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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

UKRAINE

AMICUS CURIAE BRIEF

ON THE LIMITS OF SUBSEQUENT (A POSTERIORI) REVIEW OF CONSTITUTIONAL AMENDMENTS BY THE CONSTITUTIONAL COURT

Adopted by the Venice Commission
at its 131st Plenary Session
(Venice, 17-18 June 2022)

on the basis of comments by

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I. Introduction

1. By letter of 18 November 2021, the Acting President of the Constitutional Court of Ukraine requested an *amicus curiae* brief from the Venice Commission on the limits of subsequent (*a posteriori*) review of constitutional amendments by the Constitutional Court.

2. Ms Angelika Nussberger, Mr Jan Velaers, and Mr José Vargas Valdez acted as rapporteurs for this *amicus curiae* brief.

3. In the light of the Russian attack on Ukraine, the Enlarged Bureau of the Venice Commission decided on 17 March 2022 to postpone to a later session all opinions and *amicus curiae* briefs for Ukraine that were foreseen for adoption or endorsement at the 130th session (Venice and online, 18-19 March 2022). On 3 May 2022 , the Acting Chairman of the Constitutional Court, Mr Serhiy Holovaty, informed the Commission that the Court continued its activity despite the war and it needed for its work the *amicus curiae* Brief on the limits of subsequent (a posteriori) review of constitutional amendments by the Constitutional Court. Therefore, on 18 May 2022 the Bureau of the Venice Commission decided that this *amicus curiae* brief should be dealt with at the 131st plenary session.

4. This *amicus curiae* brief was drafted on the basis of comments by the rapporteurs. It was adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022).

II. Request

A. Background

5. The Acting President of the Constitutional Court explained the background of the request as follows:

6. The Constitutional Court of Ukraine (hereinafter: CCU) adjudicates on the constitutional petition dated 29 January 2020, signed by 50 People's Deputies of Ukraine challenging the constitutionality of the Law of Ukraine "On Introducing Amendments to Article 80 of the Constitution of Ukraine (concerning the immunity of People's Deputies of Ukraine)" adopted on 3 September 2019 by the Verkhovna Rada of Ukraine (Law 27-IX, formerly draft Law 7203). The petitioners allege that in adopting this law the Verkhovna Rada had failed to observe the constitutional procedure.

7. On 17 October 2017, the former President of Ukraine, Mr Petro Poroshenko, submitted Draft Law No. 7203 "On Introducing Amendments to Article 80 of the Constitution of Ukraine (concerning the immunity of People's Deputies of Ukraine) to the Verkhovna Rada.

8. On 19 June 2018, by its opinion No. 2-v/2018, issued in compliance with Article 159 of the Constitution of Ukraine,[1] the CCU declared Draft Law No. 7203 as compliant with the requirements of Articles 157 and 158 of the Constitution.[2]

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[1] **Article 159**
A draft law on introducing amendments to the Constitution of Ukraine is considered by the Verkhovna Rada of Ukraine upon the availability of an opinion of the Constitutional Court of Ukraine on the conformity of the draft law with the requirements of Articles 157 and 158 of this Constitution.

[2] **Article 157**
The Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizen's rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine.
The Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency.
Article 158

9. On 20 September 2018, upon the recommendation of the Verkhovna Rada Committee on Legal Policy and Justice, the Parliament adopted the Resolution "On Further Work on the Draft Law on Introducing Amendments to the Constitution of Ukraine (concerning the immunity of People's Deputies of Ukraine)". Resolution No. 2557-VIII set a date for submitting proposals and amendments to the Draft Law.

10. On 21 May 2019, the current President of Ukraine, Mr Volodymyr Zelensky, issued Decree No. 303/2019 "On Early Termination of Powers of the Verkhovna Rada of Ukraine and the Appointment of Early Elections". On 21 July 2019, extraordinary parliamentary elections were held.

11. On 29 August 2019, the newly elected Verkhovna Rada of the ninth convocation adopted Resolution No.23-IX, invalidating Resolution No. 2557-VIII due to the expiration of the deadline set by the latter. Furthermore, information on the revocation of Draft Law No. 7203 was published on the official website of the Verkhovna Rada.

12. On 30 August 2019, the Verkhovna Rada re-registered Draft Law No. 7203 with allegedly the same text[3] as Draft Law No.7203, initially registered on 17 October 2017 and reviewed by the CCU in its opinion No. 2-v/2018 of 19 June 2018. On the same date, the Verkhovna Rada adopted Resolution No. 24-IX "On Preliminary Approval of the Draft Law on Introducing Amendments to Article 80 of the Constitution of Ukraine (concerning the immunity of People's Deputies of Ukraine)".

13. On 3 September 2019, Draft Law No. 7203 (re-registered on 30 August 2019) was adopted as a law.

14. Based on the factual circumstances described in paragraphs 6-12 above, the petitioners argue before the Constitutional Court that Draft Law No. 7203 of 30 August 2019 was previously approved and eventually adopted as a law without observing the constitutional procedure for amending the Constitution. In particular, reference is made to the absence of the opinion by the CCU, as required by Article 159 of the Constitution, concerning the compliance of Draft Law No. 7203 of 30 August 2019 with Articles 157 and 158 of the Constitution of Ukraine.

15. During the deliberation of this constitutional petition, the CCU was confronted with the question of the limits of the powers of the Constitutional Court in cases concerning the observance of the constitutional procedure for consideration and adoption of laws on introducing amendments to the Constitution (subsequent constitutional review).[4]

The draft law on introducing amendments to the Constitution of Ukraine, considered by the Verkhovna Rada of Ukraine and not adopted, may be submitted to the Verkhovna Rada of Ukraine no sooner than one year from the day of the adoption of the decision on this draft law.
Within the term of its authority, the Verkhovna Rada of Ukraine shall not amend twice the same provisions of the Constitution.

[3] The *amicus curiae* request does not describe or provide the content of Draft Law 7203 submitted on 17 October 2017, or of the one re-registered on 30 August 2019 and later adopted by the Verkhovna Rada of Ukraine. Hence, this *amicus curiae* brief will not address or evaluate whether the contents of the original proposal and the approved amendments are, in fact, identical or not, even if it may be relevant to the issue at hand.

[4] The Venice Commission will apply the term "*a posteriori* review".

B. Questions

16. In the absence of a uniform legal position and consistent jurisprudence of the CCU on the issue of *a posteriori* review of constitutional amendments by the Constitutional Court, the Venice Commission has been requested to answer the following questions:

1) Does the text of the Constitution of Ukraine imply the peculiarities of exercising constitutional review of the laws on amendments to the Constitution of Ukraine after their adoption and entry into force?

2) Does the provision of Article 152.1 of the Constitution allow the Constitutional Court to exercise constitutional review of the laws introducing amendments to the Constitution after their adoption and entry into force?

3) Can the Constitutional Court of Ukraine declare the law on introducing amendments to the Constitution of Ukraine as in compliance/not in compliance with the Constitution of Ukraine (is constitutional/unconstitutional) and if so, in which cases?

4) What may be the legal consequences of declaring the law introducing amendments to the Constitution of Ukraine as having been adopted in violation of the constitutional procedure for its consideration, adoption or entry into force?

17. The questions can be classified in two broad categories: on the one hand, the questions regarding the scope of the powers of the Constitutional Court to review the constitutionality of laws introducing amendments to the Constitution (questions 1, 2 and 3); and, on the other, the question about the consequences or effects of such powers (question 4).

III. Analysis

A. General remarks

18. It is not the task of the Venice Commission to review decisions by national Constitutional Courts[5] or to provide an official interpretation of the Fundamental Laws of its Member States. The Commission therefore refrains from a substantive revision of the case-law of the CCU as well as from the formal interpretation of the Constitution of Ukraine or its relevant provisions. It will be ultimately up to the Constitutional Court of Ukraine, an institution with the authority to provide a final interpretation of the Constitution, to decide whether the Constitution of Ukraine or its Article 152.1 implies/allows for *a posteriori* review of constitutional amendments. Nevertheless, the Venice Commission will make some observations on the possible ways of interpreting the Constitution in the light of applicable standards and the case-law of the CCU.

B. Applicable standards

19. In several of its Reports and Opinions the Venice Commission has taken a stance on the issue raised by this a*micus curiae* request.

20. In general terms, the Venice Commission has recognized the important role that Constitutional Courts play as a catalyst in societies in transition to democracy by protecting human rights and the rule of law, guaranteeing that the state powers remain within the limits of

[5] See CDL-AD(2007)045, Opinion on the constitutional situation in the Kyrgyz Republic, para.9; see also CDL-AD(2010)044, Opinion on the constitutional situation in Ukraine, para. 29.

the Constitution[6], assuring the constitutionality of the legal order[7] and preventing the arbitrariness of the authorities[8], emphasizing that while "there are various models of constitutional review across the OSCE and the Council of Europe regions, such review should, as a general rule, take place outside the legislative and executive branches of power".[9]

21. Regarding the convenience and scope of constitutional review of constitutional amendments, the Venice Commission has not established a rigid standard on temporality (meaning it does not exclusively recommends *a priori review* over *a posteriori* review or vice versa) nor regarding the nature of the control (formal or substantive).[10]

22. The Venice Commission has expressly established that "there is no generally accepted standard in comparative constitutional law regarding the participation of constitutional courts in the constitutional amendment process".[11] The Venice Commission recognizes that the definition of the scope and nature of constitutional control of constitutional amendments in each particular country is the result of a complex balance between the principles of "popular sovereignty" and "rule of law", which also involves the imposition of reasonable limits to the intervention of the judiciary.[12] Even if the Parliament is the fundamental arena for constitutional amendment in almost all European states, it is also valid to include "mandatory and systematic review by the national Constitutional Court before or after a proposal for constitutional amendment can be adopted by parliament"[13]. The Venice Commission is of the opinion that it is up to the constituent legislator to make a balanced choice between the above-mentioned principles[14] and that it is for the Constitutional Court to respect the choice made by the legislator and to establish a coherent jurisprudence on the matter.[15]

23. In its Report on Constitutional Amendment, the Venice Commission observed that *a posteriori* review by the Constitutional Court of whether the correct procedures for constitutional amendment have been respected (formal review) is much more widespread than *a posteriori* review of whether the amendment adopted is not in breach of "unamendable" provisions or principles of the Constitution (substantive review). As stated in the Report, in some countries legal situation is unclear, in others, judicial review of constitutional amendments is in theory possible, but has never been applied in practice, while in some countries, judicial review has been rejected, based on the argument that the courts cannot place themselves above the constitutional legislator.[16]

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[6] See Venice Commission, CDL-AD(2009)014, Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, para. 48.
[7] See Venice Commission, CDL-INF(1997)002, Opinion on the Constitution of Ukraine, p.10.
[8] See Venice Commission, CDL-AD(2010)044, Opinion on the Constitutional Situation in Ukraine, para. 52.
[9] See Venice Commission, CDL-AD(2016)025, Joint Opinion on the Draft Law "On Introduction of Amendments and Changes to the Constitution" of Kyrgyz Republic, para. 56.
[10] See Venice Commission, CDL-AD(2012)010, Opinion on the Revision of the Constitution of Belgium.
[11] See Venice Commission, CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, paras 20−21.
[12] See Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment, para 112: "The Venice Commission has repeatedly welcomed and endorsed the model of 'constitutional courts'. This is a model that in general is favourable to judicial constitutional interpretation, mainly because such courts may legitimately contribute to developing their national constitutional systems".
[13] See Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment, para. 194.
[14] In its 2011 Opinion on three legal questions arising in the process of drafting the new Constitution, the Venice Commission considered "it particularly important that basic provisions regulating the functions of the Constitutional Court both in ex post and ex ante review (…) are included in the Constitution.", CDL-AD(2011)001, Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, para. 53.
[15] In its 2010 Opinion on the constitutional situation in Ukraine, the Venice Commission stated moreover "that Constitutional Courts are bound by the Constitution and do not stand above it." (para. 36) and that "jurisprudence of a Constitutional Court has to be consistent and based on convincing arguments in order to be accepted by the people." (para. 38), CDL-AD(2010)044, Opinion on the Constitutional Situation in Ukraine.
[16] See Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment, paras. 228-234.

24. After drawing a distinction between substantive judicial review of constitutional amendments and purely procedural/formal review in order to check and ensure that the amendments have been adopted following the prescribed constitutional procedures, the Venice Commission strongly supported all systems that allow for effective and democratic supervision of the way in which the constitutional amendment procedures have been respected and followed. The Commission observed that "if there is reason to believe that the amendments have been passed in breach of the constitutional requirements, then this is an issue which may suitably be tried before a court."[17] Furthermore, In its 2020 Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court, the Commission clarified that "such a formal control by court does not interfere with the sovereign rights of the constituent power, but rather serves to protect democracy".[18]

25. The Venice Commission has acknowledged the existence of *a posteriori* review in several countries such as Austria, Germany, Bulgaria, Turkey, Portugal, South Africa and the Czech Republic, and has even identified cases where constitutional amendments have been annulled due to a breach in the amendment procedure or even because material limits have been violated.[19] The Venice Commission has recognized that substantive constitutional control is a "problematic instrument, which should only be exercised in those countries where it already follows from clear and established doctrine, and even there with care, allowing a margin of appreciation for the constitutional legislator".[20]

26. The Commission has also recognized that in "some constitutional systems, the Constitutional Court may also conduct substantive a posteriori review [to make sure] that the amendment adopted is not in breach of "unamendable" provisions or principles"[21]. Unamendable constitutional provisions indicate that there is an internal hierarchy of constitutional provisions. It is important to mention that the Venice Commission considers that "[s]*uch an inner hierarchy is not a European standard, although it is a feature that arises more and more in States where Constitutional Courts are competent to annul unconstitutional laws*", like in the cases of Austria, Bulgaria, Germany, Turkey, Portugal or the Czech Republic.[22]

27. Regarding the unamendable provisions or eternal clauses, such as the ones contained in Article 157 of the Constitution of Ukraine, the Venice Commission has also stated that the existence of these provisions helps to strengthen the justification of exercising subsequent material control, even if this is a very "controversial and extremely complex issue".[23]

28. To summarize, the Venice Commission has recognized that, even if it is a complex issue that varies among countries, judicial control of constitutional amendments may be a valid and efficient mechanism under certain circumstances, especially when Constitutions contain eternal clauses, when the review helps to avoid amendments to be passed in breach of the constitutional requirements and when there is clear and established doctrine that sustains the application of this mechanism.

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[17] See Ibid., para. 237.
[18] See Venice Commission, CDL-AD(2020)016, Armenia - Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court, para. 65.
[19] See Venice Commission, CDL-AD(2013)012, Opinion on the fourth amendment to the Fundamental law of Hungary, para. 105.
[20] See Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment, para.235.
[21] See Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment, footnote 138.
[22] See Venice Commission, CDL-AD(2013)012, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, para. 106.
[23] See Venice Commission, CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, paras. 20-21.

C. The Constitution of Ukraine

29. While the Constitution of Ukraine explicitly provides for a mandatory *a priori* review of a draft law on constitutional amendments,[24] it remains silent on the possibility of the CCU to review the constitutional amendments once they have entered into force (*a posteriori* review).[25]

30. In addition, the Constitution seems to remain silent on some aspects of the involvement in the amendment process such as the timeframe for the revision and the consequences in case the Constitutional Court's opinion is negative or lacking.[26] In its Opinion on the Draft Constitution of the Kyrgyz Republic,[27] the Venice Commission observed that these aspects should be clearly defined by the Constitution.

31. Article 159 of the Constitution provides:

"A draft law on introducing amendments to the Constitution of Ukraine is considered by the Verkhovna Rada of Ukraine upon the availability of an Opinion of the Constitutional Court of Ukraine on the conformity of the draft law with the requirements of Articles 157 and 158 of this Constitution."

32. Article 157 of the Constitution provides that:

"The Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizen's rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine.

The Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency.

And according to Article 158 of the Constitution:

"The draft law on introducing amendments to the Constitution of Ukraine, considered by the Verkhovna Rada of Ukraine and not adopted, may be submitted to the Verkhovna Rada of Ukraine no sooner than one year from the day of the adoption of the decision on this draft law. Within the term of its authority, the Verkhovna Rada of Ukraine shall not amend twice the same provisions of the Constitution."

33. Both the Ukrainian Constitution and the Law on the Constitutional Court of Ukraine (CDL-REF(2022)004) grant the power to the Constitutional Court to review the compliance of "laws" and "acts" with the Constitution.

34. Article 147.1 of the Constitution provides:

"The Constitutional Court of Ukraine decides on compliance of laws of Ukraine with the Constitution of Ukraine and, in cases prescribed by this Constitution, of other acts, provides

[24] See Article 159 of the Constitution; See also Decision of the Constitutional Court of Ukraine, No. 8-rp/98, 09 June 1998, para. 6 of part 2 of the motivation part.
[25] See CDL-AD(2010)044, Opinion on the Constitutional Situation in Ukraine, para.31.
[26] Some conclusions concerning the binding nature of the CCU Opinion on compliance of the constitutional amendments with Articles 157 and 158 of the Constitution can be inferred from Article 151^2 of the Constitution and the CCU Judgment No. 8-rp/98 of 09 June 1998. However, there are no provisions in the Constitution describing the consequences in case the Opinion is negative or lacking.
[27] See CDL-AD(2021)007, Joint Opinion of the Venice Commission and OSCE/ODIHR on the Draft Constitution of the Kyrgyz Republic, para.159; See also CDL-AD(2011)001, Hungary - Opinion on three legal questions arising in the process of drafting the new Constitution, para.53.

official interpretation of the Constitution of Ukraine as well as exercises other authority in accordance with this Constitution." [28]

35. Similarly, Article 1.1. of the Law of Ukraine on the Constitutional Court concerning the status and the powers of the Court, further elaborated in Article 7 of this Law, confirms the power of the Court to decide "on conformity to the Constitution of Ukraine (constitutionality) of laws of Ukraine and other legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea." [29]

36. In 2006 an amendment to the Law of the Constitutional Court specifically excluded "laws of Ukraine on introducing amendments to the Constitution of Ukraine that entered into force" from the jurisdiction of the CCU. More specifically the new item 3.1 of the Chapter IV "Final and Transitional Provisions" of the Law of Ukraine on the Constitutional Court of Ukraine provided that decisions on the issue of the conformity with the Constitution of Ukraine (constitutionality) of the laws of Ukraine on introducing amendments to the Constitution of Ukraine which entered into force are withdrawn from the Constitutional Court's jurisdiction. This new item 3.1. was however later declared unconstitutional by the Constitutional Court.[30]

37. Article 152 of the Constitution explicitly establishes legal grounds for and the effects of declaring the unconstitutionality of an act or law.

"Laws and other acts are declared unconstitutional in whole or in part by the decision of the Constitutional Court of Ukraine, in the event that they do not conform to the Constitution of Ukraine, or if there was a violation of the procedure for their consideration, adoption or their entry into force established by the Constitution of Ukraine.

Laws, other acts, or their separate provisions, declared unconstitutional, lose legal force from the day the Constitutional Court of Ukraine adopts the decision on their unconstitutionality unless otherwise established by the decision itself but not earlier that the day of its adoption.

Material or moral damages, inflicted on natural or legal persons by the acts and actions declared unconstitutional, are compensated by the State under the procedure established by law."

38. The precondition for allowing a Constitutional Court to check the constitutionality of constitutional amendments – especially concerning substantive review– is that the respective Constitution foresees an inner hierarchy of constitutional provisions. That is, some constitutional norms have a higher stance than others. This precondition is fulfilled in the case of Ukraine. It follows from Article 157 of the Constitution according to which the constituent power explicitly self–imposed a limitation by creating "unamendable provisions". All constitutional norms that regulate or protect "*human and citizen's rights and freedoms*" or the "*independence*" and "*territorial indivisibility of Ukraine*" must be considered the higher constitutional norms, since not even the constituent power can amend them.

39. The Constitution of Ukraine however explicitly provides only for a specific mechanism of *a priori* constitutional review *of draft laws* of the constituent legislator in relation to Articles 157 and 158. It remains silent on the possibility for the Constitutional Court to review *the laws* on amending the Constitution. This has been a subject matter of a number of constitutional petitions examined below.

[28] Article 150 of the Constitution elaborates further on the authority of the Constitutional Court.
[29] See Article 7.1.1. of the Law of Ukraine on the Constitutional Court of Ukraine.
[30] See below.

D. Case-law of the Constitutional Court of Ukraine

40. In the past, the Constitutional Court of Ukraine has not always approached the issue of the review of the compliance with the procedural rules on the revision of the Constitution in a consistent manner. However, the evolution of the CCU case-law referred to in the *amicus curiae* request (Ruling No. 6-u/2008, Decision No. 13-rp/2008 and Decision No.20-rp/2010)[31] seems to suggest that eventually the CCU made up its mind and decided that it has a power to exercise a formal *a posteriori* review of the constitutional amendments. Nevertheless, the fact that the CCU is now requesting an *amicus curiae* brief from the Venice Commission on this matter makes it clear that the CCU is still divided on the issue.

41. On 5 February 2008, the CCU delivered a Ruling concerning a petition by 102 People's Deputies of Ukraine on the constitutionality of the Law on Amendments to the Constitution of Ukraine No. 2222. The petitioners claimed that the Law had violated the procedure for its review and adoption as it was adopted without receiving the obligatory opinion of the Constitutional Court of Ukraine regarding its conformity with Articles 157 and 158 of the Constitution (as required by Article 159 of the Constitution).[32]

42. In its Ruling of 5 February 2008[33], the Constitutional Court of Ukraine stated that when Law No. 2222 took effect on January 1, 2006, its provisions and clauses became an integral part of the Constitution, and the Law itself lost its legal force.[34] In this case the Court rejected the application, based on its non-conformity with the constitutional petition requirements, given in Article 39 of the Law on the Constitutional Court.[35]

43. In this Ruling, the Court did not explicitly pronounce itself on its competence to assess the conformity of amendments to the Constitution with the procedural rules on the revision of the Constitution. It based its Ruling solely on the erroneous designation of the norm to be examined in the petition. Nevertheless, the Ruling also seemed to imply that since adopted amendments can no longer be regarded as laws, but have deemed to be constitutional provisions, they cannot be challenged before the Constitutional Court.

44. However, merely four months later, in its Decision of 26 June 2008 the Constitutional Court explicitly confirmed its competence to assess the constitutionality of amendments to the Constitution. The Court deliberated over the petition of 47 People's Deputies of Ukraine on the constitutionality of the provision of paragraph 3.1 of Section IV of the Law of Ukraine "On the Constitutional Court of Ukraine".[36] This provision excluded the "*laws of Ukraine on introducing amendments to the Constitution of Ukraine that entered into force*" from the jurisdiction of the CCU.

45. By its Decision of 26 June 2008, the CCU declared this provision as unconstitutional and clarified that Article 150 of the Constitution[37] does not rule out the possibility of the Constitutional Court on exercising subsequent constitutional review of the law on introducing amendments to the Constitution of Ukraine after it has been adopted by the Verkhovna Rada of Ukraine.

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[31] The Venice Commission had access only to the summaries of the two texts (Ruling No. 6-u/2008 and Decision No. 13-rp/2008) provided by the CCU and available on the CODICES database of the VC and the translation of the full text of Decision No.20-rp/2010. Hence, these documents should be considered as the sources of the descriptive analysis.

[32] See Venice Commission, CDL-AD(2010)044, Opinion on the Constitutional Situation in Ukraine, para. 19.

[33] See Ruling of the Constitutional Court of Ukraine, No. 6-u/2008, 5 February 2008.

[34] See para.3 of the motivation part of the Ruling.

[35] Article 39 §2.3 required the subject of the constitutional petition to provide a "full title, number, date of adoption, source of publication (provided that it was published) of the legal act which constitutionality (separate provisions thereof) is disputed or which needs to be officially interpreted".

[36] See Decision of the Constitutional Court of Ukraine, No. 13-rp/2008, 26 June 2008.

[37] Article 150 of the Constitution of Ukraine concerns the authority of the Constitutional Court of Ukraine.

Moreover, the Court considered that it is the Court which is to exercise such a review as the absence of judicial control of the procedure for the review and adoption of the law on amendments to the Constitution, determined in Chapter XIII of the Constitution may result in restriction or abolition of human and civil rights and freedoms, termination of independence, violation of territorial indivisibility and changes to the constitutional order in the way that was not envisaged by the Fundamental Law.[38]

46. Finally, on 30 September 2010, the Constitutional Court of Ukraine delivered a Decision concerning a petition of 252 People's Deputies of Ukraine on the constitutionality of the Law on Introducing Amendments to the Constitution No. 2222-IV, 8 December 2004. The petitioners argued that Law No. 2222 should be recognised as unconstitutional due to breaches in the procedure set out in the Constitution for its review and adoption. The draft Law on Introducing Amendments to the Constitution No. 4180, dated 19 September 2003 was reviewed and approved by Parliament as Law no. 2222 without the mandatory opinion of the Constitutional Court on its conformity with the requirements of Articles 157 and 158 of the Constitution, as required by Article 159 of the Constitution.

47. By its Decision of 30 September 2010, the CCU clarified that it proceeds "on the basis that not the purview of Law No. 2222 shall be subject to the constitutional control, but the procedure of its consideration and adoption established by the Constitution of Ukraine." Accordingly, the Court found Law No 2222 unconstitutional "due to a violation of the constitutional procedure of its consideration and adoption".[39] The Court stated that "under the Fundamental Law of Ukraine, the availability of a corresponding opinion of the Constitutional Court of Ukraine is an obligatory condition for the consideration of the draft law on introducing amendments to the Constitution of Ukraine at the plenary session of the Verkhovna Rada of Ukraine. The exercise, by the Constitutional Court of Ukraine, of the preliminary (preventive) control over the conformity of such draft law with the requirements, established by Articles 157 and 158 of the Constitution of Ukraine, with all possible amendments, introduced therein in the course of consideration at the plenary session of the Verkhovna Rada of Ukraine, is an integral stage of the constitutional procedure of introducing amendments to the Fundamental Law of Ukraine."[40] In this case the Court determined that "[t]he Law on Introducing Amendments to the Constitution No. 2222-IV of 8 December 2004 would lose its legal force from the date of the Constitutional Court's decision [since the] Constitutional Court (…) pronounced [Law no. 2222 to be] unconstitutional, in view of breaches in the procedure for its review and adoption."[41] The Court continued: "[T]he effect of the norms of the previous wording of the Constitution, which were amended, supplemented and removed by Law No. 2222, would be restored".

48. This Decision was criticized due to its effect/legal consequences by the Venice Commission in its Opinion on the constitutional situation in Ukraine.[42] It was stressed by the Commission that the principle of legal certainty requires to take into consideration the time elapsed since the adoption of the constitutional amendments when declaring them as unconstitutional. In addition, "when a court's decision is based on formal or procedural grounds only, the substantive effect of such a decision should also be taken into account. In other words, the final decision should be based on a proportionality test where the requirement of constitutionality should be

[38] See sub-paragraph 3.2 of paragraph 3 of the motivation part of the Decision of 26 June 2008.
[39] See Decision of the Constitutional Court of Ukraine, No. 20-rp/2010, 30 September 2010, para.4 of the motivation part; for a detailed overview of the decision and its consequences see also Venice Commission, CDL-AD(2010)044, Opinion on the Constitutional Situation in Ukraine, paras. 40-68.
[40] See Decision of the Constitutional Court of Ukraine, No. 20-rp/2010, para.3.2 of the motivation part.
[41] Up to date the Law of Ukraine "On Amendments to the Constitution of Ukraine" of 8 December 2004, No. 2222-IV, is the only Law that had been declared as unconstitutional by the CCU on the grounds of its inconsistency with the requirement of Article 159 of the Constitution (absence of mandatory Opinion by the CCU).
[42] See Venice Commission, CDL-AD(2010)044, Opinion on the Constitutional Situation in Ukraine, paras. 40-63.

balanced against the negative consequences of the annulment of the constitutional amendment in question.[43]

49. In its 2010 Opinion on the constitutional situation in Ukraine, the Venice Commission observed a certain inconsistency in the jurisprudence of CCU, in particular between its Ruling of February 2008 and Decision of June 2008, as well as between the Decision of September 2010 and the Ruling of February 2008.[44] The Commission observed that while the Constitutional Court considered in its Ruling of February 2008 "that once they have entered into force, the constitutional amendments become an integral part of the Constitution and the Law on which they are based ceased to exist", just four months later, in its Decision of June 2008, the Court declared unconstitutional an amendment explicitly excluding "laws of Ukraine on introducing amendments to the Constitution of Ukraine that entered into force" from the jurisdiction of the CCU. In addition, the Commission found it surprising that the 30 September Decision did not refer to the Ruling of February 2008 and did not explain the difference between the two petitions leading to the relevant Ruling/ Decision.

50. The Venice Commission further observes that while the 2008 Ruling of the CCU tackles a strictly procedural issue and states that whenever a constitutional amendment enters into force, its' content becomes an integral part of the constitutional text, this does not necessarily contain a clear message that the Constitutional Court does not have the powers to exercise subsequent constitutional review on laws that introduce constitutional amendments. But even if it was the case, this Ruling was issued before the other two Decisions, which consistently recognize and justify (Decision No. 13-rp/2008) and even exercise (Decision No.20-rp/2010) the subsequent constitutional review over the procedure of consideration and adoption of laws concerning amendments to the Constitution of Ukraine.

51. The Commission would like to reiterate the importance of the consistency of the jurisprudence of the Constitutional Court, in order not to undermine legal certainty and constitutional stability.[45]

E. The Venice Commission views on the interpretation of the powers of the Constitutional Court of Ukraine to exercise a posteriori control of constitutional amendments

52. The Venice Commission observes that the question of the competence of the CCU to review *a posteriori* constitutional amendments that have already been adopted is not clearly and explicitly answered in the text of the Constitution. Moreover, the Secretariat of the CCU informed the Venice Commission that the *travaux préparatoires* of the Constitution neither "contain any indications on the intention of the constitutional legislator with regard to the subsequent (a posteriori) review of the constitutionality of the constitutional amendment after it entered into force (mentioned in Article 159 of the Constitution of Ukraine)"; nor do "they contain any indications on the interpretation of the word „laws" applied in Article 147 of the Constitution of Ukraine, Article 1.1, Article 7.1 (1) of the Law of Ukraine „On the Constitutional Court of Ukraine".

53. The Venice Commission reiterates that in the absence of generally accepted standards on the issue, it is up to the national authorities - the constituent legislator in the first place, and the Constitutional Court in the second place - to establish the Ukrainian Constitutional solution to the above-mentioned problem, and it is not the task of the Venice Commission to provide a final interpretation of the Constitution. The Commission can only make some observations on possible

[43] See Ibid., para.38.
[44] See Venice Commission, CDL-AD(2010)044, Opinion on the Constitutional Situation in Ukraine, paras. 33-34.
[45] See Ibid., para.38; See also CDL-AD(2020)033, Ukraine – Urgent Opinion on the reform of the Constitutional Court, para.44; See also Venice Commission, CDL-AD(2019)012, Opinion on the constitutional situation with particular reference to the possibility of dissolving parliament in the Republic of Moldova, para. 53.

ways of constitutional interpretation, in the light of applicable standards and the case-law of the CCU.

54. The Venice Commission is of the opinion, that two opposite interpretations of the Constitution seem to be possible.

55. It is possible to conclude that the Constitution does not exclude *a posteriori review* of constitutional amendments for the following reasons:

- The word "laws" can be interpreted broadly, and can also cover "laws amending the constitution of Ukraine after its entry into force";[46]

- The fact that the constituent power only provides an explicit and specific attribution to the Constitutional Court regarding *a priori* review (Article 159) but remained silent in relation to *a posteriori* review of constitutional amendments, does not necessarily imply that it wanted to exclude *a posteriori* review. As argued by the CCU in decision No. 13-rp/2008: "[t]*he Constitution of Ukraine (Article 150) does not provide for reservations (as established by Article 106.1.30 of the Constitution of Ukraine on restricting the right of the President of Ukraine to veto such laws) on the possibility of the Constitutional Court of Ukraine to exercise the subsequent constitutional review over the law concerning the amendments to the Constitution of Ukraine after its adoption by the Verkhovna Rada of Ukraine."*

56. It is possible to conclude that the Constitution excludes *a posteriori* review of constitutional amendments for the following reasons:

- Although constitutional amendments are introduced to the constitution by laws, after their adoption, the constitutional provisions that were introduced cannot be any longer considered as laws, as they become integral part of the Constitution.

- The fact that the constituent power only provides an explicit and specific attribution to the Constitutional Court regarding *a priori* review, has to be understood as an intentional yet implicit way of depriving the CCU of an *a posteriori* review of the constitutional amendments. For the sake of legal security, the constituent power wanted potential problems of constitutionality to be checked before the entry into force of the respective amendments.

57. The Venice Commission observes that it is for the Constitutional Court to examine, in the light of the text of the Ukrainian Constitution and the Law on the Constitutional Court of Ukraine, the travaux *préparatoires* of the above-mentioned provisions, the case-law of the Court and a clear and established doctrine, which of these two interpretations is the most convincing.

58. In case the Constitutional Court finds it impossible to conclude whether the Constitution provides convincing arguments for or against a *posteriori* constitutional review, the Commission believes that the following three arguments can justify the recognition of this power, at least when this is necessary to ensure the review of amendments that were not properly submitted to a priori review.

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[46] See Constitutional Court of Hungary, Decision 45/2012, 29.12.2012, in which the Constitutional Court indicated a possible competence to review constitutional amendments from the perspective of substantive constitutionality; See Venice Commission, CDL-AD(2013)012, Opinion on the Fourth Amendment to the Fundamental law of Hungary, according to para. 102: "While the wording of Article 24 of the Fundamental Law in the non-amended version specified the power of the Constitutional Court to examine *"any piece of legislation"* for conformity with the Fundamental Law and, arguably, constitutional amendments were not originally considered 'pieces of legislation' by the drafters of the Fundamental Law, the Court clearly developed this understanding further in decision 45/2012."

a) The CCU would be in line with the arguments developed in the VC Report "on Constitutional amendment" in which it expressed "strong support" of "all systems that allow for effective and democratic supervision of the way in which the constitutional amendment procedures have been respected and followed."; (See para. 23 above)

b) The CCU would be in line with its most recent case law - the Decisions of June 2008 and September 2010 - in which the Court considered itself competent in this respect; (see paras. 43-46 above)

c) Finally, the absence of any "sanction" in relation to the non-compliance with Article 159 of the Constitution (mandatory *a priori* opinion of the Constitutional Court) would imply that the clear will of the constituent legislator that at least *a priori* review should take place, would also remain ineffective.

59. However, it is of paramount importance to understand that such powers:

- Could only be exercised within the explicit limits and for the purposes of Articles 5, 157, 158 and 159 of the Constitution.

- Do not imply meta-constitutional nor constituent powers to amend pre-existing constitutional provisions.

- Should not deprive of effects the powers or acts of the constituent legislator.

60. As to the substantive judicial review of constitutional amendments, the Venice Commission reiterates its observations made in its 2000 Report "on Constitutional amendment" that it "is a problematic instrument, which should only be exercised in those countries where it already follows from clear and established doctrine, and even there with care, allowing a margin of appreciation for the constitutional legislator". [47]

61. Even though the subject matter of the *amicus curiae* petition refers only to the possibility of conducting a formal *a posteriori* review, this recommendation of the Venice Commission should also be considered. Given the case of an eventual need for substantive *a posteriori* review of a constitutional amendment, the Constitutional Court of Ukraine should consider whether the country has a "clear and established doctrine" on this matter.

62. As to the legal consequences of declaring the law introducing amendments to the Constitution unconstitutional, Article 152.2 of the Constitution clearly establishes such consequences. Nevertheless, it must be noted that Article 5 of the Constitution explicitly provides that "[t]*he right to determine and change the constitutional order in Ukraine belongs exclusively to the people and shall not be usurped by the State, its bodies or officials*". A systematic interpretation of this provision and Articles 75, 85.1, 154 and 159 of the Constitution imply that the Court should not exercise its review powers on constitutional amendments in a manner that deprive of effects the acts of the constituent legislator acting through the Verkhovna Rada of Ukraine. However, if necessary for ensuring the uniform understanding, supremacy and stability of the Constitution, the Constitutional Court exercising its powers to interpret the Constitution and administer constitutional justice may clarify the consequences of its decision to declare the law introducing amendments to the Constitution unconstitutional, including the content of the modified constitutional regulation after such a decision, taking into account that the Constitution cannot have gaps in its regulation.

63. The Venice Commission also emphasises that if the CCU were to decide that it has a power to exercise formal a *posteriori* review of constitutional amendments, it would, in any case, have

[47] See Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment, para 235.

to respect the proportionality test when exercising this power. This is to balance the requirement of constitutionality against the negative consequences of the annulment of the constitutional amendment in question. (See para. 47 above)

64. Consequently, if a law introducing amendments to the Constitution is declared unconstitutional for procedural violations, the reasonable effect would be to allow the Parliament to reinstate the procedure, so the act of the constituent power is not completely annulled. This interpretation would be adequate to balance what the Venice Commission calls "*the partly antagonist constitutional values of popular sovereignty and the rule of law"*.[48]

IV. Conclusion

65. In this *amicus curiae* brief, the Venice Commission has limited itself to the questions posed by the Acting President of the Constitutional Court of Ukraine via making some observations on the possible ways of interpreting the Constitution and by analysing applicable standards and relevant case-law of the CCU. However, the Commission reiterates that it is the competence and the task of the Constitutional Court of Ukraine, an institution with the authority to provide a final interpretation of the Constitution, to decide whether the Ukrainian constitutional system allows for *a posteriori* review of constitutional amendments by the Constitutional Court.

66. The questions addressed to the Venice Commission for this *amicus curiae* brief by the Constitutional Court of Ukraine are as follows:

1) Does the text of the Constitution of Ukraine imply the peculiarities of exercising constitutional review of the laws on amendments to the Constitution of Ukraine after their adoption and entry into force?

2) Does the provision of Article 152.1 of the Constitution allow the Constitutional Court to exercise constitutional review of the laws introducing amendments to the Constitution after their adoption and entry into force?

3) Can the Constitutional Court of Ukraine declare the law on introducing amendments to the Constitution of Ukraine as in compliance/not in compliance with the Constitution of Ukraine (is constitutional/unconstitutional) and if so, in which cases?

4) What may be the legal consequences of declaring the law introducing amendments to the Constitution of Ukraine as having been adopted in violation of the constitutional procedure for its consideration, adoption or entry into force?

67. The conclusions reached on questions 1-3 in this amicus curiae brief are as follows:

68. The Venice Commission observes that the question of the competence of the CCU to exercise a *posteriori review of* constitutional amendments is not clearly and explicitly answered in the text of the Constitution.

69. The Venice Commission is of the opinion, that two opposite interpretations of the Constitution seem to be possible - that the Constitution does not exclude *a posteriori review* of constitutional amendments and that the Constitution excludes *a posteriori review* of constitutional amendments. It is up to the CCU to make a final interpretation. However, if the CCU finds it difficult to interpret the Constitution for or against a *posteriori* constitutional review, the Commission believes that there are strong arguments to use for justifying the recognition of this power, at least when this is necessary to ensure the review of amendments that were not properly submitted to a priori review. However, such power could only be exercised within the explicit limits

[48] See Venice Commission, CDL-AD(2012)010, Opinion on the Revision of the Constitution of Belgium. para. 51.

and for the purposes of Articles 5, 157, 158 and 159 of the Constitution and should not deprive of effects the powers or acts of the constituent legislator.

70. As concerns question No. 4, the Venice Commission observes that Article 152.2 of the Constitution of Ukraine explicitly establishes the effects of declaring the unconstitutionality of an act or law – they lose legal force from the day the CCU adopts the decision on their unconstitutionality unless otherwise established by the decision itself. This has been further interpreted and confirmed by the Decision No. 20-rp/2010 of the CCU. Nevertheless, the Venice Commission observes that the effect of declaring constitutional amendments unconstitutional due to a breach of procedure for its review and adoption should not be to deprive of effects the acts of the constituent legislator. Moreover, when a court's decision is based on formal or procedural grounds only like this is the case with the pending petition before the CCU, substantive effect of such a decision should be taken into account and proportionality test should be applied.

71. The Venice Commission remains at the disposal of the Constitutional Court and the Ukrainian authorities for any further assistance they may need.