Stability, Activism and Tradition: The Jurisprudence of Costa Rica’s Constitutional Chamber

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I. INTRODUCTION

Costa Rica has one of the most respectable and respected constitutional traditions in the world. An important part of that tradition has been the role played for more than a century by the coun-

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try's judiciary in interpreting and applying constitutional norms and principles. In 1989, Costa Rica substantially reformed its system of constitutional adjudication by: creating a Constitutional Chamber within the country's Supreme Court; vesting that Chamber with exclusive jurisdiction over constitutional questions; enlarging traditional forms of action for the assertion of constitutional claims; raising international human rights treaties and other international legal norms to quasi-constitutional status; relaxing standing requirements for plaintiffs in constitutional cases; and expanding the scope of remedies for constitutional violations.¹

These reforms have produced a tremendous increase in the amount of constitutional litigation and in the number of judgments of unconstitutionality, involving the Constitutional Chamber in matters once reserved to the policy-making branches of government, creating new admixtures of international and constitutional law, protecting certain basic human rights that are often ignored or undervalued elsewhere, and generating proposals for reform from both supporters and critics of the Chamber.

The clearest proof of the profound effect of the 1989 reforms is found in two recently-published books. In April, 2005, the Legislative Assembly of Costa Rica issued a 963-page volume titled Constitución Política de la República de Costa Rica (anotada, concordada y con jurisprudencia constitucional).² The book includes a simple unannotated text of the Constitution of 1949 and the various amendments that have been adopted since then. This material takes up forty-five pages. This unembellished text is preceded by another version, in the same size type, in which each constitutional article is followed by annotations to decisions of the Constitutional Chamber interpreting that article. This annotated text occupies 892 pages. The other principal document of the 1989 reform, the Law of Constitutional Jurisdiction, has received similar treatment. In 2006, there appeared in print the third edition of the Ley de la Jurisdicción Constitucional: Anotada, concordada

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In that book, the unadorned text of the Law itself occupies thirty-five pages. There follows the annotated and concordanced text, which takes up 411 pages. The additional pages consist almost entirely of excerpts from opinions of the Constitutional Chamber. This integration of text and jurisprudence demonstrates that constitutional adjudication is an important part of Costa Rican law and public life, and that the work of the Constitutional Chamber should be, and indeed is, taken seriously.

The purpose of the present article is to identify, describe, and evaluate some of the more important decisions of the Constitutional Chamber and some of the proposals for further reform of the country's system of constitutional adjudication.

II. JURIDICAL — HISTORICAL BACKGROUND

Costa Rica, along with the rest of Central America, gained its independence from Spain in 1821. For a year-and-a-half (from January 1822 until mid-1823) Costa Rica was part of the Mexican Empire. In 1824, Costa Rica joined Guatemala, El Salvador, Honduras, and Nicaragua in the Central American Federation. Costa Rica withdrew from the Federation in 1838, rejoined it in 1842, and proclaimed its complete independence in 1848, the year in which the Federation itself collapsed.4

Between 1821 and 1871, the period described by some of its constitutional jurists as "the era of experimentation,"5 Costa Rica had thirteen different constitutions. Most of those constitutions spoke of "control" or "enforcement" of constitutionality in ways that provide rich material for comparative legal and political analysis, but that established no rules or practices of enduring significance.6 The Constitution of 1871, which remained in effect, with a brief interruption, until 1948, gave rise to judicial review, as well as (at least intermittent) executive and legislative review, of constitut-

4. For the constitutional history of Costa Rica to 1871, see JORGE SÁENZ CARBONELL, EL DESPERTAR CONSTITUCIONAL DE COSTA RICA. For the post-1871 period, see MARIO ALBERTO JIMÉNEZ QUESADA, DESARROLLO CONSTITUCIONAL DE COSTA RICA (4th ed.) and RUBÉN HERNÁNDEZ VALLE, CONSTITUCIONES IBEROAMERICANAS: COSTA RICA.
tional questions. In 1948, the decision of the Congress to annul the results of that year's presidential election brought to the surface accumulated grievances and provoked a two-month armed conflict, which resulted in the establishment of a provisional government, the election of a constituent assembly, and, finally, the promulgation in 1949 of the Constitution that has continued in effect without interruption to this day.

From 1949 to 1989, Costa Rica's system of constitutional adjudication was rather complex. Some constitutional adjudication was within the exclusive jurisdiction of the full Supreme Court. Other constitutional matters were within the original jurisdiction of either the First Chamber of the Supreme Court or a district judge, depending on the hierarchical position of the defendant. In the cases commenced before a district judge, there was a right of appeal to the Third Chamber of the Supreme Court. Still other constitutional matters could be decided by a district judge, with a right of appeal to an intermediate appellate court. To further complicate the process, some determinations of unconstitutionality could be made only by an absolute two-thirds majority of the full Supreme Court, while others could be rendered by an individual district judge or by a simple majority of an intermediate appellate tribunal. This system was increasingly criticized as being illogical, cumbersome, and, consequently, not sufficiently effective.

III. THE 1989 REFORMS

In 1989, Costa Rica reformed substantially its system of constitutional adjudication by amending three articles of the Constitution and enacting the Law of Constitutional Jurisdiction. The most important features of the reform were the creation of a Constitutional Chamber within the Supreme Court with exclusive, unreviewable jurisdiction in constitutional matters. The Cham-

7. Barker, supra note 1, at 358-60.
10. The principal texts creating and defining the Constitutional Chamber (which is also referred to as the "Sala Cuarta" or "Fourth Chamber" because it is the fourth chamber of the four-chambered Supreme Court) are articles 10, 48, and 128 of the Constitution (as amended in 1988), and the Ley de la Jurisdicción Constitucional, Ley No. 7135 del 11 de octubre de 1989 (Oct. 11, 1989) [hereinafter Law of Constitutional Jurisdiction], particularly articles 1-14 thereof. The nature of the jurisdictional exclusivity conferred on the Chamber is discussed hereinbelow.
ber was given power to apply not only constitutional “norms,” but also constitutional “principles,” as well as human rights guarantees and other rules of International Law. The constitutional jurisdiction was expanded to encompass any and all legal norms and subjective acts of public authority, their effects and their interpretation or application by public authorities, except judicial judgments and electoral decisions of the Supreme Electoral Tribunal. The existing actions for redress of constitutional violations—habeas corpus, amparo, and the action of unconstitutionality—were enlarged, and new actions were created, such as the legislative consultation, which empowers the Constitutional Chamber to give advisory opinions on the constitutionality of bills pending in the Legislative Assembly; and the judicial consultation, which authorizes the Chamber to issue binding opinions on constitutional questions at the request of judges who are confronted with those questions in cases pending before them. The 1989 reforms also authorize the Chamber to resolve conflicts of authority between the principal branches of government.

Early in the twentieth century, United States Supreme Court Justice (later Chief Justice) Charles Evans Hughes said, “We are under a Constitution, but the Constitution is what judges say it is.”

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12. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA [hereinafter CONSTITUCIÓN], art. 10; Law of Constitutional Jurisdiction, supra note 10, art. 3.
14. CONSTITUTION, supra note 12, art. 48; Law of Constitutional Jurisdiction, supra note 10, arts. 29-72. Amparo is an action for the maintenance or re-establishment of the enjoyment of those rights that are guaranteed by the Constitution or recognized as fundamental by international conventions in effect in Costa Rica, that are not protected by habeas corpus. CONSTITUTION, supra note 12, art. 48.
15. CONSTITUTION, supra note 12, art. 10; Law of Constitutional Jurisdiction, supra note 10, arts. 73-95.
16. CONSTITUTION, supra note 12, art. 10(b); Law of Constitutional Jurisdiction, supra note 10, arts. 96-101. The Chamber must, as a matter of course, review proposed constitutional amendments, bills to amend the Law of Constitutional Jurisdiction, and proposals for approval of international treaties or conventions. Upon petition of any ten (of the fifty-seven) members of the Legislative Assembly, the Chamber must review any other bill pending in the Assembly and any proposed amendment to the internal organizational or disciplinary rules of the Assembly. If the Chamber determines that there is a defect in the procedure utilized by the Assembly, that determination is binding; that is, the Assembly must either correct the procedural problem or abandon the project. The Chamber’s opinion on the substance of the matter in question is only advisory.
17. CONSTITUTION, supra note 12, art. 10(b); Law of Constitutional Jurisdiction, supra note 10, arts. 102-08.
18. CONSTITUTION, supra note 12, art. 10(a); Law of Constitutional Jurisdiction, supra note 10, arts. 109-11.
Such an assertion would be implausible in many Civil Law countries; but in Costa Rica, despite its Civil Law tradition, the Constitution today is what the Constitutional Chamber says it is. And, just as Chief Justice Hughes's statement about the United States Constitution need not be taken as a declaration of arbitrary judicial supremacy, but rather as a concise explanation of the relationship between legislation (whatever its hierarchy) and adjudication, so the work of Costa Rica's Constitutional Chamber has produced an interrelationship between text and jurisprudence that renders the former legally complete only in the light of the latter.

IV. JUDICIAL REVIEW: CONCENTRATED OR DIFFUSED?

One of the principal objectives of the authors and promoters of the 1989 reform was to concentrate constitutional adjudication in a single tribunal. Some proponents of such concentration had favored the creation of a Constitutional Tribunal, separate from the Judicial Branch; others were inclined to give all constitutional jurisdiction to the full Supreme Court. The decision to create a new, Constitutional Chamber within the Supreme Court was essentially a compromise between those two positions: it kept constitutional adjudication within the Judicial Branch, but set constitutional decision-making and decisionmakers apart from general litigation and ordinary judges. In any event, the principle of concentrated judicial review of constitutional questions was firmly established in 1989, or so, at least, most people thought.

Article 10 of the Constitution, as amended as part of the 1989 reform, provides: "A specialized Chamber of the Supreme Court shall have power to declare, by the vote of an absolute majority of its members, the unconstitutionality of all legal norms of whatever nature, and of subjective exercises of Public Law . . . ." The Law of Constitutional Jurisdiction, enacted in 1989 as a key part of the reform, provides, in article 4, paragraph 1: "Constitutional jurisdiction is exercised by the Constitutional Chamber of

19. CHARLES EVANS HUGHES, ADDRESSES 185 (2d ed. 1916).
22. Interview by the author with Lic. Alejandro Rodriguez Vega, then-President of the Constitutional Chamber (June 1, 1990).
23. CONSTITUTION, supra note 12, art. 10.
the Supreme Court of Justice established in article 10 of the Constitution."^{24}

Article 102, paragraph 1, of the same Law would seem to reinforce and complement the foregoing grants of power to the Constitutional Chamber by providing: "Each judge shall have standing to consult the Constitutional Chamber when he has well-founded doubts about the constitutionality of a norm or act that he must apply, or of an act, conduct or omission that he must adjudicate in a case within his jurisdiction."^{25}

In 1994, a new Organic Law of the Judiciary entered into effect. Article 8(1) of that Law provides:

Article 8. — Officials who administer justice shall not:

1. Apply laws or other norms or acts of whatever nature that are contrary to the Political Constitution. If they have doubt about the constitutionality of those norms or acts, they shall seek appropriate consultation from the constitutional jurisdiction [i.e., the Constitutional Chamber].

Neither may they interpret or apply them in a manner contrary to the precedents or jurisprudence of the Constitutional Chamber.^{26}

Soon after the 1994 Organic Law entered into effect, a district judge (that is, a judge of a court of first instance), requested from the Constitutional Chamber an opinion as to the constitutionality of a tax statute relevant to a case then pending before him. The requesting judge also asked whether there was a conflict between article 8(1) of the Organic Law of the Judiciary and article 10 of the Constitution. It was the district judge's contention that the two provisions, properly understood and taken together, permit (and perhaps require) a judge who has no doubt that a given norm or act is unconstitutional, to refuse, on his own authority, to apply that norm or act in a case before him.

Agreement with the judge's argument would mean, of course, that the 1989 reform had not created a system of judicial review concentrated in the Constitutional Chamber; on the contrary, it would have produced, or at least allowed for (in a form somewhat...

^{24}. Law of Constitutional Jurisdiction, supra note 10, art. 4, ¶1.

^{25}. Id. art. 102, ¶1.

similar to that which prevailed in Costa Rica early in the twentieth century), a system in which the power of judicial review was widely diffused.

In 1995, the Constitutional Chamber, by a vote of five-to-two, concluded that article 8(1) of the Organic Law of the Judiciary does not purport to give to ordinary judges power to declare laws unconstitutional, and that there is, therefore, no conflict between article 8 of the Organic Law and article 10 of the Constitution.27

In 2001, the Constitutional Chamber clarified the position of the ordinary judge in constitutional matters. Referring to its 1995 decision, the Chamber said:

On that occasion, by a majority of votes, it was determined that our constitutional system is concentrated and specialized and therefore the declaration of unconstitutionality belongs exclusively to this Chamber, by reason of the express provision of article 10 [of the Constitution] . . . . Nevertheless, an important exception is made, in the sense that the foregoing does not imply that the judge is left in the position of applying norms that he believes unconstitutional, because that would be "a sin against the Constitution," in that he is subject to the Constitution and to the Law, in that order. In that sense, giving attention to the provision of article 8(1) in the Organic Law of the Judiciary, it is to be concluded that, when there exist constitutional precedents or jurisprudence [of the Constitutional Chamber] to resolve a case, the judge is obligated to interpret and apply — in good faith — the norms and acts proper to the matter, in conformity with such precedents or jurisprudence, even if in order to do so he must decline to apply laws or other norms that prove to be incompatible with those [precedents or jurisprudence] — even though they have not been formally declared unconstitutional — provided always, of course, that the judge is dealing with situations that are identical or analogous . . . to that which produced the constitutional precedent or jurisprudence.28

27. Sala Constitucional, Voto No. 1185-95 de las 14:33 horas del 2 de marzo de 1995 (Mar. 2, 1995). Costa Rican Supreme Court decisions are identified not only by "vote" or, more recently, "resolution" number, but also by the time at which they are officially announced.

Thus, it appears that the role of the ordinary judge in constitutional matters is not a wholly passive one. That role has been more fully defined in a later opinion, which is discussed hereinbelow.\textsuperscript{29}

V. THE CONSTITUTIONAL CHAMBER: SUPREME, SUBORDINATE OR COORDINATE?

Another challenge to the character of the 1989 system comes not from local judges, but from theories of international judicial supremacy. The 1989 reforms give unprecedented importance to international law. Article 48 of the Constitution, as amended in 1989, guarantees to every person the right to bring habeas corpus and amparo actions in the Constitutional Chamber to maintain or reestablish the enjoyment of rights guaranteed in the Constitution or "in international human rights instruments" applicable in the country.\textsuperscript{30} The Law of Constitutional Jurisdiction declares it to be the objective of the constitutional jurisdiction "to guarantee the supremacy of constitutional norms and principles and of International and Community Law in effect in the Republic."\textsuperscript{31} The Constitutional Chamber is empowered to guarantee those human rights recognized by International Law in effect in Costa Rica, and to see to the conformity of the internal legal order with International and (Central American) Community Law.\textsuperscript{32}

A. The Role of International Tribunals

The Constitutional Chamber has been vigorous in its application of international human rights law, even to the extent of invalidating a provision of the Constitution itself on the grounds that it conflicted with the Universal Declaration of Human Rights, the American Convention on Human Rights, and other international agreements to which Costa Rica is a party.\textsuperscript{33} In a similar vein, the Chamber, in deciding that a Costa Rican statute providing that only members of the official association of journalists could practice journalism violated the American Convention on Human Rights, proceeded to declare that when interpreting that

\textsuperscript{29} Infra, p. 535.
\textsuperscript{30} CONSTITUTION, supra note 12, art. 48.
\textsuperscript{31} Law of Constitutional Jurisdiction, supra note 10, art. 1.
\textsuperscript{32} Id. art. 2(b).
\textsuperscript{33} Sala Constitucional, Voto No. 3435-92, de las 16:20 horas del 11 de noviembre de 1992 (Nov. 11, 1992).
Convention, the Chamber would give to opinions of the Inter-American Court of Human Rights — even advisory opinions — the same value as the text of the Convention itself. In 1995, the Chamber said:

if the Interamerican Court of Human Rights is the natural organ for the interpretation of the American Convention on Human Rights (the Pact of San José, Costa Rica), then the force of the decision interpreting the convention and judging national laws in light of the norm [of the American Convention], be it in a contentious case or a mere advisory opinion, will have . . . the same value as the norm interpreted . . . .34

The foregoing statement leads naturally to the question whether decisions of international tribunals prevail over those of the Chamber. The Law of Constitutional Jurisdiction provides, in article 13: “The jurisprudence and precedents of the constitutional jurisdiction [that is, of the Constitutional Chamber] are binding erga omnes, except upon [the Chamber] itself.”35

In 2004, an action was brought in the Constitutional Chamber challenging the constitutionality of Costa Rica’s Law of Personnel of the Legislative Assembly on grounds that the anti-nepotism provision of the Law violated, inter alia, the American Convention on Human Rights. Later that same year, the Constitutional Chamber upheld the provision of the Personnel Law on the merits.36 The Government of Costa Rica, at the initiative of the leadership of the Legislative Assembly, then requested from the Inter-American Court of Human Rights an advisory opinion on the compatibility of the Personnel Law with the American Convention. The Government also requested an opinion on the compatibility of article 13 of the Law of Constitutional Jurisdiction with the Convention. Specifically, the Government asked whether the Legislative Assembly could ignore the anti-nepotism provision and proceed to hire persons within the prohibited degrees of consanguinity and affinity. Finally, the Government asked:

h) . . . Does the advisory opinion that is being requested [of the Interamerican Court] have a value superior to the erga

34. Sala Constitucional, Voto No. 2313-95, de las 16:18 horas del 9 de mayo de 1995 (May 9, 1995), slip op. at 12.
35. Law of Constitutional Jurisdiction, supra note 10, art. 13.
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**omnes** character that national legislation confers on the constitutional jurisprudence [of the Constitutional Chamber], specifically when the two Tribunals (Interamerican and national) give different interpretations to the [provision-in-question of the Personnel Law]?

i) Finally, if the answer to the foregoing question is affirmative . . . must article 132 of the Law of Constitutional Jurisdiction, which indicates that "the jurisprudence and the precedents of the constitutional jurisdiction are binding *erga omnes*, except upon itself," be understood [to apply] only insofar as the national jurisprudence and precedents are not opposed to advisory opinions issued in human rights matters by the Interamerican Court? 37

The Inter-American Court, by unanimous vote, rejected the request for an advisory opinion, noting, inter alia, that the request had been presented before the opinion of the Constitutional Chamber was published (although after the Chamber had announced the result), and that the Government of Costa Rica was asking the Inter-American Court practically to review by advisory opinion a decision in a contentious case. 38

More recently, the question of supremacy has received further attention and some clarification. In July, 2004, the Inter-American Court of Human Rights, in the case of *Herrera-Ulloa v. Costa Rica*, 39 held that the criminal conviction of a defendant, and the affirmance of that conviction, by ordinary Costa Rican courts violated several provisions of the American Convention on Human Rights. Some of the violations identified by the Inter-American Court concerned the scope of appellate review and the composition of appellate tribunals, matters regulated by Costa Rica's Code of Criminal Procedure, 40 the provisions of which had been followed by the Costa Rican courts. The Constitutional Chamber was not involved in the *Herrera-Ulloa* case; however, fourteen years earlier, in 1990, the Chamber had decided in another case that those same provisions of the Code of Criminal Procedure did *not* violate

37. Corte Interamericana de Derechos Humanos, Resolución de 10 de mayo de 2005: Solicitud de Opinión Consultiva Presentada por la República de Costa Rica, slip op. at OU0037.
38. Id. at OU0041-OU0042.
40. Id., slip op. at 78-81.
the American Convention on Human Rights. Thus, there was a conflict between the jurisprudence of the Constitutional Chamber and that of the Inter-American Court.

In 2005, the Third (that is, Criminal) Chamber of the Supreme Court requested an opinion from the Constitutional Chamber concerning the procedural requirements for second-instance review of criminal convictions, in light of the Inter-American Court’s Herrera-Ulloa decision. The Constitutional Chamber responded with an opinion that was consistent with Herrera-Ulloa, stating that it was basing the opinion on both Herrera-Ulloa and its own decisions in a 1992 case. While that 1992 case did deal with the rights of a defendant to appellate review of his criminal conviction, it did not address the precise point of difference between the Constitutional Chamber’s 1990 decision and the Inter-American Court’s Herrera-Ulloa decision; nevertheless, the Constitutional Chamber’s asserted reliance on both its own case law and the jurisprudence of the Inter-American Court softened the question of supremacy while, at the same time, bringing Costa Rican law into conformity with the decision of the Inter-American Court. In its opinion, the Chamber also said:

Our country accepted the full competence of the Interamerican Court of Human Rights established in article 62 of the [American Convention on Human Rights] . . . , with binding effects, as of July 2, 1980, in such manner that the decision cited [i.e., Herrera-Ulloa] is of obligatory observance [acatamiento obligatorio] to its fullest extent.

In 2006, in another judicial consultation, the Constitutional Chamber was asked to resolve what the requesting court considered to be a possible conflict between the Inter-American Court’s Herrera-Ulloa decision and a 2004 decision of the Constitutional Chamber in a habeas corpus case. The Chamber again, in 2006, issued an opinion that was clearly consistent with Herrera-Ulloa; in doing so, it said, in an opinion by the President of the Chamber, Justice Luis Fernando Solano Carrera:

43. Id., slip op. at 5.
44. Id.
Even though it is certain that all of the judgments of this jurisdiction [that is, the jurisdiction of the Constitutional Chamber] possess a binding *erga omnes* effect, the extent of that effect should be weighed and measured intelligently with respect to each new case which it might be thought to encompass, avoiding the segregation of excerpts that might come to be applied out of context. In this sense, decisions made in habeas corpus or amparo cases normally (although not always) will have less generality than those issued in the various constitutionality proceedings — be these actions [of unconstitutionality], consultations, or conflicts of authority — which obliges the interpreter to employ perhaps even greater exegetical force in order to discover the most correct manner of applying [the Constitutional Chamber's decisions] to cases different from those in which [the Chamber's decisions] were issued.\(^{46}\)

In the aforementioned decisions of 2005 and 2006, the Constitutional Chamber carefully brought its jurisprudence into conformity with that of the Inter-American Court, while (or, thereby) avoiding the issue of the impact of the Inter-American Court's decisions on (what at least would otherwise be) the *erga omnes* effect of the Chamber's own case law. At the same time, the Chamber clarified the role of ordinary national judges in the process of constitutional adjudication, acknowledging that those judges may, indeed must, make sophisticated judgments about the applicability, *vel non*, of the Chamber's decisions.

**B. The Role of Ordinary National Courts**

Another important development concerns the ability of the Constitutional Chamber to review the decisions of ordinary judicial tribunals. The Constitution, in empowering the Chamber to declare the unconstitutionality of norms of whatever nature, explicitly prohibits the Chamber's review of judicial decisions, saying that "Jurisdictional acts [*actos jurisdiccionales*] of the Judiciary shall not be impugned through this procedure . . . ."\(^{47}\) This limitation is repeated in the Law of Constitutional Jurisdiction.\(^{48}\)

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46. *Id.*, slip op. at 3.
47. Constitution, *supra* note 12, art. 10.
Accordingly, the Chamber has held that it cannot review concrete judicial judgments; in other words, once a judgment has been entered by an ordinary judge or tribunal, a litigant may not use the action of unconstitutionality to challenge the constitutionality of that judgment. Nevertheless, the Chamber has held that where ordinary tribunals, by repeated prior decisions, have interpreted a legal norm in a way that a present litigant believes is unconstitutional, and it appears that that same (arguably unconstitutional) interpretation will be made in the litigant’s own pending case, that litigant may bring an action of unconstitutionality in the Constitutional Chamber prior to the entry of judgment in his ordinary case, challenging the constitutionality of the interpretation established by the jurisprudence of the ordinary courts in their previous decisions. The Chamber has explained the matter as follows:

The action of unconstitutionality does not lie against concrete judgments of tribunals. What the Chamber has allowed . . . is the impugning as unconstitutional of jurisprudence, that is, the reiterated interpretation of a norm that the judicial authorities have made through their judgments, so that in a concrete case not yet decided, the interpretation can be adjusted to meet the constitutional framework. What the Chamber examines, in the case of actions of unconstitutionality against jurisprudence of the tribunals, is whether the interpretation that is questioned is contrary to constitutional norms, principles or values and not whether the judge made a correct or incorrect application of the statute, [the latter being] a matter of mere legality [as opposed to constitutionality] which must be resolved through the [ordinary] methods of attacking a judgment. 49

In making the foregoing distinction, the Constitutional Chamber has provided more complete protection of constitutional norms and principles, while respecting the prerogatives of ordinary tribunals and the separation of constitutional from ordinary jurisdiction.

VI. INTERNATIONAL LAW AS DOMESTIC LAW

Regardless of whether the jurisprudence of the Constitutional Chamber comes to be subordinate to that of the Inter-American Court of Human Rights (or of other international tribunals), it seems clear that the Chamber is committed to the vigorous application of international law to domestic situations. An important example of this occurred in 2002, when the Costa Rican Government announced that, for budgetary reasons, it was reducing the 2003 scholastic year in public elementary schools from 200 to 174 days. The Defender of the Inhabitants brought an amparo action in the Constitutional Chamber, arguing that various international agreements, as well as several provisions of the Constitution, would be violated by this reduction of the school year. The Chamber declared the proposed reduction unlawful and ordered the Minister of Education to reinstate the 200-day school year. While the Chamber’s opinion noted that the national Constitution declares education to be a right, the Chamber relied most heavily on the Central American Convention on the Basic Unification of Education, in which the signatory states (including Costa Rica) decided to establish a minimum of two hundred days per year as standard for primary education.

In a 2000 decision, the Chamber annulled a government concession for mineral exploration and exploitation because of the government’s failure to comply with principle number 10 of the 1992 Rio Declaration on Environment and Development, which calls for prior consultation with local communities likely to be affected by such activities. These and other decisions discussed hereinabove and below, illustrate the pervasive intermingling of constitutional and international law in the Chamber’s jurisprudence.

50. The Defender of the Inhabitants (Defensor de los Habitantes), often referred to informally as the ombudsman, is a public official elected by the Legislative Assembly for a term of four years, with the possibility of re-election for one additional term. It is his responsibility to see that the public sector functions in accordance with morality, justice, the Constitution, laws, treaties, and general principles of law. To this end, he is empowered to initiate and intervene in judicial and administrative proceedings. Ley del Defensor de los Habitantes de la República, Ley No. 7319 del 17 de noviembre de 1992, La Gaceta No. 237 del 10 de diciembre de 1992. See also, EL DEFENSOR DE LOS HABITANTES, EL OMBUDSMAN (Gerardo Trejos ed.), passim.


VII. PRESIDENTIAL RE-ELECTION AND CONSTITUTIONAL AMENDMENT

The best-known and most controversial decision of the Constitutional Chamber is its 2003 judgment concerning presidential re-election. The Costa Rican Constitution, as promulgated in 1949, provided that no former President could be elected to that office except where there would be an eight-year interval between the expiration of his prior term and the beginning of his new term. In 1969, the Constitution was amended to provide that no person who had already served a term, or the greater part of a term, as President could ever be elected to that office thereafter. A challenge to the constitutionality of the 1969 amendment was rejected by the Constitutional Chamber in 2000.

Two years later, a number of individuals commenced actions of unconstitutionality in the Constitutional Chamber, again arguing that the 1969 amendment was unconstitutional. The petitioners asserted that the procedures used in adopting the amendment did not meet the requirements of the Constitution and that the amendment itself violated substantive guarantees of equality and electoral freedom contained in the American Convention on Human Rights. Their most significant procedural argument was based on the distinction between partial and general reform of the Constitution.

The Costa Rican Constitution establishes two separate and distinct procedures for its amendment. Article 195 provides “The Legislative Assembly shall be able to partially reform this Constitution through absolute adherence to the following procedures . . . .” The article proceeds to specify the procedures to be followed by the Legislative Assembly in accomplishing such partial reform. Article 196 of the Constitution provides “The general reform of this Constitution may be made only by a Constituent Assembly convoked for that purpose . . . .”

In enacting the 1969 amendment prohibiting the election of former presidents, the Legislative Assembly had utilized the procedure for partial reform set forth in article 195.

53. CONSTITUTION, supra note 12, art. 132(1) (original text).
55. Sala Constitucional, Voto No. 7818-00.
56. CONSTITUTION, supra note 12, art. 195 (emphasis added).
57. Id. art. 196 (emphasis added).
58. Law 4349, supra note 54.
On April 4, 2003, the Constitutional Chamber, by a vote of five-to-two, held that the 1969 amendment was, in substance, a general reform of the Constitution (such as could be accomplished only by a Constituent Assembly), and that consequently the partial-reform procedure employed by the Legislative Assembly was ineffective to bring about such an amendment. The Chamber declared that the original constitutional provision, permitting re-election after an eight-year interval, was therefore restored. Speaking through Justice Ana Virginia Calzada Miranda, the Chamber said:

the partial or total reform of the Political Constitution does not refer to the number of norms reformed, rather it points to a qualitative aspect. Qualitative, in the sense that if the purported reform implies change of the essential aspects of the socio-political and economic life of the nation, or the restriction of fundamental rights and guarantees, and even though it may involve only a single constitutional norm — or one of its subsections — the Legislative Assembly could not, through the partial-reform procedure, approve such a reform without violating the Constitution.

The Chamber decided that the total prohibition of presidential re-election negatively altered the political rights of citizens (by reducing their choices on election day), and eliminated a fundamental right (the right of ex-Presidents to be elected). The importance of the voters' options, according to the Chamber, was based on principles of Costa Rican constitutionalism, while the fundamental nature of the right to be elected rested on article 23 of the American Convention on Human Rights.

The most obvious immediate effect of the decision was to open the door to the candidacy of Oscar Arias Sánchez, who had been elected President in 1986, served a full term in that office, and had retained considerable popularity. Arias did indeed become a presidential candidate and was re-elected in 2006. The long-term juridical effects of the decision were not clear. As part of the 1989 reform of the system of constitutional adjudication, all proposed constitutional amendments are subject to review by the Constitu-

60. Id., slip op. at 72-73.
61. Id., slip op. at 78-79.
tional Chamber while they are still pending in the Legislative Assembly; therefore, any procedural defect in the amendment process presumably would have been, and in the future will be, identified by the Constitutional Chamber before the proposed amendment enters into effect. However, the Constitution was amended thirty-four times before the present (i.e., 1989) system of review was established, always by the “partial reform” process; thus, the constitutionality of all of those amendments would seem to have been rendered uncertain by the presidential re-election decision.

In 2006, the Chamber reduced that uncertainty in two decisions involving challenges to the constitutionality of amendments made in 1956 and thereafter to article 96 of the Constitution. The challenges were brought by leaders of minor political parties that had not qualified for government campaign financing because those parties had failed to win the constitutionally-prescribed percentage of the votes cast in the most recent election. Article 96 in its original (that is, 1949) form made no provision for government funding of political campaigns; the 1956 amendment introduced campaign financing for those parties that obtained at least ten percent of the vote in the previous election; a 1972 amendment reduced the eligibility requirement to five percent; and a 1977 amendment further reduced it to four percent. The plaintiffs argued that the percentage restrictions limited fundamental rights and therefore could be validly imposed only by a constituent assembly as a general reform of the Constitution. The Constitutional Chamber rejected this argument. Writing for a unanimous Chamber, Justice Solano said:

the original [constitutional] norms concerning fundamental rights and the political and economic systems can be diminished only by a constituent assembly. The other norms of the Constitution . . . are susceptible of being revised by the Legis-

62. CONSTITUTION, supra note 12, art. 10(b) (as amended in 1989); Law of Constitutional Jurisdiction, supra note 10, art. 96(a).
64. CONSTITUTION, supra note 12, art. 96 (original text).
65. Id. art 96(c) (as reformed by Law 2036 of July 18, 2956, published in the La Gaceta No. 162, July 20, 1956).
67. Id., art. 96(2) (as reformed by Law 7675 of July 2, 1997, published in La Gaceta No. 147, July 17, 1997).
lative Assembly in the use of the faculties given it in [article 195 of the Constitution, providing for partial reform] . . . ; that is the scope of its competence in matters of legislative reform. Establishing a Constitution is not the same as reforming it, since the first is an act of maximum popular sovereignty, a creating act; it is the sovereign faculty of the people to give themselves their own juridical-political order. Reform is a procedure for the revision of that which is already established and whose mechanisms, extent, and subject are stipulated in the Constitution . . ..68

Since the challenged amendments did not diminish any rights established or recognized in the original (i.e., 1949) text of the Constitution, the Chamber concluded that those amendments were “partial reforms,” within the competence of the Legislative Assembly. These decisions are likely to reduce whatever juridical instability might have been created by the presidential election decision.

VIII. CONSTITUTIONAL LAW AND FOREIGN POLICY

A. The Extradition Decisions

In June, 1992, the United States Supreme Court held in United States v. Alvarez-Machain69 that the abduction of a Mexican national in Mexico and his forcible removal to the United States — all at the instigation of United States authorities — did not deprive the United States District Court for the Central District of California of jurisdiction to try that individual for his alleged complicity in the torture and death of a United States drug-enforcement official. More specifically, the Court held that nothing in the extradition treaty between the United States and Mexico precluded the exercise of federal criminal jurisdiction under the circumstances of that case.70

Five months after the Alvarez-Machain decision, the United States Embassy in Costa Rica formally requested the extradition of one James F. Karls, who was wanted in the United States on charges of homicide. Karls was apprehended and detained by Costa Rican authorities pursuant to the treaty of extradition be-

68. Sala Constitucional, Res. No. 2006-014632, supra note 63, slip op. at 15.
70. Alvarez-Machain, 504 U.S. at 663-70.
between the United States and Costa Rica. Karls’s petition for release was denied by the district judge and the denial was affirmed by a higher court. Karls then brought a habeas corpus proceeding in the Constitutional Chamber. The Chamber declared that the United States-Costa Rica extradition treaty could not be applied, and granted habeas corpus relief. The Chamber concluded that the United States Supreme Court had misinterpreted the United States-Mexico extradition treaty, which read very much like the extradition treaty between the United States and Costa Rica. The Chamber then cited article 3 of the Law of Constitutional Jurisdiction:

The Political Constitution shall be held to be infringed when there results a confrontation between the text of the norm or act that is questioned, or its effect, or its interpretation or application by the public authorities, and constitutional norms and principles.

The Chamber stated that this provision “foresees the possibility that norms or acts may be declared unconstitutional that are not unconstitutional in themselves, when they are [rendered] so because of their effects or because of their interpretation or application by the public authorities.” The Chamber continued, noting that United States Supreme Court decisions have stare decisis effect, and concluding that the juridical position adopted by the United States in Alvarez-Machain violated various provisions of the Costa Rican Constitution.

What is most important about the Chamber’s decision is not what it has to say about the merits of Alvarez-Machain (many in the United States have been as critical of that decision as was the Constitutional Chamber), or its discussion of Costa Rican constitutional guarantees. Most striking from a comparative law perspective are, first, the introduction by the Chamber, sua sponte, of the Alvarez-Machain issue (the habeas corpus petitioner had not argued it); second, the extremely tenuous connection between Alvarez-Machain and the Karls case (or any other events involving Costa Rica); and third, the fact that the opinion makes no mention of the possibility that the Executive Branch of the Costa Ri-

71. Sala Constitucional, Voto No. 0123-93, de las 14:40 horas del 12 de enero de 1993 (Jan. 12, 1993).
72. Id., slip op. at 10 (emphasis added).
73. Id.
74. Id., slip op. at 10-14.
can Government might have any interest in or discretion with respect to the continued applicability of the treaty.

Three years later, a Costa Rican judge presiding over another extradition request by the United States placed before the Constitutional Chamber a request for a consultative opinion as to whether the Chamber’s decision in the Karls case was limited to that particular case or, on the other hand, had a continuing, binding effect. The Chamber responded that the non-application (desaplicación) of the extradition treaty was limited to the concrete case (the Karls case) in which it was decided. After stating that its opinion in the Karls case was clear in so limiting its scope, the Chamber went on to note that since then the United States, by diplomatic note signed by the United States Ambassador to Costa Rica, had given assurances concerning extradition, eliminating the “threat” to which the Chamber had referred in its Karls opinion. The Chamber’s willingness to engage in an independent judicial evaluation of the diplomatic note is, again, more significant than the result in the particular case.

B. The Iraq-War Decision

The Iraq War brought about even more dramatic involvement by the Chamber in international affairs. On March 19, 2003, President Abel Pacheco de la Espriella and Foreign Minister Roberto Tovar Faja issued a statement declaring:

2. that our vocation of peace and neutrality should not be interpreted as indifference in the face of terrorism, the utilization of chemical and bacteriological weapons, and the systematic violation of human rights;

3. that since September 11, 2001, ... the Executive Power and the Legislative Assembly, with the broad support of the citizenry, have pronounced themselves in favor of the antiterrorist alliance headed by the most solid democracies of the world ...

76. Id., slip op. at 4-5.
77. Id., slip op. at 5-7.
The declaration proceeded to describe the various attempts over the years by the United Nations to bring about a peaceful solution to the problems created by Saddam Hussein’s regime and Costa Rica’s support of those UN efforts:

The Government of Costa Rica:

... 

- Reiterates, unequivocally, its support of the international alliance against terrorism, defined since the events of September 11, 2002, by the Executive Power, [by] the legislative delegation of the political parties, and by the citizenry.

- Manifests that our vocation of peace should not be interpreted as indifference or tolerance in the face of terrorism. Moreover, in the conflict between peace and terrorism we are not neutrals. Costa Rica is and will be a loyal ally firmly and decidedly in favor of those who seek peace, liberty, democracy, and respect for international law.79

Three days later, responding to questions about the appearance of Costa Rica on a list of countries opposing the Saddam regime, the Presidency of the Republic issued a “public communication” that was even more explicit. It said, in part:

2. The appearance of the name of Costa Rica on the list of those who constitute the [international antiterrorist] coalition is the expression of the well-known fact that in the face of terrorism Costa Rica is on the side of the victims and supports those who fight against terrorism . . . .

... 

4. Because of our pacifist vocation as a nation without an army, Costa Rica is not and cannot be at war, thus — in keeping within the framework of the Statute of Neutrality we would be disposed to participate only in mediation and peacekeeping, and in activities of a strictly humanitarian character. Our representatives have already been instructed to undertake diplomatic efforts in that regard.

79. Id., slip op. at 20.
5. Nevertheless, in keeping with the Statute of Neutrality and in the words of its creator, ex-President Luis Alberto Monge Alvarez, "... in the face of terrorism, Costa Rica is not and cannot be neutral." In the present case — war against the regime of Saddam Hussein — Costa Rica is on the side of the victims of that regime, and of those who fight for liberty, democracy, and peace.

6. Internally, Costa Rica pledges to be vigilant so that its territory is not used by terrorist bands to plan or execute attacks; its financial system is not used to move money for such purposes; and members of [terrorist] bands do not remain in national territory.

7. Externally, in the face of the present conflict, we will argue up to the last minute for a peaceful solution and once war is unleashed, we will be advocating respect for international humanitarian law; for the life, culture, and value of the people of Iraq; for generous, immediate, and unified assistance to the victims, the displaced, and the refugees; and for the installation of a democratic government based on broad representation in that country; all under the supervision of the United Nations and in accordance with International Law. 80

Appended to this communiqué was the text of United Nations Security Council Resolution 1441 (of November 8, 2002), which recites Saddam's repeated violations of previous United Nations resolutions and, once more, warns Iraq that it must comply with those resolutions.

Within a month, three actions were commenced in the Constitutional Chamber challenging the constitutionality of the March 19 statement by President Pacheco and Foreign Minister Tovar. One of these actions was brought by a private citizen, the second by the representative of the National Bar Association, and the third by the Defender of the Inhabitants. The Chamber, by unanimous vote, nullified the executive communications in question, stating, in pertinent part:

X. — Understanding that there has existed a consent by Costa Rica as a country, not only to the goals, but also to the means employed by the "Alliance" or "Coalition", to carry out

80. Id., slip op. at 22-24.
the international conflict in Iraq, and especially with the war-like actions carried out by some members of the “Alliance” or “Coalition”, what remains to be verified is whether this means is permissible in light of our constitutional order. On this point in particular, the response of the Chamber is negative because of the following: the pacifist tradition that impregnates our constitutional order... has as one of its most important expressions the incorporation of Costa Rica in the International System of the United Nations; but precisely because of that tradition, such incorporation for our country goes beyond the mere association with a group of nations for the carrying out of established ends. Rather, in the Costa Rican case it is possible to affirm without doubt that the said adhesion responded and still responds to the conviction that it deals with a mechanism that is a substitute for recourse to force as an instrument of policy and of international relations on the part of our country, and for that reason the Chamber understands that it must be considered a limitation created in our order, applicable to the action of Costa Rican authorities, and that it manifests itself in a true restriction on the scope of action in matters of international relations, consisting in the impossibility of our government’s associating its foreign policy with belligerent actions outside of or even parallel to the United Nations system — including of course simple “moral support” — as proper methods for the solution to conflicts.81

The Chamber proceeded to declare that the Executive statements of March 19 and 22, 2003 had lost all juridical effect, and ordered the Government to demand that the United States exclude Costa Rica from “the list of countries allied with the ‘Coalition or Alliance’ appearing on the White House web page . . . .”82

Even more than the extradition cases, the Iraq War decision manifests the breadth of the authority exercised by the Chamber, and the narrow limits imposed by the Chamber on the policymaking branches of government.

IX. PROTECTING BASIC RIGHTS

While the Chamber’s decisions about presidential re-election, constitutional amendment, and international relations may be

82. Id., slip op. at 53.
Stability, Activism and Tradition

regarded as approaching, or even surpassing, the usual limits of constitutional adjudication, the Constitutional Chamber also has been vigilant in protecting the most traditional and basic of rights — rights which, despite their fundamental nature, are frequently unenforced in constitutional systems elsewhere.

A. The Rights of the Unborn

In 1995, the Government of Costa Rica issued Executive Decree No. 24029-S regulating “In-Vitro Fertilization and the Transfer of Embryos.” A citizen, Hermes Navarro Del Valle, challenged the decree, first by means of an action of unconstitutionality and, thereafter (while the first action was pending), by an action of amparo. The principal argument of the petitioner (and of the Procurator General, who supported the petitioner’s position) was that the Decree in question, by permitting the destruction of human life (in that a large percentage of human embryos created by the process are in fact discarded or otherwise put beyond the protection of the law) violated both the Costa Rican Constitution and international human rights conventions.

The Chamber decided, by a vote of five-to-two, that the Decree was invalid as to both form and content.\(^83\) The Decree was formally invalid because, according to the Chamber, it violated the constitutional principle of “reserva de ley”; that is, the principle that norms regulating the exercise of fundamental rights may be adopted only by statute (enacted by the Legislative Assembly), not by Executive Decree (promulgated by the President and the appropriate Cabinet minister).\(^84\) The Chamber held that the Decree was also substantively invalid because it violated both international instruments in effect in Costa Rica and the national Constitution. In the most important part of its opinion, the Chamber, speaking through Justice Rodolfo E. Piza Escalante, said:

When the spermatozoid fertilizes the egg, that entity is converted into a zygote and from there to an embryo. The most important characteristic of this cell is that everything that


\(^{84}\) Id., slip op. at 9-10. The principle of “reserva de ley,” or “reserva legal,” is based on the fact that many constitutional guarantees of rights provide that the exercise of those rights may be regulated “by law.” According to the Chamber, such language means that the right in question may be limited only by a statute enacted by the Legislative Assembly, not by a regulation adopted by any other governmental authority.
will permit it to evolve to the individual is already there in place, all the information necessary and sufficient to define the characteristics of a new human being appear united in the meeting of the twenty-three spermatozoid chromosomes and the twenty-three ovular chromosomes . . . . In short, what has been conceived is a person, and we are dealing with a living being, with the right to be protected by the legal order . . . .85

The Chamber proceeded to find that protection in various “international instruments in effect in Costa Rica and in our Political Constitution,” beginning with the American Declaration of the Rights and Duties of Man: “Every human being has the right to life, liberty and personal security.”86

The Chamber then quoted the American Convention on Human Rights, article 1.2 of which declares that “person” means “every human being,”87 and article 3 of which provides that “every person has the right to recognition as a person before the law.”88 The Chamber then stated:

There do not exist human beings of any other juridical category; we are all persons and the first thing that our juridical personality demands of others is the recognition of the right to life, without which the [juridical] personality cannot be exercised. The text of the Pact of San José [that is, the American Convention on Human Rights] points out in article 4.1:

“Every person has the right to have his life respected. This right will be protected by the law and, in general, from the moment of conception. No one may be deprived of life arbitrarily.”89

After making several additional references to international conventions, the Chamber quoted article 21 of the Costa Rican Constitution, which states, “Human life is inviolable.”90 The heart of the opinion’s conclusion is the following:

85. Id., slip op. at 11.
86. American Declaration of the Rights and Duties of Man (Approved by the Ninth International Conference of American States, Bogotá, Colombia, May 2, 1948), art. I.
88. Id., art. 3.
90. CONSTITUTION, supra note 12, art. 21.
the application of the Technique of In Vitro Fertilization and Embryonic Transfer, even with . . . [the restrictions contained in the Executive Decree] is an attack on human life. The human embryo is a person from the moment of conception, and thus cannot be treated as an object for purposes of research, be subjected to a selection process, preserved by freezing, and, what is fundamental for the Chamber, it is not constitutionally legitimate that it be exposed to a disproportionate risk of death.91

Justices Carlos M. Arguedas and Ana Virginia Calzada dissented. Their opinion, which cited no legal authority, constitutional or international, invoked rights to human reproduction, to self-determination, and to found a family, and concluded that the safeguards contained in the Executive Decree (especially the prohibition on fertilizing more than six eggs per patient and the requirement that all fertilized eggs be implanted in the uterus of the mother) mean that the unsuccessful implantations are the result of natural circumstances and not of any attack on human life.92

Not long after the in vitro fertilization decision, the Chamber decided another case involving the unborn.93 On March 30, 2001, Kathia Cecilia Saborio Obando, who was four-and-one-half months pregnant, entered a public hospital in the city of Liberia with labor pains. Physicians soon determined that her child had died. Mrs. Saborio and her husband requested their child's remains for burial. The hospital denied the request, stating that, after scientific study by hospital personnel, the remains had been placed in a common burial area used by the hospital for that purpose.94 The mother commenced an amparo action against the hospital, for the remains of her child. The petitioner and her husband contended that the action of the hospital violated the dignity of the human person as guaranteed by international conventions and the national Constitution. The hospital authorities responded that the right and guarantees invoked by the petitioner applied only to those already born. The Constitutional Chamber rejected this argument, relying primarily on the same international human rights conventions that supported its in vitro fertilization decision, and

92.  Id., slip op. at 15-16.
94.  Id., slip op. at 1-2.
ordered the hospital's authorities to deliver the child's remains for burial in accordance with the parents' wishes. In a unanimous opinion by Justice Eduardo Sancho González, the Chamber said:

Although that child did not complete its process of formation such as would have enabled it to develop itself as a normal child and to endure, the certainty is that from the moment in which it was conceived it was a person with rights. Thus [also] are the parents persons with rights, having the full power to choose burial in accordance with religiously-established rules.95

B. Educational Freedom

The Chamber's defense of traditional rights began soon after the implementation of the 1989 reform. In 1991, the Government issued an Executive Decree regulating private educational institutions. The constitutionality of much of the decree (and of all or parts of predecessor decrees issued in 1977, 1969, 1960, 1958, 1957, and 1953) was challenged by the National Association of Catholic Education and the Association of Private Educational Centers, who brought actions of unconstitutionality in the Chamber.96 The principal objection of the petitioners was not to specific requirements imposed by the decrees in question, but rather to what might be called the philosophical premises recited at the beginning of each of the documents. The Chamber summarized the petitioners' arguments as follows:

by conceiving of private education as "public service," that is to say, as an activity belonging fundamentally to the State, in which private entities collaborate by means of a sort of "concession," and which the State authorizes as a form of "official instruction," subject to regulation, direction, even hierarchy and discipline, by the Ministry of Public Education and the Superior Council on Education, [the decrees in question] gravely violate [various constitutional and international human rights guarantees specifically identified by petitioners].97

95. Id., slip op. at 6-7.
96. Those actions were consolidated and adjudicated at Sala Constitucional, Voto No. 3550-92, de las 16:00 horas del 24 de noviembre de 1992 (Nov. 24, 1992).
97. Id., slip op. at 1.
The Chamber, in a unanimous opinion by Justice Piza Escalante, observed that freedom of instruction and learning and the right of parents to direct their children's education, are guaranteed by the Costa Rican Constitution, the Universal Declaration of Human Rights, and other international conventions; that these freedoms are recognized by the aforementioned sources as fundamental; that although private education is "in the public interest," this does not convert it into a "public activity or public service;" and that while the freedoms at stake may be limited, the limitations imposed by the Government decrees in question far exceed proper limits. The heart of the Chamber's reasoning is as follows:

Until today the normative, reglementary system that has been dictated and the administrative action that has been carried out in what is called private education show that the governing criterion among educational authorities has been one of considering, on the one hand, instruction, in general, not as a liberty but rather as a "public service," of which the State, not each human being, is the owner, and in which, therefore, private centers participate, not in their own right, in the exercise of their right of liberty, but rather vicariously, by means of a sort of "concession" from the State; and, on the other hand, treating the Superior Council on Education as the organ competent to govern them, in the name of the State, and not only to govern them, but also to direct and discipline them . . . .

Freedom of instruction, in particular, and the Law of the Constitution, in general, impose the complete contrary: to be educated, and to educate, is a fundamental right of every human being, and a right precisely "of liberty," that is, of autonomy or self-determination, that a democratic State should stimulate and, at most, complement, and also, always, respect and guarantee "in liberty," that is to say, in quantitative and qualitative diversity of means and ends, which are appropriate to liberty. Uniformity, univocity, efficiency, the same order and the same pace, are more possible and more easily attainable in totalitarianism and dictatorship than in democracy and liberty; in the latter . . . the contrary reigns: diversity, discussion, a certain amount of inefficiency, of disorder
and of conflict, all of which is precisely what makes us more human, more just, even more beautiful and worthy to live.\textsuperscript{98}

The Chamber proceeded to declare unconstitutional the challenged portions of the decrees in question, as well as various parts of other decrees and statutes that, in the opinion of the Chamber, were necessarily connected to, and thus suffered from the same infirmities as, the provisions successfully challenged by the petitioners.\textsuperscript{99}

C. Marriage and the Family

More recently, Yashin Castrillo Fernández, a male, applied for a license to marry another man. The authorities denied the license on the basis of article 14(6) of the Family Code, which provides that “marriage is legally impossible between persons of the same sex.” Castrillo appealed the denial to an ordinary court and, while that appeal was pending, brought an action of unconstitutionality in the Constitutional Chamber, contending that article 14(6) violated the constitutional guarantees of “equality before the law” and “liberty.”

On May 23, 2006, the Chamber, by a vote of five-to-two, upheld the constitutionality of the statute in question.\textsuperscript{100} Justice Calzada Miranda, speaking for the Chamber, first explained the long history, general and legal, secular and religious, of the heterosexual nature of marriage.\textsuperscript{101} With regard to the “equality” argument, she said that the equality guaranteed by the Constitution is denied only when persons similarly-situated are treated differently without objective and reasonable justification, that heterosexuals and homosexuals are not similarly situated, and that the distinction made by article 14(6) is neither arbitrary nor irrational.\textsuperscript{102} Finally, she noted, both the Constitution and the American Convention on Human Rights (as well as decisions of the European Court of Human Rights and the Spanish Constitutional Tribunal) recognize and protect marriage between a man and a woman, and the family based thereon.\textsuperscript{103}

\begin{itemize}
\item \textsuperscript{98} Id., slip op. at 12, 13 (emphasis in original).
\item \textsuperscript{99} Id., slip op. at 16-18.
\item \textsuperscript{100} Sala Constitucional, Res. No. 2005-007262, de las 14:46 horas del 23 de mayo de 2006 (May 23, 2006).
\item \textsuperscript{101} Id., slip op. at 4-5.
\item \textsuperscript{102} Id., slip op. at 5-6.
\item \textsuperscript{103} Id., slip op. at 6-7.
\end{itemize}
X. THE CASELOAD PROBLEM AND PROPOSALS FOR REFORM

No discussion of constitutional adjudication would be complete that did not mention the enormous caseload with which the Constitutional Chamber must deal. As soon as the 1989 reforms were enacted, indeed even before the Chamber was in operation, the number of constitutional cases began to increase dramatically, and it continues to rise to this day. The following statistics illustrate the situation:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Cases</th>
</tr>
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<tbody>
<tr>
<td>1990</td>
<td>2,296</td>
</tr>
<tr>
<td>1995</td>
<td>6,768</td>
</tr>
<tr>
<td>2000</td>
<td>10,808</td>
</tr>
<tr>
<td>2005</td>
<td>16,574</td>
</tr>
</tbody>
</table>

The most obvious, and perhaps the most important, conclusion to be drawn from these figures is that the Costa Rican public has considerable confidence in the integrity, ability, and diligence of the Chamber. It is not at all likely that an institution thought to be lacking any of these qualities would receive the ever-increasing number of petitions that continue to be presented to the Constitutional Chamber. That important vote of confidence aside, the enormous caseload is a significant problem, which the Chamber has been able to manage to date only through hard work, efficient organization, and an extraordinarily dedicated and capable staff of law clerks whose preliminary review and categorization of incoming petitions make the Chamber's definitive review possible.

At least as early as 1992 there were calls from various quarters for amendment of the Constitution and the Law of Constitutional Jurisdiction to reduce the burden on the Constitutional Chamber. Recently, the proposals that appear to have the greatest support in political and judicial circles are those that would create a number of regional constitutional tribunals to handle certain

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104. Concerning the amount of constitutional litigation before and immediately after the establishment of the Constitutional Chamber, see Barker, supra note 1, at 391; Barker, supra note 9, at 288.

105. These figures are taken from Casos Entrados en la Sala Constitucional Según Tipo de Asunto published by the Constitutional Chamber in 2006 [hereinafter Casos Entrados].

106. For a summary of the Chamber's own early proposals, see Barker, supra note 1, at 393-96.
constitutional cases — in particular amparo actions\(^{107}\) — with only a limited right of appeal to the Constitutional Chamber itself.\(^{108}\) These proposals are deadlocked, however, primarily because of differences of opinion between those who want the judges of such inferior constitutional tribunals to be elected by the Legislative Assembly (as are the members of the Constitutional Chamber and all other justices of the Supreme Court),\(^{109}\) and those who prefer that the appointment power be vested either in the Constitutional Chamber itself or in the entire Supreme Court (the latter being the present procedure for the appointment of all judges of inferior tribunals).\(^{110}\)

The debate over how (if at all) to reform the process of constitutional adjudication seems not to follow party lines. Rather, as is often remarked in Costa Rica, the party in power, whichever party that may be, tends to dislike the Chamber and wants to curtail its powers, while the opposition parties support the Chamber because it may invalidate the Government’s policies, or, at least, because any ten members of the Legislative Assembly can obstruct pending bills by requiring the Chamber to give an advisory opinion as to their constitutionality. Many believe that a large number of these “legislative consultations” are merely dilatory maneuvers or attempts to embarrass the party in power and not bona fide requests for judicial advice.

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\(^{107}\) Amparo actions have always constituted the largest category of cases filed in the Constitutional Chamber. Of the 144,640 actions commenced there through 2005, a total of 117,543, or 81\%, have been amparos. Casos Entrados, supra note 105.

\(^{108}\) For proposals to amend article 48 of the Constitution so as to permit the establishment by statute of inferior constitutional tribunals to hear amparo and habeas corpus cases in the first instance, see, e.g., Asamblea Legislativa de la República de Costa Rica, Comisión Especial de Reforma Constitucional No. 15842, Reforma del Artículo 48 de la Constitución Política, Expediente No. 15842, Dictamen Afirmativo de Mayoría, 22 de noviembre 2005, (Nov. 22, 2005). For various proposals since 2000 to amend the Law of Constitutional Jurisdiction (either pursuant to or independent of proposed constitutional amendments), see, e.g., Asamblea Legislativa de la República de Costa Rica, Expedientes Nos. 14.219, 14.308, 14.451, 14.778, 14.785, 14.993, 15.197, 15.508, 15.584, 16.031, 16.036, and 16.208.

\(^{109}\) CONSTITUTION, supra note 12, art. 157. Members of the Supreme Court, called “Magistrados,” are elected by two-thirds vote of the Legislative Assembly for terms of eight years, and thereafter are retained for additional eight-year terms unless their retention is opposed by a two-thirds vote of the Assembly. Id. art. 158. (Since 1949, only one member of the Supreme Court who sought retention was denied it by the Assembly, and that denial was because of his deteriorating health, not because of partisan or philosophical considerations.)

\(^{110}\) Ley Orgánica del Poder Judicial [Organic Law of the Judiciary], Ley No. 733, del 30 de marzo de 1993 (Mar. 30, 1993), art. 59(9).
XI. OVERVIEW

In 1989, when Costa Rica initiated its present system of constitutional adjudication, it did so not to rid itself of dictatorship or to establish the rule of law. The country's dictatorships had been few and of short duration, and by 1989 were far in the past; its tradition of constitutional government could be matched by very few other countries anywhere, and its system of judicial review of constitutional questions was certainly respectable. The 1989 reform was meant to increase constitutional adjudication by reducing formal requirements of pleading and traditional requirements of standing and ripeness; by increasing the number of constitutional and quasi-constitutional standards to which ordinary laws and actions must conform; by broadening the scope of remedies for constitutional violations; and — perhaps most of all — by concentrating adjudication in a single, specialized tribunal.

The Constitutional Chamber has certainly been active, not only in the sense that it has decided far more constitutional cases than did its predecessors, but also in that it has adjudicated matters once considered beyond the scope of the judicial power. To say that the Constitutional Chamber is active is not to say that it is activist. The latter term suggests that a court has exceeded the proper limits of its adjudicatory authority. But the proper limits of that authority are established, most of all, by the constitution and laws of each country. Thus, any evaluation of the “activism” or “self-restraint” of the Constitutional Chamber must be made in light of a Constitution and a Law of Constitutional Jurisdiction that give the Chamber extensive powers — powers that the Chamber has utilized, often expansively.

Perhaps the most interesting aspect of the Chamber's jurisprudence is that it combines a relatively modern spirit of judicial activity with an admirable defense of such traditional principles as the dignity of human life, the unique status of the family, and the importance of freedom of education.

Each reader will inevitably make his own judgments about the juridical and political merits of particular decisions; that is natural and desirable in any free society. What should be beyond dispute, however, is that constitutional adjudication in Costa Rica is not posturing or window-dressing; rather, it is the serious business of enforcing human rights and strengthening the rule of law.