Judicial Review in Costa Rica: Evolution and Recent Developments

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JUDICIAL REVIEW IN COSTA RICA:
EVOLUTION AND RECENT DEVELOPMENTS

by Robert S. Barker *

The new ideas about the effective enforcement of fundamental rights, about the normative value of the Constitution, and about the transformation of the "rule of law" into the "rule of constitutional law", have brought about a thoroughgoing revolution in Constitutional Justice in Costa Rica.

—Dr. Alejandro Rodríguez Vega,
President of the Constitutional
Chamber of the Supreme Court of
Justice of Costa Rica (1991) 1

I. Introduction

There are at least two reasons why the examination of judicial review in Costa Rica is particularly interesting and rewarding. First, Costa Rica has for many years had an independent judiciary. This means that judicial decisions, including decisions on constitutional questions, are likely to reflect bona fide legal reasoning rather than partisan pressures. 2 Second, the development of Costa Rica’s present system of judicial review has been a gradual process of experimentation, in which Civil Law and Common Law ideas and institutions have been utilized in varying proportions. As a result, the Costa Rican con-

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stitutional experience provides an excellent model for the comparative study of procedural constitutional law.

II. THE ERA OF "LEGISLATIVE REVIEW" (1821-1871)

Since the earliest days of Spanish colonization, Costa Rica has been part of the Civil Law world. The French Revolution, which began in 1789, emphasized (some would say "recast") certain aspects of the Civil Law tradition in ways which would affect the constitutional development of all Civil Law countries. From Roman times, the Civil Law had been grounded in legislation in a way which distinguished it from the Common Law tradition, the latter being rooted in custom as defined and modified by judicial decisions. The French revolutionaries, following Rousseau and other philosophers of the "Enlightenment", saw government as founded on the "general will" as expressed by the people's representatives, the legislature. This theoretical elevation of the legislator was given even greater importance because of the revolutionaries' intense dislike of the judges of the ancien régime, who in the decades prior to the Revolution had been, as a class, the most conspicuous and articulate defenders of the old order.

Thus, the Civil Law system which emerged from the French Revolution was one in which legislative prerogatives were jealously guarded, and in which there was great hostility to judicial excesses, such as respect for precedent, which was seen as covert lawmaking. It is not surprising, then, that the French Constitution of 1799 gave to the legislature the authority to interpret and enforce the constitution. French revolutionary ideas were very popular in Spain, even (and perhaps especially) among those who opposed Napoleon's occupation of the country between 1808 and 1814. Spain's first constitution, the Constitution of 1812, promulgated in the city of Cádiz by representatives of local juntas resisting the French intervention, provided that

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3. Concerning the emphasis on codification in Roman law and the continuation of that emphasis in the Civil Law tradition, see, e.g., Hans Julius Wolff, Roman Law: A Historical Introduction 198-208 (Univ. of Oklahoma Press, 1951).


6. Constitution of the Year VIII (1799) arts. 21, 28 (France). The Constitution of Bayonne, the 1808 document prepared on Napoleon's orders for the governance of Spain, contained a similar provision. See Jorge Sánchez Carbonell, El despertar constitucional de Costa Rica 57 (San José, Costa Rica: Asociación Libro Libre, 1985).
the legislature should take notice of violations of the Constitution, correct them, and punish those responsible for the violations.7

As an operating set of legal norms, the Constitution of Cádiz had little effect on Spain’s American colonies, many of which were already in rebellion against the mother country; however, as a repository of juridical ideas, the document was of considerable influence.8 The independence movements in Spanish America were strongly influenced by the French Revolution (as well as by the Revolution which occurred somewhat earlier in the United States).9 Costa Rica, along with the rest of the Captaincy General of Guatemala, became independent from Spain in 1821. For most of the next twenty-seven years, Costa Rica was part of the Central American Federation.10 During that time, Costa Rica’s various constitutions, like the Constitution of the Federation, followed the United States constitutional model in creating a presidency which was independent of the legislature, and a judiciary which was independent of both the legislature and the executive. However, with respect to guarantees of rights, Costa Rica and the Federation drew most often on the French Declaration of the Rights of Man and of the Citizen and on the Spanish Constitution of Cádiz.11 In particular, this meant that during most of its first fifty years of independence from Spain, Costa Rica vested in the legislature sole or ultimate power to decide constitutional questions.12 The inef-

7. Constitución Política de la Monarquía Española (May 19, 1812) art. 372 (Spain).
8. Sáenz Carbonell, supra, n. 6 at 70-238.
10. Costa Rica’s independence from Spain came on September 15, 1821, when the cabildo (or town council) of Guatemala City declared the independence of all of the Captaincy General of Guatemala, which proceeded to become part of the Mexican Empire from January, 1822 until the collapse of the Empire in mid-1823. In 1824, five of the component parts of the old Captaincy General, namely, Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica, formed the Central American Federation. Costa Rica withdrew from the Federation in 1830, rejointed in 1842, and finally declared itself fully independent of the Federation in 1848. For a history of the region, see Ralph Lee Woodward, Jr., Central America: A Nation Divided (2d ed. 1985).
11. From 1821 through 1870, Costa Rica promulgated ten documents of a constitutional character. The respective influences of United States and Continental models on these constitutions are discussed in Carlos José Gutiérrez, Síntesis del proceso constitucional en Carlos José Gutiérrez (ed.), Derecho constitucional costarricense 19-23 (1965).
12. The situation between 1821 and 1871 is summarized in Robert S. Barker, Taking Constitutionalism Seriously: Costa Rica’s Sala Cuarta, 6 Fla.J.Int’L L. 349, 353-355 (1991), as follows: Costa Rica’s early constitutional documents entrusted the enforcement of constitutional norms to the legislature, or to specialized agencies thereof. Although this power appears to have been used to invalidate actions of lower-ranking officials, and might have been used to reverse judicial decisions, it naturally provided no safeguard against unconstitutional legislation. . . .

In 1825, the system became a bit more sophisticated, again in accordance with French and Spanish models. The Basic Law adopted that year created a separate
fectiveness of this "legislative control of constitutionality" is aptly summarized by the twentieth-century Costa Rican jurist Carlos José Gutiérrez, who likens it to "directing the mice to guard the cheese."  

III. Judicial, and Other, Review (1871-1938)

In 1871, Costa Rica adopted a constitution which, with few interruptions, would remain in effect for more than seventy years. It was under this Constitution that judicial review had its beginnings, the branch of government, the Conserving Power, to be exercised by a Council whose members were popularly elected. The Council had general responsibility to see to the observance of the Basic Law and other laws, and to report violations thereof to the Congress. The Council was empowered to reject any legislation which violated the Basic Law or was contrary to the public good. Thus, for the first time, the constitutionality of legislation was subject to control by an entity outside the Legislative Branch itself. The power was exercised with some regularity; however, its significance was attenuated by the fact that a bill rejected by the Council (whether on constitutional or policy grounds) could nevertheless become law if re-enacted by a two-thirds majority of the Congress. Thus, the Congress could, and often did, override the Council's veto.

All control of constitutionality was eliminated when, after the coup of 1888, the dictator Braulio Carrillo effectively united all governmental power in himself. Carrillo's dictatorship was overthrown in 1892; his 1891 "Law of Bases and Guarantees" was nullified, and the 1892 Constitution was restored as a provisional measure. The new Constitution of 1894 eliminated the Conserving Power and returned control of constitutionality to the Congress, by giving the Senate the power to reject as unconstitutional legislation proposed by the House of Representatives, and to nullify orders and decrees issued by nonlegislative organs. The Constitution of 1894 abolished the Senate and charged the unicameral Congress with the by-then traditional legislative duty of watching over the Constitution.

With the Constitution of 1859, Costa Rica reestablished a bicameral legislature and charged it with maintaining the Constitution. The Constitution also provided, in new and enigmatic language, that any law, decree, or order of the legislature or the executive which was contrary to the Constitution was null and of no effect. The confusion created by these provisions, and the ineffectiveness of any system which relied on legislative control, were demonstrated in 1863. The President, relying on the nullity provision, informed Congress that he believed certain provisions of the Municipal Law to be unconstitutional. The Congress, relying on its duty to maintain the Constitution, responded by declaring the law unconstitutional. The President, in a patented unconstitutional move, dissolved the Congress and ordered new elections.

Not surprisingly, subsequent Congresses, also convened under the 1859 Constitution, did not attempt to exercise control over constitutionality.

(Footnotes omitted.)

For more detailed treatment of constitutional development during this period, see Saénz Carbonell, supra, n. 6, passim; and Mario Alberto Jiménez Quesada, Desarrollo constitucional de Costa Rica 43-165 (4th ed. 1992).


14. In the Twentieth Century, constitutional government was interrupted only twice, 1917-20 and 1948-49. Both of these episodes are discussed hereinbelow.

15. Actually, the first constitution to provide for judicial review was the Constitution of 1869. It contained the usual language about legislative control of constitutionality, but in addition authorized the Supreme Court to suspend, on the petition of any citizen, the enforcement of any legislative disposition contrary to the constitution. Upon suspending a law, the Court was required to submit the matter to the Congress, which would make the final decision on constitutionality. Constitución Política (Apr. 15, 1869) arts. 135, 146 (Costa Rica). The Constitution of 1869 was abrogated by a coup in early 1870 and its provision for judicial review was never uti-
differences between Civil Law and Common Law approaches to adjudication became most apparent, and judicial supremacy in constitutional matters was eventually established. The Constitution provided that dispositions of the Legislative or Executive Branch contrary to the Constitution were void and of no effect. In the tradition of the country’s earlier constitutions, the Congress was given the duty to look out for and correct violations of the Constitution. The Constitution expressly guaranteed the right of habeas corpus, thereby acknowledging some role for the judiciary in resolving constitutional disputes. The Constitution of 1871 made no express provision for judicial review.

Judicial review began with the enactment in 1887 of the Organic Law of the Tribunals. That Law prohibited those who administered justice from applying statutes, decrees, or orders which were contrary to the Constitution, thus making judicial review a power and duty of all judges in the country. In addition, the Law gave the Supreme Court exclusive jurisdiction of all habeas corpus actions. The first exercises of judicial review of the constitutionality of statutes, in 1890 and 1892 respectively, occurred without incident. However, the sig-

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17. Id art 132. (In 1943, because of the addition of certain amendments, this article was re-numbered art. 137.)
18. Id art 41. The first constitution to mention habeas corpus was the Constitution of 1859, article 37 of which provided: “The Republic recognizes the right of Habeas Corpus. The manner of putting this right into practice shall be determined by law.” Constitución (1859) art. 37 (Costa Rica). That guarantee appears not to have been invoked.
19. Ley Orgánica de Tribunales, Decreto No. 11 (Mar. 29, 1887), which entered into effect January 1, 1888.
20. Id art. 8, §1.
21. Id art. 53, §5.
22. The first recorded exercise of judicial review was Chinchilla v. Urrutia, Sentencia de Casación de las 14 hrs. del 10 de marzo de 1890 (Judgment of 14:00, Mar. 10, 1890, Cas.), an action by a landowner against his neighbor for an easement of ingress and egress across the defendant’s land. The defendant argued that the provision of the civil code relied on by the plaintiff violated the constitutional right of property. The judge of first instance declared the code provision unconstitutional, the court of appeals reversed on the merits, and the Supreme Court affirmed the judgment of the court of appeals.

The 1892 case, Sibaja (Sentencia de Casación de las 13 hrs. del 15 de julio de 1892) (Judgment of 13:00, July 15, 1892, Cas.), involved a dispute over judicial jurisdiction. A military officer was tried by a civilian court for unlawfully detaining another person. The officer argued that the trial of the alleged crime was, by statute, within the exclusive jurisdiction of the military tribunals. The prosecution, while apparently not disputing the defendant’s interpretation of the statute, argued that the Constitution defined military jurisdiction more narrowly than did the statute, and prohibited trial by court martial of the matter at hand. The Supreme Court held that the civilian court had jurisdiction, and in doing so stated that the definitive interpretation of the
nificance of these judicial successes was lessened by the fact that in 1891, when the Supreme Court granted habeas corpus and ordered the release of a political dissident on grounds that his detention was unconstitutional, the Court's order was ignored by the President. 23

Several events during the early decades of the Twentieth Century illustrate further the difficulties of the system of constitutional control established by the Constitution of 1871 and the Organic Law of the Tribunals. In 1911, President Ricardo Jiménez Oreamuno declared two statutes unconstitutional, asserting that he, as a person charged with administering justice, was prohibited by the Organic Law from applying those statutes, and he accordingly refused to apply them. 24

With the outbreak of World War I, Congress voted to give the President power to legislate by decree in certain matters of economics and finance. Exercising that power, President Alfredo González Flores promulgated regulations which, inter alia, imposed new prerequisites for the recording of legal documents. Soon thereafter, an individual named Alfaro presented a deed for recording. The registrar refused to record it because Alfaro had failed to comply with the new recording requirements. Alfaro commenced an action against the registrar, arguing that the new requirements were the result of an unconstitutional delegation of legislative power to the president. The Supreme Court ordered that the deed be recorded without regard to the new requirements. 25 President González responded by appealing to the Congress, which he called, "the supreme authority in constitutional matters," to ratify and declare constitutional the recording requirements and all of the president's other wartime emergency legislation. The Congress declared the laws to be constitutional and ratified them, taking care, however, to acknowledge that the Supreme

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23. The detaine, Ricardo Fernández Guardia, a well-known historian, had been arrested pursuant to a presidential decree purporting to suspend constitutional guarantees. The refusal of President José Joaquín Rodríguez to obey the Supreme Court's order to release Dr. Fernández caused the President of the Court, Ricardo Jiménez Oreamuno, to resign in protest. These events increased public support for the Court, and probably contributed to the eventual enactment in 1909 of legislation implementing the constitutional guarantee of habeas corpus. The matter is explained in Carlos José Gutiérrez, supra, note 13 at 55-57.

24. Resolución No. 8 de 15 de marzo de 1911 (Mar. 15, 1911). Interestingly, it was that same Ricardo Jiménez Oreamuno who twenty years earlier had resigned the presidency of the Supreme Court in protest over President Rodríguez's disregard of the Court's decision in the Fernández case.

Court had acted within its powers in refusing to apply a law which it believed to be unconstitutional.\footnote{Ley No. 2 de 29 de marzo de 1915 (Mar. 29, 1915).}

Shortly after these events, and largely because of the economic crisis caused by the European war, the government of President González was overthrown in a coup led by the Minister of War, Federico Tinoco. Tinoco convened a constituent assembly which purported to abrogate the Constitution of 1871 and replace it with a new constitution. The Tinoco regime fell in 1919 and its successor restored the Constitution of 1871. In 1920, the newly-convened Congress passed a statute, known as the Law of Nullities, which declared the constitution, laws, and other acts of the Tinoco government to be unconstitutional (that is, in violation of the Constitution of 1871) and, therefore, null.\footnote{Ley de Nulidades, Ley No. 41 de 21 de agosto de 1920 (Aug. 21, 1920). A similar act of nullification had occurred earlier in Costa Rican history. In 1841, the dictator Braulio Carrillo promulgated a quasi-constitutional “Law of Bases and Guarantees”. The following year, after Carrillo’s overthrow, the constituent assembly, which had been convened to restore constitutional government, declared the Law of Bases and Guarantees and all of Carrillo’s other decrees, orders, and regulations null. Decreto LXXXVI de 27 de agosto de 1842 (Aug. 27, 1842).} The Law of Nullities provoked considerable litigation involving persons asserting rights acquired pursuant to laws and decrees promulgated during the Tinoco years. Those litigants argued that the Law of Nullities was itself unconstitutional because it violated anti-retroactivity provisions of the Constitution of 1871. The Supreme Court, in several cases, held that the Law of Nullities was not unconstitutional.\footnote{E.g., Sentencia de Casación de las 15 hrs. del 21 de marzo de 1923 (Castro Cárdenas v. Municipalidad de San José) (Judgment of 15:00, Mar. 21, 1923, Cass.); and Sentencia de Casación de las 15:30 hrs. del 7 de diciembre de 1923 (Pacheco Cabezas v. Estado) (Judgment of 15:30, Dec. 7, 1923, Cass.).} However, since Costa Rica, in keeping with the Civil Law tradition, recognized no rule of stare decisis, other judges thereafter often declared the Law of Nullities unconstitutional.\footnote{The confusion caused by the inconsistent decisions is described in Sáenz Carbonell, supra, n. 15 at 56-61. The Law of Nullities also provoked important international litigation. In 1922, Costa Rica, invoking the Law of Nullities, denied liability to two British companies with respect to certain obligations incurred by the Tinoco government. Great Britain and Costa Rica submitted the dispute to arbitration by William Howard Taft, Chief Justice of the United States. Taft decided, inter alia, that the Law of Nullities did not constitute a defense to the British claims. The Tinoco Arbitration, Arbitration between Great Britain and Costa Rica. Award of William H. Taft, Sole Arbitrator. Washington, D.C., Oct. 18, 1923, 18 American Journal of International Law 147 (1924). 1 U.N.T.A.A.A. 389 (1923).}

By the 1930’s it had become obvious that the country’s system of constitutional control had two principal defects. First of all, it was not clear who had final authority to decide constitutional questions. Second, although it was undisputed that the judiciary played an important
role in resolving constitutional disputes, the lack of any principle of
binding precedent meant that there was no reliable body of constitu-
tional jurisprudence and no uniformity of constitutional decisions.

IV. Judicial Supremacy (1938-1989)

In 1938, the Organic Law of the Judicial Power (which had re-
placed the Organic Law of the Tribunals) was reformed in ways de-
signed to deal with both of these problems. The principal change was
the elimination of the old language prohibiting those who administer
justice from applying unconstitutional laws, and the adoption in its
place of the following provision:

Those who administer justice shall not apply laws, decrees, orders,
or resolutions which are contrary to the Constitution, when their in-
applicability has been determined by the Supreme Court. 30 (Empha-
sis added.)

Also in 1938, the Code of Civil Procedure was amended to create a
new form of action called the action of unconstitutionality, which ena-
bled a litigant in a case before any tribunal to challenge the constitu-
tionality of any law applicable to the case, by commencing a separate
action (the action of unconstitutionality) in the Supreme Court. If the
Supreme Court decided by an absolute two-thirds majority that the
law was unconstitutional, then that law could not be applied in the
underlying case or in any other case thereafter. 31

These reforms established judicial supremacy in constitutional
matters, concentrated judicial review of the constitutionality of stat-
utes in the Supreme Court, and gave erga omnes effect to decisions in
actions of unconstitutionality. Within a decade, however, a serious
defect in the system was revealed. During the 1940's, political ten-
sions rose, largely because of the alliance between President Rafael
Calderón Guardia and the Communists, and because of the wide-
spread belief that Calderón's government had manipulated the 1944

30. Ley Orgánica del Poder Judicial [Organic Law of the Judicial Power], Ley No. 5 de 29
de noviembre de 1937 (Nov. 29, 1937), art. 3 (effective Jan. 1, 1938). The article was repealed
in 1980 as part of the reform of the system of constitutional adjudication which occurred in that
year.

31. Código de Procedimientos Civiles [Code of Civil Procedure], Ley No. 50 del 25 de
enero de 1933, as amended, arts. 962-69 (effective Jan. 1, 1938). (The entire Code was repealed
and replaced by the Código Procesal Civil [Civil Procedural Code], Ley No. 7130 del 16 de
agosto de 1989 (Aug. 16, 1989), effective May 9, 1990.) The two-thirds requirement for a decla-
ration of unconstitutionality was adopted in part to reduce the likelihood that laws would be
declared "unconstitutional" for policy, rather than constitutional reasons, as many Costa Ricans
believed was then occurring in the United States. See, e.g., Antonio Picado, Explicación de las
Reformas al Código de Procedimientos Civiles 418-19 (1937).
elections in favor of the administration’s candidate, Teodoro Picado, who was elected. In 1947, amid increasing unrest, the police closed four anti-government radio stations. The station owners brought a habeas corpus action in the Supreme Court, arguing that the closing of the stations was a violation of the constitutional guarantee of freedom of speech. The station owners sought habeas corpus relief because in such actions the Court had clear authority to immediately restore a successful petitioner to the full enjoyment of the violated right. Since Costa Rican judges, like judges in other Civil Law countries, lack general injunctive and contempt powers, an ordinary (that is, non-habeas corpus) action, even if successful, would probably not have resulted in the prompt return of the stations to their owners. The Supreme Court denied relief, holding that habeas corpus was available only in cases of the illegal detention of natural persons. The decision demonstrated that, although judicial review had developed to the point that the Supreme Court could declare laws unconstitutional and order the release of unlawfully-detained persons, there remained no effective (that is, speedy) judicial remedy for governmental interference with other constitutional rights, such as freedom of speech. Four years later this defect would be remedied under the next constitution.

The closing of the radio stations, and continuing discontent over the election of 1944, made the presidential election of 1948 particularly tense. The apparent winner was the opposition candidate, Otto Ulate. When the Congress annulled the election, armed rebellion broke out. After a few weeks, the insurgents, led by José Figueres Ferrer, emerged victorious. The provisional government which followed convoked a constituent assembly. The assembly wrote a new constitution, which became effective on November 7, 1949.

V. PARTIALLY-CONCENTRATED JUDICIAL REVIEW (1949-1989)

The Constitution of 1949 retained judicial review and judicial supremacy in constitutional matters, by providing:

Dispositions of the Legislative Branch or of the Executive Branch contrary to the Constitution shall be absolutely null. . . . .

The Supreme Court of Justice, by vote of no less than two-thirds of all its members, has power to declare the unconstitutionality of dispositions of the Legislative Branch and decrees of the Executive Branch.

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It shall be determined by statute which tribunals shall have jurisdic-
tion to determine the unconstitutionality of other dispositions of
the Executive Branch.\textsuperscript{33}

The Constitution retained the action of habeas corpus, keeping it
within the exclusive jurisdiction of the Supreme Court. To protect
other constitutionally-guaranteed rights (i.e., those constitutional
rights not protected by habeas corpus), and thus close the gap re-
vealed by the 1947 case of the radio stations, the Constitution estab-
lished the action of amparo, jurisdiction of which was to be
established by statute.\textsuperscript{34} Amparo is a summary proceeding, of Mexi-
can origin, by which judges are empowered to stop or prevent actual
or threatened violations of constitutional rights by ordering the
offender to terminate the violation or threat thereof and to take such
other action as the court determines is necessary to restore the victim
to the full enjoyment of the right in question.\textsuperscript{35}

The Constitution of 1949 created another new form of judicial
review; that is, review by the Supreme Court of disputes between the
legislature (renamed by the 1949 Constitution the "Legislative Assem-
bly") and the president over the constitutionality of proposed new leg-
islation. If the president vetoed a bill on grounds that it was
unconstitutional, and the Assembly re-passed the bill without elim-
nating the provisions thought by the president to be unconstitutional,
then the constitutional question would be reviewed by the Supreme
Court. If the Court, by an absolute two-thirds majority, decided that
the provision in question was unconstitutional, then the Assembly
would be required either to make the necessary changes or abandon
the bill; otherwise, the bill would be considered constitutional, and the
president could not again veto it on constitutional grounds.\textsuperscript{36}

\textsuperscript{33} Constitución Política de la República de Costa Rica (1949) art. 10 (since amended).

\textsuperscript{34} Both habeas corpus and amparo are guaranteed by article 48 of the Constitution.

\textsuperscript{35} An excellent brief explanation of the Mexican amparo is Hector F. Zamudio, A Brief
treatment, see Ignacio Burgoa, El juicio de amparo (32nd ed. 1995). Most other Latin American
countries have adopted amparo, but, as in Costa Rica, its function is much more limited than it is
in Mexico. The Costa Rican amparo as established in 1949 is described in Rubén Hernández
by the reforms of 1989 is described by the same author in La tutela de los derechos funda-
mentales 75-121 (1990).

\textsuperscript{36} Constitución art. 128. See also Rubén Hernández Valle, La tutela de los derechos funda-
mentales 229-44 (1990).
The 1949 system of judicial review functioned well. The full range of constitutional rights were susceptible of effective judicial protection, and, by all accounts, the judiciary was independent. Judges were free to, and in fact did, decide cases on the basis of their good-faith interpretation of the Constitution and laws, without interference by the executive or the legislature.  

Nevertheless, as time went by, the system came under increasing criticism. The critics expressed a variety of concerns, the most important of which were the following:

The system of constitutional adjudication was said to be illogical in that judicial review was neither concentrated nor diffuse, but haphazardly allocated. Only the Supreme Court could declare statutes and executive decrees unconstitutional, but district judges could decide the constitutionality of administrative regulations and municipal ordinances. Habeas corpus cases were within the exclusive jurisdiction of the full Supreme Court, but amparo cases were either within the exclusive jurisdiction of the First Chamber of the Supreme Court or within the original jurisdiction of a district judge and subject to review by the Third Chamber of the Supreme Court. Statutes and decrees declared unconstitutional by a two-thirds majority of the Su-
preme Court became "absolutely null" by virtue of the express language of Article 10 of the Constitution, but decisions in habeas corpus and amparo cases, in keeping with general principles of the Civil Law, bound only the parties.

Critics argued that the two-thirds requirement for declarations of unconstitutionality was illogical and bred a disrespect for the rule of law because it meant that statutes were required to be treated as constitutional even though a majority of the members of the Supreme Court had formally and publicly announced their belief that those statutes were unconstitutional. Both habeas corpus and amparo were criticized, the former primarily on grounds that the Habeas Corpus Law limited too narrowly the scope of permissible judicial inquiry. Amparo was said to be in need of reform, primarily because judicial decisions had limited its availability to situations where the conduct complained of was "arbitrary." This meant that if an official acted in reliance on a statute or regulation, his conduct was not arbitrary, and amparo relief would be denied. The fact that the official might have misapplied or misinterpreted the statute was irrelevant. Another criticism of amparo was that it was available only against governmental misconduct. Many guarantees of the Costa Rican constitution limit private conduct as well as state action, yet violations of constitutional rights by private parties were outside the protective scope of amparo.41

Most of the critics also believed that the judiciary was too deferential to the other branches of government. Some said that the two-thirds rule itself created an atmosphere of judicial deference which went beyond the numerical requirement itself. Others said that members of the Supreme Court, because of their Civil Law education with its emphasis on the duty of the judge to apply the law, and their previous careers as lower-court judges, during which they were rarely if ever called on to address constitutional issues, were simply uncomfortable with constitutional adjudication.42

61(3). The Law of Amparo was repealed in 1989, as was article 61(3) of the Organic Law of the Judicial Power.

41. These criticisms are summarized by Rubén Hernández Valle in El control de la constitucionalidad de las leyes 85-137 (1978), and Las libertades públicas en Costa Rica 63-76 (1990). [NOTE: Dr. Hernández has written two books titled, "El control de la constitucionalidad de las leyes", the first, cited hereinabove in this note, and another which is not dated, but which was published in 1988.]

42. See, e.g., Carlos José Gutiérrez, Control de constitucionalidad en Costa Rica, speech delivered in the Supreme Court of Justice of El Salvador (June, 1989).
In the early 1980's, these and other criticisms led to the initiation of a reform movement spearheaded by a Special Commission of the Ministry of Justice, which culminated in the adoption, in 1989, of three constitutional amendments and a Law of Constitutional Jurisdiction. These 1989 reforms are the basis of Costa Rica's present system of judicial review.\textsuperscript{43}

VI. CONCENTRATED JUDICIAL REVIEW (1989 TO THE PRESENT)

The 1989 reforms establish a new, Fourth Chamber of the Supreme Court, called the Sala Constitucional, or Constitutional Chamber, composed of seven members. It has exclusive, non-reviewable jurisdiction in constitutional matters and with authority to declare, by absolute majority of its members, the unconstitutionality of all legal norms of whatever nature, and of subjective exercises of Public Law.\textsuperscript{44} The Law of Constitutional Jurisdiction expands the notion of constitutional adjudication in a number of ways, among them, by making clear

\textsuperscript{43} The Special Commission used as its point of departure a draft "Organic Law of Constitutional Jurisdiction," prepared in 1982 by Dr. Rubén Hernández Valle, a Professor of Constitutional Law and a member of the Special Commission. (His writings are often cited herein.) The Commission itself produced its first draft in October, 1983. Special Commission of the Ministry of Justice of Costa Rica, Proyecto de Ley Orgánica de Jurisdicción Constitucional (Oct. 1983). After extensive public discussion of the first draft, the Commission prepared a second draft, which it submitted to the Supreme Court. The Court made significant revisions and submitted its revised draft to the Legislative Assembly in May 1986. Corte Suprema de Justicia, Proyecto de Ley Orgánica de la Jurisdicción Constitucional (May 6, 1986). The Assembly made numerous changes to the Court's draft and submitted the document (now in the form of a bill) to the Supreme Court. (Article 167 of the Constitution requires that all bills affecting the organization or operation of the judiciary must be submitted to the Supreme Court and, if opposed by the Court, may become law only if approved by a two-thirds majority of the Legislative Assembly.) In August, 1989, the Court transmitted to the Assembly sixteen objections to the bill. The Assembly amended the bill to meet some of the Court's objections, override other objections, and pass the bill, which was signed into law on October 11, 1989 as the Law of Constitutional Jurisdiction, Ley de la Jurisdicción Constitucional, Ley No. 7155 de 11 de octubre de 1989 (Oct. 11, 1989). Some of the more important revisions made during the formulation of the Law are described in Barker, supra, n. 12 at 371-87. Also in 1989, the Assembly gave final approval to three constitutional amendments designed to accommodate the Law of Constitutional Jurisdiction. Reforma a los Artículos 10, 48, 105 y 128 de la Constitución Política, Ley No. 7126 de 18 de agosto de 1989 (Aug. 18, 1989). (The amendment to article 163 does not deal with constitutional jurisdiction.) In Costa Rica the power to amend the Constitution resides in the Legislative Assembly, which must follow special procedures and vote numerous times by extraordinary majorities. Constitution art. 195.

\textsuperscript{44} Constitución art. 10 (amended 1989); Law of Constitutional Jurisdiction arts. 4, 11. Article 7 of the Law gives the Constitutional Chamber exclusive jurisdiction to decide questions concerning its own jurisdiction. The Constitutional Chamber is composed of seven members, elected, as are all other members of the Supreme Court, for eight-year terms by two-thirds vote of the Legislative Assembly, and retained for successive eight-year terms unless their retention is opposed by a two-thirds majority of the Assembly. Constitución art. 158.
that constitutional jurisdiction includes the protection of not only constitutional norms, but also of "constitutional principles," by including within constitutional jurisdiction the norms and principles of international law in effect in Costa Rica. Decisions of unconstitutionality in actions of unconstitutionality, habeas corpus, and amparo constitute binding precedent, except for the Constitutional Chamber itself.

The Law of Constitutional Jurisdiction expands habeas corpus in several ways, most importantly by enabling habeas corpus to prevent, as well as terminate, unlawful detention, and by requiring the judge who orders the detention of a suspect to explain in greater detail the factual and legal bases for the detention. Amparo is expanded in a number of respects. It now protects not only constitutional rights, but also rights acquired under international law which are not protected by habeas corpus. The Law eliminates the "non-arbitrariness" defense and resolves a previously-unsettled question by making clear that amparo affords protection against an unconstitutional application of a facially-constitutional law. Amparo is also enlarged to provide protection against private persons whenever they are performing, or are charged by law with performing, public functions, or whenever they exercise such private power that ordinary legal remedies are inadequate.

The action of unconstitutionality is expanded to cover all legal norms and subjective exercises of Public Power. Also, the requirement of a pending case is eliminated where the action is brought by certain public officials, or by private persons who assert interests which are "diffuse" or "collective."

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45. Law of Constitutional Jurisdiction arts. 1, 3.
46. Id. art. 1. The Law of Constitutional Jurisdiction brings international law within the "constitutional jurisdiction" of the Constitutional Chamber in two ways. First, as stated in the text, the Law gives the Constitutional Chamber jurisdiction of questions arising under international human rights law; and second, the Law gives the Constitutional Chamber jurisdiction to resolve conflicts between (Costa Rican) statutes and any treaties to which Costa Rica is a party.
47. Id. art. 13.
utionality may now argue that a law is unconstitutional “by omission” as well as by affirmative disposition.\textsuperscript{50}

The 1989 reforms retain judicial review of presidential vetoes-for-constitutionality, the only change being that that review is now exercised by the Constitutional Chamber rather than by the full Supreme Court.\textsuperscript{51} The reforms also establish two new types of judicial review, the judicial consultation and the legislative consultation.

The judicial consultation is a proceeding by which any judge may request an opinion from the Constitutional Chamber as to the constitutionality of any norm, action, or omission relevant to any case pending before the requesting judge. The opinion of the Constitutional Chamber is binding on the requesting judge and on all other judges and other authorities in the country.\textsuperscript{52}

There are several types of legislative consultation. The Law of Constitutional Jurisdiction provides that the Constitutional Chamber shall review all proposed constitutional amendments, treaties and conventions, and amendments to the Law of Constitutional Jurisdiction itself.\textsuperscript{53} In addition, any ten members of the Legislative Assembly may request and obtain an opinion from the Chamber on the constitutionality of any other measure pending before the Assembly;\textsuperscript{54} the Supreme Court, the Supreme Electoral Tribunal, and the Controller may obtain opinions on any proposed legislation which will affect their respective powers;\textsuperscript{55} and the Defender of the Inhabitants may obtain an opinion on any pending legislation which might infringe any rights or liberties guaranteed by the Constitution or by any human rights treaty or convention in effect in the country.\textsuperscript{56} A legislative consultation is binding only insofar as the Chamber determines that the procedure being utilized for the adoption or approval of the amendment, law, or treaty is defective. In all other respects, a legislative consultation is purely advisory.\textsuperscript{57}

\textsuperscript{50} The action of unconstitutionality is now regulated by articles 73-95 of the Law of Constitutional Jurisdiction.
\textsuperscript{51} Constitución art. 128 (as amended August 18, 1989).
\textsuperscript{52} Law of Constitutional Jurisdiction arts. 102-108.
\textsuperscript{53} \textit{Id.} art. 96(a).
\textsuperscript{54} \textit{Id.} art. 96(b).
\textsuperscript{55} \textit{Id.} art. 96(c).
\textsuperscript{56} \textit{Id.} art. 96(ch).
\textsuperscript{57} \textit{Id.} art. 101.
Finally, the 1989 reforms give the Chamber jurisdiction to resolve conflicts of authority between or among any of the principal organs of government, at the request of any of them.58

VII. Recent Developments

The central feature of the 1989 reforms is the concentration of judicial review in a single, specialized tribunal, the Constitutional Chamber of the Supreme Court. This concentration, upon which the entire system of constitutional control is now premised, was called into question in a judicial consultation filed in the Chamber in 1994.59 In that matter, a district judge asked the Chamber for an opinion concerning the constitutionality of a tax law relevant to a case then pending before him. He also asked whether there was a conflict between article 10 of the Constitution, which gives the Chamber the power to declare the unconstitutionality of all legal norms, and article 8 of the Organic Law of the Judicial Power (effective January 1, 1994), which provides:

Article 8.—Officials who administer justice shall not:

1. Apply laws or other norms or acts of whatever nature which 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]. . . .60

The requesting judge understood article 8(1) of the Organic Law to mean that any judge who has no doubt that a law is unconstitutional is empowered, indeed required, to refuse, on his own authority, to apply that law. He therefore raised a significant question: If article 8(1) of the Organic Law of the Judicial Power does give to all judges power to refuse to apply laws which they believe to be unconstitutional, does that grant of power violate article 10 of the Constitution, which appears to concentrate judicial review in the Constitutional Chamber? Further, asked the requesting judge, if article 8(1) of the Organic Law does give to all judges the power of judicial review, and if that grant of power is not unconstitutional, is another provision of the same article of the Organic Law, which requires judges to follow the precedents and jurisprudence of the Constitutional Chamber, unconstitutional?

58. Id. arts. 109-111.
60. Ley Orgánica del Poder Judicial, art. 8(1) (effective Jan. 1, 1994).
The Constitutional Chamber decided that article 8(1) of the Organic Law does not purport to give to ordinary judges power to declare laws unconstitutional and, therefore, article 8(1) does not violate article 10 of the Constitution. In its order, the Chamber said, in pertinent part:

2. It is declared that section (1) of article 8 of the Organic Law of the Judicial power is not unconstitutional, provided that it is interpreted as denying to the ordinary judge the power to refuse to apply unconstitutional laws "in casu et inter partes," but permitting him to consult the Constitutional Chamber when he has well-founded doubt about the constitutionality of the norm or act applicable to the concrete case.

3. Finally, the last paragraph of section (1) of article 8 of the Organic Law of the Judicial Power, which obligates judges to interpret and apply norms and acts in the cases before them in conformity with the precedents or jurisprudence of the Sala Constitucional, is not unconstitutional.\(^{63}\)

(Emphasis added.)

In reaching these conclusions, the Sala, in an opinion written in pertinent part by Dr. Luis Fernando Solano Carrera, traced the evolution of judicial review in Costa Rica:

... the Costa Rican system has evolved from a diffuse system of control of constitutionality, like that designed by the Law of the Tribunals of 1887 in the face of the silence of the Constitution in that regard, to a concentrated system based solely on statute (the Organic Law of the Judicial Power and the Code of Civil Procedure of 1937), in the face of the same constitutional silence. The latter system was replaced by another, similarly concentrated, but this time with a constitutional basis in the Political Constitution of November 7, 1949, until finally it emerged in a system which is concentrated to the maximum extent, that of the 1989 reform.\(^{62}\)

The opinion of the Chamber was not unanimous. Two magistrates, while agreeing with the majority that the statutory provisions in question were not unconstitutional, took the position that article 8(1) of the Organic Law did in fact give to ordinary judges power to decide, on their own authority, the unconstitutionality of laws and norms relevant to cases before them, and, again on their own authority, to refuse to apply such laws and norms. The dissenting opinion, written by Dr. Rodolfo E. Piza Escalante and joined in by the President of the

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\(^{61}\) Sala Constitucional, supra, n. 59, slip opinion, p. 19.

\(^{62}\) Id. at p. 10.
Chamber, Dr. Luis Paulino Mora Mora, summarized the dissenters' position as follows:

... we must point out that our thesis that Constitutional Jurisdiction, concentrated though it is in this [Constitutional] Chamber, is not, in our opinion, incompatible with a parallel and dispersed Constitutional Justice, spread among all the tribunals of ordinary Justice, also seems to us to be the one which most completely justifies and makes complete the power-duty of all public authorities, including those who administer justice, each in its sphere of action, to carry out and see to the carrying out, to respect and cause to be respected, even in the absence of constitutional precedents or jurisprudence, ... the Law of the Constitution.  

The decision of the Chamber appears to confirm the original understanding of the 1989 reforms and, in any event, seems to have settled the matter: judicial review is within the exclusive purview of the Constitutional Chamber.

One of the more important of the 1989 reforms is the elevation of international human rights law to constitutional, or quasi-constitutional status. The far-reaching effects of this change are illustrated by one of the earlier decisions of the Constitutional Chamber. In 1991, a foreigner who had married a Costa Rican woman applied for Costa Rican citizenship. His application was denied on the basis that the naturalization provision on which he relied, article 14(5) of the Constitution, provided only for the naturalization of a woman married to a Costa Rican man. The applicant brought an amparo action in the Chamber, arguing that the constitutional provision in question was itself unconstitutional because it violated the guarantees of equality contained in various international agreements to which Costa Rica was a party.

The Chamber agreed with the applicant that the constitutional provision in question violated anti-discrimination provisions of the Universal Declaration of Human Rights, the American Convention on Human Rights, and other international agreements, and that those violations (at least when considered together with various provisions of the Costa Rican Constitution) rendered article 14(5) of the Constitution unconstitutional. The Chamber said, in pertinent part:

... the questioned provision ... is without effect or applicability in the face of the fundamental principles established by the Political Constitution and international conventions, in which equality

63. Id. at p. 25.
and non-discrimination are generic rights and therefore the cornerstone or keystone of our legal order; they are superior values that form and permeate the democratic society under the rule of law that characterizes the Nation. The aforementioned discrimination must yield to principles of a higher order since the inequality complained of does not tend to protect a higher concrete end by creating, protecting, or promoting higher common interests but rather discriminates against subjective rights.

II.

In order to avoid future inequality and discrimination that might arise ... and in the exercise of the powers given by the Constitution to the Chamber, it is decided that whenever in legislation the terms “man” or “woman” are used, they shall be understood as being synonymous with the word “person,” thereby eliminating every possible “legal” discrimination on the basis of sex. This correction shall be applied by all public officials whenever they are presented with any matter whose resolution requires the application of any norm which uses the aforementioned words.

For the foregoing reasons the writ is meritorious and the petitioner is granted the rights denied to him by the application of article 14, section 5 of the Political Constitution, with respect to his meeting the legal and constitutional requirements [for naturalization], and all officials shall follow this approach in similar situations.

THEREFORE:

The writ is granted and, consequently, the petitioner shall be inscribed as a Costa Rican if he satisfies the other constitutional and legal requirements for privileged naturalization, without distinction based on sex. The State is ordered to pay costs and damages, the amounts of which shall be determined in a Contentious Administrative proceeding.65

In 1997, the Chamber decided two amparo cases in favor of petitioners suffering from AIDS, ordering the respondents, the Social Security Administration and two hospitals, to provide appropriate treatment to the petitioners and to avoid discriminating against them and any other persons suffering from AIDS or carrying the HIV virus. In both cases, the decisions were based on guarantees contained in various international human rights conventions, as well as provisions of the national Constitution, with the Chamber devoting considerably

65. Id.
more space to discussion of the former than the latter. These and other cases make clear that international agreements have become as important a source of human rights guarantees in Costa Rica as is the Constitution of 1949 and, indeed, that international human rights law, as a practical and juridical matter, has become part of Costa Rican constitutional law.

One of the first decisions of the Chamber illustrates the breadth of the current system of judicial review. In the Fall of 1989, only weeks after the present system entered into effect, a lawyer, acting as a private citizen, brought an action of unconstitutionality, alleging that several provisions of the Electoral Code regulating government financing of political campaigns, was unconstitutional. She also alleged that the constitucional provision regulating campaign financing was unconstitutional because it had been adopted (in 1971) without meeting the procedural requirements of the Constitution and the Rules of Order and Discipline of the Legislative Assembly. Prior to the 1989 reforms, the petitioner clearly would have lacked standing because she was not a party to any lawsuit to which the challenged statutes and constitutional provision might have been applicable. Moreover, judi-


67. The significance of international human rights law in Costa Rican constitutional adjudication is poignantly illustrated by a 1995 decision concerning government regulation of journalists. Years earlier, the government of Costa Rica had requested an advisory opinion from the Interamerican Court of Human Rights as to whether a Costa Rican law providing that only registered members of the (official) Association of Journalists could practice journalism conflicted with the American Convention on Human Rights. The Interamerican Court issued a nonbinding, advisory opinion that the Costa Rican law violated the "right of information" guaranteed by the Interamerican Convention. (Advisory Opinion OC-05-85). In 1990, a journalist accused of violating the Costa Rican compulsory-membership law brought an action of unconstitutionality in the Constitutional Chamber. The Chamber decided unanimously that the Costa Rican law violated the American Convention on Human Rights, and annulled the law. In doing so, the Chamber reasoned that it was obligated not only to apply the norm contained in the Convention, but also to follow the jurisprudence of the Interamerican Court of Human Rights concerning the application and interpretation of that norm, even where that jurisprudence was declared in an advisory opinion. In reaching this conclusion, the Constitutional Chamber emphasized that it was Costa Rica itself which had requested the opinion of the Interamerican Court; however, much of the Chamber's language suggests that even if Costa Rica had not been involved in the proceeding before the Interamerican Court, that Court's opinion would have been authoritative, perhaps binding. The Chamber stated, in pertinent part:

"...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 convention], be it in a contentious case or a mere advisory opinion, will have...the same value as the norm interpreted..."

Sala Constitucional, Voto No. 2343-95 de las 16:18 hrs. de 9 de mayo de 1995 (May 9, 1995), slip opinion, p. 12.
cial inquiry into the regularity of legislative proceedings would have been barred by the “political question” doctrine. However, taking advantage of the 1989 reforms, the petitioner argued that her constitutional challenges were based on a “collective right of political association”, and that she therefore had standing under the provision of the Organic Law of Constitutional Jurisdiction, which dispenses with the “underlying case” requirement where the interest asserted is “collective or diffuse.” She further pointed out that the 1989 reforms limited considerably the “political question” doctrine. The Chamber concluded that the right asserted, though not “collective,” was “diffuse”, in that it was equal and identical to the right of all other citizens, and that the petitioner therefore had standing. Similarly, the Chamber saw no barrier to its examination of the regularity of the proceedings of the Legislative Assembly.

With respect to the merits, the Chamber held that the constitutional provision in question was unconstitutional because it had not been approved by a two-thirds majority of two separate sessions of the Legislative Assembly, as required by the Constitution, since some of its language had been added during the second session. The Chamber proceeded to declare unconstitutional the statutorily-created eligibility requirements for government funding, on the grounds that by favoring the country’s largest political parties, the law violated the concept of a multiparty system, which the Chamber found to be a constitutional principle, enforceable by the Chamber. Various statutory requirements governing the organization and registration of political parties, including some requirements not explicitly challenged by the petitioner, were also declared unconstitutional as violative of the constitutionally-protected right to form political parties, and of rights of association and expression guaranteed by the Universal Declaration of Human Rights, the American Convention on Human Rights, and other international conventions.68

This decision illustrates many of the characteristics of judicial review introduced in 1989: the lenient requirements for standing; the authority of the Chamber to inquire into the regularity of legislative proceedings, to identify and apply constitutional “principles” as well as constitutional norms, and to decide the constitutionality of laws not challenged by the complaining party; and (as discussed heretabovbe), the elevation of international human rights agreements to the status of constitutional, sometimes supraconstitutional, guarantees.

The aforementioned juridical developments are equaled, perhaps surpassed, in importance by the atmosphere of judicial activism which began with the 1989 reforms. In the campaign-financing case discussed above, the Chamber justified its liberal approach to standing in part on the grounds that stricter standing requirements might mean that the constitutionality of the statutes in question might never be tested.\textsuperscript{69} The implication underlying this rationale is that every constitutional question is, or ought to be, susceptible of resolution by the Chamber. (When, at an informal meeting with all seven original members of the Chamber, a visitor asked whether the Chamber was inclined to give weight to the pre-1989 constitutional decisions of the Supreme Court, one of the magistrates responded immediately, "No, We are in a new era."\textsuperscript{70} No other magistrate disagreed, and the subsequent jurisprudence of the Chamber is proof of the accuracy of the statement.) Given this sense of activism, the more lenient requirements for standing, the expansion of remedies, and the enlargement of the very notion of unconstitutionality, it is not surprising that Costa Rica has experienced a tremendous increase in the amount of constitutional litigation. Between February, 1979 and March, 1982, under the old system, the Supreme court invalidated statutes or other governmental actions in seventeen cases (three actions of unconstitutionality, eleven habeas corpus cases, and three amparo cases).\textsuperscript{71} During the first twenty months of the new system, the Chamber issued 216 declarations of unconstitutionality in habeas corpus and amparo cases alone.\textsuperscript{72} In 1997, the Sala issued 2,814 decisions of unconstitutionality.\textsuperscript{73} The number of cases brought in the Chamber has continued to rise, from 5,355 in 1993, to 7,421 in 1996, to 8,916 in 1997.\textsuperscript{74} The importance of constitutional law has also increased relative to other areas of the law, as the caseload of the Constitutional Chamber is consistently greater than the combined caseload of the other three chambers of the Supreme Court.\textsuperscript{75}

\textsuperscript{69} Id.

\textsuperscript{70} Meeting of the seven Magistrates of the Constitutional Chamber with the author, San José, Costa Rica, June 18, 1991.

\textsuperscript{71} Marína Alejandra & Gerardo Alberto Trejos, Jurisprudencia Constitucional 1979-1982; Digesto de Jurisprudencia 145-47 (1982).

\textsuperscript{72} Estado Recibe 216 Conten das de Sala IV, La Nación (San José, Costa Rica), June 23, 1997, at 5A.

\textsuperscript{73} Informe de la Sección de Estadística del Poder Judicial a la Jefe del Departamento de Planificación del Poder Judicial, No. 224-EST-98 (February 18, 1998), p. 8.

\textsuperscript{74} Id. at 3.

\textsuperscript{75} Id.
VIII. CONCLUSIONS

The present system of judicial review in Costa Rica is the result of a long, and, by Latin American standards, smooth, process of constitutional development. For the first sixty-seven years of independence, judicial review played virtually no part in the juridical or political life of the country. From 1888 until 1938, the judges competed with the other branches of government, and sometimes with each other, for influence in constitutional decisionmaking. Between 1938 and 1989, judicial supremacy in constitutional matters was recognized, and was exercised honorably but with restraint, usually by the Supreme Court or one of its chambers, but sometimes by other judges as well. Since 1989, judicial review has been concentrated in a single, specialized tribunal, which has been exercising its broadly-defined jurisdiction and sweeping remedial powers with great vigor.

For lawyers and scholars, it is also useful to view Costa Rica’s present system in terms of the competing influences of the Civil Law and the Common Law traditions in Latin America. With independence, Costa Rica adopted the French (or, by the 1820’s, the Franco-Spanish) idea that the interpretation and enforcement of the constitution were responsibilities of the legislature. By the middle of the nineteenth century, as legislative control of constitutionality proved everywhere to be an illusion, and as the United States came to be regarded as the most “progressive” of countries, judicial review became an attractive option, influencing, for example, the development of amparo in Mexico and of diffuse judicial review in Argentina. During that same era, Costa Rica decided to complement legislative review with judicial review. This hybrid approach provoked (perhaps inevitably) intra-governmental conflicts, as the Congress, the Supreme Court, and, indeed, the President, all purported to speak definitively on constitutional questions. These problems were compounded by the fact that in Costa Rica, whose Civil Law tradition precluded any rule of stare decisis, judicial decisions on even the most important constitutional questions varied from place to place and from judge to judge.

What is now generally regarded as the “European” style of judicial review began in the 1920’s when Austria, Czechoslovakia, Germany’s Weimar Republic, and in the early 1930’s, Spain’s Second Republic, established constitutional tribunals with exclusive authority to decide constitutional questions, usually in the abstract. These experiments were interrupted by the emergence of authoritarian regimes, but after World War II, they reappeared throughout much of noncommunist Europe. In similar fashion, Costa Rica in 1938 took
significant steps toward concentrating judicial review, and solidified those measures in the Constitution of 1949.

In 1989, Costa Rica adopted more fully the European model of constitutional adjudication by creating a constitutional tribunal, vesting it with exclusive jurisdiction in constitutional matters, and adopting postwar European ideas about the role of international human rights law in constitutional law.

Perhaps the most revealing aspect of Costa Rican judicial review is that it can be explained and understood through the cases. The decisions of the Constitutional Chamber deserve attention, and reward that attention, because they are products of good-faith, informed judicial thinking about constitutional law, and because they are respected by the other branches of government and by the country at large. One may disagree, as many Costa Ricans do, with any given decision or line of decisions, with the Chamber's activism, or with the very structure of the system. However, those disagreements but prove that judicial review is a significant part of the legal and political life of the country, and that, in the final analysis, Costa Rica has developed a comprehensive and reliable system of judicial review.

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76. The decision to create a specialized tribunal having exclusive jurisdiction of constitutional questions, and located within the Supreme Court, is itself the result of a compromise between European and American (that is, United States) models. Advocates of a thoroughly Continental approach wanted to establish a constitutional tribunal which would not only be separate from the Supreme Court, but indeed separate from the Judicial Power. Others preferred to have constitutional questions decided by ordinary judges ("ordinary" in the sense that they had jurisdiction to decide non-constitutional matters as well). The compromise has produced a specialized tribunal, within, not apart from, the judicial branch. Interview with Dr. Fernando Volio Jiménez, Professor of Constitutional Law, former President of the Legislative Assembly and former Foreign Minister, San José, Costa Rica, June 4, 1990.