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From Judicial Passivity to Judicial Activism: Explaining the Change with in Costa Rica's Supreme Court

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"In Costa Rica one talks of: before the Sala [constitutional court], and after the Sala."[1]

I. Introduction.

Over the past three decades a global change has occurred regarding the role of courts within their respective societies. Courts have placed themselves or been placed in positions of extraordinary political influence compared to earlier eras. The American disease of judicial activism with its sword of judicial review has spread to societies historically hostile to such activities. Most of that activity has occurred in common law-derived court systems or in political systems where the regime has failed either through military defeat or political disintegration. Thus, for example, the German Constitutional Court stands as a special institution placed outside the regular judiciary. Also, former socialist law countries are struggling to construct new legal mechanisms to cope with the dramatic change attendant upon regime collapse and reconstruction.

In each of those situations, change evolved because no choice effectively existed other than leaving the status quo for a new system. Within Latin America, legal traditions appeared strong, with a consensus as to the minimal role of the courts. In most Latin American countries, courts were routinely defined as political ciphers or adjuncts to the regimes. This was thought particularly germane given their civil law traditions and turbulent political histories. Courts were largely ignored as politically neutral (meaning supporters of the forces of order) or politically irrelevant due to their passivity in the face of disorder.

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1. José Miguel Corrales *quoted in* JAIME VIQUEZ MURILLO, LA SALA CONSTITUCIONAL: UNA REVOLUCIÓN POLÍTCO-JURÍDICA EN COSTA RICA 7 (1994).

Despite Latin America's well-established legal political traditions, court behavior, especially at the Supreme Court level, has begun changing significantly. Supreme courts are abandoning, albeit slowly, their traditional passive acceptance of constitutionally questionable executive and legislative actions and are endeavoring to become aggressive protectors of constitutional rule and of citizens' constitutional rights. Supreme courts become particularly powerful agents for change due to their national visibility. This assertiveness, however, has often led to negative reactions by governments, clearly surprised and dismayed by court activism. Thus, the results produced have been uneven, such as suppression of court assertiveness occurring in Peru,[2] or the stuffing of the Supreme Court in Argentina,[3] but the general trend is clearly in the direction of increased court openness to change. In fact, in a number of states, power holders have begun, at least tentatively, accepting this heightened court role.

Thus, the question becomes what motivates this radical change in judicial behavior in Latin America?[4] Also, in some cases, why do politicians voluntarily reduce their own political power by strengthening the Supreme Court, an institution over which they have no direct control? And finally, what have been the initial political consequences of these judicial reforms? This paper examines this ongoing judicial reform process through a case study of the Costa Rican Supreme Court—an institution building upon its constitutional reforms in the late 1980s.

II. Civil Law Tradition and the Judicialization Process.

Costa Rican courts, like courts throughout Latin America, operate under what has been classified historically as the Civil Law Tradition.[5] This legal tradition draws its intellectual roots from earlier Roman law, especially the form promulgated through the Justinian Code. That legal institution was revived in the twelfth century and later supplemented by other sources of law, including canon law and commercial law, in order to update the original Code. By the early nineteenth century, this legal tradition had been formally adopted in the form of civil codes across continental Europe. Earlier versions of this civil law tradition were transmitted through the European colonial empires across the globe. The various Codes promulgated by Napoleon were the prototype for this last development, reflecting a long developmental process.[6] That legacy clearly influenced the development of law within the former Spanish colonies, one of which is Costa Rica.[7]

2. *See* LINN A. HAMMERGREN, THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA 3-(1998).
3. *See* Christopher M. Larkins, *The Judiciary and Delegative Democracy in Argentina*, 30 (4) COMP. POL. 423 (1998).
4. *See* Carlos Santiago Nino, *The Debate Over Constitutional Reform in Latin America*, 16 FORDHAM INT'L L.J. 635 (1992-1993).
5. The classic overview can be found in JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION (2d ed. 1985). For Costa Rica specifically, see Robert S. Barker, *Constitutional Adjudication in Costa Rica: A Latin American Model*, 17 U. MIAMI INTER-AM. L. REV.249, 272 (1986): Professor Barker provides some of the best early insights into the Costa Rican Supreme Court reform process. For an alternative taxonomy of law systems, see Ugo Mattei, *Three Patterns of Law; Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997).
6. *See* Nicholas D.S. Brumm, *Divergent Models of Public Law in Latin America: A Historical and Prescriptive Analysis*, 24 U. MIAMI INTER-AM. L. REV. 1, 20-21 (1992); Alejandro M. Garro, *On Some Practical Implications of the Diversity of Legal Cultures for Lawyering in the Americas*, 64 REV. JUR. UNIV. P.R. 461 (1995).
7. *See* Alejandro M. Garro, *Unification and Harmonization of Private Law in Latin America*, 40

Embodied in that civil law tradition is the normative expectation that judges will generally not become involved in areas outside their narrowly prescribed sphere of work. This prohibition was especially potent regarding intrusions into what is considered the political sphere. Instead of the common law view of the judge as a craftsman molding the law to fit the needs of a changing society,[8] the civil law tradition defined judges as legal technicians applying the principles embodied in various codes to specific cases (i.e. factual situations). Notions of publicly cited court precedent and judges as independent policymakers or lawmakers were explicitly rejected.[9] Only the state, through its executive or legislative organs, can make law. Thus, judges decide cases by applying the law as defined in a code. The code is presumed, in principle, to be reasonably complete, covering the particular situation within the general tenets propounded. Commentary on the law and prior court precedent does not constitute a legitimate source of law—that is: such matters are not used as overt support (i.e., case citation) for a sitting judge's decision. Therefore, judges cite principles embodied in the applicable code (criminal, commercial, civil, etc.) as applied to case specific facts. In principle, the differences across various court decisions on basically similar issues are explained as fact-driven outcomes rather than differing judicial interpretations of the fundamental principles. In the ideal, judges become decisional ciphers, transmitters of the values expressed in the code—an image of mechanical jurisprudence in principle even more rigid than the traditional constitutional interpretation mode found in the American context. Merryman, among others, has argued that this stereotype reflects the particularly strong influence of the French cases upon the development of civil law,[10] and that, in fact, the stereotype is excessively rigid and impossible to enforce in practice, including within France.

Research into actual practice has found reality to be much more ambiguous than the decisional starkness implied by a code system considered in the abstract. Judges in continental European civil law countries are immersed in legal contexts in which precedent and legal commentary by scholars does influence judge decisions.[11] But, unlike their common law judicial counterparts, civil law judges render decisions in a form that clearly embodies those underlying influences in the rationale, but become difficult to decipher from outside the system. In a manner similar to common law judges, civil law judges cite prior decisions as decisional principles, but not by direct or overt reference as with case citations found in their common law counterparts. In fact, Shapiro asserts that, because of this lack of case citation and analysis, legal commentary by law professors becomes even more critical in transmitting the changing context of the law across the judiciary.[12]

AM. J. COMP. L. 587, 605-07 (1992). In the above article, there is a classification of the civil law systems within Latin America. For a consideration of the effects of civil law upon Latin American courts, see Joel G. Verner, *The Independence of Supreme Courts in Latin America: A Review of the Literature*, 16 J. LATIN AM. STUD. 63 (1984).

8. The classic overview can be found in BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).
9. *See* MERRYMAN, *supra* note 5, at 22; *see generally* RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW: CASES, TEXT, MATERIALS 259-83 (6th ed. 1998).
10. *See* John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109, 116 (1996).
11. *See* MARTIN SHAPIRO, COURTS 136, 143 (1981); Doris Marie Provine, *Courts in the Political Process in France*, *in* COURTS, LAW AND POLITICS IN COMPARATIVE PERSPECTIVE 201-02 (Herbert Jacob et al. eds., 1996).
12. *See* SHAPIRO, *supra* note 11, at 135, 144; Provine, *supra* note 11, at 233-36.

Rather than citing the civil law equivalent of the U.S. Supreme Court's *United States Reports*, judges are informed by consulting the professional legal commentaries that are based upon analyses of earlier cases. Cases are officially reported in civil law systems, but judge opinions become less overtly informative compared to the common law counterparts regarding such influences.[13]

However, the more politically sensitive and divisive issue of court involvement in issues deemed outside its normal purview has proven much more resistant to change. In the European context, evidence exists that judges have become sensitized to their potential role as monitors over government actions.[14] However, the exercise of such concepts as judicial or constitutional review are more commonly embodied in special courts—in effect, institutions placed outside the regular judiciary. This institutional solution was created by judicial reformers in response to their experiences with totalitarian states during and after World War II.[15] The regular judiciary failed miserably in resisting transgressions of human and political rights; rather, they usually acted as facilitators for the terror. Their professional task was narrowly defined as neutral enforcers of the law, but the content of that law was effectively irrelevant and the court became just another instrument of repression. One view expressed was that their acquiescence in those inhumane excesses grew out of their indoctrination into the civil law tradition, thus neutralizing any expectations for independent judicial action. Thus, creating a more politically independent judiciary, or at least an independent judicial body, demanded creating a new institutional setting employing decisional frameworks and criteria from outside the confines of existing law.[16] Therefore, new institutions were created such as the German Federal Constitutional Court. One consequence, however, was the dissemination of these new expectations to other parts of the judiciary resulting in a shift of the judicial universe. That process has been both abrupt and gradual, depending upon the historical context within which the reform occurred.

For example, Germany, Italy, and Japan, as the vanquished countries in World War II, had new conceptions of the judicial function impressed (imposed) upon them while developing new constitutions. Building upon the U.S. Supreme Court historical model and earlier abortive European precursors, the new court structures contain a higher level of judicial institutions capable of intervening to protect the fundamental rights and liberties of the people. Practice has been more erratic—overcoming the inertia of past practice and professional judicial training has proven more problematic than envisioned. Institutional rules create opportunities that may or may not be pursued depending upon historical and cultural context and individual initiative. Other societies, whose direct manipulation by the immediate results of the war is less, but generally influenced by those historical experiences, have moved in the direction of greater court or quasi-judicial

13. *See* Jorge L. Esquirol, *The Fictions of Latin American Law (Part I)*, 1997 UTAH L. REV. 425, 441-44 (1997).
14. *See* Alec Stone, *Abstract Constitutional Review and Policy Making in Western Europe, in* COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 42-46 (Donald W. Jackson & C. Neal Tate eds., 1992).
15. *See* Csaba Varga, *Transformation to Rule of Law From No-Law: Societal Contexture of the Democratic Transition in Central and Eastern Europe*, 8 CONN. J. INT'L L. 487, 488-91 (1993).
16. *See* Roger Handberg, *Judicialization Across Societies: The Spread of Judicial Power and Social Power*, INT'L J. OF PUB. ADMIN. (in press).

involvement in what was formerly forbidden territories. The forms have varied, ranging from the French Council of State[17] (with a very limited conception of the process but one with striking explicitly political outcomes) to the Canadian Supreme Court[18] or the Commonwealth Caribbean Courts, which are moving to enforce individual rights based upon constitutional principles.

This generalized movement has been characterized more broadly as "judicialization" by social scientists. Judicialization embodies two related but conceptually different components:

1. The process by which courts and judges come to make or increasingly to dominate the making of public policies that had previously been made (or, it is widely believed, ought to be made) by other governmental agencies, especially legislatures and executives, and
2. the process by which nonjudicial negotiating and decision-making forums come to be dominated by quasi-judicial (legalistic) rules and procedures.[19]

The first part of the above definition focuses upon what one might term the external perspective or type one judicialization; that is, the relationship of the courts to other political institutions and the society as a whole.[20] In the second part, type two judicialization, the focus is upon the internal decisional processes of other institutions and their growing congruence with legalistic approaches or perspectives on resolving issues. This latter part can be labeled an internal perspective. Within the United States, the external perspective has long existed, albeit not without controversy over the degree of judicial involvement in politics, or judicial activism.[21] The internal perspective, it is argued, has proliferated more recently with the spread of an ideology of rights across various societies, including Canada's Charter of Rights and Freedoms.[22] This expansion is alleged to have even impacted English courts, historically the most resistant to the charms of judicial activism.[23]

17. *See* ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE 60-92 (1992).
18. *See* Carl Baar, *Judicial Activism in Canada, in* JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE 53-69 (Kenneth M. Holland ed., 1991).
19. C. Neal Tate, *Why the Expansion of Judicial Power?, in* THE GLOBAL EXPANSION OF JUDICIAL POWER 28 (C. Neal Tate & Torbjorn Vallinder eds., 1995).
20. Evidence that Latin American supreme courts are becoming more sensitive to the wider implications of their role can be seen in their participation in a new organization, the Conference of Supreme Courts of the Americas. Twenty-seven courts, including the U.S. Supreme Court, participated in a general discussion of common problems and possible solutions. *See* Juan R. Torruella & Michael M. Mihm, *Foreword: To Promote and Strengthen Judicial Independence and the Rule of Law in the Hemisphere*, 40 ST. LOUIS U. L.J. 969 (1996).
21. *See* Kenneth M. Holland, *Judicial Activism in the United States, in* JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE 25-29 (Kenneth M. Holland ed., 1991).
22. *See* Peter H. Russell, *The Growth of Canadian Judicial Review and the Commonwealth and American Experiences, in* COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 29-39 (Donald W. Jackson & C. Neal Tate eds., 1992).
23. Much like the proverbial blind persons inspecting an elephant, scholars examining the notion of judicial activism in English courts have come to hold very different conclusions. *Compare* Nevil Johnson, *The Judicial Dimension in British Politics*, 21 W. EURO. POL. 148-53 (1998), *with* Maurice Sunkin, *The Incidence and Effect of Judicial Review Procedures Against Central Government in the United Kingdom, in* COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 143-56 (Donald W. Jackson & C. Neal Tate eds., 1992).

III. The Latin American Tradition.

Supreme courts within Latin America have established a long historical pattern of political minimalism. That lack of judicial assertiveness has also been compounded by inefficiency, a lethal combination for any court system.[24] As a result, supreme courts have, historically speaking, rarely been major political players within national affairs. Indeed, there is a general consensus that the role of Latin American judiciaries in the first two hundred years of independence was "minor, if not irrelevant."[25] Given the political instability often endemic to certain societies, that noticeable lack of impact is not unexpected. The legal training received by the justices along with a political socialization reinforcing the perception of weak courts has long cemented their adherence to the status quo and its pathologies.[26]

This picture of judicial impotence persisted despite the fact that often within the national constitutions, along with the procedural weapons available, supreme courts were charged with the responsibility of protecting their national constitution's integrity. In fact, many Latin American supreme courts have had greater constitutional support for their assertion of the power of judicial review than the U.S. Supreme Court has ever possessed.[27] However, rising above their limitations proved too overwhelming for most courts. Occasionally, a supreme court might strike a blow for freedom, but that outburst usually sank amid the quicksand of public indifference and political repression. Too often, the court was perceived as blatantly pursuing political advantage for one political faction or the other. The limitations of their legal tradition made appeals to higher law such as occurred in *Marbury v. Madison*[28] inappropriate. Having no tradition of judicial assertiveness except as a representative of a political faction (including the government as one faction), there was no political foundation to stand upon. In fact, many of the initial constitutional authorizations in the 1840s were expressions of aspiration—inspired by John Marshall's rhetoric and reasoning.[29]

That situation of judicial impotence has begun to change in response to several factors, including more sophisticated justifications for judicial assertiveness and a global

24. *See* Ambassador Jeffrey Davidow, *The Role of Legal Institutions in the Economic Development of the Americas: Remarks*, 30 LAW & POL'Y INT'L BUS. 11, 15 (1999); Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT'L L. 167, 168-71 (1995); T. Leigh Anenson, *For Whom the Bell Tolls ... Judicial Selection By Election in Latin America*, 4 SW. J. L. & TRADE AM. 261 (1997).
25. Jorge Correa Sutil, *Judicial Reforms in Latin America: Good News for the Underprivileged?*, *in* THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA 259 (Juan E. Mendez et al. eds., 1999).
26. *See* MERRYMAN, *supra* note 5, at 147-48.
27. *See* Michael B. Wise, *Nicaragua: Judicial Independence in a Time of Transition*, 30 WILLAMETTE L. REV. 519, 520 (1994).
28. 5 U.S. 137 (1803); *see* Robert S. Barker, *Constitutionalism in the Americas: A Bicentennial Perspective*, 49 U. PITT. L. REV. 891, 896-900 (1988).
29. *Compare* ALLAN R. BREWER-CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW 156 (1989), *with* Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 AM. U. L. REV. 1483 (1997).

emphasis upon human rights and the rule of law.[30] Latin American politics have not been immune to the latter as outside interventions both by governments and nongovernment organizations (NGOs) have pressed for reform. Pressure for establishing the rule of law, and by extension, human rights protection has come from the United Nations on an abstract level, from the United States through the USAID programs, and from the World Bank.[31] In addition, NGOs have become larger players in providing emotional and often financial support for domestic reform groups.[32] The process is often erratic and halting, but the result is at least greater awareness if not acceptance of human rights as a goal.

As Latin American states struggle toward greater democracy, the rule of law becomes more central; thus, the potential for judicial espousal of the rule of law with its implications for judicial assertiveness becomes greater. Certain factors have been identified as facilitating that growth in supreme court power. Among the factors identified earlier by C. Neal Tate are democracy, separation of powers, politics of rights, interest group use of the courts, opposition use of the courts, ineffective majoritarian institutions, perceptions of the policymaking institutions, and (willful) delegation by majoritarian institutions.[33] Democracy is almost an absolutely necessary (but not sufficient) prerequisite for courts to operate beyond a minimalist role. Authoritarian regimes do not tolerate potential competitors, whether judicial, legislative, or factional, inside or outside the government. The resurgence of democracy within Latin America has fueled much of the drive for court autonomy in protecting individual rights and the democratic process. Separation of powers implies room for maneuvering by the courts in the controversies that arise between their co-equal branches. Those competitors, the executive or legislative branches, often look for allies in their struggles with the other. A politics of rights implies protection for affected minorities against purportedly arbitrary majority actions. Judges become central to those controversies, because they interpret the meaning and extent of otherwise imprecise legal rights. Conversely, their interpretations may expand very narrow statements of principle.

Dissatisfied groups seek out whatever forums are available to accomplish their purposes. For interest groups and opposition groups (often one and the same), the courts become one such mechanism—a mechanism often particularly useful because of their aura of impartiality.[34] This avenue becomes particularly relevant when the polity's majoritarian institutions are rendered ineffectual. This situation can arise due to political stalemate because of incoherent political parties, other groups' failure to mobilize popular support, or the persistence of deep divisions within the society leading to political immobility. Likewise, political institutions may be devalued in public perception with courts concomitantly rated more highly as to their competence or responsiveness.

30. *See* Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281, 288-94 (1999).
31. For a general overview of the World Bank's perspective on judicial reform see Dakolias, *supra* note 24.
32. *See* Eric Dannenmaier, *Democracy in Development: Toward A Legal Framework for the Americas*, 11 TUL. ENVTL. L.J. 1, 5-6 (1997).
33. *See* Tate, *supra* note 19, at 28-32.
34. Use of the courts by interest groups has probably reached its greatest development in the United States. Other countries have been more resistant but there is nothing in principle preventing their use. For examples from the American context, see Mark Kessler, *Legal Mobilization for Social Reform: Power and the Politics of Agenda Setting*, 24 L. & SOC'Y REV. 121 (1990); LEE EPSTEIN, CONSERVATIVES IN COURT (1985).

Finally, and most devastating for the democratic process, the democratically elected branches may willfully decline to exercise their powers for several reasons.[35] Legislatures and executives defer decisions due to excessive controversy or fear of political retribution by aggrieved constituents. Courts become, by default, the alternative avenues for resolution of these issues (if a solution is possible). More likely, the courts provide a resolution that is totally satisfying to none, but binding in the absence of acts by other branches. This particular default by the majoritarian institutions represents an abdication of responsibility but occurs as a response to short-term political expediency and calculations of political advantage.

As noted earlier, Central and South American courts have not been generally included in such analyses.[36] This in part reflects the empirical reality that such courts, in order to have such an impact, must consistently operate in at least a semi-democratic context. In such situations, courts with their interest in comity and regularity of procedure have opportunity to operate. In the former Spanish and Portuguese colonial areas, the explanation becomes simple; the judiciaries have normally adhered to the civil law tradition of judicial deference plus, more concretely, have operated in authoritarian settings where independent political actors are not encouraged. This tracks the earlier French revolutionary tradition that reflected their experience with earlier courts that were deemed corrupt adjuncts of the deposed monarchy.[37] More broadly, however, judiciaries are recruited from the privileged elites, a fact normally discouraging particularly innovative judicial activity since their primary function is protecting the status quo from which they benefit.

Because of this combination of background and context, Latin American judiciaries have not been considered major candidates for the innovative role implied by judicialization.[38] Empirical evidence also reveals the traditionally secondary role played by Latin American courts. Such a passive view has persisted in Latin American constitutions since the 1840s despite concurrent declarations establishing or permitting judicial review.[39] Regardless of that authorization, Latin American courts have had only intermittent bouts of judicial assertiveness that are usually crushed or, more devastatingly, ignored. For example, in 1972, when Ecuador's supreme court ruled a series of presidential decrees unconstitutional, the president, with support from the military, chose to ignore the supreme court's rulings, dissolved the Congress, and established a civilian dictatorship instead.[40] More recently, in 1997, President Fujimori of Peru attempted to have four con-

35. *See* Tom Farer, *Consolidating Democracy in Latin America: Law, Legal Institutions and Constitutional Structure*, 10 AM. U. J. INT'L L. & POL'Y 1295, 1300-01 (1995).
36. *See generally* Alilo A. Boron, *Latin American Constitutionalism and the Political Traditions of Liberalism and Socialism, in* CONSTITUTIONALISM AND DEMOCRACY (Douglas Greenberg et al. eds., 1993). *See also* John Linarelli, *Anglo-American Jurisprudence and Latin America*, 20 FORDHAM INT'L L. J. 50, 53 (1996). Linarelli identifies additional factors hampering the capacity of courts to operate successfully in Latin American society and culture.
37. *See* Merryman, *supra* note 10.
38. *See* Felipe Saez Garcia, *The Nature of Judicial Reform in Latin America and Some Strategic Considerations*, 13 AM. U. INT'L L. REV. 1267 (1998).
39. *See* Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 13 (1987).
40. *See* Catherine M. Conaghan, *Loose Parties, 'Floating' Politicians, and Institutional Stress: Presidentialism in Ecuador, 1979-1988, in* THE FAILURE OF PRESIDENTIAL DEMOCRACY: THE CASE OF LATIN AMERICA 259 (Juan J. Linz & Arturo Valenzuela eds., 1994).

stitutional court justices removed from the supreme court after they ruled as unconstitutional his attempt to stand for a third presidential term.[41]

IV. Costa Rican Background.

Historically, the Costa Rican Supreme Court played a similar role until 1989, but the Court now plays a central role in economic and social policy formulation and implementation. Thus, Costa Rica stands out as both an anomaly and possibly a harbinger of future events in other countries. Our focus regarding Costa Rica is upon the external (or type one) perspective regarding its judicial change process. That is, our interest concentrates upon the situation where the Supreme Court has become an active intervener into affairs more traditionally defined by the society as solely political, or at least, not judicial matters. This expansion into new realms is fueled by a number of factors; the exact weight assigned to each factor depends upon the peculiar historical and political context within which this high court operates.

Costa Rica, a poor, isolated, and sparsely populated colony, became independent from Spanish rule in 1821 (although it was part of the ill-fated Central American Federation until 1838) and initially experienced the same political turmoil and fratricidal civil wars as its sister republics. Costa Rica, unlike its neighbors, gradually became more democratic. The country's transition to democratic governance was not a smooth, unidirectional one, nor was it very rapid. Indeed, not until after the 1948 civil war were the country's political leaders exclusively selected through the ballot box with the expectation that they would serve their entire terms. Also, the franchise remained very limited until the civil war, failing to include large groups of the population including women and blacks. The 1948 civil war was the result of the increasingly undemocratic actions of the incumbent administrations of Rafael Angel Calderón (1940-1944) and Teodoro Picado (1944-1948). The attempt by these two presidents to steal the 1948 presidential election was the final spark setting the war in motion.[42]

In the civil war's aftermath, a compromise among the victorious allies produced a new constitution and a series of new political institutions designed to prevent a repeat of the political crisis brought on by the Calderón/Picado administrations. The strategy selected was to disperse political power widely among various state agencies and to impose strict term limits on deputies and the President (one term with no immediate reelection). The new constitution of 1949 subsequently devolved decision-making power across the executive, legislative assembly, and the state-funded autonomous institutions. The role of the judicial branch, after a brief interruption, returned to its pre-war status of equality with the executive and legislative branches. This occurred because it had remained largely above the political intrigues that caused the civil war. The Tribunal Supremo de Elecciones (Supreme Tribunal of Elections, TSE) was also created as a quasi-fourth branch of government with full responsibility for all questions related to elections.

41. *See* Andres Oppenheimer, *Re-election Issue Stirs Latin American Debate*, MIAMI HERALD, May 19, 1997, at A8; Dakolias, *supra* note 24, at 173. The Supreme Court of Argentina has been replaced six times since 1946. *See* Baar, *supra* note 18.

42. For a general overview of those events and their general impact upon Costa Rican politics, see BRUCE M. WILSON, COSTA RICA: POLITICS, ECONOMICS, AND DEMOCRACY (1998).

While the legislative assembly, the executive and autonomous state institutions expanded their remits and functions during the post-war period, the Supreme Court continued its civil law tradition, playing a similarly minor role as it had before the promulgation of the new constitution.

Costa Rican courts, then, before and after the writing of the 1949 constitution, were similar to those found across Latin America where the civil law tradition, with its inhibitions regarding judge activity, operated. The major difference between Costa Rica and much of the rest of Latin America was not in the courts themselves, but rather in the civil culture with its democratic values. Consequently, incremental change occurs if it is in accord with significant elements of the political elite. Courts must rely upon enforcement of their decisions by others, clearly a factor limiting their power. That is, courts possess the power of decision, but not of implementation. That weakness is deliberate in an effort to keep those who are thought to be remote and arcane decision-makers from abusing their powers, powers which are potentially extensive and final in most circumstances.

V. Changing the Role of the Judiciary.

During the early 1980s, as part of a general reform of the courts, a proposal was made to "systematize and modernize constitutional adjudication."[43] A special commission submitted its recommendations in 1985 to the Supreme Court for review. After substantial revisions, the recommendations were sent to the Legislative Assembly in May of 1986. After amendment by the Legislative Assembly and further review by the Supreme Court, the final bill was promulgated in October of 1989. The changes were both organizational and procedural in nature, the intent being to widen the court's jurisdiction.

Until 1989, the Court consisted of seventeen members (magistrates) elected by the Legislative Assembly for eight-year terms. The Magistrates met in plenary session (*Corte Plena*) as well as serving in one of three chambers. The workload of the original three chambers was traditionally apportioned by case type. The first chamber, *Sala Primera*, had seven members and dealt specifically with civil cases. The second chamber, *Sala Segunda*, had five members and was concerned with bankruptcy, work, and family issues, while the third chamber, *Sala Tercera*, handled criminal cases. As a result of the 1989 reforms, the first three chambers continued much of their jurisdiction and caseload, but a fourth chamber was added, the *Sala Constitucional* (more popularly known as the *Sala Cuarta*, hereinafter Sala IV). In 1989, the number of magistrates was increased to twenty-two, with seven magistrates serving in the Sala IV, and five in each of the other three chambers.[44]

43. The discussion presented here draws heavily upon Barker's earlier work along with supplementation through personal interviews by the authors with court officials and legislators in 1997 and 1998. *See* Robert S. Barker, *Taking Constitutionalism Seriously: Costa Rica's Sala Cuarta*, 6 FLA. J. INT'L L. 349, 370 (1991).

44. Two of the magistrates from the *Sala Primera* were transferred to the new Sala IV, reducing the *Sala Primera* to five magistrates. An interesting facet of the Costa Rican Supreme Court is the existence of 37 "substitute magistrates" (*suplentes*), twelve of whom are assigned to the Sala IV, nine to the *Sala Primera*, and three to the other two chambers. *See Ley Organica del Poder Judicial*, art. 62 (1991). The *Suplentes* can be asked to serve on specific cases in the absence of a Supreme Court justice.

The judicial branch is afforded a significant level of institutional autonomy regarding the other executive and legislative branches of the state. Since 1957, it has been constitutionally guaranteed six percent of the state's ordinary budget (art. 177) although the government does not always fulfill its obligation.[45] The Supreme Court's magistrates are elected by the legislative assembly to a specific chamber of the Supreme Court for staggered eight-year terms, and they are automatically reelected unless two-thirds of the Legislative Assembly's members vote against a specific justice's reelection (art. 158). Supreme Court Magistrates can be removed only by a two-thirds vote of their peers. Judicial branch autonomy is further heightened by the Supreme Court's power to select all the judges and magistrates for lower courts.[46]

Institutionally (and at least formally), the Supreme Court is one of three co-equal branches of the state, although it historically regarded itself as having secondary importance to the popularly elected branches. Several factors embedded in earlier Costa Rican political and legal culture rendered the Court less effective than was, in theory, constitutionally possible. These inhibitions became embodied into a series of institutional norms and rules limiting its effectiveness. Declaring a law unconstitutional demanded a two-thirds majority of the plenary session of the Supreme Court, i.e., twelve out of seventeen had to vote for unconstitutionality. This procedural rule meant that, unlike in the U.S. Supreme Court, a simple majority was insufficient to declare a law null and void, reducing the capacity of the Court to declare laws and decrees unconstitutional.[47] This question was largely moot, given the Court's general deference to the political branches.

A second important limitation reflecting the civil law influence was the Supreme Court's presumption that the Legislative Assembly was sovereign and the assumption that its laws were constitutional unless they were clearly and evidently unconstitutional. In fact, Costa Rican history is replete with examples of the president asserting his power to declare certain laws unconstitutional.[48] Thus, the Court acted only when laws were clearly against the "letter of the law" as narrowly interpreted, taking no action if the state's action was merely against the "spirit of the law." This presumption is compatible with a civil law tradition that treats executive and legislative actions as including both the ordinary and the extraordinary. Unlike their common law cousins, judge discretion is kept as limited as possible although it is recognized that the courts may be the only institution capable of defending the constitution due to their presumed disengagement from the ordinary politics of the day (an heroic assumption rather than an empirical reality in most cases). The degree of that political disengagement is not always completely clear, but in principle the impartiality attributed to courts means that they are less openly engaged in daily political struggles.[49]

In addition, the Constitution made no specific mention of the power of the Supreme Court to control or adjudicate actions taken by state-financed agencies. These agencies, at their height, employed a significant percentage of the country's workforce and spent a large percentage of the government's budget on a broad spectrum of economic and social

45. *See, e.g., La Nación*, April 1998.
46. *See* LINN A. HAMMERGREN, THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA 219-32 (1998).
47. *See* MURILLO, *supra* note 1, at 19.
48. *See* Barker, *supra* note 28, at 252.
49. *See* Barker, *supra* note 43, at 362-63.

services. In 1950, autonomous institutions spent slightly more than seven percent of the country's GDP. By 1970, with the continued expansion in the public sector, the percentage of GDP spent by autonomous institutions increased to 17.4 percent and to thirty percent in 1994.[50] This omission becomes especially important because of the increasing span of government operations encompassed by such entities.

The lack of specificity regarding court review of those administrative agencies was mirrored by a general lack of specificity within the Constitution regarding whether the Supreme Court was the sole authority dealing with all instances of unconstitutionality. Such vagueness is not unusual—the U.S. Constitution does not make such an explicit delegation of authority—but given the legal tradition, within which the Costa Rican Supreme Court operates, the lack of such a specific declaration inhibited the magistrates from taking independent action. That omission does not prevent such action, but the Court looks for explicit popular authorization to proceed or some other overt signals from the elites, such as the later 1989 reforms that such activity would not be unsupported. Contrast this to the U.S. Supreme Court in 1803, when the Court, led by Chief Justice John Marshall, moved forward in fairly direct defiance of the sitting President and Congress.[51]

An additional set of factors that inhibited such judicial activity included the reality that within the Costa Rican legal profession there was a dearth of attorneys trained as constitutional lawyers or experts.[52] Such a paucity of trained and experienced advocates limits the Court's innovativeness because it is often through the arguments put forth by skilled practitioners that the Court becomes informed and possibly persuaded that change has become necessary.[53] Constitutional litigation in itself presupposes a view of the courts and their role that is much more expansive than traditionally thought possible within a civil law system. Therefore, such advocacy implies a change within the political culture that rolls over into the legal culture. The "new" advocates are often motivated by particular grievances or ideological perceptions, seizing the opportunity for fostering desired change.[54]

Previously, however, the Supreme Court was encouraged to defer decisions. Realistically, most judges do not push the legal system's boundaries or the tradition in which they are socialized. Instead, they tread the well-worn pathways of legal conformity. One tool that facilitates adherence to the status quo is strict observation of procedure. The Costa Rican Supreme Court was characterized in the earlier period as being extremely conscious of proper legal procedure and form. Failure to meet these paper requirements (most of which remain waivable at Court discretion) leads to dismissal or rejection of cases without a formal decision, a *de facto* acceptance of the status quo. The result was a Court generally able to deflect any movement outside the boundaries of "normal" law. Obviously, serious contemplation of constitutional issues clearly contains the potential to move outside the routine.

50. *See* 2 BRUCE M. WILSON, POLITICS AND GOVERNMENT IN COSTA RICA: A COUNTRY STUDY (Rex Hudson ed., in press).
51. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 300-26 (1996).
52. *See* MURILLO, *supra* note 1, at 20.
53. See the more general discussion of the necessity for supportive legal reform organizations in CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 11-25 (1998).
54. *See* Barker, *supra* note 43, at 396-97.

Prior to 1989, the Costa Rican Supreme Court was not so much hostile as they were indifferent to demand that the institution become a major agent for constitutional change. Instead, the magistrates operated within the boundaries of what they perceived as normal judicial politics—a situation effectively minimizing the courts' involvement in larger political debates. Many Costa Rican jurists claimed that this lack of action by the Supreme Court had resulted in the "tyranny of the law" that amounted to 170 years of disrespect for the constitution.[55] Courts, however, fulfilled their primary social functions, defending the status quo and resolving disputes within the confines of the existing rules. Fostering change demanded a reform occur in the Court's basic operating premises—restructuring the institutional context within which the Court would operate. The change would have to be fairly dramatic, given that authorization for a wider judicial role in principle already existed on paper.

VI. Fostering Change.

In making the changes we will describe, the Legislative Assembly embarked upon a voyage into new judicial and political waters, whose ultimate destination was, and remains unclear. However, these changes came to the Costa Rican Supreme Court for a variety of not always well-connected reasons, but the general result completely restructured the institutional rules under which the Supreme Court operates. Here, we discuss the factors that motivated that original change, the actual changes made in institutional structure and procedural rules that occurred, and some indications of the changes' effects upon public policy.

A. Changing the Institutional Context.

Courts operate within specific institutional contexts: political circumstances, rules of procedure and authorizing statutes and constitutions. These institutional contexts establish the framework (often very detailed) within which the courts work in pursuance of their assigned functions. Whenever that context changes in some significant fashion, the courts respond, albeit often imperfectly and slowly, to accommodate that change or their perceptions of change. A lag effect most likely exists between the change and its accomplishment, given slowness in personnel turnover and the deliberate but slow movement of litigation through the appellate court processes. Over time, though, such institutions and their rules are plastic; that is, they are continually being reshaped to fit their new conditions. Failure to adapt or excessive delay in doing so can lead to political irrelevance. Therefore, courts are normally forced to change, despite their wishes, by revisions in their operating rules—especially those changes imposed by powerful outsiders. For example, dissatisfaction with court decisions in specific policy areas can lead to changes in jurisdiction, procedures and substantive decisional guidelines. Such changes have characterized courts in every society.[56] Even the U.S. Supreme Court has had to endure that public humiliation when jurisdiction was abruptly removed, nullifying the court's actions.[57]

55. Murillo, *supra* note 1, at 37.
56. *See* Provine, *supra* note 11, at 203-04.
57. *See* Ex parte McCardle, 74 U.S. 506 (1868).

For the Costa Rican Supreme Court, this sequence occurred in 1989, when the Legislative Assembly changed both its organizational structure and procedural rules. The dissatisfaction here was the culmination of larger societal events rather than a specific dislike of earlier Court policy choices. According to some commentators, the expansionary nature of the state encouraged a "disrespect for the constitution and fundamental rights" on the part of lawmakers.[58] Lawyer Juan José Sobrado, for example, claims that before the creation of the constitutional chamber of the Supreme Court, the Legislative Assembly routinely passed "unjust discriminatory laws," and, consequently, the "state of law did not function."[59]

Thus, in Costa Rica it is generally agreed that the creation of the Sala IV was a constitutional revolution in general, and of public law specifically. Expanding state actions into new areas of Costa Rican political and economic life brought the need for protection from abusive state actions into sharp relief. These protections were broader than merely procedural rights and included explicit concerns with substantive policy. The political emphasis over time focused upon the question of protection of fundamental individual rights. Accomplishing such a task was difficult in a political system that emphasized the dominance of the political branches; their decisions are normally presumed to be in conformance with constitutional norms while the judicial branch held itself in a secondary position.

The 1989 reforms were typical of major policy changes in Costa Rica. That is, they were gradual and discussed at length among all interested groups.[60] In this particular case, the constitutional reforms that created the Constitutional Chamber and ushered in a new era of activist Supreme Court decisions were the product of more than twenty years of debate and controversy involving supreme court magistrates, politicians from both major parties, jurists, and both the executive and legislative branches of government. One factor driving the debate was the problem of a government expanding into areas formerly seen as private. By the 1980s, the state was one of the country's major employers and a major producer of goods and services on an unprecedented scale.

With this expansion, the state imposed and administered price controls and subsidies for particular industries while also providing high levels of tariff protection for infant industries. Concurrently, the state moved heavily into the general posture of being the provider of extensive social welfare benefits, especially compared to its past history and the practice of neighboring governments. This expansion of the role and scope of state interventions clearly raised the specter that protection was needed over the exercise of state power—protections broader than merely procedural rights but dealing with policy substance. In time, the political emphasis focused upon the issue of establishing protection for fundamental individual rights enumerated both in the Costa Rican constitution as well as international treaties to which Costa Rica was a signatory. As a result, this protection was extended, for the first time, to include protection of individual's rights from both the state and other private persons and companies. Their choice was to ignore any distinction between "state" and "private" action.[61]

58. MURILLO, *supra* note 1, at 34.
59. *Id.* at 37.
60. See, for example, the extensive discussion of policy making in WILSON, *supra* note 50, chs. 3-5.
61. In that sense, the decision was to go in a direction very different than taken in interpreting the Fourteenth Amendment of the U.S. Constitution. *See* The Civil Rights Cases, 109 U.S. 3 (1883).

That endeavor became part of a general court reform.[62] The reforms proceeded along three pathways: modernization of the basic legal codes, restructuring the internal organization of the court system, and expansion of the Supreme Court's constitutional jurisdiction. The latter is the focus of our attention here. The initial formal initiative to reform the judicial branch of government came in 1977 when the Minister of Planning Oscar Arias created a commission to examine the proposals to reform the constitution, including the idea of creating a new constitutional court.[63] A second commission was established by Minister of Justice Carlos José Gutiérrez in 1982. This commission included representatives from the Supreme Court and a renowned constitutional law professor. The first draft of the report, presented in October 1983, was widely discussed, re-written, and then presented to the Legislative Assembly in 1986 with the support of the Supreme Court Magistrates.[64]

In 1987, the Legislative Assembly established a "Comisión Especial" to study the bill. Former Supreme Court *Suplente* magistrate, José Miguel Corrales (PLN), headed the commission and invited submissions from members of all affected parties, including government ministers, magistrates and constitutional scholars. As is required by law, the magistrates of the Supreme Court commented on the bill and objected to sixteen provisions in the bill. Congress accepted some objections, but others were overridden by the politicians and remained part of the final constitutional reform.[65] The final reading of the constitutional amendments to articles 10, 48, 105, and 128 passed by a margin of 43-6, was signed into law by President Oscar Arias, and the Sala IV began its operations in October of 1989. The wide margin of passage suggests an elite consensus that judicial reform was essential for preserving public support for the judicial system specifically and the regime more generally. The passage of the constitutional amendment also suggests that politicians were overwhelmingly willing to reduce their own political powers in order to create the new court. This action appears, on the surface, to be an irrational act on the part of the politicians. Why would politicians be willing to reduce their political power and their capacity to make laws through the devolution of power to a Supreme Court over which they had very little control?

According to then Minister of Justice Maruja Chacón, most deputies did not actually understand the policymaking ramifications of their vote in favor of creating a constitutional court.[66] Much of the debate was of a technical/legal nature, so that many deputies deferred to party leaders rather than attempting to struggle through the legal documents and arguments. Another explanation came from a former PLN deputy (1994-98), Ottón Solís. He argues that the new court was created because deputies were convinced that it was the correct action to take and would make Costa Rica a more democratic country.[67] Remember that Costa Rica is the site for the Inter-American Human Rights Court.

62. *See* HAMMERGREN, *supra* note 46, at 226.
63. *See* MURILLO, *supra* note 1, at 35.
64. *See* Barker, *supra* note 43, at 370.
65. *See id.*
66. Interview by Bruce M. Wilson with Maruja Chacón, former Minister of Justice of Costa Rica, San Pedro, Costa Rica (Aug. 1998).
67. Interview by Bruce M. Wilson with Ottón Solis Fallas, former PLN deputy, San Jose, Costa Rica (Aug. 1997).

Also, due to an economic crisis in the early 1980s, there was recognition that constitutional reform might be necessary if the country was to avoid a severe legitimacy crisis. Accusations of corruption were leveled at the state in general, and against the Judicial Power (Poder Judicial) specifically. This focused attention upon the courts, resulting in a number of magistrates of the Supreme Court being investigated by a Legislative Commission. Declining public support for the Court, it was feared, might spread to a more general decline in support for government institutions and, more generally, for a democratic form of government. This crisis helped concentrate the attention of magistrates and politicians on the general need for judicial reform, and, in particular, the need for a constitutional court to interpret the constitution and to make rulings on the constitutionality of government decrees and laws.[68]

Judicial reform became the vehicle by which the Legislative Assembly could demonstrate its concern without committing itself to more fundamental restructuring. If the Legislative Assembly and magistrates of the Court were focused on judicial reform, it is clear from the way that the debate was carried in the leading newspapers that the reforms attracted little attention of journalists or the public. News stories concerning the constitutional amendment were few and were relegated to pages deep within the papers or merely included as Legislative reports, without commentary.[69]

The Legislative Assembly's apparent lack of interest in the question of the creation of a constitutional court is perhaps partly explained by other major crises that absorbed the legislators' attention. A primary concern was the attempts to strengthen the fragile Central American peace accords, which had been initiated by Costa Rican president Oscar Arias, and the deterioration of relations between Panama and the United States. The Assembly was also struggling with the question of adopting another Structural Adjustment Loan from the World Bank, which contained politically unpleasant austerity measures. The country was also debating the question of Costa Rica's membership in the proposed Central American Parliament and was deeply into the election campaign for the leadership of each party's presidential candidate. Coverage of the issue of creating a new constitutional court was more complex an issue and not as pressing as the others.

One could argue that since the vote fell toward the end of a legislative term, it was easier for deputies to sacrifice their powers, as they personally would not be affected. Deputies are prohibited from seeking immediate reelection due to national term limits. Furthermore, very few deputies ever return to the Legislative Assembly after their forced sabbatical from office; in any given assembly more than eighty percent of deputies are "freshmen."[70] Thus, it is possible to assert that sitting deputies had little vested interest in sustaining the long-term political power of the Legislative Assembly.

68. *See* MURILLO, *supra* note 1, at 39.

69. This paragraph is based on a close reading of the leading daily newspaper, *La Nación*, throughout the period of the Legislative Assembly debates on the constitutional amendment from February 1989 to November 1989. After the vote to create the Constitutional Court, a major debate concerning the appointment of magistrates to the new court did consume the Legislative Assembly and was extensively covered in the paper throughout the month of September 1989.

70. *See* JOHN M. CAREY, TERM LIMITS AND ELECTORAL REPRESENTATION 77 (1996).

Judicial reform occurred in 1989 because there was no organized opposition. Institutional factors such as term limits reduced the legislators' incentives to protect the institution they served temporarily. Legal reform groups were assertive but comparatively powerless previously. A window of opportunity arose that was seized by those advocating changes. Outside agents such as USAID and the World Bank assisted in the sense that they were pursuing legal reform, generally, that became part of the change. For most decision-makers, the issues were esoteric and removed from any sense of personal urgency since the now-visible political consequences were not salient until later. The earlier drawn-out technical discussions over jurisdiction and procedural reform had disarmed most critics. The result, as we will briefly discuss, was a major infusion of power and authority into an institution formerly thought docile.

B. CREATING THE SALA CUARTA.

Law No. 7128, which passed on August 18, 1989, amended articles 10, 48, 105 and 128 of the constitution. The reform of article 10 created a fourth chamber within the Supreme Court, a chamber with a much more expansive definition of its powers, including the power to declare rules (*normas*) of whatever origin and acts subject to public law (*Derecho Público*) unconstitutional by a simple majority vote. This new chamber acts alone without the requirement to consult with the Supreme Court's plenary session or the other three chambers. Thus, theoretically, the new court's ability to declare national laws and actions unconstitutional expanded dramatically. The Sala IV's mandate was to "guarantee the supremacy of the norms and constitutional principles, international law and community law in force in the republic, their uniform interpretation and application like fundamental rights and freedoms consecrated in the constitution or in international instruments in force in Costa Rica." (Article 1 de la Ley de la Jurisdicción Constitucional). The magistrates are to prevent abuses of legislative, executive, and bureaucratic powers, or the unconstitutional acts of private individuals or any acts that prevent an individual from exercising their basic rights as contained in the constitution (article 48). This is broken into two broad categories within which abuses of government power occur: (1) abuses violating the constitution (broadly interpreted), and (2) infringements of individual rights.

The former category, abuses violating the spirit of the constitution, is clearly vague but represents an impressive mandate justifying possibly expansive judicial activity. Its existence within a civil law political system appears to represent an assumption by the national elites that the judges remained sufficiently constrained by their legal and political socialization to continue deferring to the politicians' judgments. Remember that earlier, the Supreme Court would not consider such challenges with their unlimited discretionary potential. If that was a mistaken assumption, as appears to be the case, then the magistrates have been granted a broad mandate for a much more intrusive judicial presence in matters clearly not deemed germane to their traditional functions.

By contrast, infringements of individual rights are more bounded—explicit enumeration in the Constitution is normally required before court action, although residual clauses may justify a broader approach similar to the Due Process Clause of the U.S. Constitution's Fourteenth Amendment. The Costa Rican constitution contains two sections that cover rights

and individual guarantees (Titulo IV) and rights and social guarantees (Titulo V), which are analogous to the U.S. Bill of Rights except that they also incorporate social rights.[71]

Regardless, the 1989 Constitutional Amendment fundamentally changed the institutional framework within which the Supreme Court operates without altering its legal tradition and context. The Court possesses a broad constitutional mandate plus more relaxed institutional rules, allowing it to assume an activist role regarding protection of constitutional principles and individual rights if the magistrates so desired. Structurally, as was indicated earlier, a new fourth Chamber was created to implement the new directives and to enforce existing directives more fully. The Sala IV has the sole power to investigate and render an unappealable ruling on all questions of constitutionality with respect to law and the actions of other branches of government, state-financed agencies, and the TSE in matters of a non-electoral nature. The latter provision was critical because it effectively left no government or quasi-governmental entity outside the sweep of the reform. In a positive state context, inclusion of quasi-government entities becomes essential since many critical public actions affecting individuals occur through their decisions, which are not classified as laws. Such inclusiveness implies a wider sweeping grant of authority than one would normally anticipate in a civil law context with its restricted view of the courts' role regarding broader social and political matters. This moved the Sala IV beyond mere administrative review to questions of fundamental authority.

More explicitly, the Sala IV possesses broad *habeas corpus* powers with the important provision that such petitions can be presented to the court without the benefit of legal counsel. In addition, article 48 of the constitution provides *amparo*, or a more general right of appeal than *habeas corpus*.[72] This appeal to the Sala IV is to maintain or reestablish all other rights found in the constitution. In effect, all actions, rules, decrees, orders or laws contrary to the constitution can be appealed to the Sala IV. This includes actions by individuals (who were not covered earlier), a policy choice earlier resisted by the Supreme Court during the deliberation process but overridden by the Legislative Assembly.[73] Furthermore, the Sala IV can now resolve disputes between the various branches of the government as to their respective powers. New statutes are reviewed as to their constitutionality. In effect, the Sala IV encompasses both abstract and concrete, along with *a priori* judicial review—the widest possible combination for the exercise of judicial discretion and power.

A further example of the Sala IV's stature is that other magistrates or judges who entertain doubts concerning the constitutionality of governmental actions, decrees, orders, or laws may obtain advice from the Sala IV. Their decision becomes binding upon the requesting court. In effect, Costa Rica has established its judicial equivalent to a constitutional court, except that it remains institutionally embedded within the existing

71. Chapter V of the Constitution contains 24 articles guaranteeing various employment and social rights. Article 50, for example, mandates the state to provide the best welfare for all inhabitants, while article 56 requires that the state must pursue a full employment policy. Article 58 limits the workday to less than 8 hours, article 59 mandates paid vacation time, and article 60 guarantees the rights of workers to organize in labor unions.

72. *See, e.g.*, MURILLO, *supra* note 1 (discussing *amparo*).

73. *See* Barker, *supra* note 43, at 376.

Supreme Court.[74] The location of the court was the outgrowth of a compromise arrived at between the magistrates of the Supreme Court and the deputies of the Legislative Assembly. The Magistrates agreed to participate fully in the judicial reform process on the condition that the new court would remain within the Supreme Court, and that decisional power could be reallocated within the court, not be given to a new court outside of the judicial branch.[75] The European constitutional court was the intellectual model being implemented; however, because of its institutional location, the Sala IV becomes somewhat more difficult to disentangle.[76] Being institutionally contained within the regular Supreme Court provides institutional cover for an otherwise extraordinary institution. This embedded quality reflects the reality that, unlike the German situation, the reform when originally implemented was not perceived as being as powerful as its formal legal mandate implied. Therefore, perhaps there was an underestimation of the apparent demand for change; no matter how incoherently the specifics were defined.

The German Constitutional Court operates under a judicial selection process that deliberately introduced change by incorporating non-traditional (i.e., non-judicial) candidates. This was done so that change would not falter due to judge inertia or their fixed opinions regarding the narrow scope of judicial power. For the Sala IV, on the other hand, the recruitment process appears on the surface to be an extension of the past. Thus, recruitment still comes from among the usual suspects, with all seven of the current magistrates having held political or elected appointments prior to their selection to the Sala IV. Furthermore, two of the original seven were previously magistrates serving on the Sala Primera of the Supreme Court at the time of Court opening. In fact, the system ignores the dynamics of creating a totally new institutional setting and concurrently staffing it with largely new personnel. This combination proved a potent mixture for expanding the realms of the possible—the new magistrates in effect began quickly testing the limits of the possible.

The organizational behavior literature has long pointed out that in order to achieve drastic change one must both destroy and rebuild an existing organization or create a new entity charged with carrying out the new mission. Organization routines are usually so well embedded that new ways are automatically suspect and thus rejected.[77] In doing so, new folkways and procedures are created, allowing for fuller achievement of what the original reformers desired. If loaded onto existing organizations with well-established, generally successful routines and decisional patterns, the reform is adapted or maladapted to fit the Procrustean bed of existing agency value preferences. The Sala IV is an interesting expedient; a new institution was created, encapsulated in the shell of an existing one, but made separate and more powerful than its counterparts, the other three Chambers. The struggle immediately became establishing the new agency's boundaries. That process

74. This institutional location is currently (1999) under discussion in the Legislative Assembly where there is a move to make the Sala IV completely separate from the *Poder Judicial. See La Nación*, June 1998.

75. *See* Barker, *supra* note 43, at 390.

76. *See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 27-30, 162-72 (2d ed. 1997); DAVID R. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 27-30, 149-72 (1994).

77. *See* GRAHAM ALLISON & PHILIP ZELIKOW, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS 153-58 (2d ed. 1999).

of adaptation remains a work in progress and was further influenced by subsequent changes implemented by the Sala IV.

Unlike most courts, the Sala IV aggressively searches for cases, spending a considerable sum of money educating individuals regarding their rights and actively encouraging and facilitating presenting their cases to the court.[78] For example, large poster-sized advertisements outlining various individual rights appear in all public buildings throughout the country. There are no age restrictions or citizenship requirements for appeal directly to the court, and the court receives cases twenty-four hours a day, 365 days a year. Night security personnel are authorized to accept any petition even if the Court Clerk's office is closed for the day. Furthermore, no lawyer is required for an individual to submit an appeal of *amparo*, and the document can be handwritten in any language.[79] Thus, the court has decisively acted in two ways to increase its caseload, first, through actively educating people about their rights, and second, by reducing or eliminating the costs and institutional barriers to bringing an action.

VII. Discussion and Conclusions.

The Sala IV represents a major shift in Costa Rican elite perspectives regarding the proper role and function of the courts, at least at the Supreme Court level. Through the constitutional amendment of 1989, the Legislative Assembly expanded the Court's ability to intervene in state matters for the purpose of protecting the Constitution and, most explicitly, the rights of individuals against abuse by the state or other private individuals.

Symbolic of this change was one of the first cases heard by the new Chamber, involving an individual named Trinidad Fuentes Ortega ("don Trino," as he is known). He has a small wooden cart that he has parked on a street corner outside the Legislative Assembly building every business day for twenty-five years, selling cigarettes and flavored shaved-ice drinks (*conos*).[80] In 1989, in preparation for the Summit of the Americas—a meeting of nearly every head of state in the Americas—the Ministry of Public Security declared that, due to security concerns, the vendor could not sell his wares in his usual location. Don Trino appealed to the Sala IV, which ruled in his favor, allowing him to carry on his business as usual. The Sala IV's ruling made it apparent that its new role was quite different from the old Supreme Court. The court acted both swiftly and decisively, demonstrating that it was willing to protect the rights of poor humble people, even when that decision might embarrass the government.

That decision, while minor in scope, established the publicly enforced principle that there now existed effective redress for citizens abused by the government. Symbolism is often critical in establishing new political or judicial contexts; don Trino's victory was one of those symbols. The publicity was disproportionate to the practical effect but accomplished the Sala IV's purpose of sending a message to the populace and other branches of the government that the Sala IV was in business.

78. A counterpart court to the Sala IV might be the Indian Supreme Court with their Social Action Litigation. *Compare* Carl Baar, *Social Action Litigation in India: The Operation and Limits of the World's Most Active Judiciary*, *in* COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 77-87 (Donald W. Jackson & C. Neal Tate eds., 1992), *with* EPP, *supra* note 53, at 71-110.
79. Interview by Bruce M. Wilson with the General Secretary of the Sala IV (Aug. 1997).
80. The individual continues his business up to the present. *See* MURILLO, *supra* note 1, at 58.

The extent to which the Sala IV has taken its remit seriously is reflected in the total number of cases it receives and deals with each year. In 1990, it's first full year of operation, it received 2,296 cases and resolved 1,611. In 1997, the last year for which complete data are available, it received 7,421 cases and resolved 7,104.[81] Furthermore, the court no longer recognized the popular branches of government as policymaking sovereign entities. In the fifty-one years before the creation of the Sala IV, there were 347 cases of unconstitutionality taken to the Supreme Court, with 327 of those being resolved.[82] After the creation of the Sala Constitucional in 1989, more than 350 cases have been submitted to the court each year, on average, with more than 330 being resolved.[83]

The willingness of the Sala IV to challenge the popular branches was well illustrated in the mid-1990s, when the court ruled unconstitutional a major privatization measure passed into law in 1987 by the Legislative Assembly with the support of the Executive branch. In October 1993, the Sala IV ruled that cellular phone service was a form of telephone service that was a constitutionally protected state monopoly. Consequently, the government could not sign contracts with private companies granting them access to the telephone market.[84] Thus, the government's ability to make policy was significantly restricted.

The expanded influence of the Sala IV has produced some negative reaction from elements of the political elite. Personal interviews with members of the Legislative Assembly elicited concern that the Sala IV had overstepped the boundaries assumed to guide courts. One deputy noted many of his colleagues in the Legislative Assembly believed that "the Sala IV is a power that has taken away a lot of powers from the Assembly." He personally believed that the Sala IV should not have been created and that the justices of the Sala IV are judicial activists interested in interpreting the constitution rather than applying the constitution as it was drawn up by its framers in 1948.[85] However, this argument ignores the fact that the 1989 reform was responding to the original 1948 Constitution in which the courts were nominal players.

The continued decline in the political parties' capacity to articulate meaningful policy differences appears to have motivated the search for alternatives to the existing political institutions.[86] As mentioned earlier, one situation where type one judicialization arises is when the political institutions effectively waive their authority (both willfully and publicly, or implicitly). In Costa Rica, intense dissatisfaction with politics as usual motivated the change. That change, however, passed through the system on a wave of public indifference. In itself, that is a devastating commentary on the legislative branch. The court did not seek out this opportunity; rather it was imposed when the Supreme Court's very cogent objections were overridden by Congress. Judicialization can come through many doors, especially when the doors are being opened by actors usually thought most hostile to judicial assertiveness. The legislative branch was collectively uninterested in protecting its prerogatives, a decision that is currently being rethought. The fact is that the Sala IV has altered public perceptions of courts, making retrenchment more difficult than previ-

81. Poder Judicial, Sala IV Case Loads, 1990-1997 (unpublished Sala Constitucional document).
82. *See* MURILLO, *supra* note 1, at 73.
83. *See* WILSON, *supra* note 50, at 58.
84. *See La Nación*, May 15-30, 1995.
85. Interview by Bruce M. Wilson with Ottón Solís Fallas, *supra* note 67.
86. *See* WILSON, *supra* note 50, chs. 5-6.

ously. Regardless of the substantive effect of the Sala IV, its actions have created an expectation that the courts are now open to individuals, especially those normally excluded by lack of wealth or other resources.

Courts operate within the boundaries of the law and social expectations. The justices of the Sala IV perceived the 1989 law change as expanding expectations as to what could be done. That view has facilitated the court's expansive role in Costa Rican politics over the short term. The long-range response by the dominant elites to this change in the political rules still remains the interesting aspect. The Sala IV has become a wild card as it tests the limits of its powers and willingness to use them. Moving overtly against the Sala IV remains one option, but the least likely, given the political splits in the parties reflected in the Legislative Assembly. A more subtle, but real constraint can be exercised through controlling who is elected to the Sala IV. As incumbents retire (however, given the presumption of reelection this has proven a norm difficult to overturn), their replacements become the linchpin in any future restraining of the court. Similar to the Republican appointments to the U.S. Supreme Court, one can systematically change the Sala IV's momentum, first on the margins and then more centrally. The Sala IV has instituted appeals procedures facilitating review, but that is a fragile flower—easily made more difficult. The original impetus of reform is still operating; time will tell the tale. Change came to the Costa Rican Supreme Court because of immediate domestic political imperatives, with the implications still playing out in the nation's politics.

The continued independence of the Sala IV appears to reflect the essentially democratic nature of Costa Rica's politics. Mobilizing opposition has been further hampered by the term limits within the Legislative Assembly, reducing the intensity of the deputies, since no individual has a long-term commitment to redressing the apparent loss of power. Unlike most of Latin American supreme courts, conditions in Costa Rica appear particularly favorable for an ongoing experiment in judicial activism.