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## ***Judicial Power Principles in the Constitutions of African States***

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### **Abstract**

The objective of the research was to study the principles of the judiciary in the constitutions of some African states. The modern constitutional development of African states is mediated by the complex history of the continent, as well as by ongoing political processes. The emergence of basic laws in these states has become the basis not only for the establishment of constitutionalism, but also for the establishment and functioning of key public authorities. According to the functional division of state power, the organization and activities of the judicial authorities are inalienable. The source of such institutionalization and organization, of course, is its constitutions. In this sense, in the framework of this work, attention is paid to research to the analysis of the principles of the judiciary in the constitutions of African states. Formal-legal, linguistic-legal and comparative-legal methodology were used, which were used together to identify the principles of the judiciary. It is concluded that the analysis carried out showed that most of the constitutional principles sought are formalized in the special structural parts of the constitutions dedicated to the court of various instances.

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**Keywords:** judiciary in Africa; principles of the judiciary; independence of the judicial organization; legal proceedings; African constitutionalism.

## Principios del poder judicial en las constituciones de los estados africanos

### Resumen

El objetivo de la investigación fue estudiar los principios del poder judicial en las constituciones de algunos estados africanos. El desarrollo constitucional moderno de los estados africanos está mediado por la compleja historia del continente, así como por los procesos políticos en curso. La aparición de leyes básicas en estos estados se ha convertido en la base no solo para el establecimiento del constitucionalismo, sino también para el establecimiento y funcionamiento de las autoridades públicas clave. Según la división funcional del poder estatal, la organización y las actividades de las autoridades judiciales son inalienables. La fuente de tal institucionalización y organización, por supuesto, son sus constituciones. En este sentido, en el marco de este trabajo, se presta atención a la investigación al análisis de los principios del poder judicial en las constituciones de los estados africanos. Se empleó la metodología formal-legal, lingüístico-legal y comparativo-legal, que se usaron juntas para identificar los principios del poder judicial. Se concluye que el análisis realizado mostró que la mayoría de los principios constitucionales buscados se formalizan en las partes estructurales especiales de las constituciones dedicadas a la corte de varias instancias.

**Palabras clave:** poder judicial en África; principios del poder judicial; independencia de la organización judicial; procedimientos judiciales; constitucionalismo africano.

### Introduction

Having acted as an integrative constitutional and theoretical category, the judicial power principles are an object of constitutional law science from the point of view of their meaningful interpretation (Makogon et al., 2019; Molot 2004), as well as the specifics of formalization (Burley & Walter, 1993; Carrubba, 2005), including the comparative legal aspect (Zakharov et al., 2019; Treskov, 2019a). In this regard, the subject of the study was the norms of the constitutions of African states (Treskov, 2019b). The texts of

the latter were taken from the book of R.V. Pashkov “The Constitution of African countries. Volume 3. M. 2018”.

## 1. Methodology

The study was built on the basis of a dialectical approach to the disclosure of these legal phenomena and processes using general scientific (systemic, logical, analysis and synthesis) and particular scientific methods. Among the latter are formal-legal, linguistic-legal, and comparative-legal methods, which were used together to identify the judicial power principles.

## 2. Discussion and Results

In the constitutions of the Comoros and the Kingdom of Morocco, the judicial power principles are found exclusively in special structural units (“On Judicial Power” and “On Constitutional Court”, as well as “Judicial Power” and “Constitutional Court”, respectively).

In the constitutions of Côte d’Ivoire, Mali and the Constitutional Declaration of the Libyan Republic in Transition, the principles are formalized in specialized sections with a standard name for the judicial power and only Section VII of the Constitution of Mauritania is named “Judicial Proceedings”.

In other constitutions, specialization has manifested itself in varying structural components: “Judicial institutions related to the judicial system”, “Administrative judicial institutions”, “Military Tribunals”, and “On the Constitutional Court” in the Democratic Republic of the Congo; “The Judicial power” in Liberia; “Judicial Power”, as well as “Constitutional Court on Administrative and Financial Issues”, “Supreme Court”, and “High Court of Justice” in the Malagasy Constitution.

Note that the principles sought are formalized not only in the special structural sections of African constitutions. However, within the framework of this work, we will clarify the specific number of judicial power principles precisely in the declared sections. The catalogue formed by us in the course of comparative legal analysis looks as follows.

Independence of the judicial power from the legislative and executive ones (Article 31 of the Libyan Republic’s Constitutional Transitional Declaration, Article 28 of the Constitution of the Comoros, Article 101 of the Constitution of Côte d’Ivoire, Article 89 of the Constitution of Mauritania,

Article 81 of the Constitution of Mali, Article 107 of the Constitution of Morocco). Moreover, according to Moroccan regulations, the King is the guarantor of the independence of the judicial power.

Organization of justice on the basis of organic law (Articles 153 and 155, Article 28 of the Constitution of the Democratic Republic of the Congo, Constitution of the Comoros, Articles 102 and 103 of the Constitution of Côte d'Ivoire, Article 82 of the Constitution of Mali). In particular, this principle is provided specifically for them in chapters devoted to independent higher judicial instances. A concretization of the principle of legality of authority, and rules of work and the procedure for the appointment of judges of the High Court are provided for in the Constitution of Côte d'Ivoire. In relation to the Supreme Council of Justices of the Peace, these are provided for in Mauritania, and to various courts in Mali.

In addition to general norms, the constitution of the Democratic Republic of the Congo formalized also the principle sought for special courts.

In paragraph 4, "Military Tribunals" of the Constitution of the Democratic Republic of the Congo, organic law is the basis not only for the organization and activities of military tribunals, but also for jurisdiction (Article 156).

According to paragraph 5 "On the Constitutional Court", its organization and activities are carried out on the basis of an organic law (Article 169, the Constitution of the Democratic Republic of the Congo).

Article 110 of the Constitution of Morocco is narrow with a view of its content: it indicates the principle of the legality of the election procedure, organizational structure and functioning of the Supreme Court only.

Administration of justice is executed by courts of last resort (Article 102 of the Constitution of Côte d'Ivoire); by the Supreme Court, as well as other courts and tribunals (Article 81 of the Constitution of Mali).

Mandatory are the impossibility of appealing, as well as the enforcement by the legislative or executive branch, and by all territorial jurisdictions of the decisions of the Supreme Court in Article 29 of the Constitution of the Comoros. In a similar vein, the norms of Article 65 of the Liberian Constitution and Article 125 of the Constitution of Morocco are carried out.

With regard of their specialization, we note the recognition of decisions of the Constitutional Court by any authorities, including judicial authorities (Article 35 of the Constitution of the Comoros, Article 131 of the Constitution of Morocco).

The Constitution of the Democratic Republic of the Congo (Article 168), as applied to the decisions of the Constitutional Court, legalizes such principles as the impossibility of appealing against its decisions; immediate execution, and obligatoriness for all administrative, civil, military and

judicial authorities, as well as for private individuals.

The judges are subordinated only to the law (Article 28 of the Constitution of the Comoros, Article 110 of the Constitution of Morocco).

There is independence of judges (Article 31 of the Constitutional Declaration of the Libyan Republic in transition) with its guarantee by the President (Article 103 of the Constitution of Côte d'Ivoire, part 2 of article 89 and part 1 of article 90, the Constitution of Mauritania) and subordination of judges only to the law (Part 1 of Article 90, the Constitution of Mauritania) / law and conscience (Article 31 of the Constitutional Declaration, the Libyan Republic in Transition). Part 2, Article 90 of the Constitution of Mauritania specified that in the performance of their duties, judges should be protected from all forms of pressure that weaken their free will.

We believe that the norms of the Constitution of Morocco, which provide for the following principles addressed to judges, deserve special attention. Article 108 secured the independence of judges, and in Article 109 the explanations are given on the independence of both the judicial power and judges. Thus, any interference with the activities of justice is prohibited.

Each time a judge concludes that there is a threat to the independence of his activity he is obliged to notify the Supreme Court of this.

The lack of independence and impartiality of a judge is a serious professional violation, and they entail liability.

Thus, we believe that the constitutions under consideration consolidated not only the independence of judges, but also their impartiality. Moreover, further on in Article 111 these principles are emphasized as a need to comply with the formalization of the right of judges to join and create professional associations.

Election of judges of the High Court from among the deputies of the National Assembly in Côte d'Ivoire was introduced. Under Section VIII of the Constitution of Mauritania on the High Court of Justice, the principle of the election of its members by the National Assembly and the Senate is formalized. It also reflects the principle of legality in determining the composition of the High Court of Justice, managing its work and procedures (Article 92).

Urgency and appointment of judges was introduced in Article 158, the Constitution of the Democratic Republic of the Congo).

According to Article 91 of the Constitution of Mali, the term of office of judges included into the composition of the Constitutional Court is 9 years, and they are appointed by the President of the Republic, the National Assembly and the Supreme Court of Magistracy. According to Article 96, the principle of the appointment of judges becoming members of the High

Court of Justice elected by the National Assembly with each change in its composition is deduced.

In the Kingdom of Morocco, the principle of the appointment of judges by the King is reasonably established, taking into account the form of state government (Article 115). And Article 28 of the Constitution of the Comoros sets out the principle of lifelong appointment of judges.

In relation to the norm of Article 68 of the Liberian Constitution, it is fair to talk about the legalization of the judge appointment principle: The President of the Republic appoints a supreme judge and four jury judges with the consent of the Senate.

It is established that in the Moroccan Constitution, the catalogue of the judicial power principles is quantitatively and meaningfully wider, therefore, we additionally list the principles found in it conditionally dividing them into the court organization and legal proceedings types.

Among the first, the prohibition of the creation of extraordinary judicial instances is important (Article 127).

In particular, Article 116 formalizes the principles of administrative and financial autonomy of the Supreme Court of Morocco.

The aforementioned principles of legal proceedings were supplemented by the Constitution of Morocco with the law and impartiality of court decisions (Article 110); equal trial and fair judgment (Article 120); the publicity of court hearings (Article 123); the motivation of the sentence, as well as its public announcement (Article 125).

It is interesting that these principles are legalized as part of a separate block of legal rights and the rules being a part of the justice system functioning. This can be used to explain the contextual consolidation of some of these principles within the framework of the subjective rights of citizens. For example, according to Article 120 of the Moroccan Constitution, every citizen has the right to a fair trial and a justified adjudication within a reasonable time.

Previously, Article 119 reflected the principle of the presumption of innocence among the legal rights and rules of the functioning of the justice system (by analogy with Article 120, through subjective law).

Based on Article 124 of the Constitution of Morocco, sentences are pronounced and executed in the name of the king and the law.

## **Conclusions**

The constitutions which reflected the judicial power principles exclusively in special sectoral sections (Comoros, Morocco), include three minimal varieties of such principles regarding the judicial system, legal proceedings, as well as the status of judges.

The constitutions of Côte d'Ivoire, Libya, Mauritania and Mali are distinguished by a variety of judicial principles, as well as basic provisions for judges. However, their texts did not reveal principles on legal proceedings. This provision, of course, can be regarded as a defect. However, the conditions for the adoption of constitutions in African countries, the orientation of their texts on the humanitarian vector explain the fixation of global organizational principles of power and the gaps in the procedural fundamental aspects.

The special sections on the judicial power included in the constitutions of the Democratic Republic of the Congo, Liberia and Madagascar noted the variability of principles, their prevailing number within the framework of the judicial aspect, as well as the status of judges.

We believe that the presence and diversity of the principles sought in African constitutions is a progressive fact, but the logic of their formalization is subject to objective criticism.

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6 \* Although the regulations for the authors of this journal require the full names of the authors to be added to this list of references, unfortunately in some cases the source of origin only places the initial of the name. For this reason, in some cases only the initial of the name is added.

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