

## Case Note

## PRELIMINARY JUDICIAL CONTROL OF AMENDMENTS TO THE CONSTITUTION: COMPARATIVE STUDY

*Hryhorii Berchenko, Tetiana Slinko, Yevhenii Tkachenko, and Volodymyr Kobryn*

Submitted on 1 Aug 2022 / Revised 20 Sep 2022 / Approved **12 Oct 2022**

Published online: **5 Nov 2022** // Published **15 Nov 2022**

**Summary:** 1. Introduction. – 2. Preliminary Control: General Remarks. – 3. Explicit Preliminary Judicial Control. – 4. Implicit Preliminary Judicial Control. – 5. Conclusions.

**Keywords:** preliminary judicial review, constitutional control, constitutional amendment, entrenchment clause, Constitutional Court, Supreme Court

**Hryhorii Berchenko:** Cand. of Science of Law (Equiv. Ph.D.), Assoc. Prof. of the Department of Constitutional law of Ukraine of Yaroslav Mudryi National Law University, Kharkiv, Ukraine [g.v.berchenko@nlu.edu.ua](mailto:g.v.berchenko@nlu.edu.ua) <https://orcid.org/0000-0002-0365-9009> **Corresponding author**, responsible for conceptualization and methodology, writing and revising the manuscript. **Competing interests:** No competing interests were disclosed. **Disclaimer:** The author declares that his opinion and views expressed in this article are free of any impact of any organizations.

**Tetiana Slinko:** Cand. of Science of Law (Equiv. Ph.D.), Professor, Department of Constitutional Law of Ukraine, Yaroslav Mudryi National Law University, Kharkiv, Ukraine [t.m.slinko@nlu.edu.ua](mailto:t.m.slinko@nlu.edu.ua) <https://orcid.org/0000-0001-8411-9655> **Co-author**, responsible for writing and data curation. **Competing interests:** No competing interests were disclosed. **Disclaimer:** The author declares that her opinion and views expressed in this article are free of any impact of any organizations, including those related to her service as a member of the Science Council of the Constitutional Court in Ukraine.

**Yevhenii Tkachenko:** Cand. of Science of Law (Equiv. Ph.D.), Assoc. Prof., Department of Constitutional Law of Ukraine, Yaroslav Mudryi National Law University, Kharkiv, Ukraine [ye.v.tkachenko@nlu.edu.ua](mailto:ye.v.tkachenko@nlu.edu.ua) <https://orcid.org/0000-0003-2510-5362> **Co-author**, responsible for writing and data curation. **Competing interests:** No competing interests were disclosed. **Disclaimer:** The author declares that his opinion and views expressed in this article are free of any impact of any organizations.

**Volodymyr Kobryn:** Cand. of Science of Law (Equiv. Ph.D.), Assoc. Prof., Department of Constitutional Law, Ivan Franko National University of Lviv, Lviv, Ukraine [volodymyr.kobryn@lnu.edu.ua](mailto:volodymyr.kobryn@lnu.edu.ua) <https://orcid.org/0000-0002-5876-4906> **Co-author**, responsible for writing and data curation. **Competing interests:** No competing interests were disclosed. **Disclaimer:** The author declares that his opinion and views expressed in this article are free of any impact of any organizations.

**Copyright:** © 2022 H. Berchenko, T. Slinko, Ye. Tkachenko, V. Kobryn. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

**Managing Editor** – Dr. Sergii Kravtsov. **English editing** – Dr. Sarah White.

**How to cite:** H Berchenko, T Slinko, Ye Tkachenko, V Kobryn 'Preliminary Judicial Control of Amendments to the Constitution: Comparative Study' 2022 4(16) Access to Justice in Eastern Europe 159-169. <https://doi.org/10.33327/AJEE-18-5.4-n000435>

## ABSTRACT

**Background:** Genetically, constitutional control appeared in connection with the need to check the constitutionality of ordinary laws adopted by the parliament. A significant practice of the bodies of constitutional jurisdiction regarding preliminary or subsequent control over draft laws/laws on amendments to the constitution was also gradually formed. This approach has both positive and negative sides. In Ukraine, a significant practice of the Constitutional Court of Ukraine has already been formed regarding the provision of conclusions on the compliance of draft laws on amendments to the Constitution of Ukraine to comply with its Arts. 157-158 (preliminary control). An assessment of the relevant national experience is impossible without a comparative approach and study of the experience of foreign countries.

**Methods:** The present paper used the following methods of analysis and synthesis to examine the main approaches to the nature of the preliminary judicial constitutional control of amendments to the constitution and its variation (explicit and implicit): the system-structural method, which allowed us to give a structural description of the preliminary judicial constitutional control of amendments to the constitution, as well as to analyse the content of its variations (explicit and implicit), and the logical-legal method, which provided an opportunity to clarify the content of the legal positions of constitutional courts and supreme courts of foreign countries on the implementation of the preliminary judicial constitutional control of amendments to the constitution.

**Results and Conclusions:** Theoretical and practical approaches to substantiating the nature of the preliminary judicial constitutional control of amendments to the constitution in foreign countries were developed and analysed.

## 1 INTRODUCTION

Judicial review, also known as constitutional control, can be both preliminary (before an act enters into force) and subsequent (after such entry into force). Preliminary judicial review (control) is less common. Even less common is the judicial review of draft laws on amendments to the constitution, as well as adopted laws, before their promulgation. Such verification can be carried out if it is directly (explicitly) provided for by the constitution or legislation, and sometimes, it is carried out implicitly (indirectly) through the exercise of other powers of judicial authorities.

As noted by the Venice Commission, only in a few states does the constitutional court have the right to participate in the procedure of amending the constitution. Prior control is a rare procedural mechanism. Thus, this control cannot be considered a requirement of the rule of law (CDL-AD (2012)010, Opinion on the revision of the Constitution of Belgium, para. 49)<sup>1</sup>.

Nevertheless, a significant practice of prior control has already been formed in those countries where such prior control is provided for. Ukraine belongs to this list. Therefore, our goal is a general overview and analysis of the accumulated practice of foreign countries in an attempt to uncover the positive and negative aspects of the preliminary control of laws on amendments to the constitution.

<sup>1</sup> Opinion on the revision of the Constitution of Belgium: Adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012) <[https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2012\)010-e](https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2012)010-e)> accessed 20 September 2022.

## 2 PRELIMINARY CONTROL: GENERAL REMARKS

As stated in paras 51-57 of the Report of the Venice Commission 'On constitutional amendment',<sup>2</sup> in some countries, the Constitutional Court plays a formal role in the procedure for introducing constitutional amendments – for example, in Azerbaijan, Kyrgyzstan, Moldova, Turkey, and Ukraine. In Moldova, a proposal for a constitutional amendment can be submitted to the parliament for consideration only if it has received the support of at least four judges of the Constitutional Court (the Constitutional Court consists of six judges). The activity of the Constitutional Court in the amendment procedure is allowed under certain conditions. In Azerbaijan, the Constitutional Court must give its opinion before voting on the proposal if a change in the text of the Constitution is proposed by the Parliament or the President. In Turkey, the Constitutional Court intervenes in the process only at the request of the resident or one-fifth of the members of the parliament. It can check compliance with procedural requirements but not the content of the constitutional amendment.

The experience of such mandatory preliminary judicial review of constitutional amendment proposals is very diverse. On the one hand, there are examples of constitutional courts making valuable contributions that have improved and served as an example for subsequent parliamentary and public debates. On the other hand, there are also examples of prior court involvement making the amendment process overly rigid. This is especially true if any (even the most minor) change made after the court decision will mean that a revised version must be presented to the court again. The Venice Commission claims that this kind of prior judicial control is a severe limitation of the parliament – presenting the risk that some proposals will be excluded without even having a chance for democratic discussion (para. 195 of the Report 'On constitutional amendment', approved at the 81st plenary session (11-12 December 2009)).

Preliminary judicial constitutional control of amendments to the constitution can be explicit or implicit. We will consider these two varieties in more detail.

## 3 EXPLICIT PRELIMINARY JUDICIAL CONTROL

Preliminary control is enshrined in the Constitution of the Republic of Kosovo, dated 9 April 2008. In accordance with Part 9 of Art. 113 of the Constitution, before sending additions to the Assembly, the Speaker of the Assembly sends the above-mentioned additions to the Constitutional Court to confirm that the above-mentioned additions do not reduce human rights and freedoms guaranteed by Chapter 2 of this Constitution.<sup>3</sup>

According to Art. 146 of the Constitution of Romania, the constitutional court must issue an opinion on initiatives to revise the Constitution. This article is correlated with Art. 148, which sets the limits of review.<sup>4</sup>

O. Boryslavska cites the example of the decision of the Constitutional Court of Romania in 2014 when it recognised a draft law as unconstitutional in part 26 of the relevant paragraphs (Constitutional Court of Romania, Decision 80/2014). The project was also criticised by

2 Report 'On constitutional amendment', adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009) <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)001-e)> accessed 20 September 2022.

3 Constitution of the Republic of Kosovo, Constitutions of the country of world: Republic of Serbia, Republic of Kosovo, Republic of Albania, Montenegro (OVK 2022) 175-176.

4 Constitution of Romania <<https://www.presidency.ro/en/the-constitution-of-romania>> accessed 20 September 2022.

the Venice Commission (CDL-AD(2014)010). Opinion on the draft law on the review of the Constitution of Romania, adopted by the Venice Commission at its 98th Plenary Session (Venice, 21–22 March 2014), Strasbourg, 24 March 2014).<sup>5</sup> As a result, in Romania, the implementation of the relevant control caused serious state-legal conflicts.

The model operating in Moldova is similar to the Romanian one. Mandatory control of all draft laws on amendments to the Constitution is in effect there (subsection 1, part 1 of Art. 135 of the Constitution).<sup>6</sup>

As for Ukraine, its model of preliminary control over amendments to the constitution is similar to the Romanian and Moldovan ones, as it provides for checking the draft law for compliance with Arts. 157-158 of the Constitution of Ukraine.<sup>7</sup>

In 2008, the Constitutional Court of Tajikistan was granted the right of preliminary control over the project to amend the Constitution. At the same time, on 4 February 2016, the Constitutional Court of Tajikistan stated that

The Constitutional Court of the Republic of Tajikistan came to the conclusion that the proposed changes and additions to the Constitution reflect the further process of democratisation of the political and social life of Tajik society, strengthening the legal protection of the person and are a continuation of the political and social, legal and judicial reform in the country. They are aimed at improving the norms of the Constitution and correspond to the world practice of introducing amendments and additions to the constitution, as well as the values and basic principles of the Constitution of the Republic of Tajikistan.<sup>8</sup>

One cannot fail to note the sublime style in which the approval of the corresponding project is expressed. Tajik authors (in particular, D. Elnazarov), on the other hand, claim that ‘the legislator, expanding the scope of preliminary control by the Constitutional Court, thereby strengthened its role and prestige in ensuring the supremacy of the Constitution in the system of normative legal acts of the Republic of Tajikistan’.<sup>9</sup>

As a result of the 2015 constitutional reform in Armenia (Art. 168 of the Constitution), preliminary control by the Constitutional Court was provided for the approval of draft amendments to the Constitution.<sup>10</sup>

Preliminary explicit judicial constitutional control of amendments to the constitution exist in Azerbaijan. Arts. 153-154 of the Constitution of the Republic of Azerbaijan declare: ‘The Constitutional Court of the Republic of Azerbaijan shall be requested in advance to give its opinion with respect to the changes to the text of the Constitution that are proposed by the Milli Majlis or the President of the Republic of Azerbaijan’ and that ‘The Constitutional

5 O Boryslavska, European model of constitutionalism: system-axiological analysis (Pravo 2018) 313-314.

6 Constitution of the Republic of Moldova  
<[https://www.constcourt.md/public/files/file/Baza%20legala/constitutia\\_ro\\_22.05.17\\_ru.pdf](https://www.constcourt.md/public/files/file/Baza%20legala/constitutia_ro_22.05.17_ru.pdf)> accessed 20 September 2022.

7 On the preliminary control over amendments to the Constitution in Ukraine, see H Berchenko ‘Preliminary control over changes to the Constitution: legal positions of the Constitutional Court of Ukraine’ (2019) 6-1 Law and Society 9-16; H Berchenko ‘Reservation of the Constitutional Court of Ukraine as an element of the procedure for introducing amendments to the Constitution of Ukraine’ (2020) 66 Actual Problems of Politics 118-123.

8 Resolution of the Constitutional Court of the Republic of Tajikistan dated 4 February 2016  
<<http://constcourt.tj/ru/qarorho/postanovlenie-po-predstavleniyu-madzhlisi-namoyandagon-madzhlisi-oli-respubliki-tadzhikistan-ob-opredelenii-sootvetstviya-proekta-izmenenij-i-dopolnenij-vnosimyh-v-konstitucziyu-respubliki-tadz>> accessed 20 September 2022.

9 Ja Zalesny (ed), Constitutional Courts in Post-Soviet States: Between the Model of a State of Law and Its Local Application (Peter Lang Publishing 2019) Chapter IX.

10 Ibid, Chapter II.

Court of the Republic of Azerbaijan may not take decisions with respect to changes in the text of Constitution of the Republic of Azerbaijan that are adopted by referendum.<sup>11</sup>

K. Makili-Aliev explains this provision as follows:

In this way, the principle of separation of powers is ensured. If one of the two branches of government proposes a legislative initiative to change the Constitution of the Republic of Azerbaijan, a preliminary opinion from the body representing both the judiciary and the institution of constitutional control is mandatory. At the same time, the Constitutional Court itself does not have the right to initiate a similar issue, and it also does not have law-making powers. Moreover, if the initiative to change the constitutional norms comes from the citizens of Azerbaijan (that is, direct democracy), then the opinion of the Constitutional Court is not required.<sup>12</sup>

Preliminary control is provided for in Part 3 of Art. 91 of the Constitution of Kazakhstan (as amended in 2007).<sup>13</sup> The check is carried out in relation to the entrenchment clause in Part 2 of Art. 91 of the same constitution: 'The independence of the state, unitary and territorial integrity of the Republic, the form of its government, the basic principles of the Republic's activity, established by the constitution, are unchanged'.

It is interesting that the law of 21 May 2007 No. 254, the entrenchment clause in Part 2 of Art. 91 of the Constitution was expanded due to the unamendability of the status of the president (Elbas). The Constitutional Council commented on it as follows:

This constitutionally confirms the historical mission of Nursultan Abyshevych Nazarbayev as the Founder of the new independent state of Kazakhstan, who ensured its unity, the protection of the Constitution, the rights and freedoms of man and citizen; made, thanks to his constitutional status and personal qualities, a decisive contribution to the formation and development of sovereign Kazakhstan, including the constitutional values of the Basic Law and the fundamental principles of the Republic's activity.<sup>14</sup>

As a result, through changes from 8 June 2022,<sup>15</sup> these provisions were excluded from the Constitution of Kazakhstan. In its conclusion, the Constitutional Council did not comment on this change at all,<sup>16</sup> which is very surprising.

The situation is very interesting: the changes affected the entrenchment clause, for compliance with which the project had to be checked. Such cases are also unique in foreign practice. Obviously, the Constitutional Council simply had nothing to say in this case. This shows that the previous control was mainly intended to legitimise what is beneficial to politicians. In the opposite case, when the political situation has changed, and changes have appeared

11 The Constitution of the Republic of Azerbaijan <[https://stat.gov.az/menu/3/Legislation/constitution\\_en.pdf](https://stat.gov.az/menu/3/Legislation/constitution_en.pdf)> accessed 20 September 2022.

12 Zalesny (n 14) Chapter III.

13 Constitution of Kazakhstan <[https://www.akorda.kz/ru/official\\_documents/constitution](https://www.akorda.kz/ru/official_documents/constitution)> accessed 20 September 2022.

14 Regulatory Resolution of the Constitutional Council of the Republic of Kazakhstan dated 9 March 2017 No 1 <[https://online.zakon.kz/Document/?doc\\_id=36772838](https://online.zakon.kz/Document/?doc_id=36772838)> accessed 20 September 2022.

15 Constitutional Law of the Republic of Kazakhstan 'On amendments and additions to the Constitution of the Republic of Kazakhstan' (May 2022) <[https://online.zakon.kz/Document/?doc\\_id=32834868&pos=7;-60#pos=7;-60](https://online.zakon.kz/Document/?doc_id=32834868&pos=7;-60#pos=7;-60)> accessed 20 September 2022.

16 Conclusion of the Constitutional Council of the Republic of Kazakhstan dated 4 May 2022 No 1 'On verification of the draft Law of the Republic of Kazakhstan "On amendments and additions to the Constitution of the Republic of Kazakhstan" for compliance with the requirements established by paragraph 2 of Article 91 of the Constitution of the Republic of Kazakhstan' <[https://online.zakon.kz/Document/?doc\\_id=32834868&doc\\_id=33643774#pos=6;-106&sel\\_link=1008710906](https://online.zakon.kz/Document/?doc_id=32834868&doc_id=33643774#pos=6;-106&sel_link=1008710906)> accessed 20 September 2022.

that cancel the previous ones, the Constitutional Council is simply silent, as if burying its head in the sand.

In Belarus, the Constitutional Court is also empowered to pre-control the draft amendment to the Constitution adopted by the parliament. This control is provided for in Art. 102 of the Law of 8 January 2014, nos. 124-3 'On Constitutional Judiciary',<sup>17</sup> where it is called 'obligatory preliminary'.

The implementation of preliminary control can end negatively for the constitutional court itself, leading to its dissolution. This is evidenced by the experience of Kyrgyzstan. In the Decree of the Provisional Government of the Kyrgyz Republic (dated 12 April 2010 no. 2) 'On the dissolution of the Constitutional Court of the Kyrgyz Republic', among other things, it is stated:

Regarding all changes and additions made to the Constitution of the Kyrgyz Republic in 1996, 1998 and 2003 by referendum and aimed at strengthening the powers of the President of the Kyrgyz Republic, positive conclusions were given. By its actions, the Constitutional Court led to the destruction of the mechanisms of checks and balances existing in the 1993 Constitution...<sup>18</sup>

At the same time, the institution of constitutional control itself was not abolished – in the Constitution of 27 June 2010,<sup>19</sup> the Constitutional Chamber of the Supreme Court was created instead.<sup>20</sup> Already in 2011, an amendment to the Constitution of Kyrgyzstan gave the Constitutional Chamber the authority to issue an opinion during the preliminary review of amendments to the Constitution.<sup>21</sup> In accordance with the current Constitution of Kyrgyzstan dated 5 May 2021, no. 59, the Constitutional Court was created again, and it also (clause 5, part 1, Art. 97) provides an opinion on the draft law on amendments and additions to this Constitution.<sup>22</sup>

Preliminary control was once stipulated as mandatory in the Law of the Russian Federation on Amendments to the Constitution of the Russian Federation of 14 March 2020 'On Improving the Regulation of Certain Issues of the Organization and Functioning of Public Power'. After the entry into force of this Law, the President of the Russian Federation submitted a request to the Constitutional Court of the Russian Federation regarding compliance with the provisions of Chapters 1, 2, and 9 of the Constitution of the Russian Federation, the provisions of this Law, which have entered into force, as well as compliance with the Constitution of the Russian Federation with the order of entry into force of Art. 1 of this Law (part 2 of Art. 3).

This control can be characterised as a preliminary material one since a substantive check of provisions that have not entered into force was carried out, as well as a preliminary procedural one, which is related to the assessment of compliance with the procedure for the entry into force of changes. In its conclusion, the Constitutional Court essentially provided an official interpretation of the introduced changes, explaining in more or less detail what

17 Law of the Republic of Belarus 'On constitutional legal proceedings' dated 8 January 2014 No 124-3 <<https://etalonline.by/document/?regnum=h11400124>> accessed 20 September 2022.

18 Decree of the Provisional Government of the Kyrgyz Republic of 12 April 2010 VP No 2 'On the dissolution of the Constitutional Court of the Kyrgyz Republic' <<http://cbd.minjust.gov.kg/act/preview/ru-ru/202766/10?mode=tekst>> accessed 20 September 2022.

19 Constitution of the Kyrgyz Republic: Adopted by referendum (popular vote) on 27 June 2010 <<http://cbd.minjust.gov.kg/act/view/ru-ru/202913?cl=ru-ru>> accessed 20 September 2022.

20 Zalesny (n 14) Chapter VII.

21 Y Roznai, *Unconstitutional constitutional amendments* (Oxford University Press 2017) 198.

22 Law of the Kyrgyz Republic dated 5 May 2021 No 59 'On the Constitution of the Kyrgyz Republic' <<http://cbd.minjust.gov.kg/act/view/ru-ru/112215?cl=ru-ru>> accessed 20 September 2022.

such changes mean and why they do not contradict Chapters 1, 2, and 9 of the Constitution of the Russian Federation.

The complimentary opinion of the Constitutional Court of 16 March 2020, nos. 1-3<sup>23</sup> was needed for greater legitimisation of the introduced changes. The relevant procedure was applied once, exclusively under this specific law, and was contained in the very law on amendments to the constitution.

The key element in the project was to give the current president the right to ballot again in the elections for this position. Paradoxically, this project retained the limitation of holding the post of president for only two terms and even removed the word 'consecutive'.<sup>24</sup>

W. Parlett argues that, from a comparative perspective, these amendments are underpinned by what is now called a 'populist' agenda that believes in the merits of personalised leadership claiming to act on behalf of 'the people'.<sup>25</sup>

The aforementioned conclusion of the Constitutional Court of the Russian Federation confirms the opinion that undemocratic regimes are inclined to use the institution of preliminary constitutional control when amending the constitution for political purposes in order to strengthen the 'legitimizing effect' in the eyes of the public, as well as in the international arena. This case can be described as 'abusive judicial review' (according to D. Landau and R. Dixon).<sup>26</sup>

Another feature of preliminary control is its 'politicality'. I. Slidenko's remark is fair in terms of the fact that preliminary control is inherently political since it is installed in the procedure of adopting a law from the formal side.<sup>27</sup> In general, the politicisation of constitutional courts is a serious problem.<sup>28</sup> This is also confirmed by the practice of implementing the relevant authority in Ukraine, which is one of the few countries where such control is directly provided for.

It is also worth distinguishing such a type of preliminary control as the control of the adopted, but such that the law on amendments to the constitution has not entered into force.

In Hungary, as a result of the 2016 changes, the President of the Republic, before signing the Basic Law or an amendment to the Basic Law sent to him, if he finds that any

- 23 Conclusion of the Constitutional Court of the Russian Federation on the compliance with the provisions of Chapters 1, 2, and 9 of the Constitution of the Russian Federation of the provisions of the Law of the Russian Federation on the amendment to the Constitution of the Russian Federation 'On improving the regulation of certain issues of the organization and functioning of public authority', as well as on the compliance of the Constitution of the Russian Federation of the procedure for the entry into force of Art. 1 of this Law in connection with the request of the President of the Russian Federation dated 16 March 2020 N 1-3 <<https://rg.ru/2020/03/17/ks-rf-popravki-dok.html>> accessed 20 September 2022.
- 24 As Y Barabash, D Beinoravičius, and J Valčiukas stated in this regard, "The "spiciness" of the situation lies in the fact that Putin himself proposed to clarify the "restrictive" provision in the Constitution, setting restrictions on one person to be the head of state for not just two consecutive terms but for two terms in general. And such a proposal was included in the draft constitutional amendments" (Y Barabash, D Beinoravičius, J Valčiukas, 'Invisible Constitution as an instrument of consolidation of nation and defence of democracy' (2022) 4(3) Insights into Regional Development 114).
- 25 W Partlett, 'Russia's 2020 Constitutional Amendments: A Comparative Perspective' (2020) 887 University of Melbourne Law School Legal Studies Research Paper Series.
- 26 D Landau, R Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 UC Davis Law Review 1313-1387.
- 27 I Slidenko, Phenomenology of constitutional control. Genesis, nature and positioning in the context of axiological, epistemological, praxeological, synergistic aspects (Istyna 2010) 141.
- 28 Iu Barabash, D Vovk "Justices have a political sense": The Constitutional court of Ukraine's jurisprudence in politically sensitive cases' (2021) 2(18) Ideology and Politics Journal, 329-330; H Berchenko, A Maryniv, S Fedchyshyn, 'Some Issues of Constitutional Justice in Ukraine' (2021) 2 Access to Justice in Eastern Europe 134.

procedural requirement set out in the Basic Law regarding the adoption of the Basic Law or the amendment of the Basic Law has not been complied with, he or she applies to the Constitutional Court with a request to consider this issue (Part 3 of Art. S).<sup>29</sup>

## 4 IMPLICIT PRELIMINARY JUDICIAL CONTROL

It is worth emphasising that, without being directly foreseen, the prospects for the implementation of preliminary control are reduced to two options.

The first option – preliminary control – is impossible in any form. An example of this is Croatia. In the Decision of the Constitutional Court,<sup>30</sup> representatives of one chamber of the parliament (Zupanijski dom) demanded to review the decision initiating changes to the Constitution. The court ruled that it is authorised to review the procedure for amending the Constitution, but only after its completion. Since the contested decision was only part of the procedure for amending the Constitution, the claim was rejected. The Constitutional Court noted that it is authorised to review only after the end of the procedure for amending the Constitution. The Constitutional Court does not have the authority to exercise preventive control.

The second option is that the Court can carry out preliminary control, so to speak, ‘hiddenly’, or indirectly, implementing its other powers implicitly. Prior control can be exercised implicitly if there is simply no special authority for the corresponding control over constitutional changes. It is ‘integrated’ into other powers of constitutional (supreme) courts. So, for example, before the changes of 2017, which we already wrote about above, the Constitutional Council of Kazakhstan carried out preliminary control on the basis of its authority to exercise its authority regarding the preliminary control of ‘laws’ (clause 2, part 1, Art. 72 of the Constitution).<sup>31</sup>

Another example of preliminary judicial constitutional control of amendments to the constitution is the experience of Canada. R. Albert notes that the Supreme Court of Canada has a long history of advising lawmakers through its review jurisdiction on how and whether to amend the constitution. In current practice, legislators refer to the Court on whether a draft law or a proposal to amend the Constitution is constitutional. Although the Court has the right to decline to answer, the Court generally agrees to give guidance to legislators, and legislators usually follow the Court’s advice. Such a review is called Pre-Ratification Review.<sup>32</sup> Review of a constitutional amendment prior to ratification gives the Supreme Court of Canada considerable authority. This allows the Court to achieve the same result that foreign courts achieve when they invalidate properly adopted constitutional amendments.<sup>33</sup>

In the same way, appropriate control can be carried out during the judicial evaluation of the constitutional referendum. According to the Regulation on the holding of constitutional

29 Constitution of Hungary  
<[https://www.constituteproject.org/constitution/Hungary\\_2016?lang=en](https://www.constituteproject.org/constitution/Hungary_2016?lang=en)> accessed 20 September 2022.

30 Decision Constitutional Court of Croatia no U-II/603/2001 of 28 March 2001  
<<https://www.edusinfo.hr/sudska-praksa/USRH2001B603AI>> accessed 20 September 2022.

31 Regulatory Resolution of the Constitutional Council of the Republic of Kazakhstan dated 31 January 2011 No 2 <[https://online.zakon.kz/Document/?doc\\_id=30923722](https://online.zakon.kz/Document/?doc_id=30923722)> accessed 20 September 2022; Regulatory Resolution of the Constitutional Council of the Republic of Kazakhstan dated 9 March 2017 No 1 <[https://online.zakon.kz/Document/?doc\\_id=36772838](https://online.zakon.kz/Document/?doc_id=36772838)> accessed 20 September 2022.

32 R Albert, *Constitutional Amendments Making, Breaking, and Changing Constitutions* (Oxford University Press 2019) 223.

33 Ibid, 226.



referenda at the national level (CDL-INF (2001) 6-7 July 2001, para. P),<sup>34</sup> compliance with and implementation of the above rules should be subject to judicial control. It is carried out in the last instance by the constitutional court, if it exists, or by the supreme court. In particular, judicial control should be expressed and implemented in the judicial assessment of the procedural and substantive capacity of the draft texts submitted to the referendum, which should meet and be subject to preliminary evaluation criteria of judicial control.

In Ukraine, in the decision of 27 March 2000, the Constitutional Court of Ukraine actually carried out an implicit preliminary control of changes to the constitution, considering the Presidential Decree 'On Promulgation of the All-Ukrainian Referendum on People's Initiative' of 15 January 2000 and recognising two of six issues unconstitutional.<sup>35</sup> At the same time, such control, in fact, was wider than the formal requirements regarding the content, which are established in Art. 157 of the Constitution. In 2016, with the help of amendments to the Constitution, the Constitutional Court of Ukraine was empowered to provide an assessment of the constitutionality of issues proposed to citizens for a referendum on popular initiative. Potentially, this authority can also relate to the assessment of certain issues of a constitutional nature (by analogy with the situation in 2000). However, to date, the corresponding special authority has not ever been implemented.

Implicit prior control over the introduction of amendments to the constitution may also be somewhat related to the exercise of constitutional control over constitutional reform laws. Thus, Law No. 27600 (16 December 2001) of the Republic of Peru provided for constitutional reform. The constitutionality of this law was contested (due to the attribution of constituent functions to Congress). As J. Colon-Rios writes, in its decision, the Constitutional Tribunal of Peru (no. 014 -2002- AI/ TC, paras. 37, 129) defined the main content of the historical constitution in the provisions of the constitutional text, which recognises popular sovereignty, the republican and representative form of government, and the protection of fundamental rights. Among the arguments advanced in support of the law's constitutionality was that, to the extent that it requires Congress to respect the historic constitution, the law will not allow that body to create an entirely new constitutional order (i.e., to intrude on the jurisdiction of the constituent power).<sup>36</sup>

It is not necessary to involve judicial mechanisms for preliminary control. So, for example, in Luxembourg, there is a kind of preliminary check, which is carried out by the Council of State during the parliamentary procedure. Although its advisory opinions are not binding on the Chamber, they are usually followed.<sup>37</sup> In 1996, both chambers of the Federal Assembly declared the People's Initiative to amend the Constitution to be invalid due to the violation of the internationally recognised prohibition of gratuitous deportation.<sup>38</sup>

In Switzerland, the Federal Assembly declares a popular initiative for partial revision of the Federal Constitution wholly or partially invalid if the initiative violates the unity of form, unity of content, or binding provisions of international law. If the opinions of the Councils regarding the design of the initiative (or its separate part) for compliance with

34 CDL-INF(2001)010-ukr. Guidelines for Constitutional Referendums at National Level: Adopted by the Venice Commission at its 47th Plenary Meeting (Venice, 6-7 July 2001) in Ukrainian <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF\(2001\)010-ukr](https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2001)010-ukr)> accessed 20 September 2022.

35 Judgment of the Constitutional Court of Ukraine of 27 March 2000 No 3-pn/2000 (the case of the all-Ukrainian referendum at the people's initiative) <<https://zakon.rada.gov.ua/laws/show/v003p710-00#Text>> accessed 20 September 2022.

36 J Colon-Rios, *Constituent power and the law* (Oxford University Press 2020) 186.

37 X Contiades (ed), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge 2013) 253.

38 G Halmai, *Perspectives of Global Constitutionalism. The Use of Foreign and International Law* (Eleven International Publishing 2014) 36.

the requirements differ, then the Council, which recognised compliance, must confirm its decision; otherwise, the initiative will be recognised as invalid.<sup>39</sup> Thus, non-judicial verification methods should not be underestimated or ignored.

## 5 CONCLUSIONS

If implicit (mediated) preliminary control over amendments to the constitution can be found in various countries, then explicit preliminary control over amendments to the constitution by constitutional courts or equivalent bodies is a post-Soviet trend (Ukraine, Moldova, Belarus, the Russian Federation, Kazakhstan, Tajikistan, Kyrgyzstan, Azerbaijan, Armenia) and post-socialist (Kosovo, Romania, Hungary).

Some of the mentioned countries started the path of democratisation (even in the presence of problems and difficulties), and some, on the contrary, avoided real democracy. A vivid example of the latter is the Russian Federation, in which the conclusion of the Constitutional Court in 2020 was aimed at legitimising the dictatorial changes to the 1993 constitution and the introduction of the so-called 'resetting' the presidential terms of the current president with the right to be re-elected.

At the same time, it is probably not useful to paint preliminary control itself with one colour. Its success and positive and negative sides are completely individual and depend on its model in a specific country and its context. So, to what extent is the presence of preliminary control over changes to the constitution necessary?

First of all, such control has all the same disadvantages as any preliminary control – it risks being political and always means interference in the political process. In conditions of a low level of quality of the work of the constitutional control body and dependence on the political majority, there is a risk of performing not the function of control, but the formal consecration of the changes needed by the authorities (as demonstrated by the practice of Kyrgyzstan, Kazakhstan, Tajikistan, and Russia). Another disadvantage, purely legal, is that preliminary control 'ties the hands' of the court in the future – once it has recognised the changes as constitutional in content, it loses the opportunity to later express material claims to such changes. At the very least, if such a situation arose, such claims would be much more difficult to make, as they would raise questions about the court's adherence to its own position and undermine legal certainty.

## REFERENCES

1. Albert R, *Constitutional Amendments Making, Breaking, and Changing Constitutions* (Oxford University Press 2019) 223.
2. Barabash Iu, Vovk D, "Justices have a political sense": the Constitutional court of Ukraine's jurisprudence in politically sensitive cases' (2021) 2(18) *Ideology and Politics Journal* 329-330.
3. Barabash Y, Beinoravičius D, Valčiukas J, 'Invisible Constitution as an instrument of consolidation of nation and defence of democracy' (2022) 4(3) *Insights into Regional Development* 114.
4. Berchenko H, 'Reservation of the Constitutional Court of Ukraine as an element of the procedure for introducing amendments to the Constitution of Ukraine' (2020) 66 *Actual Problems of Politics* 118-123.

<sup>39</sup> N Koroleva-Borsodi, *Fundamentals of Swiss constitutional law* (Justinian 2009) 194.

5. Berchenko H, 'Preliminary control over changes to the Constitution: legal positions of the Constitutional Court of Ukraine' (2019) 6-1 Law and Society 9-16.
6. Berchenko H, Maryniv A, Fedchyshyn S, 'Some Issues of Constitutional Justice in Ukraine' (2021) 2 Access to Justice in Eastern Europe 134.
7. Boryslavska O, *European model of constitutionalism: system-axiological analysis* (Pravo 2018) 313-314.
8. Colon-Rios J, *Constituent power and the law* (Oxford University Press 2020) 186.
9. Contiades X (ed), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge 2013) 253.
10. Landau D, Dixon R, 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 UC Davis Law Review 1313-1387.
11. Halmai G, *Perspectives of Global Constitutionalism. The Use of Foreign and International Law* (Eleven International Publishing 2014) 36.
12. Koroleva-Borsodi N, *Fundamentals of Swiss constitutional law* (Justinian 2009) 194.
13. Partlett W, 'Russia's 2020 Constitutional Amendments: A Comparative Perspective' (2020) 887 University of Melbourne Law School Legal Studies Research Paper Series.
14. Roznai Y, *Unconstitutional constitutional amendments*. (Oxford University Press (2017) 198.
15. Slidenko I, *Phenomenology of constitutional control. Genesis, nature and positioning in the context of axiological, epistemological, praxeological, synergistic aspects* (Istyna 2010) 141.
16. Zalesny Ja (ed.), *Constitutional Courts in Post-Soviet States: Between the Model of a State of Law and Its Local Application* (Peter Lang Publishing 2019) 628.