Costa Rica's Constitutional Jurisprudence, Its Political Importance and International Human Rights Law: Examination of Some Decisions

Fernando Cruz Castro
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I. A BRIEF HISTORICAL ANALYSIS

The constitutional reform of Articles 10, 48, 105 and 128 of the Constitution as accorded by Law No. 7128 on August 18, 1989, caused a profound change in Costa Rican institutional life. The study of some decisions of the Constitutional Chamber serves to promote the onward transformation of the Constitutional Adjudication, parting from the establishment of a specialized jurisdictional body to handle all such matters.

Since 1989, the decisions of the Constitutional Chamber of Costa Rica have given effective force to the fundamental norm — despite possible imperfections — overcoming the era known as “the constitutional obscurantism.”¹

The 1989 constitutional reform allowed the creation of a Chamber specialized in constitutional matters within the Supreme Court after it was accepted that conditions were not met for the

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1. Before the 1989 reform, Article 10 of the Political Constitution established that unconstitutionality must be declared "by a vote of no less than two thirds of [the Supreme Court of Justice's] members." This qualified majority for the declaration of unconstitutionality required a majority of twelve votes out of the seventeen members of the Full Court (Corte Plena); that is, if a majority of eleven judges declared the unconstitutionality and six voted against it, the constitutionality of the questioned rule was maintained. The required qualified majority for unconstitutionality meant, in the last instance, a presumption of constitutionality for all laws; the constitutional jurisdictional control to be exercised on Congress was thus weakened. The unconstitutionality of a law, statute or regulation must have been very evident. This system was in place for forty years. In practice:

Costa Rican magistrates exercised constitutional control with excessive timidity. With respect to this period it is completely valid what was said by Rubén Hernandez to whom “the action of unconstitutional recourse (we could not strictly speak — even then — of a vertical and hierarchical appeal, rather than an incident where either defendant or plaintiff could challenge a statute for the impingement of any civil liberty) was the procedural form to obtain that a clearly unconstitutional norm be declared legally constitutional....”

creation of a constitutional court, following the path of Guatemala and Peru, where, in the American picture, the definitive step was taken for the creation of a constitutional court independent of the judicial branch.

Also important was the change relating to the majority requirement to declare the unconstitutionality of any regulation, since pursuant to the original text of Article 10 of the Constitution, such majority determination could only be accorded by two thirds of the members of the Supreme Court of Justice. This exigency is also contained in Section 10 of the Code of Civil Procedure. The present text of Article 10 of the Constitution expressly disposes of the qualified majority requirement and provides that unconstitutionality may be recognized by absolute majority vote of the Chamber members. As it happened in many occasions, even when the majority of Magistrates estimated that a norm was contrary to the Constitution, by not having obtained twelve favorable votes out of the seventeen members of the constitutional tribunal, the norm was left in effect with the aggravating circumstance that the issue could no longer be reargued. This limitation further weakened the relevance of constitutional jurisdiction, since once the unconstitutional argument had been raised and rejected, the disposition as to the fundamental norm was immunized.

Approved in 1989, the Law of Constitutional Jurisdiction, in addition to expanding the constitutional body’s power of intervention in matters of habeas corpus and actions for amparo and widely regulating the action of unconstitutional recourse, introduces a new series of legal figures which reflect the most modern doctrines on the subject. Among these new institutions are amparos against persons of private law, the right of rectification and response, and judicial consultation.

The balance that has resulted from 1989 through the present is very positive with respect to the previous system for constitutionality control. The present demand for constitutional justice is

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2. Abolished section 967 of the Code of Civil Procedure, in effect until 1989, established that:

   If the expressed decision did not reach that favorable number of votes with respect to the unconstitutional recourse, the law, statute, accord or discussed resolution will be applicable (the Plenary Court decided the applicability of the law for the magistrate to decide the case), and no subsequent claims of inapplicability will be allowed on the same issue . . . .

3. An amparo is a constitutional injunction proceeding that can supersede any other type of proceeding or resolution. An action for amparo is a very common legal tool in the Latin American legal systems and can be filed whenever a fundamental human right provided under the Constitution is allegedly infringed.
proof thereof. Last year alone, approximately 17,000 cases were decided.

II. THE RESCUE OF THE CONSTITUTION AS A NORM OF DIRECT APPLICATION

The biggest accomplishment of constitutional justice since the 1989 reform has been the transformation of the Constitution itself. Formerly a document of formal reference having little consequence, the Constitution was turned into a living body of law with actual application to all levels of Costa Rican society.

If the Political Constitution sustains the political ideology of a nation, embodying the most important values and goals of society, it is very important that a jurisdictional stage be in place to allow the discussion, defense and determination of all such values that uphold the rights of the Constitution. Although important limitations exist, there is no doubt that the Constitutional Chamber of Costa Rica has become, since 1989, a point of reference and a cornerstone of the political system.

III. INTERNATIONAL HUMAN RIGHTS LEGISLATION AS A STANDARD OF CONSTITUTIONALITY

Another important legal accomplishment achieved by the promulgation of the Constitutional Jurisdiction law was the incorporation of international legislation as a parameter for constitutionality. Article 1 of the law regulating Constitutional Jurisdiction, and Article 48 of the Constitution expressly incorporate international legislation on human rights as a required reference for constitutionality.4

These rules significantly strengthen the internal mechanisms available to all citizens to protect their constitutional rights by fully integrating international treaties on human rights into Costa Rican constitutional law. This has the effect of placing human rights, as indicated by the above-referenced Article 1, as a standard for interpretation of the Constitution itself and of those principles derived therefrom, naturally affecting the interpretation and application of secondary legislation with respect to such principles. With the 1989 reform, international law on human rights

4. With the creation of the Constitutional Chamber, Article 48 of the Political Constitution was amended, giving constitutional status to the fundamental rights contained in international legislation on human rights.
became not only legislation of superior authority to that of ordinary legislation, as provided by Article 7 of the Constitution, but it was also incorporated as a reference for the interpretation of the Constitution in its chapter pertaining to individual guarantees. It is in this chapter that recognition of the rights of human beings was enriched and new elements were provided to the interpreter to set limits upon them. Article 48 of the Political Constitution establishes that the amparo will protect all rights guaranteed in the Constitution, except those rights relating to physical freedom, as well as other rights of a fundamental character established in the international instruments on human rights. Jurisprudence from the Constitutional Chamber has gone even further and has expressly assigned an almost supra constitutional value to those legal instruments on human rights in Costa Rica, highlighting that not only do they have similar authority as the Political Constitution, but to the extent that they provide greater rights or guarantees to persons, they overrule the Constitution.5

The expansive and extensive hermeneutic force evolving from fundamental rights is referred to in the 2794-03 vote. In this decision it is admitted that:

Fundamental Rights gathered from dogmatic sections of the Constitutions, in many occasions, constitute the cornerstone of the entire legal system, they precede the State, have their foundation in the intrinsic dignity of every human being, strongly tie the public branches and as such are provided [superior] constitutional legality. In the structure of any constitutional State, popular sovereignty and democratic legislators are limited by individual rights. Fundamental Rights are negatively and positively linked to the legislator. In the negative aspect, they must be respected to achieve full effectiveness, that is, they work as a barrier or limit. In the positive aspect, Fundamental Rights are, to the constituted legislator, a mandate, a governing principle or a program which is to be

5. Decision No. 3435-92 and its clarification, No. 5759-93. In this clarification, as indicated by Justice Solano Carrera, author of the decision, whereby a disposition not contained in the Constitution was annulled, but a decision of the Civil Registry, which in light to those international instruments became an illegitimate process to deny registration. The consequence of this decision is that where the Constitution refers to male or female, it must be understood that applies to the concept of a person. The Constitution must be construed from a genderless point of view, recognizing that the term person includes men and women. See Luis Fernando Solano Carrera, La Jurisdicci6n constitutional en Costa Rica-Casos Prdcticos 139 (Published in the report of the Seminario sobre Derechos Humanos y Jurisdicción Constitutiona — Konrad Adenauer Foundation 2005).
developed and configured within their core substance . . . ultimate limit of each of these [Fundamental Rights]. The constituted legislator, when developing essential rights, must guard the progressive intensification and extension of their efficacy, and in general, their full effectiveness, to avoid any regressive and restrictive regulation. The guarantees of progressive efficacy of Fundamental Rights are clear and [are] precisely shaped in several instruments of International Law on Human Rights. The Universal Declaration of Human Rights in Article 28 establishes that: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized,” and in the case of economic, social and cultural rights, the American Convention on Human Rights in its Article 26 prays that: “The State’s parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social [standards] . . . .”

This Constitutional Tribunal has the attributed right, by the fundamental norm itself, of optimizing Fundamental Rights by ensuring that [these rights] become real and effective through [their] expansive and extensive hermeneutic content and means of exercise, and above all, [by] giving preference to the interpretation of those who endeavor their stronger efficacy. This Constitutional Chamber was called to protect and guarantee Fundamental Rights, given that without judicial protection or procedural guarantees there can be no such Rights. It must be taken into consideration that within the context of a Social and Democratic Rule of Law, public administrations, rather than having a passive or limit[ed] role, [tend] to uniquely and exclusively cause the individual exercise of Fundamental Rights; [additionally, they] have a contributory and [an] obligatory duty to [provide] a minimal vital sphere [for] all citizens, and of course, a duty to eradicate all possible obstacles and impediments to achieve a real and effective equality among them. Pursuant to principles of equality, [this] duty imposes on public bodies and entities that compose the administrative organization [the ability] to render . . . a series of irrevocable public services, and thus as-
sume a positive and proactive attitude before those who are to be administered.\(^6\)

Following this interpretation, the Costa Rican Constitution expands its content and variety of fundamental rights, following the evolution of international law on human rights. It is recognized, as previously indicated, the expansive and extensive effect of fundamental rights.

**IV. COMMUNITY'S GREATER ACCEPTANCE WITH RESPECT TO CONSTITUTIONAL JUSTICE**

As a result of this constitutional jurisdiction reform, a constitutional culture emerged, which was, until recently, reserved to a group of attorneys before the Plenary Court (Corte Plena),\(^7\) where they rarely succeeded. Prior to the 1989 reform, the importance of constitutional adjudication did not transcend this group of scholars, nor did the importance it has in an effective democracy, as well as in the university curriculum.

**V. FUNCTIONS OF THE CONSTITUTIONAL CHAMBER: A NEW POLITICAL ACTOR IN THE JURISDICTION OF POWER AND THE EXCLUSION OF ABUSES AND PRIVILEGES**

Evidently, the Constitutional Chamber has become a political actor, whose decisions notably affect the exercise of power in a genuine way. While prior to 1989 a symbolic and imperceptible concept of constitutional jurisdiction existed, following the reform, a new judicial construct with inevitable political vocation was introduced, and has become a factor of stability, control and limitation to the other branches and political parties.\(^8\) The "presidentialist system," with a weak constitutional jurisdiction and a system of unarticulated and in-crisis political parties, turns the

\(^6\) Judgment No. 02794-03 of Apr. 8, 2003 (Oscar Barahona Streber v. Presidente de la República y el Ministro de Hacienda) Sala Constitucional de la Corte Suprema de Justicia.

\(^7\) The Corte Plena was the tribunal in charge of writs of habeas corpus and unconstitutionality appeals before the 1989 reform.

\(^8\) The consolidation of constitutional justice provoked the judicialization of politics, resulting in better functionality of the democratic system. The preoccupation with formation and fidelity of the popular will has notably and sensibly reduced the deviations and abuses of the political bureaucracy and those pressure groups. See Alex Solis, La dimensión política de la Justicia Constitucional 308 et seq. (Publicación de la Asamblea Legislativa de Costa Rica 1989).
President of the Republic into a king without a crown, as described by Professor Alex Solís.9

Even though, in the strict sense, constitutional jurisdiction is not a political actor, its introduction in 1989 caused an important institutional revolution, setting limits on the state branches and repressing the powers of the Administration. This influence, however, does not turn the Constitutional Chamber into a mega-power, since the President of the Republic and the indivisible branches maintain a say in determining the country’s socio-political development.10 The experience is surely a unique one because until 1989, the power of a jurisdiction capable of mandating its political authorities through amparos, habeas corpus and deeming actions unconstitutional was unknown. In some cases, as will be discussed, the unconstitutionality of a constitutional reform has been ordered. In other instances, self-containment with regard to “political matters” has not followed the traditional line, and the Costa Rican constitutional tribunal has adopted decisions in which political activism, that has turned its back on the politicians, can be appreciated without “blood reaching the river.” Within the hypocrisy that characterizes political activity, where the Constitution is only cited to reminisce its existence or to provoke a tearful patriotic speech, the Constitutional Chamber has pointed out paradoxes and inexcusable inefficiencies.

Before 1989, the President and his political faction, if in the majority, had very vague limits; if a majority was not achieved, an eventual agreement would be reached between the two larger sides of Parliament, ensuring the predominance of the Executive Branch. The difficulty in breaking and counterbalancing factions can be aggravated if it is considered that the financing of political campaigns, the origin of such funds, and the knowledge of the true actors are still unknown. In the same way, constitutional reform became a balancing factor before a powerful Administration that

9. “Some of our presidents act as kings without a crown. They behave as little Louis XIV’s, who dream of the idea that: ‘I am the State.’ [Their] golden rule is the centralism, the concentration of power, the political discretion and the administrative dispersion . . . .” Alex Solís, Reyes Sin Corona at 74 et. seq. (Impresiones Gráficas del Este. Costa Rica 2002).

10. Norberto Bobbio, in referring to this occult and invisible power stated:

Among the problems that conspire against the empire of ethics and efficiency of democracy are the indivisibility, secret and [informal], with which the political power is exercised. Given the centrality and concentration of power in the President, his personalist style . . . the relationship he establishes and the orders he directs to his secretaries and other civil employees are developed “amicably and concealed” . . . .

Id. at 77.
was dominated by the President with a weakened Parliament, and controlled by a governing party that either possessed an organic majority or aligned itself with the President by means of a bipartisan coalition.

In addition to the factors discussed above that are internal within the power structure, the weakening of ideologies must not be left unknown, which causes a homogeneous doctrinal platform. With the weakening of ideologies and a porous division of powers that blurs the balance between the Executive and Parliament, the creation of a truly protagonist constitutional jurisdiction since 1989 has turned the Chamber into an actor in the weak game of breaking and counterbalancing within Costa Rica. There are many cases in which constitutional jurisdiction became a limitation of power and a balancing factor; a very pragmatic example is the case regarding the law allowing members of Parliament to import vehicles free of taxes.

This issue was raised by a member of Parliament and the Constitutional Chamber. The action, brought by José Miguel Corrales Bolaños, was decided through vote 969-90, which stated:

[I]t is evident that the regulation which allows the Representatives the privilege of having taxes exonerated on their personal vehicles constitutes a breaking of the written Constitution and its implicit values, in that it creates subjective rights in favor of legislators. [This results in] material inequality among citizens, on whom the public charges fall and allow[s] an unreasonable enrichment of a privileged group, all of which violates [the] principles of equality and justice, which are basic and fundamental values of collective interests. . . . It is important to highlight that . . . the law of which unconstitutionality is being sought violates another fundamental precept, which is that no entity or citizen, while occupying public office, can exercise prerogatives and powers inherent to the nature of his position for personal benefit . . . since, as previously mentioned, the express or implicit values in the Constitution are norms of action for employees and citizens. [I]n the case of the Representatives, the legislative reservation imposed by the Constitution limits their actions and becomes imperatively prohibited. [A]s simple depositaries of power and administrators of common good, [Representatives] cannot pass legislation that benefits their patrimony, [leading to] a perilous and abusive exercise of power, and therefore a violation of the Rule of Law; the "just law," which is not simply the
“Rule of law,” is transcended by the effect and performance of those implicit values. . . . [I]t becomes evident that exoneration allowed by the impugned law constitutes an unfunded and unreasonable privilege [that is] not objectively justified . . . \(^{11}\)

This decision has an extraordinary symbolic value. Rarely has a sector of the political class received such a clear, forceful rectification, recalling those fundamental values. This decision is representative of the fact that a full and efficient exercise of constitutional jurisdiction over Parliament can be appreciated, and can ultimately prevent the creation of a Parliament that has the ability to pass a law perverting every philosophical, political and legal sense of its function.

From the strictly political angle, the Chamber assumed a role in maintaining a balance among the different branches of government. In addition, the Chamber devised the necessary criteria to resolve some issues before the indecision, imprecision or the misgovernment of the political parties. In matters relating to the fulfillment of principles of parliamentary law — especially those pertaining to the democratic principle and minorities — the Chamber has had a determining influence; the same can be said with respect to the protection of the environment.

In sum, the weakness of the political parties, limitations on the mechanisms of participation, the authoritarian nature of the presidentialist system, and the weakness of local governments have turned constitutional jurisdiction into a referee that balances and defends those values ignored by the elite in power.\(^{12}\)

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12. C. Wright Mills, *The Elite of Power*, Editorial Fund for Economic Culture, Mexico, 1963. Mills recognized three areas of deep-seated power: the political realm, the economic realm and the military. In the three areas he finds sources of enhancement, identifying fame and wealth as attributes of power, without excluding the multiplying effect of the media. Even though fame and wealth enjoy transcendence, it is always necessary to have access to great (powerful) institutions, since from these positions it is possible to define and maintain power. Of course, Constitutional Tribunals hardly can be included in the aforementioned category. Their decisions have healthy and inevitable conditionals.
VI. THE EXPANSION OF FUNDAMENTAL RIGHTS THROUGH INTERNATIONAL LAW ON HUMAN RIGHTS

A. A Case of Discrimination of Constitutional Origin: The Limits of a Constitutional Norm Legitimizing Gender Discrimination

The case of Fliman Wrgaft against the Costa Rican state is a paradigmatic decision in which the effects of constitutional jurisdiction of international law on human rights are expanded. In this case, a foreign national entered into a legal marriage with a citizen of Costa Rica. The state denied him Costa Rican nationality following the constitutional norm, which authorized the naturalization of a foreign national and the acquisition of citizenship only if a foreign woman married a Costa Rican citizen. However, as expressly prescribed in the Constitution, the rule was inapplicable in this particular case. Despite the express text of the constitutional disposition, the court, through vote 3435-92, considered this case in the context of the constitutional principle of equality. This same principle of equality is visible in Article Two of the Universal Declaration of Human Rights, Article Two of the American Declaration of the Rights and Duties of Man, in Articles Three and Twenty-Six of the International Covenant on Civil and Political Rights, and in Articles One and Twenty-Four of the American Convention on Human Rights. The Fliman Wrgaft case stated:

13. Subsection 5 of Article 14 of the Constitution also established that Costa Rican citizenship by means of naturalization was available to:
   The foreign national female who, by entering into legal marriage with a Costa Rican national, loses her nationality, or who expresses her desire to become a Costa Rican. Later, following the 1999 reform, the term Costa Rican woman was left out and a broader concept was introduced, which encompassed: “All foreign persons.”

This modification resolved the discrimination problem in place until 1999.


15. Article 3 discusses that Parties of the State to the present Covenant must undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

   Article 26 discusses that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

16. Article 1 of the American Convention on Human Rights states:
   1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their juris-
[S]ubsection (5) of Article 14 of the Political Constitution contains a disposition which is inapplicable because it is contrary to the fundamental values of the Constitution, namely the right of equal protection. The disposition prevents discrimination, which is protected with equal transcendence by international norms, whose erga omnes effects are [in accord] with . . . Article 48 of the Constitution. [In comparing] the transcribed norms to [the actions precipitating this case, it is obvious] that the benefit granted exclusively to foreign women who marry a Costa Rican national constitutes a discrimination and prejudice . . . [under which] an artificial disadvantage is created . . .

It was also considered that this law, by preventing matrimonial equality and unity, served as an impediment to values that are also protected by the International Covenant on Civil and Political Rights and the American Convention on Human Rights. The legal base of this decision is derived from international law on human rights. While the constitutional text does not contain a reasonable and objective differentiation, the constitutional norm itself evidences an unfounded and disproportionate discrimination which affects social, cultural, economic and political conditions; such discriminatory treatment injures human dignity.

This impugned norm creates some sort of marginalization that affects all of society from the moment that a member of the community is treated differently, eliminating his equal protection and placing him in a situation of social disadvantage. To resolve an essential limitation in the normative text, the Chamber established that when general legislation uses the term "man" or "woman," it will be construed as being synonymous with the word "person," thereby eliminating any possible legal gender discrimination. This condition must also apply to all government employ-

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diction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

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Article 24 of the American Convention on Human Rights states:

Article 24 — Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

17. Art. 23(1) and (4).
18. Art. 17-4-4
ees when a situation is presented that requires the application of a statute containing “men” or “women.”

This decision was ratified in a later vote, number 5759-03, clearly emphasizing that:

[T]he international instruments on Human Rights in force in the Republic, pursuant to Article 48 of the Constitutional reform (Act No. 7128 of August 18, 1989), by being integrated into the highest level of the legal order, that is, [the] constitutional level, complement [use of the term] “person.” In this particular case, although the constitutional norm is textually conceived in one way, it must be construed and applied in a way that eliminates discrimination. [P]articularly since that reform, today’s constitutional text is composed of principles and values which are conjugated in a harmonious text.

This decision caused great controversy in that the literal reading of a constitutional provision is viewed as a predominantly rigid value or element that is to be guarded by the judiciary. In any case, this decision did not cause uneasiness within the political class since this is, in the strict sense, a matter of individual rights.

B. In Vitro Fertilization in Decision 2306-00: The Concept of Life and the American Convention on Human Rights

The concept of life can be inferred from the American Convention on Human Rights (Pact of San José). This case discussed whether in vitro fertilization contravenes the right to life. With a divided vote, the court applied international law principles, especially those contained in the American Convention on Human Rights, which establishes that life begins at conception. On this point, the Constitutional Chamber assumes that other rights, even annexed rights, are derived from the principle of inviolability of life. This right must be declared in favor of all, without exception, because, according to the court:

[A]ny exception or limitation destroys the content itself of the law. Newborns must be protected just as much as the unborn,

19. Explanatory Judgement No. 5759-93 of November 11, 1993 (Ricardo Fliman Wraga v. Director y Jefe de la Sección de Opciones y Naturalizaciones del Registro Civil) Sala Constitucional de la Corte Suprema de Justicia

20. Article 4.1 establishes that, “Every person has the right to have his life respected. This right shall be protected by law and [shall apply] from the moment of conception. No one shall be arbitrarily deprived of his life.”
from which derives the illegality of abortion and the abolition of the death penalty in countries where they no longer exist. The international norm, without being thorough, establishes governing principles with respect to human life. As a way of enumeration, we could say that the value of human life finds international normative protection in Article I of the American Declaration of the Rights and Duties of Man. This declaration was adopted by the Ninth International Conference of American States in Bogotá, Colombia in 1948, and affirms that, “Every human being has the right to life, liberty and the security of his person.” [Offering additional protections are] Article 3 of the Universal Declaration of Human Rights, Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the Pact of San José, where the right to life has a more elaborate recognition and protection. “Person” means every human being and every person “has the right to recognition as a person before the law” under both laws of the Pact of San José.21

There is no human being of a different legal category — we are all persons [with our first and foremost right]: the right to life, without which [our individual] personalit[ies] could not be exercised. This idea is expressed by Article 4.1 of the Pact of San José, which states, “Every person has the right to have his life respected. This right shall be protected by law . . . generally from the moment of conception. No one shall be arbitrarily deprived of his life.” 22

The court in the In Vitro Fertilization case continued its opinion, stating:

This international order takes a decisive step, in that it protects the right to life from the moment of conception. The order is sharply prohibited to impose the death penalty on pregnant women, which constitutes a direct protection, and thus, a full recognition of the real and legal personality of an unborn child and his rights. On the other hand, the Convention on the Rights of the Child, approved by Act No. 7184 on July 18, 1990, protects the right to life in Article 6. This Article recognizes the personality of the unborn child, and in

paragraph 2 of the Preamble, indicates that no distinction could be made for any reason, "birth" being mentioned among those reasons. Further, the Declaration of the Rights of the Child of 1959 is cited, which provides "proper legal protection, as much before as after birth." Our legislature contemplates in Article 21 of the Political Constitution that "human life is inviolable."\(^{23}\)

This is a very controversial decision, but there is no doubt that the different norms of international law on human rights provided support to this decision. To define the value of life and its protection is a very complex subject; sometimes the literal standard is applied, and other times, the mother's preeminence is taken into account as part of her right to self-determination. In these cases, the constitutional tribunal interprets the predominant religious ethical values.

C. The Unconstitutionality of the Iraq War: Integration in the Coalition

The following case was resolved through a series of arguments, in which it was ultimately decided that peace is a constitutional value. Furthermore, the tribunal held that peace belongs, especially, to what the tribunal calls the "living constitution," in which it is assumed that the provisions of the Constitution are understood and carried-out in reality by society.

The 1949 suppression of the army is tangible proof of the living constitution. Army quarters were turned into museums and schools. This process culminated with the "Perpetual, active and non-armed declaration" of Costa Rica; the declaration's content was consonant with numerous international instruments signed under similar situations.

Peace is recognized as a legal and political principle.\(^{24}\) Similarly, the Chamber admits, once again, that within the scope of international law relating to the promotion of peace as a value, which is incorporated in our Constitution, the obligations derived from relevant international instruments must be taken into ac-

\(^{23}\) Id.

\(^{24}\) See previous case law in Judgment No. 1739-92 of July 1°, 1992 (Consulta Preceptiva de Constitucionalidad de la Sala Tercera de la Corte Suprema de Justicia) Sala Constitucional de la Corte Suprema de Justicia and Judgment No. 1313-93 of Mar. 26, 1993 (Rector de la Universidad Estatal a Distancia v Artículos 7 a 16 de la Ley 6044 del 3 de marzo de 1977) Sala Constitucional de la Corte Suprema de Justicia.
count. Chief among such instruments are the following: (1) the Charter of the United Nations (Preamble and Article I); and (2) the International Covenant on Civil and Political Rights. Peace is a governing principle of the Organization of the American States, especially in Article 1 of the Charter. The preservation

25. The Preamble and Chapter 1 of the Charter of the United Nations state:

(b) WE THE PEOPLE OF THE UNITED NATIONS, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, AND FOR THESE ENDS to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS.

(c) Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

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Article 1. The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts, of aggression or other breaches of the peace, and to bring about, by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of people, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common [goals].

Act No. 142 of Aug. 6, 1945.

26. Article 1 of the Covenant emphasizes its finality related to peace.

27. Article 1 of the United Nations Charter states, in part:

Article 1 — Nature and Purposes.

The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence. Within the United Nations, the Organization of American States is a regional agency.

The Organization of American States has no powers other than those expressly conferred upon it by this Charter, none of whose provisions authorizes
of peace between nations of the world is, without a doubt, a priority of the international community and a national value, as stated by several declarations of the United Nations, including:

[T]he Declaration on the Right of Peoples to Peace,\textsuperscript{28} . . . the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States,\textsuperscript{29} and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations . . . .\textsuperscript{30}

It has also been emphasized that the United Nations has mechanisms to prevent armed conflicts, giving special relevance to the decisions of the Security Council. "For those countries [who] subscribe [to] the Charter . . . an International Law obligation arises to respect this procedure."\textsuperscript{31} The Proclamation of perpetual, active and non-armed neutrality is catalogued by the Constitutional Tribunal as a source of public international law, since it consists of a unilateral act, which encompasses all legal acts dictated by a State while carrying out its international relations; unilateral acts carry legal consequences.

Parting from these principles, it is understood that the Proclamation of Perpetual, Active and Non-Armed Neutrality of 1983 is a unilateral promise of Costa Rica in the international concert which came to "develop the constitutional value of peace . . . that must be observed permanently and in good faith by the Costa Rican government, [while] avoiding . . . the transgression of the Public International Law 'estoppel rule' (venire contra factum proprio), by making it an exception or its inobservance in a particular or determined case . . . ."\textsuperscript{32} This decision examines the justiciability it to intervene in matters that are within the internal jurisdiction of the Member States.

\textsuperscript{28} This declaration was adopted by the United Nations General Assembly in Resolution No. 3911 on November 12, 1984.
\textsuperscript{29} This declaration was adopted by the United Nations General Assembly in Resolution No. 2131 (XX) on December 21, 1965.
\textsuperscript{30} This declaration was adopted in Resolution 2625 (XXV) of the General Assembly on October 24, 1970.
\textsuperscript{32} Among the duties contained in the Proclamation, it is established:

Faithful to its secular vocation of peace, Costa Rica assumes with authority before the community of nations the inherent duties of her new condition as a perpetually neutral State. We commit ourselves not to initiate any war; not to use force, including any threat or military response; not to participate in a war between third States; to effectively defend our neutrality and independence
of what is termed "political questions," since it is admitted in this judgment that "government acts" are excluded from the court's scrutiny, but such condition does not preclude these acts from being subject to constitutional law. This decision also applies the concept of the "living constitution," defined as the norms of constitutionality, as understood and lived, in reality, by society.

D. The Presidential Re-election: Limitation on the Powers of Parliament

The Constitutional Chamber, through vote 2771-03, deemed unconstitutional the reform of Article 132, subsection 1, of the Political Constitution pursuant to Law No. 4349 of July 11, 1969; instead the court re-instated the law that was in effect prior to the reform. This pre-reform law, now in effect, establishes that: "No person who served the Presidency within eight [consecutive] years prior to the period for which election is [sought] shall be elected President or Vice President. . . ."

The arguments espoused by the majority opinion of the Constitutional Chamber take into consideration the preeminence of Fundamental Rights and, in this case, the right to be elected, which was recognized by original drafters in 1949 by allowing the reelection of the President and Vice President if eight years have elapsed between each period served. According to the opinion of the Constitutional Chamber, Fundamental Rights can not be limited through a partial constitutional reform by the derived drafters. In making this determination, the judges considered the pre-

33. As indicated by Sagués, the doctrine of non-justiciable political matters has a political origin or pragmatic order, which has not always been coherent; the subject [has] evolved and tends to dissipate, as evidenced in the Constitutional Chamber decision on the Iraq War. Pedro Néstor Sagués, Constitución y Sociedad: La revisión de las cuestiones políticas no justiciables — A propósito de la "coalición" contra Irak 23 (Published in the "Seminario sobre Derechos Humanos y Jurisdicción Constitucional.” Konrad Adenauer. Guatemala. 2005)

34. The living constitution supposes that:

The constitution is a mutant body; recreated and sanctioned day by day; and the task of interpreting it involves elaborating constitutional answers before applying recipes already made by the historical component, by which the interpreter, more than an archeologist, is an artisan and the fact that he is loyal to the constitution does not mean executing it as the creator wanted it, but rather projecting within the interpretative formulas the requirements and valuation of today's society. Id. at 19.

35. This vote contained the favorable votes of five judges and the dissent of two judges.
eminence of fundamental Rights, including, of course, the International Law on Human Rights.

This is yet another case in which the decision of the constitutional jurisdiction was based upon the recognition of Fundamental Rights and the International Law on Human Rights. With respect to the impossibility of reducing fundamental rights through a partial reform, changing the original Constitution, the majority opinion discussed that:

[F]or certain public positions, the original Drafters decided on a minimum age by which adulthood is reached, but maintained their prohibition so that public powers could not restrict this legal public liberty. The right to be elected, as a political right, also constitutes a human right of first order, and is therefore a fundamental right. Reelection, as stated in Title V, was contemplated in the 1949 Political Constitution and constitutes a guarantee of the right to be elected, in that it allows a citizen to have the right to choose, from an amplitude of possibilities, the authorities he so considers convenient. Therefore, it was through the popular will of the Drafters that the existence of reelection was provided, with the goal of guaranteeing the effective right to reelection. Despite the fact that the partial reform later occurred, this [right to reelection] was [initially] confirmed with the adoption of the American Convention on Human Rights, of which Article 23 establishes:

"(1) Every citizen shall enjoy the following rights and opportunities . . . b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters . . . ." [Further, this Convention] does not allow major limitations other than the following: "The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings." It [can be] clearly inferred from this last paragraph of the Convention on Human Rights [that] restrictions can only be established [with regard] to the rights specified therein. Reelection, as inferred from historically subscribed popular will, establishes the possibility for a citizen to freely choose his leaders; [it can be reasoned that] by reforming the Constitution in detriment of popular sovereignty and weakening its fundamental rights, the existing limitations on age,
nationality, residence, language, education, civil and mental capacity or conviction were imposed. On the other hand, Costa Rica subscribed this Agreement without reservation [by] accepting the exercise of such rights as freely as possible, [and] assuming as limitations only those which derive from subsection 2 of Article 23. If this law were to [be deemed] unconstitutional by the Legislative Assembly, it would implicate that its restoration be subject to the appropriate procedure... 

The argument espoused by the tribunal's majority is founded in the ultimate effect and preeminence of fundamental rights. This is particularly evident in this case, the Pact of San José, whereby the limitation of fundamental rights through a partial constitutional reform is not permissible — that is, the derived drafters could not reduce the rights recognized by the original drafters. On this issue, the majority opinion of the tribunal recognized that:

[The Legislative Assembly may extend the contents and reach of fundamental rights, but [they] . . . cannot suppress or reduce such contents because the basic order instituted by the original drafters could be destroyed. The rigidity of the Constitution does not allow that such dispositions be damaged by the activity of government or the legislature, because if permissible, it could provide the legislative and executive branches [with the] legitimate authority to dictate laws against the Constitution — which would also mean that the sovereignty [would] be removed from the people. The Constitution, by instituting certain competence on the legislature, at the same time surrounds and imposes limitations on its activity. We add that such an interpretation tends to protect the Legislative Assembly, since this reasoning includes that every act [overruling] or contradicting the constitutional mandate would destroy the [foundation] of the legislative activity and the legitimate foundation of its authority . . . ]

The political and legal repercussions of this decision were very significant. Among the criticism, it is worthwhile to mention the words of the Attorney General of the Republic, who affirmed that:

37. Id.
The Chamber has assumed the role of defining topics of a political nature that are not proper [for a] Constitutional Tribunal [to define]. . . . Before the ineffectiveness, inertia and exhaustion of the other governmental bodies called to make these great political decisions and provide such definitions . . . the Chamber . . . filled a gap within the constitutional engineering structure of the division of powers. . . . So what happened [to that role fulfilled by the Chamber]? There was a malfunction due to the crisis of the political parties, a lack of leadership and parliamentary representation which is not the kind required by society in order to reach levels of development.”

Although the subject of presidential reelection was considered by the International Law on Human Rights, there is no doubt that the decision shook the political class by signifying a redefinition of loyalties, support and ambitions in the structure of power. Because this is a decision that directly affects the distribution and exercise of power, it could be considered a political issue since it is, after all, nothing more than an exercise in self-containment.

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39. The political issue is a conceptual category reigned by pragmatic and opportunistic criteria; it could pretend to fortify power at a state level or could very well express the tribunal’s desire to avoid inconvenient confrontations with the President or Congress. If the tribunal estimates that is better to limit its jurisdiction, it is not a matter of separation of powers doctrine or absence or rules; in reality the determining reasons are those of opportunity. It is a variable and circumstantial concept. Manuel García-Pelayo, Derecho Constitucional Comparado 429-430 (Alianza Editorial. España 1984).