

A Critique of the Legal Regimes for Constitutional Preambles

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ABSTRACT

Globally, constitutional preamble has now become the contemporary norm in most jurisdictions as the easiest way by which a constitution can express popular values. Most constitutional preambles have been couched to denote quintessential expression of national values which flows from the citizens themselves. Most often, preambles speaks in the name of a distinct people, whether real or fictional; who are the creators and subjects of the constitutional order. In some other situations, preambles depict autobiographical narratives, legitimation of specific local actions, historical moments and organization. This article exhaustively examines global influence of constitutional preambles. It has been found, amongst others, that since constitutional preamble offers an opportunity for expressing the distinctiveness of the nation and her citizens, it has often been rated than any other part of the constitution.

Keywords: Constitution, Preamble; National, Values

INTRODUCTION

Some scholarly writings have attributed the origin of constitutional preambles to the ancient Greek world, particularly in the laws of Plato's,[1] who maintained that legislators should do more than just issuing a set of commands in the form of law,[2]to include some persuasive element to the code.[3]

This means that law makers should rather use persuasions so as to make their laws more potent, acceptable and effective.

In modern times, the origin of constitutional preambles can be traced to the British practice of prefacing Royal Decrees and statutes with brief statements which describes their purpose[4]before delving into the law itself.[5]

Within the constitutional context, it is worthy to note that the constitutions of all the thirteen states in the United States of America, with the exception of Maryland, all contained preambles, even before the grand Philadelphia Convention of 1787.[6]

The first national constitution in modern time originated from the United States of America, whose opening phrase "*we the people*" has become eponymous with its preamble.[7] The preamble to the first draft of the new United States Constitution on August 6, 1787 states:

We the people of the States of New-Hemisphere, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South Carolina, and Georgia do ordain, declare and establish the following constitution for the government of ourselves and our posterity.[8]

The above preamble was later re couched in the final constitutional text to incorporate other visions, thus;

“In order to form a more perfect union, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity...”[9]

Initially, the names of individual states that ratified the Constitution of U.S were later excluded from the preamble. The US court has upheld such removal as a wise decision since it was not a foregone conclusion that each state would actually ratify the constitution.[10]The adoption of the US Constitution triggered most, if not other historical constitutions to incorporate constitutional preambles.

For example, the first Constitution of Haiti adopted in 1805 through its preamble invoked religion, freedom and the general will of the people. Other early constitutional preambles tended to be so succinct in identifying the entity in whose names the constitution was produced.[11]At present, constitutional preambles have become popular to the extent that there is hardly a constitutions in the world today without preambles.[12]

Variation In Constitutional Preambles

Obviously, constitutional preambles manifest different styles and dimensions. Thus, constitutions produced by revolutionary regimes tend to dissipate enormous energy to the content of preambles while little emphasis is made to the enactment of rights provisions or governmental organs. While some constitutional preambles are excessively long and voluminous, others are not. For instance, the 1974 Constitution of Yugoslavia had a preamble of over six thousand words which is glaringly longer than roughly one-fifth of all national constitutional preambles put together.[13] On the other hand, many constitutions have preambles that are less than twenty words in length, such as the 1826 Constitution of Peru,[14] while the accompanying constitution was so brief both in text and lifespan.[15]

Notably, some preambles basically refer to some specific historical, religious and contemporaries living figures such as Jesus Christ,[16] Prophet Muhammad,[17] Allah[18] and even some renowned human figures.[19] In addition, most socialist preambles equally devote attention to praise their historic philosophers and thinkers,[20] while other preambles frequently refer to national historical events and shared grievances with the sole aim of establishing a distinct national identity.[21] The 2005 preamble to the Constitution of Iraq for instance states thus:

[R]e collecting the darkness of the ravage of the holy cities and the south in the Sha’abaniyya uprising and burnt by the flames of grief of the mass graves, the marshes, Al-Dujali and others and articulating the suffering of racial oppression in the massacres of HalabchaBarzan, Anfal and the Fayli Kurds and inspired by the ordeals of the Turkmen in Bashir and the sufferings of the people of the Western region...

The above preambles recounts the context by which the constitution was written by speaking to the entire citizenry.

Some preambles, like the the 2008 Constitution of Bolivia was emotionally couched thus:

In ancient times mountains arose, rivers spread out from one place to another, lakes were formed, our Amazonia, our swamps, our highlands and our plains and valleys were covered with greenery and flowers. We populated this sacred Mother Earth with different faces, and since that time we have understood the plurality that exists in all things and in our diversity as human beings and cultures. Thus, our peoples were formed, and we never knew racism until we were subjected to it during the terrible times of colonialism.... Honor and glory to the martyrs of the heroic constituent and liberating effort, who have made this new history possible.

Furthermore, some constitutional preambles contain languages which are directly external such as foreign policy statement. For Instance the 2012 amendments to the preamble of North Korea’s Constitution conspicuously stated that the country had become “an invincible state of political ideology, a nuclear-armed

state and an indomitable military power.[22]

Another worthy example is the preamble to the 2012 version of the Syrian Constitution which states that:

“Syria has occupied an important political position as it is the beating heart of Arabian, the forefront of confrontation with the Zionist enemy and the bedrock of resistance against colonial hegemony on the Arab world and its capabilities and wealth”[23]

There are divergent views as to whether preamble of a constitution possess the status of an enforceable law. While some have argued that Even though preambles can articulate national identity, their commitments to popular values are merely rhetorical due to the fact that they are not usually justiciable,[24] others have held a contrary view that preambles can be enforced. In the celebrated Indian case of *Kasavananda Bharati v. State of Kerala*,[25] the Supreme Court of India extensively relied on the preamble to declare that certain constitutional amendments had violated the “basic structure” of the Indian Constitution.[26]

Tone Of Constitutional Preambles

Notwithstanding the fact that constitutional preambles vary in many ways, it largely depends on the extent to which they all seeks to motivate the citizens. Most contemporary language of constitutional preambles are elegantly and motivationally couched with basic semantics, as well as linguistic and sentimental analysis to inspire the citizens,[27]and to further attract some feeling of affection towards the constitutional text as a whole.[28]For instance, one of the most consistently “happy” constitutional preambles can be found in the 2005 Constitution of Bhutan which provides:

WE, the people of Bhutan: Blessed with the luminous benedictions of the Triple Gem, the protection of our guardian duties, the wisdom of our leaders, the everlasting fortunes of the Pelden Drukpa and the Command of His Majesty the DrukGyalpo, Jigme Singye Wanychuck; SOLEMNLY pledging ourselves to strengthen the sovereignty of Bhutan, to secure the blessings of liberty, to ensure justice and tranquility and to enhance the unity, happiness and wellbeing of the people for all time; DO HEREBY ordain and adopt this constitution for the Kingdom of Bhutan [..][29]

It is glaring that the above preamble, just as in the case of United States of America, copiously speaks of blessings of liberty and the incorporation of positive words like wisdom, happiness and luminous benediction. The linguistic quality of this preamble has also made it a proactive and optimistic document.

Conversely, the preamble to the South Vietnam’s Constitution of 1965 can be rated as one of the most consistently negative and offensive preamble. The Constitution which was promulgated after a military coup *detat* aggressively commenced with the following preamble:

The armed forces of the Republic of Vietnam, at this time of extreme danger for the defense of the rights to existence of the people and for the prestige of the country, have undertaken their responsibilities before the people and before history. In order to carry out their mission, the Armed Forces of the Republic of Vietnam do not seek demagoguery, but rather the realization of a policy of security for the population. After so many sacrifices, the people of Vietnam continue to desire a powerful, peaceful and free nation. The mission of the Armed Forces of the Republic of Vietnam is to fulfil (sic) this strong desire at any cost. To this end, the entire people must unite its will and its action, must direct all its effort to the front for the repulsion and destruction of the communist aggressors. To this end, the rear must be stabilized in order to consolidate gradually the basic organs of government so that a tradition of democracy and liberty may have the condition favourable to its development in revolution and struggle. Drawing the unhappy lessons of the past, the provisional constitutional charter which follows defines the basic institutions of the state for the purpose of fulfilling the objectives set forth above.[30]

It can be glaringly deduced that this constitution was produced at the peak of Vietnam War, and the usage of

terms like danger, scientific, defense, struggle and unhappy lessons of the past will, no doubt, intimidated traumatized and scared the citizens while the military continue to justify their tenacity to power.

Innovations and Borrowing Memes in Constitutional Preambles

A pivotal dimension on which constitutional preambles differ is the extent to which they innovate as opposed to borrowing. Comparative legal scholars have traced the history of borrowing and transplantation of legal concepts from one country to another to the Roman law, and even earlier.[31] Analogically, constitution writing involves a practice whereby earlier drafts have, most often, becomes a source of precedence to later ones. In addition to some particular trajectories of language, most constitutional preambles around the globe are characterized with common phrases.[32]

In the contemporary era, the phrase “we the people” has been adjudged as the most frequently used opening phrase in most constitutions, as it demonstrates the notion that sovereign power resides with the people themselves as indications of effective operation of democratic governance.

Also worthy of mention is the fact that most global dynamics in social and political events today have unique impact on the contents of national constitutions as well as the preambles.[33] The existence of certain common phrases in constitutional preambles is a pointer to the fact that there is more interdependence amongst constitutions which propel sit beyond local shores. That is why the drafting of most preambles have always been an internationally oriented act.[34] Thus, constitutional preambles present some mission statements not only to the nation which enacts the constitution, but also to the entire globe.

It must be further reiterated that the circumstances under which a country may choose to innovate its preamble may vary either vertically or horizontally.[35] But that notwithstanding, the phrase “we the people” has been described as the most powerful political statement in the history of political literature.[36] Since most constitutional drafters normally import some aspects of their assignments from other jurisdictions, there is no doubt that preambles have also been widely borrowed right from the early years of constitution making.[37]

Even though some have regarded constitutional preamble as the local part of a constitution which recount the country’s history, ideological disposition, and fundamental values,[38] preambles also tends to speak in international idioms by adopting terms and memes from other constitutions.

CONCLUSION

This paper has made an in-depth exploration into the origins of constitutional preambles by reiterating some practical examples of their content. It further examined some memes that are common to most constitutional preambles, by demonstrating their evolution and cross national spread. The issue of linguistic innovations, degree of innovation from one preamble to another, and innovation within a countries’ series of constitutions, as well as innovation across constitutions written at a particular time has been properly dissected. The entire analysis unfolds that the phrase “We the People”, which was first invented into the Preamble to the United States Constitution of 1787 has now become a global idiom. In addition, many constitutional preambles have also advanced to incorporate elaborate expression of the citizen’s highest values such as the triumph of popular rule, the glories of the nation’s leaders and wide aspects of the nation’s past. Consequently preamble should be upheld as an integral part of the constitution to be justiciable. By speaking about the nation’s past, the present and future, constitutional preamble can be relied upon to resolve many imbroglios in a country.

REFERENCES

1. See Plato, the Laws 132 cited in T Ginsburg et al, We the Peoples’: The Global Origins of Constitutional Preambles (2013) 46, The Geo Wash Int’l L. Rev. 107.

2. *ibid.*
3. *ibid.*, See also C Bobonich, *Persuasion, Compulsion, and Freedom in Plato's Laws* (1999) 41 Classical 365 This author tries to juxtapose Plato's proposal to attach preambles to particular laws and to the legal codes in order to persuade citizens to act in compliance with the law, in the same way as medical doctors help to explain to the patient the nature of ailment before making prescription.
4. See T Ginsburg et al, (n 2) p.107.
5. It has been posited that the game pattern of providing for a justification for the law seems rooted in the need to the operative legal language. See generally, L R Patherson, 'The Statute of Anne. Copyright Misconstrued', (1968) 3 Harv. J. on Legis
6. See G S Wood, 'Foreword: State Constitution Making in the America Revolution' (1993) 24 Rutgers L.J. 913- 914.
7. See the US Constitution of 1787.
8. See C Berkin "We the People of the United States": The Birth of an American Identity September, 1787 (2006) OAH MAG. HIST., 53.
9. See the current preamble of the US Constitution of 1787.
10. See *US Term Limits Tnc. v Thornton*, 514 U.S. 779, 846-847.
11. For instance, the famous 1812 Cadiz Constitution of Spain States "[i]n the name of God Almighty, the Father, Son and Holy Ghost, Author and Supreme Legislator of Society".
12. It has been statistically postulate that Eighty Nine Percent representing about 125 out of 141 of constitutions produced after 1990 have a preambles and that only the Maldives National Constitution adopted in 2008 that is devoid of preamble.
13. See Preamble to the 1974 Constitution of Yugoslavia. See also T Ginsburg et al (n 142) p. 110.
14. Which preamble succinctly states "In the Name of God". See Constitution of the Republic of Peru, 1826.
15. The 1828 Constitution of Peru, however, expanded the list of innovation in the preamble viz; in the name of Almighty God, the Father, Son and Holy Ghost, Author and Supreme Legislator of Society.
16. As it appears in the preamble to the Constitution of Greece in 1975, Ireland Constitution of 1937 and Fiji Constitutional Amendment Act of 1997.
17. See the Brunei Constitution of 1959.
18. As it appears in Iran Constitution of 1989.
19. For example, Cuba's 1976 Preamble refers to Fidel Castro.
20. See Nicaraguan Constitution of 1987 which praised Augusto Sandino and Soviet Union Constitution of 1977 which refers to VI Lenin.
21. See M Versteeg, *Unpopular constitutionalism* (2014) 9-10 available at <http://papers.sson.com/selz/papers.cfm?abstract-id=2267320>. See also M Versteeg *Unpopular Constitutionalism* (2014) *Indian Law Journal* 1140-1142. The author gave many examples of preambles which narrate the nation's past and envision its future such as the Preamble to the 2011 Hungarian Constitution; the Polish Constitution of 1997, the 1979 Constitution of Iran and the 1978 Constitution of the People's Republic of China.
22. See L Waston, *We Are a Nuclear Power: North Korea's Chilling Claim in New Constitution*, (2012) *Daily Mail* available at <http://www.dailymail.co.uk/news/article-2152718/news-constitution-declares-north-korea-nuclear-armed-nation-indomitable-military-power.html>. Accessed on 2/9/2020.
23. See preamble to the Constitution of the Syrian Arab Republic Feb. 26, 2012.
24. Their contention is basically that despite its symbolic significance notwithstanding, preambles do not usually produce actual bodies of constitutional law that are justiciable, and that preserve and safeguard popular values from future law-making activity.
25. A.I.R. 1973 S.C 1461 (India).
26. *ibid*p. 506.
27. See P S Doddset al, *Temporal Patterns of Happiness and Information in a Global Social Network: Hedonometrics and Theitter* (2011) 6(12) *Plos ONE* 1-2 available at <http://www.plosone.org/article/info:doi/10.1371/journal.pone.0026752> Accessed on 2/9/2016.
28. *ibid.*

29. See 2008 Constitution of the Kingdom of Bhutan adopted on 18th July, 2008 cited in T Ginsburg et al, (n 142)., 114.
30. See Preamble to the Republic of Vietnam Constitutional Charter June 19, 1965.
31. T Ginsburg et al, (n 2) p. 117.
32. Some of these phrases are the names of international, regional or sub-regional treaties mentioned in the preambles while others are general phrases invoking the actors in whose names the Constitution was produced such as God, the People, representatives or values such as rule of laws.
33. Most preambles refer to the Universal Declaration of Human Rights, the UN Charter, the International Covenant on Civil and Political Rights, the International Covenant on Economic and Social Rights, the Convention on the Elimination of all forms of Discrimination against Women, and in Africa; the Charter of A.U, the African Charter on the Rights of Man and People's.
34. For example, the preamble to the 1822 Constitution of Chile expressly refer to the United States as its model. It refers to the drafters having before them "the better models...principally those of the classic country of liberty, the United States". In the same vein, it is a feature of most socialist Constitutions to always express appreciation to their leadership of the Union of Soviet Socialist Republic or expressing solidarity with other socialist nations. For instance, the preamble to the 1952 Constitution of the Polish People's Republic refers to the leading role of the working class based "on the historic experience of victorious socialist Constitution in the Union of Soviet Socialist Republics, the first state workers and peasants". The preamble to the XIANFA 1954 Constitution of China states that "China has already built an in destructive friendship with the Great Union of Soviet Socialist Republic and the People's Democracies; and the friendship between our people and peace loving people in all other countries is growing day by day. Such friendship will be constantly strengthened and broadened". In Czechoslovakia Republic, the 8 preamble to the 1948 Constitution equally referred to the country's alliance with the Union of Soviet Socialist Republic.
35. See generally T Ginsburg et al (n 2) pp. 123-131 where he exhaustively distinguished between vertical and horizontal innovation. He referred to vertical in innovation as terms used for the first time in a country's sequence of Constitution, while horizontal innovation refers to terms used for the first time among the entire set of countries with Constitutional Preambles.
36. See J Wheeler and B Moyers, We make progress through Collaboration not Competition (2011) UPTAKE available at <http://www.theuptake.org/2011/06/04/bill-moyers-we-make-progress-through-collaboration-not-competition>. See also A M Grazzini, What Does the American Phrase "We the People" Mean"? TE CONVERSATIONS, available at <http://www.ted.com/conversation-2960/what-does-the-american-phrase.html> (Accessed on 3/2/2021).
37. For example, the preamble of the United States Declaration of Independence and its Constitution of 1787 has continued to serve as an inspiration to subsequent European Liberals and many other countries of the world.
38. See for example, V C Jackson, Methodological Challenges in Comparative Constitutional Law (2010) 28Penn St. Int'l Rev. 325.