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THE RULE OF LAW AND CONSTITUTIONAL JUSTICE IN THE
MODERN WORLD

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Questionnaire

I. The different concepts of the rule of law

1. What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?

According to article 6 of the General Law of the Public Administration, formal sources of the Costa Rican legal order are the following: a) The Political Constitution of the Republic; b) Treaties and Central American Community legislation; c) Laws and other acts with similar value to the law; d) The executive decrees that regulate the law and those of the other Supreme branches of Government within their competence; e) the other executive decrees, statutes and regulations of the decentralized agencies; f) the subordinate rules to the central and decentralized regulations; g) the autonomous regulations of the Executive branch and of the other decentralized agencies remain subordinate to each other within their

respective authority; moreover, in accordance to article 7, non-written rules such as custom, jurisprudence and the general principles of law, shall serve a purpose to interpret, integrate and delimit the application of the written legal order and shall have the hierarchy of the rule that it interprets, integrates and delimits.

Following in particular the scope of the Rule of Law, article 11 of the Constitution, indicates:

“Article 11. Public officials are mere custodians of authority. They must carry out the duties entrusted to them by law and cannot usurp powers which the law has not conferred upon them. They must take an oath to observe and uphold this Constitution and the laws. The action to establish their criminal liability for their acts is public. The Public Administration, in its broadest sense, shall be subject to a procedure of evaluation of results and accountability, with public officials having personal responsibility for the fulfillment of their duties. The law shall establish the mechanisms to enable said evaluation of results and accountability to operate as a system that covers all public institutions”.

Likewise, article 11 of the General Law of the Public Administration provides for:

“Article 11.

1. The Public Administration will take action subordinated to the legal order and may only achieve those actions or perform those public services that are authorized by such order, in accordance to the hierarchical scale of its sources.
2. The action regulated expressly by a written provision, shall be considered authorized, at minimum as regards to the motive or contents, even in an imprecise form.”

On other matters, the constitutional jurisprudence has not only *inter-partes* effects, it also has a general binding effect. Article 13 of the Law relating to the Constitutional Jurisdiction indicates that:

“Article 13.- The jurisprudence and the precedents of the constitutional jurisdiction are binding *erga omnes*, except upon itself”.

The jurisprudence from ordinary courts will perform as a non-written source of the law. In this sense, article 9 of the Civil Code, reads as follows:

“Article 9.- The jurisprudence will contribute to inform the legal order with the doctrine, so reiterated, as it is established by the Cassation Courts of the Supreme Court of Justice and the Plenary Court as to how apply the law, the custom and the general principles of law”.

2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

In Costa Rica, the rule of law is understood as the public servants obligation, or that of those who take part of the State and its different agencies, to perform their duties always and in every moment in accordance to the legal order in force.

The Rule of Law is a source of many concrete obligations for those who hold public power, hence in its formal sense the elected or appointed officials must observe all constitutional and legislative regulations or any other relevant provisions while performing any rule-making authority.

And the substantive approach of the Rule of Law, refers to the obligation of the elected or appointed servants to perform their duties observing the rights and duties held in the Constitution and the fundamental rights therein. Hence, these officials must observe those rights enshrined by the constitutional forefathers, and in addition, the International Instruments of human rights applicable in the Republic.

3. Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?

Accordingly, the Constitutional Chamber exerts authority over most legal areas. For example, it is fully capable of enforcing public law standards over the Public Administration. In the case of criminal legislation, it can ensure that crimes have the proper legal basis. Therefore, it may strike down criminal legislation that omits a proper description of the criminal conduct, the social value at stake that it should protect and to state if the behavior is offensive to the law, the punishment and time of seclusion of the person.

There are other forms to also ensure the rule of law. For example the Administrative Contentious Jurisdiction can examine the different conducts of the Public Administration with the Public Law in force. And the Supreme Electoral Tribunal also ensures the rule of law and the effective enjoyment of electoral rights.

In this vein, the Constitutional Chamber may also exert forms of constitutional justice, like judicial review of legislation as long as it is not related to concrete forms of the electoral function (like the declaration of results in the elections).

4. Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.

There are many decisions that are relevant to the rule of law, like No. 1992-1739. This ruling affirms the rule of law to be a special form of submission of the public authorities and public institutions to the legal order. It states that they can only act as far as the Constitution and the law empowers them to. But there are two consequences: the principle of minimum regulation that puts special conditions to procedure; and the *reserva de ley* that should always be subjected to strict interpretation. *Reserva de ley* is the principle of law that only authorizes the law to validly regulate the exercise of fundamental rights. In this sense, it is a statute not an executive decree that can limit fundamental rights. Moreover, Decision No. 1992-3550 establishes that the system of liberties held in the Constitution (Article 28) entails that only the law can encroach on the regime of constitutional rights. The Constitutional Chamber highlights four consequences: a) The law must be approved by the Legislative Assembly with all the formalities of the legislative procedure. This will enable the law to validly regulate or restrict fundamental rights; b) The Executive Branch of Government can develop the legal terms as long as it interprets the law within its boundaries, it is not authorized to increase restriction, create new ones and must stay restricted within the substantial contents of the law; c) That the law cannot delegate in the Executive Branch there where it is called to regulate and restrict by the Constitution; d) There must be strict guidance in the law for the Executive Branch to develop its interpretations and regulations.

On the prohibition of arbitrariness, decision No. 1992-3410 of November 10, 1992 holds that it entails the obligation to adhere to the established hierarchical legal order, and the obligation to verify the context and facts that will justify the administrative regulation. This of course includes if it is proportional and adequate to the ends sought. It further adds that the rule of law consecrated in articles 11 of the Constitution and 11 of the General Law of the Public Administration, entails that all acts and behaviors of the Administration shall be regulated by a written norm. It is the submission to the Constitution and the law, preferably, and in general all other rules of the juridical order (in special executive and autonomous decrees,). It all comprises the juridical principle of the administration. In the same vein, see decisions 2007-11155.

On the access to justice before independent and impartial courts, including judicial review of administrative acts, it is important to mention that article 49 of the Constitution establishes the Administrative Contentious Jurisdiction to discuss and guarantee the legality of the administrative function of the State, its institutions and any other entity of public law. The misuse of power shall constitute grounds for challenging administrative acts. The Constitution also provides for the law to protect personal rights and legitimate interests of the people. Nevertheless, the procedural law imposed on any claimant, to exhaust the administrative recourses before challenging the acts of the Public Administration at the Administrative Contentious Courts. This would become a historical procedural hurdle that would become many times insurmountable. Decision No. 2006-3669 of March 15, 2006 changed the legal concept from a mandatory exhaustion of administrative remedies to an optional and elective character for the plaintiff. This decision provided great relief to the complainant, as it eliminated the Administration's privilege to slowly exhaust the remedies and burden the patience of the aggrieved individual. Today if the plaintiff decides

to file a case against the Administration, he or she may do so, and have the guarantee that the case will be decided in a timely fashion by a judicial and independent Court.

Respect for human rights is discussed in many decisions of the Constitutional Chamber, especially when interpreting articles 7 and 48 of the Constitution. Moreover, on non-discrimination and equality before the law there are many decisions. For example, Decision No. 2008-005694 of April 11, 2008, the Constitutional Chamber decides the case of a disabled individual that could not attend sport meetings at the community and municipal venues. The Constitutional Chamber not only upheld the constitutional right to equality of article 33 of the Constitution and also the Law that promotes equal treatment for the disabled (Law No. 7600), along with international instruments of human rights, like the American Convention on Human Rights and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities and the United Nations Convention on the Rights of Persons with Disabilities. The Constitutional Chamber ordered the modification of the building in order to accommodate the needs of the people with disabilities. Relating to other non-discrimination cases, as in gender or in sexual preference, Decision No. 2011-08724 sets an equal standard test for the treatment of heterosexual and homosexual couples. On race Decision No. 2008-07309.

5. Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.

The rule of law as a principle of law has been a very stable concept. It has stayed this way for over 26 years of the Constitutional Chamber's existence.

A constitutional amendment in 1989 created the current Constitutional Chamber changing and revolutionizing constitutional justice. Before that, the understanding of the rule of law was much more rigid and strict. Much of the problems of the old constitutional control system under the Supreme Court of Justice acting in Plenary Court, was considered many times to be deferential to the political branches of government. Adding therefore adherence to the law and deference to elected government officials, made the concept much more exacerbated. This of course was reinforced by the excessive legal formalities that the system had. One example on fundamental rights was the lack of the right to appeal in certain criminal procedures, as article 39 of the Constitution did not embrace it. For the Plenary Court this omission had greater weight than the possible application of human rights treaties that were already in force and were binding as international obligations. This interpretation was changed latter by the Constitutional Chamber in Decisions No. 1990-00282 and 1990-00719.

6. Does international law have an impact on the interpretation of the principle of the rule of law in your country?

One of the most revealing areas of the rule of law today, is the prominent role that international law and its different instruments on human rights have as they are applied to the domestic legal order.

The interpretation of the constitutional provisions and international human rights law, is most fruitful from their *supra*-constitutional

value; therefore, article 7 and 48 of the Constitution harmonically interpreted provide for a preferential treatment to international instruments of human rights. They offer a wider scope of interpretation even beyond the Constitution. Therefore, today international instruments of human rights are much more than principles of intentions or mere instruments of understandings on fundamental rights, they are binding legal obligations that hold core rights and rules, that may be directly invoked by the ordinary citizen in the Courts.

The long standing interpretation of the Constitutional Chamber gives prominence to the international instruments of human rights if they grant more liberties or protections and enhances regulations surpassing the Constitution itself.

Former Chief Justice Gilbert Armijo¹ provides a group of decisions that have had a significant impact in the Costa Rican legal order.

Decision 1990-1147 of Sept. 21, 1990; this case discussed the unconstitutionality of article 240 of the Organic Law of the Judicial Power. The case was based on a criminal prosecution followed against a judicial employee, once sentenced he was imposed also with other collateral punishments like losing pension benefits. The opinion is a leading case, as it interprets article 7 of the Constitution not only to hold that the international instruments of human right enjoy a higher legal status than the ordinary legislation, they are to be considered –practically- a constitutional source of law, that offers direct protection through article 48 of the Constitution. The case discusses the right not to be discriminated against, despite being convicted, held in article 33 of the Constitution, also preamble and

¹ Armijo Sancho Gilbert, “La tutela de los derechos humanos en Costa Rica”, *Ius et praxis*, Vol. 9, No. 1, Talca, 2003, pags. 36-62.

article 2 of the American Declaration of the rights and duties of man, 1, 2.1 and 7 of the Universal Declaration of Human Rights, the Preamble and articles 2.1 and 26 of the International Covenant on Civil and Political Rights, the Preamble and article 2.2 of the International Covenant on Economic, Social and Cultural Rights; y other international norms, among them, the ILO 102. Therefore, the pension benefits were to be out of the reach of the Criminal Courts.

Decision No. 1992-1739 of July 1, 1992; one of the different ways to access the Constitutional Chamber is through the advisory jurisdiction. The Third Chamber of the Supreme Court of Justice (Criminal Cassation Superior Court) sought an opinion of the Constitutional Chamber on due process rights. The Constitution and the Law allows a convict to motion and to reopen a criminal case for review if due process infractions can be argued. After enumerating all of the due process principles applicable to judicial and punitive administrative proceedings; the decision interprets and applies articles 39 and 41 of the Constitution as normative sources of the due process, but it also uses international instruments on human rights as other legal sources to structure the elements of the due process not regulated in the Constitution. These other sources are the international instruments of human rights, among them, the American Convention on Human Rights.

Decision No. 1992-3435 and its clarification under decision No. 1993-5759. These decisions refer to the correction of a discriminatory provision based on gender. The Constitutional Chamber found that a constitutional provision was discriminatory as it treated differently a foreign man and a foreign woman, when marrying a Costa Rican. The Constitution would only provide nationality to the woman, not to the man, according to article 14.5 of the Constitution. A vigorous application of international human rights law would re-interpret the meaning of the Constitutional clause, as it

was in conflict with international obligations not to discriminate on gender: the Universal Declaration of Human Rights, the American Convention on Human Rights, International Covenants on Civil and Political Rights. As a matter of law, this was the first time that the Constitutional Chamber exerted a Conventional Control of domestic legislation.

Decision No. 1995-2313 of May 9, 1995; in this case the Constitutional Chamber decided in favor of a citizen that claimed that article 22 of the Organic Law of the Journalist Association was unconstitutional as it limited freedom of speech held in articles 7 of the Constitution and 13 of the American Convention on Human Rights. The Constitutional Chamber held that the provision was unconstitutional, based on a previous advisory opinion No. OC-5-85 of November 13, 1985, handed down by the Inter-American Court of Human Rights, that held *“That the compulsory licensing of journalists is incompatible with Article 13 of the American Convention on Human Rights if it denies any person access to the full use of the news media as a means of expressing opinions or imparting information”*. This decision reaffirms that Costa Rica is bound by the decisions from the Inter-American Court of Human Rights under the contentious jurisdiction, as well as its advisory jurisdiction.

Decision No. 2000-09685 of November 1, 2000; in this case the Constitutional Chamber renders a mandatory advisory opinion to the Legislative Assembly on a bill to ratify the Rome Statute of the International Criminal Court; in this case the Constitutional Chamber addressed the legal ramifications and implications that such treaty had on Costa Rican. It held that there were not only domestic effects from the treaties that have been ratified by the country, but also from those that have not been formally approved following the constitutional process. This friendly approach means that

international instruments include not only covenants, treaties and international agreements, that must be subscribed and be subject to a constitutional process as happens in the instant case, it also includes those instruments whose given nature is the protection of Human Rights, even if they are not susceptible to this process, they are in force and apply within the Republic. The Chamber offers as an example the Universal Declaration of Human Rights (Paris, December 10, 1948), the United Nations Standard Minimum Rules for the Treatment of Prisoners when the prison administration has failed to prevent overpopulation of prisoners, or to prevent from expelling foreign protestors on tourist visas from chanting and picketing in front of the Inter-American Court of Human Right.

Decision No. 2002-10693 of November 7, 2002; this decision concerns the right of every person to an effective consultation and participation in matters involving the development of public policies relating to the environment; in accordance to the standards held in article 10 of the Río Declaration on Environment and Development, article 16 of the World Charter for Nature, article 8.2 of the Declaration on the Right to Development among others.

Apart from the mentioned precedents it is also important to mention another decision

Decision No. 2003-02771 of April 4, 2003; in this case the Constitutional Chamber declares the unconstitutionality of an amendment to article 132.1 of the Political Constitution, through Law No. 4349 of July 11, 1969. A consequence of this decision is that the Constitutional Chamber asserts that international human rights law becomes an implicit limit to the power of reforming the Constitution, as authorized in article 195 of the Constitution.

This clearly states the long standing jurisprudence of the Constitutional Chamber to uphold international instruments of

human rights with all their normative and binding character, even to displace the Constitution if they protect or promote more guarantees. This is possible when the international instrument offers a wider range of legal coverage under the *pro homine and pro libertate* interpretation.

In a similar vein, decision No. 2014-12703 of August 1, 2014, of the Constitutional Chamber, holds that the conventionality control of domestic legislation designed by the Inter-American Court of Human Rights, is also binding and enforceable over the different Chambers and Constitutional Courts. The decision supports the binding character of the Inter-American Convention on Human Rights or the Inter-American *corpus iuris*, as it comprises all the human rights treaties and declarations, the Inter-American Court jurisprudence and its advisory opinions.

II. New challenges to the rule of law

7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?

One of the factors that threatens the rule of law is corruption. There are different laws enacted by the Legislative Assembly directed to punish this type of behavior from government officials, among them, the Law against Corruption and Illicit Enrichment in Public Office (Ley contra la Corrupción y el Enriquecimiento Ilícito en la Función Pública), Law No. 8422. One of the main objectives is to deter, detect and punish corruption in the public function, or the General Law of the Internal Control, Law No. 8292, as it establishes the minimum standards that the Office of the General Comptroller of the

Republic must observe. This Office is an agency created by the Constitution and serves as an auxiliary institution of the Legislative Assembly in its supervision of the Public Finances. Also, there are other agencies and departments subjected to the supervision, the establishment, function, maintenance, perfection and evaluation of their systems of self-control.

8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?

The rule of law can be impacted in many ways, especially if there are situations that put stress on the human being, and on the institutional systems and the legal order. Migration triggers discussions on foreign citizens rights, for example as they pass through Costa Rican territory bound to another country. Decision No. 2003-11841 establishes the obligation to provide migrants with a translator, when that is necessary; Decision No. 2004-09129 when analyzing the repatriation of Ecuadorian children that where illegally traveling to the United States of America and destined to reunite with their parents; decision No. 2007-7388 for marriages arranged through powers of attorney; Decision No. 2014-2425 establishes the obligation of the Migratory Governmental Office to state sufficient grounds when ordering the detention of an illegal migrant; No. 2015-2074 that bars the deportation of an illegal foreign mother while her child was being treated at a public hospital; decision No. 2015-4322 holds that there is a state obligation to receive and not to refuse *ad portas* any documentation presented by the migrant; decision No. 2016-00788 holds the state obligation to warrant a migrant to receive consular assistance, and finally, decision 2016-

01899 whereby the Constitutional Chamber orders the correction of deficiencies found in the Detention Center for Foreigners.

Concerning the condition of refugees it is important to mention, as the decision No. 1989-00156 concerning the right to work for refugees; decision No. 2004-09255 concerning restrictions imposed by the Medical Association for the practice of medicine by refugees; the decision No. 2005-4293 discussed the right of the refugees to have access to banking and have access to loans; the decision No. 2008-11576 in which the Constitutional Chamber ordered not to extradite a woman from the United States for being a victim of domestic violence in her country of origin; and, finally, the decision No. 2014-00958, that holds that in order to be granted the refugee status, and take part of other migratory procedures, the state may not warrant conditions that may put the refugee in jeopardy.

Fortunately Costa Rica has been free of terrorist acts to this date, therefore the Constitutional Chamber cannot report on these unfortunate events.

9. Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional / international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts / bodies? What is the essence of these difficulties? Please provide examples.

There are some cases that show a collision between national and international provisions, in fact, one of the best examples is the In

Vitro Fertilization case. In *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, the Inter-American Court of Human Rights settled several allegations of human rights violations coming from a general prohibition to practice the In Vitro Fertilization technique in Costa Rica, notwithstanding that it was available before the year 2000. A decision from the Constitutional Chamber (No. 2000-02306 of March 15, 2000), found that the regulations of the Ministry of Health were unconstitutional on grounds that it lacked meeting minimum standards of the rule of law, such as, the *reserva de ley*, where any restrictions being imposed on fundamental rights were to be regulated only by the law, not through an executive decree. But after the Constitutional Chamber decision was delivered, no legislation was further pursued to comply with the standards set by the decision, and therefore no other regulation was ever approved in the country.

It was argued that the prohibition was an encroachment on the rights to private and family rights and the right to form a family. Among others, the principle of non-discrimination, personal autonomy, sexual and reproductive health, were also invoked. It was argued that the impact on women was even greater. The Inter-American Court of Human Rights decided the following: “The State is responsible for the violation of Articles 5(1), 7, 11(2) and 17(2) in relation to Article 1(1) of the American Convention, to the detriment of Gretel Artavia Murillo, Miguel Mejías Carballo, Andrea Bianchi Bruno, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchoz Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Víctor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, Maria del Socorro Calderón P., Joaquina Arroyo Fonseca, Geovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza, in the terms of paragraphs 136 to 317 of this Judgment. ”

Consequently, the decision had clearly stated that Costa Rica was breaching international law obligations. Thereafter, a new case was directed to determine whether the Constitutional Chamber had the obligation to annul or not its previous decision No. 2000-02306, since it was equivalent to a prohibition to enforce the In Vitro Fertilization technique. The Constitutional Chamber now had to take into consideration that the Inter-American Court of Human Rights had established the international obligation for the State to adopt, as soon as possible, those appropriate measures to annul the prohibition to practice said technique, taking into account the principles established in the judgment, and carry other obligations related to supervising and inspection. To that end, the persons that wished to use the IVF technique would not encounter the obstacles and infractions to those rights declared by the Inter-American Court ruling.

In response to this question, the Constitutional Chamber in a divided decision No. 2013-10712 of August 8, 2013 and a second one No. 2014-3715 of March 14, 2014, did not order the implementation of the reproductive technique motioned by petitioners, notwithstanding the existence of the Inter-American Court ruling. In the latter decision, the Constitutional Chamber held that *the obligation that was imposed on the Costa Rican State was to make possible the regulation of the IVF technique, its use, not for the Constitutional Chamber to order it through its judicial powers (to regulate it). Such obligation would be in conflict with fundamental rights, necessarily to be accompanied through legislation, of an existing legal regime based on the principle of the rule of law (article 28 of the Constitution). Therefore, as long as the Legislative and the Executive branches of government do not enact a law that would regulate this technique, it will not be possible to enforce it, and counter, no more no les, than article 30 of the American Convention*

on Human Rights, article 28 of the Constitution and the Inter-American Court ruling. Even, if the petitioners motion where to be granted, it would be an unwarranted interference in the implementation process underway by the Inter-American Court and in the progress of what the Legislative and Executive branches of government are designing to meet with the implementation of the decision. Despite that the Inter-American Court deems the use of this technique as a matter of a human right, there are many consequences and these need to be met with such rigor, that this determines the way to treat it, that is through legislation, as was said above. For those reasons the motion was denied.

Nevertheless, the bill to implement the In Vitro Fertilization technique remained log-jammed in the Legislative Assembly, facing resistance from minority political groups and missed deadlines imposed by the Inter-American Court of Human Rights. Afterward the Executive branch enacted an executive decree to regulate this technique, but it was also challenged before the Constitutional Chamber. In another divided decision, the Chamber declared the unconstitutionality of the executive decree, and from there the case was taken back to the Inter-American Court's attention. The Court in judgment of February 26, 2016, on monitoring compliance with judgment, held that it must be understood that the In Vitro Fertilization is authorized in Costa Rica, and that this right must be allowed immediately in public and private institutions. It also provided that in accordance to paragraph 36 of the ruling, the Executive Decree No. 39210-MP-S of September 11, 2015, stays in force, in so far the Legislative Assembly enacts a subsequent regulation in compliance to the standards set forth in the ruling.

III. The law and the state

10. What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?

The Constitutional Chamber has a wide variety of remedies to enforce constitutional limits over public officials, the same as sources of law. Some of these remedies do not require a lawyer, nor fees, legal formalities and the law grants a very broad definition of legal standing. The Constitution and the Law relating to the Constitutional Jurisdiction has entrusted the Constitutional Chamber to defend the interpretation and the supremacy of the Constitution along with those instruments of fundamental rights applicable in the Republic. In this sense, the impact of the Court comes through these different procedures and the interpretation or precedents of the court in its case-law. In accordance to article 13 of the Law of the Constitutional Jurisdiction, precedents are binding *erga omnes*, except on the Court itself.

11. Do the decisions of your Court have binding force on other courts? Do other / ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

As mentioned in the previous answer, the precedents of the Constitutional Chamber are binding *erga omnes*, except on the Court itself. There may be some problems with the interpretation of the constitutional decisions from various Courts, when implementing them, but there are no significant conflicts with the other Supreme

Court Chambers (acting as Cassation Courts) or other Superior Courts.

12. Has your Court developed / contributed to standards for law-making and for the application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, *non bis in idem*, *nulla poena sine lege*, etc.).

The advisory jurisdiction of the Chamber provides for a preventive jurisdiction that helps controls the approval of legislation before it is final. This is a twofold mechanism that provides constitutional advise to the Legislative Assembly, through a mandatory advisory opinion or an optional advisory opinion. The first is imposed by the Law to control constitutional amendments, the incorporation of international law and amendments to the Constitutional Jurisdiction. The second for constitutional questions that political minorities may have on bills drafted by other political parties. The Law establishes that the advisory opinion is binding when procedural matters prescribed by the Constitution or the Rules of the Legislative Assembly are broken. On other matters, the opinion will only be persuasive.

The Rules of Procedure of the Legislative Assembly mandate the publication of the draft legislation being discussed in the legislative process. This allows the public to be informed on the matter that may be of their concern and to increase the population's interest to participate in the process. For example, longstanding jurisprudence has established the need to publish certain amendments to the bills, in special if they alter its substance or redefines the ends of the draft legislation. Decisions No. 1993-1633, 1996-3625, 1997-4717, 2001-9137, among others. Even though there are dissenting opinions in

some cases, there is common ground that the need to re-publish amendments to bills infringes the legislative procedure and hurts the right of the population to be informed of the reforms.

On another matter, Costa Rica does not have a written constitutional right to health. Nevertheless, the Constitutional Chamber has interpreted and understood this fundamental right with a very high degree of autonomy. Initially it was derived from the constitutional right to life (article 21), the right to social security (article 73) and many international instruments of human rights, like the Universal Declaration of Human Rights, the American Declaration of Rights and Duties of Man, the American Convention on Human Rights and the International Covenant on Civil and Political Rights.

The right to health today is a “qualified right” in the Costa Rican legal order, even though it is not written in the Constitution, it has had a significant weight on the economic costs of the medical treatments given by the public and social security system in Costa Rica. Medications and treatments make up the many cases that are litigated in the Constitutional Chamber. The writs of amparo on the right to health are prioritized cases in all sessions of the Court, along with the writs of habeas corpus.

Please see for more information: Wilson, Bruce M. & O. Rodríguez. 2017 (in press). "Costa Rica: Understanding Variations in Compliance." In M. Langford, et al., *Making it Stick: Compliance with Socio-Economic*

And finally, the decision on the due process of law, No. 1992-1732 of July, 1992, has an intended interpretation not to be restricted only for judicial criminal proceedings but also to administrative or disciplinary proceedings that may deny, impose or suppress rights and liberties of the population.

13. Do you have case-law relating to respect for the rule of law by private actors exercising public functions?

The Law of the Constitutional Jurisdiction precisely provides for the legal framework allowing to challenge private actors exercising public functions, especially when they infringe fundamental rights. Article 57 of the said Law provides open standing for any person to file a writ of amparo for actions and omissions committed by private actors as long as: a) it is part of the exercise or must exert public functions or public authority; b) as a matter of fact and law, private actors are in a position of power to exert authority, whereas other jurisdictional remedies are clearly insufficient or late. The rulings of the Court cannot reach legitimate behaviors of private actors.

As a consequence, a writ of amparo is a remedy that can be used against private actors providing public services or administrates public powers, as for example concessions on public transportation (buses, taxi services, etc). In these cases, an amparo may be filed if the private provider adopts measures that breach obligations toward the discapacitated population.

Decision No. 1999-2288 of March 26, 1999, addresses the discriminatory practices that people with discapacitating conditions face. The jurisprudence of the Constitutional Chamber holds that there must exist conditions for their normal development. It explains that it is much more than giving a special treatment to a population that has different conditions than the rest, it must translate to the recognition of their rights and the obligation of the others to respect those rights and abide to those obligations thereof. The Court found that the petitioner was denied taxi service, based on the need to be

transported along with a guide dog. In its opinion, the denial of service constituted a discriminatory practice, by a concessionary of public services that has a duty to provide services to all those persons with discapacitated conditions and in accordance to their needs.

14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?

Public officials are subject to many controls and procedures. This may determine many times that if they fail to comply to the law, disciplinary measures or of other nature are always possible. Article 199 of the General Law of Public Administration, establishes the personal liability of public employees facing third parties (the people), as long as they have acted with malice or grave fault (negligence) in carrying out their duties or because of them, using the means and opportunities that their employment offers.

This covers those public employees that dictate apparent illegal acts, and those that abide by them.

The Law defines the apparent illegal acts, among others, as long as the Administration separates itself from consultations and opinions that have revealed the illegal condition, and if these are confirmed according to the arguments previously given in those consultations and opinions.

The qualification of the conduct of the public employee will be done without prejudice of the State's solidarity in its liabilities with the victim.

This way the public server will be responsible in accordance to the law.

In respect to the immunities they are established only for the protection of the functions and tasks that must meet the Supreme Members of the Branches of Government. They are not to be used to protect illegal actions or faults committed in their personal capacity. Decisions No. 1993-00428, 2015-6839 and 2016-16111.

The Second Chamber of the Supreme Court of Justice, on Decision No. 101 of March 29, 1995, has held that civil liability cases followed against judges, need for them to proceed a demonstrated malice or grave fault from the judges, that entails direct and demonstrable damages to the losing party. There should be real malice in the judges behavior to such degree as to knowingly produce damage, or show grave ignorance to the basics of the law in question, or incur in a negligent conduct in the different contours of the case. In of these cases, the judge shall not be able to be exempted or excused. Even though the interpretation of this Superior Court concludes that the legislation recognizes the liability in general, naturally it is for the compelling cases of malice and grave fault. As examples, it cites article 199 of the General Law of the Public Administration and 5 of the Civil Procedural Code, as it establishes that the norms of procedure pertain to the public order, and as such are binding to the judges.

IV. The law and the individual

15. Is there individual access to your Court (direct / indirect) against general acts / individual acts? Please briefly explain the modalities / procedures.

Individual access to the constitutional jurisdiction is guaranteed, it requires no lawyers, no fees, few legal formalities and has a very broad definition of legal standing. Direct access is one of the basic principles in the design of the Costa Rican Constitutional Jurisdiction. The writs of habeas corpus (article 15) and amparo (article 29) constitute the branded remedies for individual acts and concrete violations of fundamental rights.

But plaintiffs also have individual access to pursue the judicial review of general provisions of law. It is possible for the individual seek judicial review of legislation and other general acts (including those provisions from private subjects or moral persons).

There are two forms to enter the constitutional jurisdiction on judicial review, the indirect and direct standing.

The first one requires individual grounds, provide proof that the constitutional protections constitute a reasonable means to defend constitutional standards. There is obligation to demonstrate also that the constitutional protections were invoked and then file an appeal to the Constitutional Chamber. The petition to be filed must come authenticated by a lawyer. The case must be pending in an independent judicial process or administrative proceeding. Ripeness is important to address questions relating to the interests of the petitioners fundamental rights. And, for that matter admittance of the case depends whether the protection sought provides relief. Any final judgment in the pending case will bar the judicial review of the Constitutional Chamber.

Direct and more general standing is also possible for persons asserting a “diffusive” or “collective” interest, or exceptionally when it is impossible to find no individual ground to seek protection, on the

contrary it is used for an abstract review of legislation and other general acts, and it involves collective rights and groups interests (articles 73 and 75). Nevertheless, it has been held that none of these cases serve grounds to understand that in Costa Rica operates the popular action (acción popular).

Finally, judicial review is even possible when the constitutional question is not susceptible to be discussed in the writs of amparo and habeas corpus.

The final decision indicating the unconstitutionality of a provision results in its annulment and expulsion from the legal order. There are however some cases where the Constitutional Chamber cannot adjudicate cases, for example concerning concrete jurisdictional acts of the Judicial Power nor acts or provisions of the Supreme Electoral Tribunal (article 74 of the Law of the Constitutional Jurisdiction), however it has asserted jurisdiction through judicial interpretation (article 3 of the same Law), in order to entertain reiterated jurisprudence deemed to violate fundamental rights.

16. Has your Court developed case-law concerning access to ordinary / lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?

The decision of the Constitutional Chamber, No. 1992-01739, on the elements of due process of law establishes two major important legal principles: a general right to justice and another general right to the rule of law. Before it addressed each general right, it clarified that both rights are not to be considered elements of the due process of law, but instead pre-existing general conditions of a system of justice operating in a Democratic State. Both general

rights are *sine qua non* conditions, that may determine problems with the due process, especially in the manner in which they are performed. Where they are not observed it is almost certain there is a due process of law infraction.

The General Right to Justice can be explained as the underpinnings of every procedural legal order, accompanied by the fundamental right to pursue justice. It should comprise those mechanisms that allow the judiciary to perform their social role and responsibilities, it entitles them to administer justice independently, and to provide a guaranteed access to the jurisdictional apparatus in a non-discriminatory way. Among other things, it is based on the right to petition. This dictates that access to the judicial apparatus must be effective, sufficient and to purposely serve justice.

The General Right to the Rule of Law means the binding relationship between the legal order and all public authorities and public institutions, while exerting their functions they must abide to the law, as the sole source that authorizes them to act. If it is not written, it is prohibited, with the exception of very qualified circumstances, for example if provided minimum guidance in accordance to administrative law.

Well established jurisprudence has recognized that administrative and judicial procedures pertain to the law, approved in accordance to the formalities needed to achieve its enactment and by the Legislative Assembly. The jurisdictional function and the role of the parties are to be determined by the procedural law, leaving little or no room for secondary legislation.

17. Has your Court developed case-law on other individual rights related to the rule of law?

Yes, all individual rights and social guarantees (economic, social and cultural rights) enshrined in the Constitution are to be protected by the constitutional jurisdiction through the writs of habeas corpus or of amparo.

The following link gives public access to the decisions of the Constitutional Chamber:

http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_indice_despachos_x_anno.aspx?param1=IA&cmbDespacho=0007&strNomDespacho=Sala%20Constitucional¶m01=Sentencias%20por%20Despacho&txtRelevante=0

The only exemption to the rule is the political electoral rights that are protected by the writ of electoral amparo at the Supreme Electoral Tribunal.

The following link gives public access to the decision of the Supreme Electoral Tribunal:

http://www.tse.go.cr/resoluciones_relevantes.htm

18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

The general concept of the rule of law has been used efficiently and fruitfully to foster the existence of specific fundamental rights or guarantees that may be burdening other rights. On the contrary, the interpretation of articles 7, 11 and 48 of the Constitution, where the latter provision incorporates to the Constitution those international instruments of fundamental rights, has allowed to establish (where the constitution once discriminated) gender equality in the Constitution. For example, decision No. 1992-3435 and its clarification No. 1993-5759, allow to construct a supra constitutional value to these international instruments. In these decisions, the Constitutional Chamber affirms that they have similar authority to the Constitution, but if they provide greater rights or guarantees to the persons, international instruments on fundamental rights will prevail over the Constitution. The origin of the case is found in a constitutional provision that did not allow foreign men to acquire the Costa Rican nationality if they wedded a Costa Rican woman, yet the Constitution provided the naturalization process for a foreign woman that marries a Costa Rican man. This was deemed to be discriminatory and contrary to the many international obligations on gender equality.

It is self evident that the general and specific concept of the rule of law, along with the dogmatic part of the Constitution, reveals that both can be observed, especially when it is necessary to integrate and provide for a specific fundamental right such as in the guarantee to non-discrimination.