

## The Role of the Constitutional Court in the Implementation of the Principle of Checks and Balances System

*El papel de la Corte Constitucional en la implementación del principio del sistema de cheques y balances*

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### Abstract

The article deals with the analysis of the place and role of the Constitutional Court in the system of separation of powers, for the effective implementation of the system of checks and balances. The institutional and legal model of interaction of constitutional justice authorities with legislative and executive bodies is formulated on the basis of the comparative legal analysis of the regulatory legal acts establishing the powers of constitutional jurisdiction authorities in the mechanism of implementation of the system of checks and balances on the example of different countries with different forms of government, a number of conclusions and suggestions are provided.

On the basis of the conducted sociological survey, the author comes to the conclusion about the special level of efficiency of separate powers of constitutional justice authorities. This includes the possibility of applying the procedure for resolving conflicts between public authorities, which prescribes that in case of doubt about the powers of a state authority regarding the rights and obligations granted to it by the Constitution, the latter has the right to appeal to a constitutional jurisdiction authority; consideration by the constitutional justice authority of cases arising as a result of parliamentary, presidential elections or referendum; making a decision by the constitutional jurisdiction authority on bringing the President, ministers and other state officials to justice for violating the constitution; a mandatory interpretation of the law in order to resolve inconsistencies in the field of political powers.

**Keywords:** Constitutional Doctrine, Constitutional Justice, System of Checks and Balances, The Principle of Separation of Powers, The Constitutional Court.



## Resumen

El artículo trata del análisis del lugar y rol del Tribunal Constitucional en el sistema de separación de poderes, para la implementación efectiva del sistema de frenos y contrapesos. El modelo institucional y legal de interacción de las autoridades de justicia constitucional con los órganos legislativos y ejecutivos se formula a partir del análisis jurídico comparado de los actos jurídicos regulatorios que establecen las competencias de las autoridades de la jurisdicción constitucional en el mecanismo de implementación del sistema de frenos y contrapesos. sobre el ejemplo de diferentes países con diferentes formas de gobierno, se proporcionan una serie de conclusiones y sugerencias.

Sobre la base de la encuesta sociológica realizada, el autor llega a la conclusión sobre el nivel especial de eficiencia de los poderes separados de las autoridades de justicia constitucional. Esto incluye la posibilidad de aplicar el procedimiento de resolución de conflictos entre autoridades públicas, que prescribe que en caso de duda sobre las competencias de una autoridad estatal en relación con los derechos y obligaciones que le otorga la Constitución, ésta tiene derecho a recurrir ante un autoridad de jurisdicción constitucional; consideración por la autoridad de justicia constitucional de casos que surjan como resultado de elecciones parlamentarias, presidenciales o referéndum; tomar una decisión por parte de la autoridad de jurisdicción constitucional sobre llevar ante la justicia al presidente, los ministros y otros funcionarios estatales por violar la constitución; una interpretación obligatoria de la ley para resolver inconsistencias en el campo de los poderes políticos.

**Palabras clave:** Doctrina Constitucional, Justicia Constitucional, Sistema de Frenos y Contrapesos, Principio de Separación de Poderes, Tribunal Constitucional.



## **Introduction**

On March 20, 2020, the 15th Congress of the Bureau of the World Conference on Constitutional Justice was held in Strasbourg, France. The Congress was attended by 73 delegations of the Constitutional Courts of the countries, as well as 3 international tribunals. The Congress addressed the issue of Constitutional Justice and Social Integration, as well as included discussions on such issues as constitutional documents that strengthen the level of social integration; the role of constitutional justice in the system of ensuring the implementation of the principle of checks and balances.

The interest of the international community in the problems of constitutional justice and determining the place of the Constitutional Courts in the implementation of the principle of checks and balances is due to the fact that the supreme principle of existence and functioning of a democratic society and the rule of law is the supremacy of the Constitution, which is also the main point of constitutional control. As Mollers (2013) note that the content and forms of constitutional control in different legal systems are different. At the same time, constitutional control is exercised in the field of checks and balances, and its main objective is to identify, assess and restore the disturbed balance. Constitutional control does not allow the irrational reproduction of functional disorders or the accumulation of negative social energy, which, gaining critical mass, can lead to a new social explosion. In practice, this is a choice between dynamic, evolutionary or revolutionary development (Britannica, 2019).

According to Petriv (2020), constitutional control is designed to exclude revolutionary nature and social cataclysms. In other words, constitutional control is a means and an opportunity to ensure the stability of society through its consistent and continuous functioning. And this is extremely important for a transitional society. The activity of constitutional courts is also an incentive for constant improvement of the system of state power and harmonization of dynamic social relations. According to Sadurski (2014), the activity of constitutional courts forms a taste for public opinion and high quality of public consciousness. It plays a serious preventive role, when, acting clearly, it encourages lawful, constitutional behaviour in not only public authorities, but also every member of society.

Blagojević (2017) believes that the Constitutional Court, as a public authority with all its characteristic features, still has a special legal nature.

First, it is a body of justice that specializes in resolving constitutional and legal issues. These are primarily constitutional and legal disputes: the interpretation and application of the Constitution, as well as the issues of the powers of public authorities and local self-government. On this basis, Kosař and Vyhnaněk (2020) consider constitutional control from the standpoint of limiting power and resolving conflicts regarding constitutional powers. Second, the Constitutional Court ensures the supremacy and direct action of the Constitution throughout the state and in relation to all subjects of law. This is the main duty of the Constitutional Court, while only the observance of and obedience to the Constitution is sufficient for most public authorities. The uniqueness of the mission of the Constitutional Court is that it is the only public authority whose direct responsibilities include the subordination of politics to law, political actions and decisions to constitutional and legal requirements and forms (Cloots, 2016).

The role of constitutional justice in the political process is enormous. At the same time, judicial constitutional control is designed to address issues of law only, and under no circumstances should give preference to political expediency, try to assess the actions of representatives of different political systems outside the legal forms (Halmai, 2018). The Constitutional Court acts not only as an arbiter of political powers and political decisions, but also as a guarantor of the observance of existential rights of the social order organized in the state. According to Halmai (2017), this function of the Constitutional Court does not arise at the behest of any government institution, but is directly entrusted to the Constitutional Court by law, the highest law of the state — the Constitution.

The purpose of specialized institutions of judicial constitutional control is that the Constitutional Court is created and operates to protect the foundations of the constitutional order, fundamental human and civil rights and freedoms, ensure the supremacy and direct action of the Constitution, as well as protect political and legal values proclaimed and guaranteed by the Constitution. After all, it is in a transitional society that the Constitutional Court is called upon to prevent the usurpation of state power, to constantly maintain a condition in which power limited by law only is possible. It can be determined that the Constitutional Court is the main body of state power, which provides for the restriction of state power itself in favour of the principles of law. Nothing, no dogmas about the separation of powers, people's sovereignty, no classical schemes of the judiciary should press down an objective, comprehensive study of the essence of constitutional justice. As the Constitutional Court performs the function of



subordinating political decisions to the law, it guards the deep values and interests of society, while ensuring the “gradual extinction” of those that hinder the dynamic development of this society.

The Constitutional Court performs the function of social stabilization and guarantees the legitimacy of the process of formation and application of political power. The Constitutional Court, in this case and within certain limits, creates law, determining trends in legislation, creating precedents for the interpretation of the Constitution and laws, filling gaps in the Constitution itself. After all, the only legal act that binds the Constitutional Court in considering and resolving cases is, in fact, the Constitution, which is a set of general principles of law and abstract norms — the objects of interpretation. The interpretation of principles and norms of such a universal nature and such a high rank as constitutional ones gives, in a sense, the Constitutional Court constitutive power, and gives its acts a constitutional-attributive nature (Bricker & Wondreys, 2018).

Achieving these goals is the objective of the Constitutional Court, i.e. the administration of constitutional justice, and thus reveals the legal nature, purpose and place of the Constitutional Court in the system of state power, and determines the nature of measures taken to improve the efficiency and effectiveness of constitutional justice.

The goal of this research is to choose the optimal functional model of constitutional justice and the arsenal of legal means it is provided with in the implementation of the principle of checks and balances of the state.

To achieve this goal, it is necessary to achieve a number of research objectives:

- conduct a comparative analysis of constitutional acts that regulate the activities of the Constitutional Court (Constitutional Assembly, Supreme Court) of countries with different forms of government;
- conduct a comparative analysis of the scope of powers of the Constitutional Courts in the system of checks and balances;
- conduct a social survey of practicing lawyers of the surveyed countries aged 25 to 65 in order to assess the effectiveness of the Constitutional Court;
- based on the results of the study, form a model of interaction of the Constitutional Court with the legislative and executive authorities in order to implement the principle of checks and balances.

### Literature review

We base our research on the belief that it is impossible to build a democratic society based on the rule of law. World experience shows that such an approach leads to authoritarianism and dictatorship in its various manifestations. According to Garoupa (2020), constitutional control will inevitably come into conflict with social practice if it is aimed at ensuring the rule not of natural rights and human freedoms, but the rights of authorities. Albert (2017) considers it necessary to enshrine the provision that the state recognizes and respects universally recognized human rights and freedoms as the highest human values in the Constitutions of the studied states, emphasizing that in exercising power the people and the state are limited by these rights and freedoms as by applicable law directly.

According to a comparative analysis of Bentsen, Mark and Skiple (2019), the constitutions of many countries have this formulation. The issue of separation of powers is also fundamental. Article 5 of the Constitution of Armenia (Constitution of the republic of Armenia (with the Amendments of 27 November 2005) stipulates that “state power is exercised in accordance with the Constitution and laws — on the basis of the principle of separation of legislative, executive and judicial powers.” Such wording is not common in world practice. In most countries, the emphasis is not on the principle itself, but on its implementation, ensuring the separation of powers. For example, the Constitution of Italy (Costituzionedella Repubblica Italiana) states that “state power is exercised on the basis of its division into legislative, executive and judicial. Legislative, executive and judicial bodies are independent.” Moreover, in the constitutions of many countries the emphasis is on interdependence / Portugal, Art. 114 /, interaction / Moldova, Art. 6 /, coordinated functioning and interaction / Poland Art. 10 /, balance / Estonia, Art. 4 / of power, etc. This approach seems more justified and provides consistency in the implementation of the principle of separation of powers. According to Vereeck (2018), in order to reveal the content of this principle from the standpoint of constitutional control, it is necessary to answer the question: what are the criteria for assessing the level of implementation of this principle?

According to Bricker (2017), the control over the legislative and executive branches by the judiciary follows from the very principle of separation of powers as one of the main principles of a democratic state. No legal norm and no action of any of the other branches of government, if they affect the interests of any person, can remain outside the control of the judiciary. The judiciary as a whole and the Constitutional Court as its integral part must ensure the fullest possible control over



the other two branches of power. Pellegrina, Garoupa and Saldaña (2018) note that the Constitutional Court, in assessing the conformity of laws with the provisions of the Constitution, implements the principle of the supremacy of the Constitution, thus ensuring constitutional justice. Neither the Constitution, nor the Law on the Constitutional Court gives the Constitutional Court the right to refuse to assess the conformity of any law or other legal norm with the provisions of the Constitution, and none has the right to prohibit the court from exercising its function or restricting the court in exercising it. It is important to ensure that the legislator complies with the limits of his freedom of action not only for the existence of the rule of law, but also for the development of the legal system. The Constitutional Court plays an indispensable role here, because, as Pellegrina, Garoupa and Gómez-Pomar (2017) points out, it is endowed with the exclusive competence — to control the legislator's activities. There is an opinion that one of the special possibilities of the court's influence is its ability to establish the limits of the legislator's freedom of action. In general, they are stipulated by the Constitution, but the Constitutional Court, interpreting the Constitution, clarifies them in each case. This is one of the mechanisms by which the court either directly changes the social, economic and political order, or forces the legislator to do so (Meyer, 2019; Sweet, 2020).

Although the Constitutional Courts generally assess the legislator's freedom of action in various areas

(for example, in the areas of sentencing policy, legal regulation of citizenship, regulation of litigation, ratification of international treaties, education, family life, health and other spheres, in connection with the legislative technique), and in different conditions (for example, during the economic crisis), they develop the doctrine of the legislator's freedom of action in three directions — as regards social rights, in the field of taxes, and decisions in connection with judicial power. Since the responsibilities of the state are different in the context of each fundamental right (fundamental rights have different meanings), the freedom of action granted to the state and, accordingly, the scope of rights subject to review by the constitutional court also differs. And the less freedom the Constitution gives the legislator, the stricter the Constitutional Court needs to control the use of this freedom. Conversely, the wider the legislator's freedom of action, the less the Constitutional Court needs to intervene in its use, as Wendel, Reestman and Claes (2020) argue.

### Methods and materials

The study was conducted for 36 weeks using the methods of conceptual analysis, sociological, comparative law and statistical research methods, and the analysis of the results was conducted in accordance with the objectives of each stage.

The study was carried out in three stages (Figure 1).

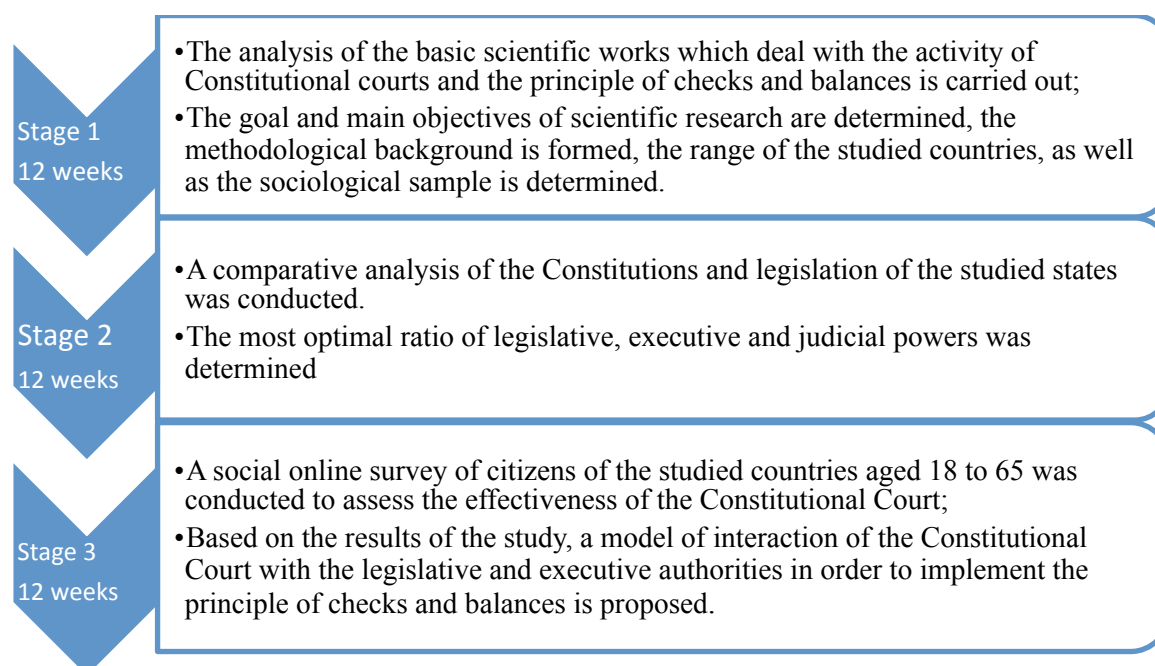


Figure 1. Stages of the study

Source: Developed by the author



At the first stage of the study, information on the role of the Constitutional Court in the implementation of the principle of checks and balances was collected and processed using specific sociological methods (analysis of expert positions, online public survey). The comparative legal method allowed studying international standards and foreign experience in the implementation of the principle of checks and balances by means of constitutional justice.

The method of conceptual analysis deserves special attention in the context of this study, as it is used to reveal the existing mechanisms for implementing the principle of checks and balances and the formation of the concept of effective constitutional justice.

Methodological integrity is used to lay the groundwork for this study and to assess the importance of the effectiveness of constitutional justice from the perspective of citizens. After all, research is conducted contrary to traditional views on the implementation of the principle of checks and balances (methodological individualism), which are dominant in legal science. Constitutional justice is a complex phenomenon that cannot be understood only by assessing it at the individual level. Methodological holism allows us to assess the mechanisms of the general social rather than the individual level (Banfield, 1958), which justifies the use of methodological holism as an approach that considers social phenomena as existing independently. Socio-scientific explanations must always be confirmed, depending on what is happening at the level of individuals.

In the second stage of the study, countries — representatives of different forms of government were selected, and a comparative analysis of the effectiveness of the Constitutional Court's influence on the activities of legislative and executive bodies. For a comparative analysis, the authors chose: parliamentary monarchies — Great Britain, Japan, Canada, presidential republics — USA, Turkey, parliamentary republics — Germany, Poland, mixed republics — Romania, Ukraine.

### Research Design

The empirical background of scientific research is a sociological experiment conducted by the author in the third stage of research. The experiment involves 4 stages: preparatory and organizational; realization; analysis of the data obtained; registration of research results. Since the United Kingdom, Japan, Canada, USA, Turkey, Germany, Poland, Romania, Ukraine are among the countries implementing the principle of checks and balances which are the subject of our research, in the preparatory phase of the sociological experiment

we prepared questionnaires for online survey of 1,800 practicing lawyers of the surveyed countries (200 questionnaires for each country) aged 25 to 65 to assess the effectiveness of the Constitutional Court. Given the number of active practicing lawyers in the surveyed countries, the sample size is 7% of respondents.

The questionnaire contained three questions:

1. Do you think that the constitutional justice authority of your country has a sufficient power to influence the activities of the legislative and executive branches?
2. Do you consider the process of forming the composition of the Constitutional Court of your country to be in line with international principles?
3. In your opinion, have there been cases of illegal influence on the work of the constitutional justice authority of your country by public authorities and their officials?

### Results

Comparative legal analysis of the main models of constitutional justice allows us to conclude that monitoring the observance of the principle of separation of state power, ensuring the effective functioning of the mechanism of checks and balances and neutralization of possible political disputes can be provided by constitutional jurisdiction through the following mechanisms:

- 1) the procedure for forming a system of constitutional jurisdiction bodies largely depends on the form of government and the position of the agency in the national mechanism of checks and balances and can be implemented: by parliament (Poland, Great Britain); government (Japan) parliament and head of state (France, Germany); the head of state and the senate (USA, Romania), the head of state, the executive and the judiciary (Turkey); Ministry of Justice (Canada); legislative, executive and judicial authorities (Latvia); parliament, the head of state and the judiciary (Ukraine and others), etc.
- 2) application of the procedure for resolving conflicts arising between public authorities, according to which in case of doubt about the powers of a public body regarding the rights and obligations granted to it by the Constitution of the state, the latter has the right to appeal to a constitutional jurisdiction. This procedure works effectively in France, Poland, Great Britain, Japan, Canada, the USA, Turkey, Germany and other countries. In total, the relevant procedure is used in 43 countries, but in Ukraine, Romania, and other countries such a procedure is not provided by law;
- 3) consideration of cases arising as a result of parliamentary, presidential elections or referendums by the body of constitutional justice. This practice



exists in Germany, France, the United Kingdom, Japan, Canada, the United States, Turkey, and other countries (a total of 31 countries), but in Ukraine and Poland such disputes are considered by the Supreme Court and do not fall within the jurisdiction of constitutional justice;

4) decision-making by the constitutional jurisdiction bodies to prosecute the President, ministers and other public officials for violating the constitution (effective in Germany, Japan, Canada, USA, Turkey, and other countries). In some countries (Poland, France) special courts on impeachment have been established, in others

(Romania, Lithuania, Russia, Ukraine) this issue, although falling within the competence of the Constitutional Court, the role of constitutional justice bodies in these states is less important in this process;

5) mandatory interpretation of the law in order to resolve inconsistencies in the field of political power. In Ukraine, as in a number of Central and Eastern European countries (Poland, Romania, Bulgaria, Slovakia), the Constitutional Court has such powers, although most Western European countries, the United States and Canada do not have such a procedure (Table 1).

**Table 1.** Comparative analysis of the constitutional justice bodies

Characteristics of the constitutional justice body	Countries								
	parliamentary monarchies			presidential republics		parliamentary republics		mixed republics	
	UK	Japan	Canada	USA	Turkey	Germany	Poland	Romania	Ukraine
Name of the of constitutional justicebody	Supreme Court of the United Kingdom	Supreme Court of Japan	Supreme Court of Canada	Supreme Court of the United States	Constitutional Court of Turkey	Federal Constitutional Court	Constitutional Tribunal	Constitutional Court of Romania	Constitutional Court of Ukraine
Establishment procedure	By the monarch on the advice of the Prime Minister upon approval of the Secretary of Justice	Formed by the Government	By the Federal Government and the Provincial Government	By the President with approval by the Senate	By the Parliament and the Government	Elected by the Bundestag and the Bundesrat	The Prime Minister is approved by the Seimas	- The Senate's choice (3 members) - The Chamber of Deputies' choice (3 members) - The President's choice (3 members)	6 - the President's choice 6 - the Parliament's choice 6 - the Congress of Judges' choice
Ability to resolve competence conflicts that arise between public authorities	yes	yes	yes	yes	yes	yes	yes	no	no
Possibility to consider cases arising from the results of parliamentary, presidential elections or referendum	yes	yes	yes	yes	yes	yes	no	yes	no
Possibility of deciding to prosecute the president, ministers and other government officials for violating the constitution	yes	yes	yes	yes	yes	yes	no	yes	yes



Possibility of carrying out the obligatory interpretation of norms of the legislation for the purpose of resolving discrepancies in the field of political powers	no	no	no	no	no	no	yes	yes	yes
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Source: author research

We used STATA software to analyse the data obtained during the sociological experiment and take into account the dynamics of the effectiveness

of the constitutional justice authorities of the studied countries (Table 2).

**Table 2.** The results of sociological survey

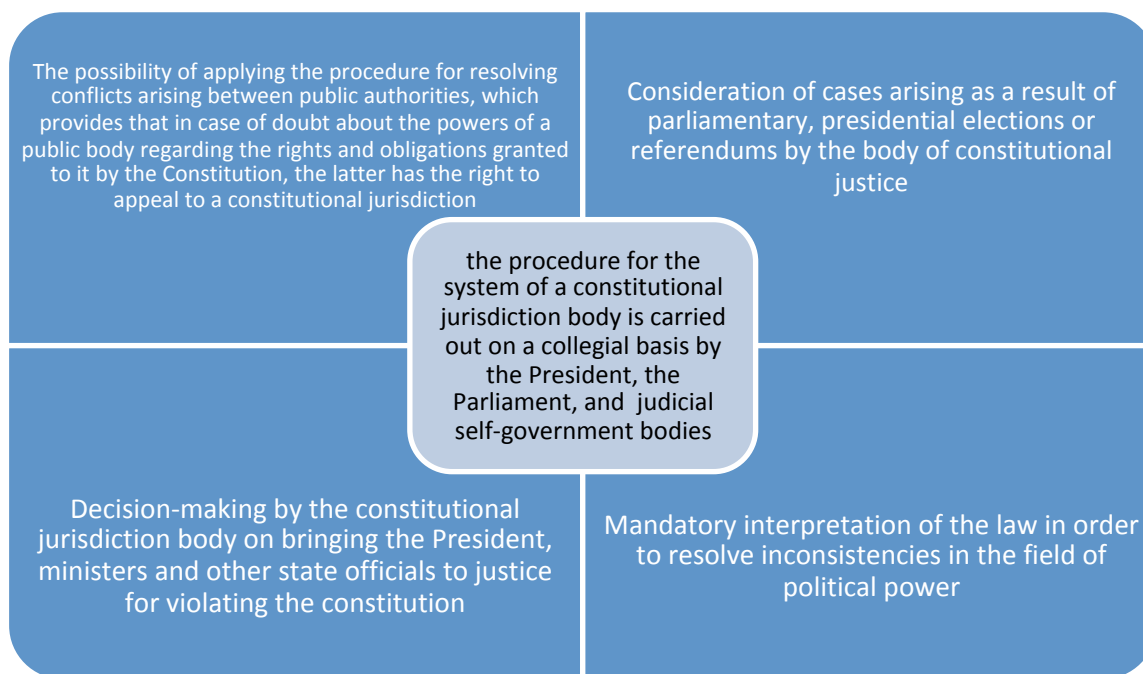
Questions and answer options	Countries								
	parliamentary monarchies			presidential republics		parliamentary republics		mixed republics	
	UK	Japan	Canada	USA	Turkey	Germany	Poland	Romania	Ukraine
<b>1. Do you think that the constitutional justice authority of your country has a sufficient power to influence the activities of the legislative and executive branches?</b>									
Yes	62%	75%	78%	65%	57%	87%	42%	34%	31%
No	38%	25%	22%	35%	43%	13%	58%	66%	69%
<b>2. Do you consider the process of forming the composition of the Constitutional Court of your country to be in line with international principles?</b>									
Yes	34%	48%	38%	35%	57%	63%	48%	78%	76%
No	66%	52%	62%	65%	43%	37%	52%	22%	34%
<b>3. In your opinion, have there been cases of illegal influence on the work of the constitutional justice authority of your country by public authorities and their officials?</b>									
Yes	24%	27%	31%	35%	29%	12%	63%	80 %	85%
No	76%	73%	69%	65%	71%	88%	37%	20 %	15 %

Source: author research

According to results of sociological survey, experts have not recognized the effectiveness of the model of constitutional justice in any country. However, the support of certain elements of the proposed

models allowed forming a single effective model of the powers of the constitutional justice body, which takes an effective part in the implementation of the principle of checks and balances (Figure 2).





**Figure 2.** Model of the constitutional justicebody

**Source:** developed by the author

### Discussion

The discussion on which branch of power the specialized body of constitutional control belongs to, what should be the procedure for its establishment and the scope of powers continues. In some countries, according to the Constitution, the body of constitutional control is included in the judicial system, in others — acts as a separate body (Pócza & Dobos, 2019; Bielen et al., 2018).

Sometimes constitutional control is seen as a legislative function. The object of constitutional control is not the application of the law, but the law itself. In this regard, it seems that the functional nature of the Constitutional Court is approaching that of the Parliament. However, Reutter (2020) unreasonably considers in this way.

Some single out constitutional control as a separate branch of power — control power, which is obviously an extreme. Pildes (2020a) notes that as much as constitutional control is at the center of the whole system of control over legality, so much constitutional justice is at the center of the system of constitutional control bodies, notes. The introduction of constitutional justice by the state indicates that the state prefers to delegate decision-making powers on constitutional issues to specialized institutions above ordinary courts, as such issues may not be resolved by ordinary courts.

According to Goldstein (2020), the specifics of the judiciary, in comparison with the “political power”— legislative and executive, is its relative

stability and neutrality, so it is the body of constitutional justice and is the main body of constitutional control. The Constitutional Court as a body of state power, with all its features, has a special legal nature.

First, it is a body of justice specialized in resolving constitutional and legal issues. These are, first of all, constitutional and legal disputes: the very interpretation and application of the Constitution, as well as the issues of powers are the real core of these disputes. On this basis, many scholars consider constitutional control from the standpoint of limiting power and resolving conflicts regarding constitutional authority (Pildes, 2020b).

Second, the Constitutional Court ensures the supremacy and direct action of the Constitution throughout the state and in relation to all subjects of law. This is the main duty of the Constitutional Court, while for most state bodies the observance of and obedience to the Constitution is sufficient only.

Thus, in countries with specialized constitutional jurisdiction, the administration of constitutional justice follows directly from the principles and norms of the Basic Law.

The Constitutional Court is called upon to prevent the usurpation of state power, to constantly maintain a state in which only limited power is possible.

The study of the constitutions of many states also shows that in all sections of the Constitution, where



counterbalances and restraints must be determined, the relationship of the body endowed with powers in this area with the constitutional court is clearly defined.

Almost all holders of state power, to the extent that they deal with the Constitution, also deal with the Constitutional Court. According to Phelan (2020), the relationship between the Constitutional Court and the Parliament is particularly multifaceted. This is manifested not only in the formation of constitutional courts, determining the constitutionality of laws and resolutions of parliament, but also in considering the separation of powers, resolving disputes over competences, exercising control over the form of adoption of legislative acts. In the latter case, misunderstandings often arise between the legislature and the Constitutional Court, especially in cases where parliamentary rules are not subject to mandatory preventive control. In many countries around the world, the issue of parliamentary voting procedure becomes the object of constitutional control.

### Conclusions

Thus, an effective model of the powers of the constitutional justice body presupposes that the decisions of the constitutional control body over the assessment of the legislator's freedom of action must be balanced and justified. Not only does the court not have the right to interfere excessively in the legislator's activities, but it must also avoid actions that may give the impression that such interference is taking place. Such an impression can negatively affect the reputation of the court. Public confidence in the judiciary strengthens the position of the courts within the principle of separation of powers. It is public trust that prevents the executive power and the legislature from ignoring court decisions. The Constitutional Court is the main body of state power that provides for the limitation of state power itself in favour of the principles of law. Understanding and reasonable realization of this role is one of the main directions of development of constitutional justice in the new millennium.

In the new millennium, the system of constitutional justice can, however, function effectively and fully with certain necessary and sufficient prerequisites. These include: the possibility of applying the procedure for resolving conflicts arising between public authorities, which prescribes that in case of doubt about the powers of a public authority regarding the rights and obligations granted to it by the Constitution the latter has the right to appeal to a constitutional jurisdiction; consideration by the constitutional justice body of cases arising as a

result of parliamentary, presidential elections or referendums; making a decision by the constitutional jurisdiction body on bringing the President, ministers and other state officials to justice for violating the constitution; mandatory interpretation of the law in order to resolve inconsistencies in the field of political power.

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