

## MEASURES OF CONSTITUTIONAL LEGAL ENFORCEMENT IN THE CONSTITUTIONAL LAW OF BRAZIL

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The subject. The article is devoted to different measures of constitutional legal enforcement in the constitutional law of Brazil, their analyzing, depending on main goal of coercion.

The purpose of the paper is to extend constitutional knowledge about measures of constitutional legal enforcement and to demonstrate generic character of constitutional legal enforcement theory for different countries.

The methodology of the study includes general scientific methods (analysis, synthesis, description) and legal methods.

The main results and scope of their application. The author describes different measures of constitutional legal enforcement in the constitutional law of Brazil. Constitutions of foreign countries contain various measures of constitutional coercion as the main way to resolve constitutional conflicts.

Among the measures of constitutional and legal coercion enshrined in the Brazilian Constitution are: holding the President accountable for abuse of power; temporary termination of the powers of the President of the Republic during the process of bringing him to justice; prohibition of the President and Vice-President of the Republic to leave the territory of the country for a certain period without the approval of the Parliament; recognition by the National Congress of the positions of the President and Vice-President as vacant if they fail to exercise their constitutional powers within 10 days of taking office; holding new elections when the positions of the President and Vice-President are declared vacant if they fail to exercise their constitutional powers within 10 days from the date of taking office.

Conclusions. Depending on the constitutional system, the history of the state, measures of constitutional coercion may be different in content, but it remains possible to classify such measures depending on the main purpose of their application. The system of measures of constitutional legal enforcement, including measures of prevention, suppression, restoration, responsibility and security is applicable not only for the Russian constitutional law, but also for constitutional law of foreign countries, in particular, Brazil.

## 1. Introduction.

Previously, we justified the concept of the existence of a special type of coercion in constitutional law, which is not reduced to the existing types of legal coercion of punitive branches of law [1; 2].

In the last decade of the XX century – the beginning of the XXI century in connection with the study of constitutional and legal responsibility in the scientific literature, the first mention of a more diverse specific coercive influence in constitutional law is the legal coercion [3, p. 234].

Currently, a large number of studies on certain aspects of constitutional and legal coercion have been undertaken in Russian science. A significant contribution to the study of theoretical problems of constitutional and legal coercion was made by Zh.I. Hovsepyan's monographic research "Legal responsibility and state coercion (General Theoretical and constitutional and legal research)". Certain issues of constitutional and legal coercion became the object of dissertation research conducted by P. V. Smirnov (2005) [4], I. S. Surkova (2008) [5] and N. Yu. Davydova (2011) [6]. These authors considered measures of constitutional and legal coercion in the electoral law, as well as individual measures of constitutional and legal coercion applied to state authorities of the subjects of the Federation and local government bodies and officials. In 2015, the author attempted a comprehensive study of constitutional and legal coercion [7].

Constitutional and legal coercion is a branch type of legal coercion, it is a system of measures of power applied to subjects of constitutional law for the prevention and resolution of constitutional and legal conflicts in a special order established by the norms of constitutional law.

In this approach, the essence of constitutional and legal coercion is the power influence on

the constitutional and legal status of the subject of legal relations in order to prevent and resolve constitutional and legal conflicts, which does not include ideological forms of influence of law on the legal consciousness of such subjects. The last element of the essence of constitutional and legal coercion is intended to distinguish this phenomenon from the impact of legal norms on the legal consciousness in a broad sense.

The system of constitutional and legal coercion is proposed to be considered as a set of the following measures, identified by the criterion of their main purpose:

- measures of constitutional and legal prevention;
- measures of constitutional and legal restraint;
- measures of constitutional and legal restoration (protection);
- constitutional and legal responsibility;
- interim measure.

Measures of constitutional-legal prevention, suppression, restoration (protection) cannot be considered as measures of constitutional-legal responsibility, due to the different purposes and grounds for their application.

Examples of various measures of constitutional and legal coercion can be found in many constitutions and acts of constitutional legislation of foreign countries, which will allow us to formulate a hypothesis about the universality of this type of legal coercion, regardless of the constitutional configuration of a particular state.

In this regard, the following article will present and analyze various measures of constitutional and legal coercion found in the constitutional law of foreign countries, in particular, in the constitutional law of Brazil.

## 2. Measures of constitutional and legal prevention in the Constitution of Brazil.

The current Constitution of Brazil is an interesting example of the latest democratic constitutions, in which the legislator aimed to

implement the most detailed constitutional and legal regulation of various spheres of society. The Constitution of Brazil is an original, specific constitutional legal act, worthy of the closest attention and research of constitutional scientists.

The current Constitution of Brazil is the eighth in the history of the country's constitutional development. It was adopted in 1988 after a long military rule and a subsequent transition period of development. In General, the Constitution of Brazil is a lengthy and detailed document, containing 245 articles of the main text and 70 articles of transitional provisions.

In accordance with articles 76 and 77 of the Brazilian Constitution, Executive power is exercised by the President of the Republic, the Vice-President and the Ministers of state.

Under article 83 of the Brazilian Constitution, the President and Vice-President of the Republic may not leave the country for more than 15 days without the permission of the national Congress.

At the same time, the Brazilian Constitution refers to the exclusive competence of the National Congress (Parliament) to allow the President and Vice-President of the Republic to leave the country when it comes to their absence for more than fifteen days.

The prohibition of senior Executive officials from leaving the territory of the country may be qualified as a measure of constitutional and legal coercion aimed at:

- to prevent constitutional and legal conflicts related to the violation of the principle of separation of powers, since the Executive branch will not be represented due to the actual absence of the President and Vice-President of the Republic;
- to prevent constitutional and legal conflicts related to the seizure of power and military coup that have already occurred in the history of Brazil;
- to prevent constitutional and legal conflicts related to violations of the rights and freedoms

of citizens due to the failure of the President to fulfill his constitutional duties, for example, the timely signing and promulgation of laws affecting the rights and freedoms of man and citizen; the exercise of command over the armed forces and defense of the country in the event of military aggression during the absence of the President and Vice-President; the untimely introduction of a state of emergency, etc.

A similar measure of constitutional and legal coercion related to the constitutional prohibition of the head of state to leave the country's territory is contained in the Constitution of the Kingdom of Norway .

According to section 3 of the Constitution of Norway, the Executive power belongs to the King or Queen, but according to section 11 of this section, the king must reside in the state and cannot stay outside the state for more than six consecutive months without the consent of the Storting (Parliament); otherwise, he loses the right to the Crown.

A similar measure of constitutional and legal prevention is also enshrined in article 93 of the Constitution of Bolivia of 1947 , according to which the President of the Republic, who heads the Executive branch, has no right to leave the territory of the state without the consent of the Congress, regardless of the period during which the extraterritorial stay of the President of Bolivia is planned.

### **3. Measures of constitutional legal responsibility and its enforcement in the Constitution of Brazil.**

The General purpose of measures of constitutional and legal responsibility is to punish a subject that has a constitutional and legal status.

Constitutional and legal liability is retrospective. In this issue, it is necessary to agree With G. A. Gadzhiev that when in the 80s of the XX century there was a dispute about whether it was

possible to include retrospective (negative) and positive legal responsibility in a single concept of responsibility, this was not possible [8, p.7-8; 9, p. 25].

O. S. Ioffe spoke very eloquently on the issue of dividing legal responsibility into positive and negative. He noted that the scientific effectiveness or practical effectiveness of such a classification (in terms of highlighting positive responsibility) can only be counted on "with a very hypertrophied tendency to optimism". Without breaking with the real needs of life, it is difficult to predict the chances of success of this classification, because in such a description of responsibility, no other than retrospective, can be, and in nothing else, except as a sanction for what has already been done, it is impossible to embody [10, p. 165, 168].

Some foreign constitutions provide for special, non-ordinary forms of tort that are the basis for applying measures of constitutional and legal responsibility.

Thus, in accordance with article 85 of the Constitution of Brazil, which is located in Section III of the Constitution "On the responsibility of President of the Republic" constitute the composition of the crime of abuse of power, acts of the President of the Republic, infringes on the Federal Constitution and especially on the existence of the Union; the free exercise of the legislative power, the judiciary, prosecutors and the constitutional powers of the Federation; the exercise of political, personal and social rights; internal security of the country; honesty in the administration; enforcement of laws and court decisions.

As we can see, this crime is not an ordinary composition, but at the same time contains the object of the crimes (above-mentioned constitutional values), the subject of the crime (the President of the Republic) and the objective side (the adoption of acts of the President of the Republic), however, did not characterize the subjective party of abuse of

power. In this connection, it is necessary to conclude that the question of the guilt of the President of the Republic does not have legal significance for resolving the issue of bringing him to constitutional and legal responsibility for abuse of power. This circumstance is also a distinctive feature of constitutional and legal liability, in contrast, for example, to administrative and criminal liability, which are impossible without guilt.

Besides, the Brazilian Constitution divides responsibility of the President under common compounds to which it attracts judicial power in a Federal Supreme court, and the abuse of power that it attracts the Federal Senate (the house of the National Congress).

It should be noted that on the issue of attributing the removal of the President to measures of constitutional and legal responsibility, there is a relative unity of opinion in Russian science. In particular, V. O. Luchin considers the removal from office of the President of the Russian Federation as a measure of constitutional and legal responsibility [11, p. 359.]. This point of view is also held by E. E. Zherebtsova [12, P. 61-62], G. A. Trofimova [13, p. 17-22], M. V. Gligich-Zolotareva [14, p. 34-38], D. I. Nazarov and I. S. Nazarova [15, p. 16], A. A. Kondrashev [16, p. 146], etc.

When applying measures of constitutional legal responsibility to the President of the Republic, the Brazilian Constitution provides for measures of constitutional and legal enforcement of such measures of constitutional and legal coercion.

In particular, measures of constitutional and legal enforcement are applied in order to ensure strict compliance by instances of constitutional and legal coercion with the procedural form of applying measures of constitutional and legal coercion or other types of legal coercion.

In accordance with article 86 of the Constitution of Brazil the President of the Republic temporarily terminates his functions in the following cases:

- for common-law violations where the Federal Supreme court has agreed to hear the charge or complaint;

- when committing a crime that qualifies as abuse of power, after the start of the process in the Federal Senate.

The termination of the President of the Republic's functions is intended to minimize the possibility of his administrative influence on the legislative or judicial authorities that are considering bringing the President to justice.

However, if the relevant case is not completed within one hundred and eighty days, the President resumes his duties without prejudice to the ongoing process of bringing him to justice, which guarantees the exercise of legitimate Executive power in the country.

According to article 79 of the Brazilian Constitution, the Vice-President replaces the President when there are obstacles to the latter's performance of his duties, and takes his post when it becomes vacant.

These provisions of the Brazilian Constitution on the temporary removal of the President from office and on the responsibility of the President are not dormant and are applied in the constitutional practice of Brazil. So, on May 12, 2016, as a result of the procedure for bringing to justice, the President of Brazil, Dilma Rousseff, was suspended from office for 180 days. Vice-President Michel Temer became the interim President of the country in accordance with the Constitution. On August 31, 2016, the Federal Senate of Brazil, by a vote of 61 to 20, decided to terminate the presidential mandate of Dilma Rousseff due to abuse of Presidential power. On the same day, Vice President Michel Temer was officially inaugurated As President of Brazil.

#### **4. Measures of constitutional and legal suppression and restoration under the Constitution of Brazil.**

In the event of a constitutional-legal conflict before its material consequences, measures of constitutional-legal suppression are used to stop illegal behavior.

Unlike the measures of constitutional and legal warning is that the measure of restraint applied at the already begun constitutional-legal conflict, i.e. at the time of regulatory impact they apply to late prevention.

In this regard, it should be noted that different measures of constitutional and legal coercion may have different goals. Since, for example, the goal of law as a social regulator is General prevention, therefore, to some extent this goal will be contained in all measures of constitutional-legal coercion, but in a separate measure it will be dominant – the measure of constitutional-legal prevention. Therefore, the classification in the framework of the constitutional-legal coercion was carried out according to the criterion of dominant purpose, without limiting the presence to some extent other objectives in relevant policies constitutional and legal coercion.

Thus, it is impossible to agree with A. A. Petrov that the presence in a specific measure of constitutional-legal coercion of signs (goals) that are both characteristic of prevention, suppression, responsibility and restoration, generates a new complex measure of constitutional-legal coercion [17, p. 14]. We believe that in each specific measure of constitutional and legal coercion, along with others, there is a dominant goal that determines the meaning and content of its regulatory impact on constitutional legal relations.

For example, under article 78 of the Brazilian Constitution, the President and Vice-President of the Republic take office at a meeting of the National Congress, at which they take the oath of office. If the President or Vice-President does not take office within ten days of taking office, except in cases of force majeure, their positions will be declared vacant. According to Article 81 of the Constitution of Brazil, if the offices of

President and Vice-President of the Republic are vacant, the national Congress shall call elections within ninety days of the opening of the last vacancy.

Thus, if the President and Vice-President actually fail to exercise their constitutional powers, a constitutional and legal conflict arises, resulting in a violation of the balance of branches of power, violation of the rights and freedoms of citizens, and a threat to the national security of the country. In this regard, the Constitution provides a mechanism for suppressing such negative consequences of unconstitutional inaction of senior Executive officials in the form of declaring posts vacant and holding new elections.

Thus, recognition by the National Congress of Brazil President and Vice-President vacant seeks a speedy end to the illegal exercise of Executive power in the country.

A new election of the President and Vice-President is a measure of constitutional restoration, since it restores the constitutional right of citizens to elect the President and Vice-President, who exercise Executive power in accordance with the constitutional principle of separation of powers. The appointment of new elections in this case does not prevent the constitutional and legal conflict, since its development was stopped by the National Congress when the relevant positions were declared vacant. In this connection, only the application of measures of constitutional and legal coercion aimed at eliminating the consequences of such a conflict was required later.

## **5. Conclusions.**

The constitutions of foreign countries contain various measures of constitutional and legal coercion as the main method of resolving constitutional and legal conflicts, which is due to the conflictological essence of the Constitution as the main law of the country.

Depending on the constitutional system and the history of state development, measures of constitutional and legal coercion may differ in content, but it is still possible to classify such measures depending on the main purpose of their application.

Consequently, the system of measures of constitutional and legal coercion, including measures of prevention, suppression, restoration (protection), responsibility and enforcement, is fair not only for Russian constitutional law, but also applicable in the constitutional law of foreign countries, in particular, Brazil.

Among the measures of constitutional and legal coercion enshrined in the Brazilian Constitution are:

- holding the President accountable for abuse of power;
- temporary termination of the powers of the President of the Republic during the process of bringing him to justice;
- prohibition of the President and Vice-President of the Republic to leave the territory of the country for a certain period without the approval of the Parliament;
- recognition by the National Congress of the positions of President and Vice-President as vacant if they fail to exercise their constitutional powers within 10 days from the date of taking office;
- - holding new elections when the positions of the President and Vice-President are declared vacant if they fail to exercise their constitutional powers within 10 days from the date of taking office.

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