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Constitutional Justice and the Separation of Powers: The Case of Costa Rica

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Constitutional Justice and the Separation of Powers: The Case of Costa Rica

*Justice Luis Fernando Solano Carrera**

Translated by: Robert S. Barkert†

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I. ACKNOWLEDGEMENTS

I wish to express my gratitude to Duquesne University for this invitation. You should know that Duquesne is the only university in the United States that the Supreme Court of Justice of Costa Rica has a written agreement of cooperation with, which Dean Cafardi and I signed in 1994. And since some might wonder how it came about that the Supreme Court of a country as small as mine would come to an agreement with a university such as this,

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there is no explanation other than to attribute it to the intervention of the Holy Spirit acting through Professor Robert Barker, an old friend of Costa Rica and Latin America. I feel honored, therefore, to be here again in this friendly setting, in the priceless company of friends, professors, and other distinguished participants in this seminar.

In the first part of my presentation, I will refer to the origin and evolution of the doctrine of the separation of powers—but only to outline the role of Locke in this matter because Montesquieu has received more recognition in Latin culture in this regard. My work will then focus on the role of justice in guaranteeing the rule of law, dealing at some length with the role of constitutional justice. Finally, I will point out some important situations (1) related to the work of the Constitutional Chamber of Costa Rica, including judgments applying the separation-of-powers doctrine, and (2) in which the Chamber itself acts under the limits imposed by the doctrine.

And it is, by the way, on the basis of this last observation that the existence and powers of the Constitutional Tribunal itself have been questioned, with critics utilizing as a parameter that very doctrine of separation of powers. As a result, I will briefly comment on this point as well.

II. THE HISTORICAL DOCTRINE OF THE SEPARATION OF POWERS

The theory of the separation of Powers is traditionally interpreted as the need for each organ of State to exercise its function with independence from the others. While there cannot be interference or invasion of the assigned function, there must necessarily be produced collaboration among the Powers. . . . The State is a unity of action and of power; but that unity would not exist if each Power were an independent organism, isolated [and] with wide freedom of decision, for in reality one cannot speak of a division of Powers in the strict sense; the power of the State is singular [Rather] it is appropriate to speak of a separation of functions, that is to say, of their distribution among the different organs of state.¹

The theme that I have been assigned on this occasion has generated writings, manifestos, studies, opinions, treatises, and other works of various kinds, and owes much to English political

1. Judgment of the Constitutional Chamber, no. 1994-000584 (1994).

thought: from Thomas Hobbes through James Harrington to John Locke, among others; from one end of the seventeenth century to the other. All of these thinkers, philosophers, humanists, jurists, and political scientists contributed to finding the way to check monarchical power and guarantee citizens' rights. For some, the solution existed in the sovereign power of the people, with Parliament embodying its maximum expression. (Even with respect to this, Hobbes and Harrington had different viewpoints and objectives.) For others, like Locke, the solution was found in the distribution and control of power from within the State itself. Ultimately, this English political thought found fertile soil in Montesquieu's *The Spirit of the Laws*,² and is fully developed in Book XI, Chapter 6 of his commentary on the English Constitution and political system.³ It is there that Montesquieu's ideas of the division of powers were molded.

These influences should not be surprising. Just as Montesquieu drank in the ideas of Locke—especially those from *Two Treatises of Government*, published considerably earlier in 1690—so too were other thinkers influenced by the phenomenon of The Enlightenment. The revolution in France took full advantage of Locke's political philosophy, which inspired the revolution's great leaders in the struggle against the absolute power of monarchy in Seventeenth Century Europe. The same thing happened in the English colonies of North America and in the liberating accomplishments of the Spanish colonies in the southern part of the American Continent. Thus, a "globalization" of political ideas occurred: at the behest of the separation of powers, liberty, and equal rights, the potent germ of liberal constitutionalism—a first constitutionalism—spread at the end of the eighteenth century and in the first half of the nineteenth.

The doctrine would, moreover, achieve a prominence that it manifests even today, having not lost any of its effectiveness or importance. To the contrary, each day it gains support, continuing to form much of the ideological core of any constitution. Indeed, just as it was present in the great ideological-political struggles against the absolute monarchies, so too has it flourished over the past 250 years against every type of despotism—both right-wing and left—and in a variety of settings, including the Anglo-

2. MONTESQUIEU, DE L'ESPRIT DES LOIS [THE SPIRIT OF THE LAWS] (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press (1989) (1748).

3. *Id.* at 156-66.

Saxon and Romano-Germanic legal worlds, adapting itself to the specific circumstances of time and place.

Incidentally, when Montesquieu published his work, it was immediately blacklisted on Louis XV's index of forbidden books. Of course, this did not hinder Montesquieu (indeed it might have helped him) and his doctrine came to form an important part of Western political and juridical thought, in fact occupying a privileged place there.

Without wishing to overstate it, I want to mention three important political-juridical documents that are faithful reflections of the influence that separation of powers has had and even now continues to have. First is the Virginia Declaration of Rights.⁴ This document was adopted when the American colonies were struggling for liberty against the absolutism and domination of the English monarchy. It has the virtue of being the precursor and immediate antecedent to the U.S. Declaration of Independence and U.S. Constitution. Section 5 of the Virginia Declaration provides that: "The legislative and executive power of the state should be separate and distinct from the judiciary"⁵

Second is the French Declaration of the Rights of Man and of the Citizen of 1789.⁶ After its adoption, this instrument quickly acquired prestige and decisive influence in the Western world, especially in Spanish America. Article 16, which provides that, "[a] society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all,"⁷ is the object of continuing analysis; it has the virtue of linking the separation of power with the guarantee of individual rights in such a way that it is impossible to understand one without the other.

Lastly, we have the Inter-American Democratic Charter.⁸ Approved by the first plenary session of the Organization of American States (OAS) on September 11, 2001, this document, with freshness, clarity, and comprehensiveness, provides in Article 3 that among the essential elements of representative democracy are "the separation of powers and independence of the branches of

4. VIRGINIA DECLARATION OF RIGHTS (Jun. 12, 1776).

5. *Id.* § 5.

6. DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN DE 1789 [DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN OF 1789] (Aug. 26, 1789).

7. *Id.* art 16.

8. Organization of American States, Inter-American Democratic Charter, Sept. 11, 2001, 40 I.L.M. 1289.

government.”⁹ Thus, with this statement, the representatives of the North and South American states, including the United States, formally announced that there are principles and values that are essential to democracy and that require ongoing work for their consolidation.

It is clear from its text that the Inter-American Democratic Charter puts the separation-of-powers doctrine within the concept of democracy, or at least treats it as a guarantee of what in modern times we understand as the “rule of law.” In fact, although they are terms of conceptually different origin, little by little, they are becoming equivalent or, according to one author, complimentary terms.¹⁰

Thus we affirm that the separation-of-powers doctrine, rather than losing force, each day acquires greater relevance and demands an ongoing effort to prevent its collapse and regression. For this is a real danger, evident every day in various social and political contexts.

In light of its continuing significance over the course of more than two centuries in very diverse situations, one author has opined of “the protean influence of the doctrine of separation of powers.”¹¹ In its beginnings, the separation-of-powers doctrine dealt with the fight against absolute monarchy. Thus, Deputy Jean Joseph Mounier, a member of the Constituent Assembly that gave birth to the French Constitution of 1791, said vehemently: “We do not really have a constitution, since all the [governmental] powers are intermixed.”¹²

Today, kings, in those countries where they may still be found (especially in Europe) coexist in a system of parliamentary monarchy—a democratic system of government—having abandoned the vices of autocracy. We must nevertheless remain vigilant in supporting and advancing the separation of powers, as is undertaken by the aforementioned Inter-American Democratic Charter, which explicitly affirms that the separation of public powers is essential to democracy. Indeed, the Charter is not just a rhetorical declara-

9. *Id.* art 3.

10. The equivalence between “democracy” and “rule of law” is usual these days. See GERARDO TREJOS & HUBERT MAY, *CONSTITUCIÓN Y DEMOCRACIA COSTARRICENSE* [CONSTITUTION AND COSTA RICAN DEMOCRACY] 29 (2001).

11. See RAFAEL LUCIANO RICHARDO, *JUSTICIA CONSTITUCIONAL, EL CONTROL DE CONSTITUCIONALIDAD Y EL AMPARO COMO INSTRUMENTOS DE PROTECCIÓN DE DERECHOS FUNDAMENTALES* [CONSTITUTIONAL CONTROL AND INJUNCTIONS AS INSTRUMENTS TO PROTECT FUNDAMENTAL RIGHTS] 5 (2006) (quoting José Sánchez Acosta).

12. [Editor's Note: The source for this quote was not provided by the printing deadline.]

tion; it also spells out negative consequences for states that fail to comply with its provisions: "[A]ny unconstitutional alteration or interruption of the democratic order . . . constitutes an insurmountable obstacle to the participation of that state's government in the Summits of the Americas process."¹³

On the other hand, it is evident that constitutions have shared a design that more or less envisions such a division and balance of powers. The constitutions of the last generation manifest a great conceptual clarity with regard to the distribution of competencies—that is, functions—among the branches of the government, including such interesting provisions as the following one found in the Constitution of Colombia: "The different organs of the state have separate functions, but they collaborate harmoniously in order to achieve their ends."¹⁴

In the same sense, the Constitution of the Republic of El Salvador provides that: "The attributes of the organs of government are non-delegable, but those organs shall collaborate among themselves in the exercise of public functions. The fundamental organs of the government are the Legislative, the Executive and the Judicial."¹⁵

In the case of Costa Rica, the Constitution provides: "The Government of the Republic . . . is exercised by three branches, distinct and independent one from another: Legislative, Executive and Judicial. None of the branches can delegate the exercise of its own functions."¹⁶

These constitutions speak of separation and independence of the powers to signify a division of labor in achieving the ends of the state, a division which itself carries an element of control. And even when we encounter constitutional language that speaks of or permits "collaboration" among branches, this collaboration must take place within the framework of the rule of law. So even when calling for "harmonious collaboration" (as in the case of the Colombian Constitution), that collaboration cannot put in danger the principle of functional legality, which implies that in order to achieve its ends, each branch of government may do only those things that it is constitutionally permitted to do.

13. Inter-American Democratic Charter, *supra* note 8, pmb1.

14. CONSTITUCIÓN DE 1991 art. 113 (Colom.).

15. CONSTITUCIÓN DE 1983 art. 86 (El Sal.).

16. CONSTITUCIÓN POLITICA DE LA REPÚBLICA DE COSTA RICA DE 1949 art. 9 (Costa Rica) [hereinafter CONSTITUCIÓN DE 1949].

Applying these considerations to the activity of judges—those who I wish to center my presentation on—one cannot “flexibilize” the judicial role under the guise of inter-branch collaboration so as to cast doubt on judicial independence. To that effect, it is not surprising that most codes of judicial ethics deal specifically with this topic. For example, the new Iberoamerican Code of Judicial Ethics tells us: “The judge with his attitudes and conduct should indicate he/she is in no way influenced—either directly or indirectly—by any other private or public power, either external to or within the judicial system.”¹⁷ (Note the importance of the judge’s both being and appearing to be independent.) Similarly, the Code of Judicial Ethics of Costa Rica provides:

He who is called to impart justice must be a person conscious of his high mission, and must take care that his actions correspond to standards of conduct that give honor to the integrity and independence of his function, at the same time stimulating respect for and confidence in the judiciary.¹⁸

Thus, on the same level as the normative “boilerplate” that assures the judge independence in the discharge of judicial functions, the judge is individually required to display everyday conduct and demeanor that leaves no doubt about his or her own adherence to that important principle.

The Council of Justice of the General Government of Catalonia, Spain speaks to us explicitly on the question: “If we truly believe in the rule of law and in the forward-looking democratic structuring of our society, the Administration of Justice, which we can understand only as a public service, must day by day win its legitimacy and develop all that society expects and demands.”¹⁹

Based on this, I believe that provisions such as those quoted above are not made in vain, but rather pursue a clear end in the sense that:

Judicial independence is one of the indispensable conditions of the rule of law, having its basis in that, in this kind of state, the relationship between the governors and the governed is

17. Ibero-American Code of Judicial Ethics art. 3, June 22, 2006, available at <http://www.cumbrejudicial.org/eversuite/Templates/Cumbres/swf/docsuno/CodigoEticoIngles.pdf>.

18. Code of Judicial Ethics of Costa Rica (1999).

19. Núria de Gispert i Català, *La Reforma de la Justicia a finales del Siglo XX [The Reform of Justice at the End of the Twentieth Century]*, in FORUM FIATC, GENERALIDAD DE CATALUÑA [FIATC FORUM: MAJORITY OF CATALONIA], at 6 (1998).

regulated by the law. . . . Using this focus, Luis María Díez-Picazo maintains that judicial independence is the keystone of the rule of law [and], from the point of view of its political legitimation, it is indispensable to the survival of that kind of state. The perception of the citizens that their judges act with independence is one of the conditions necessary for them to adopt and appreciate the values on which the rule of law is founded.²⁰

Hence, independence, separation, division, equilibrium, collaboration among powers—yet also control—are concepts that must be treated with special caution because of an almost-natural tendency by public authorities to exceed their power or to engage in functions belonging to others.

Of course, the democratic quality of countries must be measured by the practical operation of their juridical and political systems, i.e., by how those in authority actually defend the separation of powers. The theoretical design of a system is one thing; the actual capacity of that system to defend itself against threats to essential principles of democratic life is another.

In Latin America, for example, a region so inclined to *caudillismo*,²¹ efforts to support the separation of powers are essential to the creation (or, as the case may be, the strengthening), of political, social, and legal consciousness relating to democracy and the rule of law. But I insist that this is not an easy task.

It is therefore worth contemplating that, in the most recent French constitutional doctrine, the division of powers is considered, naturally, a firm republican principle.²² Accordingly, I would encourage the enthusiastic undertaking and practice of that republican principle in accordance with our social and political realities.

In the OAS, it was necessary to take a forceful position favoring democracy and the rule of law, since, in recent times (twenty or thirty years—nothing in the history of societies), there have been clear ruptures of the constitutional order, most often based on the assumption of all power by Executives (that is, by “presidents”). Worrisome experiences from those years in Haiti, Guatemala, Ec-

20. CRISTINA BEGNÉ GUERRA, *JUECES Y DEMOCRACIA EN MÉXICO* [JUDGES AND DEMOCRACY IN MEXICO] 50 (Miguel Ángel Porrúa, ed. 2007).

21. Roughly, rule by a strong authoritarian leader.

22. See MICHEL-HENRY FABRE, *PRINCEPS REPUBLICAINS DE DROIT CONSTITUTIONNEL* [REPUBLICAN PRINCIPLES OF CONSTITUTIONAL LAW] 83 (4th ed. 1984).

uador, Peru, and Panama, among others, had much to do with the OAS's decision to adopt the Democratic Charter and all that it implies.

Apart from that, no doubt, the Charter will dissuade those who are tempted to play games with democracy, knowing that their misdeeds will not be committed with impunity under International Law.

But, of course, the examples foreseen in the Democratic Charter, such as the "interruptions of the democratic order," are extreme cases. Other situations may be less severe, but they are no less significant to the continuing security of the rule of law. It is in relation to these issues that I wish to continue my presentation.

III. THE DOCTRINE OF MONTESQUIEU AND THE JUDICIARY

This portion of my presentation addresses the cutting edge of the theme that I have been assigned. For almost twenty years, I have been part of the constitutional judiciary of my country. Without denying Montesquieu the pedestal that has been built for him, there is an aspect of his juridical-political effort that merits reservation—a critical questioning.

Although it may not have been his purpose, I think that it has been at least a consequence of his doctrine within the global argument that he made about three topics. And lamentably, because of the social and institutional conventions of his era, Montesquieu did not give much consideration to the judicial branch, which he came to consider an "empty power," a "power devoid of force."

This follows, first of all, from the overvaluation of the law as the preeminent product of the general will. Judges were categorized as mere subordinates of Parliament, absolutely subject to it, "inanimate beings" who were thus reduced to the condition of being "the mouth that pronounces the words of the law."

Judges have paid dearly for this, at least in Spanish America, direct tributaries (as we have been) of French Revolutionary ideas, concepts, and even institutions.

We know that Alexander Hamilton referred to the judiciary as the least dangerous branch of government. Even so, we cannot equate that with its being the "powerless" branch of government. Hamilton acknowledged it, rather, in a sense contrary to that of the "weakness" of which Montesquieu spoke and of which we have complained. Thus, Hamilton spoke in recognition of the judiciary's institutional and social importance.

In the scheme of things that corresponds to Montesquieu's ideas, it is not an accident that Napoleon himself designed the Court of Cassation, the highest tribunal of justice in France, for the sole purpose of guarding and protecting the statutory law—particularly his shining star of law, the Civil Code. From there flourished the Exegetical School of Law, directed to finding the intent of the statutory texts and nothing beyond, given that the statutory law was a finished, perfect product, and therefore was untouchable by the judge. It was from there that a specialized tribunal was created to bring back to the legislature any question of interpretation.²³

The foregoing is quite distinct, of course, from the Anglo-Saxon tradition in which judges have become makers of rules through the doctrine of precedent.

As a result, in those first days of the earliest constitutionalism (the Nineteenth Century), the rights of persons were recognized, but those rights could be created or destroyed by statute. Today, due to other sources of juridical-political influence, we understand that the laws (that is, the statutes) prevail only insofar as they respect the rights of persons. And, in a stricter sense, as it is fashionable to say today because of the influence of the German Basic Law of 1947, statutes prevail only insofar as they respect the "essential content" of fundamental rights.

Although the power of the tribunals of justice to declare the unconstitutionality of a law was established in 1803 with the well-known doctrine developed by Chief Justice Marshall in *Marbury v. Madison*,²⁴ one had to wait until 1920 for something similar to be recognized and accepted in Europe. Professor Alvarez Conde puts it this way:

[I]n the United States, there would arise rapidly the idea of Constitutional Justice and control of the constitutionality of the laws. Europe, for its part, reacting to this development of United States constitutionalism, would continue to maintain the idea of the supremacy of the [statutory] law as the expression of the popular will. Good proof of this is that the French Third Republic—perhaps the most genuine expression of lib-

23. One of the most illustrious exegetes on the civil law of the nineteenth century, and the one who most influenced its spread, Portalis said on one occasion, "I know nothing of the Civil Law. I teach the Napoleonic Code." From this, we can understand to what extent, according to this tradition, "law" equals "statutes."

24. 5 U.S. (1 Cranch) 137 (1803).

eral constitutionalism—would not use the term “constitution”, but rather “law.”²⁵

Thus, even now we find that what we know as the Judicial Branch, a power of the state, in France is still called the “judicial authority,” and the Constitution there provides that the President of the Republic is the “guarantor” of judicial independence.²⁶

Equally, or even more important is that to this day in France, as part of the legacy of the supremacy of the legislator, no judge or tribunal, no matter how high, can fail to give effect to a law, and the Constitutional Council, created in the style of a constitutional tribunal, may exercise only prior control of constitutionality. (The competency to declare laws unconstitutional both before and after they have entered into effect is a typical attribute of other constitutional tribunals in the world.)

This situation, considered obsolete in our age, has long earned severe criticism. The renowned French professor Luis Favoreau, who died not long ago, tells us that the most celebrated French public law specialists, such as Berthélémy, Duguit, Hauriou, Mestre, and Rolland, all urged the ordinary French courts to have the courage to follow the American example. Nevertheless, the results were nil, for historically there has not been any instance where a judge has failed to apply a law on the grounds that he considered it contrary to the Constitution. Favoreau concludes: “That is the position today, and writers at present hardly support the United States system in principle.”²⁷

Perhaps not exclusively due to Montesquieu, but rather because of his established ability to influence others, he certainly contributes to the perpetuation of the position of the French judge with respect to the law.

25. 1 ENRIQUE ALVAREZ CONDE, CURSO DE DERECHO CONSTITUCIONAL [COURSE ON CONSTITUTIONAL LAW] 154 (4th ed. 2003) (1994).

26. Nevertheless, Frank Moderne contends, citing Thomas Renoux’s *Justice et politique: pouvoir ou contre-pouvoir* [Justice and Policy: To Provide or Curb Power], that it can be admitted that justice constitutes a public power alongside the Legislative Power and the Executive Power, such is its clarification in various constitutions (Spain, Germany, Italy, etc.). In France, the use of the expression “*autorité judiciaire*” (judicial authority) in the Constitution of 1958 (Article 66) does not prevent its recognition as an authentic constitutional “power.” Eduardo Sancho González, *La Jurisdicción Constitucional frente al Poder Público* [Constitutional Jurisdiction before Public Power], in EL PAPEL DE LA PROCURADURÍA GENERAL DE LA REPÚBLICA EN EL NUEVO MILENIO [THE PAPER OF THE GENERAL OFFICE OF THE JUDGE ADVOCATE GENERAL OF THE REPUBLIC IN THE NEW MILLENIUM] (2001).

27. Louis Favoreu, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND RIGHTS, at 43 (Louis Henkin & Albert Rosenthal eds. 1990).

But one must acknowledge that that negative view of judges was, in principle, well deserved. Historically speaking, I dare to say that the French judiciary of the absolute monarchy earned for itself this devalued treatment given its aristocratic roots. During the "Old Regime" the position of judge was performed by a privileged class of persons who bought their position ("the nobility of the robe") and exercised it with complete dependence upon the sovereign. Judges dispensed a "delegated justice," delegated directly by the King in a system in which he himself was the first magistrate who retained full right to dispense justice and who could at any time take jurisdiction of a case and decide it personally, or issue instructions as to how it should be decided. It was thus impossible for judges to control the power of such a strong sovereign.

But the overriding status given to statutory law has provoked reactions, and it is not surprising that the respected Twentieth Century Italian jurist Francesco Carnelutti criticized Montesquieu's negative influence and at the same time called for a reexamination of the question when he observed:

You should not allow yourself to be seduced by the myth of the legislator. Rather you should think of the judge, who is truly the central figure of the law. A juridical order can be achieved without legislated rules, but not without judges. The fact that in the continental European school the image of the legislator may in another age have surpassed that of the judge is one of our gravest errors.

It is very much better that a people have bad legislated rules but good judges than have bad judges and good legislated rules.²⁸

Carnelutti is supported in principle by sociological data, because his reflection ends by pointing out that the law considers persons as abstract categories, while judges deal with the flesh-and blood person's difficulties and needs.

28. LUIS RECASÉNS SICHES, *NUEVA FILOSOFIA DE LA INTERPRETACIÓN DEL DERECHO* [NEW PHILOSOPHY OF LAW INTERPRETATION] 130 (2d ed. 1973) (quoting Francesco Carnelutti).

IV. THE FUNCTION OF JUDGES IN THE RULE OF LAW

Because of what has been said, I want to center the second part of my presentation precisely on the role that justice plays in the rule of law.

It is unanimously agreed by those who study the history of human institutions that justice precedes legislation. That is to say, historically and logically, judges assumed a function in society long before there came to be tribunals to produce norms, since in the beginning, judges decided cases on the basis of the customs or the culture of the social group to which he belonged. Therefore, it is the judges, or what is the same thing, the adjudicatory function, that performs (or should perform) a relevant role in the rule of Law.

Furthermore, not all states, not all constitutions deserve to be called democratic and faithful to the rule of law. Instead, there must be established "some limits upon the power of the governors by means of the guaranteeing of human rights and the creation of controls among the different organs of the State."²⁹

In the design and overall ordering of the State, which is a matter for the constitution, one of its principal functions is "to limit power through the technique of the division of powers and mutual controls, the elevation of rights, liberties and guarantees, and the establishment of a system for their defense."³⁰

So it is the history of ideas, with its ups and downs, with its advances and retreats, that marks the lines that can be perceived back to its early milestones in the Declaration of the Rights of Man and of the Citizen of 1789. From the beginning of the contemporary period, there is a connection between separation of powers and the guarantee of human rights (art. 16) that is not accidental. On one hand, it fulfills an important function of ensuring liberty through the limitation of power and "the rule of law" in the strict sense; on the other hand, it makes possible the self-determination of individuals, what we might call the "democratic function." From that perspective, we reap only benefits for the health and stability of organized social life.

Furthermore, this essential connection between separation of powers, limits on the exercise of power, and the guarantee of hu-

29. [Editor's Note: The source for this quote was not provided by the printing deadline.]

30. Iván Escobar Fornos, *La Reforma Constitucional [The Constitutional Reform]*, in *BREVIARIOS JURÍDICOS* NO. 1, at 11 (2004).

man rights “manifests the almost unanimous assertion that there is no constitution but a democratic constitution.”³¹

In other words, without those conditions and characteristics, we will be facing something that we cannot call “constitutional, democratic.”³²

But we must not conform ourselves to what is merely written in text. This has coined the term *nominal constitution*—one which appears on its face to be formally democratic, yet one whose democratic mandates are, in practice, far from being carried out. It may be that one is dealing with states in which the constitution is adopted as part of a process of return to democracy, and is therefore fragile, or one is dealing with a constitution in effect in a society “in which there is no democratic culture or tradition.”³³

That position coincides with the thesis of Max Weber, according to which law is a science in which the dogmatic part, consisting of legal norms, interacts with the juridical-sociological part, consisting of the methods to effectively carry out those norms in such a way that when the former exists without the latter, there results doubt about the efficacy and the very concept of law.³⁴

Finally, we are painfully aware that there are many states that simulate the adoption of democracy and adherence to International Human Rights Law without any sincere commitment to carrying them out. It is a “rhetorical adhesion,” in which there is as yet no acceptance that “there exists no other legitimacy than that which is based on human rights and self-determination.”³⁵

And sooner rather than later it will be discovered that there is no legitimacy outside of law and democracy, understood, of course, in Weber’s context.

One must accept that in the history of humanity and ideas, as important and beneficial as they may be, are subject to highs and lows, to advances and setbacks. And political matters are especially susceptible to these vicissitudes.

31. GOIG MARTÍNEZ ET AL., *EL SISTEMA CONSTITUCIONAL ESPAÑOL SEGÚN LA JURISPRUDENCIA DEL TRIBUNAL CONSTITUCIONAL* [THE SPANISH CONSTITUTIONAL SYSTEM ACCORDING TO THE JURISPRUDENCE OF THE CONSTITUTIONAL TRIBUNAL] 68 (2004).

32. CONDE, *supra* note 25, at 68.

33. José A. Sierra González, *Rule of Law*, in *THE KAF DEMOCRACY REPORT 2006* (The Konrad Adenauer Foundation, 2006), at 133.

34. See CARLOS ARAYA & NAZIRA CHEVES AGUILAR, *CONSTITUCIÓN POLITICA COMENTADA DE COSTA RICA* [POLITICAL CONSTITUTION OF COSTA RICA WITH COMMENTS] at xxv (2001).

35. OTFRIED HÖFFE & JOSEF ISENSEE, *PANORAMA DE FILOSOFIA POLITICA* [OUTLOOK OF POLITICAL PHILOSOPHY] 32 (2002).

V. THE INDEPENDENCE OF JUDGES

Obligated by the richness of this theme, I have already advanced some ideas concerning the essential quality of the adjudicatory function of judges. I insist, then, on the key role of judges in the rule of law. Having established that one component of the rule of law is the division of powers, we should now turn to its necessary complement, the existence of real and effective controls on the exercise of power. We will encounter the “why” of the need to rely on justice and independent judges.

In the modern constitutional state, the principle of judicial independence has its origin in the theory of *separation of powers*, in which the Executive, the Legislative and the Judicial are three branches of government which, especially, constitute a system of mutual checks and balances that contribute to the prevention of abuses of power to the detriment of a free society. This independence signifies that the Judicial Branch, as an institution, or the judges individually, should decide specific cases and exercise their professional responsibilities without being subjected to any influence from the Executive, the Legislative or any other inappropriate source This principle of the independence of the judges was not invented for the personal benefit of the judges as such, but rather to protect persons against abuses of power . . .³⁶

The system, then, must guarantee judicial independence, because upon that depends the effective functioning of the rule of law.

In practice, this is the most important demand of the separation of powers. It is typical that the same political party that controls the Executive Power also holds a majority in Congress whenever the electorate, at any given time, wants it that way. This is not so with the judiciary. Alejandro Maldonado, ex-President of the Constitutional Court of Guatemala, cites Francisco Tomás y Valiente, ex-President of the Spanish Constitutional Tribunal (who was assassinated by the terrorist group ETA), that “[i]n the constitutional tribunal, no one represents anyone.”³⁷

Independent judges, then, are judges who can decide matters submitted to them with absolute impartiality and without subjec-

36. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS IN COOPERATION WITH THE INTERNATIONAL BAR ASSOCIATION, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS 115 (2002).

37. ALEJANDRO MALDONADO, JURISDICCION DE LA POLÍTICA Y DEL PODER [JURISDICTION OF POLITICS AND POWER] 6 (2006).

tion or subordination. In other words, they are subject only to the Constitution and the Law—as Professor Prieto Sanchis pointed out, the Constitution is an omnipresent norm and it binds the judge, not by means of the law, but independently of it.³⁸

This is sometimes ignored or misunderstood: upon taking office, the judge, like any other official, promises to enforce the Constitution and the laws, but the latter insofar as they conform to or adapted to constitutional patterns, because a law that is contrary to constitutional principles or values cannot bind the judge, nor does he have reason to apply it. To require a judge to apply an unconstitutional law is tantamount to obligating the judge to commit an attack on the rule of law—as it has been characterized, to commit a “sin of constitutional high treason.”³⁹

Subjecting the judge only “to the Constitution and to the law” under these terms is what we know as the principle of independence. In other words, that, to hear and decide cases, the judge cannot pay attention to any directions that do not come from the principles and values contained in the Constitution and the laws, with strict adherence to their normative hierarchy.

Of course what we foresee as the “subjection” of the judge to the law refers to the moment of pronouncing judgment. But this does not mean subjection to the mechanistic style of which Montesquieu speaks. It is interesting to take into account the nuance that we find in a clarifying phrase of then-President of the General Council of the Judicial Power, Xavier Delgado Barrio, who remarked: “The function of the judges contains a range of discretion that the law itself offers the judge in the resolution of the concrete case. Nevertheless, while he is not free, [his function] is characterized by what I would call ‘thoughtful obedience.’”⁴⁰

38. LUIS PRIETO SANCHÍS, *JUSTICIA CONSTITUCIONAL Y DERECHOS FUNDAMENTALES [CONSTITUTIONAL JUSTICE AND FUNDAMENTAL RIGHTS]* 166 (2003).

39. So spoke the Costa Rican Professor Eduardo Ortiz Ortiz, according to the minutes of the Committee on Juridical Affairs of the Legislative Assembly, when, as an expert, he appeared in the process of the creation of the Constitutional Chamber that resulted in Laws No. 7128 of August 18, 1989 (constitutional amendments that gave birth to the Chamber) and No. 7135 of October 11, 1989 (the promulgation of the Law of Constitutional Jurisdiction).

40. Xavier Delgado Barrio, *PRINCIPIOS Y CONSTITUCIÓN: SITUACIÓN Y FUNCIONAMIENTO DE LAS SALAS Y SERVICIOS Y MOVIMIENTOS DE PERSONAL EN EL TRIBUNAL SUPREMO. MEMORIA SOBRE EL ESTADO Y FUNCIONAMIENTO DE LOS JUZGADOS Y TRIBUNALES DE JUSTICIA [PRINCIPLES AND CONSTITUTION: STATE AND OPERATION OF THE CHAMBERS, SERVICES, AND PERSONNEL REPLACEMENT IN THE SUPREME TRIBUNAL: MEMOIRS ON THE STATE AND OPERATIONS OF THE INFERIOR COURTS AND TRIBUNALS OF JUSTICE]* [page number unknown] (1999). [Editor's Note: *The page number upon which this direct quote*

What Barrio says, then, is that judges apply the norm or law not literally or textually. Always there is a margin of interpretation that permits judges to apply the same provision to different fact situations in different historical moments.

But judicial independence continues to be an aspiration. It is not something given, but rather a work in progress.

In Central America, judges lacked that quality of independence, not only because it was evident and because society so understood it, but because those very judges characterized themselves as only "slightly" independent. In a 1992 survey undertaken by the Interamerican Institute of Human Rights, more than 370 judges from throughout the region acknowledged being subject to inappropriate conditions and pressures from the judicial hierarchy (that is, Justices of their Supreme Courts), military officers, politicians, and even business leaders.⁴¹

This has its origin, in large measure, in the broad discretion that higher-ranking judges have traditionally had over the selection of new judges. Nominations were made on the basis of purely subjective criteria like friendship, family relationships, political affiliation, and home town, and in the absence of any true competition that measured the professional fitness, skill and ethics of the aspirants, and of course, without any programs for the formation of prospective judges prior to their selection. On this latter subject, crucial to the condition of justice, the words of Clifford Wallace seem to me to be important: "if we define what is the role of the judge, we will at the same time determine which are the subjects with which judicial education must deal."⁴²

The Central American situation has been changing, perhaps slowly, but nonetheless constantly throughout the region, although as I have said, we are still in the process of evolving to a better condition.⁴³

appears was not provided by the printing deadline. Due to the source's length and language, locating the page number using our own translators was impractical.]

41. See LUIS FERNANDO SOLANO & DANIEL LUCRUBIER, *LA SITUACIÓN DE LA JUSTICIA: UNA VISIÓN DESDE EL PROGRAMA DE CAPACITACIÓN A JUECES DE CENTROAMÉRICA* [STATE OF JUSTICE: VISION FROM THE EDUCATIONAL PROGRAM FOR CENTRAL-AMERICAN JUDGES] 72 (1997).

42. Clifford Wallace is former Chief Judge of the United States Court of Appeals for the Ninth Circuit. He says that his statement is based on his long judicial experience and on research into justice in Asia and Africa. He made the statement in the Preparatory Conference of the International Organization of Judicial Schools, held at Jerusalem in December 1999.

43. Professor Robert S. Barker, in his article *Judicial Review in Costa Rica: Evolution and Recent Developments*, 7 SW. J.L. & TRADE IN AMERICAS 267 (2000), notes that the Mexican jurists Jorge Carpizo and Héctor Fix Zamudio concluded in 1985 that Costa Rica had

Finally, a wide-ranging and recent study of the judiciary in Central America, undertaken *in situ* by the University of Salamanca (Spain), indicates:

In order that the judicial power and its members can carry out their functions of building the rule of law, they need to be independent in the face of the other powers of the state and of groups and individuals who have political and economic power. . . . In order for judicial independence to be articulated, it needs to be secured by the rule of law; that is, it is necessary that the laws at least secure structural independence (decent salaries, lengthy terms of office, a transparent, merit-based selection process, etc.) so that the judicial power is free from influences that are not those of a government of laws.⁴⁴

And even though the study deals with even more considerations related to the importance of judicial independence, I believe that the above-quoted paragraph provides clarity about what we hope for in the way of judicial independence in the modern constitutional state.

Therefore, it is important to focus our attention on the profile of judges, if we regard them as guarantors of the rule of law and protectors of the rights of persons. Obviously, it is not that of a bureaucratic judge, caught up in office routine, but neither is it that of a “rambo” judge, to use the term employed by the Italian journalist Jean Paolo Pansa in referring to the situation in his own country:

[T]he image of the judge-functionary disappeared some years ago, to be replaced by that of the judge-magistrate, who is not beholden to the political system, but rather to the law and constitutional values. . . . There has been, and there continues today, an effort by the judges to regain their true function and to exercise it without discrimination of any kind, in accor-

the only “truly” independent judiciary in Latin America. This study, which Professor Barker characterizes as very important, was published under the title *La necesidad y la legitimidad de la revisión judicial en América Latina: Desarrollo Reciente*. He adds that the conclusions of the Mexican authors are supported by Professor Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1 (1987).

44. UNIVERSIDAD DE SALAMANCA ET. AL., LA JUSTICIA VISTA POR LOS JUECES: DIAGNÓSTICO DEL FUNCIONAMIENTO DE LOS SISTEMAS JUDICIALES CENTROAMERICANOS [JUSTICE AS SEEN BY THE JUDGES: DIAGNOSIS OF THE OPERATION OF CENTRAL AMERICAN LEGAL SYSTEMS] 72 (2004).

dance with the principle of the equality of everyone before the law. . . .⁴⁵

Judges must be the line of defense where power is restrained at the stone walls of guaranteed rights of persons. They will act in the face of the legislator and the public administration, and also in the face of the factious powers that display their force (sometimes preponderant force) in our societies.

This “the power that restrains power,” as Montesquieu himself said for other purposes, is not to strengthen the role of the judiciary. And it should be so, because as the authors who have studied the phenomenon of power have insisted, historically there is a tendency for the Executive-Presidential Power to see itself as the heir of the old monarch and to act imperiously. There is also a tendency for the Legislative Power to consider itself to be the sovereign people rather than their representative, and so each power, in turn, wishes to place itself above the others, and above all of society.

VI. THE CONSTITUTIONAL TRIBUNAL AS THE CHECK ON POWER

As I see it, the crowning feature of a system of justice is in the functioning of a system of constitutional justice. It is key that there exist a Constitutional Tribunal, whatever name it might have, with authority to make itself the guarantor of the rule of law and the supremacy of the Constitution. In other words, “the existence of a Constitutional Tribunal is not a prerequisite for the constitution to be a juridical norm, and the supreme norm, but instead is a consequence of that condition.”⁴⁶

From there, we consider the characterizations “guarantor,” “supreme interpreter,” “custodian,” and “guardian” of the Constitution, which a Constitutional Tribunal usually receives. As Professor Moderne says:

the position of preponderance in which the constitutional judge is placed necessarily results from the conception of the Constitution as the supreme norm. As the Constitutional Tribunal is normally the constitutional organ of the state, independent of the others and supreme in its order, in that it is commissioned by the constituent power for the adjudicatory

45. STEFANO MOGINI, *L'ETHIQUE DU MAGISTRAT DU PARQUET* [ETHICS OF PROSECUTION] 16 (1994) (quoting Jean Paolo Pansa).

46. CONDE, *supra* note 25.

defense of the normative primacy of the Constitution and as its supreme interpreter, it has the competence to exercise control of the constitutionality of the laws and of normative dispositions having the force of law.⁴⁷

In additional justification, I share the standard of Professor Mauro Cappelletti, who, referring to the role of constitutional justice from the social perspective, said that it is in itself a necessary constitutional value for any form of democratic government.⁴⁸ And why? Because “[constitutional] jurisdiction is not the simple subjection of the judge to the law, but rather must be understood in light of the critical analysis of its significance as a method of controlling the constitutional legitimacy [of the law].”⁴⁹

The control of the constitutionality of the laws implies the breaking of the omnipotence of the law as the expression of the general will and introduces “a disturbing element into the classical dogmas of democratic constitutionalism.”⁵⁰ Even so, the presence of a Constitutional Tribunal is also a cause of doubts and even heated debates, since the competencies on which it normally depends carry written the possible germ of a collision with the powers of the other bodies of the state. It is a source of contradiction between those who praise it and those who abhor it. Arturo Hoyos, ex-President of the Supreme Court of Justice of Panama, reviews the thesis of Ron Hirschl concerning increasing judicial power and possible self-restraint by those who have power and what is behind it. He writes:

Nevertheless, a plausible explanation for the voluntary self-restraint of those who display political power, upon the giving of greater power to the judiciary, either initiating or refrain-

47. González, *supra* note 26, at 35 (quoting Moderne). Although I have not had in hand the French-language text of Professor Moderne, it seems to me that there could have been a problem of translation, since the impression given by the word *prepotencia*, when it refers to the location of the constitutional judge in the system, perhaps is not that used by the professor, which more appropriately could be *preponderancia*, which fits better in that context. But I note that this is only my impression, because I do not have the document in the language in which it was originally written.

48. See MAURO CAPPELLETTI, LA INFLUENCIA DE LOS VALORES CONSTITUCIONALES SOBRE LA FORMA DE GOBIERNO: EL PAPEL DE LA JUSTICIA CONSTITUCIONAL [INFLUENCE OF CONSTITUTIONAL VALUES OVER THE FORM OF GOVERNMENT: THE ROLE OF CONSTITUTIONAL JUSTICE] (1984).

49. Luigi Ferrajole, LOS FUNDAMENTOS DE LOS DERECHOS FUNDAMENTALES, DEBATE CON BACCELLI, BOVERO, GUASTINI, JORE, VITALE, AND ZOLO [FUNDAMENTALS OF FUNDAMENTAL RIGHTS: DEBATING WITH BACCELLI, BOVERO, GUASTINI, JORE, VITALE, AND ZOLO] 55 (2001).

50. González, *supra* note 26, at 191 (quoting Moderne).

ing from obstructing such reforms favoring the judges, is that they retain political, economic, and legal power, calculating that their interests are better protected if they respect the limits imposed by greater judicial intervention in the sphere of policy decisions.

The aforementioned jurist contends that many of the powers of constitutional interpretation, and through them, of change and development of Constitutions that have been issued in new democracies, representative of the new constitutionalism, have resulted from interested actions, taken by hegemonic socio-political groups fearful of losing in a substantial way their political power. The constitutionalization, and its consequent judicial power, can provide an effective solution for influential groups that possess greater access to and influence over the legal world and who, before a serious erosion of their popular support, can choose to ensure in their way their own policy preferences as against the growing influence of peripheral groups and interests. . .⁵¹

One must consider the appearance of other bodies which, together with the constitutional tribunals, have gained important places in the structure of the state on the basis of their exercise of extremely delicate powers (such as electoral tribunals that are charged with safeguarding the electoral process, or comptroller-ships or courts of accounts that are charged with enforcing the proper use of public funds). Here, the greater complexity of the structure of the State, with tribunals created precisely to control power, not only does not impair democracy, but rather strengthens it and strengthens also transparency and accountability, which are emerging values in the postmodern state. As Daniel Webster says: "Nothing is more deceitful or fraught with greater dangers than the pretence of simplifying government. The simplest governments are the despotisms."⁵²

51. Arturo Hoyos, *El Papel del Juez Constitucional en el Estado de Derecho: Proteger la Democracia, Tutelar los Derechos Fundamentales, y Controlar el Poder* [The Role of the Constitutional Judge under the Rule of Law: Protecting Democracy, Guarding Fundamental Rights, and Controlling Power], in MEMORIA DEL IV CONGRESO PANAMEÑO DE DERECHO PROCESAL [REPORT OF THE FOURTH CONGRESS OF PANAMANIAN PROCEDURAL LAW] (2007), at 10.

52. ALEJANDRO MALDONADO, NUESTRA CONSTITUCIÓN [OUR [GUATAMALAN] CONSTITUTION] 27 (2001) (quoting Daniel Webster).

VII. THE CONSTITUTIONAL TRIBUNAL AND THE PRINCIPLE OF DIVISION OF POWER: EXAMPLES FROM COSTA RICAN PRACTICE

To complete my presentation, I would like to describe and comment on three very specific situations, which are presented to illustrate the operation of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, and which relate to the overall theme dealt with herein. I add, so that the audience may have an idea of the work of that tribunal, that between September of 1989, the date of the initiation of its functions, and 2007, the Constitutional Chamber issued 160,000 judgments of every type: habeas corpus, amparo, unconstitutionality, legislative and judicial consultations, binding and advisory, and conflicts of authority.

A. *The Attack on the Powers of the Constitutional Jurisdiction*

This first example presents the central debate over the role of a constitutional tribunal or court in the present-day rule of law, specifically with respect to the division of powers. It deals with an event that could be characterized as anecdotal, if not for the seriousness of what is involved. It happened that in tranquil Costa Rica, a Deputy (that is, a member of the Legislative Assembly), displeased by the authority given to the Constitutional Chamber in the matter of control of constitutionality, presented a bill in 2004 for the amendment of the Law of Constitutional Jurisdiction, so that in the future, whenever the Constitutional Chamber would declare a law unconstitutional, the judgment would have only the effect of not applying the law to the particular concrete case, contrary to what we have today, in that the judgment that declares the unconstitutionality of a law implies its nullity *ex tunc*. According to the 2004 bill, a judgment of unconstitutionality would have to be transmitted to the Legislative Assembly, so that the Deputies would decide if the law in question should be repealed or reformed to conform to the constitutional standards formulated by the Chamber in the judgment in the case.⁵³

53. I will not make reference to an additional question that would become part of any debate over the bill, but that would not arise until the Legislative Assembly approved the bill in its first debate, since the Assembly would also *then* have to consult the Constitutional Chamber. The additional question has to do with the fact that the bill deals only with the statute regulating the Constitutional Chamber, without dealing with the 1989 constitutional reform that created the new constitutional jurisdiction. By focusing on the statute, while not dealing with the constitutional norm, the bill raised not only policy questions, but juridical ones as well.

As the bill explains, a matter resolved by the Chamber would have to pass through the sieve of the Legislative Assembly. The central objective of this would be to resolve the role historically conceded to the Parliament, to be the "First Power of the Republic," and given that premise it would be incongruous that a body of lesser democratic authority (i.e., a tribunal) could render ineffective something done by a body of the highest popular representation (i.e., the legislature).

By virtue of the provisions of article 167 of the Political Constitution, the Legislative Assembly was required to submit this bill to the Supreme Court of Justice because it dealt with the Court's "organization and functioning." The bill was submitted to the Court, and the Court issued a negative statement. Notably, as part of the protective armor that the Constitution provides to the independence of the Judicial Power, article 167 provides that the Court's statement binds the Legislative Assembly in that, if the Assembly wishes to ignore the Court's criteria and pursue the project, the bill must be approved by two-thirds of the total number of Deputies to become a law. We know that historically, this requirement of a qualified majority has become a difficult barrier for the Deputies to overcome. In this case, the bill in question remained in the legislative process, but it demonstrates that the old view (that is, of legislative supremacy) has not yet been completely abandoned.

The negative criterion of the Supreme Court was based on two quite concrete concerns. First, the Court said that the bill would be a leap back to the distant past, by putting into the hand of the Legislative Assembly the final word as to the unconstitutionality of a law, an option already historically tested and discarded. After the French Revolution of 1789, there were proposals to create a tribunal that would hear all violations of the Constitution, and the Constitution of the year VIII (1799) empowered the Legislature, through the "Conserving Senate" to decide upon all acts that were denounced as unconstitutional. Professor Robert S. Barker has observed that that model was copied in the Spanish Constitution of Cádiz of 1812.⁵⁴ According to Francisco Hernández Segado,⁵⁵

54. Barker, *supra* note 43, at 4. Professor Barker makes reference to the work, *El Despertar Constitucional de Costa Rica [Constitutional Awakening of Costa Rica]*, by Jorge Sáenz Carbonnel, to the effect that Costa Rica also had adopted such a constitutional norm, although it must be said that it was not of great importance.

55. See Centro de Documentación y Estudios Constitucionales del Uruguay [Center for Documentation and Constitutional Studies of Uruguay], *La Jurisdicción Constitucional en América Latina: Evolución y Problemática desde la Independencia hasta 1979*

this model would arrive in all of America in the nineteenth century, but this system of “first constitutionalism” or liberal constitutionalism never achieved a permanent foothold, because, in the words of the renowned Costa Rican Professor Carlos José Gutiérrez, it was like appointing the “mice as guards of the cheese.”⁵⁶ Returning to the bill to amend the Law of Constitutional Jurisdiction, it was an attempt to go back almost two hundred years, something that did not fit within the present-day conception of the constitutional and democratic state.

Second, the Supreme Court’s statement asserted that the supposed solution proposed by the bill was very dangerous, since, if a judgment declaring the unconstitutionality of a law had to be transmitted to the Legislative Assembly for that body to render its decision about the continuing force of the law, this would cause the Deputies to use political criteria to evaluate an opinion based on legal criteria—a kind of juridical surrealism. *Moreover*, the Legislative Assembly could take as much time as it wished in making a decision, or could simply make no decision at all.⁵⁷ The negative consequences from the perspective of equality would be patent, since one person could obtain a judgment favorable to his rights, based on the declaration of the unconstitutionality of the law, while others, in the same situation, would have to wait for the Legislative Assembly to make a decision about the subject. Or, for the same reason, the proposed law would obligate those who are similarly situated to bring new, individual claims of unconstitutionality before the Constitutional Chamber.

It is strange that there has been no serious attempt at an ad hoc reform of one particular competence that the Constitutional Chamber has had since its creation, that is, the issuance of consultative opinions at the request of one-fifth of the total number of deputies concerning the constitutionality of any pending bill that has been approved in its first legislative debate. What is interesting is that the opinion of the Chamber is binding in such situations only when it identifies substantial defects in the procedural treatment of the bill in question. Conversely, the Chamber’s opin-

[*Constitutional Jurisdiction in Latin America: Evolution and Challenges since the Independence until 1979*] (2000), at 6.

56. In [EVOLUTION OF CONSTITUTIONAL JUSTICE IN COSTA RICA], Professor Gutiérrez traces the route of this failed attempt at self-control of constitutionality, from the French Revolution, through the Constitution of Cadiz of 1812, to the first constitutions of independent Costa Rica. CARLOS JOSÉ GUTIÉRREZ, EVOLUCIÓN DE LA JUSTICIA CONSTITUCIONAL EN COSTA RICA [EVOLUTION OF CONSTITUTIONAL JUSTICE IN COSTA RICA] 173 (1992).

57. See Expediente Legislativo No. 15. 197.

ion is not binding with respect to any unconstitutionality in the bill itself. It is curious that there has been no serious attempt to reform this power of the Chamber, inasmuch as it seems to place the Legislative Assembly under the guardianship of the Constitutional Chamber, and even though some consider this function to severely impair the liberty that the Parliament should have in doing its work of making laws. Indeed, the Deputies heavily use this consultation process, so much so that the current President of the Legislative Assembly has complained bitterly and publicly of having the Constitutional Chamber “permanently seated in the legislative hall,” and that it “creates a cause of action for political vindication through an adjudicatory process.”⁵⁸

It should be noted that similar powers given to constitutional tribunals have been repealed in Spain and Germany following difficult situations. Moreover, such consultations are inappropriate because in effect, they frequently place the tribunal in the uncomfortable position of intervening in legislative proceedings and sometimes instructing legislators as to how they should undertake their functions. This problem deserves serious thought by the Legislative Assembly and by the Constitutional Tribunal.

B. The Judgment That Condemned Costa Rica's Support for the Iraq War

During the pendency of this case, there was much legal discussion, although the judgment itself received a favorable reception in public opinion.

The facts have to do with the decision of the Executive Branch of Costa Rica to give support—the government later explained that it was merely “moral support”—to the Iraq War. A law student, the Bar Association, and the Defender of the Inhabitants (the Ombudsman), invoked very flexible standing requirements set forth in the Law of Constitutional Jurisdiction that allow access to the Constitutional Chamber without a case or factual basis, based on an allegation that the petitioner is defending “interests that affect the collectivity as such.” Thus the three complaining parties asked that the decision of the Executive be declared unconstitutional.

The Chamber accepted the matter and later held a public hearing in which the plaintiffs, the Minister of Foreign Relations, and

58. JOSÉ A. MONTILLA MARTOS, *MINORÍA POLÍTICA Y TRIBUNAL CONSTITUCIONAL* [POLITICAL MINORITY AND CONSTITUTIONAL TRIBUNAL] 57 (2002).

others participated. On September 8, 2004, in Judgment No. 2004-09992, the Chamber declared the claims to be meritorious and annulled the Executive Accord that gave support to the war in Iraq. At the same time the Chamber ordered the government to request that the United States exclude Costa Rica from the list of countries forming the so-called "Alliance" (or "International Anti-terrorist Coalition," created out of the Iraq case) from the White House web page.

Various important issues are involved in this decision. First, the judgment that establishes that the Executive violated the Political Constitution, specifically the constitutional "value" of peace which, although not expressly mentioned in the Constitution, is derived from the conscious decision made by the Constituent Assembly in 1949 to eliminate the army as a permanent institution (article 12), a matter reinforced by "The Proclamation of Perpetual Neutrality, Active and Unarmed," issued in 1983 by the Executive as a unilateral decision by Costa Rica, but which by reason of its having been deposited with the United Nations, is understood by the Constitutional Chamber as binding the country and establishing its international policy. The judgment of the Chamber is convincing insofar as Costa Rica adopted in 1949 "peace" as an overarching principle, being tired of a history of death, confrontations, dictators and the diminution of the benefits of development. The principle has been the subject of commentary and analysis during the past few years and has allowed Costa Rica to use more of its economic resources in health and education; thus, we are dealing with a conscious attitude on the part of Costa Rican society. In one of its passages, the judgment states:

There exists a common base in the allegations and responses of all of the interveners in this matter, in the sense of recognizing peace as one of the constitutional values that inform our order, clearly distinguishable not only by means of the understanding of our constitutional text, but also as a "living constitution", according to which the normative content of the Constitution is understood and applied in reality by the society. Such a standard is also shared by the Chamber since it coincides with the vision that this organ has already molded in various pronouncements on the subject . . .⁵⁹

59. Sentencia de la Sala Constitucional, No. 2004-09992, Considerando o Fundamento Jurídico IV. [Editor's Note: This citation refers to a decision by the Constitutional Chamber

Second, the Chamber also maintained that the war against Iraq arose on the margin, that is, without the authorization of the United Nations Security Council. It being evident that the war was undertaken without a favorable pronouncement by the Council, the judgment of the Chamber states:

Likewise, in keeping with article 25 of the United Nations Charter, the members of the United Nations agree to accept the decisions of the Security Council. Thus, it can be affirmed that military actions that are taken against a state, or groups of them, under the auspices of the United Nations, find justification in accordance with the International Order, insofar as they respect and carry out the decisions adopted by the Security Council in the particular case. For the states signatories to the [United Nations] Charter, therefore, there arises an obligation under international law to respect that procedure . . .

⁶⁰

Thus, it is clear that the Chamber inscribes itself within the parameters of action that for many years have distinguished Costa Rica, and that is subjection to the law and to reason in its international relations.

Finally, a fundamental matter treated by the Chamber is that of the appropriate subject matter before a constitutional tribunal. In this sense, the question arises whether we are (or are not) faced with what the Supreme Court of the United States has called a “political question”; that is, a topic that cannot be decided by the Court because it belongs strictly to the sphere of political decision and therefore belongs exclusively to the organs of state as such.

Professor Néstor Pedro Sagüés, who analyzed the judgment, writes:

Karl Lowenstein, terrified by the judicial oligarchy, the “judicialization of politics,” and the specter of the Judicial Branch as a *superpower*, warns that if the limiting doctrine of which we speak [that is, the “political question” doctrine] should disappear, more serious political conflicts would quickly be brought by the politicians to the tribunals, generating an institutional suicide. Either the judgments [of the tribunal] would be disobeyed by the political powers (seriously discred-

of the Costa Rican Supreme Court in its official reported form. Literally translating or reformatting the citation would be misleading.]

60. *Id.*

iting the rule of law), or, on the other hand, the judicial judgments would be carried out, and thus the policy decision of the government would be replaced by a judicial act which, even though dressed in juridical-constitutional garb, is basically nothing but a political act of persons who have no democratic mandate to carry out such a function.⁶¹

Professor Sagüés's study of the judgment is well-researched and cited to United States authors such as Bernard Schwartz, who, although a critic of the political question doctrine, contends that it is followed because, among other reasons, it would be unacceptable for the country to have two voices (that of the President and that of the judges) in such matters.⁶²

Notwithstanding these concerns, even before the judgment of the Costa Rican Constitutional Chamber was announced officially to the parties (but had been broadcast by the communications media), the Minister of Foreign Relations declared publicly that he would immediately comply with the result reached by the Constitutional Chamber and would seek to have his United Nations counterpart remove Costa Rica from the so-called international "coalition" against Iraq listed on the White House web page.

What the Constitutional Chamber said in this judgment is that there cannot be a range of policy decisions that are exempt from constitutional control. In other words, the Constitution cannot be violated with impunity, as the Chamber demonstrated when it rejected the doctrine of "governmental acts," or political acts, our system's equivalent of political questions.

On the other hand, as Professor Sagüés concludes in his study of the decision of the Chamber:

The doctrine of non-justiciable political questions has a political and pragmatic origin that is not always consistent and uniform. It has evolved over time and in some cases, as in Costa Rica, seems to be dissipating. . . . Even when the erosion - in some cases the collapse - of the old doctrine of non-justiciable political questions is a reality, in order to uphold the principle of the balance and separation of powers - it is

61. Néstor Pedro Sagüés, *Constitución y Sociedad: La revisión de las cuestiones políticas no justiciables (a propósito de la 'Coalición' contra Irak)* [Constitution and Society: Revision of Nonjusticiable Political Questions (Regarding the "Coalition" against Iraq)], in SEMINARIO SOBRE DERECHOS HUMANOS Y JURISDICCIÓN CONSTITUCIONAL [SEMINAR ON HUMAN RIGHTS AND CONSTITUTIONAL JURISDICTION] (2005), at 11.

62. *Id.* at 19.

necessary to emphasize and rethink certain basic guidelines of containment of judicial review in order to restore it, prudent and operative.

By contrast, Professor Sagüés recounts some causes of the weakening of the political question doctrine (dangerousness, contradiction, modification of the social context with the passing of time, among others). He demonstrates a great awareness of the need to affirm human rights where “enormous social groups are not in agreement with judicial abstention concerning those rights under the pretext of their being non-justiciable questions,” and cites concrete examples of rights on the part of constitutional justice:

- i) Judicial review of the arrests carried out by the Executive or the armed forces during states of exception, through judicial control of their reasonableness (in Argentina);
- ii) the creation of equal electoral districts, in order to avoid gerrymandering (*Baker v. Carr*, U.S.A);
- iii) declarations of the unconstitutionality of constitutional amendments (as in Honduras, Costa Rica, Colombia, and Argentina);
- iv) the evaluation of the political economy of the state when it imposes banking restrictions and currency revaluations, through hundreds of amparos, declaring unconstitutional laws and decrees of the Executive (in (Argentina);
- v) the indirect alteration of the budget approved by the Congress, giving the tribunals [control of] the protection of life and health, and increasing the amount of free medical treatment and medicines (in Costa Rica, Argentina, and elsewhere).

C. *The Case of the Congressional Investigative Committees*

In Judgment No. 1990-00592 of January 29, 1999, the Constitutional Chamber decided another case that became very controversial. The Legislative Assembly had created a Special Investigative Committee concerning the Banco Anglo - Costarricense, a state bank that in 1994 was closed by the Executive, citing enormous losses that the Bank had suffered which could not be compensated for by an injection of public monies. The condition of the Bank

was attributed to inappropriate conduct by the Board of Directors and the management. Among the persons found by the legislative investigation to have been involved was a prominent politician, who was accused of influence-peddling while he was Minister of Government. The important fact is that finally the Legislative Committee issued its report, and after much debate the full Legislative Assembly agreed, among other things, to recommend to the public authorities, present and future, that they not appoint that individual to any public position involving the application of laws or regulations, handling of public monies, or granting of benefits. The Assembly took this position because of its belief that the individual in question had been involved in influence-peddling. Thus, the Legislative Assembly, more than delivering a moral or political censure upon the person who, in its judgment, had failed to fulfill the duties of office, also purported to use binding force to ban him from specified public positions because, by the standards of the Assembly, he had engaged in influence-peddling—conduct constituting a crime.

The individual brought an amparo action before the Constitutional Chamber, which annulled the legislative action for several reasons, including the following:

The first paragraph of article 23 [of the Constitution] prescribes . . . that the Legislative Assembly shall be able to appoint these committees to investigate “any matter” that the Assembly recommends. This last term is not the object of further normative development, so the language appears to give the Legislative Assembly unlimited power to fix the scope of its investigative committees. But that is only an appearance: the limits must be found in the Constitution itself, for if it [the Constitution] is a source of powers, it is also a source of limits on the exercise of those powers. In this regard, the Chamber has already made clear in Judgment No. 1954-97 . . . decided April, 8, 1997, that a limit on the exercise of the investigative power of these committees is part of the principle of the division of powers, and in keeping with that it is evident that the investigative committees cannot validly invade the powers assigned to other constitutional organs. In the aforementioned judgment, the Chamber states that the committees “. . . cannot judge or impose punishments on any person, which is a function proper to the Judicial Power, since were it otherwise there would be created Special Tribunals, created for the judging of a particular case, thus breaching

the provisions of articles 9 and 35 of the Constitution. The foregoing leads to the conclusion that such Committees cannot perform adjudicatory functions and, therefore, no power has been conferred on them to judge and impose sanctions. They are organs of a political—not judicial—character, whose principal activity consists in the gathering of information, from which, in itself, there cannot be derived any juridical consequences of any kind for public servants or private persons. The committees do not judge or impose sanctions from the juridical point of view, even when, in their report, they make certain recommendations; rather, their function is to form and nourish public opinion about matters of general interest, and to inform the full body of the result of the investigation, in order that the Legislative Assembly may carry out its political and social, not juridical or adjudicatory, function that the Constitution itself assigns to it. It could be said that the Legislative Power is carrying out, then, a kind of political judging, since its work many times may culminate in a moral censure of officials or private persons for conduct that may be socially or politically reproachable, even when they cannot be objects of adjudication by the Tribunals of Justice. But that does not constitute a sanction in the language of article 39 of the Constitution, since the recommendations that are made in the reports of the Committee or, in turn, by the full body of the Legislative Assembly are not juridically binding, even when they might carry an undeniable social or political burden.⁶³

According to the judgment's conclusion, the Legislative Assembly had issued its decision imposing material punishment ("the individual should not be appointed to any public office"), as if it were dealing with a judgment of a tribunal of justice, indeed a punishment of perpetual character ("neither at the present time nor in the future"), which is prohibited by the Constitution itself.

These specifications of the Chamber led it to annul the act of the Legislative Assembly and, in effect, that is what it did. The Chamber, of course, recognized that the Assembly has an attribute that is directly authorized by the Constitution. Moreover, it un-

63. Sentencia de la Sala Constitucional, No. 1999-00592, de 29 de enero de 1999, Considerando o Fundamento Jurídico III. [Editor's Note: This citation refers to a decision by the Constitutional Chamber of the Costa Rican Supreme Court in its official reported form. Literally translating or reformatting the citation would be misleading.]

derstood that that authorization gives the Assembly a degree of discretion insofar as the Constitution is omissive, but that those undertakings that pertain to any public body will have the limits that the Constitution itself establishes. And from there the Chamber concluded that there had been an excess: the Assembly had gone beyond what was constitutionally permissible.

It is evident that a decision of this nature has elevated the tone of the debate over the role performed by constitutional justice.

The interesting thing is that the Chamber ties together equilibrium and separation of powers with the fundamental rights of persons, just as the outline of the doctrine was conceived ever since the French Declaration of Rights of 1789. But, in spite of the fact that the Chamber's judgment shows for us that it is upon that base that the arguments were expounded, those who think that the Chamber interferes with the work of the Legislative Branch, and that the Chamber violates the principle of separation of powers, altering the balance, continue to be heard.⁶⁴

Their argument is plausible, especially for those politicians who would like a "rule of law" that is in their own image and likeness. On many occasions they are groups joined together by the concept of a democratic constitution that they associate with the great jurist Hans Kelsen, of whom Mauricio Fioravanti writes:

Nevertheless, in Kelsen this primacy of the law is never translated into the *sovereignty* of the Parliament, since the law that emanates from that parliament maintains its position of supremacy in the system of the sources of law, and the very validity of that law lies in the forms and the rules of procedure that have led to its adoption, and that in its contents is based on that ideal of pluralism that animates the entire base of the Kelsenian conception of democracy. But when the law is proposed as pure act of the will of the majority, as an instrument of the domination by some social interests over others, for Kelsen it is absolutely necessary to place a limit on the law, since in that situation there is at risk the very Constitution, understood as the principle in which is juridically expressed the balance of political forces.⁶⁵

64. Concerning the criticism that has been formulated, see ALEX SOLÍ, CONTROL POLÍTICO Y JURISPRUDENCIA CONSTITUCIONAL [POLITICAL CONTROL AND CONSTITUTIONAL JURISPRUDENCE] (2000).

65. MAURICIO FIORAVANTI, CONSTITUCIÓN. DE LA ANTIGÜEDAD A NUESTROS DÍAS [CONSTITUTION: FROM ANCIENT TIMES UNTIL THESE DAYS] 157 (2001).

Well then, if it is legitimate to put a limit on the law, how can such a limit be denied with respect to acts of the Parliament—an entity of lower rank than the law?

Let us take note that in these matters, although we are always evolving, many things already are clear on the road of reflection and the confrontation of political-juridical ideas, such as happens with the topic of the authority of constitutional judges to exercise their competencies, that so many times has been put under interdict.

Some, in good faith, and others, whose intentions are less clear, contend that judges do not depend on democratic legitimation, and that therefore it is heresy for judges to invalidate or even question the product of the Legislative Assembly—the Parliament. It is enough for me for now that that great jurist Mauro Cappelletti has already answered that contention, asserting that the legitimation of judges is different from the political legitimation of some high offices; which is of popular origin.

Cappelletti has met with effect what he calls the “formidable problem” of the democratic legitimacy of the judges, individuals who, exempt from [political] responsibility, fill up with their own hierarchy of values or personal predilections the nearly empty receptacles of such undefined concepts as liberty, or equality. The Italian author, with good judgment, arrives at the conclusion that that legitimacy cannot be sought by the same standards that are used for the political organs, since judicial legitimacy is a “functional legitimacy” that is relative to the functions that the judges discharge in a democratic state.⁶⁶

It is unacceptable and disproportionate to place the legitimacy of parliaments in opposition to the legitimacy of judges, a juxtaposition that has come to be something of a paleo-positivistic survivor.

Rather, as Professor Vanossi points out, the independence of the controlling organ should be empowered with respect to the controlled.⁶⁷

66. Francisco Fernández Segado, *El Poder Judicial en la Constitución Española de 1978* [Judicial Power in the 1978 Spanish Constitution], in HOMENAJE AL PROFESOR EDUARDO ORTIZ ORTIZ [TRIBUTE TO PROFESSOR EDUARDO ORTIZ ORTIZ] (1994), at 346. Professor Fernández adds that Vicente Gimeno Sendra speaks to us of “legitimation through process,” the need for legitimacy that, through the discharge of his duties, the judge carries out—the functional legitimation or exercise, so valid and so democratic—by proceeding from the Constitution as “democratic legitimacy,” that is attributed to and recognizes the legislator.

67. See JORGE REINALDO VANOSSI, ESTUDIOS DE TEORÍA CONSTITUCIONAL (2002).

In this way we could sleep more peacefully in this era of sudden attacks.