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HUMAN RIGHTS COMMITTEE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Fourth periodic reports of States Parties due in 1995

Addendum

COSTA RICA */ **/

[6 January 1998]

*/ For the third report submitted by the Government of Costa Rica, see document CCPR/C/70/Add.4; for its consideration by the Committee, see summary records CCPR/C/SR.1298 to 1300 and Official Records of the General Assembly, forty-ninth session, Supplement No. 40 (A/49/40), paras. 150-165.

**/ The annexes are available for consultation in the secretariat.

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I. INFORMATION ON IMPLEMENTATION OF THE COVENANT

Article 1

1. This article is generic and is found both in the Covenant on Civil and Political Rights and in the Covenant on Economic, Social and Cultural Rights. It is difficult to see how an individual human being can allege a violation of his right to the self-determination of peoples.

2. Costa Rica's Constitution provides direct protection of the right freely to dispose of and use the nation's wealth in the Wild Animal Protection Act, the Forestry Act and its Regulations, and the Protection of Archaeological Riches Act:

> "... the juridical nature and regimes are different for private property and for public or State property: private property is regulated by article 45 of the Constitution and the relevant provisions of the Civil Code, which protect the inviolability of private property and introduce the concept of social function, with the result that no one may be deprived of his private property except to secure a benefit for society and by means of a law passed by the Legislative Assembly by a two-thirds majority of its members..." (Decision of the Constitutional Chamber No. 2306-91.)

3. The regulation of eminent domain is based on article 121, paragraph 14, of the Constitution:

> "Eminent domain consists of property invested, by the express will of the Legislature, with the special purpose of serving the community and the public interest. Eminent domain is public property and public goods or things which do not belong individually to private persons and are destined for a public use and subject to a special regime, separate from human commerce; in other words, their status is determined by their nature and vocation. Accordingly, they belong to the State in the broadest sense of the term and are assigned to the service which they provide, which is invariably essential pursuant to a specific rule ... It is a characteristic of such property that it is inalienable and imprescriptible and not subject to distraint and may not be mortgaged or otherwise encumbered under civil law, and that administrative action takes the place of possession orders for the purpose of recovery of occupation. Since such property is outside the sphere of commerce it is not subject to private ownership and, while not constituting a title of ownership, authorization to use such property is a unilateral juridical act of the Administration in the performance of its functions: what is placed in the hands of a private individual is the right to use the property, while its direct ownership is always retained by the State. Any right of use or authorization of use will always be precarious in view of the possibility that the Administration may revoke it at any time, owing to the need of the State to take full possession of the property or to construct a public work, or equally for reasons of security, hygiene or aesthetics. This means that, in the event of a conflict of interest between the purpose of the property and the authorization granted, the natural use of the public property shall prevail.

> Authorizations granted in this way will always be precarious and revokable by the Administration." (Decision of the Constitutional Chamber No. 5976-93.)

4. Furthermore, it has also been stated with respect to such property:

> "... it cannot be maintained that article 45 of the Constitution is violated ... since no limitations are imposed on private property; instead, in regulating public ownership, the law lays down conditions under which such property may be used and enjoyed ... by private individuals. Thus, anyone who seeks by unauthorized means to exercise private use of this zone will be prohibited from doing so ..." (Decision of the Constitutional Chamber No. 5399-93.)

5. For example, wireless services are provided by means of facilities in public ownership, facilities belonging to the nation and assigned to a public service; it has been stated in this connection:

> "The limits of the market and commercial transactions have been defined by the Constitution for a list of property, services and resources. The Constitution does not establish a uniform degree of assignability or of reservation to the public sector of essential services or resources. According to article 121, paragraph 14, of the Constitution, wireless services may not be removed definitively from State ownership. Ownership of these services is public: they have been assigned public purposes by the Constitution and they fall outside the scope of private law. However, they may be operated by the public administration or by private individuals ... in accordance with the law or under a special concession granted for a limited time and subject to the conditions and provisions established by the Legislative Assembly." (Decision of the Constitution Chamber No. 5386-93.)

6. The public telephone service, oil deposits, energy obtained from waters in public ownership and other property and activities "belong to the nation and have been rendered inviolable by the passage of time"; they are also described of course as "property of the State", but the language of the Constitution means that some property is entrusted to the State because the nation lacks juridical personality.

7. The State is thus a kind of trustee for the nation, a concept consistent with the arguments which have historically justified declarations of eminent domain under the Constitution. Public officials may not at whim dispense authorizations relating to services and property belonging to the nation which the passage of time is held to have rendered inviolable; there is an essential order: the law is not merely an aggregate of subjective rights but also has a requirement of objective, reasonable and democratic coexistence, an expression of the values of a social State based on the rule of law. (Arts. 74 and 50 of the Constitution.)

Paragraph 3

8. Costa Rica assigns great importance to respect for the rules of international treaty and customary law governing the relations between States.

It refrains from any interference in the internal affairs of other States and respects its international obligations.

9. As a depositary State of the four Geneva Conventions on protection of victims of war and their two additional protocols Costa Rica promotes respect for the rights of the human person and humanitarian law, as well as supporting the activities of the International Committee of the Red Cross. The Government of Costa Rica has unequivocally condemned the policy of apartheid since the World Conference on Human Rights in Teheran in 1968.

10. The situation described in the preceding section does not constitute a violation of article 7 of the Constitution by disregarding the relevant international treaties and agreements, for they do not stipulate that individuals may furnish communications services; what these international instruments do is to recognize the universal right to use such services, as is clear from article 18 of the Málaga Convention: "Members recognize the right of the public to correspond by means of the international service of public correspondence".

11. Water, sanitation and sewerage services are provided by the Costa Rican Institute of Aqueducts and Sewerage, established by Act No. 2726 of 14 April 1961. Other legislation regulates the use of water, by means of provisions which are sometimes very specific but always consistent with the concept of State monopoly.

12. According to article 121, paragraph 14, of the Constitution, the national ports and airports, as long as they are in service, may not be removed in any way from the ownership and control of the State. They may not be alienated, leased or encumbered, directly or indirectly, or be removed in any way from the ownership or control of the State. Individuals may have private airfields, subject to prior authorization by the General Civil Aviation Authority. In this connection, paragraph 14 states:

> "... The nation's railways, harbours and airports - the latter as long as they are in service - shall not be alienated, leased or encumbered, directly or indirectly, or be removed in any way from the ownership of the State."

13. Natural resources such as coal, oil, radioactive ores and the like may be exploited by private individuals only under special conditions established by the Legislative Assembly and for a limited time. Private exploitation is allowed in the case of other resources such as minerals, stone and precious metals.

14. The customs service is reserved exclusively for nationals, in accordance with article 128 of the Uniform Central American Customs Code, Act No. 3421 of 6 October 1964, and section 10.01, paragraph 1, of its Regulations, Executive Decree No. 15 of 7 May 1966, as amended by Act No. 6986 of 16 May 1985.

15. Article 50 of the Constitution states:

> "The State shall procure the welfare to the greatest extent possible of all the country's inhabitants by organizing and promoting production and the most appropriate distribution of wealth."

16. In implementation of the articles of the Constitution mentioned above, other legislation has been enacted to provide direct protection of the right to free enjoyment and use of the national wealth; for example, the Wild Animals Protection Act, the Forestry Act and its Regulations, and the Protection of Archaeological Riches Act. Improper exploitation of these resources is sanctioned by imprisonment or fine under article 289 of the Criminal Code.

Article 2

Paragraph 1

17. This paragraph creates the obligation for a State party to respect and ensure to all individuals subject to its jurisdiction the rights recognized in the Covenant. The Constitution guarantees the equality before the law of all citizens without any distinction as to origin, race or religion, as well as guaranteeing respect for all beliefs. The International Convention on the Elimination of All Forms of Racial Discrimination has also been ratified by Costa Rica.

18. As a constitutional principle, equality implies essentially the prohibition of unjustified distinctions, but it also constitutes a kind of mandate to the Legislature to reduce social inequalities and improve opportunities for the full development of the individual. Article 7 of the Constitution states that the international agreements approved by the Legislative Assembly shall take precedence over national legislation. Costa Rica has thus accorded to its international legal obligations a higher status as means of protection.

19. New provisions and amendments have recently been adopted in the Criminal Code; for example, article 7 stipulates that any person who violates the human rights recognized in the treaties signed by Costa Rica and in the Criminal Code shall be punished according to Costa Rican law.

20. Article 371 of the Criminal Code, on violations of human rights, states: "A fine of between 20 and 60 days' salary shall be imposed on any person administering or directing a public or private institution or managing an industrial or commercial establishment who implements any prejudicial discriminatory measure based on considerations of race, sex, age, religion, civil status, political opinions, social origin or economic situation".

21. If the offence is repeated, the court may also impose, as an additional penalty, suspension from public posts or positions for a period of between 15 and 60 days.

22. Furthermore, article 11 of the Juvenile Criminal Justice Act states in this connection: "Mention has been made of a series of numerically listed situations relating to the possibilities of discrimination to which a person may

be subject...for reasons of colour, sex, race, age, language, religion, nationality, political opinions, economic position, etc., to which the relevant international instruments expressly refer".

23. However, the most important thing is to emphasize that minors have the status of subjects of rights, a status carrying with it exercise of the fundamental rights to equality and protection against every kind of discrimination.

24. In connection with this Juvenile Criminal Justice Act, Costa Rica is preparing to discuss, on the basis of a specific policy, the problem of juvenile delinquency, which requires a change of outlook on the part of the persons working with minors subject to supervision by the courts. The protective-punitive spirit of the Act is designed to promote a type of procedural practice and law enforcement which will require the juvenile judges, defence counsel and prosecutors involved in proceedings against minors to acquire an outlook which will enable them to evaluate the conduct in question in an unprejudiced manner and to take into account both the realities of the lives of marginalized children - who account for almost all the juvenile crime statistics - and the realities of childhood, adolescence and youth, not only in their biological dimension but also, and most importantly, in their psychological and human dimensions.

25. Act No. 6227 of 2 May 1978, which entered into force on 26 April 1979, contained the General Public Administration Act, which reorganized the administrative system with a view to defining the purposes and forms of action of the Administration; it created a systematic administrative procedure for the benefit of the persons subject to regulation by the Administration. The purpose was to provide better guarantees of the subjective rights and legitimate interests of such persons, as enjoined in article 49 of the Constitution. Through the constitutional rules, the Administrative Jurisdiction Act and its corresponding courts, and the General Public Administration Act, inter alia, the Costa Rican State has systematized the activities of the public administration and strengthened the principle of legality.

Paragraph 2

26. This paragraph calls upon States to take the necessary steps to give effect to the rights recognized in the Covenant; an important change was made in the Costa Rican system in this respect in 1989.

27. Day by day, it is necessary to continue implementing and gradually improving the constitutional guarantees of the protection of fundamental rights.

28. Costa Rica adheres to a strict principle of separation of powers and of checks and balances. The Executive constitutes one branch, and the Legislature and the Judiciary share in the exercise of these powers in accordance with the functions assigned to them by the Constitution. It is not a question of dispersed and totally unconnected powers but of powers balanced against each other.

29. Where checks and balances are concerned, this means that the stronger one branch is, the stronger become the other two branches, for each of them is

controlled by the others and controls them in turn. In the exercise of its functions, each branch must adapt its actions to the "constitutional distribution", so that the separation of powers does not lead to an excess or abuse of power by each in its own sphere, but rather the contrary - absolute respect for the constitutional framework.

30. The Constitution accords higher status to the legal system because the other public organs and private subjects which coexist with that system are subject to it.

31. This condition is essential to any system in which the democratic principle has a decisive influence on legislation: "Democracy is the legitimizing principle of the Constitution, understood not only as a political-historical instrument but as a specific juridical instrument, and it is only through this legitimizing principle that the Constitution acquires its singular status with respect to the making of law, for it is democracy which invests the Constitution with a specific juridical quality, in which validity and legitimacy are interrelated".

32. Accordingly, it is not a question of delegitimizing the legal-political control, exercised through the constitutional courts, of an organ which lacks "representativity": there is nothing more democratic than the Constitution, which these courts are enjoined to apply and respect. This lack of representativity does not in any way impair the democratic legitimacy of the courts, for a modern democratic State such as Costa Rica, which seeks to secure not only government by the majority but also respect for minorities and for rights and freedoms in general, needs control mechanisms which do not necessarily have to be operated by representative organs.

33. Representativity is merely one manifestation of democracy. But democracy also requires security and certainty, which can only be provided by organs which, although lacking "representativity", do enjoy a "legitimacy" derived directly from the Fundamental Charter, which enables them to deliberate in an atmosphere free from political passions.

34. Accordingly, the Constitution is an ideological normative framework within which the constitutional courts can legitimately exercise their jurisdiction.

35. Article 48 of the Constitution thus offers all citizen means of protection by establishing the remedies of amparo and habeas corpus, which deliver adequate safeguards of fundamental rights in accordance with the obligation of States to provide effective remedies against any violation of the internationally recognized human rights.

36. The Universal Declaration of Human Rights states in article 8: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law". In addition, the American Convention on Human Rights, also known as the Pact of San José, Costa Rica, states in article 7, paragraph 6: "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful". This remedy cannot be either limited or abolished by States parties whose laws

provide that any person threatened with deprivation of his freedom has a right of recourse to a competent judge or court to decide on the lawfulness of such a threat.

37. Such remedies may be relied upon by the person concerned or by another person. And, lastly, the International Covenant on Civil and Political Rights states in article 9, paragraph 4: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

38. The foregoing arguments show that, apart from the right to life, the right to personal freedom is the most valuable human right, since without it the possibilities of exercising the other rights are eliminated or eroded.

39. As the Costa Rican constitutional expert Rubén Hernández has said, "... legal freedom is inseparable from the human being because his life involves the constant use and development of a vast stream of potential energy and of many different creative possibilities which cannot be confined to any pre-established channel, for a human being is the architect of his own destiny ... freedom, accordingly, is the essence of the human being".

40. Taken together, these are the requirements of a modern democracy in which new forms of procedure must be established and promoted with a view to modifying the spirit and the practice of the framework within which the relations between the Administration and its subjects should operate, without diminishing in any way the control exercised by the courts over the Administration.

41. When the perpetrator of a violation of the rights and freedoms recognized in article 2 of the Covenant is a private individual, the victim may bring proceedings before the Constitutional Chamber and avail himself of the remedies which the State offers.

42. The Constitutional Chamber has the primary function of ensuring the protection of the fundamental rights embodied in the Constitution and the effective application of its precepts. This Chamber is responsible for protecting and preserving the principle of the supremacy of the Constitution, which provides that no rule, treaty, regulation or law in Costa Rica's legal system may be more important than the Constitution itself.

Habeas corpus

43. The remedy of habeas corpus is based on article 48 of the Constitution, which guarantees personal freedom and integrity; this means that nobody may be deprived, without just cause, of his freedom of movement and residence or of the right to enter and leave the country. Any person may bring habeas corpus proceedings without any need for a legal adviser or representative. Any person may bring such proceedings on his own behalf or on behalf of another person.

44. Lastly, habeas corpus has a dual status: it constitutes a procedural guarantee by providing a procedural means of protecting the right to physical freedom and the right of movement; and it is also a fundamental right inherent in the human person. This dual status is reinforced by the provisions of

article 7, paragraph 6, of the American Convention on Human Rights (see para. 36 above), which, in addition to providing for this procedural means, stipulates: "In States parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished"; in other words, States in which the Convention is in force are prohibited from impairing the conditions under which habeas corpus is regulated in their legislation, for they must constantly seek to expand the scope of the protection but may never allow any regression.

45. This remedy is designed to protect the right of physical freedom and the right of movement; in fact, the doctrine and comparative legislation have expanded the extent of the cover by distinguishing between the following cases:

(a) Restoration: the purpose of this type of remedy is to restore freedom to those citizens who have been unlawfully deprived of it owing to a failure to proceed in accordance with domestic legislation;

(b) Prevention: here the purpose is to prevent threats of deprivation of personal freedom, including arbitrary threats;

(c) Amendment: here the purpose is to change the place of detention, either because it is not suited to the nature of the crime or because the detainee is being subjected to improper treatment;

(d) Restraint: here the purpose is to put an end to improper harassment of an individual by the judicial or administrative authorities or the obstruction of his access to public or private areas.

46. In Costa Rica's legislation, in addition to being expressly recognized in article 48 of the Constitution, habeas corpus is designed, according to section 15 of the Constitutional Jurisdiction Act, to guarantee personal freedom and integrity against the acts or omissions of authorities of any kind, including the judicial authorities, and against threats to such freedom and any unlawful disruption or restriction of the right to move about in the Republic and the right of free residence therein, as well as the freedom of entry and exit.

47. Seen in this way, the broad scope of the legislation enables the constitutional courts to exercise full control over any act or omission which, currently or in the future, may restrict or threaten to restrict any of the rights protected by the Constitution. It has been argued in this connection that "... habeas corpus has evolved in Costa Rica: from a means of protecting the freedom of movement (restorative habeas corpus) to a guarantee of the principle of legal protection, which also operates today as a means of preventing possible violations of that freedom (preventive habeas corpus)".

48. It is essential to draw attention to the progressive development of the international human rights instruments by Costa Rica's domestic courts. For example, the courts admitted proceedings of habeas corpus for amendment purposes in respect of a violation of the rules of international law currently in force in the domestic jurisdiction. Decision No. 199-89 held it to be a remedy against violation - inter alia - of article 8, paragraph (c) of the United Nations Standard Minimum Rules for the Treatment of Prisoners.

49. It was held that if the detention was not the result of a sentence imposed on the person concerned, or if he had not been brought before a court, "but was merely the result of the issue of a deportation order against him because the Migrants and Foreigners Office had ordained his deportation ... his detention in a facility of the prison system intended for charged offenders but in fact also used to house convicted criminals violates the rules cited by the plaintiff and that the lack of any special detention centres is not an admissible excuse, a consideration which applies with even greater force to the claim that such places of detention are more appropriate for the detainees, for the case concerns fundamental rights which cannot be violated under any pretext: it is obvious that the detention of persons who have not even been brought before a court must be effected under conditions at least better than those under which they are being detained".

50. The Constitutional Chamber has recognized the "principle of self-implementation" of these instruments in cases in which the implementation rules contained therein do not require any further development in domestic law; or when, if such development is required, domestic law provides the institutional and procedural arrangements (organs and procedures) necessary for the exercise of the right in question.

51. It can thus be seen that Costa Rica expressly recognises the four types of remedy referred to above but with an important innovation - that these remedies also protect physical integrity.

52. Act No. 7128 of 18 August 1989 amended article 48 of the Constitution to read:

> "Everyone shall have the right to bring habeas corpus proceedings to protect his personal freedom and integrity, and to bring amparo proceedings to maintain or re-establish his enjoyment of the other rights embodied in this Constitution and of the fundamental rights recognized in the international human rights instruments in force in the Republic. Both these remedies shall be within the jurisdiction of the Chamber referred to in article 10."

In other words, these proceedings are heard by a special chamber of the Supreme Court of Justice (the Constitutional Chamber), which is made up of seven tenured judges (arts. 10 and 48). The system is a concentrated one, for the proceedings are heard by a single court. Decisions of the Constitutional Chamber are not subject to appeal, except that they may be supplemented or clarified within three days on the application of a party, or at any time on the Chamber's own motion. An appeal for annulment is admissible in cases when it is necessary to correct serious errors in the assessment of the facts detrimental to the parties involved.

53. These proceedings may be brought by any person by petition, telegram or any other means of written communication. If telegraphic means are used, they are free of charge.

54. The proceedings are supervised by the president or by an examining magistrate designated by him. The powers of the president or examining magistrate include the power established in article 21, second and third

paragraphs, of the Constitutional Jurisdiction Act, which authorises them to order the injured party to appear or to order an investigation when this is considered necessary in the light of the circumstances, either before ruling on the application or for the purposes of enforcement, if necessary, of a ruling for or against. He may also order at any time any interim protection measures which he sees fit.

55. According to the third paragraph of article 9 of the Act, these proceedings may not be admitted on an interlocutory basis, i.e. without first hearing the arguments of the defendant. This is because, the admission of proceedings of this kind might otherwise lead to a violation of the principle of due process entailing financial and legal consequences.

56. On receipt of an application, the examining magistrate requests a report from the authority indicated as the offender, which must be submitted within a time limit of at most three days set by the magistrate. He may also order that no other action shall be taken against the injured party which may result in the non-enforcement of the Chamber's final decision. The case must be decided within five days of the expiry of the time limit, except when it is necessary to collect evidence, in which case the five-day period runs from the time of receipt of the evidence in question.

57. If the Chamber finds in favour of the applicant, the offending authority is sentenced to payment of compensation for the injuries caused, which is effected on an administrative basis by means of the procedures for enforcement of sentences, without prejudice to any other liability (arts. 25 and 26, second paragraph).

58. Any failure on the part of a defendant authority to comply with a ruling of the Chamber entails the criminal responsibility of the persons concerned (arts. 71 and 72).

59. Once proceedings have been initiated they may not be discontinued. It has been held that "in the case of habeas corpus there is no rule authorising withdrawal, which is a logical position for the law to take, since this mechanism is designed to protect the most important rights in our legal system - the rights of freedom of movement, physical and moral integrity, and personal dignity...".

60. Since what is at stake here is the protection of rights highly valued by society or of great importance for harmonious coexistence in society, the legal system denies the injured party the option of deciding whether the offender shall be punished. Thus, article 8 of the Act governing these matters provides that, once an application has been made for intervention by the Constitutional Chamber, the Chamber must act automatically "without the possibility of invoking the tardiness of the parties to delay the proceedings. What is involved here is the public interest in ensuring that, once the Chamber's intervention has been requested, it is not subject to the will of the parties involved in the constitutional proceedings; even against their will, it may hand down a substantive decision, one deemed necessary in the light of the purpose of all proceedings of this kind". (Decision No. 3867-91.)

Habeas corpus proceedings against subjects of private law

61. The Constitutional Jurisdiction Act does not address the possibility of bringing habeas corpus proceedings against acts of subjects of private law; this is also true of amparo proceedings, which are also regulated in the Act (arts. 57-65).

62. Article 48 of the Constitution provides that everyone shall have the right to bring habeas corpus proceedings to protect his personal freedom and integrity and it does not impose any limit with respect to the perpetrators of the violation. This means that the Constitution does not exclude the possibility of proceedings against subjects of private law; the Legislature may not, by simple administrative means, restrict the scope of the guarantee, which might well be the purpose of limitative control of the constitutional order.

63. Costa Rican law does not expressly recognize the right to bring habeas corpus proceedings against private individuals by means of an amparo action against subjects of private law; personal freedom and integrity are protected in accordance with the constitutional jurisprudence cited above. Thus, the constitutional courts exercise a transcendental interpretative function in protecting fundamental rights and a corrective function with regard to the current constitutional and legal system.

Amparo

64. The remedy of amparo also has its origin in article 48 of the Constitution, which establishes the right of any person to use this remedy to maintain or re-establish his enjoyment of the other fundamental rights embodied in the Constitution (except for the right to freedom, which is protected by habeas corpus).

65. In this case, as in the preceding one, the services of a lawyer are not required. According to Mauro Cappelletti, amparo constitutes the "constitutional jurisdiction of freedom", being a procedural instrument designed specifically to protect those rights.

66. Of course, the constitutional right is based on two principles which are initially opposed to each other: authority and freedom. A contemporary Argentine jurist has commented in this connection that "unrestricted authority is the death of freedom, and unrestricted freedom is the death of authority and of freedom itself". It is precisely at this point that the law comes into play by fixing, reasonably and prudently, the limits of this eternal stream of power. Accordingly, both the remedy of amparo and other similar remedies seek an appropriate balance between the two principles.

67. The right to "effective recourse" stipulated in article 25 of the American Convention on Human Rights is transformed into a primary obligation of States parties to this international instrument and requires the consequent incorporation in their domestic systems of legal remedies which satisfy that criterion. In modern times it is not sufficient to have ordinary jurisdictions such as a system of administrative law. The sea of injustices to which an individual is routinely subjected requires other privileged procedural means,

even parallel ones, to combat such injustices, and amparo is the most appropriate remedy for attainment of this end.

68. As was stated in connection with habeas corpus, it will in the end be for the courts - by means of effective use of this guarantee - to ensure the full development of the human rights recognized in the domestic legal systems of States and, of course, in international human rights law in those countries which have expressly accepted it.

69. This remedy is established in article 48 of the Constitution and regulated in title III, chapter I, of the Constitutional Jurisdiction Act. Article 29 of this Act states that the recourse of amparo guarantees the fundamental rights and freedoms with which the Act is concerned, except for the ones protected by habeas corpus.

70. Amparo may be invoked against any provision, agreement or decision and, in general, against any action, omission or simple material act not based on a valid administrative regulation committed by public servants or organs which has violated, violates or threatens to violate any of those rights, as well as against arbitrary actions and acts or omissions based on wrongly interpreted or improperly applied regulations.

71. According to article 30 of the Act, amparo may not be invoked: (a) against decisions and jurisdictional rulings of the judiciary; (b) against acts of the administrative authorities pursuant to judicial decisions, provided that such acts are carried out in accordance with the orders of the judicial authority in question; (c) against acts or decisions of the Supreme Electoral Court in electoral matters.

72. Given the broad language of the legislation, it would be difficult to find cases in which proceedings may not be brought by this means, except for the cases expressly excluded by law. However, the scope of the legislation is being delimited by legal precedents. For example, it has been held that, while it is true that any misconduct could give rise to a problem of a constitutional nature since the Constitution is the supreme law from which the entire infra-constitutional juridical system is derived, the existence of direct injury to the Constitution is a prerequisite for use of this remedy. Other injuries which may be inflicted on the Constitution, provided that they are indirect, should be dealt with by the courts of ordinary jurisdiction.

73. There are two important innovations in article 30, paragraph (a), of the Constitutional Jurisdiction Act, which refer specifically to "amparo against laws" and against "rules of automatic application" and under which amparo may not be invoked against laws and other legislation except in two cases: when the proceedings are brought against acts involving application of such laws or legislation to an individual, or in the case of rules of automatic application when their prescriptions are immediately binding by the mere fact of their promulgation, without any need for other regulations or acts to develop them or render them applicable to the injured party.

74. According to article 48 of the Act, in such cases the amparo proceedings shall be suspended and the applicant shall be granted a period of 15 working days to bring a corresponding action of unconstitutionality against the

provision serving as the justification of the act challenged in the amparo proceedings. Once a decision has been handed down in this action, it will be necessary to hear the action which gave rise to it, i.e. amparo, in order to determine whether the act of individual application was consistent with the Constitution.

75. Article 33 addresses what might be called a quasi-universal right of amparo, i.e. the fact that any person can bring such an action either on his own behalf or on behalf of another person. We say "quasi-universal" because not all violations of the Constitution, no matter how serious, justify amparo proceedings. There must be an injury to a fundamental right and not merely damage to the common interest of guaranteeing legality in the abstract. For example, violation of an organic rule of the Constitution does not authorize an individual to seek to sanction administrative actions as if he were a public prosecutor.

76. The jurisprudential criterion has also been established that neither the State nor any other public-law entity possesses fundamental rights, so that their rights are not subject to protection by means of amparo. Here, Bidart Campos points out that "in the exceptional situations in which it is admissible to accord a subjective right to the State within a juridical system, such a subjective right does not enjoy the status accorded, on other philosophical, historical or political grounds, to human rights". He concludes that "it is therefore wrong to include the State among the active subjects of what we call human rights".

77. Amparo proceedings are heard by the Constitutional Chamber of the Supreme Court of Justice. The application states the act or omission providing the grounds for the action, the right allegedly violated or threatened, the name of the public servant or organ responsible for the threat or injury, and the evidence supporting the allegation. There is no need to cite the constitutional rule which has been infringed provided that the injured right is clearly specified, except in cases when an international instrument is invoked. If the identity of the public servant is unknown, the proceedings are brought against the Administration.

78. Any third parties who derive subjective rights from the rule or legislation providing the grounds for the action will also be a party to the proceedings. In addition, any person having a legitimate interest in the result of the action is able to appear in it and be heard as an additional party.

79. This remedy is not subject to any other formalities and does not require authentication. The proceedings may be brought by petition, telegram or other written means of communication, and the use of telegraphic means is free of charge. If the application is unclear, so that its grounds cannot be established, or if it does not meet the requirements indicated above, the applicant will be advised to correct the defects within three days. If he does not do so, the action is summarily dismissed.

80. Amparo proceedings are heard by the President of the Chamber or a judge designated by him in strict rotation, and they are handled on a priority basis, so that any other case of a different kind, except habeas corpus, may be postponed.

81. An amparo action does not require any prior recourse and certainly not the exhaustion of administrative remedies. The mere lodging of amparo proceedings suspends the effects of the laws and other legislation cited against the defendant, as well as the effects of the specific acts which are challenged. This suspension comes into effect automatically and is notified immediately by the fastest possible means to the agency or official against which or whom the proceedings are brought.

82. However, in exceptionally serious cases the Chamber may order the application or the continued application of such legislation, at the request of the government department to which the defendant official or agency is responsible, if such suspension causes or threatens to cause certain and imminent damage to the public interest greater than the damage which continued application would cause to the injured party, subject to any conditions which the Chamber may deem appropriate to protect his rights and freedoms and prevent the impairment of the effects of an eventual finding in his favour.

83. The Legislative Assembly is currently considering a bill which seeks to produce "an inversion of terms", so that the mere lodging of amparo proceedings "will not suspend the challenged procedure, but instead the examining magistrate dealing with the application will decide on the question of suspension ..."; this will always leave open the possibility that the department concerned may continue to apply the legislation when public interests are at stake which are higher or more important than the damage to the individual, or that the plenary Chamber may of its own accord take a decision differing from the original decision of the examining magistrate.

84. The decision admitting the amparo proceedings accords the defendant authority a period of one to three days to submit its report, and this authority may request the administrative report or the documents containing the details of the case. Such reports are deemed to have been drawn up under oath. Accordingly, any inaccuracy or falsehood will render the official concerned liable to punishment for perjury or false testimony, depending on the nature of the facts contained in his report.

85. If the report shows that the application is sound, the Chamber states, with an explanation of its grounds, that the amparo action is in accordance with the law. Otherwise, it may immediately order a judicial inquiry, which must be concluded within three days of the receipt of any essential evidence; when appropriate, the Chamber hears the applicant and the injured party, if the latter is not the applicant, and the public servant or his representative; a record of all these proceedings is drawn up. Before ruling on the action the Chamber may order any other investigation for the purposes of its decision.

86. A ruling in favour of the applicant entails in principle liability for the damage caused and payment of the costs of the proceedings, and payment is made as part of the enforcement proceedings in an administrative court.

87. If the decision is executory, the responsible agency or official must comply with it immediately. If this is not done within 48 hours, the Chamber addresses itself to the superiors of the responsible party and requests them to ensure compliance and to take the necessary disciplinary action. At the same time it may institute proceedings against the guilty party or parties and, after

a further 48 hours, against a superior who has not acted as requested, except in the case of officials enjoying privileged status, when the Public Prosecutor is requested to institute proceedings.

88. In accordance with article 35 of the Act, an amparo action may be brought at any time as long as the violation, threat, disruption or restriction persists and for two months after its direct effects on the injured party have totally ceased. However, in the case of purely property rights or other rights whose violation can be validly allowed, the action must be brought within two months of the day on which the injured party was reliably informed of the violation and was legally able to bring the action.

89. The denial of amparo proceedings which have not been brought in time does not prevent a challenge to the act or activity by other means if the law so allows.

90. Lastly, there is the "right of correction or reply". The Inter-American Court of Human Rights was firmly in favour of the incorporation of this right in domestic legal systems. In response to the request for an advisory opinion by the Government of Costa Rica, this international court ruled: "If articles 14.1, 1.1 and 2 of the Convention are read in conjunction with each other, any State Party which has not guaranteed the free and full exercise of the right of correction or reply shall be obliged to do so, either by means of legislation or by any other necessary means of achieving this end in its legal system".

91. Accordingly, the commitments entered into by Costa Rica under article 2 of the American Convention on Human Rights when it acceded to the Convention and accepted the jurisdiction of the Court were fulfilled in articles 66-70 of the Constitutional Jurisdiction Act (title III, ch. III).

92. The Act stipulates the following procedure: the party concerned must submit the corresponding request in writing to the head or director of the media organization within five calendar days following the publication or dissemination of the item which is challenged or whose correction is requested, and he must also submit the text of his correction or reply, drafted as briefly as possible and without reference to extraneous matters.

93. The correction or reply must be published or disseminated, with the same prominence as was given to the publication or dissemination of the original item, within three days if the organization is physically able to meet this time limit.

94. The media organization may refuse to publish or disseminate any comments, assertions or opinions which go beyond reasonable limits in that they have no direct connection with the publication or dissemination of the item in question.

95. If the media organization does not publish the correction or reply within the time limit indicated above, the Constitutional Chamber, having given the organization 24 hours to submit its arguments, rules on the case without further formality within the next three days.

96. If the Chamber rules in favour of the applicant, its decision approves the text of the correction or reply; the Chamber orders this text to be published or

disseminated within the time limit indicated in subparagraph (b) and specifies the form and conditions for such publication or dissemination (art. 69).

Amparo proceedings against subjects of private law

97. The protection of human rights was established exclusively against acts by the public authorities in view of the prerogatives which the law itself and the doctrine accorded to their actions.

98. "But it is equally certain," as Sagués says, "that some individuals or groups of individuals can in certain circumstances exercise a degree of power which may injure the rights of other individuals. In concrete terms, of course, an injurious act of a public authority has an effect and scope different from the acts of individuals. But it may in any event happen that constitutional rights are damaged by one individual acting against another, and that such situations are not effectively addressed under current arrangements. In such cases, the situation of the injured party appears to be substantially the same as when he is injured by an official authority: in both cases, there is a right which is affected and, at the same time, unprotected."

99. This position is reinforced by the indisputable fact that if the Constitution is the highest law in the legal system it must apply equally to all, including individuals, for it is impossible to conceive of a constitutional State based on the rule of law which would allow certain areas of juridical life to be governed by a system not subject in any way to constitutional law, or, what amounts to the same thing, allow a law of the jungle in which everyone determines his own justice.

100. As an Italian jurist has commented: "There is little point in an individual being free in the State if he is still not free in society. There is little point in the State being a constitutional State if its society is despotic. There is little point in an individual being politically free if he is not socially free ... The current problem of freedom cannot be limited solely to the problem of freedom vis-à-vis the State and in the State, for it affects the very organization of the whole of civil society and has an impact not on the citizen as such, i.e. on the public man, but on the total man as a social being".

101. This is the argument from which the whole justification of the constitutional guarantee is derived. In modern times it is essential to have legal procedures designed to provide effective safeguards of the rights and freedoms accorded to the individual. In modern democratic systems the legal remedies for protection against and correction of possible violations by subjects of private law are an integral part of the systems themselves.

102. In Costa Rica this situation is addressed in articles 57-65 of the Constitutional Jurisdiction Act. Article 57 states that amparo proceedings may also be brought in respect of the acts or omissions of subjects of private law when they are acting or should be acting in exercise of public functions or powers or find themselves, de jure or de facto, in a position of power which the ordinary legal remedies are clearly insufficient to challenge or too slow to guarantee the fundamental rights and freedoms.

103. Without doubt, an amparo action against an individual is not a remedy designed to resolve every kind of conflict which may arise in private affairs, and it is certainly not conceived as a substitute for the jurisdiction of the ordinary courts. Sometimes a case requires further discussion or proof, and it is the ordinary courts which should assess the facts with due deliberation and balance.

104. Rodríguez Vega has pointed out in this connection: "However, the rule in question introduced an element which has prompted profound debate. In our country legal proceedings are slow beyond the limits of logic and reason. In some cases they take more than five years. And such cases are not exceptions but rather the rule. The norm which we have transcribed stipulates that amparo proceedings are brought when "... the ordinary legal remedies are clearly insufficient or too slow to guarantee the fundamental rights and freedoms"".

105. This is where the problem arises. If in most cases the ordinary legal remedies are clearly too slow, then on the basis of that criterion the constitutional court will become a substitute for the ordinary courts, since in most instances a fundamental right may have been directly injured, as in the case, for example, of interdiction proceedings or disputes over rights. On this assumption, the criterion cannot be so broad as to provoke an unmanageable avalanche of actions before the constitutional court, or so narrow as to abandon some violations of rights to the caprice of time.

106. The ineffectiveness of the parallel procedural remedies, the general importance of the case, or the implications which the threat or violation may have for the applicant if the matter is referred to the ordinary courts - all these elements enable us to delimit each possibility individually.

107. Anyone may bring the action, either on his own behalf or on behalf of another person, and the action must be brought against the alleged author of the injury when a physical person has acted in his individual capacity; in the case of a legal person, the action is brought against his legal representative; and in the case of an enterprise or an organized group or collectivity, against its apparent representative or the responsible individual.

108. Once the action is admitted, it is communicated to the person or entity cited as author of the injury, threat or omission within a time limit of three days, using the swiftest possible written means. This time limit may be extended if it is insufficient for reasons of distance.

109. The decision admitting the amparo action declares unlawful the act or omission which gave rise to the action and orders that the rule in question should be observed, as appropriate in each case, within a time limit indicated in the decision itself; the decision also orders the responsible person or entity to make reparation for the damage caused and to pay the costs.

110. In the case of an omission, the effect of a successful amparo action will be to compel the guilty party to respect the right in question. Settlement of the damages and costs is effected by civil proceedings as part of the enforcement of the decision.

111. If by the conclusion of a amparo action the effects of the challenged act have ceased, or if this act has been carried out in such a way that it is impossible to make good the damage to the enjoyment of the right, the decision will warn the offender not to commit the same or similar acts or omissions as the ones on which the finding was based and will require him in principle to make reparation of the damage caused and to pay the costs.

112. Amparo is a simple and effective means of correcting violations of fundamental rights in Costa Rica. This remedy is used on a massive scale by citizens and foreigners: the Constitutional Chamber of the Supreme Court has ruled on more than 25,000 cases in the past seven years. It is also used to challenge administrative rules and measures. However, it must be made clear that the Constitutional Chamber does not automatically rule in favour of the applicant.

113. The same reform created, under article 10 of the Constitution, a special chamber to hear actions of unconstitutionality and actions of amparo and habeas corpus.

114. Act No. 7135 approved the Constitutional Jurisdiction Act, which sets out the details of the procedures to be followed in proceedings before the Constitutional Chamber. Article 2 includes expressly within the Chamber's jurisdiction not only the rights established in the Constitution but also the rights "recognized by international law in force in Costa Rica".

115. The remedy of amparo is regulated in title III, chapters I and II, articles 29-65; these provisions include the possibility that an amparo action may be brought not only against the authorities of the State but also against subjects of private law when they are acting or should be acting in exercise of public functions or powers or when they find themselves, de jure or de facto, in a position of power against which the ordinary legal remedies are clearly insufficient or too slow to guarantee the fundamental rights and freedoms.

116. In their very nature amparo proceedings are summary and, once admitted, entail a request for the person against whom the action is brought to submit a report within a time limit of one to three days, after which the Chamber must issue its ruling; its decisions are not subject to appeal. The Constitutional Chamber is composed of seven judges.

117. The Constitutional Jurisdiction Act is designed to regulate the constitutional court, whose purpose is to guarantee the application of the rules and principles of the Constitution and of international or community law in force in the Republic, as well as their uniform interpretation and application, and to ensure the application of the fundamental rights and freedoms established in the Constitution and the international human rights instruments in force in Costa Rica. These matters are dealt with in the following articles of the Constitution: article 33: "All persons are equal before the law, and there shall be no discrimination which impairs human dignity". (As amended by Act No. 4123 of 31 May 1968.)

118. Article 7: "Public treaties, international agreements and covenants duly approved by the Legislative Assembly shall take precedence over domestic law from the day of their promulgation or the day designated in the instrument in

question. Public treaties and international agreements relating to the territorial integrity or political organization of the country shall require approval by the Legislative Assembly, by an affirmative vote of at least three quarters of its total membership, and by a two-thirds majority of the membership of a Constituent Assembly convened for this purpose". (As amended by Act No. 4123 of 31 May 1968).

119. According to article 7 of the Constitution, public treaties and international agreements take precedence over the law, so that no ordinary law may validly conflict with the provisions of a treaty or international agreement. (Decision of the Full Court, special session, 8 October 1987.)

120. According to this decision, "... in the event of a conflict between a treaty and a law, the question of which is anterior and which is posterior is irrelevant, for the treaty will always prevail by virtue of its "authority superior to laws". It is clearly easier to accept the solution of the problem when the treaty is posterior to the law, on the basis of the principle contained in article 129, paragraph 5, of the Constitution, for the posterior treaty abrogates the anterior law. But in fact the solution is the same even when the ordinary law is posterior to the treaty with which it conflicts, because the treaty prevails over the law by reason of its higher authority, as confirmed in the recent amendment to article 2 of the Civil Code mentioned above, to the effect that "provisions which conflict with other provisions of superior rank shall be void"". (Resolution of the Full Court, extraordinary session, 22 May 1986.)

Paragraph 3

121. Article 48 of the Constitution states that "everyone shall have the right to bring habeas corpus proceedings to guarantee his personal freedom and integrity, and to bring amparo proceedings to maintain or re-establish his enjoyment of the other rights embodied in this Constitution and of the fundamental rights recognized in the international human rights instruments in force in the Republic. Both these remedies shall be within the jurisdiction of the Chamber referred to in article 10". (The reference is to the Constitutional Chamber.)

122. The Decision of the First Chamber of 31 July 1987 states in this regard: "... as provided in article 48, third paragraph, of the Constitution, "in order to maintain or restore the enjoyment of the rights embodied in this Constitution, everyone shall, in addition, have the right to bring amparo proceedings ...". This constitutional rule makes a broad reference to "other rights" without restricting amparo to a specific group of constitutional rights, such as for example those which the Constitution addresses in title IV under the heading of individual rights and guarantees, because it is obvious that some of the other rules of the Constitution also establish rights of citizens which, in themselves, are not subject to protection by means of amparo. It is understood that the protected rights must be ones relating directly to the person, which may be injured by acts of agents of the Administration, but that this does not apply to other kinds of situation, since amparo is not granted in the general and common interest of all citizens, whose conduct is kept in line with the provisions of the Constitution by the public authorities".

123. It has repeatedly proved to be the case that, in order to protect the rights accorded by the Constitution to individuals, article 48 does in fact establish a dual guarantee: the remedy of habeas corpus, when a person is considered to have been unlawfully deprived of his freedom, the scope of this right being defined in article 1 of the Habeas Corpus Act No. 35 of 24 November 1932; and the remedy of amparo, designed to maintain or restore the enjoyment of the other rights, which is regulated by the Amparo Act No. 1161 of 2 June 1950. "Although under our institutional system these two guarantees differ in terms of the rights which they protect, they are the same in that they are designed to protect individual rights recognized in the Constitution." (Decision of the First Chamber of 31 January 1986.)

124. It must be borne in mind that the remedy of amparo does not exist to solve problems of legal validity or effect which should be dealt with by other procedures, because that would mean perverting the fundamental nature of the remedy and would transform it into a means of verifying legality rather than constitutionality. Thus, amparo proceedings may be brought only with respect to acts of an authority, civil servant or public employee which violate or threaten to violate the rights embodied in the Constitution. (Decision of the First Chamber of 31 January 1986.)

125. Article 48 of the Constitution establishes the remedy of amparo as an appropriate means of maintaining or re-establishing the enjoyment of the rights - to personal freedom and integrity - embodied in the Constitution, as well as the fundamental rights recognized in the international human rights instruments in force in the Republic. (Decision No. 48-90 of 12 January 1990 of the Constitutional Chamber of the Supreme Court of Justice.)

126. "... It is clear therefore that it is by legal means that the parties can seek protection of an injured or questioned right - by requesting the court to order the necessary measures and actions to guarantee to the parties the legitimate exercise of that right. Laws are generally designed to secure the protection of what pertains or belongs to an individual, in the sense both of regulating individual rights and of establishing a formal and appropriate machinery to provide persons with access to the courts; and the courts, having sufficient powers of compulsion, re-establish the rule of law and dispense justice when an injury is substantiated. The justice dispensed to the parties must be prompt and comprehensive, and may not be denied, but it must conform strictly with the law ... It is important to point out, therefore, that when requesting the application of all these legal principles the parties must comply with a previously established procedure, and that the courts cannot act arbitrarily, because they too must respect a standard imposed by the same laws, which have their origin in a supreme law - the Constitution; all this must be done for the equal benefit of the parties while ensuring the correct administration of justice. Only when access to justice is genuinely denied can the laws which themselves produce such a result be regarded as unconstitutional." (Resolution of the Full Court, special session, 26 April 1984.)

127. "... article 48 of the Constitution ... establishes this guarantee (the remedy of amparo) with respect to all the rights protected by the Constitution, not just the individual rights, and when a legal regulation limits a right broadly established in the Constitution in open conflict with the text of the

Constitution and in an arbitrary manner." (Resolution of the Full Court, special session, 2 May 1952).

128. The essential purpose of the remedy of amparo is to protect citizens against certain arbitrary acts which are being performed or have been performed by members of the public administration acting mainly within the scope of their discretionary powers. (Resolution No. 44 of the Full Court, special session, 31 July 1958.) The remedies are also protected by the Constitutional Jurisdiction Act in the following articles. The remedy of amparo guarantees the fundamental rights and freedoms referred to in the Act, except the ones protected by habeas corpus (art. 29).

129. Proceedings of amparo may be brought against any provision, agreement or decision and, in general terms, against any action, omission or simple material act not based on a valid administrative function of public servants or public bodies, which has violated, is violating or threatens to violate any one of those rights.

130. Proceedings of amparo may be brought not only against arbitrary acts but also against acts and omissions based on wrongly interpreted or improperly applied rules. Any person may bring proceedings of amparo (art. 33).

131. Proceedings of amparo may also be brought against acts or omissions of subjects of private law when they are acting or should be acting in the exercise of public functions or powers or when they find themselves, de jure or de facto, in a position of power against which the ordinary legal remedies are insufficient or too slow to guarantee the fundamental rights and freedoms referred to in article 2, paragraph (a), of the Act (art. 57).

132. A decision rejecting such an action must state the best means of protecting the injured right. Proceedings of amparo may not be brought against lawful conduct of subjects of private law. Any person may bring proceedings of amparo (art. 58).

133. Habeas corpus proceedings may be brought to protect personal freedom and integrity against acts or omissions of an authority of any kind, including the judicial authorities, against threats to that freedom and integrity or improper disruption or restriction of freedom by the authorities, and against unlawful restriction of the right to move about in the Republic or of the right of free residence, entry and exit (art. 15).

134. Any person may bring habeas corpus proceedings by petition, telegram or other means of written communication, without need for authentication (art. 18). If telegraphic means are used, they are free of charge.

135. When the challenged act is a positive one, the decision granting amparo will be designed to restore or guarantee to the injured party full enjoyment of his right and restore the pre-violation situation, if possible (art. 49).

136. If the purpose of the decision is to ensure that an authority regulates the application of, complies with or carries out the provisions of a law or other piece of legislation, the authority has two months to comply with the decision.

137. When the purpose is the prohibition of an act or omission, the decision will so order and set a reasonable time limit for compliance. If the action was brought against a simple material activity or act, or against a threat, the decision will order its immediate cessation in order to prevent any similar violation or threat, disruption or restriction.

138. In all cases, the Chamber rules on the other effects of the decision in each specific case. If by the conclusion of a successful amparo action the effects of the challenged act have ceased, or if the act was committed in such a way that it is impossible to restore to the applicant the enjoyment of his injured right or freedom, the decision will order the public agency or official not to commit in future the acts or omissions which provided the grounds for the successful action, and it will state that, otherwise, the agency or official will be committing the offence envisaged and sanctioned in article 71 of the Act, without prejudice to any liability which they may already have incurred (art. 50).

139. If by the conclusion of a successful amparo action the effects of the challenged act have ceased, or if the act was committed in such a way that it is impossible to make good the injury to the exercise of the right, the decision will warn the offender not to commit the same or similar acts or omissions as the ones which provided the grounds for the successful action, and it will also order him in principle to make reparation for the damage caused and to pay the costs; the provisions of the preceding article will also apply. All of this is without prejudice to any other civil or criminal liability which the offender may incur (art.63).

140. A term of imprisonment of between three months and two years or a fine of between 20 and 60 days' salary is imposed on any person who, having received an order issued under an amparo or habeas corpus action which he must carry out or cause to be carried out, but does not carry out or cause to be carried out, provided that the offence is not subject to a heavier penalty (art. 71).

141. A term of imprisonment of between six months and three years, or a fine of between 60 and 120 days' salary is imposed on any person who provides grounds for the lodging of a new amparo or habeas corpus action by repeating to the detriment of the same injured party the act, omission or threat which provided the basis for an earlier successful action (art.72).

Actions of unconstitutionality

142. Actions of unconstitutionality may be brought against any act, rule, provision or law which clashes with the Constitution. The Constitutional Chamber also receives requests for advisory opinions on the constitutionality of draft legislation, in order to determine whether it contains any unconstitutional provision before it becomes law; it also receives requests for advisory opinions from the courts of justice when there is some doubt about the unconstitutionality of a rule or the proceedings at the various stages of a case. The Chamber operates 24 hours a day, 365 days a year, so that it can consider applications at any moment, and it has a judge and support staff working shifts. Actions of unconstitutionality do require a more formal presentation.

Higher appeal courts

143. These courts are subordinate to the Chambers of the Court. The Higher Criminal Court of Appeal was created recently and is ranked above the other higher courts; its function is to hear appeals relating to extradition, bail, some cases of release from prison, and annulment in matters of direct application. The Organic Judiciary Act envisages the creation of courts of appeal to deal with other matters, but no action has yet been taken.

144. These arrangements presuppose that citizens are properly informed about their rights and their means and modalities of recourse against decisions of the Administration. This has been the purpose of many of the reforms introduced in recent times.

145. Taken together, these measures satisfy the requirements of a modern democracy, which must establish and promote new forms of procedure with a view to modifying the spirit and methods of the framework within which the relations between citizens and the Administration should operate.

Article 3

146. Article 3 of the Covenant concerns the equality of rights of men and women. Title IV of the Constitution, on individual rights and guarantees, states in article 20:

> "Every person is free in the Republic, and no person enjoying the protection of its laws may be a slave."

147. Article 33 of the Constitution goes on to establish the principle of equality:

> "All persons are equal before the law, and there shall be no discrimination which impairs human dignity."

148. The equality of men and women is further reinforced in article 1 of the Act for Promotion for the Social Equality of Women:

> "It is an obligation of the State to promote and guarantee equal rights between men and women in the political, economic, social and cultural fields."

Article 2 states:

> "The authorities and institutions of the State shall be obliged to ensure that women do not suffer any discrimination due to their sex and that, regardless of their civil status, they enjoy equal rights with men in all political, economic, social and cultural matters, in accordance with the United Nations Convention on the Elimination of All Forms of Discrimination against Women, ratified by Costa Rica in Act No. 6968 of 2 October 1984."

149. Article 2 of the Act Prohibiting Sexual Harassment in the Workplace and the Teaching Profession states:

> "The purpose is ... to prohibit and punish sexual harassment as constituting discrimination by reason of sex against the dignity of women and men in working and teaching relations."

Following the adoption of this Sexual Harassment Act, the Office for the Protection of Citizens, through the Office for the Protection of Women, introduced systematic measures to achieve compliance with every one of the mandatory provisions of the Act. This action is based on the terms of reference of the Office relating to the protection of the rights of citizens, its duty to ensure compliance with the law by the public sector, and the powers assigned to the Office by the Act to promote the dissemination of information.

150. This legislation has formed the basis for the "National Campaign to Promote the Act Prohibiting Sexual Harassment in the Workplace and in the Teaching Profession", which is one of a range of activities which the Office has been carrying out since it opened its doors in 1993. It was decided at the outset, on the basis of referred cases, informal consultations and the information received, that one of the main focuses of this activity should be measures to tackle and eradicate sexual harassment, which is regarded by the Office as one of the commonest manifestations of sexual violence in the public sector and thus as an infringement of the principles of equality of rights and respect for human dignity. In addition to dealing with the cases submitted to it, the Office has also begun to publicize, through the communication media and by means of talks and conferences, the existence of sexual harassment and its repercussions.

151. It has also established a monitoring mechanism, in the belief that it is not sufficient to take measures addressing training, eradication and regulation in connection with sexual harassment within institutions. It requested every one of the heads of institutions to submit information about such measures, as well as sending them a copy of the regulations.

152. The Office for the Protection of Citizens, together with the Ministry of Foreign Affairs and Religion, was one of the first institutions to be involved in the drafting of the instrument.

153. There has been a positive outcome in terms of the number of institutions which have complied with their obligations under the Act. The fact that the majority of the country's ministries, non-financial public institutions, and service institutions have approved the regulations or are in the process of doing so is a positive sign. It can thus be said that the work done under the National Campaign has been decisive in this process, for most of the institutions which hosted workshops requested and received advice and demonstrated their interest in and concern about the topic.

154. In addition, article 2, paragraph (a), of the Act creating the National Centre for the Development of Women and the Family establishes as one of the Centre's functions:

> "To protect the rights of women recognized in the international declarations and conventions and in Costa Rica's legal system, to promote equality between the sexes, and to encourage action to improve the situation of women."

155. The Government's main initiative has been to support and approve legislation to protect and establish gender equality. From a standpoint of respect for fundamental human rights it has been calling upon and urging other States to take urgent and effective action, as far as they can, to abolish such inequalities.

156. The basic premise is that a law does not construct reality but is an important means of transforming reality, so that it is essential to publicize the legislation protecting the rights in question. The hope is that the Act will constitute yet another means of establishing a society in which men and women are equal.

157. It must be emphasized that Costa Rica, in an effort to provide greater and more effective care and protection for the family, promulgated in article 1 of Act No. 5476 of 21 December 1973, which entered into force on 5 August 1974, the enactment of the Family Code and the establishment of the related courts. Costa Rica is the first country in the American continent to have created specific protection for the family. Article 2 of the Family Code states:

> "Family unity, the best interests of children and other minors, and equality of rights and duties must be the fundamental principles of the application and interpretation of this Code."

158. The year 1974 saw the creation by decree, and subsequently by law in 1979, of the National Centre for Women and the Family as a decentralized agency. This legislation invested the Centre with broad powers of management, policy-making and coordination with respect to the State's policies for the advancement of women. The gender perspective of these powers was reinforced by the reform introduced by the 1990 Act on Promotion of the Social Equality of Women by establishing as the Centre's primary function the protection of the rights of women and promotion of gender equality.

159. One of the Government's current commitments is to change the Centre's care-agency image so that it may finally perform its functions as the lead agency for the public policies established by law. The first action taken in fulfilment of this commitment was to amend the Regulations for the Act by means of an executive decree issued on 10 June 1998 with the aim of modernizing the Centre's operations and specifically to establish its coordination role with respect to the new ministerial offices for women which are being created.

160. As a result of this legislation, the National Centre can become a useful and modern instrument for, amongst other things, monitoring the establishment of public institutions for the advancement of women in Costa Rica. This legal authority and these broad powers are the substantive bases of the Centre's actions. Article 1 of the Act states in this connection:

> "In order to secure broad participation by Costa Rican women in the country's material and spiritual development, there shall be created a National Centre for the Development of Women and the Family ..."

161. The social advancement of women and the struggle for equality of opportunities have been one of the most important developments in the country. And the women in the family, together with the children and older adults, are

the persons most powerfully affected. It was thus essential to pass the recent Domestic Violence Act, which was supported by all political interests in the Legislature.

162. Equality is a universally applicable human right. Costa Rica's Constitution establishes the principle of equality in article 33:

> "All persons are equal before the law, and there shall be no discrimination which impairs human dignity". (As amended by Act No. 4123 of 31 May 1968.)

This provision is clear: it does not mean that equal treatment must be given in all cases, regardless of any legally relevant differences which may exist, or that any element of inequality necessarily constitutes discrimination. Equality, as the Constitutional Chamber has repeatedly stated, is only violated when the inequality has no objective and reasonable justification.

163. Equality must be understood in the light of the circumstances of each case in which it is invoked, so that the universal application of the law does not prohibit the consideration of different solutions or different treatment for different situations. In other words, equality before the law does not imply material equality or real and effective economic equality. (Decision of the Constitutional Chamber No. 1770-94). In that same year Costa Rica signed the Convention on the Elimination of All Forms of Discrimination against Women.

164. Where women's rights are concerned, Costa Rica has also signed, ratified and acceded to the following international instruments:

- Convention on the Political Rights of Women (1952), which entered into force on 7 July 1954;

- Inter-American Convention on the Nationality of Women (1933), which entered into force on 29 August 1934;

- Inter-American Convention on the Granting of Political Rights to Women (1948), which entered into force on 17 March 1949; and

- Inter-American Convention on the Granting of Civil Rights to Women (1948), which entered into force on 17 March 1949.

165. It was on the basis of the national legal system and the incorporation of the conventions mentioned above that the Executive submitted to the Legislature for its consideration the bill providing real equality for women, which has already been approved. This legislation envisages the strengthening of the political, economic, social and cultural rights of women in relation to the rights of men in those fields, and proposes the creation of an office for equal rights for men and women.

166. The National Centre for the Development of Women and the Family is revising the family, criminal and labour codes and reviewing the situation of women in the administration of justice with a view to taking the necessary action to enhance the application of the principle of equal rights.

167. On various occasions the Constitutional Chamber has handed down decisions concerning gender equality and discrimination:

> "The constitutional principle of equal pay for equal work is no doubt derived from a broader principle that equality is to be guaranteed by providing equal treatment for persons in reasonably equal circumstances; this means that different treatment in dissimilar circumstances is not necessarily unconstitutional." (Decision of the Constitutional Chamber No. 1725-94.)

> "The application of the principle of equality is concerned with the proportionality of taxes, and the purpose of unequal tax rates is to produce equal sacrifices, so that there will be relative equality with respect to the capacity to pay; in other words, the economic capacity of the taxpayer must be taken into account." (Decision of the Constitutional Chamber No. 5749-93.)

168. The Full Court has stated in connection with the principle of equality: "The principle of equality before the law is violated only if a law provides, without justification, for different treatment of persons in equal situations, so that the regulations must be equal with respect to the whole of any given category of persons". (Resolution of the Full Court, special session, 11 August 1983.)

Article 4

Paragraph 1

169. Article 4 of the Covenant addresses the situation in which States parties suspend some of the rights recognized in the Covenant in time of public emergency or threat to the life of the nation.

170. The purpose of the State is to provide full protection for citizens against threats. However, Costa Rica has never yet found itself in this situation, owing to its democratic system, which is established in article 1 of the Constitution: "Costa Rica is a democratic, free and independent Republic".

171. The rule is obvious, clear and manifest, and indeed applicable in the event of a threat, but it does not allow any derogation from the fundamental rights established in article 121, paragraph 7, and article 140, paragraph 4, of the Constitution, in article 4 of the International Covenant on Civil and Political Rights, and in article 27 of the American Convention on Human Rights.

172. Under international law these rights and freedoms may not be suspended; they are regarded as included in the domain of jus cogens, i.e. they are peremptory rules of international law which cannot be derived from the will of States by means of treaties. Up to the present no case of this kind has occurred in Costa Rica.

173. However, if any danger or threat to the existence of the citizens and the State were to arise, the competent authority would have to take the necessary action to safeguard the country's existence and independence. With regard to such competent authority, article 105 of the Constitution states: "The power to

legislate rests with the people, which delegates it by means of elections to the Legislative Assembly ..." The Legislative Assembly is regulated by article 106, which states that "deputies hold this status on behalf of the nation and shall be elected by provinces. The Assembly shall be composed of 57 deputies". Deputies are elected by the people for a term of office of four years and they cannot be re-elected for successive terms (art. 107 of the Constitution). Article 12 states: "There shall not be an Army as a permanent institution. The necessary police forces shall be established to supervise and maintain public order". This provision is of general application and covers the members of the National Police, the only policing body maintained in Costa Rica. It must be pointed out that no Government of Costa Rica since 1949 has suspended the constitutional guarantees.

174. The Constitution addresses this kind of situation in article 121, paragraph 7:

> "In addition to the other powers conferred by this Constitution, the Legislative Assembly shall have the exclusive right: ... (7) to suspend by a majority of not less than two thirds of its total membership, in the event of manifest public need, the individual rights and guarantees established in articles 22, 23, 24, 26, 28, 29, 30 and 37 of this Constitution."

175. Such suspension may be enacted with respect to all or only some of the rights and guarantees, or to all or only part of the territory, and for a maximum of 30 days; during such suspension the Executive may order the detention of persons only in establishments not intended for common criminals, or it may order their confinement to residential accommodation. At its subsequent meeting the Assembly must also hear a report on the measures taken to maintain public order or the security of the State. In no case may individual rights and guarantees other than the ones mentioned in paragraph 7 be suspended.

Article 5

Paragraph 1

176. This provision is clear: nothing in the Covenant may allow interpretations which go beyond the spirit of the rule in question. In other words, the interpretation of the Covenant must always be designed to safeguard and protect the human being, and prevent any infringement of his fundamental rights, in the exercise of the civil and political freedoms, with a view to creating as far as possible the conditions in which each individual may exercise his civil, political, economic, social and cultural rights and enjoy due respect for his human rights.

177. The authors of the Covenant were careful to include this article in order to prevent interpretations of the Covenant from having the effect of abolishing or limiting the enjoyment and exercise of the fundamental rights recognized in the various national and international texts. This makes the essential nature and purpose of the obligations entered into by States parties perfectly clear.

178. The establishment of the Constitutional Chamber, in article 10 of the Constitution, was designed precisely to prevent any incorrect application of the

law, the Covenant or treaties and to safeguard the fundamental rights: "A special chamber of the Supreme Court of Justice shall rule, by an absolute majority of its members, on the unconstitutionality of laws". The Constitutional Jurisdiction Act develops these powers; to give only two examples:

> "Article 1. The present Act is designed to regulate the constitutional court, whose purpose is to guarantee the supremacy of the rules and principles of the Constitution and those of the international or community law in force in the Republic, the uniform interpretation and application thereof, and the fundamental rights and freedoms embodied in the Constitution and in the international human rights instruments in force in Costa Rica."

179. Article 2 deals specifically with the constitutional court:

> "(a) (...)
>
> (b) To monitor the constitutionality of all laws and of acts subject to public law, and the conformity of the internal order with international or community law, by means of actions of unconstitutionality ..."

180. The Constitutional Chamber rules not only on violations of constitutional rights but on the whole array of fundamental rights contained in the international human rights instruments in force in Costa Rica. It is the function of the Legislature to develop the provisions of the Constitution; in so doing, it must respect and comply with the commitments entered into by the State of Costa Rica when acceding to various human rights instruments.

Article 6

Paragraph 1

181. The right to life is a supreme right of the human person. It is guaranteed by the Constitution in article 21, which states that "human life is inviolable".

182. This right - the foundation of the existence of the human person - is inherent in the human person. It is the source of the principle of the inviolability of human life, so that its protection is a duty of society and of the State, for it is the most fundamental human right, the one from which all the others are derived.

183. The right most closely connected with life is the right to physical integrity. Costa Rica's juridical system addresses this question in article 111 of the Criminal Code, on simple homicide: "(c) Anyone who kills another person shall be sentenced to a term of imprisonment of between eight and 15 years" (as amended by Act No. 7398 of 3 May 1994), in accordance with article 21 of the Constitution; aggravated homicide is addressed in article 112, which imposes imprisonment for a term of between 20 and 35 years on anyone who commits murder; and article 113 deals with homicide in particularly extenuating circumstances, stipulating imprisonment for six years.

184. Similarly, article 50 of the Criminal Code stipulates the types of penalties to be imposed:

1. Principal: imprisonment, exile, fine and disqualification;

2. Accessory: special disqualification.

In addition, article 121 of the Juvenile Criminal Justice Act stipulates the types of penalty to be imposed when a minor is involved in the commission of a crime.

185. The fundamental purpose of this framework of penal sanctions is to establish and promote the necessary social measures to enable young people and adolescents constantly to develop their personalities and take their places in their family and society; this implies in turn some degree of re-education and social training.

186. Accordingly, the Act contains three types of punishment. The first two types - socio-educational measures and guidance and supervision orders - are based mainly on article 18 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), which recommend many different kinds of disposition measure. They state: "A large variety of disposition measures shall be made available to the competent authority ... so as to avoid institutionalization to the greatest extent possible".

187. The aim is also to reduce intervention by the penal system, as far as possible, through the use of day-attendance measures, which also have the positive effect that, in many cases, the child will not be removed from the supervision of his or her parents or guardians.

188. Lastly, the avoidance of recourse to detention is much more likely to achieve the objectives of the juvenile justice system, since most of these objectives do not require institutionalization for their attainment. Detention measures must only be used to sanction conduct which causes irreparable injury or harm.

Paragraph 2

189. The death penalty was abolished in Costa Rica, given its democratic system, for it was considered inconsistent with fundamental rights.

Paragraph 3

190. Costa Rica is a party to the Convention on the Prevention and Punishment of the Crime of Genocide.

Paragraphs 4, 5 and 6

191. These provisions do not apply in Costa Rica's legislation since the death penalty has been abolished.

Article 7

First sentence

192. Several of the rights protected by the Constitution, internal legislation and international treaties constitute the basis for the protection of persons against torture and cruel, inhuman or degrading treatment. Article 40 of the Constitution expressly prohibits penalties which may directly affect a person's physical integrity:

> "Nobody shall be subjected to cruel or degrading treatment or sentenced to life imprisonment or to confiscation of property. Any statement obtained by violation of the law shall be void."

193. In addition, article 20 of the Constitution states that every person is free and may not be a slave and is protected by law. Life must be understood as a person's most important asset, which can and must be protected by law, and life is established as the principal value on the scale of human rights and as their raison d'être, for without life all the other rights are useless; this is precisely why the right to life must enjoy special protection in the legal system.

194. Costa Rica's own understanding is that a democracy is a form of State entailing a relation between power and people which operates in favour of personal dignity, freedom and rights (...).

195. While all constitutions address this situation in one way or another, Costa Rica in fact posits the constitutional right to freedom and dignity as essential rights of the human being. One obstacle to the exercise of these rights is the pain and suffering of the terminally ill, which, in times past, even justified euthanasia.

196. Nowadays, the modern constitutions of States based on the rule of law, as well as the international human rights treaties, have invested these rights with an imprescriptible content and oblige States not only to respect them but also to seek appropriate means for their observance.

197. So let us analyze the right to life: without any doubt it is the foundation and the necessary and determinant condition of the existence of the human person and is in fact inherent in the human person. From this premise is derived the principle of the inviolability of human life, so that it is the duty of society and the State to protect it as the most essential and fundamental of the human rights, from which all the others derive. The right most closely connected with the right to life is the right to physical and mental integrity. The right to life requires health in the broadest sense, so that the right to health, while remaining independent, is almost transformed into an element of the right to life.

198. "It is the responsibility of the State to ensure that the persons under its protection receive the attention which they need in good time. It is in a way possible to admit an injury to the fundamental right to health on the basis of the argument of a lack of material means, especially as this argument has been become a common excuse of public agencies for their failure to take action

within the area of their competence ... health care for prisoners cannot be subject to the physical capacity of the means of transport of the facility in which they are housed and, in any event, the social re-education authorities have a duty, derived from the custodial function assigned to them by law, to provide patients with the necessary treatment." (Decision of the Constitutional Chamber No. 3935-94.)

199. Costa Rica is aware that the fight against torture is a national and international duty. It was for this reason that Costa Rica and Switzerland took their initiative concerning the draft optional protocol to the Convention against Torture, which provided for the establishment of an international subcommittee of independent experts, under the auspices of the Committee against Torture, which would be authorized to make visits at any time to places housing persons deprived of their freedom by decision of a public authority.

200. The refusal of the authorities "to inform the wife of the place where her husband was detained and the refusal of permission for her to see him are not acceptable in a system, like ours, based on the rule of law; such a refusal must indeed be qualified as cruel and inhuman treatment, which is what article 40 seeks to avoid, and it amounts to holding a person incommunicado, with prejudice, amongst other things, to the right of defence, for a period exceeding 48 hours without any judicial order being made". (Resolution of the Full Court of 7 February 1980.)

Second sentence

201. Acts affecting a person's body are prohibited if they cause a permanent diminution of physical integrity, except in the case of acts authorized by law. It is permissible to dispose of a body or part thereof after death.

202. Any person may refuse to undergo medical or surgical examination or treatment, except in the case of compulsory vaccination or other measures connected with public health or occupational safety and in the cases envisaged in article 98 of the Family Code (this article deals with blood tests when paternity is being investigated or challenged).

Article 8

203. Article 20 of the Constitution protects freedom and prohibits slavery. Criminal cases are subject, as appropriate, to the provisions of the Criminal Code on kidnapping (art. 163), abduction (art. 189), or coercion (art. 193).

Paragraph 1

204. Title IV of the Constitution, on individual rights and guarantees, states in article 20: "All people are free in the Republic; nobody under the protection of its laws may be a slave".

205. Criminal cases are subject, as appropriate, to the provisions of the said text.

206. "Any one who reduces another person to servitude or to a similar condition or maintains another person in such a condition shall be sentenced to a term of imprisonment of between four and 12 years." (Art. 189 of the Criminal Code.)

207. The prison system does not offer prisoners any opportunity of work, a situation which makes it difficult for them to find jobs on release.

Paragraph 2

208. Servitude does not exist in Costa Rica. The Constitution itself establishes the principle that all citizens are equal before the law without distinction as to origin, race or religion.

209. The general principle of freedom is the same principle as is found in the Declaration of Human and Civic Rights, which includes the individual freedoms guaranteed by the Constitution, the law and legal precedents.

Paragraph 3

210. Article 53 of the Constitution states expressly that work is an individual right and an obligation to society. The State must seek to ensure that every one has decent, useful and properly remunerated work, and to prevent the establishment of conditions which may in any way impair a person's freedom or dignity or degrade his labour to the level of a mere commodity. The State guarantees the right to free choice of work.

211. In many of their decisions Costa Rica's courts have acknowledged violations occurring in the application of the laws; several of these decisions are cited below.

212. "The applicant alleges violation of article 56 of the Constitution because she has been informed that the Ministry of Public Works is planning the total or partial closure of the national highway linking her neighbourhood with another town, thereby infringing not only the freedom of movement but also the right to work with respect to the transport of farm and industrial goods". "As has been repeatedly stated (see decisions of this same Chamber Nos. 43, 58, 112, 113, 136 and 153, all of 1981, and No. 7 of 1984), this article of the Constitution states two things: first, that work is an individual right and, second, that the State shall guarantee the free choice of work, these two things together constituting the "freedom to work", which may be relied upon against any abuse or restriction which the authorities seek to impose.

213. "This guarantee means that a person may choose, from among the multitude of lawful occupations available, the one most suited to his individual well-being, and that the State has an obligation not to impose any given occupation on him. Furthermore, inasmuch as this guarantee charges the State with the duty of ensuring that everyone has decent, useful and properly remunerated work it is certainly proclaiming a political duty of the State which the Legislature must fulfil, but it is not proclaiming a subjective right of the citizen. Thus, strictly speaking we do not see in this aspect either any injury of the applicant's rights, for we do not see on the part of the Minister or the officials of the Ministry any act or omission preventing the applicant from

engaging in decent work suited to her interests, or compelling her to engage in only one kind of work." (Decision of the First Chamber of 6 January 1986).

214. These rules (art. 56) "do not prevent the State, for reasons of the public interest, from regulating the exercise of occupations, especially in the case of the health sciences. Regulation is necessary for reasons which extend far beyond the scope of the interests of the individual ... The right to work and the right of free choice of work cannot be unrestricted, for freedoms must themselves be subject to regulation; and when considerations of public order are in play, it is lawful for the State to establish requirements to ensure the efficiency of the service in question". (Resolution of the Full Court of 28 January 1982.)

Article 9

Paragraph 1

215. Article 9.1 establishes the right to liberty and security of person. No one may be arrested or detained arbitrarily, only in accordance with such procedure as is established by law.

216. Article 9a of the Constitution states that "The Government of the Republic is popular, representative, alternative and responsible. It is exercised by three separate and mutually independent powers: legislative, executive and judicial". No power may delegate the exercise of its own functions.

217. A Supreme Electoral Tribunal, with the status and independence of the State powers, is exclusively and independently responsible for the organization, supervision and monitoring of the electoral process, as well as for such other functions as may be entrusted to it by the Constitution and the law.

218. According to article 152, judicial power shall be exercised by the Supreme Court of Justice and by such other courts as are established by law.

219. Moreover, the judiciary protects civil liberties and fundamental rights, by means of the remedies of habeas corpus y amparo. In accordance with article 2(a) of the Constitutional Jurisdiction Act, such cases can only be heard by the Constitutional Tribunal: "... (a) To guarantee, through the remedies of habeas corpus and amparo, the rights and freedoms enshrined in the Constitution and the human rights recognised by international law in force in Costa Rica".

220. Similarly, the judicial power participates actively in the interpretation of the law through the practice of the courts. In this respect, article 9 of the Civil Code states that: "The practice of the courts shall contribute to the improvement of the legal system through the doctrine progressively established by the cassation divisions of the Supreme Court of Justice and the Full in applying the law, custom and general legal principles".

221. With regard to functional independence, article 154 of the Constitution states that "The judicial power shall be subject only to the Constitution and the law, and the decisions it may take on matters within its competence shall

not impose upon it responsibilities other than those for which the legislation expressly provides".

222. Finally, it should be noted that the Constitutional Tribunal is empowered to hear the following: applications for amparo and habeas corpus; unconstitutionality proceedings; constitutionality review proceedings; jurisdictional disputes between the State powers, including the Supreme Electoral Tribunal, and disputes concerning constitutional jurisdiction between these powers and the Office of the Comptroller-General, municipalities, decentralized bodies and other persons of public law.

223. Article 9.5 of the Covenant mentions the right of anyone who has been the victim of unlawful arrest or detention to compensation. This situation is envisaged in article 108 of the Penal Code which states:

> "Article 108. An obligation to pay civil compensation shall likewise lie with those who make slanderous or libellous accusations or complaints. The State, secondarily, and individual accusers or complainants shall also be obliged to pay compensation if, as a result of a judicial review of the facts of the case, the accused is declared innocent and acquitted after having spent more than one year in pre-trial detention. The judicial or administrative authorities concerned shall also be liable under civil law, without prejudice to any criminal proceedings, if, despite the objections of the accused, they extend the length of the prison sentence after the initial sentence has been served under the rules established for the execution of sentences."

It is considered that the liability of the State should be joint and several rather than secondary, and efforts are being made to have this article amended accordingly.

224. In this respect, it has been established that:

> "... the allowing of the civil action for damages on acquittal does not constitute a violation of the guarantee of due process or the right to a fair trial." (Judgement No. 3603-93 of 2.42 p.m. on 27 July.)

225. Furthermore, under article 37 of the Constitution: "No one shall be detained without circumstantial evidence of an offence or without a written warrant from a judge or authority responsible for public order, unless he be a fugitive from justice or a criminal found in flagrante delicto; however, in any event, he shall be brought before the competent judge within a fixed period of 24 hours".

226. Similarly, article 39 of the Constitution states that: "No one shall be made to suffer punishment other than for an offence, quasi-offence or misdemeanour sanctioned by prior law and by virtue of a final judgement pronounced by a competent authority after the suspect has been given an opportunity to defend himself and has necessarily been proven guilty. Enforcement by committal in civil or labour matters and arrests which may be ordered in connection with bankruptcy proceedings shall not constitute a violation of this article or of the two previous ones".

227. As follows from article 3 of the Code of Penal Procedure, narrow interpretation is the rule:

> "Any legal provision which restricts personal freedom or limits the exercise of the rights conferred on the parties to the proceedings or establishes procedural sanctions shall be interpreted narrowly."

228. Clearly, as regards the freedom of the accused and the exercise of the rights of the parties to the proceedings, broad interpretations and analogies are excluded unless, of course, they favour the freedom of the accused or the exercise of his rights. In this respect, it should be pointed out that "... the formalities which govern criminal proceedings must always be interpreted, in so far as they may affect his personal freedom, in favour of the accused". (Judgement No. 1974-91.)

229. Thus, the Constitutional Tribunal has strengthened favor libertatis. In the light of the above and within this context, it is clear that "procedural sanctions" can only refer to authorized enforcement measures against the accused, which cannot be other than those regulated by the Code.

230. By a majority it was agreed “to allow the plea of habeas corpus, cancel the arrest warrant which the Superior Court ... had issued against Mr. ... in the case in question and order his immediate release, unless there were other reasons for not doing so, since it was a question of depriving a person of his liberty and any provision that restricted personal freedom should be applied narrowly...” (Decision of the Full of 6 July 1987.)

231. In our penal system, liberty is the main consideration as far as legal classification is concerned and therefore in applying it narrow criteria must be employed (articles 3 and 265 of the Code of Penal Procedure). Thus, detention will be unlawful if the decision is taken without observing the procedural forms which protect the citizen from illegal detention, which include giving grounds for the decision revoking the release and indicating the legal provision authorizing that action. (Judgement No. 136-89, Supreme Court of Justice).

232. The guarantee given in article 37 of the Constitution, "insofar as it absolutely limits the deprivation of liberty by administrative authorities to a fixed period of 24 hours, is absolute and applicable to all human beings without exception; aliens have a fundamental right to equality, with respect to which no exceptions other than those reasonably linked to nationality shall apply, without discrimination and without the possibility of this being taken to mean that article 19 of the Constitution, in permitting the limitations and exceptions for which that article and the law provide, might permit the deconstitutionalization of equality. The guarantee of personal freedom is one of those guarantees which cannot reasonably be denied to anyone and with respect to which no legitimate distinction can be made between nationals and aliens. (Judgement of the Constitutional Tribunal No. 55-89.)

233. With regard to the restriction of freedom, article 265 of the Code of Penal Procedure states that: “Personal freedom may be restricted only in accordance with the provisions of this Code, within the limits absolutely indispensable for ensuring that the truth is revealed and the law enforced”.

Arrest and detention must be carried out with the least possible harm to the person or reputation of those concerned.

234. This article is a central feature of criminal procedural law, which has led to its receiving special attention from the Constitutional Tribunal (judgements 19-89; 298-90; 345-90; 823-90; 1014-91). In practice, it has made possible a change in the mentality of the investigating magistrates who, as soon as they consider that all the useful and necessary evidence has been produced, order ex officio the freeing of the accused.

235. As regards the cautioning and refusal to make a statement referred to in article 278 of the Code of Criminal Procedure (after the person is detained his statement shall be taken), "... the judge shall inform the accused in detail of the charges and the nature of the evidence against him and that he may refuse to make a statement without his silence signifying a presumption of guilt, and that he may request the presence of a lawyer to defend him".

236. "If the accused refuses to make a statement, it shall be noted in the record; if he refuses to sign it, the reasons shall be recorded; and if he requests the presence of a lawyer, the judge shall set the date for a new hearing with the lawyer present."

237. Thus, criminal proceedings are founded on a detailed charge, which must be communicated to the accused so that the latter may, on that basis, plan and set up his defence. He must also be informed of any widening of the inquiry and, if new facts are introduced, an additional charge must be drawn up (articles 278, 373 and 373 of the same Code).

238. This emphasis on the adversarial principle provides a basis for the principle of inviolability of the right to defence, since the latter can only be effective insofar as the defendant and his lawyer know precisely what is being alleged: "In application of these principles and concepts... we conclude that the investigation, having been carried out without the accused having been legally advised of his rights, ... is contrary to the principle of the right to defence guaranteed by article 39 of the Constitution ...". (Judgement No. 3461, 20 July 1993.)

239. It is also necessary to consider "the Constitution, which provides that punishment may not be imposed other than by virtue of a final judgement handed down by the competent authority, after the defendant has had the opportunity to present his case" (art. 39) and the American Convention on Human Rights, whose article 8.2.b states that "every person accused of a criminal offence shall be entitled, as a minimum guarantee, to prior notification in detail of the charges against him". (Judgement No. 2764-92.)

240. Another important point deserving consideration is the fact that the Higher Council of Justice has ordered that all the judicial authorities competent in criminal law be informed that "... in accordance with paragraph 1 of article 152 of the Organization of Justice Act, they must advise any accused person or defendant requesting legal aid that if it is shown that he is solvent, he must retain a private lawyer or else pay the court for the services of the professional representative it may appoint, the amount to be fixed by the

court". (Circular No. 14-94 of the General Secretariat of the Supreme Court of Justice.)

241. It should be emphasised that article 274 of the Code of Penal Procedure requires a detainee to be "interrogated immediately" or at the latest within 24 hours of having been brought before the judge, a period which can only be extended, if the judge has been unable to take a statement or “equally” if the accused requests him to choose a defence lawyer. Similarly, the holding of a person incommunicado does not constitute grounds for the investigating magistrate to refrain from taking the statement of the accused, since neither article 197 of the Code of Penal Procedure nor any other article of the Code so provides, in addition to which postponing this procedural act means delaying the start of the period for deciding the fate of the accused (articles 286 and 289) to the detriment of the latter. Holding incommunicado is not incompatible with the immediate interrogation of the accused nor with the latter’s right to make a statement in the presence of his or her lawyer, and all that is possible in these circumstances is to take the necessary precautions to ensure that the purposes of incommunication, as specified in article 197 itself, are not frustrated; this is stated as a general principle, without implying any particular grounds in the present case (Full judgement of 10 February 1986).

Paragraph 3

242. Article 190 of the Penal Code, in the section on “Concealment of detainees by authorities”, stipulates that authorities and officials who order the concealment of or conceal a detainee, refuse to produce him to the respective court or in any other way disregard the guarantee given in article 37 of the Constitution shall be liable to the same penalty (4 to 12 years imprisonment) and, in addition, to loss of the position or commission which they hold or disqualification from holding such position or commission for from six months to two years.

243. According to article 41 of the Constitution, through recourse to the law, everyone should be able to obtain compensation for injury or damage to their person, property or moral interests. They shall receive prompt and full justice, without being denied and in strict conformity with the law.

244. As repeatedly stated in connection with questions of constitutionality and amparo, article 41 of the Constitution actually consists of a combination of basic principles binding on both individuals and the State. Thus, “through recourse to the law” means that disputes must be settled using the means and in the place that Parliament has specified for the purpose. Moreover, this provision states that persons “should be able to obtain compensation for injury or damage...”, so that the law should be directed towards the ensuring the protection of the rights infringed, in the dual sense of establishing a universal right and, at the same time, providing the appropriate instruments not only for seeking redress from the competent court but also for ensuring that its decisions are ultimately enforced. Thus, it is not exclusively a question of justice in the seat of jurisdiction but of access to the body designated by Parliament for the proper settlement of the disputes which arise in every sphere of activity, for reasons of security and certainty, which is the ultimate aim of the legal system. It is more of a specialized form of the right of petition or of “action”, as it is known from the procedural standpoint, derived from the

essential need to live an orderly life within society. Otherwise, one would be forced to conclude that the guarantees provided in article 41 of the Constitution would cease to be effective or for various reasons might lose their effectiveness in certain circumstances, which is inadmissible. (Judgement of the First Division, 10 of December 1987.)

245. "... It is then explained that it is through legal proceedings that the parties may request amparo for a right that has been infringed or questioned by requesting from the court the pertinent measures and the intervention necessary for them to be guaranteed the legitimate enjoyment of that right. The law in general is directed towards procuring the protection of that which belongs or pertains to each one, both in the sense of regulating individual rights and in the sense of establishing formal and appropriate machinery for persons to obtain access to the courts and for the latter, given sufficient authority, to re-establish the rule of law and dispense justice if injury is proved. They should receive justice promptly and fully, without being denied, but in strict accordance with the law… In order to request the application of all these legal principles the parties must submit themselves to a pre-established procedure and the judge may not act at his own discretion since he too must follow a pattern laid down by the laws themselves, which have their origin in one supreme law, namely the Constitution, all this being for the equal benefit of the parties and in the interests of the proper administration of justice. Only if access to justice is actually denied can the laws, which, in themselves, produce these consequences, be unconstitutional. (Full judgement, 26 April 1984.)

246. Article 41 of the Constitution "..., as such, relates not only to the (justice) of the courts but also to that of the public administration". (Decision, First Division, 13 May 1984.)

247. Likewise, article 272 of the Code of Penal Procedure states that "a judicial police official or auxiliary making an arrest shall immediately bring the person arrested before the competent judicial authority".

248. "The detention of the petitioner" to investigate his migratory situation has extended beyond the period laid down in article 47 of the Constitution, without his having been brought before any judicial authority, as he should have been if he were being charged with a punishable offence, so that in these circumstances his being deprived of his liberty is unlawful since it does not have the support of the competent authority, nor can it be justified on the grounds given by the Director General of Migration, according to which the detention order was given “for the purpose of investigating his migratory situation”, since the law contains no provision that would allow a foreigner to be detained in these circumstances. (Full decision, session of 22 August 1985).

Paragraph 4

249. Articles 37 and 41 of the Constitution (see notes 1 and 3 to this article, respectively): "If the only item of proof that serves to justify the detention of the accused is that which can be extracted from a recorded telephone conversation, which is insufficient because the report of the Physical Investigation Section of the Forensic Sciences Laboratory Department of the Judicial Investigation Service is unable to establish with certainty whether the voice alleged to be that of the accused is in fact his, then clearly, in these

circumstances, his detention is a violation of article 37 of the Constitution…". (Full decision, session of 31 October 1983.)

250. As regards minors, article 41 of the Juvenile Criminal Justice Act states that: "the juvenile judicial police may summon or arrest those suspected of being responsible for the reported offence; ... in no circumstances may a minor be held incommunicado. If caught red-handed, he shall be brought immediately before the juvenile magistrate".

251. If the minor is arrested by members of the administrative authorities, they shall immediately bring him before the juvenile magistrate (article 42 of the Juvenile Criminal Justice Act).

252. The National Children's Association, through its legal representative, may participate, as an interested party, in every stage of the proceedings, with a view to monitoring, supervising and guaranteeing the strict implementation of the provisions of the law for the benefit of the minor, whether he be the victim or the perpetrator of the offence.

253. The purpose of juvenile criminal proceedings is to establish the existence of an offence, determine the perpetrator and any accomplices and order the imposition of the appropriate penalties. A further purpose is to seek the reintegration of the minor into his family and society, in accordance with the guiding principles laid down by law.

254. Crimes and misdemeanours committed by minors shall be legally characterized in accordance with the descriptions of prohibited conduct given in the Penal Code and special laws.

255. The protection of personal freedoms requires that the period which elapses between someone being arrested and his being judged be as short as possible.

Article 10

256. The first paragraph of article 10 of the Covenant establishes the right of a person deprived of his liberty to be treated with respect for his dignity. This right is affirmed in the above-mentioned Penal Code, the Code of Penal Procedure and the General Social Rehabilitation Act.

257. It should be pointed out that on 1 January 1998 the new Code of Penal Procedure will enter into force. There are many hopes, concerns, doubts and uncertainties with regard to the mechanisms which this new legislation, accompanied by dozens of reforms and other related laws, will put in place.

258. Costa Rica considers itself to be a democratic and less inquisitorial country. From next year there will be a variety of ways of dealing with criminal cases and the criminal law will be geared to seeking solutions rather than punishment.

259. The new Code forms the basis of a "revolution" in penal procedures and will replace the existing Code, which has been in force since 1973.

260. The new Code will result in the penal procedure being transformed into a tool for settling disputes, and, in this connection, the government attorneys will play a much more prominent part since it will be they who carry out the investigations and not the investigating magistrate who, it may be said in passing, is to disappear.

261. This means that the prosecution of the accused will be replaced by an investigation mechanism controlled by the Office of the Attorney-General. "The system will strengthen due process, the victim will play a more active role and proceedings will be speeded up".

262. The government attorneys will be able to apply the criterion of expediency, which means “screening” cases and pursuing those of real importance.

263. The Code establishes new ways of settling a case without it being necessary to proceed to the final stage of a trial. These include: conciliation between the victim and the accused (except in the case of sexual offences); abridged proceedings - if the accused accepts the charges his sentence may be reduced; and suspension of the proceedings - the case is halted if the accused agrees to be placed under legal supervision and to carry out the community service tasks ordered by the judge.

264. Fundamental changes: stages of the proceedings. The preparatory phase, namely the investigation of the facts by the Attorney-General’s Office, in which it will be determined whether or not there has been an indictable offence. For this purpose, the Judicial Investigation Department (OIJ) will become part of the Attorney-General’s Office. Investigations will be subject to a six-month time limit. The intermediate phase consists of the preferment of an indictment by the government attorney before a judge and in the presence of the defendant’s lawyer, in a private session with no further formalities. The judge will only hear the legal arguments of the two parties without assessing evidence and decide whether the case presented should be brought to trial. In this part of the proceedings the accused may bargain with the prosecution and agree with the judge to collaborate in exchange for the charges being reduced or completely dropped, although some serious offences are excepted. In the trial phase, a court consisting of one or three judges depending on the seriousness of the offence, will hear evidence, testimony, expert witnesses and arguments of the parties in order to arrive at a judgement.

265. The second paragraph of this article of the Covenant requires that in detention centres the accused be segregated from the convicted and that juveniles under 17 be separated from adults.

266. In 1952, Costa Rica promulgated the Organization Act of the Minors Protection Court and a special legal regime for minors. A special court and special detention centres were established for children under 17. This regime was laid down in article 17 of the Penal Code.

267. Concurrently with the above-mentioned prison reform, the system of institutions for minors was introduced and developed in the following four stages:

(1) Detention centres for minors referred by the Court;

(2) Community programmes for the minor: social and training centres for minors at social risk;

(3) Diagnostics centre for the minor at social risk: operates as a reception centre for diagnosing the problems of detained minors and referring them to the appropriate institutions; and

(4) Creation of the National Prevention Commission, with the emphasis on crime prevention and care for the minor at social risk.

268. The third paragraph of this article of the Covenant calls for the establishment of a penitentiary system for the reformation and rehabilitation of the prisoners. Reference has already been made to the general programme of penal and prison reform starting from the 60s.

269. In 1980, the portfolio of Justice and Pardons, including the Directorate of Social Rehabilitation, was re-established as an independent Ministry. The penitentiary system is being detached from the Ministry of the Interior and Police in order to place prison administration in the hands of specialized technical personnel rather than in those of the police themselves.

270. In 1985, the post of Protector of the Human Rights of the Detainee was created and, in 1986, a commission, presided over by the Ministry of Justice and Pardons, was set up to prepare a draft Prison Code. This Code is intended to incorporate and extend the United Nations minimum rules for prisoners, as well as to strengthen the judiciary's control over the execution of sentences. The draft will be submitted to the legislature by the Government in the first half of 1989.

271. In 1990, immediately after promulgating the Women's Social Equality Act, which established the General Office for the Protection of Human Rights, the government regulated the functions of the Office for the Protection of Male and Female Detainees of the Prison System by means of an executive decree whose first article reads: "The General Office for the Protection of Human Rights is an organ of the Ministry of Justice and Pardons attached to the Ministry's services and dependent upon the Ministry for budgetary, administrative and institutional policy purposes, but with independence in decision-making".

272. At the same time, according to article 61: "The Office for the Protection of Male and Female Detainees of the Prison System shall have responsibility for all the centres of the system for the purpose of guaranteeing the human rights of the inmates and the proper implementation of the minimum rules for the treatment of prisoners established by the United Nations Organization and all the provisions of the legal system in force".

273. The establishment of the Office of the Protector of the Inhabitants (Ombudsman) marked the beginning of a logical process aimed at incorporating in the new institution the work done during this period under the auspices of the Ministry of Justice, it being decided that the Office for the Protection of Male and Female Detainees of the Prison System would continue providing its services as an agency of the Ministry of Justice and Pardons because of the special

nature of its functions. The Office continued operating on the basis of Executive Decree No. 23006 of 23 February 1994, under which it was converted into a programme for the promotion of human rights attached to the Ministry of Justice and Pardons.

274. The permanent presence of a human rights ombudsman within the prison system answers a very clear need: because of the intrinsic nature of the penitentiary institution in general and especially the power relationships between those involved, persons deprived of their liberty need to be protected against infringements of their rights and interests arising out of the illegal conduct of officials or situations of a structural or incidental nature. Protection in this sense is a need that has become a right, which the Ministry of Justice is bound to respect and defend.

275. The Office of the Protector of the Inhabitants has been organized into sections, including that of justice and the police, one of whose functions is to monitor the observance, by the public sector, of the fundamental rights of male inhabitants of the Republic deprived of their liberty, whereas the Office for the Protection of Women is responsible for the corresponding protection and promotion of the rights of women prisoners.

276. The American Convention on Human Rights was signed by the Government of Costa Rica on 22 November 1969, approved by the Legislative Assembly in Law No. 4534 of 23 February 1970, ratified on 8 April of the same year and entered into force from the eleventh ratification on 18 July 1978.

277. The American Convention on Human Rights was incorporated in our domestic law and has enriched and extended the system of fundamental rights recognised and guaranteed by the Constitution.

278. The practice of the Constitutional Tribunal has developed the provisions of the Convention, giving full force to rights which, by virtue of their origin, have the same constitutional status as the fundamental rights recognised and guaranteed by the Constitution.

279. Since the 1970s the Costa Rican criminal justice system has been undergoing changes and new penal and penal procedure codes are being promulgated. Both contain regulations on the execution of sentences and on the monitoring of the legality of the process. The latter established the post of visiting magistrate whose functions were confined to supervising security measures and interviewing inmates and officers of the prison system for monitoring and supervision purposes.

280. A preliminary draft law on the execution of sentences is currently being reviewed by the Commission. The objectives of this draft law include meeting, through the implementation of a technical aid scheme, the basic needs of the convicted or accused person and minimizing the adverse effects that a prison sentence could have on his future life.

281. The prison system operates, and has operated since the start of prison reform, on the basis of the Social Rehabilitation Directorate’s Organization Act and the regulations issued so far.

282. Two sets of regulations are currently in force: those on the rights and duties of men and women deprived of their liberty, dated 26 February 1993, and the organizational regulations of the General Directorate of Social Rehabilitation of 26 February 1996. These regulations meet international standards except insofar as they fail to distinguish between the regimes applicable to persons in pre-trial detention and those sentenced to a term of imprisonment.

283. The Office of the Protector of the Inhabitants has supported the drafting and discussion of relevant reforms in the substantive penal legislation, with a view to enabling the judge to impose an alternative punishment, other than imprisonment, in certain cases in which the latter is unlikely to lead to rehabilitation or ensure compensation for the injury caused by the guilty party.

284. These reforms, together with the promulgation of the new Code of Penal Procedure, represent the most serious legislative effort of recent decades to modernize the administration of justice and therefore the Office of the Protector of the Inhabitants is actively promoting their early promulgation.

285. It is important to emphasize the role of the Constitutional Tribunal in what might be called constitutional control over the execution of sentences.

286. Since its creation, its rulings have constituted concrete applications of the human rights enshrined in the American Convention, the Constitution and the Minimum Rules. For example, Judgement No. 1032-96 reads as follows:

> "As this Tribunal has stated, the rights of prisoners must be regarded as constitutionally protected rights, in the light of article 48 of the Constitution". "For this purpose it is necessary to take into account decisions No. 663 (XXXIV) of 31 July 1957; No. 1993 of 12 May 1976; No. 2076 of 13 May 1977; and No. 1984-47 of 25 May 1984, which adopted the minimum rules for the treatment of prisoners, approved by the Economic and Social Council of the United Nations. These are applicable in our country by virtue of article 48 of the Constitution giving constitutional status to all international human rights instruments, which must be incorporated into the interpretation of the Constitution, especially in the field of human rights." (Judgement No. 709-91.)

287. It is important to note that for the purpose of monitoring respect for the Constitution the Tribunal has introduced a novel procedure for enforcing a judgement which is of great use in connection with the application of international instruments, namely setting a time limit for compliance and requesting the institution to submit a report on the measures adopted.

288. In the above-mentioned opinion it is stated that "... In accordance with article 48 of the Constitutional Jurisdiction Act, the Executive Power is granted a period of one year from the date of notification of this judgement to bring the San Jose penitentiary into compliance with the "Minimum Rules for the Treatment of Prisoners" adopted by the United Nations Organization. The Ministry of Justice and Pardons shall report to this Tribunal, every six months, on the measures adopted..."

289. Prisoners are inhabitants of the Republic who enjoy the rights which that implies, with the exception of the right to freedom of movement. In this case, the function of the Office of the Protector of the Inhabitants is clearly to act as a connecting link with respect to the rights and interests of prisoners. In addition to performing a subjective function in relation to the situation of inhabitants deprived of their liberty, the Office must play an oversight role with respect to the institutional dimension of the prison system, which includes both technical and administrative aspects.

290. The Special Protection Service of the Office of the Protector of the Inhabitants deals with complaints and enquiries received from prisoners, their families and relations, as well as from individuals and nongovernmental organizations concerned with the human rights of this sector of the population.

291. The complaints and enquiries received and dealt with and the visits made to detention centres by members of the staff of the Office of the Protector of the Inhabitants show that in the Costa Rican penitentiary system there is no discrimination on the basis of race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

292. Some prisoners of other nationalities complained to the Office of the Protector of the Inhabitants about the refusal of the National Institute of Criminology to grant them concessions on the grounds of their being foreigners, bearing in mind their isolation from their families and the nature of the offences (mostly infringements of the Psychotropic Substances Act and in some cases sex offences). Since then, the Institute has shown greater readiness to grant concessions in specific cases. In 1996, there were no complaints concerning discrimination on the grounds of nationality.

293. Religious beliefs are respected, as confirmed by the permission granted to organized groups of various faiths to maintain contact with the prisoners, in accordance with a prearranged schedule.

294. On the other hand, the Office of the Protector of the Inhabitants has found that the penitentiary system has failed to apply the minimum rule of segregation of categories and that the Constitutional Tribunal of the Supreme Court of Justice has repeatedly had to oblige it to comply. Nevertheless, since the middle of 1996 it has been possible to observe progress in this respect in the initiation of a process of prisoner relocation.

295. As regards the question of accommodation for prisoners, the Constitutional Tribunal of the Supreme Court of Justice has recognised that, traditionally, many societies have mistakenly neglected the problem of building and maintaining prisons, treating investment in projects of this type as a low priority. Thus, there is a problem and a serious one, but it should not continue.

296. Article 292 of the Code of Penal Procedure stipulates that, subject to the provisions of the following article (concerning house arrest), those detained pending trial will be housed in separate accommodation from convicted prisoners.

297. At the same time, article 51 of the Penal Code, on detention and security measures, explicitly states that: "Prison sentences shall be served and security measures implemented in the places and in the manner established by a

special law, so that they may have a rehabilitating effect on the person convicted". Their maximum duration is 25 years.

1. Measures applied by the Ministry of Justice and Pardons with respect to the prison regime

298. Services provided for the prisoner: medical and dental care, education, opportunities to work, remuneration, psychological treatment, recreation, family visits, conjugal visits, creches for the children of prisoners, etc.

(a) Medical and dental care

299. In the early 1980s, the Ministry of Health signed a co-operation agreement with the Costa Rican Social Insurance Fund guaranteeing health care for the prison population.

300. In addition, the larger prison centres can rely on the services of a professional medical and paramedical group, which provides medical care for the prisoners. This group, which is part of the General Directorate of Social Rehabilitation, comprises 15 general practitioners, 4 psychiatrists, 4 dentists, 1 gynaecologist, 1 obstetrician, 4 graduate nurses, 20 nursing auxiliaries, 3 dental assistants and support staff. The prison centres of the central plateau are frequently visited by these professionals who provide the necessary medical services.

301. The agreement described covers medical supplies and materials, drugs, specialist care, surgery and laboratory tests, operations and rehabilitation.

302. During 1996 alone, the Ministry of Justice and Pardons spent more than 75 million colones on medical care for persons deprived of their liberty, and article 8 of the Rights and Duties Regulations of the General Directorate of Social Rehabilitation, Executive Decree No. 22139-J of 31 May 1993, states: "Right to health. Shall have the right to receive health care. Shall have the right to proceed to the health centre in which he is to receive it. If his custodial regime permits, he may do so by his own means".

303. It should be mentioned that, since 1996, the La Reforma prison has had a properly equipped clinic which will be further improved as a result of the donation by the Sovereign Order of Malta of medical equipment for providing post-operative care for prisoners.

(b) Education

304. The prison education programme is based on:

(i) The Constitution, which guarantees access to education for all Costa Ricans;

(ii) Executive Decree No. 23740-J of 11 October 1994;

(iii) The institutional cooperation agreement between the Ministry of Public Education, the National Institute of Apprenticeship and the Ministry of Justice and Pardons.

305. Within this legislative framework, the Ministry of Justice and Pardons, in collaboration with the Ministry of Public Education and the National Institute of Apprenticeship, is developing a sustainable programme of education and vocational training in the prison centres. The aim of this programme is to train the members of the prison population, so that they can subsequently find employment and become useful members of society. The programme is in two parts: firstly, education, which is organized in conformity with the curricula and programmes of the Ministry of Education, and, secondly, vocational training, coordinated by the National Institute of Apprenticeship.

306. The educational services offered at the formal level include: reading and writing, minimum primary education, first and second cycles of basic education, minimum third cycle, school leaving examination for mature students, school leaving examination by distance learning, higher university education, and modular education structured by level, using the methodology of the Integrated Education Centres for Young People and Adults (CINDEA).

307. At the informal level, courses are given in accountancy, basic English and the principles of information technology, together with free courses, in coordination with the University of Costa Rica, and support courses known as “modular workshops”, which include film shows with discussion, documentaries, talks and displays of models.

308. Educational programmes are currently in place in all the institutional-level prison centres. The semi-institutional and community levels are differently served, for example by technical training councils and community care level offices. In this case, the detainee interested in continuing his studies submits an application to the council which, provided he meets the requirements, enables him to join the community educational institution as a regular student.

(c) Work

309. In the Costa Rican penitentiary system work is a right and a duty of the men and women prisoners. The work is formative, creative and encourages working habits, productive where agricultural and industrial activities are concerned, never imposed as a punishment or to humiliate, and takes into account the prisoner’s aptitudes and skills, provided that they are compatible with the proper organization and security of the centre.

310. The policy of the Ministry of Justice and Pardons has been to establish effective coordination with public and private organizations for the purposes of providing both training and employment in the prison centres.

311. In this connection, it has succeeded in arousing the interest of private enterprise in using the prisoners’ labour, in strict conformity with the labour regulations as regards minimum wage, occupational safety and hygiene requirements.

312. The General Directorate of Social Rehabilitation, under the Ministry of Justice and Pardons, is developing agricultural projects designed to supply a good proportion of the vegetables needed by the penitentiary system for feeding the men and women inmates. The Ministry is also developing an industrial

project for the production of cement products (block and terrazzo) which, being cheap, are being offered to the country's most needy communities, as well as a project for producing desks of various types for schools and colleges. Self-management projects to facilitate the acquisition of the right attitudes and skills by the prison population are also being introduced.

(d) Psychological treatment

313. There are three structured programmes for male and female inmates, whether adults or juveniles. These programmes, closed and open, correspond to the three stages involved in the process of serving a sentence, namely: admission, stay in prison, and release.

314. Psychological care is structured around group and individual treatment procedures on the basis of the following priorities:

(a) Treatment of drug addiction, with the support of public institutions, nongovernmental organizations and civil society, with which inter-institutional coordination has been established;

(b) Post-release treatment, with a view to understanding the difficulties and handicaps resulting from imprisonment and interaction in the context of confinement, with inter-institutional coordination links; and

(c) Psychological treatment for prisoners when the offence for which they were imprisoned involved the use of extreme forms of violence, as is the case with male and female offenders guilty of sexual offences and offences against human life. In this case, inter-institutional and intersectoral support and coordination mechanisms have also been developed with nongovernmental, civil society and public sector organizations.

315. The intervention phase relates to the treatment provided on admission, the purpose of which is to identify and treat at an early stage the emotions aroused by imprisonment. With regard to recreation as an aspect of communal living, technical and methodological facilities are provided for engaging in activities of a recreational, sporting, spiritual, cultural and social nature based on: interpersonal relations, discipline, organization of the prison population, and recreation.

316. Recreation promotes physical, mental and spiritual health by influencing the ways in which a person thinks and acts, and this has repercussions on social relations if interpersonal relations can be maintained within the participating groups of "equals".

317. Within the prison context, this promotion of recreational activities makes possible not only interaction between the prisoners but also relations with members of the community, which generates an interchange between the participants and helps to improve communal living conditions in the country's prison centres.

318. In all the institutional centres without exception, and in most of the semi-institutional centres, the work programmes provide for a series of recreational activities. These are organized by the following personnel: in La

Reforma prison the sports section employs four full-time officials; the San Jose prison and the Juvenile Centre have one official each, and in the country's other penal institutions these activities are organized by officials in the sector.

319. It is important to point out that, as a working strategy, the activities of a recreational nature are arranged through prisoners' committees, which join with the prison staff in organizing them and carrying them out:

- The family visit, which forms part of the programme set up in all the centres, is a guarantee of the right of communication of anyone deprived of his or her liberty. Visiting periods, which are open to the family and friends of prisoners, are granted twice a week for up to five hours.

- The conjugal visit is another important component of the community programme, whose aim is to maintain and strengthen the marital bond as a means of jointly overcoming the stresses and strains created by imprisonment. This privilege is available in all the centres at national level, once every two weeks and for an average of eight hours.

320. A big effort is being made to improve the infrastructure of the prison centres with a view to upgrading them and creating a better environment for human development, without reducing inmate capacities. However, there are severe economic constraints on further improvements, both qualitative and quantitative.

Creches for the children of inmates of the Buen Pastor prison

321. The prison has a creche for children under three years of age and their mothers, subject to community assessment. The current admission criteria are: the availability or unavailability of alternative care for the children outside the prison and the quality of the mother-child bond.

322. The departure of the children is determined by the age of the child and by the possibility of placement in alternative care (with a member of the family or in a shelter), or may be the result of a gradual process or of the imprisoned mother's failure to observe the rules of the creche. At present, there are five women prisoners and five children aged between one month and thirty months.

323. There is a bipartite commission, with officials of the Ministry of Justice and the National Children's Association, which is reviewing the operation of the creches with a view to making improvements. The achievements of this commission include: working out an agreement with the National Children's Association and a set of operating regulations for creches, together with the revised model for the treatment of mothers and their children contained in the new regulations; thus, children will be admitted for one year and not for three years as hitherto.

2. Special regimes

Special guarantees for women and young offenders

324. We cannot refer to the special guarantees for young offenders without mentioning, albeit briefly, the International Convention on the Rights of the Child, adopted by the United Nations on 20 November 1989, which was ratified pursuant to Law No. 7184 of 18 July 1990 and published in the Gaceta, No. 149 of 9 August 1990. According to the spirit of the Convention, the child is, above all, an individual who is explicitly recognised as possessing the rights to which every human being is entitled, so that the State is under the obligation to do everything possible to ensure his or her survival.

325. The State has abandoned the protective legislation based on the doctrine of the irregular situation and, on 1 May 1996, adopted a law which gives guarantees and establishes accountability (Juvenile Criminal Justice Act).

326. Under this legislation, minors who are the subject of criminal proceedings benefit from the same guarantees as adults suspected of committing an offence under the Penal Code. In addition, they are made responsible for any consequences of those actions or omissions which could constitute a criminal offence, thereby restoring the pedagogical role of justice and the law, while the social statute protects minors from possible abuses perpetrated by the administrative authorities, or rather sanctions the latter for any punishable act.

327. The judges have at their disposal a broad range of penalties other than deprivation of liberty, which has come to be seen as a last resort for dealing with serious offences against individuals and the community (offences against human life, against sexual freedom and others involving violence). As can be seen, rigorous imprisonment is an exceptional case of deprivation of liberty (article 131 (a) and (b) of the Juvenile Criminal Justice Act). The Act also requires that minors who are the subject of criminal proceedings be physically and materially segregated from adult detainees.

328. Male adolescents deprived of their liberty are sent to the San José Juvenile Centre, which can accommodate 60 inmates (article 139, Juvenile Criminal Justice Act). Male prisoners under the age of 18 are housed in a unit which is independent of the quarters for adults (article 140, Juvenile Criminal Justice Act). Female adolescents deprived of their liberty are sent to the Amparo Zeledón Juvenile Centre, which can accommodate 25 inmates (article 140, Juvenile Criminal Justice Act). The adolescents will be temporarily housed in a section independent of the quarters for adult women in the El Buen Pastor Centre (article 140, Juvenile Criminal Justice Act).

329. Conciliation (articles 61 to 67 of the Juvenile Criminal Justice Act) is undoubtedly another important safeguard for offending minors which enables the judge to settle the dispute through a conciliatory procedure. Conciliation is a voluntary jurisdictional act between the victim or his representative and the minor, the necessary parties. It results in a stay of proceedings and interrupts the limitation period, compliance with the terms being subject to a time limit.

330. Those between the ages of 12 and 18 at the time of committing an act characterized by the Penal Code or special laws as a crime or misdemeanour will be subject to the procedures granted them by the State under the Juvenile Criminal Justice Act. The Act will apply to those who commit an offence in the territory of the Republic or abroad, in accordance with the established rules of territoriality and extraterritoriality. With respect to the proceedings, penalties and liability thereto, the Act distinguishes between the group aged 12 to 14 and the group aged 15 to 17.

331. The actions of a minor under the age of 12 which constitute a crime or misdemeanour will not be subject to the present Act; civil liability, however, will remain and will have to be decided before the competent courts. Likewise, the juvenile magistrates will refer the case to the National Children's Association in order that it may provide the necessary care and follow-up.

332. If the administrative measures involve restrictions on the freedom of movement of the minor, they must be discussed with the Juvenile Visiting Magistrate. The primary concern of the Act is for the comprehensive protection of the minor, his best interests, respect for his rights, his all-round education and his reintegration into the family and society. Accordingly, the State, in association with the nongovernmental organizations and communities, will promote both programmes intended to achieve these objectives and the protection of the rights and interests of the victims.

333. The Act will have to be interpreted and applied in accordance with basic principles, the general principles of criminal law and the law of penal procedure, doctrine and the international rules relating to minors, inasmuch as the rights established in the Constitution and in the treaties, conventions and other international instruments signed and ratified by Costa Rica are guaranteed.

334. In situations for which the present Act does not expressly provide, the criminal law and the Code of Penal Procedure shall apply. However, in hearing a specific case the Juvenile Magistrate must always apply the provisions and principles of the Penal Code, provided they do not contradict any express provision of the Act.

335. The parties may appeal decisions of the Criminal Court, for which purpose the law provides the necessary remedies:

(a) Remedy of appeal (art. 112, Juvenile Crime Act). The following decisions may be appealed:

- that which settles a dispute as to jurisdiction;

- that which places a provisional restriction on a fundamental right;

- that which orders or revokes the suspension of evidentiary proceedings;

- that which terminates the proceedings, where minor offences are concerned;

- that which modifies or replaces some type of penalty in the execution stage, where minor offences are concerned; and

- those which cause irreparable damage.

336. This remedy may be used only in accordance with the procedures and in the cases expressly laid down and only those with a direct interest in the case may appeal. In this connection, the Attorney-General's Office, the victim, the minor, his lawyer, his parents and the National Children's Association are considered to be interested parties. The lawyer and parents of minors aged between 12 and 15 may appeal independently. In the case of minors aged 15 to 18, these persons may only make a subsidiary appeal.

337. At the close of the hearing, the Juvenile Criminal Court must rule on the appeal, except in cases which the Court considers complicated, when it must rule on the appeal within not more than three days.

(b) Application for judicial review for error of law or form (art. 116, Juvenile Criminal Justice Act)

338. This appeal can be made against the decision which terminates the proceedings, and against the sentence subsequently handed down, provided that the offence is not a minor one. As regards the capacity to apply for the judicial review of a criminal case, the remedy is available only to the Attorney-General's Office, the minor, his lawyer and the victim, with legal assistance. The proceedings are conducted in accordance with the formalities and time limits established for adults in the Penal Code. The High Court of Criminal Cassation must be convened to hear the application.

339. It should be noted that this is the capacity to appeal possessed by those who have reached their majority; a special appeal procedure has been established which can only be used against the decision which terminates the proceedings or against the sentence subsequently handed down. Decisions which terminate the proceedings include, for example, dismissal, acquittal and sentence.

340. The special nature of the application for judicial review for error of law or form is expressed in the restricted listing of grounds which provides the basis for this appeal, as well as in its particular purpose of verifying the legality and uniformity of the decisions made by judges.

341. In its turn, the application for judicial review cannot be used against a decision terminating misdemeanour proceedings, since for such decisions the law only allows the remedy of appeal to the Juvenile Criminal High Court.

(c) Application for judicial review of the facts (art. 119, Juvenile Criminal Justice Act)

342. The grounds for this action are laid down in the Code of Penal Procedure. The High Court of Criminal Cassation is competent to hear the appeal. This is another of the special appeals recognized by the law. Like judicial review, it is governed by the provisions of the Code of Penal Procedure relating to convicted adults. The appeal can be lodged at any time, so that it is said never to lapse or expire, against final judgements on behalf of the person

convicted before the High Court of Criminal Cassation. For it to be admissible the written application must include both the grounds on which it is based and the evidence which it is considered should be taken into account in conducting the review.

343. Likewise, it should be understood that the lodging of an application for review of the facts does not suspend the execution of the judgement, but once the process has been started the Court may suspend it or replace it with a precautionary measure.

344. The draft law on the new Code of Penal Procedure provided for applications for judicial review of the facts to be heard by the Third Chamber and applications for judicial review for errors of law or form by the High Court of Criminal Cassation, in order that these appeals might be heard by different bodies. However, Parliament amended this provision and gave a single body the power to decide both kinds of appeal.

345. Those entitled to apply for a judicial review of the facts are (art. 121, Juvenile Criminal Justice Act):

- the convicted minor or his legal representative;

- the spouse, relatives in the ascending line, and brothers and sisters of the minor, if the latter has died; and

- the Attorney-General’s Office.

346. Under article 138 of the Juvenile Criminal Justice Act, the law also establishes numerous rights during execution of the sentence, in accordance with the provisions of the International Convention on the Rights of the Child, by requiring that while serving his sentence the minor shall have at least:

(a) The right to life, dignity and protection from physical and mental assault.

(b) The right to equality before the law and the right not to suffer discrimination.

(c) The right to remain, preferably, in his family environment, if this provides conditions suitable for the minor’s development.

(d) The right to receive health, education and social services appropriate to his age and circumstances, provided by persons with the necessary professional training.

(e) The right to receive information, from the time he starts serving the sentence, concerning: the internal regulations on behaviour and life in the detention centre, the disciplinary measures which could be applied to him, and his rights with respect to the officials in charge of the detention centre, as well as his individual social rehabilitation plan, the method and means of communication with the outside world, exit passes and the visiting schedule.

(f) The right to submit petitions to any authority with the guarantee of a reply.

(g) The right to be kept segregated, in all circumstances, from offenders convicted under the ordinary criminal law.

(h) The right to be held in a place suitable for the implementation of his individual rehabilitation plan and not be arbitrarily transferred; and

(i) The right not to be held incommunicado, in any circumstances, nor to be subjected to solitary confinement or corporal punishment. If the minor must be held incommunicado or placed in solitary confinement to avoid acts of violence against him or third parties, the measure shall be notified to the visiting magistrate and the Protector of the Inhabitants.

3. Specialized detention centres

347. Sentences will be served in special centres for minors, different from those intended for offenders subject to the ordinary criminal law.

348. There must be at least two specialized centres in the country, one for males and the other for females. Minors will not be admitted to these centres without a prior order in writing from the competent authority. Within the centres there will be the necessary segregation according to age. Minors aged between 15 and 18 will occupy accommodation different from that reserved for minors aged between 12 and 15; similarly, those on provisional and permanent exchange will also be separated (article 139, Juvenile Criminal Justice Act). Furthermore, a minor inmate who reaches the age of 18 during his period of detention will have to be transferred to a prison centre for adults, but will remain physically and materially segregated from the latter (art. 140 of the Juvenile Criminal Justice Act).

349. Services provided for young offenders: the San José Juvenile Centre has a doctor who visits the institution once a week and a nursing auxiliary who works office hours. Coordination has been arranged with the Clorito Picado Clinic of the Costa Rican Social Insurance Fund, with a view to its providing orthopaedic, laboratory, dental, pharmaceutical and general medical services if the institution's own doctor is not available.

350. As far as schooling is concerned, lessons are given by the institution's own teachers and instructors assigned by the Ministry of Public Education. Moreover, inmates may attend literacy, catch-up and model education courses of the Integrated Education Centre for Young People and Adults, which cover the first and second levels of education. It has now become necessary to introduce a third level, given the characteristics and educational attainments of the population.

351. With regard to opportunities for work, the inmates can use a number of workshops, including those for welding, crafts and agriculture, in coordination with the National Institute of Apprenticeship; the institution contributes the instructors for the welding and agriculture workshops.

352. The accounts include an item for wages paid in the binding shop and bakery, and there are opportunities for part-time work keeping the infrastructure and grounds clean.

353. Psychological treatment: each centre has two psychologists who, during the review period, are making individual diagnoses of the population. These are communicated to and discussed by all the technical and professional staff, with a view to drawing up an action plan and thereby strengthening the most vulnerable aspects of the personality of each minor.

354. Recreation: this is the responsibility of the centre's technical staff and takes the form of cultural and sports activities arranged in close coordination with the voluntary groups who support the centre (board games, computer games, television, sporting events, works of art, dancing classes, painting classes).

355. Family visits: Visits are allowed three times a week, for five hours. Moreover, there are opportunities for special or extraordinary visits (Tuesday, Thursday and Sunday). The visitor is assessed by the social worker and admission is authorized by the management, which informs the Penitentiary Police; minors must be accompanied by an adult.

4. Guarantees for persons advanced in age

356. With regard to the treatment of the elderly (senior citizens), they have been assigned a penal institution in which they can be housed separately from the rest of the prison population.

357. The infrastructure includes an administrative building, five units suitable for housing an average of 21 inmates, a maximum security unit consisting of eight one-man cells, leisure and recreation areas, and plenty of land for cultivation.

358. The centre houses a male convict population consisting of 41 inmates, ranging in age from 60 to 85, mainly from rural areas, with a history of low-paid agricultural employment, a poor education and a tendency to re-offend. Most are serving sentences for offences of a sexual nature against children.

359. Their advanced age, their state of health (they generally suffer from chronic ailments), their rural origin, type of offence, etc. are aspects which, together with senility and the vulnerability of the elderly, place them at risk and make it necessary to furnish them with treatment and accommodation different from those provided for the rest of the prison population. This involves group therapy for sex offenders, which teaches them how to deal with their sexuality, the risk of death, their private problems and their sicknesses and explores their capacity for work and how they might pool their experience of life for the purpose of organizing and/or carrying out preventive projects.

360. It is the duty of the prison authorities to provide them with conditions which, as far as possible, promote their human development, such as sanitation, food, work and infrastructure, together with special care since, with advancing age, the individual's mental powers and physical strength decline, he becomes

incontinent, more prone to fall ill and, ultimately, no longer able to fend for himself.

361. According to Decision 1889-91 of 25 September 1991: "The duty of custody of the institutions entrusted with the handling of detainees, whether prisons or detention centres, entails not only responsibility for preventing the inmates from escaping but also duties such as the duty to provide food, the right to communicate with one's family and one's legal representative, access to water, a roof over one's head, a bed and, of course, respect for other fundamental rights such as life and health...", while judgement No. 2982 of 19 June 1996 states: "the prison management ... is responsible for employing and has the authority to employ its available resources for the purpose of ensuring its physical safety, without it being necessary to wait for a response from other administrative authorities in order to take action, at least precautionary, taking into account the urgency of the situation...". Likewise, article 24 of the Regulations on the rights and duties of male and female prisoners requires the prison to be provided with at least one official assigned to deal with education, training and work-related matters, one male or female social worker, a lawyer and secretarial back-up to ensure strict compliance with the provisions of article 55 of the Penal Code and other bodies of law relating to the execution of sentences which guarantee the constitutional rights of the prison population and promote the technical work in general.

362 The medical care supplied by the centre currently consists of that provided by a female officer (nurse), on duty from 7.30 a.m. to 4 p.m. Monday to Friday, and the regular visits of a doctor, but efforts are being made to appoint a full-time health professional and a psychologist, as well as to give the staff general training which will enable them to take responsibility for and deal with any medical emergencies that may arise at weekends.

363. As far as work is concerned, 50% of the inmates are employed as helpers in the kitchen or in cleaning, weeding and maintaining the grounds. Some work as craftsmen and others are interested in gardening projects (farm work) and other productive activities.

364. The prison population, which receives conjugal and family visits and enjoys the right to communicate and other rights, has the benefit of recreation areas and an adequate infrastructure. It is considered to have a special regime, being held in accommodation different from that of the generality of the prison population.

5. Guarantees for all inmates (legal framework)

365. All those deprived of liberty enjoy the same personal, social and economic rights as possessed by inhabitants of the Republic, except for those which are incompatible with their imprisonment itself. Moreover, they benefit from the special guarantees which derive from their being in prison (Regulations on the rights and duties of male and female prisoners, Executive Decree No. 22139-J, art. 6).

366. One of the functions of the General Directorate, which is responsible for the execution of prison sentences, is to ensure the safety of persons and

property in the various social rehabilitation centres, in accordance with article 3 of Law No. 4762 establishing the Directorate.

367. The fundamental obligations of the prison administration to ensure the safety and physical and mental health of male and female prisoners and to protect them from harassment and physical and mental assault are also governed by article 24 of the Regulations on the rights and duties of the prison administration with respect to the prison population.

368. The right to a fair hearing is set out in article 39 of the Constitution and in article 40 of the regulations on the rights and duties of male and female prisoners, Executive Decree No. 22139-J. In judicial proceedings, if a criminal case is being heard, the defence is entrusted to a private defence lawyer or, failing that, to a lawyer appointed by the court.

369. The right to a fair hearing of a prisoner accused of a breach of discipline is governed by article 40 of the above-mentioned regulations.

370. With regard to the right to earn a reduction in the sentence, the privilege is subject to the approval of the sentencing authority, as stipulated in article 55 of the Penal Code, which establishes entitlement to a reduced sentence in return for work.

371. Thus, the Technical Supervision Office requests the judicial authority for a variation of the writ of execution, subject to approval of the reduction by the National Institute of Criminology, on the basis of a technical report submitted by the Training and Work Division.

372. However, according to judgement No. 6829-93, which has constitutional status:

> "...the decision concerning the freeing or pre-trial detention of a person who is the subject of criminal proceedings is the exclusive responsibility of the judge and may not be taken by an administrative body. In this respect, it is considered that work done by someone under pre-trial detention does not even justify the modification of the pre-trial detention regime imposed..."

373. The functions entrusted to the National Institute of Criminology include the implementation of custodial measures and the treatment of detainees, the legal basis for which is to be found in article 140.9 of the Constitution and article 3 (a) and (b) of the Law establishing the General Directorate of Social Rehabilitation. Thus, the institution in question conducts a technical supervision programme for each inmate, develops guidelines and chooses courses of action, with a view to achieving the social rehabilitation objectives of the sentence.

374. For criminologists and students of penitentiary science, as far as the link between the penalty and the State jus puniendi is concerned, the execution of the sentence should include the study of the specific acts of the prison administration with respect to the custody and treatment of the convicts, and for experts in adjective law the study of its conditions and assumptions, such

as the determination of the competent bodies and the questions that arise while the sentence is being served.

375. In this respect, it would be more correct to speak of the law of execution of sentences, which relates to every kind and class of penalty and measure, since penitentiary law consists of the entire system of legal rules governing the serving of the term of imprisonment. Thus, the execution of sentences, and particularly sentences of imprisonment, consists in the application of certain procedures and methods of a technical and administrative (psychological, psychiatric) and judicial (visiting magistrate) nature in order to achieve specific objectives (intimidation, rehabilitation, protection of society) and guarantee respect for the rights of the prisoners.

376. Traditionally, the theory of the separation of powers is interpreted as the need for each organ of the State to function independently of the others (article 9 of the Constitution). Although there cannot be any interference with or encroachment upon the assigned function, there must necessarily be collaboration between powers. According to current doctrine and constitutional practice there can be no absolute separation; moreover, there is nothing to prevent one (non-primary) function being performed by two powers or by all, so that it is not possible to speak of a rigid distribution of responsibilities according to function and subject matter. In terms of action and power, the State is a unit, but there would be no unity if each power were an independent separate entity, with broad discretion, so that in reality it is not possible to speak of a division of powers in the strict sense of the term. The power of the State is unique, but its functions are varied. It is therefore more appropriate to speak of a separation of functions or of the distribution of functions among the various State organs.

377. This separation of functions derives from the technical problem of the division of labour: the State must exercise certain functions and these should be performed by the most competent organ of the State.

378. The above notwithstanding, in accordance with the provisions, principles and fundamental values of the Constitution, the judicial function belongs exclusively to the judiciary. In fact, from the text of article 153 of the Constitution “there follows, if not expressly then at least unequivocally, the exclusivity and, even more, the universality of the jurisdictional function in the judiciary, ... whereby our Constitution has made the jurisdictional and the judicial indivisible, with no exceptions other than perhaps the preliminary intervention of the Legislative Assembly in the waiving of the constitutional privilege of members of the executive, legislative and judicial powers and diplomats (article 121.9 and 121.10) and that of the Supreme Electoral Tribunal in matters falling within its exclusive competence..." (articles 99, 102 and 103, judgement 1148-90). In this connection, it is necessary to determine the competent body with regard to the execution of the prison sentence and the legal nature of the function, since on that will depend its constitutionality.

6. Body competent to enforce the sentence

(a) Participation of the administration

379. The powers of the court in criminal proceedings are not exhausted once sentence has been passed. On the contrary, they extend beyond the trial itself, in accordance with article 153 of the Constitution:

> "It is the responsibility of the judiciary, over and above the functions assigned to it by this Constitution,... to take final decisions and enforce those decisions, if necessary with the aid of the police..."

380. The jurisdictional function does not end with the declaratory phase of the proceedings, but includes the enforcement of the judgement. Thus, it is the judge who must order the admission of the convicted person to prison and decide upon any significant changes in the terms of imprisonment (conditional release). These functions derive from the jurisdictional power which, moreover, is exercised exclusively: the courts and tribunals do not exercise functions other than those of "judging and enforcing the judgement", and those entrusted to them by the law as a guarantee of some right.

381. Thus, the provisions of article 1 of the Organization of Justice Act are the same as those of article 153 of the Constitution and are supplemented by article 7 of the Act as follows:

> "In order to have their judgements enforced or to implement or have implemented the investigative measures they may order, the courts may request from other authorities the aid of their law enforcement services and other official means of action at their disposal."

(b) Functions of the visiting magistrate

382. These constitutional principles led to the creation of the office of visiting magistrate. However, under the Costa Rican legal system his sphere of competence is rather limited and in performing some of his assigned functions he must seek the advice of the National Institute of Criminology. His responsibilities are defined in articles 506, 513, 518 and 519 of the Code of Penal Procedure, articles 64, 65, 97 et seq. of the Penal Code, and in resolution LXVIII of the session of the Full held on 21 June 1984. Various rulings of the Constitution Tribunal have thrown light on the role of this official which could be described as limited, since he does not have sufficient powers to exercise effective control over the legality of the execution of the sentence, whether in or against the interests of the person convicted. In our context, the functions of the visiting magistrate are so restricted that they only allow him to draw attention to the existence of irregularities in the country's detention centres and to process the complaints made by inmates concerning the prison system, without the power to take a final decision. The replacement or modification of a security measure must be effected in accordance with the provisions of the Penal Code, since these are jurisdictional matters. Thus, the visiting magistrate may examine, as an intermediary and not for the purpose of verifying their legality, conditional releases, security measures, the complaints of inmates and incidental matters. The decision must be discussed with the court which affirmed the sentence.

383. He is responsible for regular visiting the prisons. The task of monitoring the constitutional guarantees, which includes the legality of the execution of the sentence, falls in part to the “Protector of Detainees” whose role is also limited inasmuch as it is reduced to “preparing reports on the material and human conditions of the detainees” (article 62, Regulations of the General Office for the Protection of Human Rights, No. 20325-J, 12 December 1990), which he submits to the Ministry of Justice, the Social Rehabilitation Directorate and the National Institute of Criminology, so that the administrative authorities may take whatever action they think fit (article 65, Regulations of the Office for the Protection of Human Rights).

384. That is to say, he does not possess the power of decision or correction required for the purpose of overseeing the legality of the execution of the prison sentence; his task is restricted to revealing and reporting anomalies in the administration of the prisons, but in relation to the administration of the execution of sentences per se. It should be pointed out that the administration and management of the prisons is entrusted to the executive power by the Constitution. Thus, article 140.9 of the Constitution states:

> "The following duties and powers pertain jointly to the President and the respective Government Minister: the enforcement of all decisions and orders made by the courts of law in matters that fall within their competence..."

385. The Ministry of Justice Organization Act No. 6739 of 28 April 1982 is based on these principles.

386. Article 1 states that this Ministry is the "governing body for criminological and penological policy" and is responsible for acting as a link between the executive branch and the judiciary. In this respect, article 7 specifies that:

> "The following shall be functions of the Ministry of Justice:
>
> ...
>
> (c) Administering the country’s penitentiary system and implementing custodial measures, in accordance with the Law establishing the General Directorate of Social Rehabilitation, No. 4762, of 8 May 1971;
>
> (d) Developing programmes calculated to improve the methods, procedures and techniques used to treat offenders for the purpose of preventing recidivism and, where appropriate, ensuring their social rehabilitation."

387. Law No. 4762 of 8 May 1971 established the General Directorate of Social Rehabilitation under the Ministry of Justice, whose functions include:

> "(a) the implementation of custodial measures ordered by the competent authorities;
>
> (b) the custody and treatment of convicted and unconvicted prisoners, in the charge of the General Directorate;

...

(f) advising the judicial authorities, in accordance with the law;

(g) making the necessary recommendations in connection with the consideration of pardons and privileges, in accordance with the criminological diagnosis.

(h) coordinating the Directorate's programmes on the prevention and treatment of crime with interested institutions."

388. In its turn, in accordance with Executive Decree No. 22198-J of 26 February 1993, the National Institute of Criminology, a technical agency of the Social Rehabilitation Directorate, has among its functions:

"1. Taking decisions, producing reports and applying the procedures stemming from articles 55, 61, 63, 64, 70, 71, 93, 97, 99, 100 and 102 of the Penal Code, those laid down in articles 505 et seq. of the Code of Penal Procedure and the provisions of Law No. 4762, which require the Institute to pursue the following objectives:

(a) Treatment of social misfits: provide a diagnosis to serve as a basis for their classification and implement, through the appropriate technical units, a programme of treatment for each individual, in accordance with his or her personal characteristics.

(b) Criminological research.

(c) Advice: advise and inform the judicial authorities, as required by law."

389. Within the legal framework in question, the intervention of the prison service, where the execution of a custodial sentence is concerned, can be explained in the sense that it acts as an administrative and technical body specializing in criminology and penology, the judicial authorities lacking their own resources for keeping people in custody and the technical personnel for deciding criminological policy and the prison regime.

390. Thus, the administration of the prisons is the responsibility of the executive power and, more particularly, the Ministry of Justice, the General Directorate of Social Rehabilitation and the National Criminological Institute, without this implying any encroachment of the executive branch on the functions of the judiciary. On the basis of the above, the distinction is between the jurisdictional function of the judiciary, exercised solely by the judges and courts of law, and the administrative function which, in this case, would be that of executing a final judgement or sentence passed by a competent judicial authority, the judge being responsible for sending the person convicted to prison, determining the sentence and ruling on the circumstances which might justify the release of the prisoner before he has served his term (conditional release) or the extinction of the punishment (prescription).

391. From articles 140.9 and 153 of the Constitution it follows that the judiciary may make recommendations and even give orders to the executive power

for the purpose of having judicial decisions enforced; nevertheless, these recommendations may be made and orders given only within the sphere of competence of the judiciary, that is the judiciary's sphere of competence may not encroach upon that of the prison system which, by definition, is that of the administrative authority, namely, in our case, the General Directorate of Social Rehabilitation and the National Institute of Criminology.

7. Forms of extinction of the punishment

392. The punishment may be extinguished by penal rescission, serving of the sentence, the death of the person convicted, the exercise of the right of pardon, prescription or judicial pardon (art. 80 of the Penal Code). Not included are the privileges of reduction of the sentence through work (art. 55 of the Penal Code), conditional execution (arts. 59 et seq. of the Penal Code) or conditional release (arts. 64 et seq. of the Penal Code), which are aspects of the execution of sentences.

393. As a rule, the convict cannot be released until the term to which he was sentenced has expired; nevertheless, since the aim of the punishment is rehabilitation rather than retribution, the Costa Rican penal system makes provision for those privileges which have an exclusively reformatory purpose. These are granted when the circumstances are favourable, from the standpoint of both the prisoner and the outside world.

The privilege of reduction of the sentence through work

394. Within the Costa Rican legal system, article 55 of the Penal Code establishes the privilege of reduction of the sentence or fine through work.

395. The Institute of Criminology, after studying the sociological, psychiatric and social characteristics of the inmate, may authorize a convict who has served at least half his sentence or a suspect to have the fine or the prison sentence remaining to be served or about to be imposed reduced or paid off in return for work on behalf of the government, the autonomous institutions of the State or private enterprise. For this purpose, one ordinary day's work is considered equivalent to one day in prison. Work of any kind done inside or outside the rehabilitation centre is calculated in the same way. All or part of the wages earned may be used to pay off the fine imposed.

396. The prisoner is entitled to the benefits granted to workers by the State and its institutions, although there is no relation in labour law between the employer and the prisoner employed.

397. In this connection, it should be pointed out that according to judgement No. 6829-93 of the Constitutional Tribunal, dated 24 December 1993:
"... article 55 establishing the privilege of reduction of the sentence or fine is not unconstitutional, but if administrative practice is to grant it to suspects as widely as to persons who have been convicted... the National Institute of Criminology should refrain from authorizing the privilege in such a way as to defeat the purposes of pre-trial detention itself... it is the responsibility of the judge who tried the case or the president of the court which passed sentence to make the appropriate changes in the sentence initially decided".

398. In itself, the granting of the privilege by the National Institute of Criminology does not have the effect of recognizing the unfairness of the punishment imposed; this can only be authorized by the judge.

399. The privilege under article 55 is available to suspects and persons in pre-trial detention as well as to convicts. Accordingly, it is conceived and structured in terms of two essential objectives of prison work: firstly, commutation of the sentence or fine imposed and, secondly, rehabilitation of the prisoner through work. In this respect, it should be pointed out that although, technically, suspects are not undergoing any punishment, as they are innocent until proven guilty, they are beneficiaries of the established prison labour regime. The accused has the right to remain at liberty during the proceedings, subject to the conditions imposed by the court, although it may be considered necessary to keep him in custody to ensure the success of the investigations, on the grounds that the main purpose of criminal proceedings is to seek the truth.

400. Being an institution favourable to the accused, the privilege in question can be applied to pre-trial detention, it being understood that it is not for reducing the sentence or fine, since the deprivation of liberty is based on other grounds, but is justified by the possibility of an eventual conviction, so that in the execution phase the reduction obtained in pre-trial detention can be applied in determining the sentence to be imposed.

401. In this respect, the court considers that there is an infringement of article 9 of the Constitution if the prison authorities - the National Institute of Criminology - grant the benefit of article 55 to those pre-trial detainees who have been refused release for non-compliance with the requirements of arts. 297 and 298 of the Code of Penal Procedure, inasmuch as the accused is under the authority of the judge and not of the administrative services, so that the aims of the criminal proceedings may be achieved. The transfer of the prisoner from jurisdictional to administrative control, referred to in art. 505 of the Penal Code, takes place when sentence has been passed, so that the "convict" can serve the sentence imposed by the judicial authority, and not before.

402. Nevertheless, it should not be forgotten that suspects in "custody" are in an ambiguous situation, inasmuch as they are both under the authority of the judge for the purposes of the trial and under that of the prison service, since the supervision and custody of all inmates is the responsibility of the National Institute of Criminology, a technical arm of the General Directorate of Social Rehabilitation, whose duties, by definition, include the custody and care of the convicted and unconvicted.

403. Article 1 of Law No. 4762 makes it clear that, despite the pre-trial detainee's being under the authority of a particular judicial authority, it is his custodians, in the first place, the detention centre or prison and, secondly, the Ministry of Justice, the General Directorate of Social Rehabilitation and the National Institute of Criminology, who are responsible for protecting him from physical and mental injury, placing him within the system, providing him with the essentials required to meet his basic needs and applying the prison regulations, and not the judges.

404. In this connection, judgement No. 1889-91 states: "The duty of custody of the institutions charged with the admission of detainees, whether prisons or detention centres, implies not only responsibility for preventing the prisoners from escaping but also the duty to protect them from violation of their person... and, of course, the right to other fundamental rights...".

8. Possibility of pardon, suspended sentence, conditional release or review of sentence

405. Pardon entails the complete or partial remission of the sentence and can only be granted by the Government Council, after first requesting the opinion of the Institute of Criminology.

406. Suspended sentences, conditional release and review of sentence are measures envisaged by the Penal Code and the Code of Penal Procedure whose final outcome depends on the decision of the courts:

(a) The judge is empowered to suspend the sentence if it consists of imprisonment or exile for a term of not more than three years. This is a discretionary power and the judge may decide what conditions to impose on the person convicted, on the basis of a report produced by the Institute of Criminology (arts. 59, 60, 61, 62 and 63 of the Penal Code on suspended sentences).

(b) Articles 64, 65, 66, 67 and 68 of the Penal Code deal with conditional release, for which the interested party must apply to the visiting magistrate who, for information and decision, requests from the National Institute of Criminology the prisoner’s criminological diagnosis and prognosis and a report showing whether or not the applicant has undergone the prescribed basic treatment.

(c) For conditional release to be granted, the applicant must not have previously been convicted of an ordinary offence leading to a sentence of more than six months, or ten years must have passed since his last conviction.

407. The remedy of judicial review of the facts, which is described in articles 490 et seq. and related articles of the Code of Penal Procedure, can be used against final judgements in the following cases:

(a) When the facts on which the verdict was based are irreconcilable with those established by another final criminal judgement.

(b) When the judgement challenged was based on documentary or personal evidence found to be false in a later final judgement.

(c) If the sentence was passed as a consequence of perversion of the course of justice, bribery, violence or other fraudulent conspiracy whose existence is revealed in a subsequent judgement.

(d) When, after sentencing, there emerge facts or items of evidence which, alone or together with those already examined in the trial, make it clear that the offence did not take place, that the person convicted did not commit it

or that the offence committed is covered by a more favourable provision of the law.

(e) In the event of a less harsh criminal law being applied retroactively; and/or

(f) If the sentence was not imposed by due process with the opportunity for the defendant to present his case.

408. Pre-trial detention is governed by article 298 of the Code of Penal Procedure, where it is stipulated that pre-trial detention shall be subject to review every three months.

409. As regards health indicators, with special reference to infectious diseases, when those for the prison population are compared with those for the population at large, it is found that in both groups among the more common pathologies and disorders the most prevalent are those which might be susceptible to preventive, hygienic, educational and environmental measures such as, for example, sexually transmitted diseases, skin diseases such as those caused by fungi and ectoparasites, pediculosis and scabies, and respiratory diseases such as influenza, pharyngo-tonsilitis, bronchitis and asthma.

410. The medical care provided for the prison population is currently in a state of flux, since a transition is in progress from a system oriented mainly towards the treatment of cases as they arise to a preventive programme of monitoring and assessment of the state of health of the prisoners; the cost of a medical consultation, by type of service, ranges from 739.71 to 1,305 colones, according to the type of clinic. In the case of dentistry the cost may be assumed to be high.

411. As regards the right to practice a religion, every prisoner is entitled to spiritual sustenance. The prison system provides for two groups professing the Catholic and Evangelical faiths. There are persons, duly identified, with a bent for evangelical prison pastoral care who, with the assistance of chaplains appointed by the General Directorate of Social Rehabilitation, celebrate various religious rites and provide individual guidance when requested. Prisoners who profess some other religion may receive individual attention from their spiritual counsellors, if they so request.

412. It is important to stress the support which the prison system receives from voluntary religious groups formally organized by the various communities to provide comprehensive spiritual care; these organized groups have permission from the institutional authority for their voluntary work.

413. It is worth noting that the Costa Rican Fundación Confraternidad Carcelaria belongs to the International Prison Fraternity, an additional source of experience in the provision of spiritual care for the prison population.

414. All this constitutes a guarantee of the enjoyment of freedom of religion, thereby confirming compliance with the standards of the United Nations as regards religious belief, articles 37, 41.1, 41.3 and 41.4, as well as with articles 27, 29, 33 and 75 of the Constitution.

9. Disciplinary regime in the prison system

415. In Costa Rica this is governed by Executive Decree No. 22139-J, whose article 3 establishes the principle of equality, namely, that: "All male and female prisoners shall have the same rights and obligations without any distinctions other than those derived from the conditions of custody or execution of sentence to which they are subjected"; likewise, it is specified that "every male or female prisoner shall have the same personal, social and economic rights as possessed by the inhabitants of the Republic, except those which are incompatible with imprisonment itself. In addition, they shall have the benefit of the special guarantees derived from their stay in prison".

416. The Decree also deals with the disciplinary regime, precautionary measures, the classification of breaches of discipline and the corresponding penalties, as well as the taking of decisions in disciplinary matters.

417. As far as precautionary measures are concerned, they are adopted as an exceptional and temporary preventive step in situations of imminent danger to individuals or the institution, that is, when there is a threat to a person's physical safety or to order and security in the various prison centres.

418. They must be justified in writing and notified promptly to the prisoner, under the authority of the governor or whoever is in charge of the centre or area. The precautionary measure must be submitted within eight working days to the corresponding assessment board, which shall determine the course of action to be followed, that is, analyze whether or not the precautionary measure adopted should continue to be applied.

419. If the precautionary measure has its origin in a suspected breach of discipline, the corresponding disciplinary procedure must be initiated. This situation is dealt with in arts. 27 et seq. and related articles of the above-mentioned Regulations.

420. Breaches of discipline and the corresponding penalties are specified in Chapter II, Section 2, of the same Regulations. Breaches may be minor, serious or very serious. The following are examples of minor breaches, which can be dealt with by means of a verbal or written warning:

- disturbing the normal course of activities organized by the prison staff;
- making unauthorized use of some piece of equipment, tool or machinery;
- being present in unauthorized places within the prison;
- fouling and dirtying the facilities; or
- failing to comply with orders validly given by the prison staff, etc.

421. Serious breaches are punishable with a written warning, restrictions on contacts with fellow prisoners, the temporary suspension of the incentives

offered by the prison or those deriving from the modalities of execution of the sentence or custody, for up to two months, or the regrading of the prisoner who engages in any of the following behaviour:

- defiance, by committing three or more minor breaches within a period of two calendar months;

- inciting to participate in fights with others;

- insulting, verbally or in writing, other prisoners, relatives, prison staff or visitors;

- sexual practices which disturb the smooth functioning of the institution; or

- introducing, possessing, making, supplying or using stabbing or cutting objects, arms or explosives, etc.

422. Very serious breaches are punished by restrictions on contacts with fellow prisoners [or suspension of incentives] deriving from the modalities of execution of the sentence or custody, for up to six months, or the regrading of those prisoners who:

- cause bodily harm to themselves or others;

- bribe or blackmail others;

- adulterate food or medicine in a way dangerous to health;

- alter, steal and use the institution’s stamps or documents for the purpose of unlawfully obtaining advantages for themselves or others; or

- maliciously assume the identity of another for the purpose of obtaining some advantage for themselves or others.

423. As for degrees of complicity (art. 36), "any prisoner who abets or assists or cooperates with the principal in committing any of the breaches of discipline described shall be liable to the same punishment as that imposed on the principal or co-principal".

424. Attempted breaches (art. 37): if, for reasons beyond the control of the principal, the breach cannot be completed, the specified punishment may be imposed, with due allowance for the circumstances of time, manner and place.

425. Alternatives to punishment are dealt with in article 38. The Assessment Board or the National Institute of Criminology may waive punitive measures and opt for a technical approach, individual or collective, in those cases in which, the acts forming the basis of the report having been duly characterized, the behaviour of the prisoner does not constitute a serious disruption of his treatment. Moreover, the entire disciplinary procedure and the corresponding rights are regulated in Section 3, Chapter II.

426. The Office of the Protector of the Inhabitants is aware of certain economic and human resource constraints on the prison system which are contributing to some of the problems of prison development.

427. It is considered that the prison system and institutional practice are infringing the human rights of male and female prisoners. Accordingly, it is recommended that the National Institute of Criminology develop and put into practice a prison policy specifically designed for the female prison population by adopting a technical approach based on the circumstances, aptitudes, activities, expectations, needs and perspectives of the women.

428. Great importance is attached to the establishment of a prison support commission composed of the various agencies concerned with the execution of sentences, as well as to coordination with a view to solving the penal, family and employment problems of female prisoners.

Article 11

429. Article 11 of the Covenant establishes a ban on sending anyone to prison for not fulfilling a contractual obligation: "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation". Article 38 of the Constitution protects this right as follows: "Article 38: No one may be imprisoned for debt". However, there is the possibility of enforcement by committal for failure to meet maintenance obligations.

430. New reforms have been introduced, for example in article 113 (ch) of the Constitutional Jurisdiction Act which revokes all the legal provisions establishing grounds for enforcement by committal, other than those relating to failure to meet maintenance obligations.

431. Article 113 (ch) of the Constitutional Jurisdiction Act, Law No. 7135 of 11 October 1997, revokes all the legal provisions establishing grounds for enforcement by committal, other than those relating to failure to meet maintenance obligations. Since the present case does not concern the exception specified by the Act, the termination of enforcement by committal was correctly ordered, so that the application for amparo is inadmissible and must be rejected outright. In this case there is no retroactive application of the law, as the appellant alleges, since the person committed was released as a result of the entry into force of Law No. 7135 of 11 October 1997 which, being an instrument of public policy, is self-enforcing. (Judgement of the Constitutional Tribunal, 10 November 1989.)

432. The Constitutional Tribunal has repeatedly stated that:

> "Firstly, we consider that the legal provisions which authorize enforcement by committal in civil and labour matters are revoked by virtue of article 11 of the International Covenant on Civil and Political Rights of 16 December 1966 (approved by Law No. 4229 of 11 December 1968) and article 7.7 of the American Convention on Human Rights of 22 November 1969 (approved by Law No. 4534 of 23 February 1970), which since being approved by the Legislature have been incorporated into the Costa Rican legal system with the precedence for which article 7 of the Constitution provides, and that those which may be established in other areas are

simply prohibited by articles 37, 38 and 39 of the said Constitution; as for paragraph 2 (d) of the latter, it only authorizes enforcement by committal in civil or labour matters or the detention that may be ordered in bankruptcy proceedings.

In short, if the enforcement for which article 568 of the Commercial Code provides signifies, as seems obvious, a way of depriving a person of his liberty for having failed to fulfil a contractual obligation – that assumed in giving the pledge and undertaking to place it at the disposal of the court in the event of execution – it would be excluded under the cited article of the International Covenant; if, moreover, this deprivation of liberty comes about and is actually used as a means of compelling the debtor to pay the claim secured by pledge, it will be revoked by article 7.7 of the American Convention; and if, on the other hand, it is considered that the enforcement is not the result of the non-payment of a debt or non-fulfilment of some other contractual obligation, it would be prohibited by the very text of articles 37 to 39 of the Constitution which authorize it only insofar as it relates to “civil or labour matters”, which cannot be confined to a purely formal definition or field, for example to the effect that everything in the Civil Code or the Labour Code is a civil or labour matter or, where appropriate, by a legal category, which is that of private law and hence subject to the regime proper to the latter, namely to regulate, in general, the relations between private individuals, or sometimes with the public administration when the latter moves into this area in accordance with well-established principles of administrative law.

In any event, it is worth pointing out that personal liberty is one of the most valued rights in a democratic State subject to the rule of law which respects the dignity and freedom of every human being, and that deprivation of liberty, as an odious and exceptional measure, should be interpreted and applied narrowly and only to the extent strictly necessary to preserve public order and the freedoms and rights of others." (Judgement of the Constitutional Tribunal No. 5-89, 3 October 1989.)

433. The Full, at its session of 6 July 1981, nevertheless added that "anyone sent to prison for issuing a bad cheque is sent there not just for debt, but for issuing the cheque, which is an offence in itself, regardless of the reason for which the cheque was written".

Article 12

Paragraph 1

434. Article 22 of the Constitution clearly establishes the freedom of movement of all nationals: "Any Costa Rican may go and reside anywhere inside or outside the Republic, provided that he or she is free of liabilities, and return when he or she thinks fit. Costa Ricans shall not be subjected to requirements that prevent them from entering the country".

435. Under article 23 of the Constitution, the home and any other private premises of inhabitants of the Republic are inviolable. Nevertheless, they may be searched by written order of a competent judge or to prevent an offence from

being committed or going unpunished or to avoid serious injury to persons or property, as provided by law.

Paragraph 2

436. The national authorities make border checks on those leaving the country. Every Costa Rican citizen must produce his or her identity card or, if the country of destination so requires, his or her passport.

437. The right to leave the national territory is an integral part of freedom of movement, which is a constitutional principle enshrined in article 22 of the Constitution.

Paragraph 3

438. Moreover, among the other powers conferred upon it by the Constitution, the Legislative Assembly may suspend, by the vote of not less than two thirds of its total membership, in cases of obvious public necessity, the individual rights and guarantees specified in articles 22, 23, 24, 26, 28, 29, 30 and 37 of the Constitution. This suspension may affect all or some of the rights and guarantees over all or part of the territory, for up to 30 days. During this time, with respect to persons, the executive power may only order their detention in establishments not intended for common criminals or decree their confinement in inhabited places.

439. It must also report to the next meeting of the Assembly on the measures taken to safeguard public order or maintain the security of the State. In no circumstances may individual rights or guarantees not specified in this article be suspended.

Article 13

440. An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

441. In this connection, it is worth noting the consideration given by Costa Rican constitutional law to the rights of aliens. The study will be confined to the period following the entry into force of the present Constitution in 1949. There are two advantages as compared with the limitation imposed by foregoing the exhaustiveness that would result if the study were to cover the whole of independent life. The provision, article 19 of the Constitution, has never been amended.

442. There has been a radical change in the system for monitoring constitutionality. The period in which this function was performed by the full Supreme Court of Justice, which began in 1937, was not affected by the adoption of the 1949 Constitution and continued in effect until 1989, when the present system of monitoring by the Constitutional Tribunal was introduced.

443. The interpretation given by the Full to article 19 of the present Constitution amounted to a flagrant denial of the principle of equality inasmuch as the Court maintained that "discrimination between nationals and aliens may be established by law".

444. This principle was regarded as an exception to equality before the law. The relation between the two provisions was seen as follows: "The principle of equality before the law, laid down in article 33 of the Constitution, is not absolute since it does not establish a right to be bestowed on any individual regardless of the circumstances, but rather the right to require that the law should not differentiate between two or more persons who find themselves in the same legal situation or in identical conditions, whereas equal treatment may not be demanded if the conditions or circumstances are not the same". Article 19 of the Constitution, which applies this rule to aliens, clarifies and supplements article 33 by specifying that "aliens have the same individual and social rights as Costa Ricans, with the exceptions and limitations established by this Constitution and the law".

445. The same principle has been applied in various situations, for example with respect to the statutes of the professional associations. Thus, when ruling on the alleged unconstitutionality of an article of the statutes of the Federal Association of Engineers and Architects requiring five years residence for aliens to be admitted to the Association, the Court found that "there is nothing at all unconstitutional about this rule".

446. The same attitude led the courts to accept as valid various kinds of differentiation for which the law does not specifically provide. For example, the principle was not considered to limit the power of the executive to admit or not to admit aliens as residents. Thus, the First Division of the Court has said: "The executive power has the authority to grant or refuse permanent residence in the country to aliens. Therefore, although there is no doubt that aliens have the same individual and social rights as Costa Ricans, this rule does not confer upon them the absolute right to reside here indefinitely; in any event, article 19 confers such equality "with the exceptions and limitations established by the Constitution and the law" and, as this Court understands it, different rules may be established by law for the treatment of nationals and foreigners". The use of the yardstick according to which any kind of difference between nationals and aliens may be established by law shows how widely this thesis had been accepted, since a deeper analysis might have revealed that the admission of aliens and the granting of residence is not a civil right but a political right, as previously affirmed by a judgement of the Central American Court of Justice in 1914.

447. We find further scope for the possibility of discrimination in another amparo judgement of the same First Division of the Court, according to which: "The appellants argue that the action of the border authorities in searching bags in which foreign citizens of this zone carry articles they have purchased in their dealings and seizing the goods, where basic consumer goods are concerned, constitutes a violation of article 19 of the Constitution, since it stipulates that aliens have the same individual duties and rights as Costa Ricans, and Decree No. 13170 cited by the authorities does not prohibit an alien from making purchases in the national territory; the authorities are preventing them from engaging in this type of business. Our Court has ruled that different

rules for the treatment of nationals and aliens may be established by law...". Now, Decree No. 13170, whose validity is not questioned or criticized by the appellants, expressly states that aliens with local passes or cards which allow them to enter the country are not authorized to purchase basic consumer goods, or to cause them to leave the country, whether at the instigation of nationals or aliens, since what is prohibited is the exporting of certain articles from the national territory, regardless of who does the exporting. (Judgement 4-6-82.)

448. Here, the possibility of differentiation has been still further extended since, as clearly follows from the above excerpts, the discrimination is based not on a formal law but on an executive decree, the constitutional limitation not even being accepted in its literal sense but being taken to be almost synonymous with a legal rule, without any distinction as to the source. It should be pointed out that, clearly, at that time there was not thought to be anything wrong in regulating fundamental rights by executive decree, whereas today it is not considered possible.

449. The most important judgement in this field, in view of the complications surrounding the case, was undoubtedly judgement 76-92, an action for habeas corpus brought on behalf of a North American, expelled from Costa Rica after his country's embassy had denounced him for links with the drugs traffic, who had been detained for several hours in the offices of the immigration service. Expulsion was decided by the Migration Board and executed immediately, without the decision having become final and without the documents that formed the basis of the charge having been translated into Spanish, which was done after the adoption of the decision.

450. The court considered that to expel the detainee for having a case pending in the United States was to impose an illegal punishment:

> "The cancellation of residence cannot operate as a punishment, since it is not so conceived in the General Migration and Aliens Act, nor is it possible to do away with this condition, which stems from an administrative act granting rights, except in accordance with the relevant provisions of the legislation in force... ordering deportation on the basis of the indisputable fact... that he was the subject of proceedings in the United States and sending him to that country undoubtedly constitutes an illegal expulsion from the national territory, equivalent to administrative extradition, which has been expressly excluded since the adoption of the Extradition Act in force. The Court recognizes the right of the Costa Rican State to guarantee its own security, peace within its frontiers and the tranquillity of its inhabitants, especially by repressing and controlling the modern scourge of drugs-related crime; and as the Court has already said in the past, we cannot embrace the view that Costa Rica should become a refuge for persons fleeing international justice. However, neither can the Court accept that the limits or procedures used to resist these possible adverse influences may be of any kind; in particular, the supremacy of the Constitution and the legal system must prevail." (Judgement No. 76-92.)

451. There are a number of features of this judgement, which deserve to be emphasized: firstly, the possibility that article 19 of the Constitution

authorizes discriminatory treatment is not even discussed; it is simply taken for granted that differential treatment is not possible. As a result, the requirements imposed on the immigration authorities with respect to the deportation of an alien are particularly rigorous. Secondly, the Court does not confine itself to granting protection (amparo) but orders the Government to arrange for the return of the person protected to the national territory and considers that there was personal liability on the part of the officials, which is the harshest finding possible in amparo proceedings. It expresses itself clearly in the following terms: "In the opinion of the Court, the action taken by the defendants was basically tantamount to true administrative extradition... in violation of human rights... meanwhile he was sent to a country which wanted him on suspicion of having committed an unlawful act, without being handed over to a competent judicial authority responsible for determining the validity of the request and inviting the requesting State to respect his fundamental rights, which is totally inadmissible under our legal system... All the action taken after the National Migration Board made its decision was spurious... This being so, the Court finds that the administration was proceeding unlawfully in acting against the rights of the alien and disregarding the rules of due process in order to cancel his immigrant status. All this entails the liability of the administration for suppressing individual rights through the unlawful use of its powers which, in its turn, implies the joint and several liability of the officials responsible for taking the clearly unlawful action". The officials considered responsible were those of the Ministry of the Interior, the other members of the National Migration Board and the General Directorate of Migration and Alien Affairs.

452. Two years later, another very similar situation arose. The Government proceeded to hand over to Venezuela a group of citizens of that country who were being tried in Costa Rica for unlawful association, aggravated homicide and aggravated theft. The Court, considering an action for habeas corpus, gave a ruling along the same lines as in the case mentioned above. Briefly, it considered "that the accused had been subject to criminal proceedings, that they had been unilaterally removed from those proceedings under duress and placed in the custody of the authorities of another State, out of the reach of the trial with its attendant guarantees and outside the jurisdiction of the lawful judge" (Judgement No. 3626-94).

453. The Court found it necessary to order the authorities involved, which included the President of the Republic and the Ministers of the Office of the President, Public Security, and Justice and Pardons, jointly and severally, to pay damages.

454. The criterion of reasonableness. An important factor in determining the status of aliens featured, as a secondary issue, in an action for unconstitutionality decided by judgement No. 1440-92 concerning the alleged unconstitutionality of a regulation and an action based thereon which involved an alien being required to deposit the price of a ticket to his country despite his being married to a Costa Rican woman.

455. What is important for our purposes is recital clause III, which states:

> "International law recognizes that aliens are subject to the laws of the country in whose territory they reside, whether temporarily or

> permanently, and that in the exercise of its sovereignty the State must regulate their entry and their stay, by specifying – be it only for reasons of security – those circumstances in which the alien must be refused entry to or be deported or expelled from the national territory. This sovereign power must be exercised with absolute respect for the other constitutional principles and norms in order that the alien may be guaranteed that his rejection, expulsion or deportation is based on objective criteria incorporated in the law (principle of legality) and not merely on the whim or subjective judgement of those who apply the immigration controls..."

456. It is not the judge's responsibility to judge the wisdom or appropriateness of a particular difference established in a regulation, but only to determine whether the criterion of discrimination is or is not reasonable, since by judging its reasonability we are able to decide whether or not an inequality violates the Constitution. In this particular case, our Constitution allows us to differentiate between nationals and aliens...; of course, these exceptions must be logical and must derive from the very nature of the differences between these two categories, so that no distinction may be made if it entails the deconstitutionalization of equality, as would be the case if a law were to assert that aliens do not have the right to life or health or to some fundamental human right, since that would be irrational. (Judgement No. 1440-92.)

457. In this way, the criterion of "rationality", which the Constitutional Tribunal often applies, has been established with respect to the situations of inequality in which aliens may be placed. On the basis of the North American concept of due process of law, it is accepted that there exists a "substantive due process", which may be defined as follows: "a rule or public or private act is valid only if, in addition to being formally consistent with the Constitution, it is based on reason and justified by constitutional doctrine. This ensures not only that the law is not irrational but also that there is a real and substantial relation between the chosen means and the end in view".

458. A distinction is made between technical reasonableness which is, as we have said, a question of proportionality between ends and means, legal reasonableness or conformity with the Constitution in general and, in particular, with the rights and freedoms which it recognizes and assumes, and, finally, the reasonableness of the effects on personal rights, in the sense of not imposing on those rights any limitations or encumbrances other than those which can be reasonably derived from the rights themselves or more extensive than those indispensable for them to operate reasonably in the life of the society.

459. The equal treatment of nationals and aliens took a new turn when a law which was preventing foreigners from participating in the ownership of newspapers, television stations and advertising agencies was declared unconstitutional.

460. The law had been adopted as a result of the reaction to the presence in Costa Rica of a self-exiled North American who came to the country to escape a mutual funds scandal. Initially protected by the government of the day, he subsequently became a political liability for the party in power with the result

that legislation was passed to prevent him from engaging in advertising activities. The personal problem was solved when he voluntarily left the country and was denied the possibility of coming back. However, the law remained in force until questions began to be raised about its constitutionality.

461. Article 2 of Law No. 6220 of 5 April 1978 states: "the mass media and advertising agencies may only be operated by Costa Ricans or by naturalized persons with not less than ten years of residence in the country since having acquired Costa Rican nationality". This article was considered to be fundamentally contrary to article 19 of the Constitution, as well as to articles 33, 29 and 46 of the Constitution, articles 13 and 14 of the American Convention on Human Rights, and articles19 and 2 of the International Covenant on Civil and Political Rights.

462. Article 2 of the law in question was declared unconstitutional by judgement No. 5965-94 of 13 October. Inexplicably, almost two years after the decision was taken, the reasoning on which the Court based its findings has still not been made known. However, even in these circumstances it is possible, for various reasons, to appreciate the importance of the decision taken:

(a) The requirements of equal treatment and non-discrimination for aliens were first formulated in habeas corpus and amparo actions. Quite properly, in these actions criteria were established for the application of the law and the interpretation of certain fundamental rights. By contrast, here the court has gone much further by invalidating criteria established by Parliament, considering them to be contrary to the Constitution.

(b) The Court acted as a negative lawmaker, that is, proceeded to repeal an enactment which it found contrary to constitutional law.

(c) It established a criterion of equality between nationals and aliens, with a precision impossible to ignore, thereby progressing even further along the path first marked out by Judge Piza.

(d) Thus, it is possible to speak of a positive advance in the treatment of the constitutional position of aliens, which has been incorporated in Costa Rican constitutional law.

463. Nevertheless, a more rigorous approach to possible discrimination was taken in a habeas corpus action on behalf of a group of Colombian citizens who were trying to stay in the country despite their links with one of the leading drug traffickers. In the words of the Court: "The equality between aliens and nationals proclaimed by article 19 of the Constitution clearly relates to the nucleus of human rights with respect to which there can be no distinctions, for whatever reason, and especially on grounds of nationality. In this sense, the Constitution reserves for nationals the exercise of political rights since these are an intrinsic consequence of the exercise of sovereignty...".

464. The Court continues: "International law has always assumed decisions concerning the immigration policies best suited to the national interest to be one of the attributes of the sovereign will of the people. In other words, no nation recognizes the right of foreigners to enter the country of their choice

at will, but only in accordance with certain legally defined rules and conditions. Of course, both the international legislation and constitutional law require these rules and conditions for entering or residing in a country to be established by formal law".

465. After examining both the international conventions and the Costa Rican legislation, it concludes that "permission to enter a country and stay there is a provisional right which can be revoked to the extent that the national interest is at stake".

466. In the analysis of the specific case it maintained that "the subjects of the amparo proceedings had permission to stay as tourists, for a minimum period of 30 days". It then asked: "whether it is certain that the tourists left voluntarily in the face of the invitation extended by the executive power or was it a case of de facto expulsion" and concluded: "It has been shown that the subjects of the amparo proceedings were expelled from the country without being granted the right to a fair hearing, for which the General Migration and Aliens Affairs Act provides, and without it being shown that their presence constituted a threat to national public order", whereupon it allowed the appeal. (Judgement No. 4601 of 26 August 1994.)

467. As has become clear from studying the practice of the courts, there has been a radical change in the interpretation of article 19 of the Constitution. The text of the article has remained unchanged but the current Constitutional Tribunal is giving it a reading different from that given by the Full. Thus, we are confronted with a totally different legal regime, although the grammatical forms are still the same.

468. This change reveals the important role played by the practice of the courts in the evolution of the law, as is particularly apparent in the constitutional field. The particularly open nature of the provisions of the Constitution admit radically different theses, such as those exemplified above. The continuous choosing between possible interpretations is the means by which constitutional law responds to the perceived needs in the field of fundamental rights and establishes closer links with the society it governs.

469. The changes make it possible to appreciate the progress made by the Costa Rican system of treatment of aliens with a view to achieving closer conformity with an ideal of universal equality in the field of human rights. However, we should beware of complacency. An important determining factor is the treatment received by the illegal Central American, mainly Nicaraguan, immigrants who are continually crossing Costa Rica’s northern border and, like all economic immigrants, are discriminated against and abused both by the authorities and the Costa Ricans who employ them. In a way which presents close parallels with what is happening in the developed world, this is leading to the creation of an underclass of non-citizens who do all the hard and dirty jobs, from harvesting crops to construction work in the cities and domestic service. Until these groups are integrated into Costa Rican society, the actual practice of discrimination may lead to its being reproduced in legal form, despite the efforts made by the constitutional courts to eliminate it.

470. Article 13 protects the alien wishing to stay in the national territory and offers him safeguards if he is going to be expelled. In this connection,

article 19 of the Constitution states: "Aliens have the same individual and social duties and rights as Costa Ricans, with the exceptions and limitations established by this Constitution and the law. They may not intervene in the political affairs of the country and are subject to the jurisdiction of the courts of justice and the authorities of the Republic, without the benefit of recourse to diplomatic channels, except insofar as international conventions may provide".

471. Similarly, article 31 of the Constitution establishes the right of asylum for those who have suffered political persecution in other countries, and Costa Rica has signed and ratified the following international instruments:

- Inter-American Convention on the Right of Asylum (1928). Entered into force on 21 May1929.

- Inter-American Convention on Political Asylum (1933). Entered into force on 28 March 1935.

- Inter-American Convention on Diplomatic Asylum (1954). Entered into force on 29 December 1954.

- Convention relating to the Status of Refugees (1951). Entered into force on 22 April 1954.

- Protocol relating to the Status of Refugees (1966). Entered into force on 4 October 1967.

- Convention relating to the Status of Stateless Persons (1954). Entered into force on 6 June 1960.

- Convention on the Reduction of Statelessness (1961). Entered into force on 13 December 1975.

472. There is a special extradition act regulating this procedure with a series of safeguards for the alien. The extradition request is examined and decided by the judiciary. The Constitution states that no Costa Rican shall be forced to leave the national territory and article 3 of the Extradition Act reads as follows:

> "Article 3. ... that extradition shall not be offered or granted if at the time the punishable offence was committed Costa Rican citizenship, by birth or naturalization, was claimed."

473. Where refugees are concerned, Costa Rica recognizes or identifies as such those persons who find themselves outside their country for the reasons indicated in the 1951 Geneva Convention and the 1967 Protocol, the Statute of the Office of the United Nations High Commissioner for Refugees or the Cartagena Declaration.

474. There are about 350,000 Central Americans who have asked for asylum and refuge in Costa Rica. This has made it necessary for the Costa Rican State to adopt a planned approach, based on our tradition of asylum, which is rooted in more than 160 years of constitutional life, and on the international commitments

assumed as a result of signing the asylum and refugee conventions, including the 1951 Geneva Convention, the Convention relating to the Status of Refugees and its 1967 Protocol, which was ratified by the Government of the Republic in August 1967.

475. Most of the thousands of Central Americans who have made their way to Costa Rica are civilians fleeing armed conflicts; many of them cannot be regarded as refugees but find themselves in an intermediate situation since they have left their country to escape an armed conflict, although they do not have good reason to fear persecution. In general, they are all poorly educated, have serious problems of health and nutrition, and are uncultured and unskilled, all of which are typical characteristics of people excluded from access to services and development in their country of origin. This has led the National Refugee Council to frame a plan for caring for refugee campesinos, which includes not only welfare measures but also providing them with productive jobs to enable them to develop socially and economically in the host country.

476. This is being done in the following four stages:

(a) Reception centres: the aim is to provide urgent medical attention, food and accommodation for persons crossing the frontier. This is the first stop for the presumed refugee and where the first assessment is made by the national authorities.

(b) Transit centres: in these centres, the refugee is offered health care, food, education and accommodation, as well as classification and immigrant documentation. The main aim of the transit centres is to provide these persons with care over longer periods, while their aptitudes and training requirements are determined with a view to their inclusion in some productive project

(c) Active camps: these are where duly selected groups of refugees engage in various forms of basic productive work, mainly for training purposes; the intention is not to achieve self-sufficiency but to lay the foundations for integration into national productive life through projects.

(d) Productive projects: these represent the final phase in the integration of the refugee into national productive life with a view to his achieving self-sufficiency.

477. As a result of this situation, in 1982, with the promulgation of Executive Decree No. 13722-J, the Government of the Republic established the National Commission for Refugees (CONAPARE). This Commission, which reports to the Ministry of Justice, consists of representatives of the Ministries of Justice, the Interior, Public Security, External Relations, and Labour and Social Security, with the participation of the Costa Rican Red Cross, the United Nations High Commissioner for Refugees, and the Inter-Governmental Committee for Migration (ICM).

478. At the same time, a series of decrees was promulgated to allow appropriate institutions in the various sectors to advise on the national refugee integration programmes and projects.

479. This led to the establishment of the legal framework necessary to create, by means of Executive Decree No. 16479-P of September 1985, the Specialized Government Agency for Refugees, General Directorate for Refugee Protection and Assistance (DIGEPARE), which reports to the Office of the President of the Republic and whose functions include providing legal, economic, social and administrative protection for refugees.

480. With the agreement of various government institutions, immigration procedures have been established for the recognition of the condition of refugees; to this end, a specialized office has been set up under the General Directorate of Migration. Furthermore, within the national context, two areas of refugee care have been defined according to their origin. Thus, one group has been designated urban refugees and is being looked after by an executive agency known as CASP/RE, while the other has been called the rural population and is being looked after by three executive agencies, namely: Red Cross, CIR and CASP/CAMP, which work in the established centres.

481. The institutional system for the care of refugees includes welfare measures and, later, the incorporation of the individual in productive projects which help him to become self-sufficient. In Costa Rica there are 35,000 registered refugees, to which should be added the hundreds of thousands of displaced Central Americans lacking identity papers who have been allowed to stay on humanitarian grounds.

482. To solve this problem, on 3 October 1987, in the city of Managua, the Governments of Costa Rica and Nicaragua, within the framework of the Esquipulas Agreements, signed an agreement on voluntary repatriation, with the participation and valuable collaboration of the Office of the United Nations High Commissioner for Refugees. The Tripartite Commission met for the first time on 29 October 1987.

483. In this connection, article 31 of the Constitution states that: "The territory of Costa Rica shall offer asylum to anyone persecuted for political reasons. If the law requires that he be expelled, he may never be sent back to the country in which he suffered persecution".

484. "... It is not, of course, legally impossible to make reasonable distinctions between nationals and aliens, as between persons who behave well and those who behave badly. Indeed, such distinctions are expressly or implicitly authorized by the Constitution itself and by international instruments. What is affirmed is that it is neither constitutional nor fair to subject anyone – innocent or guilty, national or alien – to unjustified discrimination or unequal treatment or to sanctions or seriously detrimental measures such as the cancellation of his legal resident status, deportation or expulsion from the national territory or, especially, arbitrary or unnecessary detention, without recognizing and respecting the fundamental rights and freedoms to which he is entitled simply as a human being, even though he may be accused of behaviour in varying degrees repugnant." (Judgement No. 12-89 of the Constitutional Tribunal, 6 October 1989.)

485. According to a decision of the Full, "Although aliens have the same individual and social rights and duties as Costa Ricans, the Constitution itself authorizes the establishment in their respect of exceptions and limitations

which can be imposed by law..., nor is it here the case that these exceptions or limitations have the effect of nullifying the guarantee itself enshrined in the Constitution..., since, as decided in similar cases, the detention of foreign citizens illegally present in the country constitutes the physical means of ensuring their expulsion..." (Decision of the Full, session of 12 November 1984.)

486. "Granting or refusing permanent residence in the country to aliens is one of the powers exercised by the executive branch. Accordingly, although it is true that aliens have the same individual and social rights as Costa Ricans, this rule does not confer upon them an absolute right to stay indefinitely. In any event, article 19 confers this equality "with the exceptions and limitations established by the Constitution and the law" and, as this Court understands it, different standards of treatment for nationals and aliens may be established by law". (Extraordinary session of the Full No. 32 of 27 June 1963; recital clause V of Decision 34, given at 3.45 p.m. on 4 June 1982; Decision of the Full of 19 August 1983).

Article 14

Paragraph 1

487. The first paragraph of article 14 establishes the right to equality before the courts and tribunals and specifies such procedural safeguards as hearing by a competent, independent and impartial tribunal and the making public of judgements rendered by the courts.

488. The first report submitted by Costa Rica showed that the Code of Criminal Procedure provided for some judgements against which there was no right of appeal, namely when the judgement rendered was final. Persons concerned approached the Inter-American Commission on Human Rights claiming that this right, also embodied in the Pact of San José, was being infringed and requesting that the matter be considered by the Inter-American Court of Human Rights. Having been officially notified of these complaints, Costa Rica applied itself to the study of its legislation and court structures. The commission appointed by the Executive submitted draft legislation to the Legislature, in which it proposed the establishment of a higher criminal court of cassation as a court of second instance that would reinforce this right.

489. The draft, currently under consideration in the Legislative Assembly, involves amendment of the Penal Code, the Code of Criminal Procedure, the Organization of Justice Act and the Courts Organization Act. Although this reform creates great difficulties of a legal nature and has serious budgetary implications, it is yet another demonstration of good faith and of the real respect for human rights in Costa Rica.

490. This new Code of Criminal Procedure will come into force in 1999.

491. Sufferers from disabilities, who have been one of the most segregated groups in all societies, should also be included in this listing of the forms of equality before the law. Throughout history they have been subject to elimination, isolation, contempt, exploitation and many other taunts. The fact

of being born disabled or becoming incapacitated at some point during one's life is looked upon as one of the greatest calamities that can befall a human being.

492. The attempts of sufferers from disabilities to play an effective part in the taking of decisions that affect them directly or indirectly have been beset with difficulties arising, on the one hand, from a scornful and incredulous attitude towards the possibility of such people being able to resolve their own problems and, on the other hand, from the great challenge of accepting that a population group whose independence and self-esteem has been trampled upon in the course of history is capable of engaging in a struggle that requires endurance and preparation. Despite the fact that the rights of all the citizens of Costa Rica are covered in the existing legislation, the exercise of those rights is dependent on the existence of real possibilities in the social milieu.

493. While sufferers from disabilities are members of society, they are not integrated into legal systems based on respect for human rights. Equality of opportunity is not synonymous with integration. The needs of every individual are recognized in a principle that guarantees to all the right of freedom of choice and access to and participation in a society in which we all have to live together. We may also refer to other legislation and prophylactic medical measures that are at variance with the above legal instruments, because their purpose must be the development of sufferers from disabilities in societies that aspire to recognize the worth of the existence of every human being.

494. It is for that reason, and for many others, that the Act on Opportunities for Sufferers from Disabilities is not only a landmark in our history but also part of a series of very important measures and processes. This Act is being promulgated exactly 20 years after the establishment of the first organization for sufferers from disabilities in Costa Rica.

495. Considerable efforts have also been made for several years past to achieve effective legislation guaranteeing the rights of sufferers from disabilities. We are able to assert with great satisfaction that this Act results not only from the efforts of sufferers from disabilities, parents and persons involved openly and in a disinterested manner with this population group, but also from the activity of the many other Costa Ricans who have at various times put forward legislative measures to the same end.

496. The Act is one further source of pride for Costa Ricans, apart from the fact that it is an initial measure and may not be entirely perfect. We are aware however that it has its place in an inexorable process by which society is being transformed as we approach a new century. We know that it is, without any doubt, the most advanced and fair legislation in this field and a contribution to the Latin American region.

497. The Act may appear utopian, but as we look at the results of its application it will be understood that it is simply an Act that properly meets the needs of sufferers from disabilities and the mandates of our Constitution and of the Universal Declaration of Human Rights. What may however be its greatest and most significant effect is that it is of benefit to all of the country's inhabitants, as is specified in its first article:

"The integral development of sufferers from disabilities under conditions of equality as regards quality, opportunity, rights and responsibilities with the rest of the inhabitants is declared to be in the public interest."

498. The introduction of this Act has entailed great changes in existing laws, various of the provisions of which have had to be amended so as to avoid clashes between the rules of law.

499. This article is the reflection in the judicial sphere of the principle of equality guaranteed in article 33 of the Constitution.

500. The purpose of this rule of article 41 of the Constitution is to guarantee that nobody be deprived of redress. The judicial process is governed by rules that are general and abstract, which means that the organization of justice is laid down by law. The article states: "In having recourse to the law, every person must find redress for injury or damage to his person, property or moral interests. Justice must be done promptly, effectively and without restriction, in strict conformity with the law."

501. In like manner, article 283 of the Code of Criminal Procedure states: "The accused person may make as many statements as he wishes, always provided that they are relevant and do not appear to be a delaying or disruptive procedure."

502. Article 375 of the Code of Criminal Procedure provides that: "The accused person may make as many statements as he considers appropriate in the course of the hearing - even if he may previously have declined so to do - provided always that they relate to his defence. The President shall act to prevent any digression and, should the accused persist in such digression, may exclude him from the hearing."

503. The accused person may also consult his defence lawyer without the hearing having to be suspended for the purpose, but may not do so during his testimony or before replying to questions put to him. He may not be prompted in any way (art. 366).

504. The wording of article 359 of the Code of Criminal Procedure [hereinafter CCP] is as follows: "The hearing shall be oral and public under penalty of nullity, but the court may decide, or even the judge himself may decide, that it be held wholly or on part in private where publicity might harm morals or public safety." The decision shall be substantiated, be set down in the record and not open to appeal. Should the grounds for exclusion cease to apply, the public may be readmitted.

505. In contrast to the pleadings, which are in writing (CCP, art. 95) and, while not secret (unless the judge so decides), are also not public, but are private, since only the parties and their defence lawyers may know them (CCP, art. 195), the trial is patently an oral and public stage. The rules on the reporting of proceedings (CCP, arts. 359, 360) and on the making public of the judgement (CCP, art. 396) apply to all the hearings of special proceedings on pain of the procedural penalty of nullity (CCP, arts. 415, 427, 443).

506. In its extraordinary session of 11 October 1982, the Full Court indicated that "... the powers of adjudication involve a duty for the State, that of handing out justice, at the same time as it entails in practice the public right of the governed to require that their cases be hear by the courts for a decision to be taken on their claims or their pleas according to law. The right to justice is one of the fundamental human rights, the importance of which is such that it should be accorded the status of a constitutional rule and supplemented by the corresponding legislative provisions. It is historically a right related to the "right of action" , which is now also termed the "right to jurisdiction", a broad concept embracing defence, whatever the nature of the proceedings."

507. The right to receive justice is dealt with in article 41 of the Constitution, which is the same as one of the 39 rules of defence and the need to establish guilt in criminal proceedings. In a legal system of statute law some codes and laws govern the rights of each individual and lay down the manner in which the infringed right is to be reinstated, while, generally speaking, other codes and laws indicate the procedure to be followed when exercising the right of petition (or of action) based on a claim to avail oneself of the protection of the law, including protection against the State, should it be the State that is accused of infringing a right or "legitimate interest".

508. Following the same context of the previous opinion, the Full Court stated that "...the second rule of article 41 may be violated by the courts or by the legislator: by the former when their judgement disallows, without legal grounds, an application that they should have granted, and by the legislator if quite irrational procedural obstacles are established that effectively impede access to justice; excessive formalism on the part of the legislator may result in a de facto denial of justice.

509. In connection with the foregoing, one of the opinions of the Third Chamber notes that "the entry in the record of the hearing indicates that the trial was conducted in private ‘for reasons of order’ and does not state what the motives might have been that led the Court to consider that disorder might arise in it, and therefore such a decision was taken no later than at the start of the hearing; it is concluded from the foregoing that the principle of compulsory publicity in our legislation on criminal procedure was violated, for which reason the action brought is upheld."

Paragraph 2

510. The presumption of innocence is one of the fundamentals of Costa Rican criminal law. It is an essential safeguard for the individual. This principle is to be found in article 9 of the 1789 Declaration of Human and Civil Rights, "Every individual shall be presumed to be innocent until declared guilty..." The accused person must therefore be considered as innocent and treated as such until his guilt has been established."

511. A theory of proof that protects the rights of the accused follows from what has been said above. First of all, the burden of proof is on the plaintiff and, if proceedings are taken, on the claimant for criminal indemnification. The charge will determine both the legal and material validity of the offence and the participation of the accused in it. Subsequently, at the stage of the

pre-trial proceedings, the evidence will have to be sufficient; in other words, the evidence both against and in favour of the accused.

512. Article 39 of the Constitution provides that "nobody shall be punished other than for an offence, a quasi-delict or a minor offence sanctioned by a pre-existing law and by virtue of an enforceable sentence pronounced by competent authority, subject to the suspect having been given the opportunity to defend himself and to guilt having been established as required. Enforcement on the person in civil matters and labour disputes or the detentions that may be ordered in cases of insolvency, bankruptcy and creditors' meetings shall not constitute an infringement of this article or of the two preceding articles.

513. Equally, article 1 of the Code of Criminal Procedure provides that "Nobody may be punished other than by virtue of proceedings carried out in accordance with this Code; nor be tried by courts other than those established by the law in accordance with the Constitution; nor be considered guilty until so pronounced by an enforceable sentence; nor punished more than once for the same deed unless there be a change in its legal definition or new circumstances are declared. This latter prohibition does not cover cases in which no pre-trial proceedings were begun or they were suspended by virtue of a formal impediment to the bringing of the action."

514. The expression of general criminal procedural law is not to punish the accused, which is the claim or raison d'être of substantive criminal law, but to guarantee the accused a fair trial ending in a judgement on suspicion of punishable conduct. It should be noted that it is not merely the principle of the legality of the sentence that is established, but that closely linked with it there follows the undoubtedly positive principle of "no sentence without trial".

515. It must be emphasized that criminal proceedings are not synonymous either with impunity or with sentence, but with safeguards. We should not go to absurd lengths and come to believe that the criminal trial is an obstacle to the carrying out of a sentence, or an efficient tool for penal abolitionism; there are those, including some judges, who believe that the function of the criminal trial is to protect the security of citizens and that the procedure must depend on the enforcement of penalties, in which we operate with preventive detention as a means of correction and of punishment, more than as a means of prevention. In reality, the process is a set of rules laying claim to provide a solution to a social conflict: the offence, with the purpose of guaranteeing all subjects fair and proper disclosure of the truth, whether it result in acquittal or sentence, but imposing rational limits on the State in order not to increase levels of violence already altered by the crime itself.

516. In its session of 8 August 1985 the Full Court asserted that article 39 of the Constitution provides the principle of legality along with those of innocence, defence and guilt. In accordance with the first of those principles, nobody may be punished in any way in the absence of a pre-existing law that defines as an offence the event for which the punishment is given, or unless the criminal law applicable to a given case is in existence before any punishment, which is a fundamental legal concept of the liberal democratic system in which we live. The second, on which there is so much disagreement among commentators, should not be understood as a presumption of innocence, but rather as the state

of every defendant unless and until declared guilty by an enforceable sentence. This principle is also referred to by the Constitution in the following manner: "Nobody shall be punished other than (...) by means of the proper proof of guilt", whereas the principle of defence assumes the constitutional safeguard that gives the accused the right to be assisted at all stages in the proceedings by a member of the legal profession, and also complete respect for every procedural phase displayed in the various confrontational means of control, in the interests of the accused.

517. This latter point necessarily coincides in many respects with due process, a generic term, non-compliance with which carries the threat of nullity in favour of each of the constitutional guarantees that are enjoyed by all persons and transients and are dealt with in article 41 of the Constitution.

518. The article of the Constitution cited at the beginning adds an element not commonly found in the constitutions of other parts of the world, but one that ought to commend itself for its commitment to legality, because every punishment backed by an enforceable sentence may be derived only from the opinion of the higher court that may go beyond examination of the judgement to what it contains for every individual who may consult the record for the purpose of avoiding unlawful or arbitrary decisions by the courts. In contentious matters, specifically regarding transit, it could be argued that article 84 of the traffic regulations is not unconstitutional in stipulating the guilt of the wrongdoer for breach of a rule of this same law that obliges him to park in areas not prohibited by paragraph 1 in fine of the text in question. The fact that the procedural system established for minor offences has been inserted in a Code of this nature, which is applicable to the investigation and punishment of unlawful acts on a higher level, undoubtedly necessitates the introduction into this other sphere of the basic principles governing our criminal procedural system, more specifically, in the interest of the matter under discussion here, the guilt of the wrongdoer should be apparent and clearly demonstrable, and if not then he must be acquitted in accordance with the principle of the benefit of the doubt [in dubio proren].

519. Furthermore, judgements based on free conviction are completely left on one side by the Code of Criminal Procedure in force as regards the protection that should be accorded to defendants to deserve punishment only if it is demonstrated to the defendant, the parties and society that his conduct should be punished. In other words, even at the level of misdemeanour, the matter should be settled relying on the rules of rational sound criticism, which ought to coincide in all respects with the framework of criminal legal procedure and substantive criminal law, especially with the historical framework that may be shown to be in favour of the statutory regime and the absence of partiality and arbitrariness in the courts.

520. To put it another way, our legal system goes beyond the principle of German law that anyone found in an illegal situation who committed an illegal act under those circumstances should be answerable for all its consequences, even those that are accidental. The matter is one of confrontation between versari in Relator Especial illicita and the modern principle of culpability, no punishment without guilt [nulla poena sine culpa], of which the first is regarded by the doctrine as the principle of culpability.

521. This principle, qualified as reserve of culpability, stipulates that guilt is the minimum basis for liability, in contrast to versari, which leads to the imputation of chance occurrence, the unforeseeable, on the basis of the concept of culpability that it constitutes, known as objective liability.

522. From this point of view, the position of the appellant should be taken up. Given that paragraph 2 of the Act on Transit is in conflict with article 39 of the Constitution, this constitutional rule makes the authorities or the defendant responsible for showing that the accused is guilty, whereas in the case to be examined that principle is reversed and the burden of proof is on the accused. The grounds set out lead to the declaration that the remedy is founded and, in consequence, that article 84 of the Act on Transit is founded

Paragraph 3

523. The accused is informed of the nature and grounds of the criminal charge against him.

524. During the pre-trial proceedings, on first appearance, the examining magistrate verifies the identity of the accused and informs him clearly of each of the charges against him. When the accused has requested the assistance of a lawyer and one has been duly called upon the examining magistrate proceeds with the questioning. In other cases, the examining magistrate advises the accused of his right to appoint a lawyer or to request that legal assistance be assigned to him. The lawyer may examine the records of the case in situ and communicate freely with the accused. The examining magistrate subsequently informs the person that he may be questioned only with his immediate prior agreement noted in statements; the examining magistrate shall note them immediately.

525. Where legal assistance is granted, the lawyer assigned may not refuse to act unless he has grounds for being excused or a duly established impediment.

526. Should irregularities occur in the course of the pre-trial proceedings, and especially if a fundamental rule, such as the rights of the defence, has been infringed, sanctions of various types may be imposed. Such sanctions may be disciplinary, criminal, for damages and nullity (proceedings thus annulled shall be removed from the record).

527. As regards the writ and refusal to testify, they are dealt with in article 278 of the Code of Criminal Procedure, which states: "(place where the person is detained, proceeds to take his statement; for that purpose,)...the judge shall inform the accused in detail concerning the act of which he is accused, what evidence there is against him, and that he may decline to make a statement without his silence implying an admission of guilt, and that he may require his defence lawyer to be present".

528. Should the accused decline to make a statement, that fact shall be noted in the record; should he refuse to sign it, the grounds shall be recorded, and when he requests that his defence lawyer be present, the judge shall set a new hearing and order the defence lawyer to be summoned to attend. The writ deals with the facts and not with the legal indictment of those facts.

529. In one of its judgements the Constitutional Court lays down that "... the bringer of the action has suffered from infringement of the right of defence guaranteed by article 39 of the Constitution and consequently of the principle of due process set out in article 41 of our Constitution" or, as it is called in doctrine, the principle of "the bilateral nature of the hearing", of "due legal process" or the "adversarial principle", summarized as follows in the interests of better understanding:

(a) Notification of the person concerned regarding the nature and purposes of the proceedings;

(b) The right to be heard and opportunity for the person concerned to present arguments and produce such evidence as may be deemed relevant;

(c) Opportunity for the administrator to prepare his argument, which necessarily includes access to information and to administrative records relating to the matter under consideration;

(d) Right of the administrator to be represented and to be advised by lawyers, technicians and other qualified persons;

(e) Adequate notification of the decision of the administration and the grounds for it, and

(f) The rights of the person concerned to appeal against the decision rendered. Consideration is given to appeals that the right of defence contained in article 39 of the Constitution applies not only to jurisdictional proceedings, but also to any administrative proceedings carried out by the public administration; and that the bringer of the action must necessarily be given the right to be assisted by a lawyer, should he so desire, for the purpose of presenting his defence and that the appellant was denied this right in the case under examination, in breach of the constitutional rules already cited" (Opinion No. 15-90 of the Constitutional Court dated 5 January 1990). In addition, see the jurisprudence on note (2) of this article, resolution of the Full Court dated 8 August 1985.

530. Confession may be obtained in the course of an interrogation that must never go beyond the limits of legality. However, an accused person may not respond to the questions put to him. Acts of brutality or acts that are an affront to the dignity of the human being are sanctioned. Furthermore, jurisprudence condemns any act on the part of a police investigator that constitutes an unfair or deceptive procedure.

Paragraph 4

531. Acts committed by a child below 12 years of age that constitute an offence or a misdemeanour shall not be the object of juvenile criminal law; civil liability shall remain applicable and shall be pursued in the appropriate courts. Judges in the juvenile courts shall however refer the case to the National Children’s Association, so that its attention may be drawn to the situation and follow-up action taken as required.

532. Should administrative measures entail restricting the freedom of movement of the juvenile, the juvenile crime enforcement officer shall be consulted and he will also monitor their application.

533. The Juvenile Criminal Justice Act is aimed at all-round protection of the minor, his higher interests, respect for his rights, his all-round education and reinsertion into the family and society. The State, in conjunction with non-governmental organizations and the communities, will promote programmes directed towards both those ends and protection of the rights and interests of the victims of the act.

534. This Act must be interpreted and applied in harmony with its main guidelines, the general principles of criminal law, and international doctrine and regulations regarding minors. All this must be done in the way that will best ensure the rights laid down in the Constitution, and in the conventions and other international instruments that Costa Rica adheres to and has ratified.

535. Article 111 of the Code of Criminal Procedure governs denunciation for delay in the agreement procedure "At the end of the period within which a ruling should be given the interested party may request a prompt answer and, should he not receive it within three days, he may complain about the delay to the Supreme Court of Justice, or the legal inspectorate will subsequently verify as appropriate, having been informed of the complaint.

536. With regard to complaint for delay in the Court of Jurisdiction or in the Higher Criminal Court of Cassation, article 112 of the same Code establishes "If a member of the Court of Jurisdiction may be held responsible for the delay referred to in the previous article, the complaint may be submitted to the Higher Criminal Court of Cassation; if a judge may be responsible, the interested party may exercise his rights before the Full Court ."

537. Likewise, article 41 of the Constitution indicates the reparation for injury or damage to the person, property or moral interests. Justice must be done promptly, fully, without denial and in strict conformity with the law.

Paragraph 5

538. The defence lawyer must, by virtue of his professional and ethical mandate, use every legal means of proof to prevent the conviction of his client or to ensure that the penalty imposed is not the most serious. Only graduates of national or foreign universities duly registered with the Bar Council may practice as lawyers.

539. The right to be legally defended in all trials is laid down for Costa Rican criminal procedural law by judgement No. 5-12-90, which extended the service to trials for misdemeanours. Nowadays the Department of Public Defence Lawyers has two lawyers assigned to what are loosely called guardianship cases. By virtue of the guarantee of defence they have to devote themselves to ensuring respect for due process.

540. Concerning the absolute necessity for a public defence lawyer, it has been written in our legislation and in accordance with judgement No. 3321-93:

"In comparison with any accused person, the least able defence lawyer provides better likelihood of defence than does the accused on his own, however well versed he may be".

541. With regard to self defence "... it may be laid down as a general principle that every accused person ought to be defended by a lawyer in criminal proceedings and only exceptionally is it possible to allow him to defend himself". The reasons for this stem directly from the lofty and increasingly technical nature of the law and from considerations of equality between the parties, given that the representative of the public prosecutor's office is a lawyer. The defence has to be technical to be effective and not to lose its meaning (Vásquez Rossi).

542. The defence lawyer is officially appointed, in accordance with article 83 of the Code of Criminal Procedure, which states "When the accused person does not appoint a defence lawyer at the proper time, the Court shall nominate a public defence lawyer to act in that capacity, unless the accused is allowed to defend himself personally, in accordance with article 80". It should not be overlooked that the accused person is entitled to a defence lawyer from the time of being taken in by the police.

543. A defence lawyer may also be appointed subsequently at the request of the person summoned in accordance with article 84 of the Code of Criminal Procedure, which states "The appointment of the public defence lawyer does not prejudice the right of the accused subsequently to choose another in whom he places confidence, but the change shall not be considered to be effective until the person nominated has agreed to act and informs the office to which notice must be given.".

544. This possibility gives expression to the right to change defence lawyers that stems from the freedom of choice inherent in the right of defence.

545. The lawsuit may also be abandoned under the terms of article 89 of the same Code "Should the defence lawyer of the accused abandon the defence and leave his client without a lawyer, he shall be replaced without delay by the public defence lawyer and shall not be eligible for reappointment in the trial". Should the abandonment have occurred before or during the oral hearing, the new defence lawyer may request an adjournment of the hearing for a maximum of three days.

546. The hearing may not be suspended again for the same reason. The intervention of another private defence lawyer will not exclude that of the public defence lawyer. Abandonment by the defence lawyers or the attorneys of claimants for criminal indemnification shall not suspend the action.

547. On account of the foregoing, the Office of the General Secretary of the Supreme Court has stated repeatedly that "when a private defence lawyer is not present unjustifiably at a legal hearing which he was previously summoned to attend ... he shall be replaced in accordance with the provisions of article 89 of the CCP by another private or public defence lawyer in accordance with the procedure ... without the possibility of reappointment of the defence lawyer who abandoned the defence".

548. Subsection 3 of art. 145 states that failure to comply with the provisions concerning:

(a) the appointment, capacity and constitution of judges and courts;

(b) the intervention of the public prosecutor's office in the action and its participation in the acts in which its involvement is obligatory;

(c) the intervention, attendance and representation of the accused in the cases and in the manner laid down by law

shall always be regarded as grounds for nullity.

549. The grounds may be an error in the number of members of the court (if it is a collegiate court) , which may be too large or too small, or in the number of a defective single-judge court, which can only be too large.

550. Provision is made for the nomination of the public defence lawyer in article 189 of the Code of Criminal Procedure "On the first opportunity, but in any case before the testimony of the accused person, the judge shall invite him to appoint a defence lawyer; should he fail to do so or should the lawyer not agree to accept immediately, the judge shall proceed in accordance with article 83. (This article deals with the nomination of a public defence lawyer to represent the accused person.)

551. Failure to comply with this rule shall render null the acts referred to in article 191. (Records, investigations, reconstructions, expert examinations and inspections, witness statements). In the same act, an accused who is at liberty shall determine the place within the district where he may be summoned to appear by the court).

552. It should be pointed out that the subject could be detained as the possible author of the deed or indicated as such by the judiciary police before the intervention of the judge or the office of the public prosecutor; the conclusion from this is that the conduct of the accused person emerges before the start of the pre-trial proceedings (summary or formal), because a charge has already been drawn up implying an attack on the right of freedom. Concerning the documents excluded, as laid down in article 222 of the same Code "Letters or documents sent or handed over to the defence lawyers for the performance of their task may not be confiscated". This is also regulated in Act No. 7.425 on the registration, confiscation and examination of private documents and the seizure of communications".

Paragraph 6

553. Regarding the appointment of interpreters, there are four groups of indigenous people in our country who have flourishing languages. Regarding the problems of providing interpreters and of better access for the indigenous peoples to the criminal justice system, the principle of the impartiality of the judge is additionally involved; he cannot be both judge and interpreter.

554. The judge shall appoint his own interpreter when documents have to be translated or testimony has to be given in a language other than Spanish, even

when he knows the language. During the pre-trial proceedings the deponent may write out his testimony, which shall be added to the record (article 253 of the Code of Criminal Procedure).

Paragraph 7

555. In criminal proceedings no one shall be obliged to give evidence against himself, or against his spouse, ascendant or descendant relatives or collateral kinsmen up to three removes, including blood relations and relations through marriage. According to article 278 of the Code of Criminal Procedure:

> "The judge shall inform the accused in detail of the charge against him and of the existing evidence against him; that he may refuse to make a statement without his silence implying a presumption of guilt and may require his defence lawyer to be present."

Should the accused person decline to testify, that fact shall be noted in the record; should he refuse to sign the record, the grounds shall be noted; and when he requests the presence of his defence lawyer the judge shall set a time for a new hearing and order that the defence lawyer to be summoned to attend.

556. The basis of criminal procedure is a detailed indictment that must be communicated to the accused so that he may plan and base his defence upon it. Any addition to or amendment of the body of evidence attributed must equally be communicated and, if new acts are included, a further indictment must be drawn up. All this is regulated in articles 278, 373 and 376 of the Code of Criminal Procedure.

557. The accusatory principle gives rise to the principle of the inviolability of the defence, because it can be effective only in so far as the defendant and his defence lawyer are undoubtedly aware of the acts set down.

558. It is accepted that the writ, at the stage of the pre-trial proceedings, is of a provisional nature, since it is subject to amendment in conformity with the results of the evidence received, given that at this stage it is scarcely the act that is being investigated, whereas in the writ it is relatively definitive, in the intermediate stage, and only exceptionally may it be amended or expanded (CCP, articles 376, 397 in fine).

559. Regarding the freedom of the subject to testify, article 276 of the Code of Criminal Procedure states that the accused may refrain from testifying. In no case shall he be required on oath or by undertaking to tell the truth, nor shall he have pressure put upon him or be threatened, nor may any measure be taken to compel, induce or determine him to testify against his will, nor may charges or countercharges be made against him to obtain a confession. Failure to comply with this rule shall render the record null, without prejudice to any corresponding disciplinary or criminal liability.

560. It is an expression of the old procedural principle nemo tenetur edere contra se, which embodies the assertion that no one may be obliged to testify against himself to the benefit of his adversary (article 36 of the Constitution, art. 278 of the CCP). In our criminal procedural system, in the interests of the search for the real truth as one of the essential purposes of the process,

the accused undoubtedly becomes obliged to offer (passive) cooperation for the obtaining of evidence, and arising from this reality is held to be an object or source of evidence.

561. "The Constitutional Court considers that two interests must be weighed up in obtaining evidence in criminal proceedings: the search for the real truth, on the one hand, and respect for the basic rights of the accused, on the other". In this context, it is appropriate to analyse the use of the accused as a source of evidence (the accused as an object of evidence); and whether it is admissible to oblige him to allow a series of investigative acts or acts for the obtaining of evidence to be carried out for which purpose his person must be used. In this regard, the Court considers "that in the name of the search for the real truth as one of the essential purposes of the process, the accused may be the source of proof in those cases in which arriving at it does not occasion any physical or mental harm for the subject, nor affect inherent human rights. Consequently, acts requiring the passive cooperation of the accused .. may be carried out even without his agreement in accordance with the special circumstances of each case and the corresponding legal formalities". (Constitutional Court, judgements No. 556-91 of 20 March 1991 and No. 3461-93 of 20 July 1993.)

562. The right of the accused to refrain from testifying does not imply a presumption of guilt; that is why the court must restrict itself to assessing the testimony given by the agent in the hearing, without concluding whether if he refrained it was because he had no defence to put forward. (Third Chamber, judgement No. 56-F of 27 May 1983).

563. The same judge may not act as a judge in hearings on the same point in different courts. No one may be judged more than once for the same punishable act (article 42 of the Constitution). The reopening of completed criminal proceedings and dismissed proceedings is prohibited on grounds of res judicata except when application is being made for judicial review.

564. Article 42 of the Constitution does not establish the second hearing system for the decision of jurisdictional cases, as has already been stated by the Court in the following terms in the judgement on unconstitutionality to which session No. 61 of 7 October 1982 relates: "... Article 42 referred to does not create that second hearing system, since what it lays down is that ‘the same judge may not act as a judge in hearings on the same point in different courts’, without that implying that all proceedings must have more than one court... It is not therefore a matter of a general guarantee of a second hearing, but of a ground for impediment created in the Constitution for the case in which, should a decision have to be reviewed by a higher legal body, that review may be real and effective through the intervention of another person as the judge and not of the same person who handed down the pronouncement being appealed against." (Resolution of the Full Court, extraordinary session of 3 July 1984).

565. The American Convention on Human Rights, known as the "Pact of San José of Costa Rica" was approved by Act No. 4534 of 23 February 1970. The second paragraph of article 8 of the Convention prescribes the following , among "other legal safeguards" : "Every person accused of criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.

During the proceedings every person is entitled, with full equality, to the following minimum guarantees:... (b) the right to appeal the judgement to a higher court", from which the right that the Convention recognizes or states is the right "to appeal the judgement". It is clear that this right is in favour of the accused who appear in the criminal proceedings... They (the accused persons who have made the application for declaration of unconstitutionality) claim that "the remedy of application for judicial review does not suffice...", but it can be seen that paragraph 2(b) of article 8 of the International Convention does not refer to "appeal", but to the right to "appeal the judgement", because the remedy of application for judicial review then fulfils the condition that this rule provides. (Judgement of the Full Court, session of 3 July 1984).

566. Regarding the general rules, article 447 of the Code of Criminal Procedure states "Judicial rulings may be appealed against only by the means and in the manner expressly laid down. The right of appeal will correspond only to someone to whom it is expressly accorded. When the law fails to distinguish between the various parties to the proceedings, the appeal must be made by one of them. Further to the foregoing, the rule presupposes interest in the court proceeding to be challenged. (Judgements of the Third Chamber Nos. 330-F-90 and 137-F-92).

567. Article 449 of the same legal instrument provides that the accused shall be able to challenge the judgement of dismissal of acquittal when a security measure is imposed on him, or solely the provisions in the judgement on restitution or compensation of damages. Appeals in favour of the accused may be made by the accused himself or by his defence lawyer and, if he is a minor, by whoever exercises parental authority or by the guardian or guardian ad litem, although they are not entitled to be informed of the decision.

568. In connection with the judgement of dismissal that imposes a security measure, its presupposition is obviously previous declaration of a state of non-imputability (art. 42 of the Constitution) existing at the time when the accused committed the deed. Professor Francisco Castillos has commented in that respect that "In such a case the legislator establishes the right to challenge because it is considered that the imposing of a measure of security is sufficient for the accused to generate the right and the interest to challenge. On the other hand, the mere declaration of non-imputability, without the imposition of a security measure, does not in itself produce interest in challenging the judgement of non-imputability of article 320 of the CCP. Dismissal on grounds of non-imputability of someone upon whom a security measure has been imposed could not then require him to be considered imputable and to have a penalty imposed upon him".

569. Should the judgement of dismissal challenge a security measure on grounds of non-imputability, what is challenged is solely the security measure, not the declaration of non-imputability nor the dismissal on account of it. This measure avoids the imputability of the defendant. In effect, were the object being challenged also to be the declaration of non-imputability and were the agent to be able to demonstrate that he was non-imputable at the time of the deeds, the security measure imposed would have to be revoked, but the dismissal directed in his favour on grounds of non-imputability could not be revoked, because of application of the prohibition of reformatio in peius.

570. Under our criminal procedural law a minor is excluded from this hypothesis. Under our law, jurisdiction is regulated by the Organization Act on Guardianship of Minors and by the Juvenile Criminal Justice Act, so that the minor should be defended by a private or a public defence lawyer, who should have the procedural possibility of challenge in criminal cases.

571. The remedies for the accused in the legal system are provided in article 474 of the Code of Criminal Procedure. The accused may appeal against:

(a) any sentence for crime;

(b) a judgement of dismissal or acquittal imposing a curative security measure for an unspecified period;

(c) orders that refuse liquidation of the punishment; and

(d) judgements that impose a security measure.

572. With regard to the previous text, we have to point out that the Constitutional Court has stated that "... the clash of unconstitutionality between the provisions of paragraphs 1 and 2 of article 474 and the principles of due process and the right of defence was eliminated by judgement No. 719-90, a verdict in which the limitations on the right of appeal to vacate a judgement in favour of the accused against a judgement in penal proceedings for crime are annulled and deemed not to have been put ... and in which the measure is also enacted to enable parties injured by these provisions exactly to satisfy the guarantees of due process and the right of defence that has been violated for them". (Judgement No. 100-93).

573. The direct consequences of these verdicts as regards the significant increase in the number of proceedings in the Third Chamber of the Supreme Court of Justice explain the establishment of the High Court of Criminal Cassation.

574. Article 490 of the Code of Criminal Procedure concerning the application for judicial review of the facts specifies that the review shall always precede and be in favour of the person sentenced against executable judgements in the following instances:

(a) when the acts taken as the basis for the conviction prove to be irreconcilable with those established for another executable judgement in criminal proceedings;

(b) when the judgement appealed against was based on documentary evidence or testimony declared to have been false in a later executable judgement;

(c) if the sentence was passed as a consequence of prevarication, bribery, violence or other fraudulent machination, the existence of which has been declared in a later executable judgement;

(d) when new events or elements of proof arise after the sentence that by themselves or in conjunction with those already examined in the proceedings make it evident that the act did not occur, that the convicted person did not

commit it or that the act committed is covered by a more favourable provision;

(e) if it is a case to which milder criminal legislation may be applied retrospectively; and

(f) when it was not imposed through due process and with opportunity for defence.

575. It is precisely the Third Chamber, the Court of Criminal Cassation, that hears the application for judicial review for prejudice to due process, where due process has been defined, with regard to its information content, by the Constitutional Court in judgement No. 1739-92 of 1 July 1992.

576. The Constitutional Court neither defines nor verifies the existence of the alleged violation, but corroborates, checks or states whether the procedure that was omitted or not followed in the penal proceedings was or was not essential to guarantee the accused - now the person convicted - the requirements for the holding of a fair criminal trial and whether or not they were those established by precedent or court decisions. The judgement of the Constitutional Court on the content, conditions and general scope of the due process - or, where appropriate, the rights of hearing and defence - would be the working hypothesis on the basis of which the Third Chamber would have to decide the thesis of the appellant. (Constitutional Court, judgement No. 1739 of 1 July 1992).

577. The competence assigned to the Third Chamber and the Constitutional Court over judicial review in cases of application for legal review of the facts has already been defined, and it has already been determined that the verification or non-verification of the alleged violation in relation to the facts is the province of the former, while definition of the basic principles of due process that can be ascertained through the procedure of judicial review is the province of the latter. (Judgement No. 651-94 of 2 February 1994).

578. According to article 498 of the Code of Criminal Procedure, the judgement from which the innocence of the convicted person stems may decide, at the request of one party, on the damages occasioned by the sentence. The damages shall be borne by the State, provided that the party has not contributed by his deceit or negligence to the judicial error. Civil damages may be awarded only in favour of the convicted person or his legal heirs.

579. No one may be punished other than through a trial conducted in accordance with this Code, nor tried by courts other than those established by law in accordance with the Constitution, nor be deemed guilty until so declared by an executable judgement, nor be the subject of criminal proceedings more than once for the same act even if its legal determination is modified or new circumstances are affirmed.

580. This latter prohibition does not cover cases in which the jurisdictional process had been commenced prior to or suspended on account of a formal impediment to the bringing of the action.

581. This is the maximum expression of the general right of legality of the hearing, in which the ultimate purpose of criminal procedural law is not to

punish the accused, which is the claim or raison d'être of substantive criminal law, but to guarantee the accused a fair trial ending in a judgement on the suspicion of punishable conduct. It is not only the legality of the process that is established, but also that of the legality of the sentence, from which indissoluble interrelationship there follows the undoubtedly positive principle of "no sentence without trial" (article 39 of the Constitution, linked with article 41 of the same text; paragraph 2 of article 11 of the Universal Declaration of Human Rights; and article 9 of the American Convention on Human Rights).

582. If in a specific thing an extraordinary extension of the pre-trial proceedings of the crime of embezzlement was granted in favour of the accused and if an obligatory dismissal of proceedings was granted in his favour a year later, but the government attorney has later sought a new injunction, arguing that it was an extension of the original one, making the accused to be tried and sentenced for the same acts, an application for judicial review may be taken for the interjected ground, since the affair was closed by the granting of the dismissal in favour of the accused and that judgement has become executable, so that the case cannot be reopened and retried because prevented by the principle non bis in idem embodied in the Constitution; with the result that the person judged is absolved of all penalty and liability. (Judgement No. 72-F, dated 3 September 1981, of the Third Chamber.)

583. The matter adjudicated appears in the legal process under the twin aspect of definitive statement as regards the indictment of the crime and definitive closing of the possibility of retrying the matter decided. Subjectively it refers to the identity of the accused, given that proceedings cannot be taken against the same person who has already been tried for the same act and been acquitted or convicted. With regard to the act of dismissal of proceedings, that is equivalent to a judgement and results in res judicata. (Third Chamber, judgement No. 31 of 29 April 1982).

Article 15

584. The second paragraph of this article provides for the punishment of international crimes in accordance with the principles of international law. Furthermore, concerning the constitutional and legal rules set out in the first report regarding the crime of apartheid, Costa Rica has consistently condemned it in international forums.

585. On 4 July 1986, after having given consideration to many motives of an ethical and legal nature, the Government of Costa Rica decided to break off its diplomatic and consular relations with the Republic of South Africa.

586. After 1987 trade between Costa Rica and this country was legally prohibited. Diplomatic relations were minimal. The consular offices of Costa Rica in South African territory were closed. No recognition was accorded to the Bantustans that South Africa had elevated to the level of "sovereign" States - Transkei, Ciskei, Bophuthastwana and Venda - and a firm stand was maintained against the illegal occupation of Namibia. On top of all these elements, the Legislature urged the Executive on 25 June 1986 to break off all relations with the racist regime of South Africa.

587. On 4 June the Government of the Republic issued the following statement to announce and explain the grounds for the breaking off of relations:

"Official Declaration of the Government of Costa Rica

The Government of Costa Rica has decided to break off its diplomatic and consular relations with the Republic of South Africa, in view of the continuing state of emergency imposed by the regime in Pretoria, the continuing practice of apartheid and the lack of interest of the Government of Pieter Botha in satisfying the expectations of the international community as set out in resolution 569 of the United Nations Security Council.

The Government of Costa Rica, faithful to the position maintained over the years during which it has voted in favour of resolutions aimed at the final elimination of apartheid, considers that the persistent refusal of the South African Government to accept the mandate arising from the resolutions of the United Nations is contrary to the Costa Rican tradition of absolute respect for the full applicability of human rights. In that sense, ever since the dawn of our independence as a country, Costa Rica has sought to strengthen those principles set out in its first Constitution, the Interim Fundamental Social Covenant (1 December 1821), that all men were free and had the right to vote, which altered the situation created by the Spanish Constitution of 1821, under which persons of African descent were excluded from the right of citizenship.

Various later reforms have always confirmed the same principle expressed in the following terms in the Central American Federal Constitution of 30 November 1824: "Every man in the Republic is free. No one who accepts its laws may be a slave, and no slave trafficker may be a citizen."

In interpreting this humanitarian sentiment of men of the last century, the makers of the 1949 Constitution under which we are governed inserted the following provision in article 33:

> "Every man is equal before the law and there may not be any discrimination against human dignity."

The above provisions are in agreement with the spirit of the International Convention on the Elimination of All Forms of Racial Discrimination signed on 13 March 1966 and ratified by our country by Decree No. 384 of 16 December 1966.

Costa Rica has contributed to the work of the Special Committee against Apartheid for seven year, during which time it has alternately held the offices of Chairman and Vice-Chairman, and in the course of the fortieth series of sessions of the United Nations General Assembly held in New York between September and December 1985 it voted in favour of the following draft resolutions:

1. Broad sanctions against the racist regime of South Africa.

2. The situation in South Africa and assistance to the liberation movements.

3. World Conference against sanctions on racist South Africa.

4. Information and public action against apartheid.

5. Work programme of the Special Committee against Apartheid.

6. International Convention Against Apartheid in Sports and co-sponsorship in other Member States.

7. United Nations Trust Fund for South Africa.

8. Concerted international measures for the elimination of apartheid.

588. The foregoing resolutions are designed to eliminate apartheid, which is looked upon by the United Nations as a crime that violates the principles of international law, and in particular the purposes and fundamentals of the United Nations Charter. Within this repressive and dictatorial climate of the Pretoria regime, and of the so-called state of emergency, thousands of people have been incarcerated or assassinated for political reasons, including leaders of democratic organizations, community and church leaders, students and trade unionists. Others have been harshly punished for their stand against apartheid.

589. In the Conference of Paris, which examined the subject of South Africa, the final report of the States parties adopted on 20 June 1986 agreed on more effective measures in the economic field to strengthen the existing voluntary measures and to impose an embargo on armaments. It should be noted that Costa Rica has banned import and export trade with South Africa ever since 1967 by Executive decree No. 4015 of 9 December 1967. That amounts to saying that Costa Rica had anticipated the political decision just mentioned by two decades.

590. The respectful petition of the Legislative Assembly in June 1986, which requested the Government of the Republic to break off diplomatic relations with the Government of South Africa, is an addition to the earlier reasoning of a historical and political nature that has provided the basis of the international policy of Costa Rica down the years.

591. On 4 July 1986 Costa Rica decided to break off relations with South Africa because of the incompatibility of the South African regime with the basic principles of respect for human rights.

Paragraph 1

592. No legislation shall be given retroactive effect to the detriment of any person, or to his acquired property rights or established legal status.

593. No one may be punished for an act not regarded as punishable under criminal law nor subjected to measures of security for which there was no previous provision (principle of legality).

594. Judgement No. 1010-93 of the Constitutional Court provides in this context "... the principle of criminal liability is essential for the protection of personal liberty and an integral part of the process". Furthermore, article 13 of the Juvenile Criminal Justice Act provides that "No minor may be tried for an act not regarded under criminal law as a crime or a misdemeanour. Nor may he be subjected to punishments for which there is no prior legal provision."

595. Punishable acts shall be tried in accordance with the law in force at the time when they were committed. Article 12 of the Penal Code provides that "Should new law be promulgated subsequent to the commission of a punishable act, the law most favourable to the accused shall be applied in the case being tried." Article 34 of the Constitution also provides that "no legislation shall be given retroactive effect to the detriment of anybody, or to his acquired property rights or established legal status".

596. Should the promulgation of the new legislation whose application is more favourable to the accused occur before the execution of the sentence, the court shall amend the sentence in line with the provisions of the new legislation.

Article 16

597. Legal capacity is absolutely and generally inherent in everyone throughout life. With regard to natural persons it is modified or restricted by their status, their age or their physical or legal disability, in accordance with the law, and with regard to legal persons by the legislation that regulates them.

Article 17.

Paragraph 1

598. The Constitution guarantees respect for private life that is restrictive on the State, save for exceptions for which legal provision is made proportional to the end in view. The individual is free to develop in his own way, provided that he does not do what is expressly prohibited by law.

599. The private sphere embraces health, religion, and professional or private relations with other individuals in accordance with article 23, which states: "The domicile and all other private premises of the inhabitants of the Republic shall be inviolable. Nevertheless they may be searched under written warrant from a competent judge, or to prevent the commissioning or impunity of crimes, or to avoid serious damage to persons or property, as laid down by law".

600. The right to the privacy, freedom and secrecy of communications is guaranteed (article 24 of the Constitution): "The private documents and the written and oral communications of the inhabitants of the Republic shall be inviolable. However, the law shall specify the instances in which the law courts may order the seizure, inspection or examination of private documents when so doing may be absolutely essential in order to clarify matters brought to their notice".

601. The law shall also specify instances in which the appropriate officials may examine account books and related documents as an essential measure for fiscal purposes. Correspondence of any kind that is taken away shall not have legal effect; article 219 of the Code of Criminal Procedure states: "Whenever considered useful for the establishment of the truth, the judge may order the interception or seizure of postal or telegraphic correspondence or of any other thing sent by or intended for the accused, even if under an assumed name".

602. In establishing the principle of the inviolability of private documents, article 24 of the Constitution also includes the permitted exceptions to this principle. This article specifically indicates the two permitted exceptions to the principle of the inviolability of private documents, ... (a) seizure, examination or inspection by law courts, when so allowed by law and (b) when it may be indispensable that Treasury officials audit account books for fiscal purposes. (Judgement No. 1608-91 of the Constitutional Court of 20 May 1991).

603. Correspondence sent by the accused to the appointed defence lawyer or sent by the latter to the former is excluded (in agreement with article 36 of the Constitution and article 222 of the Code of Criminal Procedure, and with paragraph 2 of article 26 of Act No. 7425, Act on the Seizure, Inspection and Examination of Private Documents and the Interception of Communications, of 9 August 1994).

604. Upon receipt of the intercepted correspondence or documents, the judge shall open it and note it in the record. The objects shall by examined and the correspondence read by the judge himself. Should they be related to the proceedings, he shall order their seizure; if not he shall keep its content confidential and order its handing over to the recipient, his representatives or his close relatives.

605. Anyone who by word or deed offends the dignity or decorum of an individual, either in his presence or by means of a communication addressed to him, shall be punishable by a fine equivalent to from 10 to 15 days of imprisonment. The penalty shall be equivalent to from 15 to 75 days if the offence was caused in public.

606. The penalty for a person who insults another person or who discloses true information to harm his reputation shall be a fine equivalent to from 20 to 60 days of imprisonment.

607. The penalty shall be a fine equivalent to from 50 to 150 days for a person who falsely accuses another of committing a criminal act.

608. With regard to the publication of insults, the person who publishes or reproduces insults against the honour of another person through any medium shall be treated as if he were the author of those insults.

609. The rule established regarding interference with correspondence states that anyone who opens or acquaints himself with the content of a communication addressed to another, whatever the medium used, shall be punished by a term of imprisonment of from one to three years (article 196 of the Penal Code, as amended on 9 August 1994).

610. Regarding the theft, diversion or suppression of correspondence, anyone who seizes a letter or other private document, even if not sealed, or who suppresses or diverts from its destination correspondence not addressed to him shall be punished by a term of imprisonment of from one to three years (article 197 of the Penal Code, as amended on 9 August 1994, Act No. 7425).

611. A person who wrongfully records verbal statements shall be punished by imprisonment for from one to three years (article 198 of the Penal Code).

612. In accordance with article 199 of the Penal Code, imprisonment for from nine months to three years and disqualification from performing public duties or holding office shall be the punishment for a postal or telecommunications employee, whether employed by a public or an authorized service, who abuses his post to seize a letter, a sealed document, telegram, cablegram or other item of correspondence, acquaints himself with its contents, communicates it or hands it over to a person to whom it is not addressed, conceals it or alters its text.

613. A person who makes wrongful use in any form of letters, papers, recordings and telegraphic, telephonic and cabled or other kinds of messages that have been stolen or reproduced shall be punished by imprisonment of from six months to one year (article 201 of the Criminal Code).

614. Correspondingly, the penalty imposed for the offence of disclosure referred to in article 202 of the same Code on a person who, being in legitimately in possession of correspondence, documents or recordings not intended to be made public, although they had been sent to him, has disclosed them without being authorized so to do, shall, if the act could be prejudicial, be a fine equivalent to from 30 to 60 days of imprisonment. The penalty shall be a fine equivalent to from 30 to 100 days of imprisonment if the information disclosed, although prejudicial, is of a personal nature.

615. With regard to the disclosure of secrets, the enactment has established that a person who by virtue of his rank, occupation, employment, profession or trade becomes privy to a secret and discloses it without just cause, shall be punished by a term of imprisonment of from one month to one year or a fine equivalent to from 30 to 100 days of imprisonment. Should the person concerned be a public servant or an official he shall also be disqualified from carrying out official duties, holding office or practising in the legal profession for from six months to two years.

616. A person who enters a dwelling or business premises, their branch offices or a place inhabited by another person without the express or presumed consent of the person entitled to exclude him, or clandestinely and fraudulently, shall be punished by a term of imprisonment of from six months to two years. The penalty shall be from one to three years if force was used, if the premises were broken into, if there was violence against individuals, with show of arms, or by two or more persons (as amended by Act No. 6727 of 10 March 1982).

617. With regard to unlawful entry, article 205 of the Penal Code lays down a term of imprisonment of from six months to three years and disqualification from carrying out official duties and holding public office for from one to four years for an officer or public servant who enters a dwelling without observing the formalities laid down by the law or other than in the cases which it

determines. Should the procedure not observed be of a judicial nature, the above penalties shall be increased at the discretion of the judge.

Article 18

Paragraph 1

618. Freedom of thought, speech and the written word are protected by article 29 of the Constitution which, in its turn, lays down responsibility for abuses committed in exercise of this right, according to the law. This freedom of expression contained in the above article of our Constitution enables thought to be expressed in speech or in written form and to be published without previous censorship, which is a guarantee that reinforces article 28 prohibiting prosecution for exercise of this freedom. However, this freedom, like any right, is not absolute and has a limit, so that abuse of it will render its perpetrator liable in accordance with the legislation in force (Judgement No. 1292-90 of the Constitutional Court).

619. Our Constitutional Court has reiterated that the principle of freedom of expression requires that there should not be any individuals or groups who are excluded in advance from access to the media of social communication. Freedom of expression also requires that the media should, in practice, be true instruments of this freedom and not vehicles for its restriction. The only conditions compatible with that are those in which: (a) there is a multiplicity of media; (b) any monopoly of the media shall be prohibited, whatever the form in which it is manifested, and the freedom and independence of journalists must be guaranteed. It is undoubtedly the case that there is a broad concept of religious freedom in Costa Rica, but also that no conduct in conflict with the generally accepted concepts of morals and respectability is protected in this legislation. (Judgement No. 2313-95 of the Constitutional Court).

620. Article 75 of the Constitution states that the Roman Catholic Apostolic Religion is the religion of the State, which contributes to its upkeep, without there being any obstacle in the Republic to the free practising of other faiths that are not in opposition to general morals and decency.

621. The history of a nation is an organized development that leads to common endeavour within the same physical, ethical, moral, religious, cultural and social setting, a development that enables the people to build on their experience as a basis for their ethical and social convictions and their political and social ideologies.

622. Costa Rica became an independent nation and a sovereign Republic in the Pact of Agreement, accepted as the first Constitution; it laid down the denominational nature of a people and belief in the Christian God under whose protection the life of the new nation was to be commenced. Likewise, when the new Constitution, currently in force, was decreed and approved in November 1949, the makers of the Constitution asserted: "we, the representatives of the people of Costa Rica, freely elected deputies to the National Assembly, calling upon God and reiterating our belief in democracy, decree and approve the following Constitution of the Republic of Costa Rica ..."; and when the Constitution was amended in 1975 they reasserted the same text as article 75, which states: "The Roman Catholic Apostolic Religion is the religion of the State, which

contributes to its upkeep, without there being any obstacle in the Republic to the free practising of other faiths that are not in opposition to general morals and decency."

623. If the broad wording of this article in its four paragraphs is compared with article 75 of our Constitution, which effectively and boldly defends "the free practising in the Republic of other faiths that are not in opposition to general morals and respectability", we shall see that the difference is in the brevity of the above-mentioned article 75 and the wordiness of the article in question.

624. In 1940, when liberal educational approaches were overcome, our educationalists became aware of the importance of the principles of Christian life in the education of the individual, and of how the feeling for religion was important in the life of society and in Costa Rican culture, not only for the individual as such, but vital for the very experience of a creation that has grown under the influence of the highest and most noble Christian values, handed down from generation to generation by the Catholic Church. For the same reason, it was necessary to preserve and defend as one of these values the freedom of non-Catholic faiths, respect for the individual conscience, and freedom of choice in religious matters, including the freedom to proselytize, and to hold commemorative marches and meetings both in public venues and in private places.

625. This is precisely what the 1944 Constitution approved and what the situation actually is in our country, as may readily be verified at any time.

Religious education

626. Article 79 of the Constitution states "Freedom of education is guaranteed. Nevertheless, every private educational establishment is subject to official inspection. The private initiative in education deserves to be encouraged by the State in the manner indicated by the law" (art. 80). Freedom of conscience and religion are concomitant and representative in all Costa Rican education. In State schools the State pays for Catholic religious education along the lines of article 75.

627. Pupils in primary and secondary schools who are not of the Catholic faith have the option with their parents and guardians of not attending these lessons, or of attending them should they see fit. This is because religious education is seen as an important factor in the human, social and civic education of the Costa Rican citizen, so that religious knowledge and respect for the beliefs and religious faith of the pupils shall develop.

628. On the other hand, the Costa Rican State does not prohibit religious instruction of other religions and faiths in private schools or churches and also through the media. On the contrary, this right of any private institution to provide the religious education of its choice is maintained, respected and defended.

629. The municipality of San Carlos held a consultation on problems concerning the freedom of worship at the Office of the Attorney-General of the Republic, the report of which (C-148-92) established that the consultation was directed towards all measures concerning public order that the authority was legally

empowered to carry out towards these sects by virtue of complaints from neighbours. The points established refer to various fundamental legal problems: the content and scope of religious freedom; police measures in the face of activities affecting public order; and religious activities.

(a) Provisions applicable to the consultation

630. The provisions governing matters of religion occur here and there in our legislation and are incomplete. Firstly, the Constitution reaffirms the freedom of worship, despite the fact that it designates the apostolic Roman Catholic religion as the State religion.

631. In the second place, at the legal level, there are provisions of the Penal Code that may be applied (art. 392). A fine equivalent to from 3 to 10 days of imprisonment is imposed on "anybody who causes disturbances in a town with shouting, dancing around, making a clatter and other similar measures ... people who disturb the occupations or peace of their neighbours with uncalled for shouting, screaming or singing or whistling, or with instruments, loud sounds ... anybody who causes or takes part in a disorder in a public place or a place to which the public has access, when the act does not appear to indicate a more serious penalty...".

632. Affronts to moral and religious feelings are dealt with in section IV of the Penal Code: "Article 393: A fine the equivalent of from 3 to 20 days of imprisonment shall be the punishment for devotees of witchcraft, sorcery or any other cult or belief opposed to civilization or decency".

633. In addition, article 325 of the General Health Act stipulates "... the health authorities may at any time close down any building or facility referred to in this chapter if it is deemed to be a danger to public health or to the well-being of its occupants or of visitors or nearby residents".

634. As may readily be deduced from its wording, the articles of the Penal Code provide sanctions for disturbances of tranquillity, commotions and religious practices contrary to civilization or decency. As will be indicated, these concepts - public order, tranquillity, decency - are somewhat imprecise, but may be made precise for the authorities in a specific context and within the limits of discretionality: logic, justice and good administration.

(b) Analysis of the legislation instanced

635. It may be pointed out regarding health and security that minimum conditions are required to ensure them for participants and for the local community. That is to say that religious activities that are a threat to the health and safety of the participants or the neighbourhood may not take place. If that situation arises, the sanitary inspectorate may apply the sanction of the closing of the building. The application of the closure procedure is set out in the General Health Act (art. 363): "The act of closure consists of the formal closing and the affixing of seals by the competent authority to an establishment, building, dwelling, installation or similar objects to prevent their use".

636. In general, freedom of worship is guaranteed in the Constitution. However, this freedom raises the problem of the limitations arising from the requirements of public order. There must, therefore, be a balance between worship and security, tranquillity and public morals. Consequently, worship is one of the types of activity over which the police responsible for order have competence.

637. It is possible to assimilate this activity to a public meeting and consequently to apply to it the limits applicable to public meetings. There may be religious celebrations that are of the nature of private meetings held in a private place and with respect for the rules governing private meetings. In general, however, worship is, in principle, a public meeting.

638. It does not, however, require to be organized in the form of associations or some other type of corporate body from among those envisaged in the legislation. Given that this requirement is not laid down, neither may it be required. Our legislation fails to go to this extreme. In that sense, private religious organizations do not have to declare their existence, and they act freely.

Basis in jurisprudence

639. Costa Rican jurisprudence has indicated principles from which the meaning, scope and limitations of freedom of worship may be determined. In the first place, it outlines a general principle for interpretation of the public freedoms within which freedom of worship is to be found which helps to resolve the problems arising from the exercise of that freedom. Specifically, the Full Court has stated:

> "The Constitution that governs us, in its entirety, draws its inspiration from general principles of a liberal nature, but without it being possible to understand such an appraisal as an extreme concept, but rather, on the contrary, we find in it rules that temper these principles with the aim of bringing them into line with a modern criterion of living together socially; and in that form the system of freedom and of propriety are conceived of in a manner in which they do not conflict with that sense and with living together as human beings that the tax payer in various cases leaves to the concern of the ordinary legislator."

640. The constitutional principle embodied in this judgement on the limitations of propriety and freedom derived from living together socially, appear to be established in paragraph 2 of article 28 of the Constitution, which states:

> "Private actions that are harmful to morals or public order, or that are not prejudicial to a third party, are outside the scope of the law..."

641. Our jurisprudence has established the principle that the religious freedom embodied in the Constitution is subject to limitations: universal morals, respectability and public order. Accordingly, it should be concluded that:

(a) There is freedom of worship and, in general, it is possible to practise religion within the limits stemming from public order, morals and decency;

(b) The concept of public order embodies that of public tranquillity, security and health. Consequently religious practise could be restricted for reasons of public tranquillity, security and health. These limitations must be given effect in application of the principles of logic, justice and good administration, so that they are not imposed in an arbitrary manner;

(c) The construction requirements for any building are subject to technical criteria that have, in general, to be approved by the municipality concerned and by the Ministry of Health. The duty of monitoring health is invariably the task of the Ministry concerned, which may, in accordance with the law, impose such sanctions as the closing of the premises, should circumstances so require;

(d) There are no rules governing the siting of religious buildings;

(e) Lastly, regarding noise late at night, the police are under the obligation to guarantee the public tranquillity of the inhabitants and, in that sense, they may order the congregation of any religion to respect this general public right upon pain of the sanctions provided in the Penal Code; and

(f) The legislation does not require that a religion be organized in a specified way in order to be practised.

642. In a similar manner, Constitutional Judgement No. 3173 has established that "In its generic concept, the freedom of religion comprises a complex set of faculties, namely freedom of conscience, which must be considered to be an individual public right. It consists in the legal possibility of guaranteeing to accord to the subject the religious behaviour and way of life that fits in with his own conviction. In another context, with reference to the social level, freedom of worship means in practice the right to follow one's own belief. Freedom of worship may exist both indoors and outside, always within the limits established by the legislation, or by a constitutional or legal rule. In that sense the same constitutional text permits the free practise in the Republic of faiths other than the Catholic religion, always provided that they are not at variance with general morals or decency.

643. Article 75 should not be interpreted in a restrictive sense, on the contrary the State is obliged, in a general sense, to collaborate with the various religious faiths professed by the inhabitants of the country. The interpretation of article 75 should not be treated as an indication of the partiality of the Constitution towards a specific religious faith, but rather as an indication of a sociological reality, namely the express mention of the faith that is undoubtedly the most deep-rooted and widespread in our country, which at no time implies discrimination by the authorities against the other faiths or against persons of no faith. Per se, the Constitution recognizes the right of all its nationals to practise any faith whatsoever, provided that it is not at variance with general morals or decency.

644. The regulations in force have the precise aim of allowing every individual to choose his beliefs or religion with absolute freedom. The law is solicitous to ensure that the individual shall be free in all the spheres of individual and social life from all pressure or discrimination stemming from his beliefs or religion .

"It is legally impossible to prevent a group of persons from organizing themselves for the practise of religious activities, such as those indicated in this case, if so doing does not harm what the community regards as decency. Nor, however, is it possible for the group enjoying this constitutional protection to fail to comply with the legal formalities that the law lays down for society as a whole, such as building permission and sanitation permits." (Judgement No. 1040-90 of the Constitutional Court.)

645. In the matter of interest: "... the State has the obligation, in a general sense, to collaborate with the various religious faiths professed by the inhabitants of the country.... This constitutional obligation consists in facilitating religious education in teaching institutions and public institutions ... and not specifically in economic assistance. In this way the superior legislation regards the satisfaction of religious needs as of general interest, despite the existence of individuals who do not share them. In addition, it should be interpreted as in indication of a sociological reality, namely the express mention of the faith that is undoubtedly the most deep-rooted and widespread in our country, which at no time implies discrimination by the authorities against the other faiths ". (Judgement No. 3173-93 of the Constitutional Court.)

646. Article 147 of the Labour Code "in laying down the public holidays that employers must grant to workers, expressly includes Maundy Thursday and Good Friday, so that although it may not be the religion of all the inhabitants of the country ... which is one further proof of the recognition by our legislators ... and the duty of the State to promote its development and maintenance in the Nation..." (Judgement No. 3173-93).

647. The text of the above article expressly indicates that "practitioners of religions other than the Catholic religion shall be able to request their employers to consent to the days of religious celebration in their faith being treated as holidays and the employers shall be obliged to accept the request". As follows from the foregoing, Costa Rican legislation does not discriminate against the practise of other faiths or religious sects.

Article 19

Paragraphs 1 and 2

648. The first and second paragraphs of article 19 protect rights similar to the freedom of opinion and the freedom of expression.

649. By Act No. 4534 of 23 February 1970 Costa Rica ratified the American Convention on Human Rights, known as the Pact of San José, and on 2 July 1980 became one of the countries that, without convention and by law, accepted the competence of the Inter-American Commission on Human Rights which, by virtue of the provisions of paragraph 2(h) of article 8 of the Convention, granted the right to appeal a judgement to a higher judge or court. On 18 April 1986, a ruling was given on a petition submitted by a citizen:

"To recommend to the Government of Costa Rica that, in accordance with its constitutional procedures and especially the letter and the

> doctrine of article 7 of its Constitution, it should adopt the legislative or other measures needed to give full effect to the guarantee provided in paragraph 2(h) of article 8 of the American Convention on Human Rights, thus complying with the provisions of article 2 of the Convention..."

In order to give expression to this call the State of Costa Rica, through the Supreme Court of Justice, noted that there was effectively a contradiction between the Code of Criminal Procedure and the American Convention on Human Rights, and that that contradiction had been overlooked by the legislator at the time, although the Code cited came later than the approval of the Pact of San José.

650. The essence of the contradiction was that in some cases of direct situation and regarding offences concerning printed matter there was no appeal, the matter being judged in a single court, in contravention of paragraph 2(h) of article 8 of the American Convention, which provides for appeal to a higher court.

651. The Executive submitted to special sessions a draft bill produced by an interdepartmental commission of the Supreme Court of Justice, the Ministries of Justice and Foreign Affairs and the Office of the Attorney General of the Republic which put forward amendments to article 473(1) and (2) and articles 474, 478, 479 and 485 of the Code of Criminal Procedure; amendments to the Act on Printed Matter and the establishment of a higher criminal court of cassation had already been approved by a majority report of the Legal Affairs Commission of the Legislative Assembly, from which they were passed on to the Assembly itself.

652. Although these rights are certainly protected in article 13 of the American Convention on Human Rights, articles 18 and 19 of the Pact, article 10 of the European Convention on Human Rights and articles 29 and 30 of our Constitution, they protect the freedom to receive and impart information as a part or aspect of the freedom of expression. This right is a broad one in our country and is limited only with regard to State secrets or limitations imposed by law, in such a way that it may be exercised without prior censorship. That does not signify that the legislator had wanted to leave the honour and reputation of individuals unprotected, since article 29 itself establishes liability for abuses committed in exercise of this right.

653. The responsibility referred to in the article cited seeks to penalize, and hence to prevent the giving of information that if revealed will definitely and imminently violate the privacy, honour or reputation of individuals. On the same point, article 13 of the American Convention on Human Rights specifies that the right of freedom of information must be exercised without disreguard for: (a) respect for the rights or reputation of others.

654. The rule specifies that nobody shall be disturbed or persecuted for the expression of his opinions nor for any act that does not infringe the law. Private actions that do not harm morals or public order and are not prejudicial to third parties are outside the scope of the law. Nevertheless, such actions may not be carried out in the form of political propaganda by members of the clergy or the laity invoking religious grounds or making use of religious beliefs as a means.

655. Everyone may communicate their thoughts orally or in writing and publish them without prior censorship; they shall, however, be responsible for abuses committed in exercise of this right, as provided by law.

656. It is not excessive to add, merely by way of clarification, that the right of "free access" to sources of information is intimately bound up with what is laid down by article 29 of the Constitution, inasmuch as it provides that: "everyone may impart his thoughts orally and in writing, and publish them without prior censorship". These two constitutional texts establish a set of rights, including freedom of the press, implicitly recognized by article 29, which deals with other means of collective communication. The essential purpose of the press is to provide information to the public, information that must be sought in the sources in which it is to be found. What is at issue is the freedom of expression and communication of thought and of the right to be well informed about public affairs. Hence the importance of the press in the exercise of these rights, for which reason, where there is adequate legislation on the matter, legal rules regulate, in particular, relations between the State and the press, which is everything concerning the right of information...". (Judgement of the First Court, 13 September 1983.)

657. The right of respect for private life is enshrined in the Civil Code. Violations of that right may be redressed by civil proceedings and, in addition, are an offence under the Penal Code.

Article 20

Paragraph 1

658. The first paragraph of article 20 of the Covenant states that propaganda for war shall be prohibited.. In addition to the constitutional and legal provisions referred to in the first report of Costa Rice, it was thus that on 17 November 1983 the President of the Republic proclaimed the perpetual, active and unarmed neutrality of Costa Rica.

659. This neutrality is the reiteration of the principles pursued in the international policy of Costa Rica since the beginning of its independent existence. In that sense, the proclamation of neutrality is a continuation of our best traditions and of the general rule of Costa Ricans not to take part in any armed conflict.

660. It is important to emphasize that Costa Rica acted unilaterally in elevating the abolition of the armed forces to the level of the Constitution and in disarming. It has based its external security on international bodies (article 12 of the Constitution).

661. Costa Rican neutrality is a natural outcome of dispensing with the armed forces and its voluntary disarming in 1949. Every neutrality has its own distinctive features. It is, however, impossible nowadays to conceive of a neutrality that does not have international peace and security as its aim. Costa Rica is a country whose pacifist and liberal course has taken distinct historical, cultural and political forms. The neutrality of Costa Ricans is a radiating essence directed towards the protection, safeguarding and proliferation of human rights, which is a human desire.

662. The neutrality of Costa Rica will be perpetual and not transitory, something that will be persisted with in the face of all the warlike conflicts that beset other States. Costa Rican neutrality will be active. It does not imply a lack of bias in the ideological or the political field.

663. Consequently, Costa Rica reasserts its faith in the political and social outlook that it has shared and continues to share with the western democracies. This active neutrality is fully compatible with the rights of Costa Rica as a member of the United Nations, the Organization of American States and the Inter-American Reciprocal Assistance Treaty in all matters concerning the preservation of peace and international security, as well as in connection with activities promoting the peaceful resolution of conflicts, the establishment of a fairer economic and social order and promotion and respect for human rights and fundamental freedoms.

664. On the other hand, the Government of Costa Rica abolished military ranks in 1987 and its efforts for the establishment of peace in Central America through the Arrangements of Esquipulos earned it the Nobel Prize for Peace awarded to its President Óscar Arias Sánchez.

665. It has been in order to avoid any propaganda for war or acts of violence that various penalties for such propaganda have been decreed, as in article 387 of the Penal Code: "The penalty shall be a fine equivalent to from 10 to 50 days of imprisonment for anyone who puts on public display, or publishes in the press, or knowingly allows the circulation of a document inciting hatred against a definite person or institution. Documents that, although capable of leading to the discrediting of an institution, are aimed at rational criticism of it in connection with public interests shall not be considered to be of that nature; nor shall documents dealing with election candidates that are aimed at discussion of their merits without making use of harmful or libellous concepts".

Article 21

Paragraph 1

666. This right is also protected in the European Convention on Human Rights; it is guaranteed irrespective of the nature of the opinions expressed (save for some limitations of a penal nature), and it includes the right to convene a meeting, to organize it and to take part or not take part in it.

667. Everybody has the right to assemble peacefully and without arms, whether for private negotiations, or to discuss political affairs and examine the public conduct of officials. Meetings in private premises do not require prior permission. Those held in public places have to be legally regulated (article 26 of the Constitution).

Article 22

Paragraph 1

668. Freedom of association and the fundamental right to band together for lawful purposes without that involving pressure or interference that may alter or distort its purpose is a right embodied in article 25 of the Constitution.

669. Our legislation defines a union as follows in article 339 of the Labour Code: "Any permanent association of workers or employers or of members of the professions and the self-employed established exclusively to examine, improve and protect their respective common economic and social interests".

670. That is like the provision of ILO Convention No. 87, approved by Act No. 2561 of 11 May 1960, which is known as the Freedom of Association and Protection of the Right to Organize Convention. In agreement with the transcribed rule, article 70 of the Labour Code lays down the duties of employers and what they may not do, especially in section (c), which states the following.

671. Employers are absolutely prohibited from:

> "(c) Compelling workers, by whatever means, to leave unions or legal groups to which they belong, or to interfere with their political decisions or religious convictions."

672. By virtue of this article, the use of any means, and especially dismissal, to hinder trade union freedom must be regarded as against the law, and consequently the dismissal of workers after they have joined a union implies discrimination against them and the obstruction of all collective bargaining that they might carry out in their interests. The Court recognizes the right of employers to reorganize their business and to reduce costs in the interests of economy, since failure to accept that would be a violation of the constitutional right to freedom of trade, but in a social State such as Costa Rica governed by the rule of law the fundamental freedoms and rights of citizens may not be infringed with impunity.

673. The rights associated with freedom of association are mainly the right to conclude collective agreements on work and the right to strike.

674. The judgement of the Full Court of 28 January stated: "... And should the legal system favour the formation of these associations, that is because the State must secure the greater good of the governed and because, as a general proposition, the union of individuals is to the advantage of the group as a whole and of every person in particular. It is impossible to confuse these cases with compulsory registration or membership of professional associations, because they have a different rationale and are organized for purposes that extend well beyond the scope of looking after the interests of the group or of the person individually considered... These associations admittedly also act in common interest and in defence of their members, but it should be noted that, this interest apart, there is another interest of a higher order that justifies compulsory membership of an association in some professions (generally known as the "liberal professions") since, in addition to the qualification that is a guarantee of proper training, there is also the requirement strictly to comply with a code of professional conduct, both for the kind of activity that these members of a profession carry out and for the trust placed in them by those who need their services. All this is in the public interest, and the State delegates to professional associations the authority to supervise the proper practise of the profession."

Paragraph 2

675. Employers and employed may both freely form associations for the exclusive purpose of obtaining and maintaining economic, social or professional advantages (article 60 of the Constitution).

676. The right of employers and workers to form unions without prior permission is recognized, but the procedures set out in the following article must be begun within 30 days thereafter. However, no union may be established with less than 12 members in the case of a trade union or with less than 5 employers in the same activity. (Amended by Act No. 7360 of 4 November 1993.)

677. "The freedom of association laid down by article 60 of the Constitution is not restricted to giving to employers the right of forming or joining a union, but in its turn essentially extends to recognition of this class of association by the State and to the protection that the State must offer them as tools for the development of the democratic system through the improvement and protection of the economic and social interests of their members... But, in every instance, the principle of free association prevents them (the Ministry of Labour by article 337 of the Labour Code) from any administrative act affecting the existence of the union, since only the law courts may take such a measure."

Article 23

Paragraph 1

678. Recognition of the family as a fundamental element of society in Costa Rica and the protection of that institution by the State are set out in article 51 of the Constitution, which states: "The family is entitled, as a natural and fundamental element of society, to special protection from the State. That right shall be equally enjoyed by mothers, children, the elderly and the sick and destitute".

679. In any case there is an ample legislative system for protection of the family, just as there are institutions that support the family, which may approach them for advice and guidance, among which we may instance the National Children’s Association, the National Centre for Women and the Family, PANIAMOR and the Office for the Protection of the Population.

680. The rule is a statement of principle obliging the State to protect the family as a basic social institution through the strengthening of the nuclear family where materially and legally possible.

681. It has been constitutionally established that the family, as a natural element and basis of society, is entitled to special protection from the State. That right shall likewise be possessed by mothers, children, the elderly and the sick and destitute. The Costa Rican State has the duty to protect the family.

Paragraph 2

682. The Constitution provides that marriage is the essential basis of the family and rests on equality of the rights of the spouses (art. 52).

683. The spouses share the responsibility for and the running of the family. They must jointly settle domestic affairs, provide for the education of their children and prepare their future. They are also under the obligation to respect one another, to be faithful and to help each other. They have to live in the same home unless separate residences are justified on grounds of socializing or of the health of one of the spouses or the children (article 34 of the Family Code).

684. The Family Code (art. 35) provides that the husband shall be the person mainly responsible for paying the upkeep of the family. The wife is obliged to contribute in a joint and proportional manner when she has means of her own.

685. The last paragraph of article 48 of the same Code states that divorce by mutual consent may not be requested until three years after the marriage and that the agreement or public instrument must be presented in the form laid down in its article 50. The agreement and the separation, if in order and not prejudicial to the interests of the under-age children, shall be approved by the court in a founded decision; before giving its approval the court may require further information on or clarification of the agreement if it is incomplete or unclear regarding the points set out in this article (as amended by Act No. 5895 of 23 March 1976).

686. In granting the divorce, the court, having regard to the interests of the under-age children and the physical and moral capacities of the parents, shall determine which of them shall be awarded the custody, rearing and education of the children. However, should neither of the parents be capable of assuming these duties, the children shall be given into the care of a specialized institution or a suitable person, who shall assume the role of guardian. The court shall additionally adopt any measures required concerning personal relations between the parents and the children. Whoever or whatever may be the person or institution to which the children are entrusted, the parents shall be under the obligation to bear the cost of their upkeep, in accordance with article 35. The decision made in accordance with the provisions of this article shall not be res judicata and the court may amend it in accordance with the needs of the children or if the circumstances change.

687. Separation by mutual consent may not be requested until after two years of marriage. The petitioning spouses must submit an agreement in the form of a public instrument covering the following points:

(a) who shall have the custody, rearing and education of the under-age children; and

(b) which of the spouses shall take responsibility for the upkeep of these children or what shall be the proportion to be borne by each of them.

Article 24

Paragraph 1

688. The first paragraph of article 24 of the Covenant provides the rights of the child for protection.

689. Every person in Costa Rica, and therefore every minor, enjoys civil rights; consequently, everybody has equal capacity to be subject to rights and duties, within the limits of the law. However, only adults and children who have reached the age of discretion may exercise civil rights and therefore be responsible for their own acts.

690. Children who have reached the age of discretion may not enter into an undertaking without the agreement of their legal representative. However, that consent is not needed to acquire something gratuitously, or to exercise such strictly personal rights as fundamental rights of an ideal nature. These principles have regard to the need to protect the minor, on the one hand, and respect, on the other hand, for his wishes in matters that are within his discretion.

691. The first rights of protection of the child are to be found in the Constitution, namely:

> Article 51 "The family is entitled, as a natural and fundamental element of society, to special protection from the State. That right shall be equally enjoyed by mothers, children, the elderly and the sick and destitute".

And

> Article 53 "The duties of fathers towards children got outside of marriage shall be the same as towards those born within the marriage.
>
> Every person has the right to know who his parents are, in accordance with the law."

692. Article 55 creates the institution of the National Children's Association for the special protection of mothers and minors. Article 71 establishes protection for minors in matters of work, laying down laws for the protection of women and minors in their work.

693. The Family Code also has many rules that protect minors, such as the second paragraph of article 5, which states:

> "In any matter appearing to involve a minor, the administrative or legal body acquainted with it must have the Association as a party, given that the fact of not so doing is a ground for nullity of the proceedings, should the court proceedings have been prejudicial to the minor."

694. There are also several prohibitions and regulations concerning the marriage of minors, the purpose of which is to protect their rights. Article 56 of the Family Code provides for the protection of minors should the marriage of their parents fail. Article 156 provides that parents must pay alimony for their under-age children. Article 162 provides that a minor not under parental authority shall be in the care of a guardian.

695. Article 172 of the Penal Code makes the trade in minors for prostitution a punishable offence. Article 167 of that Code makes the corruption of a minor punishable by imprisonment. Article 184 makes the abduction of a minor from the

parents or guardian an offence. As a special protection for minors, article 17 provides that minors shall be tried in a jurisdiction under the Protection of Minors Act.

Paragraph 2

696. The second paragraph of this article of the Covenant provides the right of minors to be registered upon birth and to have a name.

697. Article 182 of the Penal Code provides for the punishment of anybody who allows a newborn child to remain without civil status through concealment, substitution and declaration; the punishment shall be a prison sentence of two years. Article 381 provides for the punishment of individuals whose duty it is to register the birth of a child and who have not done so within 30 days from the date of birth.

Paragraph 3

698. The third paragraph of this article of the Covenant provides the right of every child to acquire a nationality. Under the Constitution of Costa Rica there may not be any children without nationality within the national territory. Article 13 of chapter II, Costa Ricans, provides as follows:

> "Article 13 - Costa Ricans by birth are:
>
> (1) The child of a Costa Rican father or mother born in the Republic;
>
> (2) The child of a father or mother Costa Rican by birth born abroad and registered as such in the Civil Register at the wish of the Costa Rican parent while still a minor or at his or her own request up to the age of 25 years;
>
> (3) The child of foreign parents born in Costa Rica who is registered as Costa Rican at the wish of either of the parents while still a minor or at his or her own request up to the age of 25 years;
>
> (4) The child of unknown parents found in Costa Rica."

699. Article 17 of the same text provides that acquired nationality is passed on to under-age children, but loss of nationality is not passed on to them.

700. Article 55 of the Constitution states that "The special protection of mothers and minors shall be the responsibility of an independent institution called the National Children's Association with the cooperation of other State institutions". The law shall provide special protection for working women and for minors who work.

701. The right to freedom, as it applies to minors, is governed by the rules on paternal authority without prejudice to what shall be determined by the courts and to the guardianship exercised by the National Children's Association, but measures adopted to the detriment of the authority that falls to the parents (both parents or one of them) shall constitute an illegal deprivation of that

freedom if not done in those instances in which, in accordance with the law, the authorities may intervene in carrying out their duties. (Judgement of the Full Court, session of 12 September 1985).

702. As regards the name of the person, article 49 of the Civil Code provides that "Everybody has the right and duty to have a name by which he may be identified, which shall be made up of one or all of ... the words used as the given name, followed by the first name of the father and the first name of the mother, in that order".

703. Costa Ricans by birth are:

(a) The child of a Costa Rican father or mother born in the Republic;

(b) The child of a father or mother Costa Rican by birth born abroad and registered as such in the Civil Register at the wish of the Costa Rican parent while still a minor or at his or her own request up to the age of 25 years;

(c) The child of foreign parents born in Costa Rica who is registered as Costa Rican at the wish of either of the parents while still a minor or at his or her own request up to the age of 25 years;

(d) The child of unknown parents found in Costa Rica (article 13 of the Constitution).

Article 25

Paragraph 1

704. Every individual may take part in the conduct of public affairs as an elector and as an elected person. Elections are held in Costa Rica every four years; it is in this way that the people elect those who govern them, be it the President or the deputies. Chapter VII on political rights and duties provides in article 90: "Citizenship is the set of political rights and duties that are those of Costa Ricans more than 18 years old".

Paragraph 2

705. Everybody is entitled to vote: all Costa Ricans who have attained the age of majority and are in possession of their civil and political rights (the age of majority is 18 years and older).

706. Suffrage is a basic and obligatory civic duty and is exercised before the Electoral Boards by direct secret vote of the citizens whose names are in the Civil Register (article 93 of the Constitution).

707. Article 95 of the Constitution states: "The law shall regulate the exercise of suffrage in accordance with the following principles:

(a) Autonomy of the electoral function;

(b) Duty of the State to enter citizens in the Civil Register at its expense and to provide them with an identity card for voting;

(c) Effective guarantees of freedom, order, and the probity and impartiality of the authorities;

(d) Prohibition of citizens from voting other than in the place where they are registered;

(e) Identification of the elector by a card with a photograph; and

(f) Guarantees of representation for minorities. (As amended by Act No. 2345 of 20 May 1959).

708. All citizens are entitled to form themselves into parties to participate in national politics, always provided that these parties give an undertaking in their programmes to respect the constitutional order of the Republic.

Article 26

Paragraph 1

709. The requirement of general equality of treatment is clear from the idea of the State governed by the rule of law grounded in justice. In that sense, it is a fundamental principle of the Costa Rican legal system protected in article 33, Principle of Equality, which provides that "Everybody is equal before the law and no discrimination against human dignity shall be permissible". (As amended by Act No. 4123 of 31 May 1968.)

710. With regard to the constitutional principle, equality mainly entails the prohibition of unjustified distinctions, but the legislator has provided to some extent for the reduction of social inequalities and for improvement in opportunities for full development.

711. Lastly, this provision is not exclusive to Costa Ricans, but also exists for foreigners, i.e. they also have the right to equality. In effect, equality is a universally applicable human right.

712. The noun "man" should a understood as "person", both physical and legal, and in the first sense as both man and woman. What the guarantee of equality means is that different treatment is prohibited under equal circumstances, even when they are different. It has likewise been said, both for doctrine and for jurisprudence, that the principle of equality before the law consists in not making distinctions between two or more persons who find themselves under the same conditions, but that this principle is not infringed if the circumstances are unequal, because the maxim that then prevails is rather that it is unfair to treat in the same way under different circumstances. The application of a criterion of equality under unequal circumstances would harm article 33, because the equality established by the law under these conditions would be converted into unequal treatment for those entitled to have legal recognition of the differences under which they find themselves. That is why it is said that the equal treatment of unequals has rightly been regarded as the supreme injustice. Consequently, when things are seen in their true perspective, it must be concluded that the principle of equality set out in article 33 of the Constitution is also infringed when equal treatment is given under different, unequal circumstances. (Resolution of the Full Court, extraordinary session of

4 April 1987. The Full Court gave judgements in the same sense on 15 June 1976, 4 March and 11 November 1982, 21 November 1985 and 22 May 1986).

713. The article of the Constitution, as amended by Act 4123 of 31 May 1968, provides that "Everybody is equal before the law and no discrimination against human dignity shall be permissible.

714. In the above-mentioned amending Act the phrase "and no discrimination against human dignity shall be permissible" was added to the rule initially decreed by the 1949 Constitution. In order to settle the present appeal it is appropriate to establish, in advance, whether the guarantee of equality before the law provides protection only with regard to forms of discrimination contrary to human dignity, or whether, on the other hand, it embraces other differences that may affect varied subject matter, and should the former be the correct answer, whether the discrimination provided by article 3 of the Notarial Act is an outrage against human dignity. In the opinion of this Court, the addition of the phrase "and no discrimination against human dignity shall be permissible" did not seek to restrict the sphere of application of article 33 of the Constitution. The reference to human dignity is made as a simple application, perhaps the most important, of the general principle of equality, the opinion alluded to by the legislator when proposing the draft changes that gave rise to Act No. 4123 already mentioned, when he pointed out:

> "Although the principle of equality before the law has sufficed to give us, the Costa Ricans, a legal system in which there are no appreciable changes in discrimination, we consider it indispensable to add to it a broad definition on this matter so as to bring our Constitution into line with the wording of the Universal Declaration of Human Rights and to avoid future instances of discrimination..., so that the protection conferred by the afore-mentioned article 33 shall be seen with regard to all discrimination, not only that affecting human dignity, for which reason it is superfluous to consider whether the discrimination provided by article 3 of the Notarial Act is or is not an affront to human dignity." (Judgement of the Full Court, session of 26 March 1986).

715. The principle of equality before the law is not of an absolute nature, because a right may not properly be held to be accorded equally to any individual without having regard to circumstances but rather to require that the law should not make any distinction between two or more persons who are in the same legal situation or under identical conditions, or that treatment may not be claimed to be equal when the conditions or circumstances are unequal. (Judgement of the Full Court, session of 23 June 1963).

716. The principle of equality provided by article 33 of the Constitution is not of an absolute nature because a right may not properly be held to be accorded equally to any individual without having regard to circumstances but rather to require that the law should not make any distinction between two or more persons who are in the same legal situation or under identical conditions, and treatment may not be claimed to be equal when the conditions or circumstances are unequal. (Judgement of the Full Court, extraordinary session of 27 November 1963.)

"... So that the procedural provision in civil actions that exempts the State from the duty to return a surety for costs shall not infringe article 33 of the Constitution, because the principle of equality before the law signifies the obligation to give the same treatment and, therefore, prohibits different treatment if the conditions or circumstances are equal, and more so when, as happens in this case, the State and private persons may by no means be considered to be on the same level." (Judgement of the Full Court, extraordinary session of 28 June 1982.)

Article 27

Paragraph 1

717. Indigenous groups: the clearest case of discrimination existing in the majority of Latin American countries is that of the American Indians who, despite being the original inhabitants of these territories, have long seen themselves deprived of their basic rights, including that of their own nationality. Our country has endeavoured to promote the equality of these groups in relation to the rest of the population, starting with the need to preserve their customs.

718. Act No. 5251 of 11 July 1973 establishing the National Commission for Native Affairs created a specialized institution to concern itself with the problems of the indigenous peoples as a means of ensuring that these groups should have a real possibility of developing in line with their traditions. The institution is not made up solely of official representatives of the public bodies concerned, but also has representatives of the American Indian groups of Guatuso, Talamanca, Coto Brus, Pérez Zeledón, Buenos Aires and Mora and of the Boruca District Council. There is also a member from each of the legally registered associations for the indigenous peoples..

719. The Act contains extremely valuable regulations concerning the organization of a system of defence and assistance for the indigenous peoples that succeeds in properly representing the needs of these groups. The native reserves are declared to be inalienable and dedicated exclusively to the location of these populations and their development. (Transitional amendment of the Act establishing the National Commission for Native Affairs by Act No. 5651 of 13 December 1974.)

720. In order to protect the indigenous autochthonous groups against discrimination the Costa Rican State is acceding to the Convention on Indigenous and Tribal Peoples in Independent Countries, Act. No. 7316 of 3 November 1992, adopted by the General Conference of the International Labour Organization meeting in Geneva on 7 June 1989. The above-mentioned Convention offers institutions of assistance in opposing discrimination against indigenous peoples:

"Article 2.

1. Governments must accept the responsibility for the development, with the participation of the peoples concerned, of coordinated and

systematic action with the aim of protecting the rights of these peoples and guaranteeing respect for their integrity.

2. This action must include measures:

(a) That ensure that the members of these peoples shall enjoy, on an equal footing, the rights and opportunities provided by national legislation for the other members of the population;

(b) That promote the full effectiveness of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;

(c) That assist the members of the groups concerned to eliminate the social and economic differences that may exist between the indigenous members and other members of the national community, in a manner compatible with their aspirations and ways of life."

721. The article gives a categoric definition of the attitude that our State should adopt towards the problems of discrimination against the indigenous people, which obliges it to seek material comparison of the rights of these groups in relation to the rest of the population, above all as regards the provision of services, so as to establish equal terms between the parties.

722. The Convention also contains rules concerning education and information in the media with the aim of inculcating in these information tools a mentality of respect and equality between the various population groups of the country.

723. Lastly, and in development of the above-mentioned provisions of the Constitution and the Convention, the Legislative Assembly is considering draft legislation entitled "Act on the autonomous development of the indigenous peoples", the main aim of which is defined in its first article along these lines:

"The Act defines the relations between the native communities and the State, establishes a framework for their autonomous development in accordance with the Constitution, international conventions and national legislation, starting with recognition of the full autonomy of the indigenous peoples and their rights to achieve the restoration of their cultures."

724. The draft goes far beyond the mere recognition of the right of the indigenous peoples to equality, since it seeks to provide the native communities with sufficient autonomy to take real control of their destiny; to that end it proposes the establishment of representative political bodies with sufficient authority to be able to impose certain standards of conduct within the peoples (internal rules that must certainly be compatible with the national order), and anyway to give the native territories autonomy, giving their population groups security with regard to possession of the territory. Furthermore, it is proposed to establish financial institutions and institutions for economic development that will permit effective social growth of the indigenous peoples in harmony with their customs.

725. Measures intended to eliminate existing imbalances in international economic relations that contribute to the exacerbation of racism and racial prejudice (paragraph 9(4) of the Declaration): our country has vociferously called in various international forums for greater equality in international economic relations and has supported the various initiatives to that end.

726. Initiatives aimed at dissemination of the main conclusions of the most relevant research in the humanities and the social and economic sciences (article 8(2) of the Declaration): Costa Rican educational establishments, especially in higher education, promote the discussion of current affairs concerning social, economic, political and social topics at all levels and with the participation of well-known qualified speakers. The most recent instance was the discussion on the Annual Report of the United Nations Development Programme on 3 November 1995, attended by notable political figures, the object of which was to discuss and disseminate information on the social development situation facing our country.

727. Beyond that, it is up to the Ministry of Information to lay down the guidelines for publicizing these problems and the solutions to them to the other sections of society.

728. Initiatives for the implementation of wide-ranging education and research programmes to combat racial prejudice and racial discrimination (article 8(2) of the Declaration): the Ministry of Education is the body competent to handle these detailed matters. The Ministry of Education does not have programmes for the combating of racial prejudice and discrimination. Nevertheless, it may be pointed out that the Ministry does have a Department for the Coordination of Native Education, which carries out specific programmes for the indigenous peoples. The Department is developing a plan for the inclusion of the native languages in the school curriculums in these localities, and also for preservation of their traditions by this means. Furthermore, education curriculums at the national level make various references to the cultural groups that make up our country, with the aim of providing a broader and less discriminatory view of the various ethnic groups.

729. With reference to legislation and publicity, we may mention as one of the most important educational elements for the advance of the means of communication the "Act on the Defence of the Spanish Language", which provides on the matter with which we are concerned:

> "Article 1: The company name or trade name, brand names, publicity, placards or announcements concerning every kind of cattle farming, agricultural, commercial or industrial enterprise must be correctly written in Spanish or in the native languages of Costa Rica.
>
> Alongside the company name or trade name and brand names, and on placards or announcements written in these languages, enterprises may put, in considerably smaller lettering, a translation of it into a foreign language."

730. The purpose of the rule is defence of the Spanish language against the encroachments of foreign languages, so as to protect the identity of Costa Ricans.

LIST OF DOCUMENTS APPENDED

1. Annual Report of the Office of the Public Defender 1996, vols. 1 and 2.

2. Annual Report of the Office of the Public Defender 1997, on 4 diskettes (Word for Windows).

3. Constitutional Jurisprudence concerning the Covenant, two volumes.

4. Compendium of Legislation:

   (a) Act on Equality of Opportunity for Persons Suffering from Disabilities;

   (b) General Act on Migration and the Status of Aliens and its Regulation;

   (c) National Inquiry on the Draft Act on autonomous development of the indigenous peoples;

   (d) Act on the Office of the Public Defender;

   (e) Act establishing and regulating the National Centre for the Development of Women and the Family;

   (f) Act against Sexual Harrassment in Employment and Teaching;

   (g) Basic Rules of Public Law:

   - The Constitution;

   - Rules of Procedure of the Legislative Assembly;

   - Act on Constitutional Jurisdiction;

   - General Act on the Public Administration;

   - Act on Adversarial Administrative Jurisdiction;

   - Taxation Code;

   - Act against Domestic Violence;

   - Policy: a Growth Alternative;

   - Act on Promotion of the Social Equality of Women.