



*Asesorías y Tutorías para la Investigación Científica en la Educación Puig-Salabarría S.C.  
José María Pino Suárez 400-2 esq a Lerdo de Tejada, Toluca, Estado de México. 7223898476*

RFC: ATI120618V12

**Revista Dilemas Contemporáneos: Educación, Política y Valores.**

<http://www.dilemascontemporaneoseducacionpoliticaivalores.com/>

**Año: VII Número: 1 Artículo no.: 122 Período: 1 de septiembre al 31 de diciembre, 2019.**

**TÍTULO:** Principios del poder judicial: experiencia constitucional de la regulación estructural en los países de América.

**AUTORES:**

1. Ph.D. Aleksey P. Treskov.
2. Ph.D. Al'bina S. Kalmanova.
3. Ph.D. Tatiana N. Matyusheva.
4. Ph.D. Vyacheslav L. Rasskazov.
5. Ph.D. Lyudmila A. Tkhabisimova.

**RESUMEN:** Este artículo presenta una comparación legal de cómo el funcionamiento del poder judicial está regulado por las constituciones de los países de las Américas. Nuestro análisis muestra que el poder judicial está regulado a través de capítulos dedicados al poder judicial, así como a través de otros capítulos de las constituciones. La formalización de estas últimas regulaciones es el tema de este artículo. Establecemos que los capítulos de constituciones no dedicados prevén (pero no se limitan a) principios clave de la autoridad judicial como la independencia, la cooperación / coordinación y una serie de prácticas judiciales. Todas las demás regulaciones abordan directamente las actividades del poder judicial en el aspecto humanitario.

**PALABRAS CLAVES:** poder judicial, principios del poder judicial, Juez, independencia, interacción.

**TITLE:** Principles of the Judiciary: Constitutional Experience of structural regulation in American countries.

**AUTHORS:**

1. Ph.D. Aleksej P. Treskov.
2. Ph.D. Al'bina S. Kalmanova.
3. Ph.D. Tatiana N. Matyusheva.
4. Ph.D. Vyacheslav L. Rasskazov.
5. Ph.D. Lyudmila A. Tkhabisimova.

**ABSTRACT:** This article presents a legal comparison of how the operation of the judiciary is regulated by constitutions of countries in the Americas. Our analysis shows that the judiciary is regulated through chapters dedicated to the judiciary, as well as via other chapters of the constitutions. The formalization of the latter regulations is the subject of this article. We establish that the non-dedicated chapters of constitutions provide for (but are not limited to) such key principles of the judiciary authority as independence, cooperation / coordination, and a number of judicial practices. All other regulations deal directly with the activities of the judiciary in the humanitarian aspect.

**KEY WORDS:** judicial power, principles of judicial power, Judge, independence, interaction.

**INTRODUCTION.**

The comparative law method contributes to deconstructing various legal phenomena. It is also expedient to compare the judicial principles underlying the organization and operation this branch of the government based on the constitutional practices of various countries [1, pp. 221-224; 2, pp. 521-526; 3; 4, pp. 112-116].

In this work, our research focuses on discovering the principles of the judiciary in constitutions of countries in the Americas (the full texts of the constitutions are referenced from the Online Library of World Constitutions (<http://worldconstitutions.ru/>) [5].

Our analysis shows that the judiciary is regulated through chapters dedicated to the judiciary, as well as via other chapters of the constitutions. The formalization of the latter regulations is the subject of this article.

## **DEVELOPMENT.**

### **Methodology.**

The research was based on the dialectical approach to deconstructing legal phenomena and processes using general scientific method (systematic method, logical method, analysis and synthesis) as well as specific scientific methods. The latter methods include the formal legal approach, the linguistic legal approach, and the comparative law method, which have been used jointly to identify the principles of the judiciary power.

### **Discussion and results.**

Thus, the principles of the judiciary power are traditionally listed in chapters dedicated to the basics of the organization of the State (Section One "State" of the Constitution of Bolivia, Section I "Basic Principles" of the Constitution of Brazil, Chapter I "Sovereignty and powers authorized to carry out the sovereignty" of the Constitution of Haiti, Part 1 "Nation and the State" of the Constitution of Guatemala, Part IV "Form of government" of the Constitution of Honduras, Section One "Nation and its government" of the Constitution of the Dominican Republic, Part 5 "Branches of government and government service" of the Constitution of Colombia, Part I "The Republic" of the Constitution of Costa-Rica, Chapter VII "Principles of organization and operation of state authorities" of the Constitution of Cuba, Chapter I "Separation of Powers" from Section Three of

the Constitution of Mexico, Section 2 "Forms of Government" of the Constitution of Nicaragua) or those dedicated to the human rights and freedoms (sections 2 and 4 "Rights and Guarantees", "Citizenship and Citizen's Rights" of the Constitution of Bolivia, Section II "Basic Rights and Guarantees" of the Constitution of Brazil, Section III "Human rights, Guarantees and Duties" of the Constitution of Venezuela, further divided into chapters regarding general provisions, citizen rights and economic rights, Chapter I "Rights" of the Constitution of Haiti, Part IV "Human Rights" with further details in Chapter I "Personal Guarantees" and Chapter II "Judicial Patronage" of the Constitution of Guatemala, Parts II "Citizenship and Citizen Rights" and III "Rights and Guarantees" of the Constitution of Honduras, Part II "Personal Rights" of the Constitution of the Dominican Republic, Part 3 "Citizen Rights and Social Guarantees" of the Constitution of Colombia, Part IV "Personal Rights and Guarantees" of the Constitution of Colombia, Part IV "Personal Rights and Guarantees" of the Constitution of Costa Rica, Chapter VI "Basic Rights, Duties and Guarantees" of the Constitution of Cuba, Chapter I "Guarantee of Individual Rights" from Chapter One of the Constitution of Mexico, Part IV "Rights and Guarantees" of the Constitution of Nicaragua, Section I "Basic Individual Rights" of the Constitution of Peru).

The Constitution of Argentina is particularly noteworthy. In Chapter One, that constitution combines the basics of state organization with the legal status of a person ("Principles, Rights and Guarantees").

An additional finding of our research is that the principles in question were found in other structural units of constitutions as well, and this tends to be an exception rather than the rule.

Another non-standard structural unit of a constitution that formalizes the principles in question is Article 178 (Part 17 "Elections") of the Constitution of Colombia, which states that judges may not have membership in political parties.

Following our earlier stated goal of deconstructing the formalization of the principles of judicial power in non-dedicated structural units of constitutions of the Americas, let us summarize the findings of our comparative law research.

The first principle that underlies the constitutional foundation of the judiciary power is its independence.

The Constitution of Bolivia, along with the idea of delegating the sovereignty of the people to the legislative, executive and judiciary branches, provides for independence and coordination of these branches. Therefore, we note that besides independence, it creates the principle of cooperation as applied to the judiciary branch and its relations with other government authorities (Article 2).

Based on Article 2 of the Constitution of Brazil, the three branches of government that are independent of each other and working in harmony with each other are the legislative, executive and judiciary branches. As for the independence, the legal wording is clear, while the wording "working in harmony with each other" can be interpreted as a variant of the principle of cooperation.

The Constitution of Colombia also provides for more than merely independence of the judiciary. Its Article 55 states that the Congress, the Government and judges perform different functions, but cooperate to perform the tasks of the government. Therefore, we note the principle of cooperation. While cooperation and coordination certainly have different meanings linguistically, but in the big picture, the purpose of these principles is to demonstrate the importance of both independence of the judiciary and the basics of constructive cooperation.

Article 2 of the Constitution of Guatemala and Article 9 of the Constitution of Costa Rica both merely state the principle of independence of the judiciary.

The Constitution of the Dominican Republic, besides fully-fledged judicial independence, provides for liability of the officers of the judiciary for their actions (Article 2).

We suppose it is logical to reflect the principle of liability of judges on the constitutional level. For instance, this is stated in Article 8 of the Constitution of Bolivia: officials and private citizens who interfere with execution of a court order shall be at any time liable for violating constitutional guarantees and cannot cite an order from a higher authority as a justification.

Article 18 of the Constitution of Argentina provides for such liability when it makes judges liable for unreasonable death of a person in prison as a consequence of any detention ordered by the judge.

In accordance with Article 49 of the Constitution of Venezuela, besides victims being able to demand personal liability of judges, the state is authorized to take appropriate measures against them either.

Article 64 of the Constitution of Guatemala provides for liability of judges for exceeding the time permitted for issuing a court order, imprisoning or releasing a prisoner.

These constitutions typically make a passing reference to the principle of competence of a judge (Articles 8, 9 of the Constitution of Bolivia, Article 40 of the Constitution of Nicaragua, Article 56 of the Constitution of Guatemala), judicial officer (Article 12 of the Constitution of the Dominican Republic), the court (Articles 34, 35 of the Constitution of Bolivia, Article 28 of the Constitution of Venezuela, Articles 52 and 187 of the Constitution of Honduras, Article 26 of the Constitution of Colombia, Article 58 of the Constitution of Cuba, Article 41 of the Constitution of Nicaragua) or judiciary branch (Paragraph LI of the Constitution of Brazil, Article 45 of the Constitution of Nicaragua) in various sections of the document.

We typically observe the principle of judicial protection described in the humanitarian sections of constitutions dealing with human rights and rights of the citizen. Such protection can be addressed to any persons or to specific persons mentioned in the constitution; for instance, Article 8 of the

Constitution of Bolivia creates judicial protection for persons who believe they are unfairly arrested, tried in court or imprisoned (Article 8).

Article 10 of the Constitution of Haiti mentions judiciary protection in connection with the right of victims to submit a case to relevant courts without a preliminary approval of managing or executive officers there.

When implementing such protection, courts in the subject countries also follow a principle that a civilian can never be tried in a martial court. In the same way, military personnel tried for purely civilian matters cannot be removed from a general court's authority, unless a siege is formally announced (Article 11 of the Constitution of Haiti). Article 13 of the Constitution of Mexico makes a similar statement.

In Honduras, Article 32 of the Constitution guarantees habeas corpus. Therefore, any person who is illegally detained (or anyone acting on their behalf) are entitled to petition a court (verbally or in writing) and request the detained person to be delivered to court. This right is recognized by Article 41 of the Constitution of Nicaragua.

Article 85 of the Constitution of Honduras provides that if the executive branch violates any of the provisions, the victim or any other party on their behalf may seek judicial protection.

An unusual form of judicial protection is judicial patronage created by Chapter II "Judicial Patronage" of the Constitution of Guatemala.

The key function of judicial patronage is to ensure individual guarantees and non-violation of the constitutional provisions; procedurally, it requires a special application in a form specified by law to courts created by this law (Articles 79 and 80).

Another unusual form of judicial protection is the amparo procedure provided by Article 27 of the Constitution of Venezuela. In accordance with that, each person has the right to judicial protection of constitutional rights and guarantees that are inherent to the human person and are not explicitly

stated in the Constitution or international human rights treaties. The court proceedings based on the constitutional amparo process are verbal, public, fast, free of charge and formalities, and the relevant court authorities are permitted to immediately restore any violated legal status through the means that are most appropriate in the opinion of the court. The court reviews such cases as a priority, postponing other cases.

We believe that the importance of this process is underscored by the principles of verbal discussion, openness, speed, being free of charge and having no formalities.

The principle of judicial protection for the general public was identified in Article 18 of the Constitution of Argentina, Article 49 of the Constitution of Venezuela, and Article 60 of the Constitution of Guatemala.

From the humanitarian perspective, the principle of presumption of innocence is important as a basis for the judiciary (Article 49 of the Constitution of Venezuela, Article 68 of the Constitution of Guatemala, Paragraph 11 of Appendix B of the 1982 Constitution Act of Canada, Article 39 of the Constitution of Costa Rica, Article 58 of the Constitution of Cuba, Article 24 of the Constitution of Peru).

Constitutions of American countries include different variations of the principle of courts being formed by law, or, most frequently, rejection of trial by special commissions or special courts (Article 18 of the Constitution of Argentina, Article 13 of the Constitution of Bolivia, Article 49 of the Constitution of Venezuela, Article 60 of the Constitution of Guatemala, Article 99 of the Constitution of Haiti, Article 43 of the Constitution of Honduras, Article 35 of the Constitution of Costa Rica, Article 13 of the Constitution of Mexico, Article 48 of the Constitution of Nicaragua).

Non-dedicated sections of constitutions contain principles that we normally regard as principles of judicial proceedings. For instance, judging from the content of Article 12 of the Constitution of the Dominican Republic, we can conclude that court proceedings are required to be public: cases



reviewed and tried in a public court exclude cases for which disciplinary courts are created under law.

Article 20 of the Constitution of Mexico also implies public trial in connection with the guarantees for the defendants: are entitled to trial in a public proceeding by a judge or jury consisting of literate citizens residing in the area where the crime was committed, provided that such crime carries a prison sentence of more than one year.

In accordance with Article 43 of the Constitution of Nicaragua, legal proceedings shall be public.

The structural units of constitutions that we reviewed contain principles that are comparable to court orders / sentences.

Paragraph 2, Article 44 of the Constitution of Bolivia creates the principle of finality of the court sentence.

Paragraph 1, Article 41 of the Constitution of Brazil states that the final judgment of a court can be the grounds for dismissing a public employee from a permanent position.

Articles 115 and 116 of the Constitution of Venezuela also discuss the finality of a judgment as the grounds for expropriating or confiscating any property.

Part 2, Article 19 of the Constitution of Guatemala and Article 26 of the Constitution of Honduras reflect the principle of finality of court judgments as the basis for suspending one's citizen rights.

The finality of a sentence is also recognized by Article 39 of the Constitution of Costa Rica. This is the grounds for serving a sentence for a crime, offense or misdemeanor specified in a law passed prior to that.

As for the final judgment, it is also subject to the principle of having the legal effect (Article 18 of the Constitution of Argentina).

In the same context, we may also mention the principle of the court's judgment being reasonable as created by Article 73 of the Constitution of Honduras: no one shall be deprived of property other than by law or by a reasonable judgment of a court.

With regard to constitutions that regulate the format of the judiciary's cooperation with other government bodies and officials, it is fair to mention the principle of cooperation. This is mentioned in Part 11 "President of the Republic and Acting President" of the Constitution of Colombia when it lists the powers of the President of the Republic with regard to justice (Article 119). Typically, this means support, which is required for expedient justice. The Constitution of Mexico provides for similar regulations in Chapter III "Executive Power" (Article 89).

Regulations dealing with cooperation apply not only to the head of state, but also to heads of local units of the government (for example, their functions include administration of justice in accordance with the law - Part 4, Article 194 of the Constitution of Colombia, Article 193 of the Constitution of Nicaragua).

Meanwhile, the opposite regulations exist too. Under Article 109 of the Constitution of Argentina, the President of the Republic may not under any circumstances perform the functions of the judiciary, including usurping the power of reviewing cases or restarting cases that were already closed.

We believe it is logical to look at the cooperation principle in all cases when such cooperation occurs in the context of exercising the hiring and dismissal powers, or as part of the impeachment procedure.

## **CONCLUSIONS.**

We suggest that these articles are located in chapters dealing with human rights and citizen rights due to the character and purpose of such chapters / sections. On the one hand, the subject principles

form the basis for the operation of the judiciary, while on the other hand they guarantee subjective rights and freedoms.

To summarize, we note that non-dedicated chapters of constitutions list independence and cooperation / coordination as the key principles of the judiciary, as well as a number of judiciary practices. All other regulations deal directly with the activities of the judiciary in the humanitarian aspect.

### **BIBLIOGRAPHIC REFERENCES.**

1. Makogon, B. V., Nikulin, M. I., Samsonov, V. N., Sorokoletova, M. A., & Tovstukha, O. O. (2017). Objectives and Principles of Administrative Proceedings: Doctrinal Ideas and Legislative Wordings of the Eastern European Countries. *Journal of Politics and Law*, 10 (4), 221-224.
2. Treskov, P., Aristov, A., \ Novikova, E., Solovyev, A., Khlebnikov, A. (2019). Standard constitutional catalog of principles of judicial authority in the CIS countries. *Humanities & Social Sciences Reviews*, 7 (3), 521-526.
3. Zakharov, S., Chemshit, A., Novikova, A., Stus, N., & Zajceva, T. (2019). Justice independence: foreign constitutional experiences. *Revista Dilemas Contemporáneos: Educación, Política y Valores*, Año: VI, Número:3, Artículo no.:81, Período: 1ro de mayo al 31 de agosto del 2019.  
[https://dilemascontemporaneoseducacionpoliticayvalores.com/\\_files/200004762-a03d7a1364/19.05.81%20Independencia%20de%20la%20justicia%20experiencias%20constitucionales%20extranjeras..pdf](https://dilemascontemporaneoseducacionpoliticayvalores.com/_files/200004762-a03d7a1364/19.05.81%20Independencia%20de%20la%20justicia%20experiencias%20constitucionales%20extranjeras..pdf)
4. Treskov, A.P. (2018). Principy sudebnoj vlasti: opyt standartnoj konstitucionnoj legalizacii v stranah SNG. *Social'no-politicheskie nauki*. Vypusk, 4, 112-116. (In Russian)
5. <http://worldconstitutions.ru/> (accessed 6 August 2019).

**DATA OF THE AUTHORS.**

- 1. Aleksej P. Treskov.** PhD in Law, Associate Professor, Rostov State University of Railway Engineering, Russia.
- 2. Al'bina S. Kalmanova.** PhD in Law, Associate Professor, North Ossetian State University, Russia.
- 3. Tatiana N. Matyusheva.** Ph.D. in History, Associate Professor, Northern Caucasian branch of the «Russian state University of Justice», Russia.
- 4. Vyacheslav L. Rasskazov.** Associate Professor, Ph.D. in law, Federal State-funded Educational Institution of Higher Professional Education «Kuban State Agrarian University», Russia. Email: [altreskov@yandex.ru](mailto:altreskov@yandex.ru)
- 5. Lyudmila A. Tkhabisimova.** Doctor of Law, North Ossetian State University, Russia.

**RECIBIDO:** 7 de agosto del 2019.

**APROBADO:** 21 de agosto del 2019