Periódico do Núcleo de Estudos e Pesquisas sobre Gênero e Direito
Centro de Ciências Jurídicas - Universidade Federal da Paraíba
V. 9 - Nº 04 - Ano 2020
ISSN | 2179-7137 | http://periodicos.ufpb.br/ojs2/index.php/ged/index

CONSTITUTIONAL LEGALIZATION OF JUDICIARY PRINCIPLES: EXPERIENCE OF AMERICAN STATES

Aleksej P. Treskov[1]
Ludmila O. Losilkina[2]
Zara A. Mamisheva[3]
Andrey P. Peterburgskiy[4]
Igor V. Timofeev[5]

Abstract: The article presents the results of the comparative legal study concerning the formalization of the judiciary principles in the constitutions of Latin American states. Most of the analyzed constitutions identified special sections on the judiciary, many of which are distinguished by fragmentation into smaller structural units. At the same time, the special chapters formalized the judiciary principles in the varieties of the judicial system, legal proceedings, as well as in the organization and activities of judges.

Keywords: judicial power, justice, court, principle of judicial power, judge, publicity, independence, finality.

1. Introduction

It is true that all human knowledge is built on comparison, which is a universal tool, the main purpose of which is to help in obtaining information. In this very general sense, the comparative method in law is used to acquire knowledge in relevant fields and incorporate them into a person's concept of the world. As it developed, comparative jurisprudence, initially limited by legislative and other norms, began to encompass legal practice, primarily the entire application of law by courts; later on, the legal sphere was supplemented by the study of social factors affecting legislation and the application of law. Thus, the circle of traditional comparative methods had to be expanded by adding to the so-called "legal" methods characteristic of

[1] Rostov state University of railway engineering, 2 square of the Rostov Shooting Regiment of the National Militia, Rostov-on-don, 344038, Russia
[2] Belgorod State University, 85 Pobedy Street, Belgorod, 308015, Russia
[3] Adyghe state University, 208, Pervomayskaya Street, Maikop, 385000, Russia
[4] Belgorod State University, 85 Pobedy Street, Belgorod, 308015, Russia
[5] Charter court of Saint Petersburg, 62 Suvorovsky Ave., Litera a, Saint Petersburg, 191124, Russia

positivist science, and new approaches borrowed from other humanities [1, pp. 77-78]. Let us clarify that the objective of this study is the comparative legal analysis of Latin American state constitutions [2, pp. 498-504] regarding the formalization of the judiciary principles in them. Such a comparison makes it possible to evaluate state approaches to the constitution of the judiciary principles [3, 4, 5:8], their specific and substantive characteristics [6, pp. 3511-3514; 7, pp. 179-201].

2. Methodology

The study was built on the basis of the dialectical approach to the disclosure of legal phenomena and processes using general scientific (systemic, logical, analysis and synthesis) and private scientific methods. The latter include formal-legal, linguistic-legal, and comparative-legal method, which were used together to identify the principles of the judiciary. The texts of Latin American state constitutions were taken from the database of the Internet library "Constitutions of the states (countries) of the world" (http://worldconstitutions.ru/) [8].

3. Discussion and results

Each of the analyzed American constitutions had special sections on the judiciary (Section sixteen "Judicial Power" of the Bolivian Constitution, Section V "Judicial Power" of the Haitian Constitution, Part VII "Judicial Power" of the Guatemalan Constitution, Part 15 "Administration of Justice" of the Colombian Constitution, Part XI "The Judiciary" of the Constitution of Costa Rica, Chapter X "Courts and the Prosecutor's Office" of the Cuban Constitution, Chapter IV "On the Judiciary" of the Mexican Constitution, Part VII "Judicial Power" of the Nicaraguan Constitution, Section VIII "Judicial Power Article" of the Constitution of Peru). Interestingly, many of them are distinguished by separation into smaller structural units. For example, Section Three of the Constitution of Argentina is generally named "On the Judiciary", but contains Chapter One "On the nature and terms of the judiciary authorities" and Chapter Two "The powers of the judiciary". Chapter III "On the judiciary" of the Brazilian Constitution, Chapter III "Judicial power and the justice system" of the Venezuelan Constitution, Part VII "Judicial power" of the Constitution of

Honduras, Part IX of the Dominican Republic Constitution are structured in a similar vein. It should be noted that the special chapters of the Latin American constitutions devoted to the judiciary reflected the principles of the judiciary in the varieties of the judicial system, legal proceedings, as well as in the organization and activities of judges. Adhering to the indicated gradation, let's clarify that the independence of the judiciary was revealed among the judicial principles. According to the Art. 254 of the Venezuelan Constitution, the judiciary is independent and the Supreme Court enjoys functional, financial and administrative autonomy. Traditionally, in the group of countries under consideration, the constitutional formalization of the principle of independence is connected with the section on state structure. In this regard, the Venezuelan Constitution was a peculiar exception. Besides, with respect to the Supreme Court, the principles of functional, financial and administrative autonomy are fixed separately, which can also be considered as independence of the state highest judicial instance. The art. 187 of the Guatemalan Constitution was more concise and also set out by way of exception in a special chapter, according to which the administration of justice is mandatory and independent. Specifically, on the one hand, when they consolidate independence, there is no indication of other types of power, and on the other hand, the article introduces an original imperative of bindingness for justice. Based on the fact that we regard independence as a principle, it can be assumed that binding is also positioned here as the main principle. - The exercise of judicial power by the court (Article 108 of the Constitution of Argentina, Article 100 of the Constitution of Haiti, Article 121 of the Constitution of Cuba, Article 138 of the Constitution of Peru; specification of the instances in Article 137 of the Constitution of Bolivia, Article 187 of the Constitution of Guatemala, Article 129 of the Constitution Honduras, article 57 of the Constitution of the Dominican Republic, article 152 of the Constitution of Costa Rica, article 94 of the Constitution of Mexico, article 209 of the Constitution of Nicaragua). In Art. 227 of the Constitution of Nicaragua and Art. 187 of the Constitution of Guatemala, the stated principle provision is compared with the exclusive right of the courts to make sentences and appeal to their execution. The statement of the Art. 141

of the Honduran Constitution addressing the relevant principle of law not only to the courts, but also to the tribunals is performed in a similar vein. - The establishment of a court on the basis of law. The principle of the art. 137 of the Constitution of Bolivia, the Art. 187 of the Constitution of Guatemala, the Art. 57 of the Constitution of the Dominican Republic is presented in the same wording. The Art. 154 of the Brazilian Constitution, enshrined this principle in the format of the judiciary subordination not only to the law, but also to the Constitution (the meaning of the Article 94 of the Mexican Constitution, the Article 209 of the Nicaraguan Constitution is identical). However, in the most typical wording, the declared principle is still correlated with the law. The addition of other details of the principle under consideration is noted in the Haitian constitutions (the organization and jurisdiction of the courts on the basis of the law, Art. 100; courts of appeal are established, the jurisdiction and seat of which will be established by law, Art. 101); Honduras (the law regulates the organization and powers of the judiciary, art. 142), etc.

- Free administration of justice in the courts was found in the wording of the Art. 137 of the Constitution of Bolivia, the Art. 187 of the Constitution of Guatemala, the Art. 137 of the Constitution of Honduras, and the Art. 231 of the Constitution of Nicaragua.

- Reporting of courts as a principle is fixed in the Art. 128 of the Constitution of Cuba - the courts report on their activities to the Assembly that elects them at least once a year. Unfortunately, the standard constitutional principle prohibiting the establishment of emergency courts is enshrined in a single version only in a special section of the Constitution of Bolivia (the Article 139).

Among the principles of legal proceedings there are the following ones:

- The publicity of court hearings is a common wording of the corresponding principle in the constitutions under consideration. Formalized with the provison that it does not threaten public order and good morals provided by the Art. 107 of the Constitution of Haiti. They also specified here that closed hearings are not allowed in cases on political crimes and on press crimes. Please note that along with the term “publicity”, the Haitian Constitution uses the term “openness” of the meeting in the Art. 108. According to

the Art. 94 of the Mexican Constitution, the meetings of the plenum and the Chambers of the Supreme Court also take place publicly, unless moral considerations or public interest require a closed session.

The publicity of court sessions and judicial presences provided by the Art. 235 of the Constitution of Nicaragua, are excluded in special cases prescribed by law, as well as in cases where publicity is contrary to order or good morals.

As compared to publicity, openness is formalized only in two American constitutions - Bolivia (Article 140) and Guatemala (Article 187).

In isolated cases, the principles of collegial activity of the courts (the Article 127 of the Constitution of Cuba) and the equality of duties and rights of professional judges and assessors (the Article 127 of the Constitution of Cuba) were met.

The Art. 94 of the Mexican Constitution provides the principle of collegiality together with the principle of uniqueness (also in a single version). It is advisable here to provide a number of principles comparable to the issuance of decisions / sentences by the courts. The most common principle is the finality of judiciary decisions. The Art. 153 of the Constitution of Costa Rica reflected it in details: the implementation of the decisions is provided by the armed forces, if necessary. According to the Art. 124 of the Cuban Constitution, the People's Supreme Court exercises the highest judicial power, and its decisions are final;

In Brazil, the final substantive decisions made by the Supreme Federal Court concerning the claims for the recognition of federal law constitutionality or federal regulations are final and binding on other judicial and executive authorities (art. 102).

- Making decisions and sentences in the name of the Republic (the art. 109 of the Haitian Constitution) / administration of justice on behalf of the Republic by the judiciary (the art. 209 of the Nicaraguan Constitution) / on behalf of the Nation (the art. 143 of the Venezuelan Constitution). The motivation of the verdict and court decision is formalized in the Art. 108 of the Constitution of Haiti and the Art. 163 of the Constitution of Colombia. As a single option, binding sentences and court decisions for prosecutors and police were identified (the art. 109 of the Haitian Constitution). Many principles

relate to the status of judges. The principle of the independence of judges and their submission / following only the law is certainly widespread (the Article 138 of the Constitution of Bolivia, the Article 256 of the Constitution of Venezuela, the Article 125 of the Constitution of Cuba, the Article 236 of the Constitution of Nicaragua, and the Article 146 of the Constitution of Peru).

- The urgency of judge powers is fixed in a number of Latin American constitutions. For example, according to the Art. 136 of the Constitution of Honduras, the term of Supreme Court members is six years and begins on the first of January. Based on the Art. 158 of the Constitution of Costa Rica, the Supreme Court members are elected for eight years. In Mexico, the judges of district courts serve for four years (the Art. 97). The principle of judge power urgency mediates the attitudes about their appointment or election. Thus, the appointment of judges is formulated in the context of supreme state bodies and official powers involved in the formation of the court composition. According to the Art. 101 of the Brazilian Constitution, the judges of the Federal Supreme Court are appointed by the President of the Republic after their selection has been approved by an absolute majority of the Federal Senate members. The procedure of the Art. 96 of the Constitution of Mexico is formalized with a similar composition. The Art. 100 of the Haitian Constitution states that the President of the Republic appoints the members of the courts and tribunals. As for the principle of the election of judges, it is associated with the activities of the country parliament in a more traditional version. As an exception, this principle is nevertheless combined with the population. In the first case, for example, the members of the Supreme Court are elected by the National Congress in accordance with the Article 131 of the Constitution of Honduras. In accordance with the Art. 157 of the Constitution of Costa Rica, the Supreme Court consists of 17 members elected by the Legislative Assembly and constituting various chambers in accordance with the law. This series may be continued by the Art. 188 of the Constitution of Guatemala, and the Art. 149 of the Constitution of Colombia. As for the participation of the population in the formation of the court, such a norm was found only in the Art. 152 of the Constitution of Peru: the Justices of the Peace are elected by general election.

- The impossibility of a judge's position arbitrary dismissal is another principle that has been consistently reflected in the considered group of constitutions (in laconic formulations of the Article 110 of the Constitution of Argentina, and the Article 100 of the Constitution of Haiti). With details of the procedure, the declared principle was found in the Art. 199 of the Constitution of Guatemala, the Art. 160 of the Constitution of Colombia, and the Art. 165 of the Constitution of Costa Rica. - The inability to combine the position of a judge with any other paid public service (the Article 105 of the Haitian Constitution) / with any position in other higher authorities (the Article 161 of the Constitution of Costa Rica). An updated version of the principle was discovered with substantial increments in the Art. 256 of the Constitution of Venezuela, the Art. 60 of the Constitution of the Dominican Republic, the Art. 160 of the Constitution of Colombia, the Art. 101 of the Constitution of Mexico, the Art. 227, 238 of the Constitution of Nicaragua, and the Art. 146 of the Constitution of Peru. Interestingly, that the principle stated in the Art. 95 of the Brazilian Constitution applies to the judges held in reserve. They do not have the right to perform other functions or duties, with the exception of teaching, and they also have no right to devote themselves to political activity.

- The principle of remuneration / salary, which cannot be reduced in any way during the tenure of judges (the Article 110 of the Constitution of Argentina, the Article 95 of the Constitution of Brazil, the Article 160 of the Constitution of Colombia, the Article 94 of the Constitution of Mexico). According to the Art. 239 of the Constitution of Nicaragua, the content relying on the representatives of the judiciary cannot be reduced or canceled to the detriment of any of them; suspension of its payment is also not allowed. In accordance with the Art. 146 of the Peruvian Constitution, judges are guaranteed remuneration that provides them with decent living standards in accordance with their position and rank. It is necessary to pay attention to the wording of the Art. 198 of the Guatemalan Constitution, when the State Treasury as a guarantee transfers in advance the twelfth of the budget allocated for the judiciary to the Judicial Treasury monthly. The Art. 254 of the Constitution of Venezuela has a similar warranty.

Individual constitutions of Latin American countries have isolated versions of the principles addressed to judges:

- irremovability, with the exception of public interest grounds (the Article 95 of the Brazilian Constitution);

- a life appointment, which is granted to the judges of first instance only after two years in office (the Article 95 of the Brazilian Constitution);

- impartiality (the Article 256 of the Constitution of Venezuela).

Summing up the results of the study, let's note that special sections were found on the judiciary in each of the analyzed constitutions of the Latin American states, many of which are distinguished by fragmentation into smaller structural units. At the same time, in special chapters the principles of the judiciary are formalized in the varieties of the judicial system, legal proceedings, as well as the organization and activities of judges. For the most part, the sought-after principles in specific and substantial variations are standard and quantitatively more oriented towards judges.

As a negative specificity, they stated only a single consolidation of the standard constitutional principle concerning the inadmissibility of emergency court creation in the Constitution of Bolivia (the Article 139). In isolated cases, important legal principles of collegial activity of courts (the Article 127 of the Constitution of Cuba) and the equality of duties and rights of professional judges and assessors (the Article 127 of the Constitution of Cuba) were also met. We believe that such a constitutional practice could be more multiplicative.

References

Peteri Z. Zadachi i metody sravnitel'nogo pravovedeniya // Sravnitel'noe pravovedenie: sbornik statej / sostavlenie, redakciya V.A. Tumanova. M.: «Progress», 1978. pp. 77-78. (In Russian)

Treskov A.P. 2019. Konstitucionnaya legalizaciya principov sudebnoj vlasti: opyt amerikanskih gosudarstv. Nauchnye vedomosti Belgorodskogo gosudarstvennogo universiteta. Seriya: Filosofiya. Sociologiya. Pravo. V. 44. # 3. pp. 498-504. (In Russian)

Jacob H. 1978. Justice In America – courts, lawyers, and the judicial process – Third edition. United States of America, Little, Brown and Co. 259 p.

David W. Neubauer, Henry F. Fradella 2018. America's Courts and the Criminal Justice System. 648 p.

Wilson B., Gloppen S., Gargarella R., Morten Kinander, Skaar E. 2016. Courts and Power in Latin America and Africa. Palgrave macmillan. 231 p.

Marina V. Markhgeym, Oksana A. Morozova, Ludmila I. Nikonova, Marina S. Savchenko, Grigory M. Sukhodolsky 2018. Interaction principle: doctrinal strokes to constitutional alternates. Helix. Vol. 8(4): 3511-3514.

Yukihiro Yazaki. 2014. Rights and judicial independence. Economics of Governance. # 15(2): 179-201/

http://worldconstitutions.ru/

Habibzadeh, M. (2016). Legal Strategies of money Laundering Prevention Emphasizing Financial –Economical policies. UCT Journal of Social Sciences and Humanities Research, 4(2), 26-30