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CONSTITUTIONAL ADJUDICATION IN COSTA RICA: A LATIN AMERICAN MODEL

ROBERT S. BARKER*

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I. INTRODUCTION

In the United States, judicial review came early and with relative ease following the foundation of the new nation. The power of the courts to declare laws unconstitutional was implicitly recognized in the constitutional arrangement even before the Federal Constitution was ratified,¹ and was announced in a concurring opinion in the Supreme Court as early as 1798.² *Marbury v. Madison*³ established the principle of judicial review as a rule of law. Although there was judicial resistance to the rule, even its most articulate opponents eventually altered their views.⁴ Foreign jurists have often suggested that judicial review is the most significant contribution by the United States to Western jurisprudence.⁵ The comparative significance of judicial review lies in its adoption by many nations with constitutional systems of government.⁶ The particular variations created by adopting countries are as interesting and instructive as the rule, because they indicate the richness of diverse legal traditions, the difficulty of reconciling within a single legal system principles derived from the different traditions, and the ingenuity of lawyers and judges everywhere in adjusting foreign traditions to meet national needs.

This richness, difficulty, and ingenuity in adaptations are best illustrated by the legal systems of Latin America. As colonies of Spain and Portugal, this area of the world exercised virtually no governmental authority over its own affairs.⁷ Newly independent Latin American states in the early nineteenth century faced, for

1. Hamilton observed in Federalist paper No. 78:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

2. See the opinion of Iredell, J., in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798).

3. 5 U.S. (1 Cranch) 137 (1803).

4. Chief Justice John Bannister Gibson of the Pennsylvania Supreme Court, whose dissenting opinion in *Eakin v. Raub*, 12 Serg. & Rawle 330, 343-358 (Pa. 1825) (written when Gibson was an associate justice) is a classic argument against judicial review, later acknowledged the power of courts to decide the constitutionality of statutes in *Norris v. Clymer*, 2 Pa. 277, 281 (1845).

5. See, e.g., A. DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 98-101 (H. Reeve trans. 1945).

6. See M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 25-7 (1971).

7. C. GIBSON, *SPAIN IN AMERICA* 90-111 (1967); J. ELLIOTT, *IMPERIAL SPAIN* 167-78 (1966).

the first time, the opportunity (and the need) to develop national legal systems. These states naturally gravitated toward the Roman law tradition of the European Continent, which had been the basis of the legal systems of the old colonial powers. In the tradition of the Enlightenment, Latin American jurists sought to adopt the most advanced models for their governmental institutions.⁸ In law, this included the United States Constitution and various constitutional principles drawn from England.⁹ Thus, while the Latin American nations took the great body of their law from the Continent, particularly from France and Spain, they also looked to England or, more often, the United States in matters relating to governmental structure and power, and constitutional protection of human rights. In theory, this might not present problems, because it could be said that the best models, whatever their temporal origins, ultimately would be harmonious. In practice, however, there were conflicts, and these conflicts were nowhere more apparent than in constitutional law, where lawyers and judges trained in the civil law were required to deal with subject-matter whose application presupposed common law training and institutions.¹⁰

The Roman law systems had little basis for the exercise of judicial control over the operation of the other branches of govern-

8. GRIFFIN, *THE ENLIGHTENMENT AND LATIN AMERICAN INDEPENDENCE*, in WHITAKER, *LATIN AMERICA AND THE ENLIGHTENMENT* 119-43 (2d ed. 1961).

9. H. DAVIS, *LATIN AMERICAN THOUGHT: A HISTORICAL INTRODUCTION* 36 (1972).

10. The matter is put quite clearly in Jaffin, *New World Constitutional Harmony*, 42 *COLUM. L. REV.* 523, 561-62, 564 (1942):

The Constitutional Fathers [in the United States] did not invent new constitutional machinery to protect the Bill of Rights. Instead, they used the old machinery of the Common Law for this purpose; as lawyers brought up in the Common Law tradition and as disciples of Blackstone, they did not deem it necessary to implement the new constitutional ideology with new apparatus. In other words, the historic methods used for centuries in England to dispose of litigated disputes between private individuals were borrowed to provide protection to the Bill of Rights and other constitutional guarantees. . . . Once the Latin-American republic realized the necessity of protecting the Bill of Rights and thereby translating American constitutional ideology into action, they were faced with a serious problem. Where could they find appropriate machinery for the purpose. In the United States? No. America merely borrowed from England the Common Law machinery, which was not suitable to Latin-America. In the Old World? No. For the general administration of justice the machinery of the Napoleonic Code was available; but obviously 19th century Europe provided no machinery to safeguard constitutional guarantees; the Old World was dominated by Napoleon, Metternick, and Bismarck, and the protection of the Bill of Rights was unthought of—except by the authors of unheeded proposals. (Footnotes omitted).

ment.¹¹ Moreover, the French Revolution, which had a compelling influence on the Continental legal systems upon which Latin Americans drew, was profoundly anti-judicial in nature.¹² The Revolution's emphatic insistence on legislative supremacy, coupled with its abhorrent excesses in the area of human rights, created agonizing dilemmas for Latin American jurisprudence. On the one hand, Latin American revolutionaries themselves drew spiritual sustenance from the ideals of the French Revolution. On the other hand, the drafters of Latin American constitutions readily adopted the United States model, including the Bill of Rights. At issue, therefore, was the problem of enforcing constitutionally guaranteed liberties against legislative and executive denials. It was at precisely this juncture that the doctrine of judicial review came into play.

Judicial review, as practiced in the United States, was sometimes suggested as a means of enforcing constitutional liberties against legislative and executive actions in Latin America. Judicial review, however, ran counter to several principles of the civil law. Judges were not regarded as important figures in the civil law. There was no tradition of judicial intervention into decisions or conduct of the other branches of government. In fact, it was generally believed that the invalidation of statutes by court decision would constitute an improper intrusion by the judiciary into matters which were by nature legislative, thus disturbing the proper relationship between those two branches of government.¹³ Moreover, in classical civil law thinking, judicial decisions are not a source of law, at least in modern written-law societies; rather, court decisions should have effect only upon the parties to the particular suit.¹⁴ Thus, it was feared that judicial review would cause judicial decisions to acquire *erga omnes* effect. The eventual result of this situation was the development in many Latin American countries of unique juridical arrangements which may be seen as both compromises between civil law and common law principles and as indigenous solutions to the problems posed by conflicting legal traditions and uniquely national needs. This Article examines the procedures and institutions adopted and utilized by one Latin

11. J. DAWSON, *THE ORACLES OF THE LAW* 100-147 (1968).

12. *Id.* at 376.

13. See R. DAVID & H. DE VRIES, *THE FRENCH LEGAL SYSTEM: AN INTRODUCTION TO CIVIL LAW SYSTEMS* 30 (1958); J. MERRYMAN, *THE CIVIL LAW TRADITION* 36-7 (2d ed. 1985).

14. M. VILLORO TORANZO, *INTRODUCCIÓN AL ESTUDIO DEL DERECHO* 177-78 (2d ed. Mexico 1978).

American country, Costa Rica, for the adjudication of constitutional questions as a method of dealing with this historical dilemma.

It should be recalled at the outset that Costa Rica has long been a functioning democracy with stable governmental institutions a tradition of respect for law. The phrase *estado de derecho* is often used to express both the continuing aspiration and the social reality of the nation. The Costa Rican Constitution (and most of its predecessor constitutions)¹⁵ establishes three branches of government: the Legislative Power, the Executive Power, and the Judicial Power.¹⁶ The Legislative Power is vested in a unicameral Legislative Assembly whose fifty-seven members are elected by direct popular vote for four-year terms.¹⁷ The Executive Power is exercised by the President, who is elected by direct popular vote for a four-year term, and by the Ministers of Government who head the various executive departments and are appointed by the President.¹⁸ The country also has two Vice-Presidents, elected by direct popular vote for terms which coincide with that of the President.¹⁹ The judicial power is exercised by the Supreme Court of Justice (hereinafter Supreme Court) and such other tribunals as are established by law.²⁰ The Supreme Court is composed of seventeen members, called magistrates, who are elected by the Legislative Assembly for eight-year terms, and are retained for additional eight year terms unless opposed by a two-thirds majority of the Legislative Assembly.²¹ The Supreme Court is divided into three chambers.²² The first chamber, composed of seven magistrates, has cassation jurisdiction in contentious-administrative matters and in most civil and commercial matters.²³ The second chamber, composed of five magistrates, has cassation jurisdiction in cases of fam-

15. Costa Rica has had fifteen charters of a constitutional nature. I. CREEDMAN, *HISTORICAL DICTIONARY OF COSTA RICA* 49 (1977). Unless otherwise indicated, all constitutional references herein are to the present Constitution, which entered into effect on November 7, 1949.

16. CONSTITUCIÓN art. 9 (Costa Rica).

17. *Id.* arts. 105, 106, 107 (Costa Rica).

18. *Id.* arts. 130, 134, 138 (Costa Rica).

19. *Id.* arts. 135, 138 (Costa Rica).

20. *Id.* art. 152 (Costa Rica).

21. The number of magistrates is fixed by the *Ley Orgánica del Poder Judicial* arts. 61, 63, 65 and 70 [hereinafter cited as LOPJ]. Their method of election and retention is established by article 158 of the Constitution.

22. Article 157 of the Constitution provides that the Supreme Court shall be composed of such Chambers as shall be provided by statute.

23. LOPJ, *supra* note 21, art. 61.

ily law, successions, and bankruptcy.²⁴ The third chamber has cassation jurisdiction in criminal matters.²⁵ The entire Court (*Corte Plena*) has original and exclusive jurisdiction over actions of unconstitutionality and petitions for habeas corpus (both of which are discussed below), appointing members of the lower courts, exercises administrative and disciplinary control over the entire Judicial Power, and resolves jurisdictional disputes between and among its own chambers.²⁶

There are three levels of tribunals below the Supreme Court. They are, in ascending order, *Alcaldes*, district judges, and Superior Tribunals. *Alcaldes* have jurisdiction over minor civil matters and are roughly equivalent to justices of the peace.²⁷ District judges have original jurisdiction in civil, commercial, contentious-administrative, labor, and juvenile matters, and over lesser crimes (*delitos menores*).²⁸ Superior Tribunals, which usually sit in three-judge panels, have original jurisdiction in major criminal cases and appellate jurisdiction over many decisions of district judges.²⁹ In keeping with civil law practice, decisions of higher courts do not constitute binding precedent for lower courts.³⁰

Costa Rican history is typically Latin American in its search for procedures to ensure the observance of constitutional guarantees. Every constitution since 1859 has expressly provided that constitutional norms are superior to other norms, and that all statutes, decrees, and orders of the legislature or the executive which contravene the Constitution are null and void.³¹ The early constitutions, however, established no mechanisms for the enforcement of constitutional supremacy. At various times, therefore, each branch of government enforced the Constitution in its own way. The foremost example of legislative constitutional review is the Law of Nullifications of 1920. In 1917 General Federico Tinoco Granados, the Minister of War, overthrew President Alfredo Gon-

24. *Id.* art. 63.

25. *Id.* art. 65.

26. *Id.* art. 71.

27. *Id.* arts. 89-97.

28. *Id.* arts. 79-81, 83, 85, 86, 88.

29. *Id.* arts. 78, 78 bis.

30. This principle is so fundamental and well-understood that it is not embodied in legislation.

31. CONSTITUCIÓN POLÍTICA de 1859, art. 11 (Costa Rica). CONSTITUCIÓN POLÍTICA de 1869, art. 12 (Costa Rica). CONSTITUCIÓN POLÍTICA de 1871, art. 17 (Costa Rica). CONSTITUCIÓN POLÍTICA de 1917, art. 7 (Costa Rica). CONSTITUCIÓN POLÍTICA de 1949, art. 10 (Costa Rica).

zález Flores and promulgated a new constitution to replace the Constitution of 1871. Less than three years later, the Tinoco regime itself was overthrown, and the newly-convened Legislative Assembly enacted a law annulling Tinoco's 1917 Constitution and the legislation enacted pursuant to it as violating the Constitution of 1871.³²

A number of presidents exercised executive constitutional review by declaring certain statutes unconstitutional and refusing to enforce them. For example, in 1911 President Ricardo Jiménez Oreamuno declared certain tenure-of-office provisions of the Personnel Law and Secondary Education Law unconstitutional because, in his opinion, they encroached upon the President's constitutional prerogative of nominating and removing employees of executive departments.³³

Judicial control of constitutionality began in 1888 with the *Ley Orgánica de los Tribunales*, article 1 of which prohibited judges from applying statutes or decrees which were contrary to the Constitution.³⁴ Acting pursuant to this provision, judges at all levels declared laws unconstitutional. The result is generally believed to have been unsatisfactory. Because Supreme Court decisions did not create case-law binding on inferior courts, the constitutionality of laws varied from time to time and place to place.³⁵ This difficulty was ameliorated somewhat by a 1922 amendment to the Code of Civil Procedure which provided for Supreme Court review of lower court decisions whenever the lower court refused to apply a statute or decree on the ground that it was unconstitutional.³⁶

The modern system of litigating constitutional questions began with the 1938 reforms to the Code of Civil Procedure. Modern practice is characterized by the principle that constitutional litigation should be "concentrated;" that is, constitutional questions may be decided only in certain forms of action before designated courts. This is in contrast to the United States where, as a general rule, a claim or defense based on the constitution may be raised in

32. Zeledón, *Historia Constitucional de Costa Rica* in DIGESTO CONSTITUCIONAL DE COSTA RICA 6 (1946).

33. R. HERNÁNDEZ, *EL CONTROL DE LA CONSTITUCIONALIDAD DE LAS LEYES* 90-91 (1978).

34. *LEY ORGÁNICA DE LOS TRIBUNALES* (1888), art. 1.

35. Costa Rica's unsatisfactory experience with pervasive or diffuse judicial review was explained by a number of lawyers and judges.

36. *CÓDIGO DE PROCEDIMIENTOS CIVILES*, art. 967, (Costa Rica 1982) (as amended by Law of July 13, 1922).

any proceeding, regardless of the tribunal or type of case.³⁷ In Costa Rica there are six discrete methods of raising constitutional questions: (1) the action of unconstitutionality; (2) habeas corpus; (3) *amparo*; (4) ordinary contentious-administrative litigation; (5) an opinion in response to a presidential veto-for-unconstitutionality; and (6) administrative enforcement by the Procurator General.

II. THE ACTION OF UNCONSTITUTIONALITY

In most situations, the only method available to a litigant to challenge the constitutionality of a statute or a presidential decree having the force of a statute is by the action of unconstitutionality. This action, which has its basis in article 10, paragraphs 3 and 4 of the Constitution, provides:

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

It shall be determined by statute which tribunals shall have power to hear claims of unconstitutionality of other dispositions emanating from the Executive Power.³⁸

The action of unconstitutionality must arise out of a separate lawsuit. This occurs when a party already in litigation believes that a statute or decree which he contends is unconstitutional will be applied to his disadvantage in that suit. The party then obtains a written certification of the status of the suit from the judge before whom it is pending. His lawyers then file a petition of unconstitutionality with the Supreme Court, identifying the lawsuit, the statute or decree believed to be unconstitutional, and the constitutional provisions allegedly violated.³⁹ Upon receipt of the petition, the Supreme Court instructs the judge or tribunal where the petitioner's case is pending to suspend proceedings in the case until

37. In the United States, a statute which purported to prohibit a court from deciding a constitutional question in a case otherwise within that court's jurisdiction would raise serious questions concerning the constitutionality of the statute itself. *See, e.g.*, *Johnson v. Robison*, 415 U.S. 361, 367-68 (1974) and cases cited therein.

38. CONSTITUCIÓN art. 10 (Costa Rica).

39. CÓDIGO DE PROCEDIMIENTOS CIVILES arts. 962-64 (Costa Rica) [hereinafter cited as *CÓD. PRO. CIV.*] The gravity of the action of unconstitutionality is underscored by the fact that it may not be brought where the underlying case is a small civil claim or minor criminal infraction, and by the unusual requirement that the petition alleging unconstitutionality be signed by *two* lawyers.

the action of unconstitutionality is decided. The Supreme Court also instructs all other judges and courts in the country to suspend proceedings in any cases pending before them which involve the allegedly unconstitutional statute or decree. The petitioner then submits a written brief in support of his allegations of unconstitutionality. All other parties to pending suits which involve the statute or decree in question are permitted, but not required, to submit briefs in the action of unconstitutionality. They are free to argue that the statute or decree is unconstitutional for reasons other than those asserted by the petitioner. The Public Ministry also has the right to file a brief.⁴⁰ Oral argument is not permitted; the case is decided on the briefs. For the Court to declare a statute or decree unconstitutional, all seventeen magistrates must participate in the decision, and at least twelve must vote for unconstitutionality.⁴¹ Thus, for example, if eleven magistrates vote to declare the law unconstitutional, and six vote to uphold its constitutionality, the statute or decree is upheld as constitutional. The judgment is communicated to all courts, which are then free to proceed with the suspended cases in accordance with the Supreme Court decision.⁴² If the law is adjudged to be unconstitutional, it may not be applied in any case then pending nor in any case commenced thereafter. This is so because of the conjunction of two provisions of article 10 of the Constitution, which provide:

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

The Supreme Court, by vote of not less than two-thirds of all its members, has the power to declare the unconstitutionality of dispositions of the Legislative Power and decrees of the Executive Power.⁴³

This may be considered an exception to the rule that decisions of higher courts do not bind lower courts. On the other hand, it might be seen as removing a law and thus making its subsequent application legally impossible, rather than as creating a binding precedent.

A determination of constitutionality is likewise binding. A

40. *Id.* arts. 965, 966.

41. CONSTITUCIÓN art. 10 (Costa Rica); Cód. PRO. CIV., *supra* note 39, art. 967.

42. Cód. PRO. CIV., *supra* note 39, art. 969.

43. CONSTITUCIÓN art. 10 (Costa Rica).

subsequent action of unconstitutionality against the same law will be rejected preliminarily even if the second petitioner asserts reasons for unconstitutionality which were not raised in the first action.⁴⁴

III. HABEAS CORPUS

Habeas corpus has been adopted by most Latin American republics to protect the constitutional rights of personal liberty and freedom of movement.⁴⁵ Article 48 of the Costa Rican Constitution provides:

Every person has a right to Habeas Corpus whenever he believes himself to be unlawfully deprived of his liberty.

This remedy is within the exclusive jurisdiction of the Supreme Court of Justice, which has power to order the detained person brought before the court, which shall not be avoided by a claim of obedience to authority or any other excuse.⁴⁶

The first article of the Habeas Corpus Law clarifies the scope of the action: "Habeas corpus is available not only against illegal detention imposed by any authority, but also against any unlawful restriction upon the right to come and go and to move about from place to place guaranteed by Article [22] of the Constitution."⁴⁷ Although the language of article 48 seems to make habeas corpus available against *private* conduct which restricts personal liberty, there are no cases where the writ has been so utilized, and the consensus is that the remedy is available only against actions of governmental officials.⁴⁸

A habeas corpus petition is commenced in the Supreme Court

44. Cód. Pro. Civ., *supra* note 39, art. 967; R. HERNÁNDEZ, EL CONTROL DE LA CONSTITUCIONALIDAD DE LAS LEYES 115-16 (1978). Of the eighteen unconstitutionality cases decided between February, 1979 and March, 1982, judgments of unconstitutionality were entered in three cases. M. RAMÍREZ & G. TREJOS, JURISPRUDENCIA CONSTITUCIONAL 1979-1982: DIGESTO DE JURISPRUDENCIA 145-47 (1982).

45. Fix Zamudio, *Latin American Procedures for the Protection of the Individual*, 9 J. INT'L COMM. JURISTS 67 (1968).

46. CONSTITUCIÓN art. 48 (Costa Rica).

47. Ley de Hábeas Corpus (No. 35 de 243 de nov. de 1932), art. 1.

48. R. HERNÁNDEZ, LAS LIBERTADES PÚBLICAS EN COSTA RICA 64 (1980). The Law of Habeas Corpus does not expressly limit the writ to victims of *governmental* restraint. However, the Law makes frequent reference to "public authorities," thus providing a basis for the conclusion that the writ lies only against official conduct.

and heard in plenary session.⁴⁹ Because of the importance of the liberties involved, habeas corpus petitions take priority over all other matters before the Court. Similarly, the action need not be commenced by the injured person but may be brought by any relative or, indeed, any citizen.⁵⁰ Immediately upon the filing of the petition, the President of the Court directs the authorities responsible for the detention or restriction to submit a report to the Court. The report must include a copy of the order of detention or restriction and a "clear and explicit" statement of both the legal and factual bases for the detention or restriction.⁵¹ The authorities must submit this information to the Court within twenty-four hours if they reside in San Jose or its outskirts, or within longer time periods according to their distance from the capital.⁵² In determining whether to grant the writ, the Court must consider:

(1) whether the authority responsible for the detention or restriction had jurisdiction to order such detention or restriction;⁵³

(2) whether the act of which the petitioner is accused is punishable by a law enacted prior to the act;⁵⁴

(3) whether the detention is made in violation of Article 40 of the Constitution;⁵⁵

(4) whether the petitioner was tried and convicted by judgment of a competent authority and whether a final sentence has been imposed upon him;⁵⁶

(5) whether the punishment imposed upon the petitioner is one which is provided for by law;⁵⁷

(6) whether the order of detention or restriction of liberty was made pursuant to a lawful suspension of individual guarantees;⁵⁸ and

49. LOPJ, *supra* note 21, art. 71(8); Ley de Hábeas Corpus, *supra* note 47, art. 2.

50. Ley de Hábeas Corpus, *supra* note 47, art. 3.

51. *Id.* arts. 5-7.

52. *Id.* art. 7(a),(b).

53. *Id.* art. 9(1).

54. *Id.* art. 9(2).

55. *Id.* art. 9(3). Article 40 of the Constitution prohibits cruel and degrading treatment, perpetual punishment, and confiscation of property. It also provides that any statement obtained by violence is null.

56. Ley de Hábeas Corpus, *supra* note 47, art. 9(4).

57. *Id.* art. 9(5).

58. *Id.* art. 9(6). The rights guaranteed by articles 20 through 49 of the Constitution are denominated "individual guarantees." These include freedom of speech, press, association, and petition; freedom from unlawful detention and unlawful imprisonment; and equality

(7) in case of a lawful suspension of individual guarantees (as described in item 6, immediately above), whether those guarantees have yet been restored.⁵⁹

If the Court concludes that the detention or restriction is unlawful, then it must vacate the order of detention or restriction and command the authorities to place the person at liberty.⁶⁰

IV. AMPARO

The writ of *amparo* is probably Latin America's most important contribution to the defense of constitutional guarantees. The writ originated in Mexico as a procedure through which the court would extend its protection ("*amparo*") to individuals whose constitutional rights had been violated or threatened by governmental officials. The Mexican *amparo* has been expanded by court decisions, statutes, and constitutions to the point where it protects nearly all legal norms in the nation.⁶¹ Elsewhere in Latin America, *amparo* serves the more limited function of protecting those constitutional rights which are not protected by habeas corpus. In all countries, *amparo* is a speedy and summary remedy. The respondent must answer the petition quickly (usually within a day or two), the case is given high priority on the court calendar, and the court is required to decide the matter promptly. In most countries *amparo* is available only where both the facts and the law are clear; that is, there must be no need for extensive taking of evidence or for lengthy discussion of novel or complicated questions of law. *Amparo* relief usually consists of the *suspensión* of the unlawful conduct; that is, the court orders the offending public official to cease the unlawful conduct and to take such affirmative action as may be necessary to restore the complaining party to the

before the law. In contradistinction to "individual guarantees" are "social rights and guarantees" (set forth in articles 50 through 74 of the Constitution) which deal with working conditions and other economic matters. Freedom of religion is guaranteed by article 75 and is thus neither an "individual" nor a "social" guarantee. Article 121(7) empowers the Legislative Assembly to suspend certain of the individual guarantees for up to thirty days. Article 140(4) empowers the President to do the same when the Assembly is in recess, but suspension by the President operates to convoke the Assembly which may then lift or maintain the suspension of guarantees.

59. Ley de Hábeas Corpus, *supra* note 47, art. 9(7).

60. *Id.* art. 10. Of the twenty-eight habeas corpus cases decided by the Supreme Court between February, 1979 and March, 1982, relief was granted in eleven cases and denied in seventeen. M. RAMÍREZ & G. TREJOS, *supra* note 44, at 145-47.

61. Fix Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CALIF. W. INT'L L. J. 306 (1979).

full enjoyment of the right which was violated. In most countries *amparo* is not the exclusive remedy for the vindication of the rights which it protects. An injured party usually may raise the constitutional question as part of a claim or defense in an ordinary civil or criminal case. Ordinarily, however, litigation takes years. Moreover, courts in civil law countries generally lack the power to grant interim injunctive relief. Thus, as a practical matter, ordinary litigation is often inadequate to vindicate constitutional rights. The unique benefits of *amparo* are speed and comprehensive relief.⁶²

Article 48 of the Constitution of Costa Rica, after guaranteeing and defining habeas corpus, proceeds as follows: "For the maintenance of other rights protected by the Constitution [i.e., constitutional rights not protected by habeas corpus] there is available to every person the writ of *Amparo*, which shall be heard by such tribunals as shall be designated by statute."⁶³ The *Amparo* Law, which implements the foregoing provision, provides that *amparo* is available against every disposition, act, or resolution and against every action or omission which violates, has violated, or threatens to violate any constitutional right not protected by habeas corpus.⁶⁴ *Amparo* does not lie against legislative acts,⁶⁵ the remedy in such cases being the action of unconstitutionality. Nor is it available against judicial decisions.⁶⁶ *Amparo* is not available where the injured party has failed to exhaust other remedies provided by law, unless the pursuit of those other remedies will not

62. Concerning the Argentine *amparo* see the decision of the Supreme Court of Justice in *Siri*, 239 Fallos 459, [1958-II] J.A. 478 (1957); Comment, *The Writ of Amparo: A Remedy to Protect Constitutional Rights in Argentina*, 31 OHIO ST. L.J. 831 (1970). Concerning Brazil, whose writ of security (*mandado de seguranca*) is similar to *amparo*, see 1984 *Revista do Instituto dos Advogados da Bahia, passim* (Número Especial, 1984). See generally, Rosenn, *Judicial Review in Latin America*, 35 OHIO ST. L.J. 785, 796-804 (1974).

63. CONSTITUCIÓN art. 48 (Costa Rica). An excellent comparative study of the Mexican *amparo*, the Argentine *amparo*, and the Brazilian writ of security is found in K. KARST & K. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA* 98-183 (1975).

64. Ley de Amparo (No. 1161 del 2 de junio de 1950, as amended) art. 2 [hereinafter cited as Ley de Amparo]. The *Amparo* Law had originally limited the action to the protection of individual rights (as distinguished from "social" or other rights, see n. 58) guaranteed by the Constitution. However, in 1956 the Supreme Court held that article 48 of the Constitution extends *amparo* protection to all constitutional rights not protected by habeas corpus. (1956 Corte Plena, ses. ext. 54 de 11 de octubre, Boletín Judicial, 7 de diciembre de 1956). Thereafter the *Amparo* Law was amended to conform to the Supreme Court's decision.

65. Ley de Amparo, *supra* note 64, art. 3(a).

66. *Id.* art. 3(b), (c).

resolve the dispute within fifteen days.⁶⁷

An *amparo* action may be commenced by any natural or juridical person.⁶⁸ If the conduct complained of is that of the President, a Minister of Government, a provincial governor, the Director General of the Civil Guard, or certain other specified police officials, the matter is heard by the First Chamber of the Supreme Court and is not subject to review.⁶⁹ In all other cases it is first heard by the criminal judge of the judicial district in which the conduct in question occurred,⁷⁰ with a right of appeal (in the nature of cassation) to the Third (*i.e.* criminal) Chamber of the Supreme Court.⁷¹ An *amparo* petition may be filed at any time on any day by the injured person, a relative, or any citizen, and takes priority over all other matters except habeas corpus.⁷² The petition must identify the act or omission complained of, the constitutional right allegedly violated or threatened, the official responsible for the conduct, and the proof on which the petitioner relies.⁷³ As with habeas corpus, most of the formal pleading requirements are dispensed with in *amparo* proceedings.⁷⁴

If the petition deals with subject-matter inappropriate to *amparo* (for example, a court judgment or the enactment of a statute), the petition is dismissed *in limine*. If the petition deals with subject-matter within the scope of *amparo*, then the judge or Chamber requires the respondent official to file a written report as in habeas corpus. If the report disputes the facts alleged by the petitioner, evidence is then taken.⁷⁵ If serious or irreparable harm may be done to the petitioner before the case can be decided on the merits, the judge or Chamber may order suspension of the conduct complained of, pending final judgment.⁷⁶ If the petitioner prevails on the merits, the respondent is ordered to take specified negative or affirmative steps to restore the petitioner to the enjoy-

67. *Id.* art. 3(d). See also 1961 *Montoya Castillo vs. Gobernador de la Provincia de Alajuela*, Corte Plena, ses. ord. No. 43, 14 hrs. del 28 de agosto de 1961. (1969 Rev. Col. Abog., No. 17, p. 805).

68. Ley de Amparo, *supra* note 64, art. 5.

69. LOPJ, *supra* note 21, art. 61(3), (amending art. 6, p. 1 of the Law of Amparo).

70. Ley de Amparo, *supra* note 64, art. 6.

71. *Id.* art. 14.

72. *Id.* art. 7.

73. *Id.* art. 8.

74. *Id.*

75. *Id.* art. 12.

76. *Id.* art. 13.

ment of the right which has been violated.⁷⁷ The denial of relief in *amparo* is not a bar to a subsequent civil or criminal action challenging the same conduct which was the subject of the *amparo* proceeding.⁷⁸ This is so because, given the summary nature of *amparo*, relief is often denied because the issues are too complicated or the evidentiary needs too great to be accommodated in an *amparo* proceeding. Thus, an *amparo* judgment denying relief is not necessarily a determination on the merits, and therefore, bars only subsequent *amparo* actions.

In deciding *amparo* cases, the Costa Rican courts have consistently applied an "arbitrariness" test. This means that relief will be granted only where the conduct is both unlawful *and* arbitrary. For example, if the respondent official shows that he was acting pursuant to or in reliance upon a statute, then his conduct was not arbitrary and relief will be denied even if a constitutional right has been violated and even if the respondent's conduct was based on an incorrect interpretation of the statute. A district judge addressed the matter in these terms:

[T]he writ of *amparo* lies against every. . . act or omission which violates in arbitrary fashion a right protected by the Constitution. . . . An act or omission is arbitrary when it is committed out of pure self will or caprice, without relying on existing legislation. Even though the act is tainted with unconstitutionality, *amparo* will not lie because that is not the way to declare laws unconstitutional.⁷⁹

The Supreme Court has explained the "arbitrariness rule" in the following way:

[A]cts of officials which are based on statutory mandates are legitimate and cannot be faulted as arbitrary, because in *amparo* it is the arbitrariness and the abuse of power by officials which the law represses, not those acts which officials are empowered by statutory precept to perform, because those precepts involve, for the officials, the fulfillment of their duties.⁸⁰

77. *Id.* arts. 15, 16. An *amparo* judgment by a district criminal judge may be appealed to the Third Chamber of the Supreme Court for review of questions of law. Where the *amparo* action was commenced in the Third Chamber, there is no review. *Ley de Amparo*, *supra* note 64, art. 14.

78. *Ley de Amparo*, *supra* note 64, art. 21.

79. Juzgado 30 Penal, Sentencia No. 165 a las 15 hrs. del 2 de agosto de 1961.

80. Corte Plena, Sentencia No. 147 a las 14 hrs. del 21 de nov. de 1960.

This approach has been criticized as imposing an unwarranted limitation on *amparo*. Dr. Ruben Hernández, Professor of Constitutional Law at the University of Costa Rica, has said:

It is apparent that our courts have misinterpreted the meaning of *amparo* in unduly limiting it, by judicial decisions and without basis in legislation, to arbitrary exercises of state power. In fact there are actions which, while not necessarily arbitrary, nevertheless trample fundamental liberties of the governed. In any event, our [*amparo*] legislation requires only that the act complained of violate a fundamental right which is something quite different from requiring that the act be arbitrary.⁸¹

This dispute illustrates the dilemma created by the interaction of civil law and common law concepts. The civil law's deference to the legislature is so great that an official's reliance (even misplaced reliance) on a statute will cause the courts to refrain from examining the constitutionality of the official's conduct.⁸² The official's conduct, although it may be unconstitutional, is regarded as "legitimate" because it has a basis in legislation. In theory, the statute on which the official relied could be attacked directly in an action of unconstitutionality; however, a statute which is constitutional on its face will survive an action of unconstitutionality. If the same statute is thereafter applied in an unconstitutional manner by a public official, *amparo* relief will be denied so long as the official relied on the statute.

Despite its limitations, *amparo* has often proven effective in protecting and restoring constitutional rights. For example, *amparo* has been successfully invoked to stop governmental interference with the circulation of a newspaper,⁸³ to require municipal

81. R. HERNÁNDEZ, *LAS LIBERTADES PÚBLICAS EN COSTA RICA* 68 (1980).

82. The restrictive approach of the Costa Rican courts to claims in *amparo* is not without merit. *Amparo* is a summary action in all countries. It is intended to provide relief where the petitioner's right is legally clear and the respondent's violation of that right is factually certain. Conversely, *amparo* is usually inappropriate to matters which are factually or legally complicated. See discussion in *Samuel Kot, S.R.L.*, 241 Fallos 291, 1958-IV J.A. 227, (Supreme Court of Justice of Argentina, 1958). The same is true of the Brazilian writ of security. See Tourinho, *Direito Líquido e Certo: Expressão Atécnica*, 1984 *Revista do Instituto dos Advogados da Bahia* 25-37 (Número Especial, 1984). When a public official acts in reliance on a statute, the reasonableness of his reliance, the applicability of the statute, (ultimately) the constitutionality of the statute all serve to complicate the case, perhaps taking it beyond the reach of *amparo*.

83. *Sálazar Sálazar vs. Jefe Político de Turrialba*, Juzgado Penal de Turrialba, 8:30 hrs. del 20 de nov. de 1962; aff'd Sala Segunda Penal, 16:30 hrs. del 11 de dic. de 1962 (1969

officials to act on petitions properly filed with them,⁸⁴ and to prevent a public agency from dispossessing a private landowner.⁸⁵

V. CONTENTIOUS-ADMINISTRATIVE LITIGATION

The general rule in Costa Rica is that in ordinary litigation a court may not hear a claim or defense based on the alleged unconstitutionality of a statute or decree. The action of unconstitutionality exists to perform this function. There is, however, a significant gap in the subject-matter of an action of unconstitutionality. Article 10 of the Constitution speaks of the unconstitutionality of acts of the Legislative Power and the Executive Power. Similarly, Book IV, Title I, Chapter IX of the Code of Civil Procedure deals with the action of unconstitutionality governing the terms of enactments that come from either the Legislative or the Executive Power.⁸⁶ In recent decades, however, there has been a significant increase in the number and importance of autonomous administrative agencies with rulemaking power.⁸⁷ The rules promulgated by these agencies are not acts or decrees of the Legislative or Executive Power and, thus, are not within the scope of the action of unconstitutionality. For the same reason, municipal ordinances and regulations promulgated by the Controller General also escaped review.⁸⁸ *Amparo* is likewise ineffective, because the "arbitrariness" doctrine protects officials who act in reliance on regulations and

Rev. Col. Abog. No. 17, p. 891).

84. *Peyroutet Carricondo vs. Municipalidad de San Pedro de Montes de Oca*, Juzgado Primero Penal de San José, 16:50 hrs. del 22 de nov. de 1954 (1969 Rev. Col. Abog. No. 17, p. 891).

85. *Sánchez Ulate vs. Jefe Político*, Juzgado Penal de Cañar, 7:30 hrs. del 20 de mayo de 1960 (1969 Rev. Col. Abog. No. 17, p. 583). Of the nineteen *amparo* actions commenced and decided in the Supreme Court from February, 1979, through March, 1982, relief was granted in three cases and denied in sixteen. M. RAMIREZ & G. TREJOS, *supra* note 44. For an interesting discussion of *amparo* decisions during an earlier period see Donaldson, *The Costa Rican Amparo in the Period 1950-1962*, 8 LAW. AM. 371 (1976).

86. Cód. Pro. Civ., *supra* note 39, arts. 962, 965, 967.

87. The Central Bank, the Coffee Institute, and the various integrated professional associations such as the National Bar Association are among the numerous administrative agencies.

88. The Controller General is elected for an eight-year term by the Legislative Assembly. Article 183 of the Constitution provides that although the office is an auxiliary institution of the Legislative Assembly, it enjoys absolute functional and administrative independence. The prevalent view is that the Controller General's Office is not part of the Legislative Power but is itself a basic organ of government. See Murillo, *Naturaleza Jurídica de la Contraloría General de la República*, 49 REVISTA DE CIENCIAS JURÍDICAS 143 (1984).

ordinances.

To remedy this situation, the Contentious-Administrative Jurisdiction Regulatory Law, adopted in 1966, expressly extends jurisdiction in contentious-administrative cases to include questions of the constitutionality of rules promulgated by administrative agencies and municipalities.⁸⁹ This means that an inferior court (a single judge in the first instance and a multi-judge panel of a Superior Tribunal on appeal) may declare a municipal ordinance or a rule or regulation of an autonomous administrative agency unconstitutional. This places the lower contentious-administrative courts in an exceptional position, because they have an important power which is denied their counterparts in civil, criminal, and commercial cases—the power to declare unconstitutional a normative act.

VI. RESOLUTION OF A PRESIDENTIAL VETO

All of the procedures discussed so far involve constitutional adjudication in connection with actual cases or controversies between adversary litigants. In the Costa Rican system there is also a procedure for adjudicating constitutional questions outside of litigation. Article 128 of the Constitution provides that where the President vetoes a bill because he believes it to be unconstitutional and the Legislative Assembly does not delete the allegedly unconstitutional provision, the Assembly is required to submit the bill to the Supreme Court for a decision on the constitutionality of the disputed provision. If at least two-thirds of the total membership of the Court find the provision unconstitutional, the bill is returned to the Assembly with the unconstitutional provision stricken, and the Assembly may either pass the revised bill or abandon the project. In the former situation, the President may not again veto the bill on constitutional grounds because his constitutional objections have been met. If fewer than twelve magistrates vote for unconstitutionality, the President is prohibited from vetoing a second time on constitutional grounds because the Court has settled the constitutional question.⁹⁰ A determination of

89. Ley Reguladora de la Jurisdicción Contenciosa-Administrativa (No. 3667 de 12 de marzo de 1966), art. 20(2). The First Chamber of the Supreme Court has jurisdiction to review contentious-administrative decisions for errors of law. LOPJ, *supra* note 21, art. 61(1). Consequently, the Chamber may review constitutional decisions by lower courts in contentious-administrative matters.

90. CONSTITUCIÓN art. 128 (Costa Rica). See also MUÑOZ LA ASAMBLEA LEGISLATIVA EN COSTA RICA 171 (1981).

constitutionality operates, in practice, to protect the bill from successful challenge by action of unconstitutionality.

Although this procedure seems to involve constitutional adjudication in the abstract, it may be seen as arising out of an actual controversy between the Legislative Assembly and the President. The procedure may be adequate to determine whether the legislation is unconstitutional *on its face*, but it cannot address questions of unconstitutional application, which also escape *amparo* review because of the "arbitrariness" rule.

VII. ADMINISTRATIVE ENFORCEMENT BY THE PROCURATOR GENERAL

The Procurator General of the Republic performs an important role in the protection of constitutional guarantees. While his role is not strictly adjudicatory, it is an integral part of the scheme of enforcement gradually developed by Costa Rica. The Procurator General is appointed by the Council of Government, with the approval of the Legislative Assembly, for a term of six years.⁹¹ He acts as the technical-legal advisor to the government in matters of public administration and represents the state in all legal proceedings except the prosecution of criminal cases.⁹² His formal opinions constitute operational rules binding on governmental officials in the performance of their administrative functions.⁹³ Since 1982, the Procurator General has also been charged with protecting human rights. The Organic Law of the Office of Procurator General, enacted in 1982, empowers the Procurator General to defend the inhabitants of the country against any acts or omissions of public officials or public employees which interfere with the enjoyment of any individual rights guaranteed by the Constitution and any civil or political rights enumerated in international conventions to which Costa Rica is a party.⁹⁴ The Procurator General is empowered to receive complaints from any source against public authorities, including police, and to undertake such investigations as he deems appropriate. This investigatory power includes the right to enter public offices without prior notice, and to inspect all public documents and records except those which are by law confi-

91. Ley Orgánica de la Procuraduría General de la República (No. 6815 del 27 de septiembre de 1982) art. 10 [hereinafter cited as LOPG]. The Council of Government is composed of the President and his cabinet ministers. CONSTITUCIÓN art. 147 (Costa Rica).

92. LOPG, art. 1.

93. *Id.* art. 2.

94. *Id.* art. 3(k).

dential or which have been classified by the Council of Government as state secrets.⁹⁵ If the Procurator General determines that a public official or other public employee has violated any right guaranteed by the Constitution or a treaty, he shall direct the offender's superior to impose the appropriate disciplinary sanction.⁹⁶ If the violation in question also constitutes a crime, the Procurator General so informs the Public Minister in order that criminal proceedings might be commenced.⁹⁷ The Procurator General is also authorized to make recommendations to government administrators for the protection of human rights.⁹⁸ The human rights function of the Procurator General is quite new, dating from the promulgation of the current Organic Law in September, 1982. Although it may be too early to evaluate the effectiveness of this institution, its potential has been noted by a constitutional scholar who himself served as Procurator General and, later, as Minister of Justice.

From the statute, it is difficult to ascertain precisely the nature of [the human rights] function of the Procurator. Although the statute indicates that this function is defense, it is not defense in the procedural sense. His function is much broader: [I]t consists of preventive and educational actions for the protection of human rights. His role is preventive in that, by simple and direct means such as a telephone call, he warns the officials of an evident violation of human rights; it is educational in that his activities continuously teach officials about the law, the rights of citizens, and the limits on the exercise of power.⁹⁹

The human rights function of the Procurator General may close the gaps in the protection afforded by the action of unconstitutionality, the decision on a veto-for-unconstitutionality, and the writ of *amparo*. A complaint to the Procurator General may prove to be an effective remedy where an official has acted unconstitutionally because of a misplaced reliance on a statute which has been determined to be constitutional on its face or has not been the subject of constitutional litigation.

95. *Id.*

96. *Id.*

97. *Id.* The Public Minister is an official of the Judicial Power whose duties include the prosecution of criminal cases.

98. *Id.*

99. Muñoz, *La Protección de los Derechos Humanos por la Procuraduría General de la República*, DERECHO CONSTITUCIONAL COSTARRICENSE 389, 400 (Gutiérrez ed. 1983).

VIII. THE PROPOSED ORGANIC LAW OF CONSTITUTIONAL JURISDICTION

In 1982, the Minister of Justice suggested to the President of the Supreme Court the potential value of having a single organic law of constitutional jurisdiction that would organize existing law pertaining to *amparo*, habeas corpus, and the action of unconstitutionality, and modernize constitutional adjudication to meet current needs. In addition, the single organic law of constitutional jurisdiction could act to modernize the law to meet current needs. The court, which itself had been interested in such a project for some time, agreed. A Special committee was established, composed of one Supreme Court magistrate and thirteen other lawyers, many of them law professors and public officials. The committee's final draft, *Proyecto de Ley Orgánica de la Jurisdicción Constitucional*,¹⁰⁰ has been submitted to the Legislative Assembly. The proposed law would change constitutional adjudication in several important respects.

The most important changes proposed in the draft are: the expansion of the action of unconstitutionality to include review of administrative regulations; the expansion of *amparo* to provide protection against conduct of private parties and to limit the defenses available to governmental respondents; and the creation of jurisdiction to resolve constitutional conflicts between branches of government.

IX. EXPANSION OF THE ACTION OF UNCONSTITUTIONALITY

Article 69 of the proposed draft Organic Law would broaden the scope of the action of unconstitutionality by eliminating the existing qualification which limits the action to "dispositions of the Legislative and Executive Power having the force of legislation."¹⁰¹ This change would make administrative regulations and municipal ordinances subject to challenge in the same manner as statutes and decrees, and would eliminate the present anomaly of deciding the constitutionality of administrative regulations in ordinary contentious-administrative suits.

100. Unless otherwise indicated, all references to the proposed Organic Law of Constitutional Jurisdiction are to the Committee draft of the "Proyecto de Ley Orgánica de la Jurisdicción Constitucional," of October, 1983 [hereinafter cited as LOJC].

101. *Id.* art. 69(a).

X. EXPANSION OF AMPARO

The present *Amparo* Law provides that *amparo* shall lie against "authorities, functionaries, and employees."¹⁰² This provision has been uniformly construed as limiting *amparo* to acts of persons exercising governmental authority.¹⁰³ Article 57 of the proposed Organic Law would expand *amparo* by making it available against private persons for any act or omission violating or threatening the following constitutional rights: freedom of association and non-association;¹⁰⁴ freedom of assembly;¹⁰⁵ freedom of expression and communication of ideas;¹⁰⁶ freedom from discrimination violative of human dignity;¹⁰⁷ freedom from cruel or degrading treatment;¹⁰⁸ rights of patent, trademark, or trade name;¹⁰⁹ freedom to form labor unions;¹¹⁰ and freedom of education.¹¹¹ Although these constitutional guarantees are regarded as limiting private conduct as well as state action,¹¹² the actual vindication of these guarantees against violation by private parties to date has been relegated to the less-effective remedy of ordinary litigation. Bringing these guarantees within the protective scope of *amparo* without regard to the public or private status of the alleged violator should have significant substantive, as well as procedural impact.¹¹³

102. Ley de Amparo, *supra* note 64, art. 4.

103. R. HERNÁNDEZ, *LAS LIBERTADES PÚBLICAS EN COSTA RICA* 67 (1980), and authorities cited therein.

104. LOJC, *supra* note 100, art. 57(1). Freedom of association and non-association are guaranteed by article 25 of the Constitution.

105. LOJC, *supra* note 100, art. 57(2). Freedom of assembly is guaranteed by article 26 of the Constitution.

106. LOJC, *supra* note 100, art. 57(3). Freedom of expression and communication of ideas is guaranteed by article 29 of the Constitution.

107. LOJC, *supra* note 100, art. 57(4). Freedom from discrimination violative of human dignity is guaranteed by article 40 of the Constitution.

108. LOJC, *supra* note 100, art. 57(5). Freedom from cruel or degrading treatment is guaranteed by article 40 of the Constitution.

109. LOJC, *supra* note 100, art. 57(6). Rights of authorship and invention and of trademark and trade name are guaranteed by article 47 of the Constitution.

110. LOJC, *supra* note 100, art. 57(7). Freedom to form labor unions is guaranteed by article 47 of the Constitution.

111. LOJC, *supra* note 100, art. 57(8). Freedom of education is guaranteed by article 79 of the Constitution.

112. This is in clear contrast to the United States Constitution, where all guarantees, except those in the Thirteenth Amendment, are worded and have been construed as limitations only on governmental conduct. See e.g., *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

113. In Argentina, where *amparo* was created by judicial decision, it has been ex-

Another important change in the proposed Organic Law is the narrowing of the defense available to public officials who act in reliance on a statute. At the present time, such reliance is a complete defense in an *amparo* proceeding. The proposed Organic Law would change this in two respects. First, where the respondent in an *amparo* proceeding asserts that he is acting pursuant to a statute or other normative act which the petitioner believes to be unconstitutional, the Organic Law would expressly permit the *amparo* petitioner to commence an action of unconstitutionality.¹¹⁴ The commencement of this action would operate to suspend the *amparo* proceeding until the constitutionality of the statute or regulation is adjudicated. If the Supreme Court determines that the statute (or decree or regulation) is unconstitutional, article 10 of the Constitution would preclude the respondent from invoking it in the *amparo* proceeding.

The second change limiting the defense of statutory-reliance (or "non-arbitrariness") is equally important. The proposed Organic Law expressly provides that in an *amparo* proceeding an official cannot defend his actions by claiming to have acted pursuant to a statute or other normative act if the *amparo* court determines that the statute is inapplicable to the situation in question or that the official misinterpreted the statute.¹¹⁵

These changes will not formally eliminate the judicially-created rule that *amparo* will be granted only where the respondent official has acted arbitrarily. The proposed Organic Law, however, significantly increases the number of constitutional violations susceptible of redress, by depriving the official of the ability to rely on an unconstitutional or inapplicable law, or on his own misinterpretation of a law.

XI. JURISDICTION TO RESOLVE INTRA-GOVERNMENTAL CONSTITUTIONAL DISPUTES

Article 96 of the proposed Organic Law gives the Supreme Court jurisdiction to resolve conflicts between the principal organs of government concerning their respective powers under the Con-

panded, also by judicial decision, to protect against private conduct which violates constitutional guarantees. See *Samuel Kot, S.R.L., supra* note 82.

114. LOJC, *supra* note 100, art. 29. Article 29 of the draft has since been renumbered article 33.

115. *Id.* art. 29.

stitution. If the Executive, the Legislative Assembly, the Judiciary, the Supreme Electoral Tribunal, or the Controller General believes that any power granted to it by the Constitution is being infringed or usurped by any other governmental entity, it may bring the dispute directly to the Supreme Court, which shall resolve the matter in plenary session.¹¹⁶ This is a logical extension of the principle underlying judicial review of the veto-for-unconstitutionality; that the Supreme Court should be the arbiter of intra-governmental disputes of constitutional magnitude.

XII. OVERVIEW

An overview of the Costa Rican legal system indicates that it is a civil law system. The manner in which the laws are organized, their sources and content,¹¹⁷ the way law is taught and studied,¹¹⁸ and the way courts and judges function, all demonstrate a strong Continental and, ultimately, Roman influence. In short, it would be a mistake to view the Costa Rican legal system other than as part of the civil law tradition.

The influence of the civil law is, however, attenuated by other juridical forces. The influence of the common law tradition is readily apparent in constitutional matters such as the language of numerous constitutional guarantees, the remedy of habeas corpus, and the practice of judicial review. Other influences are evident as well. *Amparo* is of Mexican origin, but it has been generally adopted throughout the region to the extent that it may be said to be a distinctively Latin American institution. Even in the constitutional area, however, the Costa Rican system is not merely the

116. *Id.* art. 96. Article 100 of the Constitution provides that the Supreme Electoral Tribunal be composed of three or five members (the membership is increased at election time) appointed for six-year terms by a two-thirds vote of the Supreme Court. The Tribunal is responsible for the organization, direction, and safeguarding of popular elections, and enjoys independence in the performance of its duties. Article 103 of the Constitution provides that the decisions of the Supreme Electoral Tribunal are not subject to review, however, the action of *prevaricato* is available to compel the Tribunal to act where it has a non-discretionary duty to do so. Article 96 of the draft Organic Law presumably would not violate article 103 of the Constitution, because the Organic Law would merely provide for prior judicial determination of the Tribunal's powers, rather than subsequent judicial review of the Tribunal's decisions.

117. Costa Rica's principal non-constitutional juridical norms are contained in the five fundamental civil law codes: the Civil Code, the Commercial Code, the Code of Civil Procedure, the Penal Code, and the Code of Criminal Procedure.

118. *See, e.g.,* Universidad de Costa Rica, Facultad de Derecho, Plan de Estudios (1983).

product of foreign influences. The operation and interaction of the country's various procedures and institutions constitutes a distinctively Costa Rican adaptation.

Costa Rica's approach to constitutional litigation illustrates a number of principles which are central to the country's concept of its Constitution and of its legal system. First, and most important, the Constitution is treated as a set of operating legal rules. It is not merely a statement of national aspirations; it is also a set of norms, whose application determines the outcome of real controversies.

Second, constitutional questions are regarded as so sensitive and qualitatively so different from other legal questions that special procedures are necessary in constitutional matters. This is in obvious contrast to the approach taken in the United States, where the nature of constitutional litigation was defined by the rationale in *Marbury v. Madison*: the power of the court to decide constitutionality derives from the nature of the judicial duty "to say what the law is."¹¹⁹ It follows from *Marbury* that a court may - indeed must - decide a constitutional question whenever the question is raised by a litigant and the answer will effect the outcome of a case. For a time Costa Rica employed this same approach to judicial review. But the experience proved unsatisfactory in a country system where judicial decisions do not constitute binding precedent and where judges educated in the civil law tradition are often uncomfortable with the broad political implications of constitutional adjudication. Consequently, Costa Rica concluded that the power to declare laws unconstitutional is so distinctive and so delicate that it must be entrusted only to the highest court, acting by an extraordinary majority. Similarly, the power to declare and restrain unconstitutional conduct by public officials is carefully allocated. All habeas corpus proceedings and the most important *amparo* cases are within the exclusive jurisdiction of the Supreme Court. The exception to the special treatment of constitutional issues is, of course, contentious-administrative litigation, where any court otherwise competent to hear the case may decide constitutional questions relevant to the litigation. But this exception is likely to disappear because the proposed Organic Law of Constitutional Jurisdiction would treat constitutional questions arising in contentious-administrative litigation the same way as constitutional questions arising in other types of litigation by bringing

119. 5 U.S. (1 Cranch) 137, 175 (1803).

them all within the action of unconstitutionality.

Another characteristic of the Costa Rican system is the belief that the enforcement of the Constitution should not be fortuitous or selective, but comprehensive. The action of unconstitutionality deals with allegedly unconstitutional legislation. Habeas corpus and *amparo* afford relief where the unconstitutionality lies not in the statute, but in the official's conduct. Judicial review of the veto-for-unconstitutionality deals with intra-governmental disputes over constitutionality. The ombudsman-like role of the Procurator General is designed to provide more complete protection by authorizing preventive action which may prove to close the spaces between *amparo* and the action of unconstitutionality. The proposed Organic Law of Constitutional Jurisdiction would not only better organize existing remedies, but would also extend their reach in important respects.

Finally, procedures for constitutional litigation are structured to enhance, rather than disturb, traditional and constitutional concepts of separation of powers. This helps to explain a number of requirements which might strike a United States lawyer as unusual or unnecessary. The practice of reserving most constitutional questions to the Supreme Court prevents intrusion by lower levels of the judiciary into decisions of the higher levels of legislative and executive authority. The requirement that a declaration of the unconstitutionality of a law or bill be made by an absolute two-thirds majority reflects the conviction that public policy should not be set aside lightly, and that legislative determinations should not be interfered with unless their unconstitutionality is clear. The same principles are the basis of the "arbitrariness" test in *amparo* cases. All of this corresponds to the civil law view of the limited role of the judiciary and the paramount importance of written law, that is, legislation. The Costa Rican courts have been criticized at times for their reluctance to intervene in matters which the judges regard as legislative or executive in character. It would be foolish and impertinent for a foreign observer to suggest the proper balance for Costa Rica between judicial restraint and judicial activism, but in a functioning democracy such as Costa Rica, judicial restraint constitutes deference to the democratic process. More importantly, the debate itself is testimony to the most important quality of the Costa Rican system: that constitutional principles are followed and court decisions are obeyed to an extent equalled in few other countries.