

W. Voermans, M. Stremmer and P. Cliteur, *Constitutional Preambles: A Comparative Analysis*, Cheltenham-Northampton: Edward Elgar Publishing 2017, ISBN 9781785368141, 302 pp.

1. Constitutions and Constitutional Preambles

The theme of constitutional preambles is a very timely one, covering legal systems characterized both by high instability and regime changes as well as those of more established democracies. An example of this last case can be found the Netherlands, where they have discussed – and are still discussing – the addition of an incipit to the Constitution, which would clearly express the supreme principles of that constitutional system.

The recently published *Constitutional Preambles: A Comparative Analysis*, written by professors Wim Voermans, Maarten Stremmer and Paul Cliteur, considered in these pages, is a comparative work, which has the undoubted merit of focusing its attention on a classic issue of constitutional law while also dealing with the ‘functional’ implications that could potentially unfold on contemporary constitutional framing processes.

At first glance, constitutional preambles – those texts ‘sending out messages in all directions’ (p. 152) – belong to the ‘nobler’ parts of constitutions, rather than to the more ‘efficient’ ones. In the field of tension between the poles of idealism and harsh reality, the large majority of preambular formulas appears to aspire towards idealism. Experience has taught us that many people have been – and still are – willing to defend or abolish (only apparently pointless) constitutional preambles.

While the preambles of constitutions are indeed serious narrative micro-structures, in my opinion they need to be approached with a healthy dose of skepticism. It seems reasonable, especially with reference to preambles of those constitutions that try to shape the weaker and less mature legal systems, to approach such introductory texts with some caution, in the belief that they contain only partial truths, are inevitably imperfect, and are possibly filled with stale clichés and rhetorical platitudes.

Moreover, preambles vacillate between what is assumed and what is artificially written.

If historical facts (wars, political changes, revolutions, social conflicts, i.e. the historical ‘magma’ that never stops flowing) are nevertheless presumed in the writing of a new constitution, what then is the purpose of solidifying, curbing, and synthesizing them in a preamble? How can we artificially contrive what is assumed but can neither be determined nor stopped? In this perspective, writing a preamble is basically a vain exercise in conflict with the dynamic course of history.

The volume by Voermans, Stremmer and Cliteur is an original and valuable work, as it provides a comprehensive overview of preambles as well as useful analysis of contemporary constitutions and tendencies of so-called ‘global constitutionalism’. Among its pages we can find some answers to these questions.

2. The Authors' Perspective

The book, which is broken down into eight chapters, starts with an introductory and methodological note and ends with some conclusive considerations. It also includes an appendix containing the English versions of all the existing UN member-state constitutional preambles (pp. 165-297). The authors exploit a good mix of quantitative and qualitative tools. The former being useful to test the occurrences of stylistic and editorial choices in constitutional texts and the latter being fundamental to contextualize the analysis with existing literature and with the most significant cases of constitutional review of legislation.

At the beginning of their work, the authors present an inventory of preambles. Particularly interesting are the pages dedicated to non-constitutional preambles (chapter 2, pp. 9-13), a topic of utmost importance, in relation to its most general connections with the logic of legal discourse. The following part of the chapter is devoted specifically to constitutional preambles. Considering the large sample given, which consists of 190 constitutions, only 32 of them (17%) lack a preamble. Of great interest is the paragraph on the trend of contemporary constitutionalism: the more recent the constitution, the more likely they are to have a preamble. Voermans, Stremmer and Cliteur write: 'the use of preambles is becoming common practice' (p. 18).

The third chapter is dedicated to the contents of preambles. The authors distinguish three types of content: *a*) the general structure of the constitutional system; *b*) elements linked to the recognition and safeguarding of fundamental rights; *c*) elements that specifically outline the national characteristics of a legal system.

The chapter's following pages are mainly based on language analysis and develop around a threefold scheme analyzing *a*) the references to the 'authors' of the preambles, *b*) the addressees of the preambles, and *c*) the style used (chapter 4). Focusing on the second element: Voermans, Stremmer and Cliteur identify the main addressee as the public. They write: 'The primary addressees of preambles ... are the citizens (or the people as a whole)' (p. 74) – not forgetting, however, the possible presence of secondary or even more specific recipients: 'people who have to work with the constitution and have to apply it', 'groups of people to which the constitution is directed' and 'specific groups of people outside the country' (p. 75).

It is very worthwhile to note that the 'world community' is a further potential addressee. In other words, today's preambles serve a broad promotional function. In the words of the authors: 'states may try to convince the international community (including donors and investors...) of their credibility' (p. 76).

The possible modulation of the style of preambles can be distinguished as 'solemn', 'plain' or 'legal', depending on the way in which the phrases and terms are structured (pp. 80-88).

The functionalist approach comes in the middle of the fifth chapter. Voermans, Stremmer and Cliteur distinguish *legal functions* from *non-legal functions*.

In the former, the preamble acts as ‘a potential source of directly enforceable rights’ (p. 89) and provides additional support for the interpretation of a constitutional text. An additional legal function is referred to as ‘constitutional entrenchment’: in this perspective preambles represent a sort of protected nucleus versus primary legislation, and may even be able to withstand amendments to the constitution they precede. The five *non-legal functions* as identified by the authors, however, seem more elusive: *expressive, identifying, evocative, ‘bridge in time’* and *educational* (pp. 91-94).

The following chapter (*Two prototypes: The United States and France*) is devoted to the contrast between two distinct and opposing models: *a)* The US Constitution's preamble, ‘We the people of the United States, in order to form a more perfect union ...’ and *b)* the opening of the current French Constitution, ‘Le peuple français proclame solennellement son attachement aux Droits de l’Homme et aux principes de la souveraineté nationale ...’. Voermans, Stremmer and Cliteur, classifying the US and French preambles into two ‘prototypes’, they refer to the divergent use that national courts have made of their respective constitutional preambles.

In adopting a different approach, we could instead argue that the two preambles differ because they have dissimilar goals and different ‘compensating’ capacities. The United States preamble confers inspiration to a regulatory instrument (i.e. the Constitution), which would otherwise only find its core characteristics in prudence and mistrust. In France, on the contrary, the preamble compensates for the tone of the Constitution (characterized by considerable novelties regarding the form of government) and links it to the past and to the French constitutional heritage.

The seventh chapter (*Preambles from other states*, pp. 116-149) is structured as a review of major cases drawn from the most disparate constitutional experiences. Thus, the preamble of the constitutions of Canada, Ireland, Germany, Poland, Bosnia and Herzegovina, South Africa and India (in relation to the decisions of their respective Courts) are highlighted. In most cases preambles seem to play a ‘supporting role’ to other constitutional provisions; it is much less common for a preamble to be awarded a full and autonomous rank.

We may therefore isolate one of the conclusions reached by Voermans, Stremmer and Cliteur: preambular formulas are referred to as ‘expressions of faith’ (p. 150); they should be reconsidered as an appeal to the beliefs and credence of the people. In this perspective a preamble is structured and phrased in order to facilitate the legitimacy of political and legal systems: ‘They serve as a nexus between the abstract systemic world and the individual’s psyche’ (p. 151).

The book as a whole has four strengths that make it unique in the existing landscape. Firstly, it provides an impressive and intelligent collection data processing (quantitative and qualitative). Secondly, the reader is offered an up-to-date overview of works dealing with constitutional preambles. Thirdly, there are many references to the decisions of courts and tribunals that have dealt with constitutional preambles and have had to analyze their legal force. Finally, all

contemporary constitutional preambles in their English translations can be found in the book.

3. Some Additional Considerations

Taking inspiration from the authors' reflections and trying to take some further steps, what can we learn about the role constitutional preambles play today? Why do we even feel it is useful to write a preamble?

Experience has shown us two strong points of constitutional preambles.

Preambles are good examples of 'lyrical constitutionalism'. That is to say, a constitutionalism aimed more towards creating and maintaining idyllic, symbolic and identity tension than to generating clear and defined prescriptions. They lead to emotional reactions, they set the tone and can even contribute to enhancing the actual effectiveness of constitutional texts by facilitating cohesion and identification.

Furthermore, constitutional preambles are sometimes performative expressions that not only tell and recount, but also 'do things with words' and show us that sometimes 'to say something is to do something'.

But experience also shows us three points of weakness of constitutional preambles:

a. The collocation of individual norms into the preamble can be intended to dampen their effect.

Therefore, and paradoxically very often, preambles can in fact be the most suitable places for the renouncement of normative production. In Italy, the Constituent Assembly (1946-1947) discussed the possibility of including a preamble, but in the end, this option was discarded in order to prevent ambiguities in interpretation. On several occasions it was suggested by members of the Constituent Assembly to confine the most controversial provisions (e.g. those related to the protection of social rights and the actualization of welfare) to the preamble. Had such a contentious preamble been included in the Italian Constitution, it might have been useless.

b. 'Lying' or incongruous preambles, which do not appear to be perfectly consistent with the text that follows. This can happen, for example, when the preamble makes solid references to more or less defined divinities, but the constitution that follows contains provisions which sanction religious freedom.

c. The inconsistency between what preambles proclaim versus reality. One thing that is astonishing is the widespread appeal of constitutional preambles to the rule of law, democracy and political pluralism. The comparison between the already-mentioned ideals and harsh realities (which are reported, for example, in the annual *Democracy Index* developed by the *Economist's Intelligence Unit*) would reveal many dramatic surprises.

These considerations, together with the authors' analysis, can lead us to identify the main function – today as in the past – of constitutional preambles.

Constitutional history teaches us that preambles have often been used to offset deficiencies and deficits of constitutional texts. I believe that the main function of a constitutional preamble is to be compensatory and balancing. In light of this, we should, from time to time, and case by case, evaluate whether it is better (or even necessary) to write a constitutional preamble.

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