

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

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

–Justice Antonin Scalia

ABSTRACT

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

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## I. INTRODUCTION

There is considerable debate in the academic literature on the relevance of enumerated constitutional rights and the capacity of courts to turn those rights into reality and thereby bring about profound change in society. Some argue, for example, that even when courts issue pro-rights decisions, they cannot bring about meaningful social change because court decisions are not necessarily implemented broadly immediately following the decision.<sup>1</sup> Even one of the U.S. Supreme Court's most famous landmark decisions, *Brown v. Board of Education*,<sup>2</sup> was largely ignored, and consequently, in the southern U.S., where state laws segregated schools by race, ten years after the Court's decision only slightly more than one percent of African-American students attended non-segregated schools.<sup>3</sup>

Furthermore, courts might not protect and enforce individual and collective constitutional rights because courts often were designed as a deliberate attempt by political elites to cement the socio-political status quo and block any real change through democratic process.<sup>4</sup> From this point of view, courts are a barrier to the enforcement of rights, and courts exercising judicial review actually could harm rights protection by strengthening the political power of existing elites and thereby exacerbating the powerlessness of more marginalized social groups.<sup>5</sup> Indeed, this is in large part why leftist parties and movements in Latin America historically were suspicious of the increasing role of superior courts.<sup>6</sup> Instead, those groups viewed "law and the courts not as an instrument, but as an obstacle to social change."<sup>7</sup> Based on this conventional wisdom, it would be

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1. See generally GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

2. *Brown v. Board of Education*, 347 U.S. 483 (1954).

3. Gerald Rosenberg, *Impact of Courts on American Life*, in *THE JUDICIAL BRANCH* 280, 303 (Kermit Hall & Kevin McGuire eds., 2005).

4. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 213–14 (2004).

5. See generally C. Neal Tate & Torbjörn Vallinder, *The Global Expansion of Power: The Judicialization of Politics*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 1 (C. Neal Tate & Torbjörn Vallinder eds., 1997).

6. Javier A. Couso, *The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity*, in *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES* 61, 62 (Pilar Domingo, Roberto Gargarella & Theunis Roux eds., 2006).

7. *Id.*

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

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

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

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

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

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

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

10. *Id.*

11. See RONALD DWORKIN, LAW’S EMPIRE 356 (1987). See generally MALCOLM LANGFORD, SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (2008); ROBERTO GARGARELLA, SIRI GLOPPEN, MORTEN KINANDER, ELIN SKAAR & BRUCE WILSON, COURTS’ ACCOUNTABILITY FUNCTIONS: LESSONS FROM LATIN AMERICA AND AFRICA (2010); VARUN GAURI & DANIEL BRINKS, COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (2008).

years, which occurred as a direct result of the creation in 1989 of the Constitutional Chamber of the Supreme Court. The Costa Rican case may help other researchers shed some light on the behavior of other newly assertive superior courts in other Latin American countries such as Colombia and Argentina, which presents compelling evidence contradicting Justice Scalia's view of constitutional rights, and as well, unravels the causes of judicial inaction in some other less developed countries, such as Chile.<sup>12</sup>

The case study of Costa Rican courts is especially enlightening as it resembles a quasi-scientific experiment. The two distinct periods since the end of the short, bloody Civil War and the promulgation of the current Constitution in 1949 are separated by a single constitutional amendment in 1989 that created a constitutional chamber of the Supreme Court.<sup>13</sup> Unlike many other cases in Latin America, the new, assertive Superior Court was not part of a major constitutional crisis or the writing of a new constitution; rather it took place with a single, minor change to the existing constitutional order without any other major changes in the institutional framework.

Although Justice Scalia's cynical dismissal of many constitutions as parchment guarantees may have been correct historically, his dismissal fails to give credence to developments outside of the United States over the last twenty years where courts have been transformed, for various reasons, from moribund, deferential institutions into assertive protectors of constitutional rights, willing to act as accountability agents, and thereby limiting the actions of popularly elected branches of government. That is, courts in many countries might have been unwilling or unable to protect constitutional rights, but in many of those very same countries, courts have had a very real impact on the constitutional rights of even the most socially, politically, and economically marginalized people. Employing Costa Rica as a case study, this article argues that courts can and do serve to enhance individual rights guaranteed by constitutions when the institutional framework facilitates access to courts for all members of society, regardless of their social status, wealth, or political connections.

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12. See generally GARGARELLA, GLOPPEN, KINANDER, SKAAR & WILSON, *supra* note 11.

13. Ley No. 7128, Reforma Constitucional (Creación de la Sala Constitucional) [Constitutional Amendment (Creation of the Constitutional Chamber)] (Costa Rica, Aug. 18, 1989) (amending articles 10, 48, 105, and 128 of the 1948 Constitution).

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

## II. A DEFERENTIAL SUPERIOR COURT 1949-1989

The 1949 Constitution, written in the aftermath of a short, bloody Civil War, is a rights-rich document<sup>14</sup> that deliberately distributed political power among Costa Rica's four branches of government: the Executive, Legislative, Supreme Court, and the Tribunal Supremo de Elecciones (Supreme Elections Tribunal, or TSE).<sup>15</sup> Although situated in an isthmus historically dominated by dictators, insurgencies, poverty, and fratricidal wars, Costa Rica was widely viewed as a democratic success story, often regarded as one of the most democratic countries in the Americas. Clean, fair elections

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

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

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

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

Governance was animated, but democratic—a struggle between opposing parties, and a struggle between the legislative and the executive. During the first 40 years of the new Constitution, major political battles in the country were fought between two dominant political movements: the social democratic-leaning Partido Liberación Nacional (Party of National Liberation, or PLN); and a coalition of social Christian and center-right parties that eventually merged into the Partido Unidad Social Cristiana (Social Christian Unity Party, or PUSC) in 1982.<sup>17</sup>

For the first 40 years of the 1949 Constitution, the Supreme Court enjoyed high levels of political independence, magistrates effectively had life tenure, and after 1957 the Poder Judicial (Judicial Branch), which is controlled by the Supreme Court, became financially independent when it was constitutionally guaranteed “no less than six percent” of the state's annual budget.<sup>18</sup> Yet the Supreme Court exercised little of its constitutionally-granted judicial powers,

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16. See Press Release, Freedom House, Freedom in the World 2012: The Arab Uprisings and Their Global Repercussions (Jan. 19, 2012), [http://www.freedomhouse.org/sites/default/files/inline\\_images/Table%20of%20Independent%20Countries%2C%20FIW%202012%20draft.pdf](http://www.freedomhouse.org/sites/default/files/inline_images/Table%20of%20Independent%20Countries%2C%20FIW%202012%20draft.pdf).

17. See BRUCE M. WILSON, COSTA RICA: POLITICS, ECONOMICS, AND DEMOCRACY (1998).

18. CONSTITUCIÓN art. 177 (translation by author).

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

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

### III. THE REFORMED COURT

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

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19. Juan Carlos Rodríguez Cordero, *Sala Constitucional y Equilibrio de Poderes*, in PROYECTO ESTADO DE LA NACIÓN EN DESARROLLO HUMANO SOSTENIBLE, IX INFORME, ESTADO DE LA NACIÓN 1, 1–34 (2003).

20. Fernando Cruz Castro, *Costa Rica's Constitutional Jurisprudence, its Political Importance and International Human Rights Law: Examination of Some Decisions*, 45 DUQ. L. REV. 557, 562 (2007).

21. In these legal systems, magistrates act as technocrats and regard popular branch laws and decrees as constitutional unless they obviously failed to comply with the letter of the law. See generally, e.g., JOHN MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (2d ed. 1985); Carlos José Gutiérrez, *La constitución 50 años disputes*, in TEMAS CLAVES DE LA CONSTITUCIÓN POLÍTICA 200–03 (Carlos José Gutiérrez et al. eds., 1999).

22. Cruz Castro, *supra* note 20, at 557.

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

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

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

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

The reform, although not part of a well-thought-out judicial plan, created a powerful court that stunned even its supporters and creators. As one major player in the creation of the court, Rubén Hernández Valle, noted, "[t]hose of us who participated in the creation of the Sala Constitucional 20 years ago never imagined the impact it would have on Costa Rican society."<sup>27</sup> Indeed, few could predict the manner

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23. Rubén Hernández Valle, *Tribunales Constitucionales y consolidación de la Democracia. La evolución de la justicia constitucional y sus retos en Costa Rica* [Constitutional Courts and consolidation of democracy. The evolution of the constitutional justice and its challenges in Costa Rica], 324 SUPREMA CORTE DE JUSTICIA DE LA NACIÓN (2007).

24. *Id.*

25. Castillo Víquez, Fernando & Giulio Sansonetti H., LEY DE LA JURISDICCIÓN CONSTITUCIONAL 334 (unpublished manuscript on file with the author).

26. Ley No. 7128, *supra* note 13.

27. RUBÉN HERNÁNDEZ VALLE, LA SALA DE LA LIBERTAD, [http://www.poder-judicial.go.cr/salaconstitucional/ARTICULOS%20Y%20CONFERENCIAS/Seminario\\_20Aniversario/005.pdf](http://www.poder-judicial.go.cr/salaconstitucional/ARTICULOS%20Y%20CONFERENCIAS/Seminario_20Aniversario/005.pdf) (last visited Oct. 20, 2012).



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

*A. The Foundation for Change*

Several important components of the reform of 1989 enabled the Chamber to effect meaningful change in Costa Rican constitutional jurisprudence. The new Sala IV was given the power to “declare, by the absolute majority vote of its members, the unconstitutionality of provisions of any nature and acts subject to Public Law.”<sup>28</sup> A simple majority vote of the seven magistrates assigned to the Constitutional Chamber replaced the previous requirement of a two-thirds majority vote of the entire Supreme Court. This change made the Court’s judicial review function easier to use and effectively abolished the previous culture of judicial deference.

Modernly, the Sala IV is one of the most powerful courts in Latin America. It enjoys wide-ranging powers, including the ability to resolve intra-government disputes between agencies and branches, the authority to exercise both *a priori* and *a posteriori* judicial review, and the power to deliver rulings that are “binding *erga omnes* on everyone except the court itself.”<sup>29</sup> Moreover, the Ley de la Jurisdicción Constitucional (Law of Constitutional Jurisdiction) requires the Sala IV 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 of fundamental rights and freedoms consecrated in the constitution or in international instruments in force in Costa Rica.”<sup>30</sup> Additionally, in cases of habeas corpus and *amparo*, the Sala IV’s decisions are unappealable and have *inter partes* effects. Thus, judicial formality was replaced by a broad definition of standing and access<sup>31</sup> that allows anyone in Costa Rica, regardless of age, gender, or nationality, to file a case directly with the Sala IV twenty-four hours a day, 365 days a year, without fees, a lawyer, or any kind of legal formality.<sup>32</sup>

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28. CONSTITUCIÓN art. 10 (translation by author).

29. See Patricio Navia & Julio Ríos-Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 COMP. POL. STUD. 189, 195 n.2 (2005). See also *Law of Constitutional Jurisdiction*, in LA GACETA, NO. 198 (Costa Rica, Oct. 19, 1989).

30. Ley No. 7135, Ley de la Jurisdicción Constitucional (Costa Rica, Oct. 11, 1989).

31. CONSTITUCIÓN art. 33. See also Sala Constitucional, Res. No. 1997-00835 (Costa Rica, 1997) (articulating the importance of standing and open access to courts).

32. Constitutional challenges are the only type of case that requires legal representation. For an in-depth discussion of the lack of formality and the issues of standing an access see

*B. The Sala IV's Accountability Function*

Although the emphasis of this article is to demonstrate the realization of constitutional rights in Costa Rica, it is important to recognize that the Chamber has, since its creation, exercised a widely enforced accountability function that clearly demonstrates the end of the Court's deference to elected officials.<sup>33</sup> This is important as it broadens the Court's capacity to make decisions that are at odds with the preferences of the executive and legislative branches, and as such, the accountability function provides more opportunity to rule in favor of groups without much electoral clout. As one magistrate noted, "public functionaries are representatives of a sovereign nation and not sovereign representative of the nation."<sup>34</sup>

Some key rulings serve to illustrate the extent to which the Sala IV has been willing and able to limit the actions of all other branches of government including the state-controlled agencies and the TSE. For example, as the result of a Sala IV decision, the TSE no longer has the power to admonish or punish sitting politicians for their actions in the Legislative Assembly. Moreover, in 2006, the Sala IV declared Article 64 of the Código Electoral (Electoral Code), which governed political party registration requirements, unconstitutional.<sup>35</sup> This too was an issue that had previously been left in the remit of the TSE. The Sala IV's willingness to exercise its accountability function was made apparent through the limitation of the TSE's constitutional responsibility to act as the final court of appeal for all election-related issues. By accepting and deciding an increasing number of significant or contentious election cases, the Sala IV has demonstrated that it will no longer defer to other branches of government when constitutional rights are at stake.

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Bruce M. Wilson, *Rights Revolutions in Unlikely Places: Costa Rica and Colombia*, 1 J. OF POL. IN LATIN AM. 59 (2009).

33. For an in-depth discussion of this accountability function see SIRI GLOPPEN ET AL., *Lessons from Latin America and Africa*, in *COURTS' ACCOUNTABILITY FUNCTIONS* (2010); Bruce M. Wilson, *Enforcing Rights and Exercising an Accountability Function*, in *COURTS IN LATIN AMERICA* 73 (2011).

34. Rubén Hernández Valle, *Tribunales Constitucionales y consolidación de la Democracia. La evolución de la justicia constitucional y sus retos en Costa Rica* [*Constitutional Courts and consolidation of democracy. The evolution of the constitutional justice and its challenges in Costa Rica*], 324 SUPREMA CORTE DE JUSTICIA DE LA NACIÓN (2007).

35. Sala Constitucional, Res. No. 2006-15960 (Costa Rica, 2006).

*C. Sala IV and the Executive Branch*

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

Although the president's powers are relatively attenuated, foreign policy decisions usually had been deferred to the president. Currently, however, the Sala IV's decisions routinely curtail the president's power to set foreign policy. For example, President Abel Pacheco (PUSC, 2002–06) was reminded of the limitations on his foreign policy statements when the Sala IV declared his support for the War on Terror unconstitutional, reasoning that although the president had the right to conduct foreign policy, the Constitution and international treaties necessarily limited that right. The Court held that the president's proclamation "acted against the constitution, international law accepted by Costa Rica, and the international system of the United Nations."<sup>37</sup>

A similar case with a similar restatement of the limits on the president's power to conduct foreign policy came in 2006. It forbade Costa Rican representatives to march in military parades in foreign countries.<sup>38</sup> Again in 2006, an executive decree permitting extraction of materials to be used in armaments manufacture was ruled unconstitutional.<sup>39</sup> The Court argued that the decree was a "detriment to the fundamental right of Costa Ricans to peace recognized by the Sala Constitucional in its sentence 2004-9992 [the Iraq Decision]."<sup>40</sup> The impact of the Court's rulings is reflected in the decline in the executive branch's use of its decree powers. In the decade before the creation of the Sala IV, there were over 10,000 presidential decrees,

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36. SCOTT MAINWARING & MATTHEW S. SHUGART, *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA* 432 (1997).

37. Sala Constitucional, Res. No. 2004-09992 (Costa Rica, 2004) (translation by author). *See also* Cruz Castro, *supra* note 20, at 572–73 (discussing the Court's reasoning).

38. Sala Constitucional, Res. No. 2006-15245 (Costa Rica, 2006).

39. *Decreto Ejecutive* [Executive Decree] No. 33240-S, *in* LA GACETA NO. 161 (Costa Rica, Aug. 23, 2006),

[http://historico.gaceta.go.cr/pub/2006/08/23/COMP\\_23\\_08\\_2006.html#\\_Toc144006900](http://historico.gaceta.go.cr/pub/2006/08/23/COMP_23_08_2006.html#_Toc144006900).

40. Sala Constitucional, Res. No. 2008-14193 (Costa Rica, 2006) (translation by author).

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

#### *D. Sala IV and the Legislative Branch*

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

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

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

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

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

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

itself or the pre-reformed Supreme Court.

#### IV. THE SALA IV'S RIGHTS PROTECTION JURISPRUDENCE

While the Sala IV has been quite active in limiting the reach of elected officials and other government branches, it similarly has been extending its own reach concerning citizens' rights. Returning to the central observation made by Justice Scalia, concerning constitutional rights and their lack of enforcement, the rest of this article examines the transformation of Costa Rican constitutional rights from aspirational rights, largely ignored by the Supreme Court, to a reality for many previously marginalized groups and individuals, which ushered in significant change in Costa Rican society.

##### A. *Amparo*

*Amparo*, a relatively inexpensive instrument for the protection of constitutional rights, is rooted in Article 27 of the Constitution. Article 27 gives Costa Ricans the "freedom of petition, both collectively and individually, against any public official or official entity and the right to a speedy response."<sup>45</sup> However, until the creation of the new Court, this right was largely ignored, and as a result, only a small number of cases were filed. Since 1989, the newly inaugurated Constitutional Chamber of the Supreme Court has taken the Article 27 right of petition seriously, and has encouraged the filing of cases through programs that educate the people of their constitutional rights and the actions they can take to protect them.<sup>46</sup> As a result, the number of cases filed in each year of the Sala IV's operation has increased significantly, from less than 2,300 cases in 1990, the Court's first full year of operation, to double that number within two years. For example, over 9,000 cases were filed with the Sala IV in 1998, about 16,500 in 2005, and approximately 20,000 cases in 2011. Reflecting the Court's commitment to Article 27, over

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45. CONSTITUCIÓN art. 27 (translation by author).

46. See generally, e.g., Irene Vizcaíno, *Confianza de los ticos sofoca a la Sala Constitucional* [*Costa Rican confidence suffocates the Sala Constitucional*], *NACIÓN* (Sept. 18, 2004), [http://www.nacion.com/ln\\_ee/2004/septiembre/19/pais14.html](http://www.nacion.com/ln_ee/2004/septiembre/19/pais14.html); CHRISTIAN HESS ARAYA & ANA LORENA BRENES ESQUIVAL, *LEY DE LA JURISDICCIÓN CONSTITUCIONAL* [LAW OF CONSTITUTIONAL JURISDICTION] (1997) (providing an annotation of the Court's rulings and a section on how to prepare and file an *amparo* case). See also LA SALA EN LAW PRENSA [The Sala in the Press], <http://www.poder-judicial.go.cr/salaconstitucional/prensa.htm> (last visited Aug. 8, 2012) (The Sala IV also has a well-functioning media office and magistrates frequently give talks interviews to explain their decisions.).

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

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

### *B. Rights Protection for the Poor*

Rights protection at the Sala IV has reached even the poorest sectors of Costa Rican society. Several cases illustrate the power of even the most weakly organized, socially marginalized, and politically disconnected individuals and groups to successfully seek judicial protection of their constitutional rights. For example, one of the Sala IV's first decisions concerned the right of a humble shaved-ice vendor to conduct his business in his regular location outside the Legislative Assembly building during an international meeting of American heads of state. The Court held that the state had no power to restrict the vendor's constitutional right to earn a living and "to bring sustenance back to his family."<sup>49</sup> This early decision, a surprising victory for a poor individual against the executive branch of the state, set the tone for many subsequent cases involving claimants from marginalized, weak sectors of society. The poor finally had gained a viable avenue to seek protection of their

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47. See *Estadísticas 1989–2011 por tipo de asunto* [*Statistics for type of matter 1989–2011*], SALA CONSTITUCIONAL, <http://www.poder-judicial.go.cr/salaconstitucional/estadisticas.htm> (last visited Sept. 2, 2012).

48. More than half of Sala IV's rulings are not enforced. For example, from October 2009 to October 2010, only 931 sentences of 2,355 were fully implemented, resulting in a dismal compliance rate of only 39.5 percent. Rommel Téllez, *Sala IV Rulings not Being Enforced*, TICO TIMES (Jan. 28, 2011), [http://www.ticotimes.net/Current-Edition/Top-Story/News/Sala-IV-rulings-not-being-enforced\\_Friday-January-28-2011](http://www.ticotimes.net/Current-Edition/Top-Story/News/Sala-IV-rulings-not-being-enforced_Friday-January-28-2011).

49. Sala Constitucional, Res. No 1989-75 (Costa Rica, 1989) (translation by author).

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

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

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

### *C. Sexual Orientation*

The protection of the rights of homosexuals in Costa Rica offers a good illustration of the power of a Court to animate the constitutional rights of and offer equal protection to even the most poorly organized, socially marginalized groups. Before the creation of the Sala IV, homosexual people's constitutional rights were routinely trampled by private and state agencies alike. Anti-gay discrimination by employers, schools, and the state meant that the

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50. Sala Constitucional, Res. No 2000-7484 (Costa Rica, 2000).

51. Sala Constitucional, Res. No. 1996-4576 (Costa Rica, 1996).

52. Sala Constitucional, Res. No. 1995-2313 (Costa Rica, 1995).

53. Sala Constitucional, Res. No. 1998-1317 (Costa Rica, 1998). For a full discussion of this case, see Bruce Wilson, *Rights Revolutions in Unlikely Places: Costa Rica and Colombia* 1 J. POL. LATIN AM. 59 (2009).

vast majority necessarily needed to keep their orientation secret, and as historian Jacobo Schifter notes, “most gays would rather resign” than be identified publicly as gay.<sup>54</sup> Richard Stern, an AIDS activist, also notes that even in the 1990s, “hundreds of gay people [were] fired each year when their employers discover[ed] their sexual identity.”<sup>55</sup> At that time, homosexuals lacked a social movement or politically powerful allies to protect their rights, and as a result, they routinely suffered from discrimination.<sup>56</sup> The impunity with which police regularly and routinely harassed gay people until the mid-1990s<sup>57</sup> was facilitated by a Court that had little history of protecting individual rights and abided by a population that was distinctly hostile to gays.

Before 1995, gay rights groups were routinely refused legal recognition by the state’s Registro de Asociaciones (Registry of Associations), part of the TSE.<sup>58</sup> The Registry argued that gay and lesbian groups violated Article 3 of the Law of Association, which denies legal recognition to groups that “undermine good customs and morality.”<sup>59</sup> However, the Registry reversed its own decision when a small gay rights organization, Abraxas, enlisted the support of the new Defensoría de los Habitantes (Ombudsman’s Office) and threatened to challenge the constitutionality of the Registry’s ruling at the Sala IV based on the Registry’s infringement upon the gay organization’s right to free association.<sup>60</sup> Following the Registry’s policy reversal, numerous other gay rights groups secured legal recognition, marking an end to the Registry’s discrimination against

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54. Bruce M. Wilson, *Claiming Individual Rights through a Constitutional Court: The Example of Gays in Costa Rica*, 5 INT’L J. CONST. L. 242, 249 (2007) (quoting Richard Stern, *Costa Rican AIDS Patient Coalition Wins Drug “Cocktail” in High Court Ruling*, 10 PSYCH. INT’L 3, 3–4 (1999)).

55. Bruce M. Wilson & Juan Carlos Rodríguez Cordero, *Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics*, 39 COMP. POL. STUD. 325, 334 (2006) (quoting Stern, *supra* note 54, at 3).

56. Anti-gay discrimination has been well documented. See JACOBO SCHIFTER, *LA FORMACIÓN DE UNA CONTRACULTURA: HOMOSEXUALISMO Y SIDA EN COSTA RICA* (1989); *Discriminación Laboral por Orientación Sexual*, CIPAC, [http://www.cipacdh.org/cipac\\_articulo\\_completo.php?art=57](http://www.cipacdh.org/cipac_articulo_completo.php?art=57) (last visited Sept. 1, 2012).

57. See generally SCHIFTER, *supra* note 56 (discussing police treatment of homosexuals in Costa Rica); JACOBO SCHIFTER, *PUBLIC SEX IN LATIN SOCIETY* (2000) (discussing how formal resistance to violent police practices against Costa Rican gays did not occur until 1987).

58. See Wilson (2009), *supra* note 53, at 74.

59. Ley de Asociaciones, No. 218, art. 3 (Costa Rica) (translation by author).

60. *Id.* at arts. 25, 26, 27.



homosexual groups.

A more basic fear for gays and lesbians in the 1980s concerned physical safety and relentless police harassment. In 1993, owners of a gay nightclub filed one of the first gay rights cases with the Sala IV.<sup>61</sup> The Court subsequently ruled that police harassment of gays was an unlawful abuse of power,<sup>62</sup> and ordered special training to familiarize the police with concepts of individual rights,<sup>63</sup> which according to a comprehensive study on Costa Rican police forces, has had a significant positive impact on the lives of gays and lesbians.<sup>64</sup>

Other more anecdotal evidence suggests police behavior improved dramatically after the ruling. For instance, one gay nightclub owner notes that police harassment is no longer an issue as it was in the 1980s when, “the police would arrive and take you away . . . all the time, on weekends, during the week, with no respect for people’s basic human rights.”<sup>65</sup> These observations were corroborated in the annual reports of the Ombudsman’s office, which identified a major decline in number of complaints of anti-gay harassment by police.<sup>66</sup> Indeed, the Court’s 1994 ruling led to a near total cessation in the routine police harassment of gays that had previously existed.

#### *D. Health Rights*

The topic of health rights provides a compelling example of the realization of constitutional rights in Costa Rica for several reasons. First, unlike the other rights cases discussed, health rights tend to be a major drain on the state’s budget. Second, it is a highly specialized, technical area for which the Court might not have the expertise to

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61. Sala Constitucional, Res. No. 1994-4732 (Costa Rica, 1994).

62. See Wilson (2007), *supra* note 54, at 250 (discussing gay rights rulings which addressed abuse of power by the police, including “the illegal use of force, illegal arrests, arbitrary detentions, and police corruption”).

63. Quirine Eijkman, ‘*Around here I am the Law!*’ *Strengthening police officers’ compliance with the rule of law in Costa Rica*. 2 *UTRECHT L. REV.* 1, 9 (2006) (conference paper presented at ‘Police Human Rights Strategies’ at the University of Utrecht, The Netherlands, April 7–8, 2006).

64. See generally Quirine Eijkman, *To be Held Accountable: Police Accountability in Costa Rica*, 7 *POLICE PRAC. & RES.* 411, 411–30 (2006).

65. Andrea Gourgy, *Tolerance for Gays Improving, Not Perfect*, *TICO TIMES* (June 25, 2004), available at [www.ticotimes.net/archive/06\\_25\\_04\\_t.htm](http://www.ticotimes.net/archive/06_25_04_t.htm).

66. *Historico de Informes de Labores Defensoría de los Habitantes* [The Annual Reports of the Ombudsman], LA DEFENSORÍA DE LOS HABITANTES DE LA REPUBLICA DE COSTA RICA, <http://www.dhr.go.cr/informe.html> (last visited Aug. 17, 2012).

address. Third, the Costa Rican health care system is efficient and efficacious, allowing Costa Ricans to enjoy some of the highest health care standards in the world. And, finally, in Costa Rica, the right to health is not found in the 1949 Constitution, but has nonetheless been acknowledged by Sala IV magistrates.<sup>67</sup> Yet, since courts in many countries with a constitutional right to health treat the right as a non-justiciable right, that a county without a constitutional right to health should construct such a right and then aggressively enforce it requires explanation.

Sala IV magistrate Luis Fernando Solano acknowledges that although there is no explicit constitutional right to health in the Constitution, it still is a very real and justiciable fundamental right, derived from Article 21's right to protection of human life,<sup>68</sup> and Article 73's right to social security protection.<sup>69</sup> In addition, Article 48 grants international human rights conventions the same force as those contained in the Constitution.<sup>70</sup> Solano further notes that health rights are contained in numerous international conventions signed by Costa Rica governments. For example, Costa Rica is a party to the Universal Declaration of Human Rights (UN 1948), the American Declaration of Rights and Duties of Man (Bogotá 1948), the International Pact of Civil and Political Rights (New York, 1966), and the American Convention on Human Rights (San José, 1969).<sup>71</sup>

Another sitting Sala IV magistrate, Fernando Cruz Castro, concurs and notes that the Sala IV grants "an almost supra constitutional value" to international human rights treaties,<sup>72</sup> which are regularly featured in Sala IV jurisprudence in health cases. For example, when the Sala IV ruled against a state-funded health clinic for its routine refusal to treat people living with HIV/AIDS, the core

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67. See generally Luis F. Solano Carrera, *Derecho Fundamental a la Salud*, 9 GACETA MÉDICA DE COSTA RICA 141, 141–44 (2007).

68. CONSTITUCIÓN, art. 21 (stating that "[h]uman life is inviolable") (translation by author). In 1949, this Article was included with the intent to ban capital punishment, but is now also employed as part of the judicial rationale for the right to health.

69. *Id.* at art. 73 (providing that "Social security is established for the benefit of manual and intellectual workers, regulated by a system of compulsory contributions by the State, employers and workers, to protect them against the risks of illness, disability, maternity, old age, death and other contingencies as determined by law") (translation by author).

70. *Id.* at art. 48. As amended in 1989, article 48 states that everyone has the right to use writs of protection (*amparo*) to "maintain or reestablish the enjoyment of other rights conferred by this Constitution as well as those of fundamental nature established in international instruments on human rights, enforceable in the Republic." *Id.*

71. Solano Carrera, *supra* note 67, at 142–43.

72. Cruz Castro, *supra* note 20, at 560.

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

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

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

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

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

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

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

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

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

## V. CONCLUSION

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

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

Although clearly not all decisions made by the Sala IV have been implemented, many important decisions with significant impacts on the lives of citizens have led to routinized, rights-conscious behavior by state agencies, having significant impacts on society as a whole.<sup>79</sup> Thus, the Costa Rican case undoubtedly shows that statements concerning the futility of constitutional rights and

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78. See generally GARGARELLA, GLOPPEN, KINANDER, SKAAR & WILSON, *supra* note 11.

79. See generally Bruce M. Wilson & Olman Rodríguez, *Costa Rica: Understanding Compliance with Economic Social and Cultural Rights Decisions*, in ENFORCEMENT OF JUDGMENTS ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: TOWARDS A THEORY AND PRACTICE (Malcolm Langford, Julieta Rossi & César Rodríguez eds., forthcoming 2012).

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constitutional courts are overgeneralized and outdated, as courts in several countries have taken on a much more assertive role in protecting citizens' rights against the exigencies of the state.