n.1.

216. CONST. POLITICA 1987, supra note 105, art. 46. Article 46 of the Constitution mandates full compliance with the rights defined in the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the American Convention on Human Rights. Id.

217. Acevedo, supra note 33.

218. Family Relations Act, supra note 113, art. 14 (“When applying the provisions of this law, the competent authority will guarantee that the rights of minors defined in the Declaration of Rights of the Child are not violated.”) (B. Stephens trans.).

219. Universal Declaration of Human Rights, supra note 213, art. 16.


222. CONST. POLITICA 1987, supra note 105, art. 73; Family Relations Act, supra note 113, art. 1, paras. 1, 4.

The Universal Declaration also barred discrimination based on "birth."\textsuperscript{224} This ban is taken up in both of the United Nations human rights covenants,\textsuperscript{225} the American Convention,\textsuperscript{226} and the Declaration of the Rights of the Child.\textsuperscript{227} The Universal Declaration\textsuperscript{228} and the two United Nations human rights covenants\textsuperscript{229} follow this with an affirmation that all children, whether born in or out of wedlock, have an equal right to "protection." The language of the American Convention is slightly stronger, stating that the law must recognize the "equal rights" of children born out of wedlock.\textsuperscript{230}

Pre-1979 Nicaraguan law, having a multitude of discriminations based upon legitimacy, also deviated sharply from international standards.\textsuperscript{231} The 1987 Constitution, however, bars discrimination based on birth,\textsuperscript{232} proclaims the equality of all children, forbids discriminatory classifications based on legitimacy, and renders null any legislative distinctions based on birth.\textsuperscript{233}

In these two important areas—the equal rights of mothers and fathers and of nonmarital children—the post-1979 reforms brought Nicaraguan law into compliance with international standards. Prior Nicaraguan law had been far out of step with these international norms. In both areas, Nicaragua now embraces the strongest language used in the various international instruments, going beyond the slightly weaker provisions of some of the documents.

\textbf{B. The Modern Trends}

The past thirty years have seen dramatic changes in family law around the world, spurred by the movement for women's rights, the surging divorce rate, and an increased tolerance of different life styles.\textsuperscript{234}

\begin{itemize}
  \item \textsuperscript{224} Universal Declaration of Human Rights, supra note 213, art. 2.
  \item \textsuperscript{225} International Covenant on Civil and Political Rights, supra note 213, art. 2(1); International Covenant on Economic, Social and Cultural Rights, supra note 213, art. 2.
  \item \textsuperscript{226} American Convention on Human Rights, supra note 213, art. 1, § 1.
  \item \textsuperscript{227} Declaration of the Rights of the Child, supra note 214, principle 1. The same language is used in the Proposed Children's Rights Convention, supra note 223, art. 4, § 1.
  \item \textsuperscript{228} Universal Declaration of Human Rights, supra note 213, art. 25(2).
  \item \textsuperscript{229} International Covenant on Civil and Political Rights, supra note 213, art. 24, § 1; International Covenant on Economic, Social and Cultural Rights, supra note 213, art. 10, § 3.
  \item \textsuperscript{230} American Convention on Human Rights, supra note 213, art. 17, § 5.
  \item \textsuperscript{231} See supra text accompanying notes 43-64.
  \item \textsuperscript{232} CONST. POLMCA 1987, supra note 105, art. 27, para. 1.
  \item \textsuperscript{233} Id. art. 75.
  \item \textsuperscript{234} “During the twenty years since the publication of the first edition of this work [in 1968] the law of domestic relations has changed enormously. Many forms of discrimination
Many jurisdictions have recognized the equal rights of mothers and fathers within the marriage and the family. After early, futile attempts to stem the divorce statistics by restricting divorces, many have now moved to permit dissolutions upon demand. The family is no longer viewed as a permanent, primarily economic, child-rearing unit. The surge in the number of post divorce and single parent families has forced legal changes to accommodate these nontraditional families. A greater willingness to accept choices previously labelled as immoral, combined with a recognition of the injustice of punishing a child for the decisions of the parents, have led to the elimination of many of the forms of discrimination against nonmarital children.

The central features of the Nicaraguan legal reforms parallel those which have occurred around the world over the past decades. The expanded notions of both the purpose of the family and of its composition reflect the worldwide movement toward recognition of the emotional, rather than the economic, functions of marriage and the greater legal tolerance of families that do not fit the conventional mother-father-children model. The elimination of the father’s legal dominance within the family mirrors the drive for equality between men and women. The mitigation of the harsh legal penalties formerly imposed on nonmarital children, although still incomplete, reflects a widespread drive for justice for this long discriminated against sector.

Of all the post-1979 Nicaraguan legislation analyzed here, only one provision goes against the trend in the United States: the application of the “tender years” preference to award custody of children under seven years.

against women have been mitigated or removed. The power of the individual to control many of his personal relationships by contract has been increased. The discrimination against the illegitimate child has been removed, while the relationships between parents and illegitimate children have been altered in many respects. The old fault based grounds for divorce have largely been replaced by such non-fault grounds as marriage breakdown in many states.” H. CLARK, supra note 83, at xvii. Similar trends are reported in Western European countries and common law jurisdictions such as New Zealand and Australia. See supra notes 90-91.

235. The U.S. legal system has virtually conceded the inevitability of the breakdown of the family: “We have reduced our goals and expectations from the days when we thought we could limit the number of divorces and thereby increase the stability of marriage. We now seem content to make the divorce process less traumatic. . . .” H. CLARK, supra note 83, at 412.

236. The “functions of marriage” have changed, “from the days when it was an economic producing unit of society with responsibilities for child rearing and training to the present, when its chief functions seem to be furnishing opportunities for affection, companionship and sexual satisfaction. . . . It is . . . accurate to say that today the concept of permanence has been eliminated from the legal definition of marriage. Marriages may last for life or for a few years or a few months.” Id. at 25-26.

237. In the United States, “Ten years of Supreme Court litigation have undeniably eliminated many of the legal disabilities formerly afflicting the illegitimate child.” Id. at 171.
to the mother, if both parents are equally fit. In the majority of U.S. jurisdictions this presumption has been replaced by the recognition of the equal rights of mothers and fathers, although in practice mothers are still awarded custody in the vast majority of cases.\footnote{238} It will be interesting to see whether the changing legal terrain in Nicaragua spurs development of a father's rights movement demanding the elimination of this type of discrimination against men.

C. Revolution or Modernization?

At the time of the 1979 Nicaraguan revolution, the inherited family law structure was out of step with both the international standards applicable to the family and the modern trends in the field. But it was also far out of touch with the social realities within Nicaragua. The old Civil Code was designed to regulate the patriarchal nuclear family and to protect it from the claims of outsiders—including children born out of wedlock. The majority of Nicaraguans thus lived in families that were on the margin of the law: extended families, households led by women, and children of unmarried parents. The law neither protected their rights nor imposed duties on them toward other family members (with the exception of the support obligation of the unmarried mother).

The family as an institution was extremely unstable. Although family ties were very important, and the extended family played an important role in sustaining family members, the majority of couples did not stay together to raise their children, who almost inevitably remained with their mothers. The most glaring problem was the low level of paternal responsibility.\footnote{239} Laws which made it extremely difficult to force a father to assume responsibility for children born out of wedlock encouraged this pattern.

All of these problems had, however, existed for decades in Nicaragua. The family law structure had remained stagnant, unresponsive to either the needs of the majority of the country or to international trends. Why was dramatic change suddenly possible after the 1979 change in government? To begin with, the revolution brought every law and every institution under scrutiny. Suddenly, nothing was taboo, nothing was immune from possible revision. The new government maintained a commitment to respond to the needs of the majority of the population. Family laws which did not reflect the reality of the large majority of families

\footnote{238} Id. at 799-800.

\footnote{239} Acevedo, supra note 33; Flores, supra note 70.
were thus a likely target of reform.\textsuperscript{240}

At the same time, the revolution unleashed a strong new movement among Nicaraguan women. Women were active in the revolution in a multitude of roles. Many were exposed for the first time to living independently, filling positions of responsibility, and facing physical danger. After the change in government, the trend toward more freedom and responsibility for women continued. Women taught in the literacy campaign, ran health campaigns, and formed community organizations.\textsuperscript{241} Many Nicaraguan women say that both they and their relationships with men changed during this time as they became more confident and more assertive of their rights.\textsuperscript{242}

Committed to reconsidering all of the inherited legal structures, meeting the needs of the majority, and doing justice to women and other previously marginalized members of society, the new government was open to proposals for reforms in the family law structure.\textsuperscript{243} This openness did not mean that change came easily. The Family Relations Act was one of the most highly debated laws considered since 1979.\textsuperscript{244} Old notions die hard; many Nicaraguans of all political tendencies were not yet ready to accept fundamental changes in their family lives. It is important to realize that changes which are now relatively noncontroversial in many jurisdictions—such as equal rights and responsibilities between parents—were extremely controversial in Nicaragua just a few years ago. Such changes remain controversial in many Latin American countries.

To frame the question in terms of revolution or modernization then is somewhat misleading. The very process of modernization was revolutionary in Nicaragua. Although most of the legal changes discussed in this Article fall within the general trends in other jurisdictions, they reflect a major leap forward for a country long saddled with a very traditional view of the family and family law.

D. Law Versus Reality

One important product of the rapid family law reforms in Nicaragua since 1979 has been a rich debate about the interaction between law and social change. Did the legal reforms reflect new social patterns or did they spur social change? Have the new laws made an impact in the

\textsuperscript{240} Zelaya, supra note 33.
\textsuperscript{241} J. DEIGHTON, supra note 98, at 27-102.
\textsuperscript{242} Acevedo, supra note 33; Silva, supra note 21.
\textsuperscript{243} Zelaya, supra note 33.
\textsuperscript{244} Id.
daily life of Nicaraguan families, or have they remained on paper and unenforced?

In the absence of detailed demographic studies of the Nicaraguan family or opinion polls testing the attitudes of its members, no definitive answers to these questions are yet available. In addition, the Nicaraguan family is still very much in a state of flux, a result of both the changes provoked by the revolution and of the war, which uprooted large segments of the population. But most observers seem to agree that legal reform and changing societal values have been interrelated. Some of the early reforms clearly reflected long suppressed pressures to modernize the archaic family law system, while others responded to the demands of women who had become more assertive and independent through their participation in the revolution.

As Nicaraguans emphasize repeatedly, effective changes in family relations require the development of new values, as well as legal reforms. The Women's Association and the Youth Organization have both proposed programs designed to push Nicaraguans—both men and women—to reconsider their sex-biased notions of family life. The publicity and debate generated by the proposed family law reforms has helped to bring into the open many issues that had never been discussed in Nicaragua. Some observers see this as one of the most important effects of the reform movement: women who had never considered asserting their rights or complaining about mistreatment are now aware of their rights and able to talk openly about them.

A key objective of the reforms to date has been to extend legal protection to sectors formerly left out of the legal fold: mothers, particularly unwed mothers, and nonmarital children. In this respect the reforms have had their most important practical effect: protecting custodial mothers from the arbitrary interference of absent fathers and granting children born out of wedlock full legal rights, enforceable against their fathers. The long-term goal of these reforms is to strengthen the family. It is hoped that all family members—but especially men, who have been the most irresponsible—will take their family obligations more seriously once they know they will be held economically responsible for the conse-

---

245. Zelaya, supra note 33; Acevedo, supra note 33; Silva, supra note 21; Flores, supra note 70.
246. Zelaya, supra note 33.
247. Interview with Miguel Angel Martinez, advisor to the youth organization, in Managua, Nicaragua (Sept. 30, 1988).
248. Zelaya, supra note 33; Acevedo, supra note 33.
249. Zelaya, supra note 33; Acevedo, supra note 33.
Two major holes in the legal framework, however, still must be filled: an effective procedure for investigating paternity and an effective mechanism to enforce support awards. 251

Many of the legislators and jurists active in family law and women's legal issues are currently debating how to address these and other pending legal problems. One proposal is to seek passage of a new family code, which would replace the Civil Code provisions concerning the family and unify all of the family legislation approved since 1979. 252 The proposal would probably include formation of family courts with a professional staff including psychologists and social workers. A main obstacle is financial: "We have many good ideas and good intentions," one lawyer commented, "but with the war and our economic problems we don't have the resources to put them into effect." 253

V. CONCLUSION

Amid the rapid—revolutionary—upheaval in Nicaragua since the overthrow of the Somoza dictatorship, have come a series of ambitious attempts to reform both the family law system and the basic nature of family relationships. Although it is too early to judge the long-term results of these fundamental changes, it is clear that a process has begun that will leave both the Nicaraguan legal system and the Nicaraguan family permanently changed.

250. Acevedo, supra note 33. See also Nicaragua Women's Association, El Derecho de Tener un Padre II SOMOS at 3 (Oct. 1983) (one goal of proposed paternity investigation law was to encourage women and men to think carefully about the possible economic repercussions before producing children).

251. The Women's Legal Office reports that many men deny paternity when faced with a support demand. Those whose wages are garnished to meet support obligations frequently threaten to quit their jobs to avoid payments. Flores, supra note 70; see supra notes 128-31 for a discussion of the administrative proceedings to investigate paternity and order support payments conducted by the Office of Family Counseling and Protection.

252. Zelaya, supra note 33; Acevedo, supra note 33.

253. Zelaya, supra note 33.