

CONSTITUTIONAL EXPERIMENT: REGULATORY APPROACHES IN FRANCE AND SPAIN

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Abstract

Purpose: The article is devoted to the study of the constitutional experiment features in France and Spain. The author analyzes the regulations, including the constitutions and laws of both France and Spain. It also provides the analysis of constitutional regulation methods in these countries.

Methodology: The methodological basis of the study was the set of scientific knowledge leading methods. The methods of analysis and synthesis are widely used among general scientific ones, formal legal and comparative legal methods are among private scientific ones.

Result: The analysis of approaches to the formalization of the constitutional-legal experiment on the example of two European countries - France and Spain - showed the difference in corresponding models and levels. France developed the system of the state constitutional legal experiment regulation at the level of the Constitution and other legal acts (organic law, regulations, etc.), taking into account the corrective law-enforcement practice of constitutional control body - the Constitutional Council. The implementation of constitutional legal experiments in France was associated with the decentralization of power, the activities of public scientific and cultural institutions, criminal justice, social policy, etc.

Applications: This research can be used for universities, teachers, and students.

Novelty/Originality: In this research, the model of Constitutional Experiment: Regulatory Approaches in France and Spain is presented in a comprehensive and complete manner.

Keywords: *Legal Experiment, Constitutional Law, Constitutional System Basis, Constitutional Experiment, Constitutions.*

INTRODUCTION

Constitutional science has not developed yet a consistent definition of the legal experiment, despite the growing interest in its study ([Zagaynova, et al. 2018](#), [Zagajnova, 2018](#)). We suppose that the following is quite suitable as a reference definition: a legal experiment is the approbation of proposed legislative innovations on a limited scale organized by a competent law-making body to test the effectiveness, usefulness, and economy of experimental legal norms and to develop the optimal options for future law-making decisions of general action. Such an interpretation of the experiment allows, in our opinion, to reveal the general and the particular in state approaches to the legal experiment formalization ([Zagaynova, et al. 2018](#), [Zagajnova, 2018](#)).

The study of the legal experiment by constitutional law is carried out by the development of such terminological series as the “legal experiment goal”, “the legal experiment function”, “the experimental legal process”, “the stage of the experimental legal process”, as well as the study of experimental activities in countries and their subjects ([El'cov, 2009, p. 12](#)). However, the scientific developments of this problem do not always cover the arrays of normative acts of individual states. We consider it interesting to cover this problem using the example of France and Spain. Being unitary, but decentralized states, they determined the levels of experiment formalization and regulation fundamentally differently.

METHODS

The methodological basis of the study was the set of scientific knowledge leading methods. The methods of analysis and synthesis are widely used among general scientific ones, formal legal and comparative legal methods are among private scientific ones.

RESULTS AND ITS DISCUSSION

The study of the procedure consolidation concerning the conducting, the content and the outcome of the state-legal experiment in the French Constitution is of great scientific and practical interest.

In 2003, the following provisions on the experiment were reflected in the French Constitution: [Carcassonne and Guillaume, 2014, pp. 194-195](#)).

1. the law and the regulations may contain the experimental provisions for a limited subject and a limited period (Article 37.1);
2. under the conditions provided by organic law, and with the exception of cases when the basic conditions of a public

freedom or a right are guaranteed by the Constitution, the territorial groups or their associations, depending on the case, and when this is provided by law or regulation, may break legislative or regulatory provisions governing the exercise of their powers as an experiment on a limited subject matter and for a limited period (Part 4 of the Article 72).

These provisions were introduced into the Constitution within the framework of the reform of 2003, aimed at the decentralization of power. However, prior to these amendments to the Constitution, the practice of regulatory and administrative experiments was developed in France. [Carcassonne and Guillaume, 2014, pp. 194-195](#)).

France has a certain history of regulatory experiments:

1. During the late 1960s the State Council agreed on the possibility of legal experiments within the competence of the executive power, establishing clear conditions for its conduct, as well as for the evaluation of its results;
2. Legalization of abortion in 1974 [Carcassonne and Guillaume, 2014, pp. 194-195](#)).
3. The legal position of the Constitutional Council - the body of constitutional control in the case of "public scientific and cultural institutions" in 1993, consisting of the fact that legal experiment is the deviation from the rules, allowing the legislator the possibility of experimental standard introduction. In this case, the Constitutional Council indicated the following requirements for the experiment:
 - Its legal certainty - the "essence" and the "limits of action" of the law, the cases to which it applies, must be defined fully;
 - The temporary nature of the measures - the obtained results are introduced as the changes to the legislation;
 - The obligatory fixation of criteria and the order of experimental measure effectiveness;
4. The legal position of the Constitutional Council on the "Corsica case" in the resolution of 2002 ([Decision, 2001](#)), which does not deny the possibility of a legal experiment to territorial entities on the issues regulated by French law in order to ensure the implementation of the Republic territory indivisibility and equality principle. [Constitución, 1978](#))

The amendments made to the French Constitution in 2003, regulating the conduct of the experiment, contain less stringent requirements for its conduct. Thus, article 37.1 indicates only the subject and the date of the experiment conduct among the requirements of the experiment constitutionality. Thus, this amendment freed the legislative and the executive authorities from the need to establish the criteria and the procedure for the experiment's effectiveness evaluation. Also, this article does not indicate the need to respect the principle of law equality. The State Council, giving the opinion on the draft of these amendments to the Constitution, criticized this version of the Article 37.1 of the Constitution, and proposed to supplement it with the provision that the experiment "should not prevent the equality principle application." Besides, these changes to the Constitution were criticized by French constitutional law ([Carcassonne and Guillaume, 2014, pp. 194-195](#)).

At present, the Constitutional Council, guided by the text of the new Constitution, which resolves legislative experiments that deviate from the general legal principle of equality, controls that the experiment subject matter and the date of completion are determined by law. Thus, it recognized those law provisions that allow the executive authorities to set the end date of the experiment independently as unconstitutional ([Decision, 2009](#)). At the same time, the Constitutional Council decided to check whether the conduct of the experiment violates other "provisions of constitutional significance" ([Dubut, 2009, pp. 749-764](#)).

In accordance with Article 37.1 of the Constitution, a number of experiments were carried out in French legislation. In particular, Law No. 2011-939 issued on August 10, 2011 provides for the experiment with the participation in criminal proceedings within certain categories of assessor cases. The experiment was to be conducted from January 1, 2012, in two courts of appeal at least, and from January 1, 2014, in ten courts of appeal at least. The right to choose these courts was granted to the Minister of Justice. [Constitución, 1978](#)) The Constitutional Council considered that the subject and the conditions of this experiment were determined and indicated that the appeal courts in the district of which the experiment will be conducted will be determined by the judiciary body. This experiment failed, as follows from the report of the advocates-general at the Court of Cassation of France (L'experimentation). The experiment was terminated early in 2013 by the decree of the Minister of Justice (URL: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027199869&dateTexte=&categorieLien=id>).

About 40 experiments were initiated in France from 2012 to 2015. More than half of them were related to social policy legislation (the fight against unemployment, housing policy), the remaining half was represented by state regulation of the economy and the reduction of various administrative barriers. [Zagaynova, et al. 2018, Zagajnova, 2018](#)).

The amendments to Part 4 of the Article 72 of the French Constitution in 2003, unlike its Article 37.1, fix the possibility of an experiment conduct, determining its subject and date, leaving the decision on its conduct at the discretion of the respective administrative-territorial entities - communes, departments, regions, as well as their associations. At that, the Constitution establishes more restrictive conditions for the implementation of experiments, in contrast to the acts of administrative-territorial entities, characterized by: [Zagaynova, et al. 2018, Zagajnova, 2018](#)).

- The absence of public freedom violations (individual and collective rights enshrined in constitutional legal acts);

- The scope of the experiment - both independent and delegated competence of administrative and territorial entities;
- The determination of the requirements for the experiment that is of great legal force in regulatory legal acts. ([Constitución, 1978](#))

At that, the general conditions for local legal experiment conduct are reflected in Organic Law No. 2003-704 issued on August 01, 2003 ([Loi organie, 2003](#)). This law states that the law authorizing the conduct of an experiment should evaluate the characteristics of the administrative-territorial entities participating in the experiment. The maximum validity period of the experimental norms is also set and makes no more than five years. After the expiration of this period they become invalid. In order to start the procedure for an experiment, a representative body of any administrative-territorial unit that meets the parameters of some participant in the experiment must apply with a reasoned decision to participate in the experiment. Then the Government of the Republic, having checked the observance of the requirements specified in the regulatory legal acts, adopts the decree indicating the administrative-territorial entity which is allowed to participate in the experiment. Thus, in thirty-four departments of France (out of ninety-nine), the experiment was conducted to ensure the minimum income for the unemployed and stimulate the population employment. Then in 2015 the experiment took place on the application of social tariffs for water supply, taking into account the population composition and income.

Another regulation of the legal experiment exists in Spain. The difference is that the Spanish Constitution of 1978 does not contain the rules concerning the experiment ([Constitución, 1978](#)). At that, we believe that “legal experiments can also include the situations where one or another social and legal institution is introduced as an experimental factor” ([Zagajnova, 2017, p. 69](#)).

However, a brief commentary on Article 1 of the Spanish Constitution of 1978, posted on the official portal of the Congress of Deputies of Spain, states that the state should act not only as a regulator but also as a manager and a distributor in the relevant areas. A direct consequence of this approach is the wider implementation of Spanish state policy in such traditional areas as education, health care and social security, more intensive state intervention in the areas of labor and the economy, urban planning and housing, environmental protection, culture and media activities, as well as the provision of special protection for those citizens who need it (Sinopsis artículo 1). Therefore, the legal experiment in Spain is carried out by regulatory legal acts of the regions only in this perspective exclusively.

In particular, according to the Part 1 of the Article 28 of the Organic Law of Spain ([February 25, 1983](#)) No. 3/1983 “The Charter of the Community of Madrid Autonomy” ([Ley Orgánica, 1983](#)), the Community of Madrid ensures the implementation of Spanish national legislation, also in such areas as public health and independent management of social service provision under the social security system. ([Zagaynova, et al. 2018, Zagajnova, 2018](#)).

In accordance with the Article 10 of the Organic Law of Spain (March 19, 2007) No. 2/2007 "On the Reform of Andalusia Autonomy Statutes", the Autonomous Community of Andalusia helps to create the conditions for the freedom and the equality of individuals and groups of individuals and ensures the quality of democracy, as well as promotes the elimination of any kind of discrimination. Accordingly, for this purpose, the Autonomous Community of Andalusia independently performs, in particular, such basic tasks as population full employment, labor safety provision, and the provision of the balance between family life and population working life; the provision of access to education for the people of Andalusia; improving the quality of population life, including the protection of the environment; the social, economic and labor integration of persons with disabilities and migrants, as well as other tasks.

According to the part 1 of the article 23 of the "Organic Law of Spain" (April 20, 2007) No. 5/2007 “On Aragon Autonomy Charter Reformation” ([Ley Orgánica, 2007](#)), the public authorities of Aragon should promote a social cohesion of the population, ensure personal and social development, eliminate the causes and the consequences of the population marginalization, through the provision of base-level income guarantees.

According to the clause “a” of the Article 24 of the Organic Law of Spain (April 20, 2007) No. 5/2007 “On Aragon Autonomy Charter Reformation”, public authorities must implement their policies, in particular, to achieve the goal of life quality and well-being improvement among the entire population. ([Zagaynova, et al. 2018, Zagajnova, 2018](#)).

According to Article 27 of the "Organic Law of Spain" (April 6, 1981) No. 1/1981 “The Constitution of the Autonomy of Galicia”, the provision of social assistance makes an exclusive competence of the Autonomous Community of Galicia.

The Article 33 of the "Organic Law of Spain" (April 6, 1981) No. 1/1981 “The Constitution of the Autonomy of Galicia” (URL: <https://www.boe.es/buscar/act.php?id=BOE-A-1981-9564&tn=1&vd=&p=20100717&acc=Elegir>) contains the provisions relating to the rather broad powers of this autonomous community on rule-making in the field of health and social security.

CONCLUSION

The analysis of approaches to the formalization of the constitutional-legal experiment on the example of two European countries - France and Spain - showed the difference in corresponding models and levels.

France developed the system of the state constitutional legal experiment regulation at the level of the Constitution and other legal acts (organic law, regulations, etc.), taking into account the corrective law-enforcement practice of

constitutional control body - the Constitutional Council. The implementation of constitutional legal experiments in France was associated with the decentralization of power, the activities of public scientific and cultural institutions, criminal justice, social policy, etc. [Zagaynova, et al. 2018](#), [Zagajnova, 2018](#)).

Unlike France, the legal experiment in Spain, not being reflected at the constitutional level, is mediated by organic laws and the regional statutes. The implementation of legal experiments in Spain is associated primarily with the social sphere, where the “experimental” accents are placed by the autonomies themselves and are reflected in their charters.

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