Taking Constitutionalism Seriously: Costa Rica's Sala Cuarta

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TAKING CONSTITUTIONALISM SERIOUSLY: COSTA RICA'S SALA CUARTA

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I. INTRODUCTION

In 1989, Costa Rica significantly reformed its system of constitutional adjudication. The 1989 reforms and the manner of their implementation have already brought about significant changes in substantive constitutional law, and have generated considerable controversy about the proper role of the courts, the appropriate balance among the branches of government, the virtues of activism and restraint, and the effect of precedent. These constitutional issues are of importance and concern to Costa Ricans, but their significance goes beyond the borders of that small nation. Costa Rica has long been a functioning democracy, and in an era when countries all over the world are working to establish constitutional government and to convert democratic theory into political reality, the constitutional experiences of all democracies are instructive. Moreover, because Costa Rica's constitutional history has been one of experimentation with a number of approaches to "controlling constitutionality" (that is, enforcing constitutional guarantees), its constitutional processes are a rich source of comparative study, made richer still by the interaction — in different proportions at different times — of Civil Law, Common Law, and indigenous legal principles and institutions. For these reasons, this article attempts to examine Costa Rica's current system of constitutional adjudication in the context of the institutional development of the country, and in the broader context of the growth of Western democratic institutions during the past two centuries.

II. THE COLONIAL BACKGROUND

In theory, Spanish colonial government was absolutist; in practice, it left little opportunity for popular participation in the affairs of state.¹ There were, however, several factors that made Costa Rica's colonial

¹ See, e.g., CHARLES GIBSON, SPAIN IN AMERICA 90-100 (1966); see also JOHN H. ELLIOTT, IMPERIAL SPAIN 1469-1716, at 161-78 (1966).
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experience conducive to the eventual emergence of democracy. Despite its name, Costa Rica had few of the natural resources that attracted Spanish settlers to other parts of the New World. It also lacked a large indigenous population that might be put to work for European masters. Thus, the conditions which led to the easy establishment of colonial aristocracies and sharp social and economic divisions elsewhere in Spanish America were not present in Costa Rica, or were present to a much lesser degree.

Very soon after the Conquest it became apparent that those Spaniards settling in the Central Plateau of Costa Rica would have to do their own work, on more or less equal terms. The relatively small Indian populations continued to live in their own communities, some distance from the centers of Spanish settlement. Costa Rica itself was remote, far from the seats of Spanish administrative authority. The Captain General was in Guatemala and the Bishop was in Nicaragua. The Governor of Costa Rica, in Cartago, exercised a degree of power which, by reason of distance, isolation, and poverty, was much attenuated. Thus, the enervating burden of imperial bureaucracy weighed less heavily in Costa Rica than elsewhere, leaving some room, and some need, for freedom of action among the farmers of the Central Plateau.

When the Wars of Liberation broke out across Spanish America, Costa Rica did not break away from the Crown, it fell away. In the words of one historian, Costa Rica "received its independence by mail," being informed by messenger that the municipal council of Guatemala had declared the independence of all of Central America some four weeks earlier. The same factors that had kept the area on the fringe of Spanish power allowed the newly-independent State of Costa Rica considerable autonomy during its year-and-a-half affiliation with the Mexican Empire and its quarter-century association with the turbulent, dictator-prone Central American Federation. Full independence, which dates from the promulgation of the Republic of Costa Rica in 1848, coincided with the achievement of economic independence

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2. An excellent summary of those characteristics of the colonial epoch which were conducive to the development of democracy is found in Carlos José Gutiérrez, Libertad, Derecho y Desarrollo Político, in DERECHO CONSTITUCIONAL COSTARRICENSE 48-54 (Carlos José Gutiérrez ed., 1983).


4. Id.

5. Gutiérrez, supra note 2, at 45.
through the cultivation and exportation of coffee.\textsuperscript{6} Although this led to the emergence of a "coffee aristocracy," the dangers inherent in the situation were minimized by several factors. First, the nature of coffee cultivation in the Central Plateau required even the "aristocrats" to work closely with their employees. Second, the availability of open land just beyond the coffee-growing areas permitted pioneers to move out from the old population centers and establish themselves as small but independent farmers. Third, from the time the national government began receiving significant revenue from the coffee trade, it began to invest in education,\textsuperscript{7} thus reinforcing the ability of a large percentage of the population to participate, in an orderly way, in public affairs.

This is not to suggest that there were not dictatorships and invidious discrimination; but the dictatorships were fewer and of shorter duration,\textsuperscript{8} and the discrimination, less severe and less extensive than in most of Costa Rica's neighbors.\textsuperscript{9} In short, the conditions were such that the law could take hold, and democracy could grow.

\section*{III. The Early Constitutions}

Since gaining its independence from Spain, Costa Rica has had thirteen constitutions of its own, and in addition was at least technically subject for brief periods in its early history to the Provisional Regulations of the Mexican Empire and the Constitutions of the Federal Republic of Central America.\textsuperscript{10} Ten of the thirteen Costa Rican constitutions were promulgated prior to 1871, during the fifty-year period which Costa Rican constitutionalists often refer to as the "era of experimentation."\textsuperscript{11} The experiments were many: the country moved into

\textsuperscript{6} The relationship between the economic independence achieved from the export of coffee, and complete political independence is explained in detail in SÁENZ, \textit{supra} note 3, at 327-403.


\textsuperscript{8} In this century, constitutional government has been interrupted only twice: 1917-20 and 1948-49.

\textsuperscript{9} Regarding class, race, and ethnicity, see BIESANZ ET AL., \textit{supra} note 7, at 53-70.

\textsuperscript{10} A detailed and intensive study of Costa Rica's constitutional development before 1871 is SÁENZ, \textit{supra} note 3. Other important works, dealing with all of the country's constitutions, are MARIO ALBERTO JIMÉNEZ, DESARROLLO CONSTITUCIONAL DE COSTA RICA (1979) and HERNAN G. PERALTA, LAS CONSTITUCIONES DE COSTA RICA (1962). The last work includes the texts of all of the country's constitutions.

and out of the Central American Federation several times,\textsuperscript{12} oscillated from strong legislatures with weak executives to the opposite arrangement,\textsuperscript{13} tried both bicameral and unicameral legislatures,\textsuperscript{14} and, for a time, even attempted to end local rivalries by rotating the seat of government every six months among the country’s four major cities (Alajuela, Cartago, Heredia, and San José).\textsuperscript{15} Similarly, the procedures for enforcing constitutional guarantees underwent numerous changes.

The French Revolution enormously influenced all parts of the Civil Law world, including the newly-independent countries of Latin America. The revolutionists’ hatred of the judges of the ancien régime and their glorification of legislative power caused France to place ultimate authority for safeguarding the constitution in the legislature, or in one or another instrumentality of the legislature.\textsuperscript{16} Spain followed the French model, providing in its Constitution of 1812 (the Constitución de Cádiz) that the legislature should take notice of violations of the constitution, correct them, and take appropriate action against those responsible for the violations.\textsuperscript{17} The Spanish model, in turn, influenced much of Spanish America. Costa Rica’s early constitutional documents entrusted the enforcement of constitutional norms to the legislature, or to specialized agencies thereof.\textsuperscript{18} 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. The system of legislative control of constitutionality has been aptly de-

\textsuperscript{12} Costa Rica was part of the Federal Republic of Central America established by the federal constitution of 1824. Costa Rica declared its separation from the federation in 1838, but rejoined in 1842. In 1848, recognizing that the federation had in fact collapsed, Costa Rica proclaimed itself a republic and declared full and complete independence. JIMÉNEZ, supra note 10, at 56-68, 105-08.

\textsuperscript{13} This “pendulum theory” is developed in some detail by JIMÉNEZ, supra note 10, at 113-94, and is summarized in CARLOS JOSÉ GUTIÉRREZ, EL FUNCIONAMIENTO DEL SISTEMA JURÍDICO 22-25 (1979).

\textsuperscript{14} Id.

\textsuperscript{15} The so-called “Ambulatory Law” was enacted in 1834. See JORGE SÁENZ CARBONELL, LOS AÑOS DE LA AMBULANCIA 55-65 (1st ed. 1989).

\textsuperscript{16} CONST. OF YEAR VIII (1799) arts. 21, 28 (France); CONST. OF 1852 arts. 25, 26, 29 (France). The Constitution of Bayonne, the 1808 document prepared at Napoleon’s direction for the governance of Spain, contained a similar arrangement.

\textsuperscript{17} CONSTITUCIÓN POLÍTICA DE LA MONARQUÍA ESPAÑOLA (Mar. 19, 1812) art. 372 (Spain).

\textsuperscript{18} Pacto Social Interino Fundamental de Costa Rica (Dec. 1, 1821), arts. 48-56; Primer Estatuto Político de la Provincia de Costa Rica (Mar. 17, 1823), arts. 46-47; Segundo Estatuto Político de la Provincia de Costa Rica (May 16, 1823), arts. 50-56.
scribed by one present-day Costa Rican jurist as, "directing the mice to safeguard the cheese."

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 branch of government, the Conserving Power, to be exercised by a Council whose members were popularly elected.20 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.21

All control of constitutionality was eliminated when, after the coup of 1838, the dictator Braulio Carrillo effectively united all governmental power in himself.22 Carrillo's dictatorship was overthrown in 1842; his 1841 "Law of Bases and Guarantees" was nullified, and the 1825 Constitution was restored as a provisional measure.23 The new Constitution of 1844 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.24 The Constitution of 1847 abolished the Senate and charged the unicameral Congress with the by-then traditional legislative duty of watching over the Constitution.25

With the Constitution of 1859, Costa Rica reestablished a bicameral legislature and charged it with maintaining the Constitution.26 The

20. Ley Fundamental del Estado Libre de Costa Rica (Jan. 25, 1825), arts. 60-75.
22. JIMÉNEZ, supra note 10, at 63-65. Ley de Bases y Garantías (Mar. 8, 1841), arts. 4, 5. This law, of constitutional status, was dictated by Carrillo and made him "First Chief" for life.
23. Decreto LXXXVI (Aug. 27, 1842), art. 8.
24. CONSTITUCIÓN POLÍTICA DEL ESTADO DE COSTA RICA (Apr. 9, 1844) art. 126.
25. CONSTITUCIÓN POLÍTICA (Feb. 10, 1847) arts. 69, 188 (Costa Rica).
26. CONSTITUCIÓN POLÍTICA (Dec. 27, 1859) arts. 66, 137 (Costa Rica) [hereinafter CONST. (1859)].
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.\textsuperscript{27} 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 a certain provision of the Municipal Law to be unconstitutional.\textsuperscript{28} The Congress, relying on its duty to maintain the Constitution, responded by declaring the law unconstitutional.\textsuperscript{29} The President, in a patently unconstitutional move, dissolved the Congress and ordered new elections.\textsuperscript{30}

Not surprisingly, subsequent Congresses, also convened under the 1859 Constitution, did not attempt to exercise control over constitutionality.\textsuperscript{31} On the positive side, the 1859 Constitution did make constitutional supremacy an explicit principle. It also introduced the right of habeas corpus. Article 37 provided: "The Republic recognizes the right of Habeas Corpus. The manner of putting this right into practice shall be determined by law."\textsuperscript{32} Although implementing legislation would be long in coming, habeas corpus became a permanent part of Costa Rican constitutional law, and the 1859 guarantee would prove to be an important step in the development of a comprehensive system for the enforcement of constitutional rights.

The Constitution of 1869 is significant because of its attempt to formally involve the judiciary in the process of constitutional control. It retained the boilerplate language about legislative control,\textsuperscript{33} but added a provision empowering the Supreme Court to suspend, on the petition of any citizen, the enforcement of legislative dispositions contrary to the constitution.\textsuperscript{34} After suspending a law, the Supreme Court was to submit the matter to the Congress, which would definitively decide the question of its constitutionality.\textsuperscript{35} The Constitution of 1869 was abrogated by a coup in the Spring of 1870, and its plan of limited judicial review was never implemented.\textsuperscript{36}

\textsuperscript{27} Id. art. 11.
\textsuperscript{28} Sáenz, supra note 21, at 38.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} CONST. (1859) art. 37.
\textsuperscript{33} CONSTITUCIÓN POLÍTICA (Apr. 15, 1869) art. 146 (Costa Rica).
\textsuperscript{34} Id. art. 135.
\textsuperscript{35} Id.
\textsuperscript{36} Sáenz, supra note 21, at 39.
IV. THE CONSTITUTION OF 1871

Although it was not apparent at the time, the promulgation of the Constitution of 1871 marked the end of the era of constitutional experimentation. The early constitutions had sought to maintain stability and liberty by dividing governmental power between the legislative and executive branches. Whenever one or the other became too powerful, a new constitution was adopted to correct the imbalance; but the ultimate formal safeguard of constitutionality was based on the French idea of legislative control.

By 1871, certain important aspects of constitutionalism had been established. First of all, it was clear that the constitution should be rigid, that is, the constitution should be the supreme law of the land, and all other legal norms should conform to it (a principle obviously rejected in the 1825-1838 arrangement under which Congress, by a qualified majority, could re-enact an unconstitutional law). Second, it was obvious that the legislature, no matter how structured, could not be relied on to ensure the constitutionality of statutes and official conduct. Third, the establishment of habeas corpus in 1859 and of limited judicial review in 1869 evidenced an increasing belief that effective enforcement of the constitution required some role for the judiciary.

The Constitution of 1871 was to remain in effect, with three interruptions, for more than seventy years. It said no more about enforcing constitutional norms than its predecessors, and did nothing to resolve the ambiguities of earlier constitutions. The Supremacy Clause (article 17) provided that dispositions of the Legislative or Executive Branch contrary to the Constitution were void and of no effect, but did not specify who would decide questions of constitutionality. Article 132 imposed on the unicameral Congress the usual duty to look for and correct any violations of the constitution. The guarantee of habeas corpus relief was retained, but the 1869 provision for limited judicial review was eliminated. It was within this sparse and unpromising

38. Constitución Política (Dec. 7, 1871) art. 17 (Costa Rica).
39. Id. art. 132. In 1943, because of the addition of several provisions to the constitution, art. 132 was re-numbered art. 137.
40. Id. art. 41.
41. Several writers have noted that the constitution of 1871 was in some respects a return to the principles of the Spanish Constitution of 1812. Jiménez, supra note 10, at 138-41; Sáenz, supra note 21, at 39.
framework that an effective system of enforcing constitutional norms would evolve.

Costa Rica's present system of constitutional control may be said to have begun in 1887, with the promulgation of the Organic Law of the Tribunals (Organic Law). The law prohibited those who administered justice from applying any statutes, decrees, or orders which were contrary to the Constitution, thereby establishing judicial review as a power and duty of all judges in the country. The same Organic Law gave the Supreme Court jurisdiction over habeas corpus actions. Despite the Organic Law, the early decades of judicial review were difficult.

The first recorded exercise of judicial review, Chinchilla v. Ureña, decided in 1890, went smoothly enough. A landowner brought an action against his neighbor to obtain an easement of ingress and egress across the latter's land. The defendant argued that the provision of the civil code on which the plaintiff relied violated the constitutionally-guaranteed right of property. The court 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 appellate court, again on the merits. The case appears to have attracted little attention.

Two years later, a military officer was convicted by a civilian court of unlawfully detaining another person. The officer argued that the court lacked jurisdiction because the crime was by statute an offense against military discipline, and was therefore within the exclusive jurisdiction of the military tribunals. The prosecution argued that the Constitution defined military jurisdiction more narrowly than did the statute, thereby placing the crime in question within the jurisdiction of the civilian courts. The Supreme Court held that the civilian court had jurisdiction. Although the Court did not explicitly declare the

42. Ley Orgánica de Tribunales, Decreto No. 11 (Mar. 29, 1887). The law entered into effect January 1, 1888.
43. Id. art. 8, § 1.
44. Id. art. 53, § 5.
45. Sentencia de Casación de las 14 hrs. del 10 de marzo de 1890 (Judgment of 14:00, Mar. 10, 1890, Cass.) (Costa Rican judicial decisions are often identified by the date and time of their issuance).
46. Id.
47. Sentencia de Casación de las 13 hrs. del 15 de julio de 1892 (Sibaja Case) (Judgment of 13:00, July 15, 1892, Cass.).
48. Id.
statute relied on by the soldier to be unconstitutional, it did say that it was for the judiciary and not the legislature to definitively interpret the Constitution.\textsuperscript{49} By refusing to apply the statute, the Court impliedly determined that the statute was unconstitutional.

Habeas corpus had more difficult beginnings. In 1891, President José Joaquín Rodríguez suspended constitutional guarantees and imprisoned a number of his political opponents, including the historian Ricardo Fernández Guardia. The prisoner brought a petition for habeas corpus, arguing that his confinement was unconstitutional. The Supreme Court agreed and ordered Fernández's release.\textsuperscript{50} President Rodríguez ignored the decision. The President of the Supreme Court, Ricardo Jiménez Oreamuno, resigned in protest. In the long run, the case increased public support for the Court, but attempts to strengthen habeas corpus through legislation to implement the constitutional guarantee did not succeed until 1909.\textsuperscript{51}

The ambiguity of the Constitution of 1871 about the locus of ultimate authority to decide constitutional questions was underscored by three events in the first quarter of this century. In 1911, President Jiménez Oreamuno (who twenty years earlier had resigned the Supreme Court presidency over the Fernández case) declared that two statutes unconstitutionally infringed on the powers of the presidency and refused to apply them.\textsuperscript{52} He asserted it was the right and duty of all who exercised public authority to refuse to apply unconstitutional laws.\textsuperscript{53}

Four years later, with the outbreak of World War I, the Congress gave President Alfredo González Flores power to legislate in certain economic and financial matters. Using this power, the president established new prerequisites to the recording of certain documents. An individual named Alfaro presented a deed for recording, without having complied with the new requirements.\textsuperscript{54} The Register refused to accept the deed, and Alfaro brought suit to compel him to record it, arguing that the new prerequisites were the product of an unconstitutional delegation of legislative power. The Supreme Court refused to apply the new requirements, and ordered that the document be re-

\textsuperscript{49} Id.
\textsuperscript{50} Gutiérrez, \textit{supra} note 19, at 55-56.
\textsuperscript{51} The legislative struggle which culminated in the Habeas Corpus Law of 1909 is described in Gutiérrez, \textit{supra} note 19, at 56-57.
\textsuperscript{52} Resolución No. 8 de 15 de marzo de 1911 (Mar. 15, 1911).
\textsuperscript{53} Id.
\textsuperscript{54} See Sentencia de Casación de las 14:30 de 2 de marzo de 1915 (Alfaro v. Registrador) (Judgment of 14:30, Mar. 2, 1915, Cass.).
corded. President González, fearing that the decision would prevent him from dealing with the economic crisis brought on by the war, immediately appealed to the Congress, as the “supreme authority in constitutional matters,” to declare the law (and other laws promulgated by the President pursuant to his emergency powers) constitutional, and to ratify the President’s actions in the matter. The Congress, while acknowledging that the Supreme Court had not exceeded its powers in refusing to apply a law which it believed to be unconstitutional, granted the President’s request and ratified the economic emergency laws.

Under the pressure of the economic crisis provoked by the European conflict, the government of President González fell victim to a coup led by the Minister of War, Federico Tinoco. Tinoco had himself elected president and convened a constituent assembly which replaced the Constitution of 1871 with a new charter. The Tinoco government itself fell in less than three years. In 1919, the Provisional President, Francisco Aguilar Barquero, issued a decree declaring that the Tinoco government was unlawful because it had come to power in violation of the Constitution of 1871, and that its actions were null and of no legal effect unless ratified by the Provisional Government. When the new Congress convened in 1920 (under the 1871 Constitution), it enacted, over the veto of the new constitutional president, Julio Acosta, a statute called the Law of Nullities. The Law of Nullities declared the constitution and laws promulgated under the Tinoco regime unconstitutional (that is, contrary to the 1871 Constitution). As one might expect, the Law of Nullities created problems for many persons who had acquired rights under laws passed during the Tinoco regime. A carnival operator whose carousel had been shut down by municipal authorities sued the municipality and won. On appeal, the judgment was reversed because the jurisdiction of the court of first instance was based on a 1918 statute which had been invalidated by the Law of Nullities. The National Treasury refused...
to pay the holder of a government note issued while Tinoco was in power. In these and many other disputes, individuals argued that the Law of Nullities violated the 1871 Constitution. The argument most frequently made in these disputes was that the Law of Nullities violated the 1871 Constitution (the argument most frequently made was that the Law of Nullities violated article 26 of the Constitution, which provided that laws shall not have retroactive effect). The Supreme Court, in both of the cases mentioned above, and in other decisions on the subject, held that the Law of Nullities was not unconstitutional; however, various other courts, in other cases decided during the 1920's, held otherwise. As a practical and legal matter, then, the Law of Nullities was, at any given time, constitutional in some courts and unconstitutional in others.

The events of the first quarter of the twentieth century demonstrated two fundamental problems with the system of constitutional control which had developed under the Constitution of 1871. First of all, it was not clear what branch of government had the final word in constitutional matters. The Congress, the President, and the Supreme Court had each spoken definitively on constitutional questions at one time or another, and each had deferred, at least implicitly, to each of the others. This uncertainty, which had its legal roots in the Constitution of 1871 and in the tradition inherited from earlier constitutions, was compounded by the country's occasional political instability which, while modest by Latin American standards, was great enough to slow the development of a system of constitutional decision-making.

The second problem was made evident by the Law of Nullities. Costa Rica had always adhered to the traditional Civil Law principle, given unprecedented prominence by the French Revolution, that judicial decisions have binding effect only in the cases in which they are rendered. Thus, the litigation provoked by the Law of Nullities produced sharp divisions among judges and, because of the public importance of the questions involved, the result was chaotic. The Supreme Court acknowledged its own limitations, and its virtual withdrawal

63. The confusion is described and the cases summarized in Sáenz, supra note 21, at 56-61.
64. The Constitution of 1871 was suspended twice: from July 30, 1876 to August 1, 1882; and from September 11, 1892 to May 1, 1894. In addition, it was abrogated by Tinoco on January 27, 1917, and not fully restored until May 1, 1920.
from constitutional decision-making, in a 1927 case in which it upheld the constitutionality of the Law of Nullities. 66 The Court acknowledged its statutory power and duty (based on the Organic Law of the Tribunals) to refrain from applying unconstitutional laws, but said: "it cannot be maintained that . . . Congress has conferred on the courts the power to define and control, in substance and form, [Congress'] own power to make laws, to such an extent as to permit this court to decline to apply the . . . [Law of Nullities]."67

V. JUDICIAL SUPREMACY

It is difficult, and perhaps pointless, to attempt to determine whether the problems created by the system of constitutional control in effect since 1888 were ones of underprotection or overprotection of the Constitution. In either event, the result was unsatisfactory. A significant step toward order and clarity came with the 1938 reform of the Organic Law of the Judicial Power (successor to the Organic Law of the Tribunals). Since 1888, the old Law had provided that public officials should not apply laws or decrees contrary to the Constitution. The comparable provision of the 1938 Law read: "Those who administer justice shall not apply laws, decrees, orders, or resolutions which are contrary to the Constitution, when their inapplicability has been determined by the Supreme Court."68 (The italicized language was added in 1938).

In the same year, the Code of Civil Procedure was amended to create a new form of action, the action of unconstitutionality, 69 by which a litigant in an ordinary case could challenge the constitutionality of a statute or decree relevant to his case by bringing a separate and distinct action, called an action of unconstitutionality, in the Supreme Court. Upon commencement of the action, the Supreme Court would instruct the judge before whom the petitioner's case was pending not to enter judgment until the questions of unconstitutionality raised by

67. Id.
68. Ley Orgánica del Poder Judicial [Organic Law of the Judicial Power], Ley No. 8 de 29 de noviembre de 1937 (Nov. 29, 1937), art. 8 (effective Jan. 1, 1938). The article was repealed in 1989.
69. 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, Ley No. 7130 del 16 de agosto de 1989 (Aug. 16, 1989), which entered into effect May 3, 1990.
the action were decided by the Supreme Court. Similar notice was given to the entire judiciary not to apply the challenged law until its constitutionality was determined. The petitioner then submitted a written brief in support of his allegations of unconstitutionality, and other parties to pending suits involving the challenged statute were permitted to submit briefs as well. The Public Ministry also had the right to file a brief. The case was decided on the briefs, without oral argument. If the Supreme Court, by an absolute two-thirds majority, determined that the law was unconstitutional, then that law could not be applied in the underlying case or in any proceeding thereafter.

The 1938 reforms had two principal effects: to establish judicial supremacy in constitutional matters and to concentrate judicial review in the Supreme Court. The latter was done not only to end the confusion and inconsistency which had characterized the previous system, but also as a sign of respect for the other branches of government. Many legislators who otherwise favored judicial review believed it was inappropriate to permit judges of the lowest courts to overrule the highest executive and legislative authorities. Similarly, the two-thirds requirement was an important gesture to the political branches of government, designed to ensure that only in those instances where unconstitutionality was clear could the Supreme Court set aside the dispositions of the other branches.70

Discussion continues among Costa Rican constitutional scholars over the extent to which the example of the United States influenced the 1938 reforms. One of the principal sponsors of the reforms has stated that the United States model, as adapted by Argentina, served as a guide.71 There is an important similarity in that Costa Rica, like the United States and Argentina and unlike most European Civil Law countries, permitted the adjudication of constitutional questions only when such questions arose in the context of actual lawsuits between adversary litigants; but the Costa Rican decision to concentrate judicial review in a single tribunal, the Supreme Court, was an obvious departure from the United States model. In another respect, the United States experience was important, but in a negative way. In 1935 and 1936, when the Costa Rican reforms were being drafted, many Costa Ricans feared judicial supremacy in constitutional matters would lead to the same problem which the United States was then experiencing: that is, that the judges would use judicial review of constitutionality

70. ANTONIO PICADO, EXPLICACION DE LAS REFORMAS A LA LEY ORGÁNICA DEL PODER JUDICIAL 27 (1st ed. 1937).
71. This statement, by Antonio Picado, is evaluated in RUBÉN HERNÁNDEZ VALLE, EL CONTROL DE LA CONSTITUCIONALIDAD DE LAS LEYES 93 (1978).
as a pretext for substituting their own policy preferences for those of the other branches of government. The desire to avoid such a situation was an important reason for the requirement that declarations of unconstitutionality be by a two-thirds majority of the members of the Court.\(^7\)

Although the 1938 reforms appeared to establish a clear and complete arrangement for constitutional control based on judicial review, it soon became evident there was a significant gap in the system. The 1940s were a turbulent decade in Costa Rica, in part because of the widespread belief that the government of President Rafael Calderón Guardia, since 1942 in alliance with the Communist Party, had rigged the 1944 elections to secure the presidency for the government candidate, Teodoro Picado. As popular dissatisfaction increased, the government became more heavy-handed. In 1947, the police closed four opposition radio stations.\(^7\) The station owners brought a habeas corpus action, alleging that the closing of the stations violated their constitutionally-guaranteed freedom of speech. (Since Costa Rican judges, like Civil Law judges elsewhere, have no general power to grant injunctive relief, the station owners believed, probably correctly, that habeas corpus was the only proceeding which might provide them with effective — that is, timely — relief.) The Supreme Court denied the petition, holding that habeas corpus was limited to cases of illegal detention.\(^7\)

The closing of the stations, and other repressive government actions, including the annulling of the 1948 presidential election (apparently won by the opposition candidate Otilio Ulate), led to armed conflict, from which the insurgents, led by José Figueres, emerged victorious. The provisional government, headed by Figueres, called elections for a constituent assembly. The assembly wrote a new Constitution, which entered into effect November 7, 1949, and has been in operation ever since.

VI. THE CONSTITUTION OF 1949

The Constitution of 1949 gave the 1938 reforms constitutional status. Article 10 provided, in pertinent part:

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 the power to declare the

\(^7\) Antonio Picado, *Explicación de las Reformas al Código de Procedimientos Civiles* 418-19 (1937).

\(^7\) Sesión Extraordinaria de la Corte Plena del 25 de julio de 1947 (July 25, 1947).

\(^7\) Id.
unconstitutionality of dispositions of the Legislative Branch and decrees of the Executive Branch.

It shall be determined by statute which tribunals shall have jurisdiction to determine the unconstitutionality of other dispositions of the Executive Branch.\textsuperscript{75}

Because the limitations of habeas corpus had been demonstrated in 1947, some members of the Constituent Assembly wanted to replace it with amparo, a summary procedure created in mid-nineteenth century Mexico to protect all individual rights.\textsuperscript{76} However, the assembly decided instead to retain habeas corpus as a protection against illegal detention and to adopt a limited version of amparo to protect all those constitutional rights not protected by habeas corpus.\textsuperscript{77} Article 48 of the new Constitution provided that habeas corpus would remain within the exclusive jurisdiction of the Supreme Court, and amparo jurisdiction would be determined by statute.\textsuperscript{78}

Another new review procedure created by the 1949 Constitution was judicial review of presidential vetoes. Article 128 provided that if the president vetoed a bill on grounds that it was unconstitutional, and the Legislative Assembly re-passed the bill without meeting the president's constitutional objections, then the Supreme Court would decide the constitutionality of the disputed provision.\textsuperscript{79} If the Court, by a two-thirds vote, decided that the provision was indeed unconstitutional, then the Assembly would be required either to make appropriate changes in the bill or abandon the project.\textsuperscript{80} Otherwise, the bill would be determined to be constitutional and the president could not again veto it on grounds of unconstitutionality.\textsuperscript{81}

The Constitution of 1949 established a Legislative Power, exercised by a unicameral Legislative Assembly whose fifty-seven members, called deputies, are elected by direct popular vote for four-year terms

\textsuperscript{75} CONSTITUCI\'N POL\'ITICA DE LA REP\'UBLICA DE COSTA RICA (1949) art. 10 (since amended) [hereinafter CONSTITUCI\'ON]. A thorough study of the action of unconstitutionality under the system that prevailed from 1949 to 1989 is found in RUB\'EN HERN\'ANDEZ VALLE, EL CONTROL DE LA CONSTITUCIONALIDAD DE LAS LEYES, passim (1988).

\textsuperscript{76} For an explanation of the Mexican amparo, see Hector Fix Zamudio, A Brief Introduction to the Mexican Writ of Amparo, 9 CAL. W. INT'L L.J. 306 (1979).

\textsuperscript{77} The discussion by the Constituent Assembly is summarized in Guti\'errez, supra note 19, at 63.

\textsuperscript{78} CONSTITUCI\'ON art. 48.

\textsuperscript{79} CONSTITUCI\'ON art. 128; see also RUB\'EN HERN\'ANDEZ VALLE, LA TUTELA DE LOS DERECHOS FUNDAMENTALES 229-44 (1990).

\textsuperscript{80} See supra note 79.

\textsuperscript{81} Id.
The Executive Power is exercised by the President, who is elected by direct popular vote for a four-year term, and by the Ministers of Government, who head the various executive departments and are appointed by the President. The country also has two Vice-Presidents, elected by direct popular vote for terms which coincide with that of the President. The Constitution originally permitted the re-election of a former president who had been out of office for at least eight years, but a 1969 amendment now prohibits any presidential re-election.

The judicial power is exercised by the Supreme Court of Justice and such other tribunals as are established by law. Until 1989, the Supreme Court was composed of 17 members, called magistrates, elected by the Legislative Assembly for eight-year terms and retained for additional eight-year terms unless opposed by a two-thirds majority of the Assembly. Until 1989, the Supreme Court was divided into three chambers. The First Chamber, until 1989 composed of seven magistrates, has cassation jurisdiction in most civil, commercial, and contentious-administrative matters. The Second Chamber, then and now composed of five magistrates, has cassation jurisdiction in successions, bankruptcy, and family law. The Third Chamber, also composed of five magistrates, has cassation jurisdiction in criminal matters. The entire Court (Corte Plena) selects its own president and the presidents of the respective chambers, appoints the members of the lower courts, and exercises administrative control over the entire court system.

82. Constitución arts. 105-107. The Constitution of 1949 originally set the number of deputies at 45, but a constitutional amendment in 1961 increased the number to 57.
83. Constitución arts. 130, 134, 138, 139(1).
84. Id. arts. 135, 136, 138.
85. Id. art. 132, inciso 1, amended by Ley No. 4349 de 11 de julio de 1969 (July 11, 1969).
86. Id. art. 152.
87. The selection and tenure of magistrates are established by art. 158 of the Constitution of 1949. The number of magistrates was (and is) determined by statute and, until 1989, was set by arts. 61, 63, and 65 of the Organic Law of the Judicial Power. Since the adoption of the 1949 Constitution, only one incumbent Supreme Court magistrate who sought an additional term has been rejected by the Legislative Assembly.
88. "Cassation" is review by a higher tribunal of a lower court decision for error of law. It is thus roughly equivalent to appellate review as practiced in the United States. In civil law countries, "appeal" denotes review by a higher court as to fact and law. See John H. Merryman, The Civil Law Tradition 39-41, 120-21 (2d ed. 1985).
89. Organic Law of the Judicial Power, art. 61.
90. Id. art. 63.
91. Id. art. 65.
92. Constitución art. 162.
Judicial Branch. Until 1989, it also had original and exclusive jurisdiction over actions of unconstitutionality and petitions for habeas corpus. Magistrates of the Supreme Court may be removed from office only for cause, and only by a two-thirds majority of the Court itself. All legislative bills that affect the organization or operation of the judiciary must be submitted to the Supreme Court for review and, if opposed by the Court, may become law only if approved by a two-thirds majority of the Legislative Assembly. The Constitution requires that at least six percent of the government’s ordinary revenues be allocated to the Judicial Branch.

The Legislative Assembly, by statute, has established three levels of tribunals below the Supreme Court. They are, in ascending order, alcaldes, district judges, and Superior Tribunals. Alcaldes have jurisdiction over minor civil matters and are roughly equivalent to justices of the peace. District judges have original jurisdiction in civil, commercial, contentious-administrative, labor, and juvenile matters, and over lesser crimes. Superior Tribunals, which usually sit in three-judge panels, have original jurisdiction in major criminal cases, and appellate jurisdiction over most decisions of district judges. In keeping with its Civil Law tradition, Costa Rica has no juries.

The Constitution guarantees individual rights similar to those found in the constitutions of most other Western nations, and a number of social and economic guarantees as well.

By any test, the Constitution of 1949, and the system of judicial review which it established, functioned well. The Constitution itself has been in continuous operation since November 7, 1949. Elections have been free and orderly, opposition candidates have often won the presidency, and control of the Legislative Assembly has frequently

94. CONSTITUCIÓN art. 156; Organic Law of the Judicial Power, arts. 71(5), (10).
96. CONSTITUCIÓN art. 165.
97. Id. art. 167.
98. Id. art. 177, ¶ 2.
100. Id. arts. 79-88.
101. Id. arts. 78, 78 bis.
102. Individual rights and guarantees are set forth in articles 10-49; social rights and guarantees in articles 50-74; rights and duties related to education and culture, articles 76-89; political rights and duties, articles 90-98. Freedom of religion is guaranteed by article 75.
shifted from one party to another.\textsuperscript{104} The judiciary is independent, and judicial decisions are obeyed.\textsuperscript{105} The country's human rights record has been very good.\textsuperscript{106} Nevertheless, by the 1980's there was serious and increasing criticism of the system of constitutional adjudication. Some of the criticisms had to do with the structure of the system, while others were directed at the manner of implementation.

Some critics argued the allocation of adjudicatory authority made little sense: actions of unconstitutionality and habeas corpus were within the exclusive jurisdiction of the full Supreme Court.\textsuperscript{107} \textit{Amparo} actions were within the original jurisdiction of either the First Chamber of the Supreme Court or a district judge, depending on the rank of the respondent official.\textsuperscript{108} \textit{Amparo} decisions of the First Chamber were not reviewable, while decisions of district judges were reviewable (in cassation) by the Third Chamber of the Supreme Court.\textsuperscript{109} The constitutionality of statutes and executive orders could be challenged only before the full Supreme Court by means of an action of unconstitutionality,\textsuperscript{110} but the constitutionality of administrative regulations and municipal ordinances could be decided by a district judge in an ordinary contentious-administrative proceeding, and reviewed by a Superior Tribunal on appeal.\textsuperscript{111} Another structural anoma-

\textsuperscript{104} BIESANZ ET AL., supra note 7, at 177-207; WOODWARD, supra note 7, at 224-29.
\textsuperscript{107} CONSTITUCIÓN arts. 10, 48 (both since amended).
\textsuperscript{108} Ley de Amparo [Law of Amparo], No. 1161 del 2 de junio de 1950 (June 2, 1950) art. 6, amended by Organic Law of the Judicial Power, art. 61(3). The Law of Amparo was repealed in 1989, as was art. 61(3) of Organic Law of the Judicial Power.
\textsuperscript{109} Law of Amparo, art. 14.
\textsuperscript{110} CONSTITUCIÓN art. 10 (since amended).
\textsuperscript{111} The general rule was (and is) that in ordinary litigation a court could not decide a claim or defense based on the alleged unconstitutionality of a statute or decree. The Supreme Court exercised exclusive jurisdiction of such matters in the action of unconstitutionality. However, the provisions of the Constitution and the Code of Civil Procedure limit the action of unconstitutionality to the review of enactments of the Legislative or the Executive Power. See Code of Civil Procedure, supra note 69. In the decades since the adoption of the Constitution there was a substantial increase in the number and importance of autonomous administrative agencies with rulemaking power. The rules promulgated by those agencies, and the ordinances enacted by the country's municipalities, were not enactments of the Legislative or Executive Power and thus were not subject to review by the action of unconstitutionality. Amparo was likewise ineffective because of the judicially-created rule, discussed infra, that where the conduct complained of was undertaken in reliance on a statute, decree, rule, or ordinance, relief would
aly, the critics noted, was the fact that some constitutional questions, such as those raised by habeas corpus, *amparo*, or contentious-administrative actions) could be decided by either a single judge or a simple majority, while others (such as those presented in an action of unconstitutionality or review of a presidential veto) were subject to the two-thirds rule. The two-thirds requirement in unconstitutionality and veto cases was also seen by some as establishing a "minority veto" in constitutional matters.\(^1\)

Critics also charged that habeas corpus and *amparo* had been too limited, by statute or by judicial decision, to effectively protect constitutional rights. The Habeas Corpus Law limited the Supreme Court's inquiry to the following:

1. whether the authority responsible for the detention or restriction had jurisdiction to order such detention or restriction;
2. whether the act of which the petitioner is accused is punishable by a law enacted prior to the act;
3. whether the detention is made in violation of article 40 of the Constitution [which prohibits cruel and degrading treatment, perpetual punishment, and confiscation of property, and provides that any statement obtained by violence is null];
4. whether the petitioner was tried and convicted by judgment of a competent authority and whether a final sentence has been imposed upon [the petitioner];
5. whether the punishment imposed upon the petitioner is one which is provided for by law;
6. whether the order of detention or restriction of liberty was made pursuant to a lawful suspension of individual guarantees; and
7. in case of a lawful suspension of individual guarantees [as described in item 6, immediately above], whether those guarantees have yet been restored.\(^2\)

not be granted. To fill the gap, the Contentious-Administrative Jurisdiction Regulatory Law, adopted in 1966, expressly extended jurisdiction in contentious-administrative cases to include questions of the constitutionality of rules promulgated by administrative agencies and municipalities. Ley Reguladora de la Jurisdicción Contenciosa-Administrativa (No. 3667 de 12 de marzo de 1966) (Mar. 12, 1966), art. 20(2) (since repealed). Jurisdiction to review contentious-administrative decisions for error of law was given to the First Chamber of the Supreme Court by article 61(1) of the Organic Law of the Judicial Power. See Eduardo Ortiz Ortiz, *El Control de Constitucionalidad en Costa Rica: Antecedentes Históricos*, IUSTITIA No. 50, at 12-13 (Feb. 1991).

112. HERNANDEZ, supra note 71, at 114.
113. Ley de Habeas Corpus (No. 35 de 24 de noviembre de 1932) (Nov. 24, 1932), art. 9
It was frequently observed that the Law precluded inquiry into important matters such as the existence of probable cause for the detention.

Amparo was severely limited by the judicially-created rule that relief could be granted only where the conduct complained of was arbitrary.\textsuperscript{114} This meant that if the respondent official had acted in reliance on a statute or regulation, his conduct was not arbitrary, and amparo would not be granted.\textsuperscript{115} Even if the statute or regulation was inapplicable to the situation, had been misinterpreted by the official, or was itself unconstitutional, the respondent’s reliance was sufficient to defeat the petitioner’s claim for relief.\textsuperscript{116}

Another criticism of amparo was that it was available only against governmental conduct. A victim of unlawful private conduct was required to pursue ordinary actions, which proceeded much more slowly, were more expensive, and, because judges lacked the equity powers of their Common Law counterparts, offered more limited relief. Many of the individual guarantees contained in the Costa Rican Constitution — unlike similar guarantees in the United States Constitution — are framed not only as limitations on government, but as general guarantees, thus limiting private as well as governmental conduct.\textsuperscript{117} For these reasons, it was argued, amparo ought to be expanded to provide protection against private persons as well as public officials.

Perhaps the most pervasive criticism, and the most difficult to evaluate, was that the Supreme Court was simply too deferential to the other branches of government and therefore overly reluctant to find laws and actions unconstitutional. Most Supreme Court magistrates were career judges who had never been required (or permitted)...

\footnotesize{(since repealed). The operation of habeas corpus prior to 1989 is explained in Rubén Hernández Valle, Las Libertades Públicas en Costa Rica 63-66 (1980).

114. E.g., Corte Plena, Sentencia No. 147 de las 14 hrs. de 21 de noviembre de 1960 (Judgment of 14:00, Nov. 27, 1960). The operation of amparo prior to 1989 is explained, and the “arbitrariness rule” is forcefully criticized, in Hernández, supra note 71, at 66-76.

115. See supra note 114.

116. Id.

117. For example, article 29 provides:

Everyone may communicate ideas orally or in writing and publish them without prior censorship. . . .

Article 33, which originally guaranteed only “equality before the law,” was amended in 1968 by the addition of the provision that, “there shall be no discrimination whatever contrary to human dignity.”

Article 60 provides, in pertinent part that, “Employers and workers are free to organize themselves in order to obtain and retain economic, social, and professional benefits.”

Constitución arts. 29, 33, 60.)
to decide constitutional questions prior to their elevation to the highest
court. This lack of experience with constitutional questions, coupled
with the two-thirds rule and the message of restraint implicit therein,
may have made the magistrates reluctant to find unconstitutionality
either in statutes or in executive conduct. (It is true that the Supreme
Court denied relief in a large majority of constitutional cases that
came before it, but statistics may indicate nothing more than that the
claims themselves lacked merit. The point is that many jurists wanted
the Court to become more active. They wanted a new constitutional
atmosphere.)\textsuperscript{118}

\section*{VII. The 1989 Reforms}

The 1989 reforms had their formal beginning in 1982, when the
then-Minister of Justice, Carlos José Gutiérrez, suggested to the Su-
preme Court the need for a "law of constitutional jurisdiction" to
systematize and modernize constitutional adjudication. The Ministry
of Justice organized a Special Commission, chaired by Minister Gutiér-
rez, and the Supreme Court authorized one of its members, Magistrate
Fernando Coto Alban, to participate in the work of the Commission.
The Commission began meeting in August 1982, and used as its point
of departure a draft of the Organic Law of Constitutional Jurisdiction
prepared earlier that year by Dr. Rubén Hernández Valle, a Professor
of Constitutional Law and a member of the Commission. The Commiss-
ion produced its first draft in October 1983.\textsuperscript{119} The document was the
subject of extensive public discussion that led the Commission to pre-
pare a second draft, which it sent to the Supreme Court in June,
1985. The Court made significant revisions and transmitted its revised
draft to the Legislative Assembly in May 1986.\textsuperscript{120}

The Assembly, in turn, made numerous changes in the Court's
proposal and, as required by the Constitution, submitted the docu-
ment, now in the form of a bill, to the Court. In August 1989, the
Court formally made sixteen objections to various provisions of the

\textsuperscript{118} See, e.g., HERNÁNDEZ, supra note 71, at 110-16; Carlos José Gutiérrez, Control de
Constitución en Costa Rica, Speech Delivered in the Supreme Court of Justice of El
Salvador (June, 1989). Another much-criticized part of the pre-1989 system was the rule, found
in article 967 of the Code of Civil Procedure, supra note 69, that once the Court had declared
that a law was not unconstitutional, subsequent unconstitutionality actions raising the same
issues would not be entertained.

\textsuperscript{119} Special Commission of the Ministry of Justice of Costa Rica, Proyecto de Ley Orgánica
de la Jurisdicción Constitucional (Oct. 1983).

\textsuperscript{120} Corte Suprema de Justicia, Proyecto de Ley Orgánica de la Jurisdicción Constitucional
(May 6, 1986).
The Assembly acceded to some of the Court's objections, overrode others, and passed the bill. On October 11, 1989, the bill was approved by President Oscar Arias Sánchez and became the Law of Constitutional Jurisdiction.\textsuperscript{122} Earlier in 1989, in a parallel process, the Assembly initiated and approved three constitutional amendments designed to accommodate the new jurisdictional law.\textsuperscript{123}

**VIII. General Provisions**

The 1989 reforms consist of the amendment of articles 10, 48, and 128 of the Constitution,\textsuperscript{124} and the enactment of the Law of Constitutional Jurisdiction (the Law).\textsuperscript{125} The reforms establish a new, Fourth Chamber of the Supreme Court, called the Sala Cuarta or Sala Constitutional (the Sala), with exclusive, non-reviewable jurisdiction in constitutional matters.\textsuperscript{126} The Sala is composed of seven Magistrates elected by a two-thirds majority of the Legislative Assembly.\textsuperscript{127} Two of the original seven were chosen from among the members of the First Chamber (thereby reducing the size of the First Chamber to five), and the remaining members were new to the Court.

The Preliminary Provisions\textsuperscript{128} of the Law make a number of important changes. The definition of “constitutional jurisdiction” is expanded to include the protection of the supremacy not only of “constititutional norms,” but also of “constitutional principles.”\textsuperscript{129} The Sala has utilized

\begin{itemize}
\item \textsuperscript{121} Letter (No. 5765-89) from Gerardo O. Arce Portuguez, Acting Secretary of the Supreme Court of Justice, to Allen Arias Angulo, President of the Legislative Assembly (Aug. 18, 1989).
\item \textsuperscript{122} Ley de la Jurisdicción Constitucional [Law of Constitutional Jurisdiction], Ley No. 7135 de 11 de octubre de 1989 (Oct. 11, 1989) [hereinafter Law of Constitutional Jurisdiction].
\item \textsuperscript{123} Reforma a los Artículos 10, 48, 105 y 128 de la Constitución Política, Ley No. 7128 de 18 de agosto de 1989 (Aug. 18, 1989). The amendments to articles 10, 48, and 128 are discussed \textit{infra}. The amendment to article 105 does not deal with constitutional jurisdiction.
\item \textsuperscript{124} See \textit{Reforma a los Artículos 10, 48, 105 y 128 de la Constitución Política}.
\item \textsuperscript{125} Law of Constitutional Jurisdiction, \textit{supra} note 122.
\item \textsuperscript{126} \textit{Constitución} art. 10 (amended 1989); Law of Constitutional Jurisdiction, \textit{supra} note 122, arts. 4, 11. Article 7 of the Law gives the Sala exclusive jurisdiction to decide questions concerning its own jurisdiction.
\item \textsuperscript{127} Law of Constitutional Jurisdiction, \textit{supra} note 122, art. 4, ¶ 2.
\item \textsuperscript{128} See \textit{id.} arts. 1-14.
\item \textsuperscript{129} \textit{id.} art. 1; \textit{see also id.} art. 3.
\end{itemize}
this provision, finding, for example, that a “multipart system” (something not explicitly guaranteed in the constitutional text) is a “principle” of constitutional law.\textsuperscript{130}

Constitutional jurisdiction is further expanded to include the norms and principles of international human rights law in effect in Costa Rica.\textsuperscript{131} This elevation of international law has two aspects. First, the enforcement of human rights derived from International Law is now within the constitutional jurisdiction of the Sala even where those rights are not guaranteed in the Constitution; and second, the resolution of conflicts between ordinary laws and international treaties is now also part of constitutional jurisdiction. The Sala has utilized its international-law jurisdiction to declare that a statute terminating the pension rights of certain public officials convicted of crimes was unconstitutional because it violated, among other norms, the Convention of the International Labor Organization.\textsuperscript{132} Similarly, the Sala declared unconstitutional a provision of the Family Support Law because it did not provide the right of appeal which the Sala found to be guaranteed by the American Convention on Human Rights.\textsuperscript{133}

The Law provides that the jurisprudence of the Sala in constitutional matters is binding\textit{ erga omnes}, except upon the Sala itself.\textsuperscript{134} This is as important change. Prior to 1989, statutes and regulations declared unconstitutional by a two-thirds majority of the full Supreme Court became “absolutely null” by virtue of the express language of article 10 of the Constitution. However, decisions in habeas corpus and\textit{ amparo} cases bound only the parties. As part of the 1989 reforms, the nullification language was deleted from article 10. This change appears to have been made to eliminate the retroactivity problems sometimes created by the “absolutely null” language. Under the new system, all unconstitutionality, habeas corpus and\textit{ amparo} decisions constitute binding precedent, and it is for the Sala itself to determine the retrospective effect, if any, of each decision.\textsuperscript{135}

\textsuperscript{130} Sala Constitucional, Voto No. 980 de las 13:30 hrs. del 24 de mayo de 1991 (May 24, 1991).
\textsuperscript{131} Law of Constitutional Jurisdiction,\textit{ supra} note 122, art. 1.
\textsuperscript{132} Sala Constitucional, Voto No. 1147 de las 16:00 hrs. del 21 de septiembre de 1990 (Sept. 21, 1990).
\textsuperscript{133} \textit{Id.}; Sala Constitucional, Voto No. 282 de las 17:00 hrs. del 13 de marzo de 1990 (Mar. 13, 1990).
\textsuperscript{134} Law of Constitutional Jurisdiction,\textit{ supra} note 122, art. 13.
\textsuperscript{135} Article 91 of the Law provides that the effect of a declaration of unconstitutionality shall be retroactive to the date on which the norm entered into effect, without prejudice, however, to rights acquired in good faith. The same article proceeds to authorize the Sala to
Interestingly, when the Supreme Court reviewed the proposed Law in September 1989, prior to its passage, the Court recommended that the "binding effect" provision be extended to include the Sala's interpretations of statutes which it finds not to be unconstitutional.\textsuperscript{136} This recommendation was not adopted by the Legislature and consequently is not part of the Law. It remains to be seen how much of the Sala's decisions will come to have binding effect. Other dimensions of the "binding effect" rule will be discussed hereinbelow, as will certain other general provisions of the 1989 reforms.

IX. **Habeas Corpus**

The Law of Constitutional Jurisdiction expressly repeals the Habeas Corpus Law of 1932,\textsuperscript{137} and establishes new rules for habeas corpus actions.\textsuperscript{138} Habeas corpus now provides protection not only against governmental acts, but against omissions as well; and, whereas the old law provided relief only from unlawful denials of liberty, the new Law makes habeas corpus available as well against unlawful threats, interferences and restrictions on liberty.\textsuperscript{139} The purpose of this change is to give habeas corpus a "preventive" dimension, to provide protection against, for example, police harassment.\textsuperscript{140}

Perhaps the most important changes in habeas corpus law are those which require the judge who orders the detention of a suspected criminal to give a clear explanation of the legal and factual basis for the detention, and of the evidence against the prisoner.\textsuperscript{141} In the past, it was usually sufficient for the judge to state that, "there is evidence" to support the detention. Now the Sala can and does scrutinize the evidence in habeas corpus proceedings to determine its sufficiency.\textsuperscript{142}

As in the past, a respondent may be ordered to take such action, such as releasing the prisoner, as may be necessary to place the petitioner in the full enjoyment of his right of liberty.\textsuperscript{143} Under the
new system, the Sala may also order the respondent to pay money damages to the petitioner. This provision was adopted over the objection of the Supreme Court, which pointed out that there was already a procedure for recovering damages from public officials who abuse their authority, and that the new procedure might discourage the police from acting in doubtful situations.

During the drafting process, some had argued for the extension of habeas corpus to protect against actions of private persons who deprive others of liberty (as, for example, by telephone harassment, or denial of an easement of ingress and egress), but this proposal was not adopted.

X. AMPARO

The 1989 Amendment of article 48 of the Constitution expanded amparo so that it now protects not only all constitutional rights not protected by habeas corpus, but also all rights acquired under international law which are not protected by habeas corpus.

The Law of Constitutional Jurisdiction expressly repeals the Amparo Law of 1950, and establishes its own rules governing amparo actions. The Law expands amparo in several important ways. It eliminates the old, judicially-created “non-arbitrariness” defense, by which public officials could prevail by showing that they acted in reliance on a statute or regulation. The Law provides that amparo is available not only against arbitrary conduct, but also against conduct based on legal norms that are incorrectly interpreted by the official or mistakenly believed by the official to be applicable to the situation at hand. The Law makes clear, as prior law did not, that amparo protects against the unconstitutional application of a facially constitutional statute or regulation.

During the preparatory phase of the work on the Law, the Supreme Court recommended that questions of international and intragovernmental relations be expressly excluded from the protective scope

144. Id. art. 26, ¶ 2.
145. Informe, supra note 121, at 17-19.
147. CONSTITUCIÓN art. 48 (amended 1989).
148. Law of Constitutional Jurisdiction, supra note 122, art. 113(b).
149. Id. arts. 29-72.
150. Id. art. 29, ¶ 3.
151. Id.
of *amparo* on the grounds that *amparo* was meant to protect only individual rights and that the constitutional separation of powers required that political questions be non-justiciable. The Legislative Assembly rejected this proposal, thereby apparently indicating that such “political” matters should be subject to review in *amparo*. Whatever may be the merits of this decision, it is consistent with the overall tendency of the Law to expand *amparo*.

Another liberalization of *amparo* is the abandonment of the requirement that an *amparo* petitioner first exhaust ordinary legal procedures unless recourse to such procedures would cause undue delay. In the same vein, the new Law changes the rules concerning the suspensive effect of the commencement of an *amparo* action. Prior to 1989, although the *amparo* court had authority to order such suspension to prevent serious or irreparable harm pending adjudication of the merits, the filing of an *amparo* petition did not operate to suspend the activity complained of. The new Law reverses the procedure: the filing of an *amparo* petition has the effect of preliminarily enjoining the conduct complained of, unless the Sala orders otherwise.

In *amparo*, as in habeas corpus, a successful petitioner may now receive money damages from the government agency of which the respondent official is a functionary, and also from the offending individual if his conduct violates the Law of Public Administration. The imposition of personal liability on a public employee guilty of official misconduct is not new; however, in the past such liability was determined in a separate proceeding. Now in both habeas corpus and *amparo*, the determination of liability for money damages is within the constitutional jurisdiction of the Sala, although the calculation of damages remains within the jurisdiction of ordinary tribunals. The Supreme Court opposed this provision for the same reasons that it opposed the adjudication of liability for damages in habeas corpus cases.

One of the most important extensions of *amparo* is its availability, under the new Law, to obtain relief against acts of private parties.

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152. Corte Suprema de Justicia, Proyecto: Ley Orgánica de la Jurisdicción Constitucional (1986), art. 29(2); Informe, supra note 121, at 23-24.
153. Compare Law of Amparo, art. 3(d) with Law of Constitutional Jurisdiction, supra note 122, art. 31.
155. Law of Constitutional Jurisdiction, supra note 122, art. 41.
156. Id.
157. Id. art. 51.
158. Informe, supra note 121, at 33-36.
Article 57 of the Law provides that *amparo* actions may be maintained against private persons not only when such persons are performing or are charged by law with performing public functions, but also when they are, in law or fact, in such positions of power that ordinary remedies would not adequately protect the rights of the injured person.  

*Amparo* against private persons was one of the most controversial parts of the 1989 reforms. Its advocates argued that large and powerful private entities such as business enterprises and labor unions often have been able to engage in clearly unlawful activities such as dumping and illegal strikes, thereby injuring large numbers of people while ordinary litigation dragged on. Opponents of expansion argued that it is always government that poses the greatest threat to liberty, and that the efficacy of *amparo* against governmental actions will be diminished as the Sala becomes overwhelmed with private *amparo* suits that have little or nothing to do with constitutional rights.

The desire for *amparo* against private parties is understandable when one recalls that Costa Rican judges (like judges in most civil law countries) have no general powers comparable to the equity powers enjoyed by judges in Common Law systems. *Amparo* proceedings are unusual in that the tribunal may issue the equivalent of mandatory or prohibitory injunctions and, because of the summary nature of the action, may act quickly. The expansion of *amparo* to private disputes is also seen as a logical part of constitutional jurisdiction since many declarations of rights in the Costa Rican Constitution are not only limitations on government, but guarantees as against the whole world. Whatever may prove to be the merits of *amparo* against private parties, the critics have been proven right in at least one respect: the Sala is overwhelmed with *amparo* petitions, and the backlog is increasing.

*Amparo* actions, whether against public officials or private persons, may now be brought by “any person.” The Supreme Court objected to this liberalization, preferring the retention of the old rule that only

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159. Law of Constitutional Jurisdiction, *supra* note 122, art. 57.
161. Interview with Dr. Fernando Volio Jiménez, Professor of Constitutional Law and former President of the Legislative Assembly (June 4, 1990) [hereinafter Volio Interview].
162. MERRYMAN, *supra* note 88, at 55.
163. *Amparo* procedure is explained in HERNÁNDEZ, *supra* note 71, at 93-100.
164. See *supra* note 117.
in exceptional cases (such as claims on behalf of minors or disabled persons) could anyone other than the injured person commence an *amparo* action.\(^{167}\) It is not clear how much this relaxation of the standing requirement will encourage meddlesome suits.

Before 1989, actions of the Supreme Court, inferior courts and other personnel of the Judicial Power were not subject to review in *amparo*.\(^{168}\) Under the new system, exercises of *adjudicatory* power by the courts remain exempt from *amparo* review, but administrative (for example, managerial) decisions are now reviewable.\(^{169}\) This new system means, for example, that decisions of the full Supreme Court concerning the governance and operation of the Judicial Power are reviewable by the Sala in *amparo*.

A similar change concerns the activities of the Supreme Electoral Tribunal, an independent body whose members are elected by the Supreme Court. The Tribunal appoints pollworkers, investigates and adjudicates electoral questions, declares winners, and generally oversees the electoral process.\(^{170}\) In the past, its decisions were not subject to review.\(^{171}\) The 1989 Law provides that *amparo* does not lie against dispositions of the Supreme Electoral Tribunal "in electoral matters," thus presumably making non-electoral matters (such as, perhaps, personnel decisions) reviewable.\(^{172}\) This change is more controversial than the parallel change permitting review of administrative decisions of the Judicial Power. An earlier draft of the Law would have exempted from *amparo* review only the Tribunal’s declarations of election winners. The Supreme Court objected, arguing that the Tribunal should enjoy independence in all electoral matters. The Legislative Assembly broadened the exemption to conform to the Supreme Court’s position.\(^{173}\) Some jurists remain concerned that review in *amparo* of any

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168. Law of Amparo, art. 3(b).
170. CONSTITUCIÓN arts. 99-102.
171. CONSTITUCIÓN art. 103.
172. Law of Constitutional Jurisdiction, *supra* note 122, art. 30(d).
173. In its 1986 draft, the Supreme Court recommended that amparo not be made available against decisions of the Supreme Electoral Tribunal in electoral matters. Corte Suprema de Justicia, Proyecto: Ley Orgánica de la Jurisdicción Constitucional (1986), art. 29(4). The 1989 amendment of article 10 of the Constitution, promulgated in August of that year, exempted from the Sala’s review only those acts of the Supreme Electoral Tribunal that declare the winners of elections, and the Court’s 1986 recommendation that all of the Tribunal’s decisions in electoral matters be statutorily exempted from judicial review was deleted from the bill submitted by the Assembly to the Court in 1989. The Court objected to the deletion, and the Assembly restored the provision recommended in 1986 by the Court. See Informe, *supra* note 121, at 21-22.
decisions of the Tribunal may interfere with that body's ability to continue to ensure fair elections.\textsuperscript{174}

Another expansion of \textit{amparo} concerns the "right of correction and reply." Article 29 of the Constitution guarantees the right to publish one's thoughts orally and in writing, but also provides that those who abuse this right shall be responsible for the abuse in such manner as may be provided by law.\textsuperscript{175} The American Convention on Human Rights, which Costa Rica has signed and ratified, provides, inter alia, that anyone injured by the dissemination of inaccurate or offensive statements by a medium of communication has the right to reply or to make a correction using the same communications outlet.\textsuperscript{176} The Law of Constitutional Jurisdiction places the right of rectification or reply within the \textit{amparo} jurisdiction of the Sala.\textsuperscript{177}

Although this specific right originates not in the Constitution but in an international convention, its inclusion within the constitutional jurisdiction of the Sala seems to be consistent with the general rule, discussed hereinabove, that rights derived from international law in force in Costa Rica are part of constitutional jurisdiction.\textsuperscript{178} Critics emphasize that rectification and reply cases have at most an indirect relationship to constitutional law, that most such cases are in any event trivial, and that the Sala should not be burdened with the factfinding that will be required in such cases.\textsuperscript{179}

XI. THE ACTION OF UNCONSTITUTIONALITY

A comparison of the old and new actions of unconstitutionality properly begins with a consideration of article 10 of the Constitution. Before the 1989 amendment, article 10 read, in pertinent part:

Dispositions of the Legislative Power or of the Executive Power that are contrary to the Constitution shall be absolutely null. . . .

The Supreme Court, by vote of not less than two-thirds of all its members, has the power to declare the unconstitutionality of dispositions of the Legislative Power and decrees of the Executive Power.

\textsuperscript{174} Volio Interview, \textit{supra} note 161.
\textsuperscript{175} \textit{Constitución} art. 29.
\textsuperscript{176} American Convention on Human Rights, art. 14. Concerning the application of this guarantee in Costa Rica, see \textsc{Fernando Volio Jiménez}, \textsc{El Derecho De Rectificación o Respuesta} (1977).
\textsuperscript{177} Law of Constitutional Jurisdiction, \textit{supra} note 122, arts. 66-70.
\textsuperscript{178} \textit{Id.} art. 1.
\textsuperscript{179} Volio Interview, \textit{supra} note 161.
Jurisdiction to determine the unconstitutionality of other actions of the Executive Branch shall be determined by law. 180

As amended in 1989, article 10 reads:

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. This power shall not extend to judicial decisions of the Judicial Power, to declarations of election made by the Supreme Electoral Tribunal, or to such other matters as may be determined by law. 181

The most obvious change, other than the creation of the Sala itself, is the reduced majority required for determinations of unconstitutionality. Until 1989, the votes of 12 of the 17 members of the entire Supreme Court were required for a declaration of unconstitutionality. Now unconstitutionality may be declared by the affirmative vote of as few as four of the seven members of the Sala. An equally important change is the extension of the action of unconstitutionality to cover “norms of whatever nature.” This means that municipal ordinances and administrative rules, whose constitutionality in the past had been decided by contentious-administrative judges in ordinary proceedings, 182 are now within the exclusive jurisdiction of the Sala.

The immunities previously enjoyed by the Judicial Branch and the Supreme Electoral Tribunal have been narrowed. In the past, all rules promulgated by those entities were immune from challenge in unconstitutionality actions, just as their other decisions were immune from challenge in amparo. 183 Now only judicial, as opposed to administrative, decisions of the Judicial Power and only electoral decisions of the Supreme Electoral Tribunal enjoy immunity from actions of unconstitutionality. 184

180. Constitución art. 10 (prior to 1989 amendment).
182. See supra note 111.
183. The pre-1989 action of unconstitutionality was limited to challenging dispositions of the Legislative and Executive Powers. See supra note 75. Regarding amparo, see Law of Amando, art. 3.
184. Judicial acts are exempt from the action of unconstitutionality by article 10 of the Constitution, as are declarations of election made by the Supreme Electoral Tribunal. Constitución art. 10 (amended 1989). The Law of Constitutional Jurisdiction also exempts judicial acts,
Another change, potentially of great importance, is the final provision of the 1989 Amendment to article 10, allowing the legislature, by ordinary statute, to create exceptions to the constitutional jurisdiction of the Sala. Prior to the 1989 reforms, the right of the Supreme Court to decide the constitutionality of laws and decrees was beyond the power of the legislature to limit. The 1989 change probably reflects both a desire to establish a measure of legislative control over the constitutional process, and a recognition of the need to protect the Sala from an overwhelming caseload. In any event, the provision runs counter to the general trend of the 1989 reforms to constitutional jurisdiction. The practical significance of this newly-established legislative control is not yet clear.

The Law of Constitutional Jurisdiction repeals those statutes that had regulated the old action of unconstitutionality (recurso de inconstitucionalidad) and establishes in their place rules for the action of unconstitutionality (acción de inconstitucionalidad). The scope of the action is expanded to include review of certain laws for non-constitutional defects. For example, the action of unconstitutionality may now be used to challenge the validity of statutes and treaties on grounds that they were not adopted or approved in the manner prescribed by the internal procedural rules of the Legislative Assembly.

The action of unconstitutionality is now available against laws which violate the constitution "by omission," and also against unconstitutional omissions by public authorities. The former provision drew strong objection from the Supreme Court, which noted that the Law fails to specify what omissions are actionable. Some indication of the significance of "unconstitutionality by omission" was provided in 1990, when the Sala declared unconstitutional article 26 of the Support Law because of its failure to provide a right of appeal, as guaranteed by

and expands the immunity of the Supreme Electoral Tribunal to include all acts in electoral matters. Law of Constitutional Jurisdiction, supra note 122, art. 74.

185. For a criticism of this change as a "step backward," see Eduardo Ortiz Ortiz, De Una Reforma Desafortunada, LA NACIÓN (SAN JOSE), May 3, 1989, at 15A.
186. Law of Constitutional Jurisdiction, supra note 122, art. 113(c).
187. Id. arts. 73-95. The change of name from "recurso" to "acción" had long been advocated by Dr. Rubén Hernández Valle, who argued that the term "recurso" was a misnomer in that it denotes but another step in the same case, whereas the unconstitutionality proceeding is, and ever since 1938 was, a separate and distinct case. See HERNÁNDEZ, supra note 71, at 92.
188. Law of Constitutional Jurisdiction, supra note 122, art. 73(c), (e).
189. Id. art. 73(a).
190. Id. art. 73(f).
international law. The Costa Rican Constitution contains a number of programmatic provisions obligating the government to, for example, promote cooperatives and working-class housing and stimulate production and the adequate distribution of wealth.

It is not yet clear whether the Sala will consider itself empowered to enforce these provisions by, for example, requiring the Assembly to enact laws or to amend existing laws. As the Supreme Court pointed out when it reviewed the pending legislation, the Law provides no standards to guide the Sala in such situations. The Sala, however, seems to be developing its own standards. In a 1990 unconstitutionality action, the Sala declared “unconstitutional by omission” the failure of the President and the Minister of the Treasury to adopt regulations required by, and in implementation of, the Law of Public Sector Financial Equilibrium. The Sala said that since there is no express norm governing the form of relief in cases of unconstitutionality by omission, the Sala would apply, by analogy, the provision of the law of Constitutional Jurisdiction that empowers it, in cases of amparo for omission, to fix a reasonable time within which the respondent must comply. Accordingly, the Sala directed the President and the Minister of the Treasury to promulgate regulations within two months.

Many basic characteristics of the unconstitutionality proceeding remain the same. In most instances, the action of unconstitutionality still may be commenced only by someone who is a party to a pending case, although the new Law creates important exceptions which will be discussed below. The Law makes clear that the pending case may be a habeas corpus or amparo proceeding. As in the past, a party is permitted to bring an unconstitutionality action at any time before the judgment in the pending case becomes final. The Procurator General is “neutral” in the sense that he is free to take any position with respect to the constitutionality of the challenged law. However, as in the past, he almost always argues for its constitutionality.
As in the past, the parties to the underlying case have the right to participate in the unconstitutionality proceeding, but in a departure from pre-1989 practice, the Law requires that the Sala hear oral arguments in unconstitutionality cases.  

A major change in unconstitutionality litigation is the relaxation of the requirement that the action be brought by someone who is a party to a pending case in which the statute in question will or may be applied. The Law of Constitutional Jurisdiction eliminates the "pending case" requirement whenever the unconstitutionality action is brought by the Controller General, the Procurator General, or the Defender of the Inhabitants, or whenever by the nature of the subject there is no direct and individualized injury, or the interests involved are diffused or affect people collectively. One criticism of the old system had been the fact that constitutional questions could be decided only "incidentally;" that is, only when the constitutional decision was necessary to resolve a concrete case. The Supreme Court made no objection to this liberalization, and, in its Report to the Legislative Assembly, noted that environmental protection and public health might be good illustrations of matters where interests were diffuse and the effects collective.

In 1989, an individual citizen who was not a party to a pending case commenced an unconstitutionality action challenging the country's system of financing political campaigns. The Sala held that the plaintiff asserted a "diffuse" interest, and could therefore prosecute the action. Several months earlier, the Sala upheld the right of an individual citizen to maintain an action of unconstitutionality challenging the failure of the Executive Power to promulgate economic regulations and make fiscal evaluations, as allegedly required by statute. The Sala concluded that the nature of the matter was such that there could be no direct or individual injury, and therefore the plaintiff had standing. These cases suggest that the Sala is giving a broad interpretation

202. Id. arts. 10, 81, 85. The Law gives the Sala discretion to permit oral argument in other classes of constitutional cases, but the Sala rarely does so. Id. art. 10.
203. Id. art. 75.
204. The exclusive use of the "via incidental" was criticized by, for example, Dr. Rubén Hernández Valle. See HERNÁNDEZ, supra note 71, at 112-14.
205. Informe, supra note 121, at 52-53.
206. Sala Constitucional, Voto No. 980-91, supra note 130. This case is discussed in greater detail infra notes 245-55 and accompanying text.
207. Id. slip op. at 5-6.
208. Sala Constitucional, supra note 130.
209. Id.
to the already relaxed standing requirements for unconstitutionality actions.

Another important change concerns the effect to be given to declarations of unconstitutionality. Prior to 1989, if two-thirds of the members of the Supreme Court found a statute unconstitutional, that statute became "absolutely null." When an unconstitutionality case was decided on the merits, and there was no two-thirds vote of unconstitutionality, the statute in question was "applicable" (that is, constitutional), and subsequent actions of unconstitutionality could not be brought on the same point. Under the new system, a declaration of unconstitutionality nullifies the unconstitutional law and eliminates it from the legal order. Further, the Sala now has power, once it declares the challenged law unconstitutional, to also declare unconstitutional any other laws whose nullification is made necessary because of their relationship to the challenged law. On the other hand, a determination by the Sala that the challenged law is constitutional does not bar future unconstitutionality challenges of the same law.

XII. THE LEGISLATIVE CONSULTATION

Prior to 1989, a constitutional question could be adjudicated only if it arose out of an actual controversy between contending parties. The 1989 reforms have significantly expanded constitutional jurisdiction by empowering the Sala to issue two types of consultative opinions - legislative and judicial. Articles 96 through 101 of the Law of Constitutional Jurisdiction establish what has come to be called the "legislative consultation," that is, review by the Sala of certain matters pending before the Legislative Assembly.

Article 96 provides that the Sala shall issue consultative opinions on all proposed constitutional amendments, treaties and conventions,
and amendments to the Law of Constitutional Jurisdiction.\textsuperscript{217} Other pending legislation shall be reviewed by the Sala at the request of any ten members of the Legislative Assembly.\textsuperscript{218} In addition, the Supreme Court, the Supreme Electoral Tribunal, and the Controller General may obtain consultative opinions from the Sala on any legislative bills that affect their respective powers,\textsuperscript{219} and the Defender of the Inhabitants may obtain an opinion on any legislation that might infringe any rights or liberties guaranteed by the Constitution or by any human rights treaty in effect in the country.\textsuperscript{220} The opinions of the Sala are binding only insofar as they declare the unconstitutionality of the procedures being followed with respect to the proposed measure.\textsuperscript{221} In all other respects, the opinions are purely advisory. A consultative opinion does not bar a challenge to the constitutionality of the bill or treaty once it has entered into effect.\textsuperscript{222}

The legislative consultation was one of the more controversial parts of the 1989 reforms. It was not part of the Special Commission's first (that is, 1983) draft, but was included in the second draft, which the Commission submitted to the Supreme Court in 1985.\textsuperscript{223} The Court deleted all provisions for consultative jurisdiction from the version it sent to the Legislative Assembly in 1986.\textsuperscript{224} The May 1989 Amendment of article 10 of the Constitution expressly authorized consultative jurisdiction in constitutional matters, and the Supreme Court did not object to the inclusion of consultative jurisdiction when it reviewed the proposed Law of Constitutional Jurisdiction in September 1989.\textsuperscript{225} The Court did, nevertheless, express concern that the Law fails to identify

\begin{itemize}
  \item \textsuperscript{217} Law of Constitutional Jurisdiction, supra note 122, art. 96(a).
  \item \textsuperscript{218} Id. art. 96(b).
  \item \textsuperscript{219} Id. art. 96(c).
  \item \textsuperscript{220} Id. art. 96(ch).
  \item \textsuperscript{221} Id. art. 101, \S 2. For example, in November 1989, in response to a petition filed by eleven members of the Legislative Assembly, the Sala declared that portions of the proposed Budget Law were unconstitutional because they dealt with matters that were not budgetary in nature, thereby violating several constitutional provisions. The Sala determined that the constitutional defects were procedural and that the decision was therefore binding. Sala Constitucional, Voto No. 121-89 de las 11 hrs. del 23 de noviembre de 1989 (Nov. 23, 1989), 1 Jurisprudencia Constitucional 115, 120-21.
  \item \textsuperscript{222} Law of Constitutional Jurisdiction, supra note 122, art. 101, \S 3.
  \item \textsuperscript{223} Proyecto [de] Ley Organica de la Jurisdicci\'on Constitucional (draft submitted by the Commission to the Supreme Court, June 7, 1986).
  \item \textsuperscript{224} Corte Suprema de Justicia, Ley Orgánica de la Jurisdicción Constitucional: Exposición de Motivos [y] Proyecto de Ley (May 6, 1986), at 7-8.
  \item \textsuperscript{225} Informe, supra note 121, at 62-63.
\end{itemize}
the factors to be considered by the Sala in formulating consultative opinions.  

Critics of legislative consultation say that it interferes (both in theory and in practice) with the legislative process; burdens the Sala with matters which may be trivial, partisan and premature; and reduces the prestige of the Sala by requiring it to issue opinions that the legislature may reject. An apparent anomaly, and source of criticism, is the provision for the review of proposed constitutional amendments. It would seem that by definition a constitutional amendment cannot be unconstitutional. Supporters of review, however, argue that it tests the constitutionality of the procedures followed in adopting the amendment, and also enables the Sala to warn the Assembly of any conflicts among constitutional norms or principles that might be created by the amendment.

Those who support the legislative consultation in all its aspects point out that it is easier and less disruptive to correct a constitutional mistake before the unconstitutional or discordant law has entered into effect and been relied upon. They also maintain that the legislative consultation provides protection for political minorities in the legislature.

XIII. THE JUDICIAL CONSULTATION

Article 102 of the Law of Constitutional Jurisdiction provides that every judge may consult the Sala about the constitutionality of any norm that he must apply or any action or omission that he must

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226. Id.
227. Volio Interview, supra note 161.
229. Informe, supra note 121.
230. Id. By August 31, 1991, almost two years after the establishment of the current system, the Sala had received 48 petitions for legislative consultations. Thirty of these were reviewable as a matter of course, and the others were presented to the Sala by groups of Deputies of the Legislative Assembly. In nine instances the Sala found substantive or procedural defects. As one member of the Sala notes, two years is a short time in which to assess the significance of the legislative consultation; however, he continues, the salutary effects of the legislative consultation have already been demonstrated by the fact that the Legislative Assembly has created a Permanent Special Committee on Constitutional Consultations and has made other changes in its internal rules in order to adjust its operations to the new consultative power of the Sala. Solano, supra note 228, at 23.
decide.231 The Sala’s opinions in judicial consultations have the same binding effect as its decisions in actions of unconstitutionality.232

In its 1989 review of the proposed Law, the Supreme Court objected to the entire chapter on judicial consultations because the draft submitted to the Court would have permitted only appellate courts to request consultative opinions.233 The Assembly amended the bill to permit all judges to request opinions from the Sala. Some critics then feared that judges might be tempted to overuse the consultation in order to impress the Sala with their seriousness.234 To date, however, more requests for consultative opinions have come from the Third (that is, Criminal) Chamber of the Supreme Court than from any other judge or court, and the Third Chamber would seem to have no need to try to impress the Fourth. Some of these intramural consultations have resulted in declarations that criminal statutes, routinely applied for years, are unconstitutional.235 Supporters of the judicial consultation see this as evidence that the process has had the effect of heightening judicial appreciation of due process and human dignity.236

XIV. Resolution of Intragovernmental Conflicts

The 1989 Amendment of article 10 of the Constitution permits the Sala to resolve conflicts of authority involving the branches of government, including the Supreme Electoral Tribunal, and such other governmental entities as may be provided by statute.237 The Law of Constitutional Jurisdiction provides that the Sala shall have power to resolve conflicts of authority between the branches of government

231. Law of Constitutional Jurisdiction, supra note 122, art. 102. The Procurator General and the parties to the underlying case may be heard. A request for a judicial consultation does not preclude anyone otherwise permitted to do so from commencing an action of unconstitutionality. Id. art. 105.

232. Id. art. 107.

233.Informe, supra note 121, at 63-64. The Court also objected to the provision for mandatory judicial consultations over questions of due process, right to a hearing, and the right to a defense when these are involved in certain proceedings to open judgment (recursos de revisión). This provision was retained and is part of article 102 of the Law.

234. Volio Interview, supra note 161.

235. See, e.g., Sala Constitucional, Voto No. 1059 de las 16:00 hrs. del 4 de septiembre de 1990 (Sept. 4, 1990), Cuadernos de Justicia, No. 6, at 17 (1990) (in which the Sala, in a consultative decision requested by the Third Chamber of the Supreme Court, declared unconstitutional a provision of the 1973 Code of Criminal Procedure).

236. Solano, supra note 228, at 1, n.1. For a summary of both legislative and judicial consultations, see Eduardo Sancho, La Consulta en la Jurisdicción Constitucional, CUADERNOS DE JUSTICIA, No. 6, at 5 (1990).

237. Constitución art. 10(a) (amended 1989).
(including the Supreme Electoral Tribunal), or between any of them and the Controller General. The Law further provides that the Sala shall also resolve conflicts of authority involving municipalities, decentralized agencies, and other governmental entities (including conflicts between any of the branches of government, the Supreme Electoral Tribunal, or the Controller General) where those conflicts are based on constitutional grants of authority. The difference in language indicates that all conflicts of authority among the major organs of government are within the Sala’s jurisdiction, regardless of the legal basis of the dispute, while conflicts involving lesser units of government are within the Sala’s jurisdiction only when a constitutional allocation of power is in question. In every case, the process is commenced by a petition by the head of any one of the entities involved in the conflict.

The Special Commission of the Ministry of Justice had recommended the creation of broad “conflict jurisdiction,” but the Supreme Court’s 1986 draft provided for the resolution of conflicts only among the “Supreme Organs of State.” The Assembly, however, restored the broader jurisdiction proposed by the Special Commission, and in its 1989 review, the Court did not object to the creation of conflict jurisdiction which encompasses lesser entities. Critics of conflict jurisdiction are concerned that since neither “conflict” nor “head” (of the entity) is defined, there is a danger that petty differences between administrators will be converted into constitutional disputes.

XV. REVIEW OF PRESIDENTIAL VETO

The 1989 reforms leave judicial review of the presidential veto-for-unconstitutionality unchanged, except that review is now exercised by the Sala rather than the full Supreme Court, and declarations of unconstitutionality now require only a majority vote.

238. Law of Constitutional Jurisdiction, supra note 122, art. 109(a).
239. Id. art. 109(b).
240. Id. art. 110.
242. Informe, supra note 121, at 64-65.
243. Volio Interview, supra note 161. However, during its first year, the Sala received only three conflict cases. 1.571 Casos Presentados Ante la Sala IV, supra note 165.
244. These changes were accomplished by the amendment of article 128 of the Constitution. The Law of Constitutional Jurisdiction makes no mention of review of the veto-for-unconstitutionality.
In the summer of 1991, a number of prominent Costa Rican jurists were asked whether there was any one constitutional decision which, more than any other, demonstrated the significance of the 1989 reforms. Almost all of them identified the same case, an unconstitutionality action decided by the Sala on May 24, 1991. A lawyer named Estela Quesada commenced the action in the Fall of 1989, challenging the constitutionality of several provisions of the Electoral Code and one provision of the Constitution itself, all of which had to do with government funding of political campaigns. Most of the plaintiff's challenges were directed at the eligibility requirements for funding, the kinds of activities funded, the timing of the payments, and the allocation of governmental responsibility for administering the funding program. The plaintiff alleged that the challenged statutes violated a number of constitutional norms and principles, and that the constitutional provision in question was unconstitutional because it had been adopted (as a constitutional amendment in 1971) in a manner which did not satisfy the requirements of the Constitution and the Rules of Order and Discipline of the Legislative Assembly governing the amendment process.

The plaintiff was not a party to any pending lawsuit in which the challenged provisions might be applied. She contended, however, that she was asserting a "collective right of political association" sufficient to give her standing to maintain an action of unconstitutionality without a separate, pending case. The Procurator General argued that to conclude that the plaintiff had standing would be to convert the action of unconstitutionality into a "popular action," by which anyone could challenge any law, something not intended by the drafters of the reforms. On the merits, the Procurator General opposed all but one of the plaintiff's claims.

The Sala concluded that the right asserted by the plaintiff was not, as she contended, "collective," but rather that her interest in political association was "diffuse" in that it was equal and identical to the right of all other citizens, and that she therefore had standing to pursue the action. On the merits, the Sala held the challenged con-

245. Sala Constitucional, Voto No. 980-91, supra note 130.
246. Id. slip op. at 1-3.
247. Id. at 5.
248. Id. at 3.
249. Id. at 3-4.
250. Id. at 5-6.
Constitutional provision (those portions of article 96 which provide for *advance* payments to political parties) unconstitutional because the language in question had not been approved by a two-thirds majority of two separate sessions of the Assembly, as required by the Constitution, but rather had been added to the text of the proposed amendment during the second session. In addition, the Sala held the eligibility requirements for funding (generally based on past electoral performance) unconstitutional in that they gave undue preference to the two major political parties, thereby violating what the Sala found to be the constitutional principle of a multiparty system.

The Sala also found unconstitutional a number of requirements for the organization and registration of political parties because, the Sala said, they violated article 98 of the Constitution (which guarantees the right to form political parties) as well as principles established by the Universal Declaration of Human Rights, the American Convention on Human Rights, and other international conventions. Various other statutes, including some not challenged by the plaintiff, were held to violate one or another constitutional guarantee, and the remaining statutes challenged in the action were found not to be unconstitutional. The holdings were followed by an order that the declarations of unconstitutionality made in the case would operate to nullify the unconstitutional laws with respect to the 1994 elections and all elections thereafter, but not with respect to the elections held in or before 1990. The opinion of the Sala was unanimous.

The case illustrates many of the reforms made in 1989: the more liberal standing requirements; the power of the Sala to decide issues not raised by the parties; the quasi-constitutional status of international human rights law and the internal rules of the Legislative Assembly; the power of the Sala to discover and apply "constitutional principles" and the discretion given the Sala to determine the retroactivity, if any, of its declarations of unconstitutionality.

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251. *Id.* at 18-21.
252. *Id.* at 6-7, 12-13.
253. *Id.* at 11-12.
254. *Id.* at 35-38.
255. *Id.* at 38.
257. Article 13 of Law of Constitutional Jurisdiction, *supra* note 122, provides that once a matter is properly before the Sala, that body may act "de oficio."
258. CÔNSTITUCIÓN art. 10; Law of Constitutional Jurisdiction, *supra* note 122, arts. 2(a), (b), 73(c), (e).
259. Law of Constitutional Jurisdiction, *supra* note 122, arts. 1, 73(a), (b).
260. *Id.* art. 91.
these innovations are either required or expressly permitted by the Law of Constitutional Jurisdiction. Other significant developments are not found in positive legislation. In this case, as in many others, the Sala has held laws unconstitutional on three or four grounds, any one of which would have been sufficient to nullify the law.\textsuperscript{261} Also, the Sala has decided, as a matter of policy, not to rely on decisions made under the pre-1989 system.\textsuperscript{262} Indeed, as a general matter, the Sala rarely cites any authorities other than the statutes, treaties, and constitutional provisions under consideration.\textsuperscript{263}

The most obvious result of the 1989 reforms has been the expansion of constitutional jurisdiction. All of the old forms of action have been broadened, and new proceedings have been established. The very meaning of "unconstitutionality" has been enlarged. The changes are in the aggregate are a movement away from the United States model of constitutional adjudication and toward Continental European models. The concentration of adjudicatory authority in a single, specialized tribunal is a hallmark of continental systems, as is the practice of deciding constitutional questions in the abstract.\textsuperscript{264}

\begin{footnotesize}
\begin{enumerate}
\item Sala Constitucional, supra note 130, slip op. at 11-12; see also Sala Constitucional Voto No. 1147-90, del 21 de septiembre del 1990 (Sept. 21, 1990) (an unconstitutionality action in which the Sala held that a provision of the Organic Law of the Judicial Power violated articles 33, 34, 39, 40, 41, 45 and 73 of the Convention of the International Labor Organization).
\item Interview with the seven magistrates of the Sala Constitucional, in San José, Costa Rica (June 18, 1991) [hereinafter Seven Magistrates Interview].
\item However, as its own jurisprudence increases, the Sala frequently supports its opinions by references to its own prior decisions; e.g., Sala Constitucional, Voto No. 980-91, supra note 130, slip op. at 8-9.
\item The idea of entrusting control of constitutionality to a single, specialized body, is generally traced to the French Tribunal de Cassation, established in 1790 as an arm of the legislature. The Austrian Constitution of 1920 established a centralized system of judicial review of constitutional questions by a constitutional court. Italy, Spain, and Germany are now among the countries that follow the "Austrian model" of concentrated jurisdiction (as distinguished from the "American [i.e., United States] model," in which judicial review may be exercised by all judges). The Austrian Constitution of 1920 also created a special plea for the review of constitutional questions, with the result that constitutional adjudication was dissociated from concrete controversies. MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 45-77 (1971). Many present-day European systems provide for both "direct review" of constitutional questions (that is, review without any underlying case), and "indirect review" (that is, review by the constitutional court of a question raised in the course of an ordinary lawsuit). See, e.g., Alessandro Pizzorusso et al., The Constitutional Review of Legislation in Italy, 56 TEMP. L.Q. 503 (1983). But whether review is direct or indirect, constitutional resolution is separated from the adjudication of an actual case or controversy. Costa Rica's decision to vest constitutional jurisdiction in a special chamber of the Supreme Court was the result of a compromise. Some of those deeply involved in the 1989 reforms, such as Dr. Rubén Hernández Valle, had long advocated the establishment of a constitutional court, which would not be part
\end{enumerate}
\end{footnotesize}
stitutional decision-making is incidental to the ordinary judicial function of deciding contentious cases has been replaced by the concept — and the reality — of control of constitutionality by a special tribunal whose only function is to protect the Constitution.

The most obvious effect of the 1989 reforms has been a tremendous increase in constitutional litigation. During the first six months of the new system, the number of habeas corpus petitions filed in the Sala was almost twice the number filed in the Supreme Court during the corresponding period a year earlier; unconstitutionality actions increased by more than 700%, and amparo petitions increased tenfold. Less obvious, but no less important, is the Sala's activist spirit. The Sala has come close to realizing an important objective of some proponents of the 1989 reforms: the abolition of any presumption in favor of the constitutionality of statutes.

The new judicial activism is demonstrated more by the Sala's words than by any statistics. In concluding that the plaintiff Quesada had standing to challenge the campaign-financing laws, the Sala explained that were it to hold otherwise, the laws in question might never be tested. The presumption underlying this statement — that every
constitutional question is justiciable — would seem to be of the essence of judicial activism. Another important example is the willingness of the Sala to look behind the assertions of regularity made by other branches of government, and even beyond the allegations of the parties, to find unconstitutionality. In 1990, the Sala heard unconstitutionality actions in which private parties challenged various provisions of the Forestry Law and the Landlord-Tenant Law. Even though the plaintiffs in these cases alleged only that certain provisions of the laws were unconstitutional, the Sala decided in both cases that the process by which the Legislative Assembly enacted the laws was unconstitutional, and therefore declared both laws unconstitutional in their entirety.270

The Sala has acquired a prominence in day-to-day public affairs that is unprecedented in the history of the country’s judiciary271 and the decisions of the Sala have substantially affected many areas of national policy. Because of the Sala, the country’s system of campaign financing has been changed,272 layoffs of public employees have been suspended,273 legislators’ perquisites have been limited,274 and persons arrested without probable cause have been released and awarded damages.275 Between February, 1979 and March, 1982, under the previous

satisfying the general requirement of a pending case. However, the Sala, having determined that citizens’ rights of political association were involved, was evidently concerned that the individual citizen be able to vindicate her rights.

270. The Landlord-Tenant Law was declared unconstitutional in Voto No. 479-90 de 11 de mayo de 1990 (May 11, 1990); the Forestry Law in Voto No. 546-90 de las 14:30 hrs. del 22 de mayo de 1990 (May 22, 1990). The basis of both decisions was article 45 of the Constitution which guarantees the right of property and provides that a law limiting that right must be approved by a two-thirds majority of the Legislative Assembly. The Sala held that the laws in question did limit the right of property, and determined that they had not received the required 38 votes.

271. The best evidence of this the amount of coverage given the Sala by the country’s newspapers and radio and television stations, day in and day out. Four excellent op-ed pieces which illustrate the range of thoughtful defenses and criticisms of the Sala are found in LA NACIÓN, Apr. 14, 1991, at 15A-16A, and a similarly high-quality discussion took place on a panel discussion about the Sala on the television program En la Mira (June 19, 1991).


273. Sala IV Frena Despidos en el MOPT, LA REPÚBLICA (SAN JOSÉ), Apr. 11, 1991, at 4A. The Sala ordered that the 116 employees in question be reinstated in their jobs pending final judgment in their amparo action against the Ministry of Public Works and Transport.

274. Gollerías de los Diputados, LA REPÚBLICA, Sept. 8, 1990, at 12A.

275. See, e.g., Jurisprudencia de la Sala Constitucional en Materia de Derecho Penal, Procesal Penal y Penitenciario, CUADERNOS DE JURISPRUDENCIA, No. 4 (1990), and cases cited therein.
system, the Supreme Court invalidated laws or other governmental actions in three unconstitutionality cases, eleven habeas corpus cases, and three *amparo* cases. Between October, 1989 and mid-June, 1991, under the new system, the Sala had made 216 determinations of unconstitutional governmental conduct in habeas corpus and *amparo* cases alone.

It would be beyond the scope of this article, and beyond the competence of the author, to attempt to evaluate the merits of these decisions; but the significance of the Sala and of the 1989 reforms transcends the debate over any particular decision or line of decisions. The Sala, and the reforms which it has brought to life, have generated a new spirit of constitutionalism in an already-democratic society. Time may bring about some moderation in the volume and pace of constitutional litigation, and some adjustments may be made in the system. However that may be, the 1989 reforms have brought about basic changes which are likely to endure and to reinforce Costa Rican democracy. Few could disagree with the words of Dr. Alejandro Rodríguez Vega, the first President of the Sala: "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."

**XVII. UPDATE**

Since the foregoing article was submitted for publication, the amount of constitutional litigation in Costa Rica has increased significantly and the activism of the Sala has continued to be a subject of intense debate. On July 24, 1992, the Sala itself proposed a number of changes in the system established by the 1989 reforms. The proposals have received support from government, and opposition legis-

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278. There is a consensus that something must be done to moderate the workload of the Sala. It has been suggested that a special inferior tribunal be created to hear *amparo* cases in the first instance, with the possibility of review by the Sala. *En la Mira*, supra note 271. The Sala itself has recommended that the Law of Constitutional Jurisdiction be amended to suspend for five years the time limits imposed on the Sala for the resolution of cases. See *Informe Estadístico Interno*, supra note 266, app.

lators, and from the President of the Republic. The proposals offer insight into many of the issues discussed hereinabove, and indicate the probable direction of future reforms. This update has been added in order to summarize those proposals.

The Sala's recommendations are set forth in a document addressed to the Legislative Assembly, the Executive Branch and the full Supreme Court. The Sala characterizes the 1989 reforms as beneficial to the country and describes its own experience as a rich one. However, the document continues, the ever-increasing volume of constitutional litigation presents a serious problem, necessitating changes in the Law of Constitutional Jurisdiction. The following chart, based on figures compiled by the Sala, illustrates the problem:

**Caseload of the Sala Constitucional**

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</thead>
<tbody>
<tr>
<td><strong>Number of Cases</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commenced</td>
<td>407</td>
<td>2,297</td>
<td>3,550</td>
<td>2,131</td>
</tr>
<tr>
<td>Decided</td>
<td>292</td>
<td>1,591</td>
<td>2,207</td>
<td>---</td>
</tr>
</tbody>
</table>

To deal with the caseload problem, the Sala proposes its own division into panels, the establishment of procedures for prior review of habeas corpus and *amparo* claims, the imposition of stricter standing requirements in unconstitutionality cases, and the limitation of oral argument. In addition, the Sala proposes amendments designed to reduce the disruptive effects of constitutional litigation on other tribunals and on society at large.

**A. Division of the Sala into Panels**

Since its creation, the Sala has always decided all cases en banc. The Sala now proposes that it be divided into two panels for the

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280. Sala Constitucional, Proyecto de Reformas a la Ley de la Jurisdicción Constitucional: Proyecto Propuesto por la Sala Constitucional a la Asamblea Legislativa, al Poder Ejecutivo y a la Corte Suprema de Justicia, 24 de julio de 1992 (July 24, 1992) [hereinafter Proyecto de Reformas].
281. *Id.* at 3.
282. *Id.* at 3-4.
283. *Id.* at 4-5.
284. *Id.* at 6-14.
285. *Id.* at 14.
purpose of considering and deciding habeas corpus and *amparo* cases. *Amparo* petitions account for two-thirds of the Sala's caseload and most of its backlog, while habeas corpus petitions constitute another twenty percent of its caseload.\(^2\) By working in panels, the Sala believes that it will be able to resolve habeas corpus and *amparo* cases more expeditiously.\(^3\) Under the proposal, the Sala would continue to function en banc in unconstitutionality cases, consultations, and intragovernmental conflicts, as well in those habeas corpus and *amparo* cases which present novel questions.\(^4\)

**B. Prior Review of Habeas Corpus and Amparo Cases**

The Law of Constitutional Jurisdiction gives the Sala original and exclusive jurisdiction in all habeas corpus and *amparo* cases. The Sala now proposes the establishment of a system of prior review of *amparo* and habeas corpus claims. *Amparo* petitioners would be required to assert their claims before the agency responsible for the alleged wrongdoing; only when relief is denied by the agency would a claim be reviewable by the Sala.\(^5\) In habeas corpus, the aggrieved party could elect to proceed either directly before the Sala or before the public authority responsible for the alleged illegal restraint; in the latter situation, the Sala would review all denials of relief.\(^6\)

**C. Suspensive Effect of Amparo Actions**

At the present time, commencing an *amparo* action operates to protect the petitioner from the conduct complained of during the pen-

\(^2\) The Sala's statistics concerning the constitutional cases commenced and resolved from October 1989 through June 1992 are as follows:

<table>
<thead>
<tr>
<th></th>
<th>Cases Commenced</th>
<th>Cases Decided</th>
</tr>
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<tbody>
<tr>
<td>Habeas Corpus</td>
<td>1,674</td>
<td>(almost 100%)</td>
</tr>
<tr>
<td><em>Amparo</em></td>
<td>5,552</td>
<td>(approx. 65%)</td>
</tr>
<tr>
<td>Unconstitutionality</td>
<td>974</td>
<td>(approx. 50%)</td>
</tr>
<tr>
<td>Judicial Consultations</td>
<td>115</td>
<td></td>
</tr>
<tr>
<td>Legislative Consultations</td>
<td>66</td>
<td>66</td>
</tr>
<tr>
<td>Conflicts</td>
<td>4</td>
<td>4</td>
</tr>
</tbody>
</table>

\(^3\) *Id.* at 5.

\(^4\) *Id.* at 7.

\(^5\) *Id.* at 7-8.

\(^6\) Prior to the 1989 reforms, habeas corpus cases were heard by the full Supreme Court, and *amparo* cases were heard by a chamber of the Court. *See supra* notes 95, 108 & 109. Similar proposals to require prior review of *amparo* claims have been advanced since at least early 1991. *See supra* note 278.

\(^7\) Proyecto de Reformas, *supra* note 280, at 8-9.
The Sala points out that although about forty percent of amparo claims are so obviously deficient that they are dismissed preliminarily, the filing of even the least substantial amparo petition usually causes a one- or two-week suspension of some (usually governmental) activity. The Sala proposes that during the pendency of an amparo action, the respondent be restrained from engaging in the conduct complained of only when the Sala decides that the private interest of the petitioner outweighs the public interest in the activity in question.

D. Standing Requirements for Plaintiffs in Unconstitutionality Actions

In liberalizing the standing requirements for actions of unconstitutionality, the Law of Constitutional Jurisdiction provides that a person who is asserting a “diffuse” or “collective” interest may prosecute an unconstitutionality action even if he is not a party to a pending case in which the allegedly unconstitutional statute or regulation might be applied. The Sala recommends elimination of this exception to the “pending case” requirement because the exception has proved difficult to apply and has led to the commencement of unconstitutionality actions by persons who have no substantial connection to the controversy.

The Sala also notes that the provision of the Law eliminating the “pending case” requirement where “by the nature of the matter there is no individual or direct injury,” is also undesirable; but the Sala does not recommend elimination of this exemption.

E. Suspensive Effect of the Action of Unconstitutionality

The Law of Constitutional Jurisdiction provides that once the Sala determines that the petition in an unconstitutionality action meets the formal requirements of the Law, notice of the action is published in the Boletín Judicial and that publication operates to prohibit all courts and administrative agencies in the country from entering judgment in any case involving the statute or regulation whose constitutionality is

291. Law of Constitutional Jurisdiction, supra note 122, art. 41.
292. Proyecto de Reformas, supra note 280, at 10.
293. Id. at 9-10. The Sala's proposal would restore the rule that prevailed prior to the 1989 reforms. See supra note 137.
294. Law of Constitutional Jurisdiction, supra note 122, art. 75.
295. Proyecto de Reformas, supra note 280, at 11-12.
296. Id. The Sala's preference for traditional "standing" requirements is in interesting contrast to the more liberal attitude taken by the Supreme Court when it reviewed the proposed Law of Constitutional Jurisdiction in August and September 1989. Informe, supra note 121, at 52-53.
challenged until the Sala has decided the unconstitutionality action.\textsuperscript{297} The amendment proposed by the Sala would continue to prohibit the entry of judgment in the pending case of the unconstitutionality petitioner, but would permit the entry of judgment in all other cases, subject to modification in accordance with the Sala’s decision in the unconstitutionality action.\textsuperscript{298}

\textbf{F. Oral Argument}

The Law of Constitutional Jurisdiction makes oral argument mandatory in unconstitutionality actions and discretionary with the Sala in all other cases.\textsuperscript{299} The Sala’s experience has convinced it that most oral arguments are little more than restatements of the parties’ written briefs, and therefore are usually an unprofitable use of time.\textsuperscript{300} The Sala proposes that it be given discretion in all cases to decide whether oral argument shall take place.\textsuperscript{301}

The Sala’s proposals are clearly designed to deal with the most serious and most obvious problems of the current system — the huge caseload and the disruptive effects of frivolous suits — without discouraging the litigation of substantial claims. The proposals are in every respect traditional. It is not unusual in Civil Law countries for high courts to function in panels in all but the most important cases, and for injured persons to be required to seek relief from tribunals that are close-at-hand before approaching the highest court in the nation. Similarly, one must usually be able to show a probability of ultimate success and the likelihood of irreparable harm before obtaining preliminary relief.

The Sala’s proposal to restore the “pending case” requirement in certain situations, and its apparent preference for such a requirement in all unconstitutionality cases go to the heart of the debate over the nature of judicial review. Should judges have power to decide constitutional questions only because, as Marshall said in \textit{Marbury v. Madison}, such decisions are sometimes necessary to the resolution of genuine lawsuits? Or should judges (or at least some judges) be vested with general power to decide constitutional questions? It would be beyond the scope of this article to debate the nature of judicial review, but it is important to note that this debate is part of Costa Rica’s ongoing effort to perfect an already exemplary constitutional system.

\textsuperscript{297} Law of Constitutional Jurisdiction, \textit{supra} note 122, art. 81.
\textsuperscript{298} Proyecto de Reformas, \textit{supra} note 280, at 12-13.
\textsuperscript{299} Law of Constitutional Jurisdiction, \textit{supra} note 122, art. 10.
\textsuperscript{300} Proyecto de Reformas, \textit{supra} note 280, at 13.
\textsuperscript{301} \textit{Id.} at 13-14. The Sala has only rarely exercised its discretion to allow oral argument.