

## CHARACTERISTIC FEATURES OF EUROPEAN CONSTITUTIONAL JUSTICE AS GUIDELINES FOR THE FORMATION OF THE KAZAKHSTAN MODEL OF CONSTITUTIONAL JUSTICE

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### Abstract.

In the article, the author examines the characteristic features of European constitutional justice as guidelines for the formation of the Kazakhstan model of constitutional justice. The purpose of the article is to study the typological and normative-legal grounds for classifying the Kazakhstan model of constitutional justice as part of the European tradition of regulating constitutional-legal relations based on the provisions of the theory of constitutional justice and the practice of its legislative regulation. Conducting a study of constitutional justice required an integrated approach, which is ensured, firstly, by the use of general scientific, special scientific and strictly legal methods (analysis and synthesis, induction and deduction, abstraction, generalization, definition of concepts and their classification, etc.); methods of retrospective analysis of social reality and a comparative legal approach. The conducted analysis of the legislation of the Republic of Kazakhstan regulating the activities of the Constitutional Court allows us to clearly classify the model of national constitutional justice as a European type. Accordingly, further development of the Kazakhstan model of constitutional justice should be aimed at studying the European experience of constitutional courts in order to clarify the national model of the constitutional court and enhance its role in the system of further democratization of social development of the Republic of Kazakhstan. The value of this article is determined by the fact that in this work the author specifies the legislative basis that allows us to classify the Kazakhstan model of constitutional justice as a European type of constitutional justice, clearly resolving the issue of the further direction of development of the Constitutional Court of the Republic. The identified features of the Kazakhstan model of constitutional justice fully correspond to the democratic nature of Kazakhstan's statehood, the principle of the rule of law and ensuring the possibility of progressive, sustainable development of the Republic of Kazakhstan.

**Keywords:** constitution, constitutional justice, model, court, comparison, legislation.

### 1. Introduction

According to Part 1 of Article 1 of the Constitution of the Republic of Kazakhstan, the country is a democratic, secular, legal and social state, the highest values of which are man, his life, rights and freedoms. These attributes of Kazakhstan's statehood determine the need for their normative legal consolidation in the Basic Law, according to which the current law in the Republic of Kazakhstan is the norms of the Constitution, relevant laws, other normative legal acts, international contractual and other obligations of the Republic, as well as regulatory rulings of the Constitutional Court and the Supreme Court of the Republic, as stated in Part 1 of art. 4 of the Constitution of the Republic of Kazakhstan [1].

These provisions of the Constitution, defining the legal conditions for the development of statehood in the Republic of Kazakhstan, marked the beginning of a new stage in the formation

constitutional legal order that allows in practice to implement the norms of the national Constitution, providing the state, society and each individual with opportunities for constructive cooperation and development based on constitutional guarantees.

This task is provided, first of all, by protecting the Constitution from arbitrary interpretation of its provisions, from ignoring constitutional norms in the process of lawmaking, from attempts to give the Constitution only a formal, attributive meaning, ignoring in practice its principles, provisions and democratic principles.

Ensuring the effectiveness of the Constitution as an instrument of socio-political development should be considered as a primary public need provided by the functioning of state and legal institutions, among which the Constitutional Court of the Republic of Kazakhstan occupies the first place in terms of its importance and capabilities in the field of constitutional and legal protection as an effective means of protecting fundamental human rights, proven by many countries of the world, strengthening the rule of law and the development of democracy.

The status of the Constitutional Court of the Republic of Kazakhstan is enshrined in Section VI of the Constitution, and the creation of the Constitutional Court in the Republic is one of the results of the constitutional reform of 2022, which was supported by more than 77% of Kazakhstan's residents in a nationwide referendum.

The relative novelty of this legal mechanism determines the need to study its fundamental foundations and features in order to reproduce the best world examples of constitutional justice in the national model of constitutional justice.

The theoretical substantiation of the doctrinal and applied aspects of constitutional justice, in particular in the Republic of Kazakhstan, is found in the works of [2-5].

These authors agree that the constitutional jurisdictional process is the legally regulated procedural activity of authorized entities for the consideration and resolution of legal cases (legal disputes) related to constitutional jurisdiction, with the adoption of final, non-appealable decisions in order to protect the foundations of the constitutional order, fundamental human and civil rights and freedoms.

The conducted definition opens up the possibility to consider constitutional justice as a system of subjects of constitutional control engaged in procedural activities related to solving the tasks of constitutional justice, among which one can single out the task of constitutional control, the task of interpreting constitutional legal norms and other tasks defined by national legislation for this model of constitutional justice.

In previous researches [6-10] addressed issues related to constitutional justice as the most important institution that allows achieving socio-political harmony. Others who study the national model of constitutional justice, formed in Kazakhstan from various theoretical and practical positions (in the context of a unitary state structure; from the point of view of the right-wing protection of the Constitution, the interpretation of the norms of law by the body of constitutional control, the role of constitutional control in ensuring the rule of law). In the works of these authors, it is suggested that in the process of forming a national model of constitutional justice, it is advisable to study foreign experience, especially the experience of those countries that have a long history of constitutional justice.

In the foreign legal literature, issues related to the specifics of constitutional justice have been studied quite fully, this issue has been studied by [11-14]

In turn [15-19], note that constitutional justice is a sign of the democratic nature of the state, and totalitarian regimes, not feeling the need for this institution of regulating public relations, deprive their legal systems of an essential element, allowing effective interaction between society and the state.

Such a dialogue, as noted by [20-22], is essential not only in terms of achieving political consensus, but is also an essential element of the socio-economic development of the state, since

it ensures the dissemination of the principle of legality to the substantive side of the national economy and ensuring social stability in society. These researchers prove that in the modern system of legal relations, it is constitutional justice that ensures public consensus, socio-economic stability and stability of the political system, being not only a guarantee of legality, but also a guarantee of the formation of politically responsible state regimes that fully accept the ideas of the limitations of state power, its subordination to society and constant legitimate turnover [23-25].

The works of such authors as [26-30] are devoted to the problems of national specifics of constitutional justice and models of modern constitutional control.

A study of the works of these authors suggests that there are various organizational and legal forms of constitutional justice in the world, the most effective of which rely on a specially created body that protects the Constitution. At the same time, the functioning of quasi-judicial institutions for ensuring the supremacy of the Constitution proved ineffective, since these institutions did not have real levers of influence on the processes of constitutional and legal regulation of public relations, and their decisions were not final and binding. That is why the practice of modern constitutionalism defends the position of the need to create a specialized independent body of constitutional justice.

Currently, there are two main models of constitutional justice in the world practice of constitutional justice: American and European. Referring to the works of such authors as [27, 28], suggests that the main difference between the European model and the American one is that in Europe constitutional control stands out from the general justice is carried out not by courts of general jurisdiction, but by specialized bodies – the constitutional courts. Scientists cite differences in the perception of the rule of law principle as the reasons for the rejection of the American model of constitutional control by European countries, when in Europe the understanding of "law" is based on its interpretation as an absolute "shrine"; while in the United States, courts independently interpret laws, creating precedents for judicial law-making, and therefore the legislative system itself becomes flexible. It does not allow unambiguously determining the constitutionality of a particular law, given that in practice there may be different interpretations of the same constitutional norm.

Also, in the practice of judicial activity in the United States, issues of constitutional legality can arise in any process, and the problem of interpreting constitutional norms becomes the responsibility of ordinary judges, whose professional level does not always make it possible to ensure the correct interpretation of constitutional provisions.

At the same time, in the works of such as [29-35], it is indicated that the Kazakh model of constitutional justice It is approaching the European model, which requires further justification from the point of view of the need to clearly identify those legal grounds that indicate that a European-type model of constitutional justice is currently being formed in the Republic of Kazakhstan.

This task is important given that the "mixing" of elements of various models of constitutional justice in a single system of constitutional justice leads to methodological and legal contradictions that can reduce the effectiveness of the functioning of the Constitutional Court, as well as create prerequisites for reducing the stability and integrity of the legal system of the state [36-40].

Thus, the purpose of this article is to study the typological and regulatory grounds for attributing the Kazakh model of constitutional justice to the European tradition of regulating constitutional and legal relations based on the provisions of the theory of constitutional justice and the practice of its legislative regulation.

The object of research in this article is the theoretical and legislative foundations of constitutional justice in the Republic of Kazakhstan.

The subject of the study is the typological features of the European model of constitutional justice and their presence in the regulatory and legal space of the functioning of constitutional justice in the Republic of Kazakhstan.

Achieving this goal requires solving the following tasks:

- to identify the characteristic features of the European model of constitutional justice
- to investigate the norms governing the functioning of constitutional justice in the Republic of Kazakhstan for their compliance with the European tradition of constitutional justice.

The hypothesis of the study is the assumption that the definition of typological features characteristic of the main models of constitutional justice and their comparison with the norms of legislation regulating the activities of the Constitutional Court makes it possible to unambiguously attribute the national system of constitutional justice to a specific type of constitutional justice.

The scientific novelty of the article lies in the fact that the author specifies the legislative framework that makes it possible to attribute the Kazakh model of constitutional justice to the European type of constitutional justice, unequivocally resolving the issue of the further development of the Constitutional Court of the Republic.

The practical value of this article lies in the fact that the results obtained can be used for further theoretical and practical understanding of the activities of the Constitutional Court in the Republic of Kazakhstan.

## **2. Materials and methods of research**

The materials of this study are the results of scientific research, as well as legislative acts regulating the activities of Constitutional Courts. The methodology used is conditioned by the objectives of a comprehensive study of the typological features of constitutional justice models. That is why a variety of approaches and ways of understanding models of constitutional justice is a prerequisite for a comprehensive analysis of this phenomenon. In this regard, this study required an integrated approach, which is provided, firstly, by the use of general scientific, special scientific and legal methods proper. In particular, general scientific methods of dialectical, systemic, and historical cognition (analysis and synthesis, induction and deduction, abstraction, generalization, definition of concepts and their classification, etc.) were used in the research process; the methodology of retrospective analysis of social reality was used from specially scientific methods.; proper legal methods included formal legal and comparative legal approaches, which made it possible to determine the grounds for attributing the Kazakh model of constitutional justice to the European type of constitutional justice.

### **2.1 Characteristic features of the European model of constitutional justice**

The European model of specialized constitutional court proceedings originated in Austria and currently prevails in the states of continental Europe [31, 41, 42, 43].

Unlike the American model of constitutional control, which was formed on the basis of precedents, the European model is the result of theoretical research by Professor Kelsen of the University of Vienna (1881-193) [27], who systematically studied the activities of the Supreme Court of Austria and based on this proved the optimal model of constitutional justice.

The unity of the entire legal system and the mechanism of its functioning, as argued by Kelsen [27], are determined by the existence of a special and only supreme instance of constitutional control of laws, which, in his opinion, is the constitutional court. At the same time, the scientist proved the formation of constitutional courts designed to monitor the constitutionality of laws, which fully corresponds to the theory of separation of powers.

This model is based on the following principles:

- The Constitution is a fundamental legal norm, therefore it must have a high degree of stability;
- The stable nature of the Constitution is achieved by creating a special procedure for its amendment;
- The main guarantee of the operation of the Constitution is the ability to freely annul norms that contradict it;
- The right to annul norms that contradict the Constitution cannot in any case belong to the body that adopted them.

Thus, the peculiarity of this model is that the constitutionality of the objects of control is checked by specialized constitutional courts endowed with constitutional jurisdiction, implemented through independent constitutional justice. The recognition of the law by the bodies of constitutional justice as unconstitutional means the suspension of the operation of this law, that is, in essence, in this way, conditions are created for the exclusion of this law from the practice of law enforcement. Next, we will outline the characteristic features of the European model of constitutional justice.

## **2.2 The priority of the idea of creating an independent specialized body of constitutional jurisdiction**

In continental Europe, unlike in the United States, as mentioned, the priority of the idea of creating a specialized body of constitutional jurisdiction was traced. The French Constitution of 1799 it contained a provision on the review of laws for their constitutionality by the Security Senate (one of the consuls of which was appointed E.-J. As mentioned in the very text of the Constitution). However, the realization of this idea under the conditions of a dictatorship was not possible, although this idea was very attractive and was fully accepted by constitutional scholars.

Later, in European countries, until the 1920s of the last century, Austria had a decentralized model for verifying the constitutionality of acts, which operated in parallel with ordinary courts. However, such a system had significant drawbacks: firstly, it was only a specific control (it was carried out only within the framework of a specific case and had legal consequences only for its participants); secondly, different courts could have different (or even opposite) opinions about the constitutionality of the same act, which it was a great danger to the authority of the constitution.

The way out of this situation was seen in the introduction of a centralized model of judicial control and the creation of a specialized body of constitutional jurisdiction. This model was embodied in the Austrian Federal Constitutional Law of 1920, as well as in two other interwar constitutions. In general, the process of spreading constitutional democracy in Europe was accompanied by the creation of constitutional courts in the vast majority of states. Their existence was stipulated by the post-war constitutions of Germany and Italy, the post-socialist constitutions of Spain and Portugal, and, finally, the basic laws of the post-communist states of Central and Eastern Europe.

## **2.3 Protection of constitutional human rights**

Over the past decades, there has been a rethinking of the role and importance of constitutional jurisdiction in a number of European States, both at the practical and doctrinal levels, which is associated with an increased human rights role. Thus, in the vast majority of States whose law is based on the ideas of constitutionalism, mechanisms for the protection of fundamental human and civil rights have been introduced using the mechanism of constitutional jurisdiction, which has become one of the characteristic features of this model. The protection of constitutional human rights is one of the main areas of activity of the European bodies of



constitutional jurisdiction for the functioning of constitutionalism and the system of constitutional democracy.

#### ***2.4 The possibility of citizens applying to the Constitutional Court.***

All States geographically covered by the European model of constitutionalism have, in one way or another, ensured individual access of citizens to constitutional jurisdiction, most of them directly, including through filing an individual constitutional complaint.

#### ***2.5 The method of forming the composition of the Constitutional Court***

One of the most important means of ensuring the independence of a body of constitutional jurisdiction is the way constitutional courts are formed, ensuring their independence, which is achieved by participating in the process of forming national parliaments, as well as other branches of government.

Currently, three formation options are used to determine the composition of constitutional courts:

- 1) Appointment by the head of State (mostly this authority is of a ceremonial nature) on the proposal of the Parliament, the Government and/or the judiciary (Austria, Spain, Slovakia, Czech Republic);
- 2) Parliamentary method of appointment: by Parliament, chamber or two chambers of Parliament (Latvia, Lithuania, Macedonia, Poland, Slovenia, Hungary, Germany, Croatia, Montenegro);
- 3) a mixed method involving the appointment of several judges by such entities as the President, Parliament, and the judiciary (Italy, Portugal, Moldova, Romania, Ukraine, Serbia, and Bulgaria).

### **3. Results**

The main activity of the bodies of constitutional jurisdiction is to resolve issues of the constitutionality of laws and other legal acts. At the same time, the bodies of constitutional jurisdiction of European states perform other functions aimed primarily at ensuring a balance in the system of separation of state power. These include, in particular, the resolution of constitutional conflicts between the highest authorities of the state (Italy, Spain, Germany, France), between territorial units (Spain, Germany), control over the constitutionality of political parties (Germany), lawsuits against senior officials (Italy, Austria), control over the electoral process (Austria, France, Germany) and holding referendums (Italy, Austria), etc.

As for constitutional control itself, the difference between constitutional jurisdiction in the context of the European model of constitutionalism, on the one hand, and the American and English, on the other, primarily lies not in which state bodies are entrusted with the function of constitutional control, but in the fact that American and British courts, exercising constitutional control, proceed from First of all, from the rule of law, and the bodies of constitutional jurisdiction in Europe – from the rule of the constitution.

In fact, we are talking about two distinct legal traditions: common law (with its inherent role of courts, which have a significant degree of independence in the system of state power and a law-making function) and continental law (where courts only apply law, not create it), which is a characteristic feature of the Kazakh model of justice.

The nature of constitutional jurisdiction in continental Europe, as defined by Kelsen [27], is closer to the legislative function, and the decision of the constitutional court, which annuls an unconstitutional law, has the same character as a law repealing another law, acting as a negative act of lawmaking, which has the highest legal force and is not subject to appeal.

The activities of bodies of constitutional jurisdiction are related to the functioning in practice of the mechanism of separation of state power, and the cases resolved by these bodies most often concern the highest bodies of state power and senior officials. Therefore, the effective performance of its functions by a body of constitutional jurisdiction is possible only if its independence and political neutrality are guaranteed and practically ensured, as well as trust in it from the authorities and society.

In the European model of constitutional justice, the specificity of the subject of proof is that the constitutional judicial process is limited to legal issues that relate to clarifying the constitutionality or unconstitutionality of objects of constitutional judicial control, as well as determining the essence and content of objects of official interpretation. According to Kelsen [27], the subject of constitutional control, from the point of view of the theory of law, are legislative norms, the rule of law, relations between different legal systems, in order to provide a lawyer (jurist and practitioner) with an understanding and description of positive law.

For example, based on the powers of the Constitutional Court defined by the Austrian Constitution, the subject of evidence in the Austrian constitutional judicial process may include:

- the constitutionality of "property legal claims ... that are neither subject to a decision in an ordinary judicial procedure, nor to execution by a decision of a governing body" [9];
- controversial issues "between courts, between lands, land and the Federation" [9];
- the constitutionality of the "laws of the Federation or lands";
- illegality of state contracts;
- responsibility of the supreme bodies of the Federation and the lands for the offenses committed by them in the course of their official activities," including the federal president, members of the government, deputies, governors of the lands, authorities of the capital city of Vienna [9];
- the decision of the governing bodies and cases of violation of the norms of international law [10], etc.

Thus, the subject of evidence in constitutional proceedings in the continental (Kelsen [27]) model, as a rule, follows from the powers defined by the constitution, which specifies and restricts these powers and coincides with the subject of consideration of a particular case according to the procedure established by law.

### **3.1 Comparative grounds for attributing the Kazakh model of constitutional justice to the European constitutional and legal tradition**

The above makes it possible to present real arguments that make it possible to attribute the Kazakh model of constitutional justice, based on its highlighted characteristic features and on the legal norms that define the features of the Kazakh model (Table 1).

Table 1 - The grounds for attributing the Kazakh model to the European tradition of constitutional justice

Characteristic features	The rule of law	Link to the rule of law
Priorities for the formation of a specialized body of constitutional jurisdiction	In exercising its powers, the Constitutional Court is independent and independent of citizens, organizations, government agencies, and officials, and is guided by the Constitution of the Republic of Kazakhstan and this Constitutional Law. Judges of the Constitutional Court are independent in the performance of their	Section 6 of the Constitution of the Republic of Kazakhstan; Article 1 of the Constitutional Law of the Republic of Kazakhstan dated November 5, 2022 No. 153-VII SAM "On the

	duties and are subject only to the Constitution of the Republic of Kazakhstan and this Constitutional Law..	Constitutional Court of the Republic of Kazakhstan" paragraph 1 of Article 10 of the Constitutional Law of the Republic of Kazakhstan dated November 5, 2022 No. 153-VII SAM. "On the Constitutional Court of the Republic of Kazakhstan (hereinafter referred to as the Law)
The mixed procedure for forming the composition of the Constitutional Court	Four judges of the Constitutional Court are appointed by the President of the Republic of Kazakhstan, three judges of the Constitutional Court are appointed by the Senate and the Mazhilis of the Parliament of the Republic of Kazakhstan on the proposal of the Chairmen of the Chambers of the Parliament of the Republic of Kazakhstan.	p. 4 of Article 3 of the Law
The possibility of citizens applying to the Constitutional Court	At the request of citizens, the Constitutional Court examines the regulatory legal acts of the Republic of Kazakhstan for compliance with the Constitution of the Republic of Kazakhstan, which directly affect their rights and freedoms enshrined in the Constitution of the Republic of Kazakhstan.	p. 1 of Article 45 of the Law
Control over the activities of the highest authorities and participation in resolving issues related to their formation	In case of dispute, the Constitutional Court of the Republic of Kazakhstan decides on the correctness of the election of the President of the Republic of Kazakhstan; elections of deputies of the Parliament of the Republic of Kazakhstan; the republican referendum.	p. 1 of Article 23 of the Law
Interpretation of laws to ensure their understanding in accordance with the Constitution	The Constitutional Court of the Republic of Kazakhstan considers legislative acts for compliance with the Constitution of the Republic of Kazakhstan before they are signed by the President of the Republic of Kazakhstan and laws adopted by the Parliament of the Republic of Kazakhstan; resolutions adopted by the Parliament of the Republic of Kazakhstan and its Chambers; international treaties of the Republic of Kazakhstan before their ratification. The Constitutional Court of Kazakhstan gives: the official interpretation of the norms of the Constitution of the Republic of	Article 1, paragraph 2 of Article 23 of the Law



	Kazakhstan, while refraining from establishing, investigating and verifying other issues in all cases where this falls within the competence of courts or other state bodies.	
Protection of constitutional human rights	The Republic of Kazakhstan considers the appeals of the Commissioner for Human Rights in the Republic of Kazakhstan. At the request of citizens, the Constitutional Court examines the regulatory legal acts of the Republic of Kazakhstan for compliance with the Constitution of the Republic of Kazakhstan, which directly affect their rights and freedoms enshrined in the Constitution of the Republic of Kazakhstan.	p. 5 of Article 23 of the Law, p. 1 of Article 45 of the Law
The highest legal force of the decisions made	Normative resolutions and opinions of the Constitutional Court come into force from the date of their adoption, are generally binding throughout the territory of the Republic of Kazakhstan, final and not subject to appeal.	Article 62 of the Law
The subject of proof	The Constitutional Court of the Republic of Kazakhstan shall refrain from establishing, investigating and verifying other issues in all cases where this falls within the competence of courts or other state bodies.	Article 1 of the Law

Thus, the analysis of the legislation of the Republic of Kazakhstan regulating the activities of the Constitutional Court makes it possible to unambiguously attribute the model of national constitutional justice to the European type. Accordingly, the further development of the Kazakh model of constitutional justice should be aimed at studying the European experience of constitutional courts in order to clarify the national model of the constitutional court and enhance its role in the system of further democratization of social development of the Republic of Kazakhstan.

#### 4. Conclusion

Thus, the identification of typological features characteristic of the main models of constitutional justice and their comparison with the norms of legislation regulating the activities of the Constitutional Court makes it possible to unambiguously attribute the national system of constitutional justice to a specific type of constitutional justice.

The analysis of the problem related to the identification of the characteristic features of the European constitutional justice as a guideline for the formation of the Kazakh model of constitutional justice allows us to state that the European vector of development is the fundamental foundation of the Kazakh constitutional justice.

The analysis makes it possible to identify the main features that currently characterize this model:

- in this model, constitutional justice is carried out on the basis of the formation of a special body of constitutional justice, which has limited powers, but performs the most important

function of constitutional control under the supreme force of decisions taken by the Constitutional Court.;

- In this model, the Constitutional court acts as an independent body while guaranteeing independence to persons (judges of the constitutional court) who administer constitutional justice;

This model is characterized by a special democratic procedure for forming the composition of judges of the constitutional court, is aimed at universal protection of human and civil rights, and guarantees citizens the opportunity to apply to the Constitutional Court on issues within its jurisdiction.

The highlighted features of this model fully correspond to the democratic nature of Kazakhstan's statehood, the principle of the rule of law and ensuring opportunities for progressive sustainable development of the Republic of Kazakhstan.

In conclusion, we note that the Republic of Kazakhstan is at the stage of active development of a rule-of-law state, when the mechanism of constitutional justice becomes one of the key elements of statehood, creating conditions for Kazakhstan's inclusion in the list of countries providing real protection of human and civil rights and legitimate interests.

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