

CONSTITUTIONAL RIGHTS IN THE AGE OF ASSERTIVE
SUPERIOR COURTS: AN EVALUATION OF COSTA RICA'S
CONSTITUTIONAL CHAMBER OF THE SUPREME COURT

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Every banana republic in the world has a bill of rights.

–Justice Antonin Scalia

ABSTRACT

There is considerable debate concerning the relevance and impact of constitutional rights on the reality of people's lives. In this article, I use a case study of the significance of rights contained in the Costa Rican Constitution on the lives of the people of that country to illustrate how constitutional rights can be transformed from 'parchment guarantees' into a reality as a result of changes in institutional context and rules under which superior courts operate. The article also demonstrates how justiciable rights can be created by superior court jurisprudence even when they are not explicitly enumerated in a constitution. Using examples of court decisions before and after the 1989 creation of a constitutional chamber of Costa Rica's Supreme Court shows how fundamental rights can impact people's lives. This new Chamber of the Supreme Court and its enabling laws resulted in a metamorphosis of superior court behavior from excessive deference and inaction to becoming one of the most assertive courts in the Americas.

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I. INTRODUCTION

There is considerable debate in the academic literature on the relevance of enumerated constitutional rights and the capacity of courts to turn those rights into reality and thereby bring about profound change in society. Some argue, for example, that even when courts issue pro-rights decisions, they cannot bring about meaningful social change because court decisions are not necessarily implemented broadly immediately following the decision.¹ Even one of the U.S. Supreme Court's most famous landmark decisions, *Brown v. Board of Education*

“unreasonable to expect that the courts will consistently produce outcomes that are significantly more pro-poor than the results achievable through conventional politics.”⁸

U.S. Supreme Court Justice Antonin Scalia recently, sarcastically noted the significance of constitutional rights and Courts:

The bill of rights of the former evil empire, the Union of Soviet Socialist Republics, was much better than ours. We guarantee freedom of speech and of the press. Big deal. They guaranteed freedom of speech, of the press, of street demonstrations and protests, and anyone who is caught trying to suppress criticism of the government will be called to account. Whoa, that is wonderful stuff!⁹

“Of course,” Justice Scalia concluded, “it’s just words on paper, what our framers would have called a ‘parchment guarantee.’”¹⁰ That is, rights enumerated in constitutions have little bearing on the reality of the exercise of those rights.

On the other side of the debate, some argue that even in the United States, courts have played a role in fashioning a much more just society than would have been possible if left exclusively to the actions of majoritarian institutions.¹¹ In this article, I present a case study of the relevance of the rights contained in the 1949 Costa Rican Constitution during two distinct periods of Superior Court behavior. While Justice Scalia’s dismissal of the importance of parchment guarantees contained in the constitutions of ‘banana republics’ might offer a plausible explanation for the lack of Superior Court enforcement of rights from 1949 until 1989, it fails to recognize or explain the massive change in Costa Rican society in the last 20

8. Daniel Brinks & Varun Gauri, *The Law’s Majestic Equality? The Disruptive Impact of Litigating Social and Economic Rights* 3 (World Bank Policy Research, Working Paper No. 5999, 2012).

9. Adam Liptak, ‘We The People’ Loses Appeal With People Around the World, N.Y. TIMES (Feb. 6, 2012), http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html?_r=1&nl=todayshadlines&emc=th.

10. *Id.*

11. See RONALD DWORKIN, LAW’S EMPIRE 356 (1987). See generally

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years, which occurred as a direct result of the creation in 1989 of the

The article moves beyond a description of the huge number of cases filed and decided by the Court to examine the impact of the Court's orders on the litigants and the society more generally. The article unfolds in the following manner: Part II offers a description of the rights-rich 1949 Constitution, the role of the Supreme Court before the constitutional reforms in 1989, and a brief overview of the institutional context and operational rules under which the Court operated. Part III details the constitutional reform that created the new Chamber of the Supreme Court, the nature of the new Chamber, and the institutional rules that guide its operation. Part IV continues by examining the rapid increase in the Court's docket and its switch from acting as a traditional, deferential Latin American superior court into one of the most assertive courts in the Americas. I will explore a number of illustrative cases to reveal the profound impacts the Court's modern jurisprudence has on Costa Rican politics and society. The final section, Part V, draws some conclusions to show how the jurisprudence of Costa Rica's Constitutional Chamber of the Supreme Court improves the lives of the people, affecting real and lasting social change.

II. A DEFERENTIAL SUPERIOR COURT 1949-1989

The 1949 Constitution, written in the aftermath of a short, bloody Civil War, is a rights-rich document¹⁴ that deliberately distributed political power among Costa Rica's four branches of government: the Executive, Legislative, Supreme Court, and the Tribunal Supremo de Elecciones (Supreme Elections Tribunal, or TSE).¹⁵ Although situated in an isthmus historically dominated by dictators, insurgencies, poverty, and fratricidal wars, Costa Rica was widely viewed as a democratic success story, often regarded as one of the most democratic countries in the Americas. Clean, fair elections

14. The Constitution contains a total of fifty-three individual and collective rights articles. Twenty-nine of these enumerate individual rights. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA (1949) [hereinafter CONSTITUCIÓN] arts. 21 (the right to life), 24 (intimacy and communications), 22, 32 (freedom from forced exile), 25, 26 (freedom of association), 28 (speech), 33 (equality and protection from discrimination), 45 (property rights), 48 (*Habeas Corpus* and *Amparo*), 50 (healthy environment), 51 (marriage), 52 (family). The remaining twenty-four rights articles provide "social guarantees." *See, e.g., id.* at arts. 78 (education), 87 (teachers' academic freedom), 93-98 (political rights).

15. "The Government of the Republic is popular, representative, alternative and responsible. It is exercised by three distinct and independent branches: Legislative, Executive, and Judicial. None of these Branches may delegate the exercise of their own functions." CONSTITUCIÓN art. 9 (translation by author).

for the executive and legislative branches have been held every four years with political control often alternating between parties. Turnout was consistently high, often exceeding 80 percent, and the electoral process has been consistently certified as honest and fair, with virtually every aspect of the process supervised by the TSE.

Costa Rica's relatively high quality of life demonstrates its success as a democratic nation, which is due, in large part, to its rights-rich Constitution. At the end of the 1980s, when the Constitutional Chamber of the Supreme Court was created, Costa Rican citizens enjoyed life expectancy on a similar level to some developed European countries. Although Costa Rica is a middle income country, it is routinely ranked among the most developed countries in the world on the composite Human Development index, and also is considered to be among the most democratic countries in the world.¹⁶ Costa Rica's development and democratic achievements are especially impressive when compared to the dire condition of its regional neighbors.

Governance was animated, but democratic—a struggle between opposing parties, and a struggle between the legislative and the executive. During the first 40 years of the new Constitution, major

heard few constitutionality cases, and even fewer rights cases.¹⁹ Prior to the 1989 reform, the Supreme Court's magistrates routinely afforded excessive deference to the elected branches of government, lacked a 'constitutional culture,' and did not understand the significant role that constitutional adjudication necessarily plays in a strong democracy.²⁰ Consequently, the behavior of the Court was similar in style to that of civil law courts in other Latin American countries.²¹

Compounding these issues was the Court's adherence to high levels of legal formality, a very restrictive notion of standing, and its famous propensity to move very slowly in concluding cases. Furthermore, some of the enabling laws exacerbated the Court's existing tendencies toward deference and inaction. For example, a two-thirds super-majority vote of the *corte plena* (full court) was required to declare a law or decree unconstitutional, which helped create among the magistrates a "presumption of constitutionality for all laws."²² Thus, in the first 40 years of its existence, the Constitution's limits on powers of elected politicians and its enumeration of individual and collective rights were largely ignored. Accordingly, the Supreme Court was not viewed as an attractive venue to seek rights protection, limit abuses of power, or resolve disputes.

III. THE REFORMED COURT

The creation of a specialized constitutional chamber of the Supreme Court in 1989 seemed surplus to requirements for a well-functioning democracy. Indeed, one of the main arguments against the creation of the Chamber was that there was no substantive need for such a court, and that it would not have enough work to justify its

19. Juan Carlos Rodríguez Cordero, *Sala Constitucional y Equilibrio de Poderes*, in PROYECTO ESTADO DE LA NACIÓN EN

creation. As one of the Chamber's architects noted twenty years later, "in 1989 the number of *amparos* did not exceed 10 per month and the number of unconstitutionality cases did not exceed 15 per year."²³ Thus it was not clear that the need for a constitutional chamber even existed.

However, after a corruption scandal touched the Supreme Court in the 1980s, a congressional investigative commission recommended a series of measures to strengthen the process of constitutional adjudication in Costa Rica.²⁴ According to one of the commission members, Rodolfo E. Piza:

[T]he cornerstone of our entire political system resides in the supremacy of the Constitution, which for us is the guarantee of democracy, freedom, the rule of law. So everything we do should tend toward the constitutionality of the actions of all public authorities and individuals; all that being conducive to getting things done under the Constitution, should be welcomed and everything that harms it must be rejected.²⁵

The congressional investigation ultimately led to a constitutional reform, Law 7128, which added the new Constitutional Chamber to the Supreme Court's existing three chambers.²⁶ The "Sala Constitucional" (frequently referred to as the Sala Cuarta or Sala IV)

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in which the Chamber would affect all strata of Costa Rican culture through its enforcement of constitutionally-granted rights.

A. The Foundation for Change

Several important components of the reform of 1989 enabled the Chamber to effect meaningful change in Costa Rican constitutional jurisprudence. The new Sala IV was given the power to “declare, by the absolute majority vote of its members, the unconstitutionality of provisions of any nature and acts subject to Public Law.”²⁸ A simple majority vote of the seven magistrates assigned to the Constitutional Chamber replaced the previous req3(abs)5.5(o)1 stiteie oa teiUo-thirdsw[(ive)eieithe3(abs)5

B. The Sala IV's Accountability Function

Although the emphasis of this article is to demonstrate the realization of constitutional rights in Costa Rica, it is important to recognize that the Chamber has, since its creation, exercised a widely

C. Sala IV and the Executive Branch

The new Court similarly curtailed deference to the executive branch, as is illustrated by the Sala IV's rulings on some important Presidential decrees, the constitutionality of which would previously have been left unchallenged. It should be noted that the executive branch in Costa Rica was deliberately granted few powers or tools to influence or control its party members to vote for specific bills or projects. Indeed, studies reveal that the Costa Rican president is among the weakest in the Americas.³⁶

Although the president's powers are relatively attenuated, foreign policy decisions usually had been deferred to the president. Currently, however, the Sala IV's decisions routinely curtail the

but as a result of numerous Sala IV decisions in its first 10 years of operation, that number fell by almost 40 percent.⁴¹ The Sala Constitucional's willingness to review and confront unconstitutional executive action thus serves as an additional protection of Costa Ricans' constitutional rights.

D. Sala IV and the Legislative Branch

The Court has been equally assertive in its limitation of executive power. Before the creation of the Sala IV, the 57 members of the Legislative Assembly acted as if their "power to legislate was absolute."⁴² The Supreme Court's profound deference to the Assembly's actions supported the Assembly's belief in its sovereign right to legislate. The Court further emboldened the Assembly through its apparent unwillingness to hear unconstitutionality cases.⁴³ Such extreme deference facilitated frequent congressional overreach.

After its creation, the Sala IV quickly established itself as a major actor in the country's political life. Its jurisprudence transformed the legislative process, diminished the power of the two major parties in the Assembly, and re-equilibrated the balance of power between the executive and legislative branches of government. A notable example of a major challenge by the Court to the presumed policy-making sovereignty of the Assembly is the 2003 ruling striking down the 1969 Constitutional Amendment that precluded any sitting or future president from ever seeking reelection. In a majority decision, the Court stated that the amendment infringed on 'fundamental rights' and, as such, it constituted a general amendment to the Constitution, which could only be undertaken by an elected constitutional convention. The Legislative Assembly lacked the power to make such amendments.⁴⁴ The Court's decision clearly specified a much less expansive understanding of the Legislative Assembly's power than the historical view held by the Assembly

41. Proyecto Estado de la Nación [State of the Nation Project], *Auditoría ciudadana sobre la calidad de la democracia en Costa Rica*, [Citizen audit on the quality of democracy in Costa Rica] 124 (2001), available at <http://www.estadonacion.or.cr/index.php/biblioteca-virtual/costa-rica/otras-publicaciones/auditoria/capitulo-01>.

42. Constantino Urcuyo, *La Sala IV: Necesarios Límites al Poder* [*The Sala IV: Necessary Limits on Power*], 3 REVISTA PARLAMENTARIA 44 (1995).

43. Between 1938 and 1989, the Supreme Court heard only 150 cases of unconstitutionality compared to 228 in its first 20 months of operation.

44. Sala Constitucional, Res. No. 2003-02771 (Costa Rica, 2003) (reversing the Court's decision Resolución 2000-7818 in 2000 that upheld the constitutionality of the reelection prohibition).

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itself or the pre-reformed Supreme Court.

IV. THE SALA IV'S RIGHTS PROTECTION JURISPRUDENCE

85 percent of these cases have been *amparo* cases, which generally are filed by individual litigants without legal representation of any kind.⁴⁷

It is clear that many litigants view the Sala IV as a promising venue to seek judicial protection of their rights. However, it should be noted in general that only about 25 percent of *amparo* cases filed with the Sala IV result in a positive decision for the plaintiff. Furthermore, even if a litigant wins a favorable ruling at the Sala IV, there is no guarantee that the defendant will comply with the Court's decision. Thus, although it is very easy to file an *amparo* case at the Court, the likelihood of winning is relatively low. Even if a litigant does win, the defendant's compliance with the Court's decision is not assured, and often the result is merely a hollow victory.⁴⁸ Nevertheless, *amparo* remains a viable avenue through which Costa Rican's may secure rights protection at the Supreme Court.

B. Rights Protection for the Poor

Rights protection at the Sala IV has reached even the poorest sectors of Costa Rican society. Several cases illustrate the power of

economic, social, and cultural rights against powerful interests, including the expansive powers of the state.

What followed was a series of cases in which the Court ruled in favor of the marginalized litigants, including decisions that alleviated the desperately overcrowded living conditions endured by prisoners,⁵⁰ and required accessibility upgrades to public buildings and transportation, enabling access for physically disabled people.⁵¹ Similarly, groups such as journalists won protection of their economic rights from the Court in 1995 when the Sala IV decided that the mandatory state licensing requirement for journalists was an unconstitutional limitation on journalists' right to work.⁵² In the same way, organized labor's right to strike, which had been severely restricted by the Labor Code since the end of the Civil War, was enhanced when the Court struck down parts of the Labor Code as unconstitutional.⁵³

The realization of previously unrecognized constitutional rights resulting from the Sala IV's decisions was not limited to the litigants, but resulted in enhanced enjoyment of constitutional rights for everyone. While these cases illustrate the breadth of constitutional rights litigated, the extent to which favorable Court decisions enhanced the lives of the affected parties may be seen more clearly through an in-depth study of some selected examples. The following discussion of homosexual groups and health care issues reveals the extent to which constitutional rights can be realized and enjoyed as a direct result of litigation.

C. Sexual Orientation

The protection of the rights of homosexuals in Costa Rica offers a good illustration of the power of a Court to animate the constitutional rights of and offer equal protection to even the most poorly organized, socially marginalized groups. Before the creation of the Sala IV, homosexual people's constitutional rights were

of the decision relied on Articles 21, 33, and 51 of the Costa Rican Constitution, as well as a number of international instruments, including Article 11 of the American Declaration of Rights and Duties of Man, and Articles 3, 7, and 25 of the Universal Declaration of Human Rights.⁷³ This legal framework made it possible for a large number of people to witness an expansion of their right to health.

A defining case in the Court's health rights jurisprudence came in 1997,⁷⁴ when it reversed an earlier decision on the issue of state-funded anti-retrovirals for people living with HIV/AIDS. In a unanimous decision, the court ordered that the state health agency, the Caja Costarricense de Seguro Social (Department of Social Security, or CCSS), had to provide anti-retroviral medication to all people living with HIV/AIDS. The Court reasoned, "[w]hat good are the rest of the rights and guarantees . . . the advantages and benefits of our system of liberties, if a person cannot count on the right to life and health assured?"⁷⁵ In response to a subsequent flood of similar cases, the decision took on an *erga omnes* effect, resulting in free anti-retrovirals to any patient with a valid prescription from a state-agency doctor.

The Court's decision, which explicitly does not consider the costs to the state of fulfilling the Court's order, led to the filing of numerous cases where other patients sought access to expensive medication that the CCSS previously had declined to cover.⁷⁶ For example, the Sala IV recently ordered the CCSS to provide Herceptin (Trastuzumab), a very expensive breast cancer treatment, to 22 women, which according to the CCSS, accounts for almost one percent of its medication budget.⁷⁷ What is instructive in these cases is that the Sala IV has created a very broad definition of health rights as well as clear, generous rules employed in its decision-making. The result has been a higher success rate for health rights cases at the Court, a very high compliance rate with its decisions, and a

73. The ruling also relied on Article 26 of the International Pact of Civil and Political Rights, and Article 12, of the International Pact of Economic, Social, and Cultural Rights. See Sala Constitucional, Res. No 1997-5934 (Costa Rica, 1997).

74. Sala Constitucional, Res. No. 1997-5934 (Costa Rica, 1997).

75. *Id.* (translation by author).

76. Data compiled by Dr. Carlos Zamora of the CCSS actuarial services department show the extent of the growth in health cases filed with the Sala IV; in the first 8 years of the Sala IV's operation few medication cases were filed, but starting in 1997 the number starts to grow rapidly. Solano Carrera, *supra* note 67, at 130–34.

77. See Bruce Wilson, *Enforcing Rights and Exercising an Accountability Function, in* COURTS IN LATIN AMERICA 73 (Gretchen Helmke & Julio Rios-Figuero eds., 2011).

measurable improvement in the lives of the litigants and other non-litigants with similar health conditions.

V. CONCLUSION

Arguments against the relevance of constitutionally enumerated rights, citing the inability of courts to turn those rights into reality, appear to offer compelling explanations for the historical experience of many democratic countries with weak rights protection mechanisms, such as Costa Rica before 1989. But, as this article shows, these arguments fail to account for the transformation that has taken place in Costa Rica over the last 20 years or many other countries in southern Africa and Latin America.⁷⁸ Furthermore, the Costa Rican example demonstrates not only the importance of constitutional rights, but also the critical nature of specific institutional mechanisms to enforce those rights. Such mechanisms can and do play a role in fundamentally enhancing the lives of even the most socially marginalized, politically weak groups in society, which otherwise would remain unable to enjoy those rights.

In the first 40 years of the 1949 Constitution, Costa Rica's Supreme Court declined to protect the numerous rights enumerated in the document itself and refused to utilize its accountability function to restrict the unconstitutional actions of the other branches of government. However, in the 22 years since the judicial reform of 1989 that created the Constitutional Chamber of the Supreme Court, a genuine rights revolution has occurred. The Court imposed clear limits on the scope of permissible actions of elected officials and state agencies, and at the same time, provided legal avenues which made it easier for citizens to assert and enforce their constitutional rights.

Although clearly not all decisions made by the Sala IV have been implemented, many important decisions with significant impacts on the lives of citizens have led to routinized, rights-conscious behavior by state agencies, having significant impacts on society as a whole.

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constitutional courts are overgeneralized and outdated, as courts in several countries have taken on a