Seeking Governance without Undermining the Constitutional Jurisdiction in Costa Rica

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Seeking Governance Without Undermining the Constitutional Jurisdiction in Costa Rica

Olman A. Rodríguez L.*

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* Olman A. Rodríguez L. currently is a law clerk to Justice Fernando Castillo Viquez of the Constitutional Chamber of the Supreme Court of Costa Rica and has been a part of the Chamber's legal staff since 1991. He graduated from the Law School Collegium Academicum of the Universidad Autónoma de Centroamérica in 1990 and earned an LL.M. degree from George Washington University School of Law in 1995.
I. INTRODUCTION

Reading the strong reactions\(^1\) to the U.S. Supreme Court decision\(^2\) on the Patient Protection and Affordable Care Act (Obamacare) (the individual mandate upheld under the Tax Clause) has made me reflect on how much passion a Court of last resort can cause in the political scheme of any country. This is more apparent when several politically charged issues are decided definitely by the Court. The sense of defeat may be a very solid blow to some, it can also be highly significant if it leaves little room for elected officials to continue political action. Hence a new form of legitimacy must be sought, possibly in a new general election of the popularly elected branches of government.

Opening this introduction with such an assertion is risky, because while writing this, the presidential and congressional elections in the United States had not concluded. But from the perspective of the winner or loser, it may or may not put in jeopardy the consolidation of a health care system or the beginning of an-

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1. There are several comments about this law. See, e.g., E.J. Dionne Jr., A Victory for Obama - and for Roberts, WASHINGTON POST, June 28, 2012, http://articles.washingtonpost.com/2012-06-28/opinions/35458931_1_health-care-coverage-president-obama-health-care-law ("But the headline victory for the law was of enormous importance to Obama. Had the court knocked the Affordable Care Act down, all the spin in the world would not have undone the damage this would have been inflicted on the president, his political standing and his legacy. Thanks to this ruling, the broad structure of the largest domestic achievement of the Obama legacy remains intact. It gives him bragging rights in the campaign, and in history. And for those who support universal coverage, the fact that the law remains on the books offers an opportunity to build on it in the future."); Richard A. Epstein, A Confused Opinion, N.Y. TIMES, June 28, 2012, http://www.nytimes.com/2012/06/29/opinion/a-confused-opinion.html?_r-1&ref=opinion ("But what Chief Justice Roberts took from Congress with one hand, he gave it with the other: a broad reading of the taxing power. In the majority opinion, he wrote that since paying a penalty for not obtaining insurance could be seen as a tax, and since ‘the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.’ He will no doubt attract praise in some quarters for splitting this baby. But his decision is wrong. As a matter of constitutional text, legal history and logic, the power to regulate commerce and the power to tax should not be separated. It is not good for the court or the country that the chief justice’s position in such an important case is confused at its core.")

other political battle in the U.S. Congress. I ask of you to excuse my indulgence to use this as an example in my introduction, but it is an excellent example of the political exposure that the Costa Rican Constitutional Chamber faces weekly, if not daily.

The Constitutional Jurisdiction is perhaps amongst the most sophisticated judicial bodies in comparative constitutional law. It has abounding powers given by the Constitution and the Law that regulates the constitutional jurisdiction. In its more than twenty years of existence, it has not been introverted and has extended the Constitutional decisions to all branches of government and areas of the law. That is why its constitutional and legal attributes foster many controversial claims against this jurisdiction, among them, that of an overstepping Court that interprets with no limits the Constitution. There are many claims that this Court inhibits the political bodies of government. But how valid are these claims? Are they somehow a reflection of some imbedded political culture? Are these controversies real? Will it be a missed opportunity for the Costa Rican political system to keep adjusting to the Constitution?

This paper will explain in Part II the role of the Constitutional Chamber and how it contrasts with the pre-1989 period. In Part III, the different criticism faced by the Constitutional Chamber will be addressed, and Part IV will analyze difference cases. Part V will look at possible amendments and the likelihood of their approval.

3. Ruben Hernández Valle, Constitución Política de la República de Costa Rica [Political Constitution of the Costa Rican Republic], 40 EDITORIAL JURICENTRO 2008 (commenting on the wide range of legal attributes endowed to the Constitutional Jurisdiction, possibly to be that of the most ample in comparative law).


5. Id. at 174 (“The Constitutional Chamber has certainly been active, not only in the sense that it has decided far more constitutional cases than did its predecessors, but also in that it has adjudicated matters once considered beyond the scope of the judicial power. To say that the Constitutional Chamber is active is not to say that it is necessarily activist. The latter term often suggests that a court has moved from adjudication to policymaking. The proper limits of adjudicatory authority are established by the constitution and laws of each country. Thus, any evaluation of the “activism” or “self-restraint” of the Constitutional Chamber must be made in light of a Constitution and Law of Constitutional Jurisdiction that give the Chamber extensive powers – powers that the Chamber has utilized, often expansively.”).

6. CELÍN ARCE GÓMEZ, EL ABUSO INTERPRETATIVO DE LA SALA CONSTITUCIONAL [THE INTERPRETATIVE EXCESSSES OF THE CONSTITUTIONAL CHAMBER] 24-28 (Editorial Universi-
dad Estatal a Distancia 1st ed. 2008).

7. Id.
II. DIFFERENCES BETWEEN THE HISTORICAL AND THE CURRENT SYSTEM OF CONSTITUTIONAL CONTROL

A. The Pre-1989 Constitutional Court

The legal structure of the Costa Rican constitutional jurisdiction prior to 1989 would have easily fit the same characterization of other Latin American Supreme Courts. To describe these courts, Bruce Wilson and Roger Handberg state:

Within Latin America, legal traditions appeared strong, with consensus as to the minimal role of the courts. In most Latin American countries, courts were routinely defined as political ciphers or adjuncts to the regimes. This was thought particularly germane given their civil law traditions and turbulent political histories. Courts were largely ignored as politically neutral (meaning supporters of the forces of order) or politically irrelevant due to their passivity in the face of disorder.8

The civil law tradition emphasizes on the strong role of the law and the more limited function of the judiciary in relation to creating law. The judge however should be confined by the political powers, having a limited political role within the State. In fact, the case law only guides to a valid interpretation of the law, but only in a very limited sense to be persuasive.9 Moreover within the judiciary, it is not formally binding, even if it comes from a hierarchical superior judge.10

9. Código Civil [C. Civ.] art. 9 (Costa Rica) (Ley No. 63 del 28 de septiembre de 1887).
10. Ruggero [Roger] J. Alsdert, Logic for Lawyers: A Guide to Clear Legal Thinking 11 (3d ed. 1997) (“The difference between the common-law tradition and the civil-law tradition of the European continent and Latin America must be repeated for emphasis. We must be aware of the distinctive methodology and hierarchical disciplines of the two systems. In the civil-law countries, the legislative Codes (and written constitutions) are the sole sources of decisions; theoretically, in every case, recourse must be made to the language of the Code. And in every civil-law jurisdictions the relevant provision of the Code becomes the major premise in the categorical deductive syllogism. In common-law countries, however, the concept of stare decisis governs. Stare decisis commands that lower courts follow decisions of higher courts in the same judicial hierarchy. The tradition also demands that the most recent higher court decision be followed, whether the original precept stems from statutory or case law. In the United States, unity of judicial action within a given jurisdiction is ensured by the rule that a court may not deviate from precedents established by its hierarchical superior.”).
Today, the more a Court breaks away from the said characterization by involving itself actively in the assertion of constitutional and human rights, the more it will be labeled as an overreaching court, overstepping its “traditional role,” “to make or increasingly to dominate the making of public policies.” In such a case that will be delegitimized and its products deemed part of the judicialization of politics, anomalous to the reach of the judges.

For our purposes, there are two distinct moments that define these two legal traditions: before and after the 1989 constitutional amendments.

B. Main Characteristics of the System Prior to 1989

Up to 1989, Costa Rican constitutional justice was the sum of different and individual legal efforts. The creation of the writs of habeas corpus, of the writ of amparo and judicial review of statutes were not part of a systematic governmental policy—obviously as they were installed in the legal order at very different moments of its history. Under the legal system prior to 1989, it would have been unthinkable to find claims of judicial activism or of an overstepping Court. Under this period it was easy to find much distance between judicial decisions and political constitutional questions.

Judicial review was part of a concentrated system of constitutional control. The Constitution established judicial review for legislation and executive decrees before the Supreme Court of Justice, and opened another jurisdiction to challenge other minor executive legislation. Unfortunately, this was not regulated until

16. Hernández et al., supra note 12, at 323.
many years after the promulgation of the 1949 Constitution, when the Legislative Assembly enacted the Regulatory Law of the Administrative Contentious Jurisdiction, seventeen years after the 1949 Constitution, in 1966.

Moreover, the Civil Procedure Code was designed to avoid conflicts with the political bodies of government. For example, the Plenary Court is not allowed to strike down legislation unless two thirds majority vote of the Supreme Court is in favor of declaring a law unconstitutional. This was endowing little leverage to the judiciary and an overt action to protect the political branches of government. Clearly the legislation and judicial practice would have the effect of leaving undisturbed certain institutional authorities, through their legislation and secondary legislation, as the previous 1989 constitutional control system allowed politicians to pass legislation that was of questionable constitutionality and nevertheless the Supreme Court would avoid to challenge the politicians. This buttressed a presumed law making sovereignty.

On writs of amparo and habeas corpus it also had a similar legal pattern to solve individual questions involving constitutional rights infringements. The criteria used by the legislator to determine the competent judge was reduced to the type of authority endorsing the public act.

19. Id. at 36

20. Olman A. Rodríguez L., The Costa Rican Constitutional Jurisdiction, 49 DUQ. L. REV. 243, 273-74 (2011) (internal citations omitted) (describing that an amendment to article 967 of the Civil Procedural Code “[e]stablished the two-thirds voting requirements for the Plenary Court to declare a law unconstitutional, as a way to avoid conflicts on policy questions. It was planned this way to avoid conflicts among the different branches of government and its agencies, as it was believed and explained in the preparatory commission of the bill, that a simple majority voting rule provided an avenue to many conflicts among the political branches of government. It is clear that this rule was intended to provide deference to the laws and other general provisions, until the new constitutional control system of 1989 was put into force.”).

21. Solano, supra note 18, at 37. The First Chamber of the Supreme Court would have authority to review individual public acts that came from the President, Ministers of Government, Governors, and high ranking police authorities. On other matters, the Criminal Trial Judge would be competent to adjudge those other acts from the remaining public authorities. For the writs of Habeas Corpus the Supreme Court of Justice was assigned with the powers to solve these other cases.
C. Main Characteristics of the System After 1989

In contrast, the 1989 constitutional amendments enhanced the importance of the constitutional jurisdiction, institutionalizing a super-concentrated system of constitutional control.\textsuperscript{22}

The legal system mutated to the opposite philosophical underpinnings of the past Constitutional Control System, staying as a concentrated mechanism to bring all constitutional questions regarding the legal order,\textsuperscript{23} but now under a unique jurisdiction. In fact, the legal mechanisms installed by the Law of the Constitutional Jurisdiction\textsuperscript{24} established a precautionary measure designed to safeguard fundamental rights, granting for example an injunction to automatically suspend the impugned act,\textsuperscript{25} or for administrative and judicial authorities to stay if they should apply any impugned legislation.\textsuperscript{26} In practice this meant obviously a valuable instrument for claimants, but not for governmental officials that were ordered to freeze all material acts, pending the Constitutional Chamber’s decision.

This jurisdiction not only regulates the traditional procedures such as the writs of habeas corpus, amparo,\textsuperscript{27} and the judicial review,\textsuperscript{28} but also it was also reinforced with the advisory jurisdiction and the conflicts of competence of the different branches of government.\textsuperscript{29} These include the writ of amparo against private individuals,\textsuperscript{30} besides having no other judicial authority over the Constitutional jurisdiction, and establishing that the Constitutional Chamber’s jurisprudence and precedents to be binding \textit{erga omnes}.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{22} \textit{Id.} at 38-40. According to former President Justice Solano of the Constitutional Chamber, it is a system characterized for being specialized, concentrated and reinforced. He explains that article 10 of the Constitution established the specialization of judges or justices, meaning not that the Judges are to be experts in Constitutional Law, rather it sought to change the former system, were civil, labor and criminal judges would rule on ordinary judicial criteria, far from constitutional standards. Therefore, it was thought that this specialization would result in a keen judge on constitutional law, using the Constitution and human rights law as instruments to adjudge cases.
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} Ley No. 7135 de 11 de octubre de 1989 Ley de la Jurisdicción Constitucional [Law of the Constitutional Jurisdiction], art. 41 (Costa Rica).
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{Id.} at art. 81.
\item \textsuperscript{27} \textit{CONSTITUTION} (amended 1989) art. 48 (Costa Rica).
\item \textsuperscript{28} \textit{Id.} at art. 10.
\item \textsuperscript{29} Solano, \textit{supra} note 18, at 39
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{31} \textit{Id.}; Law of the Constitutional Jurisdiction, art. 13.
\end{itemize}
The additional judicial remedies endorsed a jurisdictional scheme that would provide for a well built and reinforced constitutional control system. They would also enhance the supremacy of the Constitution, aggregating the constitutional advisory jurisdiction within key state bodies of government\(^{32}\) (legislative and the judiciary), and provide for an extended scope for standing on judicial review, etc.\(^{33}\) These procedures were designed to enhance the constitutional order and they were introduced as part of an institutional process to open the Judicial Power to human rights, transparency, etc.\(^{34}\)

Obviously, the past Costa Rican constitutional control system shared much of Latin American Courts traditions. That is, prior to 1989, it had a profound deference to the political bodies of government; the legal framework and the judges conceded to a culture that favored their political minimalism.\(^{35}\)

In contrast to both systems, this meant a profound transformation for the different branches of government.\(^{36}\) The rules for

\(^{32}\) Law of the Constitutional Jurisdiction, arts. 96, 102.

\(^{33}\) Id. at art. 75.

\(^{34}\) See Wilson & Handberg, supra note 8, at 527-28. These authors explain that the changes began from the need for judicial assertiveness and international pressure to enhance human rights and the rule of law.

Latin American politics have not been immune to the latter as outside interventions both by governments and nongovernment organizations (NGOs) have pressed for reform. Pressure for establishing the rule of law and by extension human rights protection has come from the United Nations on an abstract level, the United States through the USAID programs, and the World Bank. In addition, NGOs have become larger players in providing emotional and often financial support for domestic reform groups. The process is often erratic and halting but the result is at least greater awareness if not acceptance of human rights as a goal.

Id. at 528 (citations omitted).

\(^{35}\) See id. at 527 (“Supreme Courts within Latin America have established a long historical pattern of political minimalism. That lack of judicial assertiveness has also been compounded by inefficiency, a lethal combination for any court system. As a result, supreme courts have historically speaking rarely been major political players within national affairs. Indeed, there is a general consensus that the role of Latin American judiciaries in the first two hundred years of independence was “minor, if not irrelevant”. Given the political instability often endemic to certain societies, that noticeable lack of impact is not unexpected. The legal training received by the justices along with a political socialization reinforcing the perception of week courts has long cemented their adherence to the status quo and its pathologies.”).

\(^{36}\) Id. at 535. (“Thus, in Costa Rica it is generally agreed that the creation of the Sala IV [Constitutional Chamber] was a constitutional revolution in general, and of public law specifically. Expanding state actions into new areas of Costa Rican political and economic life brought the need for protection from abusive state actions into sharp relief. These were protections were broader than merely procedural rights and included explicit concerns with substantive policy. The political emphasis over time focused upon the question of protection of fundamental individual rights. Accomplishing such a task was difficult in a political system that emphasized the dominance of the political branches; their decisions are nor-
politicians to govern changed rapidly after the promulgation and enactment of the 1989 Costa Rican Constitutional Jurisdiction. The creation of the Constitutional Chamber meant a higher level of judicial enforceable standards for the people, but greater limits upon government. Even though governance directly deals with the problem of exercising legitimate authority, the concept has attached other important standards, such as the observance of fundamental rights and the respect of minorities. Therefore, it excludes regimes that rule without limits. In this respect, the branches of government are expected to play a role within their legal realm to control each other. They must be in the position to impose their decisions among others independently. It must involve policy driven directly from democratic standards and constitutional foundations.

III. CRITICISMS TO THE CONSTITUTIONAL CHAMBER

The critics of this jurisdiction can be regarded in two ways: (1) those that oppose the structural or organic positioning of the Constitutional Chamber within the State, and (2) those others that complain about the Court's judicial activism, overreaching decisions and its lack of self-restraint.

A. Structural Criticisms of the Constitutional Chamber

One author has a very well balanced view of the constitutional jurisdiction in Costa Rica. Rodriguez Cordero thinks the Constitutionally presumed to be in conformance with constitutional norms while the judicial branch held itself in a secondary position.

37. Understanding governance to be the art of putting coherently together institutional powers of government and political ideas within a given constitutional framework, it is no less than exercising legitimate political ideas to reality and within a framework that grants public recognition and reasonable stability to a government. See, e.g., John Bailey, Corruption and Democratic Governability in Latin America: Issues of Types, Arenas, Perceptions, and Linkages, Address at the 2006 Meeting of the Latin American Studies Association, San Juan, Puerto Rico (March 15-18, 2006) (“[D]emocratic governability encompasses not only how power is achieved and the rules of the game (democracy as regime) but also the exercise of power by state agencies acting within a legal framework to address priority problems in a society (governability)... Manzetti differentiates between systems of low corruption, with functioning checks and balances, internal constraints and an exigent civil society versus those with high corruption, which is the case of most Latin American countries: High corruption takes place when: (1) many checks and balances among the three branches of government and the institutional mechanisms to combat corruption are weak or not used; (2) there are not self-restraints in profiting from corruption as commissions reach extremely high levels; and (3) corruption is so widespread at any societal level as to be accepted and tolerated... [M]any LDCs are likely to fall into the second model.”).
tional Chamber has been established as a court of law, but it has many political implications. He argues that the compelling force of the Constitutional Chamber comes from its institutional position, being part of the judiciary, giving it more strength than the other branches of government. Though the 1989 reforms established a system that not only was designed to guarantee constitutional supremacy, it has re-engineered that power to reform the Constitution, to even assess in a non-binding manner the substance of the amendment. Another, Hugo Alfonso Muñoz ex-legislator and Constitutional Law Professor, states that the amendment to the Constitution in 1989 meant a change in government. It meant passing from a moderate presidential system to a co-governing body of the political branches of government and the Constitutional Chamber.

Muñoz considers that the Costa Rican state has evolved into a system of rule of law extremely controlled. The Constitutional Chamber is a decisive political organ in the Costa Rican political order. He holds that the relevant political decisions are taken here with its constitutional attributes or competences. Hence, he claims that the 1949 Constitution sought to avoid that the Executive Power would have all the power to decide every matter before it, and now today, everything must be driven through the constitutional jurisdiction such as treaties, constitutional amendments, and other matters that could be decided by other public authorities.

39. Id. at 109.
40. Id. at 112.
42. Id. at 253-63. This author observes that the 1949 Constitution diminished the power enjoyed by the Executive Branch of government in the previous constitutional design. It is now limited and moderated by the autonomous institutions endowed to carry very specific public services, in addition the constitutional framers enhanced municipal governments, all this to weaken the strong Executive power. Id.
43. Id. at 263-70. Muñoz claims the legal design favours the Constitutional Chamber to intervene in political questions, but in an unbalanced manner through judicial review, as the other political bodies must yield to its decisions. Id.
44. Id. at 263.
45. Id. at 264.
46. Id. at 265.
Both Rodriguez Cordero and Muñoz claim that the Constitutional jurisdiction tilted the power in favor of the judiciary instead of the political branches of government. This is an important assertion, because even Muñoz holds that this change, in balance, does not mean a substantial change in government, but rather enough to have strengthened the judicial branch of government more while trying to enhance fundamental rights.

In this sense, Francisco Antonio Pacheco, ex-president of the Legislative Assembly, shares the opinion with Muñoz that the Costa Rican state has installed procedural bars that have affected its course of action. He assures that the state is even more vulnerable to solve many of the current problems (some of which jump from one period to another). There are too many disruptions among the different branches of government, in fact both Muñoz and Pacheco match the Constitutional Chamber as a senate when it renders its advice through the advisory jurisdiction. Pacheco argues that political agreements are fragile when forged.

But of course, a constitutional control system is a form of control over the actions of the different branches of government; one must not forget that the legitimacy of a government comes closely bonded to the observance of human rights and minority rights. In this sense, limits upon governments can be irritating. Even though keeping it as a legal form of control, in contrast to political controls, may well interfere when a Court deems unconstitutional certain governmental actions and has a very definitive political implication. Being that the Constitution is the real and lasting limit of all sources of governmental powers, to interpret the Constitution, inevitably will have consequences outside of the legal order.

47. Id. at 278.
48. Id. at 277.
50. Id. at 282.
B. Overreaching Decisions and Lack of Self-Restraint

The other form of criticism comes from Alex Solis Fallas, who through his intense reading of rulings implicitly reveals the importance of being vigilant on the Constitutional Chamber's decisions. He claims that the Constitutional Chamber overreaches the interpretation of the Constitution. He holds it does this by the open texture and that it has no limits criticizing the Constitutional Chamber for annulling the procedure followed in a constitutional amendment prohibiting reelection of presidents. That is why he reverberates the famous phrase of U.S. Supreme Court Justice Charles Evans Hughes "[t]he Constitution is what the judges say it is," repeated many times by justice Piza in Costa Rica. Solis holds that the Constitution cannot be interpreted in the manner done by the Constitutional Chamber.

Nevertheless, no politician will deny the importance of the Constitutional Chamber's role in Costa Rican society. That is why

[t]he control of the constitutionality of the laws implies the breaking of the omnipotence of the law as the expression of the general will and introduces "a disturbing element into the classical dogmas of democratic constitutionalism." Even so, the presence of a Constitutional Tribunal is also a cause of doubts and even heated debates, since the competencies on which it normally depends carry written the possible germ of a collision with the powers of the other bodies of the state. It

54. Id.
55. Id. at 106.
56. Id. at 71.
57. Id. at 94.
58. CONSTITUTION (amended 1969 by Ley No. 4349 del 11 de Julio de 1969) (Costa Rica). The original 1949 art. 132.1 says
The following may not be elected President or Vice President: 1. A person who has served as President during any period of time within the eight years prior to the term for which the election is being held, or a Vice President or whoever has replaced him, who has served for the greater part of a constitutional term . . . .
59. SOLIS, supra note 53, at 15.
60. Id. at 189.
61. Id. at 190-93.
is a source of contradiction between those who praise it and those who abhor it. 62

Rodriguez Cordero is keen to respond to the claims that the creation of the constitutional jurisdiction was the avenue to the judicialization of politics, 63 and the revelation of a supposedly lack of constitutional engineering among the different branches of government. 64 But he acknowledges not only former Justice's Piza explanation of the fundamental mission of the Constitutional Judge to adopt in his or her decisions the ideology of the Constitution, but this author finds something that is key to understand the problem posed in this debate: that there is some resistance or reluctance of the political branches of government to understand that the Constitutional Court also shares a degree of political power when the Judges say what the Constitution says. 65

In the case of the reelection of ex-presidents, 66 it is clear that the Law of the Constitutional Jurisdiction authorized the Court to analyze the procedure given to all legislation including a constitutional amendment, 67 and also, to determine the power of the legislative assembly to impair a constitutional freedom rightfully handed down by the original constitutional framer. 68 In this case, even though the Court deemed unconstitutional the procedure used to partially amend the Constitution, and not through a general reform by a Constituent Assembly, the Court argued that the original constitutional framer had historical reasons to allow non-consecutive reelection of ex-presidents, regulating implicit re-

63. RODRÍGUEZ, supra note 38, at 104.
64. Id. at 105.
65. Id. at 105.
66. BARKER, supra note 4, at 150. This author rightfully explained the case as the “most controversial” question faced by the Constitutional Chamber because of the multiple implications concerning political consequences of constitutional amendments.
67. Law of the Constitutional Jurisdiction, art. 73 (“The action of unconstitutionality proceeds: a) . . . c) When the law-making procedure or legislative agreements violate a substantial requirement or procedure provided for in the Constitution or, where appropriate, established in the Rules of Order, Direction and Interior Discipline of the Legislative Assembly; ch) When approving a constitutional amendment in violation of constitutional rules of procedure; d) . . . ”).
strictions in the Constitution. The difference between constituent and constituted powers is ultimately a legal concept, where the latter is a concept implicitly limited. It is true that even though sovereignty resides with the people, the rule of law and a living democracy must grow from the forefather's unlimited power to design democratic mechanisms that keep the system working, for the people and the election of their leaders. On the contrary, the amendment worked against the democratic principle, which is the main source of legitimacy of any government.

C. Advisory jurisdiction

Article 10 of the Constitution gives ample powers to the Constitutional Jurisdiction. In section (b) it opens access to an abstract system of constitutional control to analyze the constitutionality of bills before their final legislative approval. The design given in the Constitution and the Law provides for this Court to be a tributary on legislative amendments to the Constitution, on the approval of treaties and other legislation through its technical advice.

There are two forms to provide consultation to the legislative assembly. The first form is mandatory prescribe by the Constitution and the Law of the Constitutional Jurisdiction. These cases involve constitutional reforms, international law and amendments to the Constitutional jurisdiction.

The second form is the optional advisory opinion that may be requested by ten or more legislators on any type of bill, giving recourse to minorities to protect their rights from legislative majorities. As we will see, this advisory jurisdiction is very controversial. Some argue that the legal design breaks away from the classical division of powers of government when reviewing constitutional bills in progress before the Legislative Assembly.

69. The framer left two complete presidential periods before allowing reelection.
71. CONSTITUTION (amended 1989) art. 10 (Costa Rica).
72. Article 101 of the Law of the Constitutional Jurisdiction establishes that the Chamber shall render its advice within a month of its filing, and in its assessment, it shall consider the relevant contents from a constitutional point of view.
73. CONSTITUTION (amended 1989) art. 10.b (Costa Rica); Law of the Constitutional Jurisdiction, art. 96.a.
74. Law of the Constitutional Jurisdiction, art. 96.b.
These forms of consultation serve all kinds of bills, and it is exercised when the bill reaches a great deal of maturity in the Costa Rican legislative procedure. The bill must pass the initial stages: production of the legislative initiative, construction of the records, publication of the bill, the incorporation in the records of multi-disciplinary studies and reports, Committee Report, Plenary discussions and introduction of new motions from the members of the body, and then first debate vote. It is after this point, where the advisory opinion may be elevated to the Constitutional Chamber, to clear constitutional questions that may have risen during the procedure.

The Court seems to have a powerful position under the advisory jurisdiction (as it may be filed by a minority group of legislators or according to the cases regulated by the law), since the law making process is interrupted before the second debate, and later enactment and promulgation of legislation, evidently, has the effect of turning around the presumption that existed prior to 1989—that laws produced by the Legislative Assembly were constitutional. Instead today, it is the opposite, where the legislative body must wait for the Constitutional Chamber to deliver its advisory opinion.

The advisory opinion—even though it reflects a neutral opinion of a court—unfortunately it may entertain shadows, not of political colors but of political confrontation; simply because the Constitutional Chamber is at the edge of a political or of a judicial body. Therefore, could it be legitimate to ask if it is a Court or is it a de facto Senate To illustrate the solution to the problem, scholars differentiate the system of judicial review from the moment it can

75. Id. at art. 98; Reglamento de la Asamblea Legislativa [Regulations of the Legislative Assembly] arts. 141, 154 (Costa Rica). Once the bill has reached the first debate and receives the body’s approval, motions to amend are inadmissible with the exemption of minor changes or editing errors contained in the bill.
76. Regulations of the Legislative Assembly, [amended 2005] art. 113 (Costa Rica).
77. Id. at art. 115.
78. Id. at art. 116.
79. Id. at arts. 118, 122, 126.
80. Id. at arts. 131, 132, 133.
81. Id. at art. 134.
82. Id.; CONSTITUTION (amended 2003) art. 124 (Costa Rica). With the exception of constitutional reforms, ordinary legislation only requires two debates and votes. Constitutional reforms are rigorously treated by the Constitution as it requires several series of debates and votes.
83. Regulations of the Legislative Assembly [amended 2003], arts. 143-46 (Costa Rica).
84. Muñoz, supra note 41, at 269; Pacheco, supra note 49 at 285.
be exercised. For them it is clear that it is just one form of constitutional control and possible relationships between branches of government. That is why, if the judicial review operates before the approval and sanctioning of the law, it is commonly referred to as an *a priori* system, and after, a *a posteriori* system of judicial control of the law.

In European countries where there are concentrated forms of judicial review, they have rich discussions on the prevalence of any of these two systems. This fact was highlighted in a Seminar that marked the twentieth anniversary of the Constitutional Chamber in 2009, where some of these discussions were recollected. In fact, a previous study grouped the following systems: (a) the *exclusive system* as it operates in France; (b) the *mixed systems* that have both *a prior* and *a posteriori* controls; and (c) the *exceptional a priori systems* of constitutional control still present in several European countries (Spain, Italy and Austria) that have the *a posteriori* system, yet have not totally detracted from this system, by installing an exception to the main judicial review system allowing the *a priori* design to work exceptionally. These authors highlighted Moderne's assertions of the *a priori* system of constitutional control reflecting a twofold scholarly trend of thought. One side asks why have the *a priori* system if the *a posteriori* system of judicial review would be as good and effective of a remedy in the case of unconstitutionalities? This group believes this system is not jurisdictional rather it is tainted as a political instrument, concluding its functions are *quasi* legislative as it operates on provisions that are not in force and to avoid a constitutional infraction. Hence, considering this form of judicial review places a shadow of doubt upon the legislation when, on the contra-

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88. Franck Moderne, *supra* note 85, at 149.

89. *Id.* at 151-152.
ry, the system should be in favor of those representing the people.\textsuperscript{90} All forms of judicial review should operate until the legislation has been fully approved and never should be stopped from course.\textsuperscript{91}

On the other side, there are the others, including Moderne himself,\textsuperscript{92} that believe in its jurisdictional character; it is decided under juridical and procedural criteria, consequently it is governed by arguments of law.\textsuperscript{93}

To discover the answer to the question previously posed in this section—is it a court or a de facto Senate?—the problem returns to how we see the constitutional jurisdiction. It mainly should be answered in two forms: from the political or legal point of view. If it is political, Rodríguez Cordero,\textsuperscript{94} citing the Spanish Scholar Manuel Aragón in his book “Constitución y control del poder” [Constitution and the control of power], clearly explains this situation:

[Los] controles pueden clasificarse en políticos y jurídicos, siendo propio de los primeros su carácter subjetivo y su ejercicio, voluntario, por el órgano, autoridad o sujeto de poder que en cada caso se encuentra en situación de supremacía o jerarquía mientras que lo peculiar de los segundos (los controles jurídicos) es su carácter objetivado . . . es decir, basado en razones jurídicas, y su ejercicio, necesario, . . . no por el órgano que en cada momento aparezca gozando de superioridad, sino por un órgano independiente e imparcial, dotado de singular competencia técnica para resolver cuestiones de Derecho.

[The] controls can be classified into political and legal controls, the first participating of a subjective and free exercise character, by the organization, authority or body whose power is in a position of supremacy or hierarchy while the peculiarity of the latter (legal controls) is its objectified character . . . that is based on legal grounds, and its exercise, compulsory, . . . not by the body that appears to entertain superiority,

\textsuperscript{90} Miguel Angel Alegre Martínez et al., La experiencia española del recurso previo de inconstitucionalidad: de la supresión a la añoranza [The Spanish experience of the a priori recourse of unconstitutionality: from the abolition to the longing], No. 9-1 REVISTA DE DERECHO PÚBLICO 49 No. 9-10.
\textsuperscript{91} Id.
\textsuperscript{92} Moderne, supra note 85, at 153.
\textsuperscript{93} Id.
\textsuperscript{94} RODRÍGUEZ, supra note 38, at 30.
but by an independent and impartial body, endowed with unique competence to resolve questions of law.95

It seems then, that political controls endow a superior authority to a member or body than that legal control given by the law. In this sense, the Constitutional Chamber recognizes this when it concedes in its jurisprudence that the legislators have the power to freely decide how to regulate procedures,96 unless the Constitution dictates otherwise. In this sense, the legislators could restrict their own power by installing better guarantees, like the protection of human rights, or even to that end, for judicial reform to install or restructure a judicial body, its powers, etc. From their supreme position they can also control all other legal procedures, including of course, the Law of the Constitutional Jurisdiction.

Both political and legal controls are very different in the way they work. As expressed in the Federalist Papers, the legislative branch of government commands the financial and legislative functions of the State97 and has the power to exercise political control. In this sense, Hugo Alfonso Muñoz holds that:

El control parlamentario lo ejerce el órgano representativo y constitucional, esencialmente político y como consecuencia reviste su función características políticas, no se trata de una supervisión jurídica, ejercida con base en criterios de legalidad, sino de oportunidad o conveniencia.

Parliamentary control is exercised by the representative and constitutional body, it is essentially political and because its function is of political nature, it is not a form of legal supervi-

95. Id.
97. THE FEDERALIST No. 78 (Alexander Hamilton) ("Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.")
sion, executed on a legal basis criterion, but on opportunity or convenience.98

It is important then to settle that it is not the Constitutional Chamber that has exceeded its powers, instead it has fully executed them accordingly to the legal authority given by the 1989 constitutional forefathers. Because it is the attainment of a legal objective in favor of the legislative function of government to perform constitutional and internationally protected human rights, it must be seen as a significant part of that policy, undertaken vigorously by the Justices since the 1989 constitutional reform.

This legal form of control is initiated by any given group of ten congressmen (from any party), or by Law, it is a compulsory form of constitutional control where the Law of the Constitutional Jurisdiction only establishes a binding decision over procedural matters, but not on the contents of the bill.99 Hence, if political control is based on the political will of the body (group or organ) to engage on such control, the legislator did not endow that to the Constitutional Chamber, instead it conceded to minorities the exercise of this form of legal control.

It is mainly a juridical system of constitutional control when it addresses procedural issues, rather than a political one, as it may influence the will of the legislative body if it declares unconstitutional the procedures of the bill. But from a policy point of view, it is not decisive; the legislator may choose to continue approving the piece of legislation.

No formal political control can be asserted by the Constitutional Chamber. This is clearly a preemptory function of the Legislative Assembly, which still resides in the law granting standing to 10 legislators or in the mandatory cases it provided for advice. This of course can be amended. Either way, the Constitutional Chamber lacks the power to engage sua sponte in any form of control, which is very different from political control systems. The Constitutional Chamber as a judicial body cannot decide for itself to begin a particular course of action if it has not been previously authorized by the law.

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Through the 1989 amendments to the Constitution, the legislators implicitly limited their own power in favor of a juridical system based on binding analysis of procedural matters (not on substantive matters) that would place constitutional principles and values ahead of future legislation. The Law provided for an advisory opinion to enhance the quality of their power to enact freely any type of legislation, counting with technical advice from a specialized judicial body, and only when the bill would be sufficiently mature.

This system clearly works in favor of the rights and freedoms of the people, as bills do not have to wait until being examined on constitutional grounds until they are in force, avoiding unnecessarily the infringements to the constitution.

To modify this system will also be a political decision, but it shall have to be carefully crafted. It is evidently a system that is harsh on certain political moments and strategies, and has been systematically disqualified severely. There are studies nonetheless that reveal a low impact of the advisory jurisdiction over the legislative work; in fact, statistics prove that much of the claims of its harmful interventions should be discarded. For example, based on a study done on the advisory opinions statistics, two year ago, it was stated that:

It is possible that the Opposition Parties will use the Advisory Opinion to move forward with their political agendas. In fact, it is often contended that the Advisory Opinion is often used as leverage to end a dispute and to reach a political agreement. Nevertheless, this might be true in some cases, but not always. An analysis of the different advisory opinions (mandatory and optional) from the years 1989 to 2007 reveals that the Constitutional Chamber's involvement in the legislative process to be positive. It analyzed a total of 525 cases, where 60 % were mandatory and 38% were optional. This fact easily rules out that the optional advisory opinion could be used to filibuster the legislative procedures. Moreover, 24% of the mandatory advisory opinions of the Constitutional Chamber were found with constitutional problems, 62% did not. For optional advisory opinions 43% found breaches in the procedure

100. Id. at arts. 96 – 101.
or to the fundamental rights, therefore preventing the enact-
ment of legislation with expensive repercussions due to im-
portant constitutional breaches.\textsuperscript{102}

But then again, when in 2009 the Constitutional Chamber cele-
brated its twentieth anniversary, another study rendered favora-
ble results.\textsuperscript{103} In twenty years of existence, the study revealed
that the mandatory advisory opinions dominate with a 63% of to-
tal cases,\textsuperscript{104} and 36% are produced under optional advisory juris-
diction.\textsuperscript{105} The total number of cases analyzed in these twenty
years was 479, which only represented 0.24% of the decisions tak-
en by the Constitutional Chamber in the same period.\textsuperscript{106} This con-
cludes that the advisory jurisdiction is not a significant source to
the case load of the Court. It is also significant to conclude that
because a major source of cases for the Constitututional Chamber
is advising the legislative assembly on constitutional amendments
and the incorporation of international law and amendments to the
law of the Constitutional Jurisdiction,\textsuperscript{107} political parties have
played a minor role in relation to many claims.

It does not cause delays in the legislative decision making pro-
cess; results of the study show evidence of this to be true. Elo-
quent results come in favor of the Constitutional Chamber as 70%
took less time than a month to examine the legislative process,\textsuperscript{108}
and 95% of the time more than a month and a half to hand down
the constitutional decision.\textsuperscript{109} It is important to mention, as the
study highlights,\textsuperscript{110} that if the legislative records are incomplete,
the time elapsed from the moment the advisory opinion is filed
and then decided by the Court, is rarely caused by the Constitu-
tional Chamber, as it must wait until the legislative authorities
send the records.

Finally, it has been discarded that the advisory jurisdiction may
be used as an instrument to filibuster the legislative procedure.\textsuperscript{111}
Malicious usages could be considered as forms to obstruct bills

\textsuperscript{102} Id.
\textsuperscript{103} Milano & Echandi, supra note 85, at 33-37.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Law of the Constitutional Jurisdiction, art. 96.a.
\textsuperscript{108} Milano & Echandi, supra note 85, at 33-37.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
from opposing groups, where the optional advisory jurisdiction would be used at length as long as ten congressmen sign the petition. Measured by the level of success of these petitions, these claims also have to be discarded. Consequently, this could lead us to a reasonable conclusion that the Constitutional Chamber’s intervention has been necessary to correct inefficiencies in the legislative procedure.

The study results show that on mandatory advisory opinions, 14.47% of the decisions have constitutional problems that invalidate the legislative process, and for optional advisory opinions it reveals that 61.71% of cases brought to the constitutional jurisdiction have constitutional issues. Therefore, the legislative process is invalidated and has been recoiled to the moment it suffered the procedural substantive breach. From a historical perspective of this study, it concludes that there are reasons to favor the advisory jurisdiction as it avoids a surge of further constitutional challenges through the *a posteriori* system of constitutional control.

This is quite beneficial, because it helps escape from future legal gaps created by the judicial review of legislation and the examination of legislative procedures and breaches to the fundamental rights and human rights. Therefore, the legislator may rewrite the bill and purposely avoid future constitutional conflicts.

Possibly, the main problem with Costa Rican governance has been the will of the electorate. The Costa Rican legislative body has passed from a political system dominated by two political parties to a very distinct one with many political groups, and that has hurt the legitimacy of many decision making processes. Political parties have now to compete with many other organizations to reach the people and satisfy their needs. Under these circum-

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112. Law of the Constitutional Jurisdiction, art. 96.b.
113. Milano & Echandi, supra note 85, at 36.
114. Id.
115. Id.
116. Id. at 37.
118. RAFAEL ENRIQUE AGUILERA PORTALES ET AL., *LAS TRANSFORMACIONES DEL DERECHO EN IBEROAMÉRICA. PROBLEMAS DE GOBERNABILIDAD DEMOCRÁTICA Y CIUDADANÍA SOCIAL EN AMÉRICA LATINA [THE TRANSFORMATIONS OF THE LAW IN IBEROAMERICA. PROBLEMS OF DEMOCRATIC GOVERNABILITY AND SOCIAL CITIZENSHIP IN LATIN AMERICA] 11* (Editorial COMARES S.L. 1st ed. 2008). The author holds that political and constitutional sciences tend to satisfy the needs of the State, institutions and political elites, that citizens are only affected by the decisions taken from above, having no influence and besides being incapable of having political will. But it must not be taken for granted that society does
stances, political branches of government cannot evaluate their political mandates merely in terms of the numbers they receive from their constituency. It is not possible to conceive a constitutional democratic state from a picture exclusively taken on Election Day; instead it is necessary to understand that institutions are designed to serve the individual and their communities, as they all converge in the Constitution.

But still, it is important to analyze some cases that will reveal the importance of this constitutional safeguard, endowed by the 1989 framer of the Constitutional jurisdiction. Therefore, it is the judge's execution of the law that has been the problem because it has been handed down by the politicians through constitutional means.

IV. CASES

A. The Amendment to Article 24 of the Constitution

Article 24 of the Costa Rican Constitution holds the right to privacy, freedom, and confidentiality of communications. But the original constitution did not contemplate the new forms of communication. In this regard, the legislative branch was seeking to approve a constitutional bill to furnish the State with instruments to fight drug trafficking and other organized crime. It was understood that these maladies were not foreseeable to the original constitutional framer.

In 1991, pursuant to article 101 of the Law of the Constitutional Jurisdiction, the President of the Legislative Assembly requested advice on the constitutional amendment of article 24.

The Court rendered its advice based on several major arguments. The first one consisting of the nature of an evolving society: the need for the Constitution to adapt to these changes, through constitutional reform passed by the legislative assembly, and by the Constitutional Chamber's interpretation. The Court have an influence on the impact and social repercussion of institutional changes, in a significant manner, when it involves more fundamental rights and public liberties. Democratic governance cannot be measured by governmental terms (political elites or a representative political dominance) and governed classes (people and citizens in general), this is no longer a valid equation and a functional one in our complex societies.

119. CONSTITUTION (amended 1996) art. 24 (Costa Rica). The original version of the Costa Rican Constitutional did not provide for the possibility to intervene communications, only private documents. Therefore, the amendment would put to date the constitutional language.

announced its consideration that the Legislative Assembly should choose constitutional reforms only when there are profound gaps between the Constitution and the underlying values of society, or when there are circumstances not regulated by the constitutional framer and nevertheless no constitutional principles apply. It is clear that the message of the Constitutional Chamber is that the Constitution should not be amended unnecessarily, unless it is important from a utilitarian point of view.

This generated a big reaction from the Legislative Assembly basically because the Constitutional Chamber gives the impression that it can control the opportunity and convenience of the legislative function (that only pertains to the legislators). In clarification of the decision,\footnote{SCCSJ, Apr. 16, 1991, No. 1991-0720 (Costa Rica).} on the first point of controversy with the Legislative Assembly, the Constitutional Court explained its role “to adapt the text of the Constitution” not as a way to extend its powers over those of the Legislative Assembly, but as a form to energize the Constitution while interpreting the static language throughout time and to very different situations when promulgated.\footnote{Id.} The Constitutional Chamber then argued that the Constitution should be integrated with the rest of its legal text,\footnote{Id.} meaning that the amendments will require a great deal of unity, surpassing temporary majorities in the Legislative Assembly.\footnote{Id.} Therefore, the Constitutional Chamber can call upon the dangers and inconveniences of the text of the constitutional amendment.\footnote{Id.}

The main problem with the bill amending article 24 can be pinpointed to the void left in its text, as it did not regulate the voting requirements for any future law on wire tapping or all other types of communications—that is, if the Constitution required its approval by a simple or qualified majority vote. This would inherently carry many dangers to privacy rights, as in the future it could have been open to regulation through a simple majority vote for the government to meddle or restrict a fundamental right. Despite the problems that were created from the Constitutional Chambers advice, the amendment introduced some coherence to the bill approved by the Legislative Assembly, as it took into account the Constitutional Chamber’s advice, to included the two-
thirds majority vote in order to approve all legislation that would impinge on privacy rights.

B. Bill for the Approval of the Extradition Treaty Between the Republic of Costa Rica and Korea

In Costa Rica treaties are negotiated and signed by the Executive, and then are approved through the ordinary legislative procedure, then sanctioned as national legislation by the Executive. Only at this point can it be ratified by the Executive for it to be binding at the international plane. Moreover, according to article 7 of the Constitution,126 international legislation has a higher authority than the law, having the capacity to modify statutes and other regulations. Therefore, their approval has been treated by the constitutional framer cautiously.127

The advisory jurisdiction is mandated before the second debate that gives legislative approval of international legislation. This is an important rule, as the consultation will give light before the reciprocal or multilateral relations of the country are engaged. There are cases in which the Constitutional Chamber has found unconstitutional the legislative procedure given to a treaty or has held it incompatible with the Constitution—for example, when the legislators have not examined thoroughly the particular piece of legislation, having missed or passed illegible portions or other addendums in other languages different than Spanish.128 The Constitutional Chamber has held the obligation of the executive to seek the approval from the Legislative Assembly that reveals the exact and correlative instruments of international law.129

In the case of the Extradition Treaty between the Republics of Costa Rica and Korea, a group of errors emerged from the text.130 The Constitutional Chamber noted minor imperfections that consisted in omissions or misspelling of terms. But the treaty had three authentic languages: Korean, Spanish, and English. Pursuant to the treaty, the English version would prevail in case of conflict. Comparing both Spanish and English versions, some im-

126. CONSTITUTION (amended 1968) art. 7 (Costa Rica).
127. Id. at art. 10.b.
129. Id.
important issues emerged, revealing incomplete portions of the treaty because subsections were missed or omitted completely.

From the legislative records, there were different institutional opinions that clearly shed more light on the many problems that the treaty would have if approved and later enforced. The Constitutional Chamber verified that the incomplete treaty if endorsed by the Legislative Assembly would severely undermine the object of the Treaty and even though the constitutional role is to give advice to the Costa Rican congressmen (on strict constitutional issues and binding on procedure), it admittedly had done an exception in controlling the use of the different languages.\textsuperscript{131} This of course was a role of the Congressmen, not of the Constitutional Chamber.

But under these circumstances, the Treaty was declared invalid \textit{ab initio} (from the very start of the legislative procedure). In this sense, the judgment relied on its precedents that held the constitutional obligation of the Executive branch to submit before the legislative assembly a complete version of the treaty, a clear codification of the text, before it could be approved by the Legislative Assembly.\textsuperscript{132} Moreover, the Constitutional Chamber also reinforced its previous case law, adding that it could not render proper advise to the Legislative Assembly if the bill was incomplete.\textsuperscript{133}

\textbf{C. The Constitutional Chamber on Substantial Infractions of Procedure}

As mentioned many times before, the Law of the Constitutional Jurisdiction provides for the Constitutional Chamber to examine the procedure given to legislation\textsuperscript{134} or to bills.\textsuperscript{135} For a bill to become law, [it] shall be subject to two debates, each on a different non-consecutive day. It shall obtain the approval of the Assembly and the sanction of the Executive Branch, and be published in the Official Journal, without prejudice to the re-

\begin{footnotes}
\item 131. \textit{Id.}
\item 132. SCCSJ, May 5, 2006, SCIJ, 2006-6011 (Costa Rica).
\item 134. Law of the Constitutional Jurisdiction, art. 73.c), ch.
\item 135. \textit{Id.} at art. 101.
\end{footnotes}
quirements established by the Constitution for special cases and those decided by popular initiative and referendum.\footnote{136} In the recent past the Legislative Assembly has also moved toward expediting the discussion and approval of legislation.\footnote{137}

Article 121.22 of the Constitution\footnote{138} provides for the legislative assembly to "[e]stablish regulations for its internal operation, which, after being adopted may not be amended, except by a vote of no less than two-thirds of all its members."\footnote{139} This article has also been construed by the Court with article 9 of the Constitution to allow it to establish independently its own regulations, but at the same time to be amended at the will of the body.\footnote{140} The procedures to amend these regulations are located in article 124, establishing the need for one session and its official publication.\footnote{141} Any amendment to the Legislative Regulations needs the approval of two-thirds vote.\footnote{142}

A leading case, decision number 1992-0990,\footnote{143} interprets article 1 of the Constitution to hold the most important legal principle held in the Costa Rican Constitution: "Costa Rica is a free and independent democratic Republic."\footnote{144} The Constitutional Chamber holds that article 1 has two very important cornerstones, the positivization of the democratic principle and its assertion that it constitutes one of the columns that supports the Constitutional rule of law.\footnote{145} The Court's holding implicates that it must be effective directly upon all sources of the juridical order,\footnote{146} including the power to regulate internal legislative regulations (\textit{interna}...
corporis)\textsuperscript{147} that comes not only authorized by the Constitution article 121.22, but it is substantial to the democratic system\textsuperscript{148} and in particular to the Legislative Assembly as a branch of government.\textsuperscript{149}

This cannot be ignored or modified without causing a serious breach to the democratic organization of the country.\textsuperscript{150} In other words, this principle must permeate the procedures of the legislative assembly. An important statement follows: where the Constitutional Chamber consecrated that this rule making power is inherent to the legislative assembly,\textsuperscript{151} free from all other branches of government, and restricted only by the Constitution,\textsuperscript{152} where it will find those limits comprised by the fundamental rights and the substantial due process.\textsuperscript{153}

The assertions of the Constitutional Chamber concerning article 1 of the Constitution, brings a logical consequence to the rule making power, as the democratic principles must cascade down to the final products of the governing body. In fact, it is asserting that the democratic principle is the base for political participation and political representation, and it needs to be present at all times along existing political factions.

D. Important Fiscal Reform Cases

Concerning the object of this paper, an analysis of all the case law on the advisory jurisdiction is desirable, but this task is in itself monumental and should be reserved for another moment, but then, there could be an analysis of those bills that are highly relevant to any government. Under this character, there are two very important bills that reveal the importance of the advisory jurisdiction.

Fiscal reform is one of the most important topics in Costa Rican politics, but for almost up to two decades it has been postponed.\textsuperscript{154} Besides being an unpopular political measure, it is a vital instru-

\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} SCCSJ, Jan. 21, 2005, SCIJ, 2005-0398 (Costa Rica).
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Análisis del proyecto de Ley de Solidaridad Tributaria [Analysis of the Bill on Solidarity Tax Law], COLEGIO DE PROFESIONALES EN CIENCIAS ECÓNOMICAS DE COSTA RICA [PROFESSIONAL BAR ASSOCIATION OF ECONOMIC SCIENCE OF COSTA RICA], 5 http://www.cpcecr.com/documentos/AnalisisProyectoLeyReformaFiscal.pdf.
ment that advocates in favor of public policies, where scarce resources are used to cover for normal governmental business, or to cover for urgent needs. There are welfare state programs underway that need these scarce resources, many of them expensive ESC rights. Therefore, it is important to have revenue, but it also unleashes fierce political confrontations and deterioration.

Two major reforms were put in place by two governments at different moments in the past seventeen years. All kinds of discussions in favor and against taxes and other forms of taxation took place, but all this reveals that more than two decades will pass with no fiscal reform. In two cases, the Constitutional Chamber was seen as part of a mechanism to expunge these taxation efforts. Undoubtedly, these decisions had enormous consequences to the Constitutional Chamber and the other political branches of Government, as passing taxes was necessary to measure their level of success. Evidently, the outcome of the constitutional decisions made them look bad and awkward.

The Abel Pacheco de la Espriella administration (elected 2002-2006) introduced tax reforms and other structural amendments, designed to fix public finances and financial deficits in various governmental sectors. Nevertheless, the legislative procedure did not pass the constitutional test.

But before we analyze the reasons why the legislative procedure failed the constitutionality test, it is important to take up again some information on the legislative procedure.

Within the objective to make the Legislative Assembly more efficient and expeditious, there have been some amendments to enhance legislative regulations. One of such reforms introduced tailor made procedures to approve legislation by creating certain conditions. These were adopted in article 208 bis of the Legislative Regulations. Moreover, these constraints were self imposed by the Legislative Assembly. They are (a) there must be a motion to create these special procedures, approved by two-thirds of the Legislative Assembly; (b) the content of the bill to be approved

155. Regulations of the Legislative Assembly [amended 2005] art. 208 bis. (Costa Rica) ("Mediante moción de orden, aprobada por dos tercios de sus votos, la Asamblea Legislativa podrá establecer procedimientos especiales para tramitar las reformas a su Reglamento y proyecto de ley cuya aprobación requiera mayoría absoluta, exceptuando la aprobación de contratos administrativos, los relacionados a la venta de activos del Estado o apertura de sus monopolios y los tratados y convenios internacionales sin importar la votación requerida para su aprobación. Todo procedimiento especial deberá respetar el principio democrático, y salvaguardar el derecho de emmienda.") (Adicionado mediante Acuerdo No. 6231 del 8 de marzo de 2005).
must require a simple majority or absolute majority vote; (c) it exempts subject matters such as the approval of administrative contracts, the selling of State actives or the opening of monopolies installed in favor of the State, and the approval of all treaties and other international agreements; and (d) it must observe the democratic principle and safeguard the right of the legislators to motion to amend (seen as a right of the legislator). This article 208 bis of the Legislative Regulations has been interpreted by the Constitutional Chamber as a procedural mechanism to amend the regular body of regulations or ordinances applicable to the Legislative Assembly. In this sense, the two-thirds majority vote of the Legislative Assembly was necessary to begin with the special procedure. This was clearly met at the initial stages.

The Constitutional Chamber reviewed the advisory petition of several legislators, and it decided unanimously on two set of breaches: (a) the bill regulated contents that required two-thirds majority vote, instead of a simple majority vote for their approval; and (b) the provisions were also in conflict with constitutional contents where it mandated institutional or constitutional consultations.

Decision number 2006-03671 found several constitutional inconsistencies. Along the contents, the bill would authorize several public institutions to have access to private financial information protected by article 24 of the Constitution and for the gov-

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156. SCCSJ, Jan. 21, 2005, SCIJ, 2005-0398 (Costa Rica). In this particular aspect of the decision, the Chamber's justices are divided 4 to 3 in the level of requirements that these special procedures should provide. The majority has held that at the moment of its approval, it is then where the Legislative Assembly must agree sufficiently, explicitly, clearly and precisely on the different stages or phases by which it will substantiate the procedure. A minority of justices hold that the legislative regulations should have provided for a stricter framework.


158. Id.

159. Id.; Rodriguez L., supra note 20, at 283-84 (“Before 1989, the constitution did not have a judicial body to render an advisory opinion to the Legislative Assembly. The forefathers did, however, establish a formal constitutional consultation for very specific circumstances. This consultation prescribed the constitutional obligation to have a hearing for certain institutions when bills targeted matters under their jurisdiction. Examples include the universities; the Supreme Electoral Tribunal when the regulation would affect electoral matters; the Central Bank if the regulation regarded the determination of the law of the unit of currency; the judicial branch when the regulation regarded its organization or functioning; and, finally, any autonomous institution when the discussion and approval of bills affected its institutional legal framework.”) (emphasis added) (internal citation omitted).


ernment to install these restrictions. The Constitutional Chamber examined one by one the institutions that were given powers to examine private documents. It held that for taxation purposes, three institutions were not authorized to review private documents; therefore, in order for the legislators to endow these great powers, the bill needed the approval of a two-third majority vote. Consequently, it could not be considered a legitimate piece of legislation passing under article 208 bis, as it was not designed for bills that required no more than a simple majority vote.

On the second aspect of the unanimous decision, it is relevant to read article 190 of the Constitution that states “[f]or the discussion and approval of Bills concerning an autonomous institution, the Legislative Assembly shall previously hear the opinion of that entity.” This guarantees the bill some technical integrity. From the first set of breaches, it also had another set of constitutional infringements, falling to that end to an incomplete institutional consultation. Several motions amended the bill and introduced a series of institutional obligations that would modify their structural and legal powers and required under article 190 to hear their opinion such as the opening of bank accounts which has been historically covered by bank secrecy. In this sense, the decision to regulate new aspects of the law, using this procedural exemption, also violated the applicable constitutional provision that installed the obligation to seek technical advice. All this made compliance with this institutional consultation necessary. But two additional questions divided the Constitutional Chamber on the 2006 advisory opinion to a point where the judges would discuss

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162. CONSTITUTION (amended 1996) art. 24 (Costa Rica) ("The right to the privacy, freedom and confidentiality of communication is guaranteed. Private documents and written, verbal or other communications of the inhabitants of the Republic are inviolable . . . . A special law, approved by two-thirds of all the members of the Legislative Assembly, shall determine which other Public Administration bodies shall be authorized to examine the documents stipulated by said law in the performance of their duties of regulation and supervision for public purposes. This law shall also indicate those cases in which such examination is appropriate.") (emphasis added).


164. CONSTITUTION art. 190 (Costa Rica).


166. CÓDIGO DE COMERCIO [COMMERCIAL CODE] art. 615 (1936) (Costa Rica) (Ley No. 3284 de 30 de abril de 1964 Código de Comercio). Since 1964, the Commercial Code regulates the different commercial relationships, among them, all forms of contracts, including banking accounts and the obligation to keep them inviolable.

if they should adjudge these questions or concede to some self-restraint. To this end, not all points of the consultation decided by the Constitutional Chamber were agreeable to all Justices.\textsuperscript{168}

\textsuperscript{168} Id. The first question complained about the short time given to the Special Commission to debate the different motions. It was argued that the timeframe given was unreasonable and disproportionate. Four Justices considered that the subject matter regulating the tax reforms played a vital role in the need to promote thorough discussions among the members of the Commission, and because of these restrictions, neither happened at the Legislative Assembly and at the national level. The majority of the Constitutional Chamber considered that: "proyecto de enormes dimensiones, que regula materias altamente complejas, para cuya comprensión se requiere de un detenido conocimiento de buena parte de la legislación fiscal costarricense." ["the bill [has] enormous proportions, regulating highly complex matters, that require a thorough knowledge of most of the Costa Rica tax laws".] Consequently, the majority vote held that the time given to debate the motions did not propitiate ample and open discussions, nor deliberate and effective debate of all contents of the bill. In the opinion of the majority, this limited the discussions because it barred 400 motions, that were rejected. But a minority of three Justices (Mora Mora, Solano Carrera and Jinesta Lobo) considered it was improper for the Constitutional Chamber to rule on the timeframe given by the legislative Plenary to a special Commission, as it would substitute the will of the legislators. In its opinion, the Court should exercise self-restraint and the principle of separation of branches of government. The minority observed that the rules given to the Special Commission could not be modified, moreover as it already provided how to proceed in case there was need to continue the discussions of motions, to that end through the extension. Another question, was the Commission's president decision to organize the discussions through sets of motions organized by contents. It decided that neither the President of the Plenary nor of the Commission could limit debates, as it found that the political factions with the majority of motions had less time to defend them. Moreover, the motion to amend a bill was an individual right of the congressmen, therefore it understood it violated this congressional right and underscored the infringement to equal treatment between legislative political parties, those with less motions had more time than those that behaved decisively. But again the three justices considered otherwise. In fact, they put their attention on the parliamentary reality, of a very "fragmented and atomized" body. They considered that this gave rise to filibuster the legislative process through abusive exercise of legislative powers by individual or groups of congressmen, to purposely prolong and obstruct the discussion of the bill. A Constitutional Court could not avoid, they held, to judge the legislative procedure under the Law of the Constitution, but on the contrary resulting to the detriment of its own essence and meaning. The opinion of the minority is that it

"constituye un claro intent legitimo por racionalizar el tiempo y funcionamiento de ésta, para cumplir a cabalidad con un cometido en un término relativamente corto impuesto no por el capricho de la presidencia, sino por el propio plenario ..." ["is clearly an attempt to rationalize the legitimate operation within a timeframe and to comply fully with a task in a relatively short term imposed not by the whim of the president, but by the will of the plenary ...".]

What the minority was precisely arguing was the recognition of not only the right of the minorities to oppose any legislative initiative, but it was also calling its attention to protect another principle of democracy such as the rule of the majorities. Therefore it considered improper to judge the limited timeframe given to the special commission to discuss motions to amend the bill, that was under the authority of the Plenary. The minority understood that the decision sought to rationalize the time to defend a motion and to argue in every case through groups of contents of the amendments. This was a protection in favor of the majorities of the legislative assembly, properly approved by a significant voting majority of two thirds vote.
On a more recent case this year, another set of tax amendments were introduced to the Legislative Assembly floor by the current government. President Laura Chinchilla Miranda elected for the presidential period 2010–2014 and her government prepared the "Solidarity Tax Law."\(^{169}\) In order for it to reach advanced legislative procedures, a series of political agreements were necessary, but there was opposition to the bill. A nation-wide discussion focused on many angles of the tax reform, some of them to show the level of inefficiency in tax revenue versus the need to tax more in relation to the GDP.\(^{170}\)

Once again, an advisory opinion was filed, based on several procedural breaches. In a unanimous decision of the Court, No. 2012-04621\(^{171}\) found two substantial breaches in the legislative procedure. Again, article 208 bis\(^{172}\) of the legislative regulations provided the rules to approve the bill and a series of amendments to tax law. A motion of order provided for these rules to govern the Special Commission that would study and report back on the bill. According to this set of regulations, approved by a two-third majority vote, ordered that the Committee Report should be delivered in a one month term. If necessary, the Committee could extend the time limit to one more week, but such extension needed the approval of a two-third vote of the Legislative Assembly. If still there were pending motions at the end of the additional week, the Committee would have a two day extension to render its final report.

The Presiding officer of the Special Committee, conducive to the procedure set forth by the said rules, took the extension but surpassed the final two day extension. The legislative records revealed that the Special Commission would expire November 15, 2011. Nonetheless it extended its working sessions two days more, up to November 17. The Constitutional Chamber held this to be a breach to the special legislative procedures, which represented the will of the entire legislative body, previously approved by a two-thirds majority vote. Evidently, the Committee’s presiding officer modified predefined ordinances or regulations by adding two more days to the discussions before the committee.

\(^{170}\) PROFESSIONAL BAR ASSOCIATION OF ECONOMIC SCIENCE OF COSTA RICA, supra note 154, at 7-8.
\(^{172}\) Regulations of the Legislative Assembly [amended 2005] art. 208 bis. (Costa Rica).
The two days in excess were declared invalid by the President of the Legislative Assembly and struck down the Committee Report,\textsuperscript{173} representing a shot to the heart of the bill. This decision was appealed before the full body of the Legislative Assembly, which at the time, voted thirty three in favor of revoking his resolution, five votes short to recoil the President's decision. This finally killed the political viability of the bill.

This political moment was decisive. Accordingly to the Court's opinion 2012-04621, if the Plenary of the Legislative Assembly would have accepted the said appeal by thirty eight votes, it would have been a legitimate action in favor of the President of the Special Committee. This would have been even a plausible solution, for example, under Section 615 "Committees are Agenices of the House" of Mason's Manual of Legislative Procedure and pursuant to a parliamentary principle to preserve the will of the majority,\textsuperscript{174}

1. Committees are instruments or agencies of the body appointing them, and their function is to carry out the will of that body. 2. A legislative body cannot delegate its powers to a committee, but when it ratifies the act of a committee in due form, the act of the committee becomes the act of the body. 3. The functions of a legislative committee are purely advisory. All its acts are subject to review by the body and may be approved or rejected. Committee acts are recommendations only and, except as especially authorized, have no force until approved by the body.\textsuperscript{175}

Furthermore, Section 13.2 "Right to Change Rules" states the following:

2. A majority does not have power to make a rule that cannot be modified or repealed by a majority. If a majority of an official public body has authority in the first instance to pass a rule, it has authority to annul or repeal the same rule. Rules that can be adopted by a majority vote can be repealed or annulled by the same vote, even a rule that provides that no rule

\textsuperscript{173} Id. at arts. 27.1, 27.3. One of the main functions of the President of the Legislative Assembly is to preside during debates and rule on procedural issues.

\textsuperscript{174} NATIONAL CONFERENCE OF STATE LEGISLATURES, MASON'S MANUAL OF LEGISLATIVE PROCEDURE 615 (West ed. 2010) [MASON'S].

\textsuperscript{175} Id. (emphasis added).
can be repealed or amended without a vote greater than a majority.\textsuperscript{176}

The challenge against the decision of the president, concerning this special procedure was not enough for the Legislative Assembly to ratify the Special Commissions works. If it would have had the necessary votes, it would have been able to recoil the President's decision, and keep the validity of the Special Committee Report. But it was not enough to have changed the original consensus laid down by the original tailor made framework under article 208 bis, previously approved by the legislative body, upon which the Special Commission should have worked. It is evident, then, that the Constitutional Chamber had many reasons that would have made it impossible to validate the procedure, as it was not corrected by the full legislative body.\textsuperscript{177} One could consider that the Constitutional Chamber was inflexible on this matter, but on the contrary, it explored other solutions on the particular legislative procedure. Moreover, it was also evident that the bill suffered major changes, which meant under the rules originally approved for the Special Commission, to republished in the official journal, notwithstanding that was also not the case.

V. CURRENT AMENDMENTS TO THE CONSTITUTION AND THE LAW OF THE CONSTITUTIONAL JURISDICTION

The Legislative Assembly's data base shows a history of many bills aimed to amend the Constitutional Jurisdiction. Accordingly, 41 bills have been presented to modify the Law since 1989. Of those, only two have passed—one at the beginning of the constitutional jurisdiction containing a transitory provision (that relaxed peremptory terms to adjudge cases\textsuperscript{178}) and more recently the amendment to article 102 of the Law of the Constitutional Juris-

\textsuperscript{176} Id. at 21 (emphasis added).

\textsuperscript{177} But additional arguments added to this decision, holding that when a Special Committee expires, with it, it also loses its legal capacity to act. In this sense, it followed decision number 2006-03671 reaffirming the rule that a Special Committee may exist as long as the legislative body votes to confirm, or uphold and extend its powers. Among other reasons, the Court explains that it is inadmissible to have an exemption to the exemption, that is, where the ordinary legislative procedure has been already modified to allow special rules under article 208 bis of the legislative regulations, therefore there is a need to narrow down on the construing exemptions. See SCCSJ No. 2012-4621).

diction.\textsuperscript{179} This reform eliminated what had been a historical necessity: the different due process of law principles and the meaning of the right of defense contained in the constitutional right to reopen and review criminal cases.\textsuperscript{180} In the advisory opinion that reviewed the legislative procedure to this amendment, decision number 2001-09384\textsuperscript{181} reaffirmed the Constitutional Chamber's different precedents on due process, long confirmed by the body, therefore, being applicable directly by the judiciary.\textsuperscript{182} In this sense, if an important issue arises, the first paragraph of article 102 of the Law would authorize any judge whatsoever, to request an advisory opinion before the Constitutional Chamber, even during the procedures to reopen and review criminal cases.\textsuperscript{183} Therefore, the last paragraph was now unnecessary.

A. Current Constitutional Reform

The most important bill that began legislative study intended to reform two key constitutional provisions, articles 10 and 48.\textsuperscript{184} At its initial stages, it proposed to relax the form of voting within the Constitutional Chamber to declare the unconstitutionality of laws and of other provisions regulated by the law. It said nothing on how many votes were required, whether absolute or qualified majority votes. It suppressed the ample legal scope regulated in today's Constitution that indicates "by an absolute majority vote of

\textsuperscript{179} Ley 9003 del 31 de octubre de 2011 Reforma del artículo 102 de la Ley No. 7135, Ley de la Jurisdicción Constitucional [Amendment to article 102 of the Law No. 7135, Law of the Constitutional Jurisdiction] LA GACETA 228 del 28 de noviembre de 2011. According to article 96.a of the Law of the Constitutional Jurisdiction, reforms to this Law must comply with a mandatory advisory opinion. In this case, it was requested on July 29, 2011 and through decision number 2011-11309 on August 24, 2011, the Constitutional Chamber declared it free from any constitutional breaches that would invalidate it.

\textsuperscript{180} It is important that article 39 of the Constitution was literally interpreted by the pre-reformed constitutional jurisdiction:

\begin{quote}
No one shall be made to suffer a penalty except for a crime, unintentional tort or misdemeanor punishable by previous law, and by virtue of a final judgment handed down by a competent authority, after the defendant has been given an opportunity to plead his defence, and upon the necessary proof of guilt.
\end{quote}

This article was construed not to explicitly assert the right of appeal, but it was later incorporated through the Constitutional Chamber's interpretation in decision number 1992-1739, SCCSJ, Jul. 1, 1992, SCIJ, 1992-1739 (Costa Rica), and through other decisions, where a very complete framework of due process principles and rights was forged. The right to appeal was construed through article 8.2h of the American Convention on Human Rights.

\textsuperscript{181} SCCSJ, Sept. 19, 2001, SCIJ, 2001-09384 (Costa Rica).

\textsuperscript{182} Id.

\textsuperscript{183} Id.

\textsuperscript{184} Legislative record number 17.926.
its members, the unconstitutionality of provisions of any nature and of acts subject to Public Law”.

The Special Commission has reported back to the Legislative Assembly to motion and modify this bill, however, to re-establish the simple majority votes to declare the unconstitutionality, to keep similarities between the current language of the bill and the current text, but also adding new functions of the Constitutional Chamber as an appellate court. This implies that the legislators are planning to break the super concentrated system by creating lower special constitutional courts for the different writs. And with that, they are planning to leave the Constitutional Chamber to unify conflicting case law.

This bill keeps the language of sections (a) for conflicts of competence and (b) for the advisory jurisdiction. Nevertheless, the development of this constitutional amendment is somewhat fragile, since there are higher consensuses to eliminate some forms of advisory opinions. A Blue-ribbon panel appointed by President Laura Chinchilla has given its advice to eliminate the optional advisory opinions or consultation.

On article 48 of the Constitution, it is noticeable that it incorporates along with the habeas corpus and the writ of amparo, the writ of habeas data which will be regulated by the law. It avoids defining what the subject matter for each procedure is and appears to leave it to the law. It nevertheless keeps the current language that refers to maintain, guarantee and re-establish the rights contained in the Constitution as “[w]ell as those of a fundamental nature established in international human rights instruments, enforceable in the Republic.” Nevertheless, this may

185. Id.
186. Francisco Antonio Pacheco, Vladimir de la Cruz, Manrique Jiménez, Rodolfo Piza, Fabian Volio & Constantino Urcuyo, Propuestas para Fortalecer la funcionalidad y calidad de la democracia costarricense [Proposals to buttress the functionality and quality of the Costa Rican democracy] Informe final Comisión Presidencial sobre Gobernabilidad Demócrata [Final Presidential Commission Report on Democratic Governance] (MIDEPLAN 2013) (San José, Costa Rica), available at http://www.mideplan.go.cr/. This document analyzed problems related to government and society, as relationships between the Executive Branch and the Legislative Branch, the public administration, the Judicial Branch and the Constitutional Chamber, and other aspects involving society and government. Out of the thirty nine problems diagnosed, the Blue-ribbon panel came up with ninety seven proposals. I am addressing those relevant to this document.
187. The habeas data, is a writ that provides for protection of the right to intimacy, to personal information and grants redress in case personal information is illegitimately accessed and divulged.
188. CONSTITUTION (amended 1989) art. 48 (Costa Rica).
carry some dangers as it can allow eliminating the reach of the writs of amparo, especially those within ESC rights categories.\textsuperscript{189}

\textbf{B. The Current Reform to the Law of the Constitutional Jurisdiction}

With these new developments, it is apparent that the original legal bill to amend the Law of the Constitutional Jurisdiction will inevitably be modified. The original approach of the motion to amend the law was clearly based on a very restrictive functional view of the Constitutional Court, seen not as a specialized body to give expert advice on Constitutional Law, but as an interference to the political process. It is relevant here to cite the following extract:

\begin{quote}
Si bien es cierto que la Sala atiende por definición discusiones políticas, pues de lo que se encarga es de resolver la rama del derecho más política que existe, no menos cierto es que sus decisiones son (o deben ser) ante todo jurisprudenciales, apegadas al derecho vigente, y no de oportunidad política, ni mucho menos de libre creación legislativa. Debe entenderse asimismo, que la labor de fiscalizar el respeto a la Constitución y el desarrollo de sus principios, no es monopolio de la Sala Constitucional, sino deber de todos los Poderes del Estado, e incluso, de todos los ciudadanos, eso sí dentro del marco de competencia que le fija a cada quien la Carta Política.
\end{quote}

It is true that by definition the Chamber resolves political discussions because it is in charge of deciding the most political branch of law that exists, no less true is that its decisions are (or should be) primarily jurisprudential, adhering to applicable law and not to political expediency [or opportunity], much less the free creation of legislation. It must be understood that the task of monitoring respect for the Constitution and the development of its principles, is not a monopoly of the Constitutional Chamber, but it is the duty of all branches of

\textsuperscript{189} Pacheco et al., \textit{supra} note 186, at 24. The members of the Panel argue that Economic, Social and Cultural rights (derechos prestacionales) should be constrained to the public administration's availability, this however, would degrade and harness the effectiveness of any decision due to the scarce resources of governments. Another member even goes farther considering that the Constitutional Chamber should not transform these ESC rights into individual rights for plaintiffs.
government, and includes all citizens, albeit within the competency framework granted to each by the Constitution.\textsuperscript{190}

The motion opts for an approach that clearly resembles the old constitutional control system, that is, it promotes the antique role of the Plenary Court before 1989 when it was the constitutional court. It seeks to moderate the system differentiating those powers of government to a more traditional role.

In this sense, the explanatory statement of the bill argues that through its legislation the Legislative Assembly is in charge of the development and respect of the constitutional provisions; the Executive Power must develop executive decrees and constitutional acts; and the Constitutional Chamber’s functions are to control that these provisions and acts are effectively constitutional.\textsuperscript{191} It tends to isolate the legislative function keeping for the Executive branch’s involvement in the legislative initiative through its treaty making process, the Constitutional jurisdiction involvement, which it is clear since treaty obligations are much more important in terms of international credibility and to avoid future declarations of unconstitutionality of treaties after their approval and ratification.

Even though it advocates eliminating the advisory jurisdiction, today there is heightened discussions, like in Spain that partially eliminated the \textit{a priori} constitutional control system but kept it exclusively on treaties.\textsuperscript{192} That said, however, there is renewed interest to discuss whether it still needs the \textit{a priori} system, to control the secession of different territorial autonomies from Spain and other legislation.\textsuperscript{193} It is important to mention, that there too has began a debate after 2003 on the need to bring back this \textit{a priori} constitutional control system.\textsuperscript{194}

\textbf{C. Status of the Reforms}

Out of the 39 failed proposals to reform the Law of the Constitutional Jurisdiction, only today four have chances to become legis-

\textsuperscript{190} Legislative record 17743.
\textsuperscript{191} Id.
\textsuperscript{192} Alegre Martínez et al., \textit{supra} note 90, at 39.
\textsuperscript{193} Id. at 43.
\textsuperscript{194} Id. at 44. The author describes how many governmental officials are in favor and others are against the \textit{a priori} system of constitutional control.
lation. The others have stagnated through the years lacking coherent political consensus, basically because of a rule in the Legislative Regulations establishing a statute of limitations for bills over four years. Therefore, every year many bills pass informally to the archives, surviving only those when one or several legislators, or the Executive Branch, foster them. The rule states that if no motion moves to reactivate the file within four years, it will be automatically expunged.

But, it is likely from the new developments that all these bills will be unified under the new motion to amend articles 10 and 48 of the Constitution, many political and intellectual actors of Costa Rican society are pushing for reform, but the contents of the amendment to the Constitutional Jurisdiction will depend on the political viability.

It is important to say that there might be enough conditions to think in a political moment to amend the constitutional jurisdiction, the changes done to article 10 are much better balanced and driven politically to enhance the constitutional system, but there are other cases, that are relaxing constitutional control systems for certain governmental agencies, which will undermine constitutional justice. But these amendments are very frail, they are not definitive, and they are part of the many efforts to find a new structure to energize the Costa Rican government. It will also be important to wait for the civil society, to determine if these amendments have popular support.

It is also important to mention, that the said Blue-ribbon panel has proposed an amendment to the Constitution to allow

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195. There are four active legislative records containing bills to amend the Constitutional Jurisdiction, one with the Special Committee Report, another currently located at another Committee waiting for its Report and the other two to be reactivated. Only one of these bills has been fostered by the Constitutional Chamber. This bill amends article 4 of the Law of the Constitutional Jurisdiction that regulates the structure of the Constitutional Jurisdiction and proposes to divide the Constitutional Chamber into two sections. The Committee Report is pending which would allow it to pass to the Legislative Assembly's Floor.

196. Regulations of the Legislative Assembly art. 119 (Costa Rica).

197. Id.

198. Pacheco et al., supra note 185, at 24.

199. Id. Precisely, the Blue-Ribbon Panel has come up with a series of proposals, among them, a change in the relationship between the different branches of government. It fosters a change from a Presidential system, to a more parliamentary system of government, where for example the executive can remove the legislators and call for congressional elections. Conversely, the legislators can censor the government and move for the removal of the President's ministerial cabinet.

200. Id. at 21
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the reelection of legislators. Under the current constitutional stipulations, re-election is only possible after non succeeding terms. This has been explained to have a restrictive effect on the efficiency of the legislative body, as within the first years the new members will be learning the work, and leave once they have the know-how. Precisely, a free, experienced and responsible legislator is said to be an essential part of political development of a country.\textsuperscript{292} To the contrary, the short period only favors economic sectors and party leadership,\textsuperscript{293} which many times may work precisely against important democratic principles.

D. Recent Conflict Between Branches of Government

The adversity that the Constitutional jurisdiction has been facing in the past is now more evident, when just a week and a half after Duquesne's Seminar sessions in November, the Legislative Assembly voted to remove Justice Fernando Cruz from his bench. For the first time in Costa Rican history\textsuperscript{294}, an associate judge of the Supreme Court of Justice was voted out being denied automatic re-election.

Article 158 of the Constitution establishes

The Justices of the Supreme Court of Justice shall be elected for a period of eight years by a vote of two-thirds of all the members of the Legislative Assembly. In the performance of their duties they must act with efficiency and shall be considered re-elected for equal periods, unless the Legislative Assembly, by a vote of no less than two-thirds of all its members, decides otherwise. Vacancies shall be filled for complete periods of eight years.\textsuperscript{295}

On its face this was considered a discretionary act of government, but clearly deemed by some as a political backlash for a series of decisions that have not been well received by political and eco-

\textsuperscript{291} CONSTITUTION art. 107 (Costa Rica). Representatives shall hold office for four years and may not be re-elected to a succeeding term.


\textsuperscript{293} Id.

\textsuperscript{294} Id.


\textsuperscript{296} CONSTITUTION (amended 2003 by Law No. 8365, July 14 2003) art. 158 (Costa Rica).
onomic actors in the country. The head congressman for the official
governing party declared through the media that the vote was a
wake up call for the Justices of the Supreme Court\textsuperscript{206}. It was also
claimed to vindicate the power lost by the Legislative Assembly
and the Executive branch of government\textsuperscript{207}.

It is clear that there is a group of political actors who see the re-
lationship between the Executive Branch and the Legislative As-
sembly superior to the judiciary. Unfortunately some politicians
yearn for a traditional role of the courts. Nevertheless, these ar-

guments do not suit a democratic state like Costa Rica. Precisely,
during discussions of the constitutional forefathers in 1949\textsuperscript{208},
three main problems arose: (a) that of guaranteeing judicial inde-
pendence through an automatic re-election process, not by life
terms; (b) to free the Justices from the reach of political interfer-
ences; and (c) the need to have some control over these judges
opening the possibility of a super majority vote to remove them if
proven inefficient or unqualified judges. In the case of Justice
Cruz, non of these circumstance were demonstrated in any record,
on the contrary, a very independent judge\textsuperscript{209} characterized for dis-
senting votes was surprised by a quasi-impeachment process with
no discussion whatsoever over his performance as a Judge.

Even though the Constitution regulates another form of election
of Justices in article 163 establishing that

The election and replacement of Justices of the Supreme
Court of Justice shall take place within thirty calendar days
after the respective period has expired or after the date on
which notification of a vacancy has been received.\textsuperscript{210}

This article properly read, regulates very different assumptions:
as Supreme Court Judges have tenure for eight years with an
automatic reelection, it provides for the election of new judges that
take office in the place of another, that has not completed the con-
stitutional period. Article 158 of the Constitution will provide for
the legal regime for any Justice put in office by regular means, but
constitutional article 163 regulates the abnormal cases where the

\begin{itemize}
\item \textsuperscript{206} Mata, \textit{supra} note 204.
\item \textsuperscript{207} Id.
\item \textsuperscript{208} Actas de la Asamblea Nacional Constituyente [Proceedings of the National Constit-

tuent Assembly] (on file with author).
\item \textsuperscript{209} Id.
\item \textsuperscript{210} CONSTITUTION (amended 2003 by Law No. 8365, July 14 2003) art. 163 (Costa Ri-

can).}
\end{itemize}
Justice has been removed by the Supreme Court of Justice on disciplinary causes, death, or for permanent incapacity to perform duties. The elected judge will complete the original eight year term he or she has been called to complete. In the case of Fernando Cruz, he was allegedly re-examined under this article, and voted out. Several recourses were presented to the President of the Legislative Assembly, who consequently decided to invalidate the vote that removed Justice Cruz from his office\(^{211}\), when concluding on the wrongful use of article 163 of the Constitution. Nevertheless, his decision was challenged before the full legislative body, and his decision overturned by a majority vote.

Even though the legislative decision did come up with the necessary votes, it will be discussed in the writ of *amparo* if there have been due process rights infringements and it could also discuss a macro understanding of government, the protections that the judiciary must need and that legitimates any democratic state. It is the real safeguard to guarantee all citizens rights against abuse of power.

For the detractors of the Constitutional Chamber, this will be a rich and excellent opportunity to complain loudly about the Court’s unlimited powers. But, one must ask, is it not the reason for a constitutional jurisdiction to be designed this way, to give constitutional protection under presumably political excesses? It is clear that the question, to determine the future of Justice Cruz’s tenure, shall be decided by judges (current or alternate judges) and not by the legislators, as they have already spoken\(^{212}\).

VI. CONCLUSION

Democracy is not only a way to add votes every four years after the election. This model of government should not be imported to the legislative procedure, reduced only as a model of competing political factions where winners takes all, this cannot be a simple mathematical exercise as the legislators were elected in a proportional manner by the electorate. Political gains must conform to the ideology of the Constitution.

It is easy to distort political participation into counterproductive majority excesses, where some economic and political forces would prefer a Constitutional Court to be (dangerously) a bystander of

\(^{211}\) Legislative record No. 18.583.
\(^{212}\) *Id.*
the majorities\textsuperscript{213} or even to be inexistent, but these judicial mechanisms must enforce the democratic principle, as an enforceable constitutional provision, consecrated in article 1 of the Constitution\textsuperscript{214}.

Many of the critics claim, the advisory jurisdiction meddles into that democratic process lived day by day at the deliberative body, in an area where political decisions are feeble or frail, and for that purpose, agreements can be changed with ease. Yet, far from being an obstacle to the legislative process, the constitutional jurisdiction should be regarded as an instrument that enhances the quality of legislation and allow it to be permanent. The policy behind the Constitutional amendments of 1989 was to place the human being at the center of governmental policies, in the context of a Democratic state and the rule of law. In an ideal world the advisory opinion plays a vital role for the new legislation to be in conformity with the Constitution. There are however distorted ideals about its virtues, but at the end, it seems that good reasoning will prevail. It is still difficult to accept a change in the Costa Rica political culture, but it is important to have confidence on those who believe in a democratic society and in the expansion of human rights.

\textsuperscript{213} Wilson & Handberg, supra note 8, at 524. These authors explained the complexities of judicial intervention in political issues, a context in which European countries resorted to special Courts to protect themselves from totalitarianism:

\begin{quote}
the more politically sensitive and divisive issue of court involvement in issues deemed outside their normal purview has proven much more resistant to change. In the European context, there exists evidence that judges have become sensitized to their potential role as monitors over government actions. However, the exercise of such concepts as judicial or constitutional review are more commonly embodied in special courts - in effect, institutions placed outside the regular judiciary. This institutional solution was created by judicial reformers in response to their experiences with totalitarian states during and after World War II. The regular judiciary failed miserably in resisting transgressions of human and political rights; rather, they usually acted as facilitators for the terror. Their professional task was narrowly defined as neutral enforcers of the law, but the content of that law was effectively irrelevant and the court became just another instrument of repression. One view expressed was that their acquiescence in those inhumane excesses grew out of their indoctrination into the civil law tradition, thus neutralizing any expectations for independent judicial action. Thus, creating a more politically independent judiciary, or at least an independent judicial body, demanded creating a new institutional setting employing decisional frameworks and criteria from outside the confines of existing law. Therefore, new institutions were created such as the German Federal Constitutional Court. One consequence, however, was the dissemination of these new expectations to other parts of the judiciary resulting in a shift of the judicial universe. That process has been both abrupt and gradual, depending upon the historical context within which the reform occurred.
\end{quote}

\textsuperscript{Id.}

\textsuperscript{214} See supra note 143.
The most recent motion to amend articles 10 and 48 of the Constitution is revealing a possible new culture that admits the advisory opinion as a rich legal design to avoid future legislation from being struck down on constitutional grounds. The sole purpose of avoiding future constitutional discussions, or adjustments to the bill, should be an important motivation to keep, as well driven political ideas will be more permanent at the use of the Nation.

Even if there is still much resilience upon the legislators, Constitutional Courts must have a place in the political scheme of a country, as the mechanism to control power.

Finally, it is possible that the way to energize the relationship between the legislative body and the judicial power would be by amending the constitution, to enhance the legislator's chances for immediate reelection, and by upgrading qualitative and ethical requirements for members to the legislative assembly. The system must be changed, without eliminating the advisory opinion as a whole, to a constitutional amendment to eliminate the prohibition of immediate reelection of legislators that would create a real congressional career. This will eventually, professionalize and stabilize political controls between all powers of government.

An amendment that would favor the reelection of succeeding terms for legislators has probably a better chance of being a qualitative change in Costa Rican politics. It would allow assessing in time, if it is a wise measure to amend the constitutional jurisdiction in order to attain governance. Precisely, career congressmen could regard the advisory jurisdiction as a firm resource and instrument, as possibly did, some of the 1989 constitutional framers.