CONSTITUTIONAL PREAMBLES: MORE THAN JUST A NARRATION OF HISTORY

*Justin O. Frosini**

"It seems to me that the Preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble."[1]

While often overlooked as a mere introduction to a country's constitution, a preamble may provide insight into certain issues that the framers were unable to work into the articled provisions. In many countries, these preambles are actually binding from a legal perspective and play a role in constitutional interpretation. This Article explores the language and content of five countries' constitutions, beginning with the Untied States and France and moving on to highlight three other constitutions (Bosnia and Herzegovina, Colombia, and India) where the preamble has become of utmost importance. Preambles do not simply contain flowery introductory language, but are present to remind the reader why the constitution was approved in the first place.

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* Assistant Professor, Bocconi University, Milan; Adjunct Professor, Johns Hopkins University's School of Advanced International Studies ("SAIS") and Director of the Center for Constitutional Studies and Democratic Development ("CCSDD"), Bologna.

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I. INTRODUCTION

Many constitutions have preambles that are ceremonial in nature, and legal purists usually want nothing to do with them because they believe they are not truly operative. In fact, a preamble is often used as a way of including in the constitution issues that some of the framers were unable to include in the articled provisions.

Having said this, if these statements are codified in the preamble (*i.e.*, they become written phrases) then they are more likely to resist over time. There are, in fact, many preambles that have become very well-known. In any case, however noble the ideals that a preamble may contain the issue that we wish to address herein is whether preambles are actually nonbinding from a legal perspective, as many authors believe.

On the basis of global research,[2] the answer is that in several countries preambles have more validity and effect than is generally recognized; in other words, they not only make for beautiful reading, but also often play the role of the protagonist in the constitution.

After briefly classifying constitutional preambles on the basis of their content and language, this Article will then examine the preambles of the two countries that represent respectively "Anglo-Saxon constitu-

2. *See generally* JUSTIN O. FROSINI, CONSTITUTIONAL PREAMBLES AT A CROSSROADS BETWEEN POLITICS AND LAW (2012); Ebrahim Afsah, Book Review, 11 INT'L J. CONST. L. 831–34 (2013) (reviewing FROSINI, *supra*).

tionalism" and "Jacobin constitutionalism," *i.e.*, the United States of America and France, before going on to examine three other countries (selected from a much larger number of case studies) where the preamble of the constitution has assumed the utmost importance—that is to say Bosnia and Herzegovina, Colombia, and India.

II. CLASSIFICATIONS OF PREAMBLES ON THE BASIS OF CONTENT AND LANGUAGE

Before turning to the case studies, it should be noted that, putting aside the issue of legal force in terms of language, one can classify preambles in different ways.

For example, Peter Häberle from the University of Bayreuth, who was heavily influenced by the great German legal scholars Konrad Hesse and Rudolf Smend, classifies constitutional preambles as follows: 1) preambles with a solemn and celebrative language (*Feiertagssprache*); 2) preambles that use very simple and everyday phrases (*Alltagssprache*); and 3) preambles that contain a highly technical and legalistic terminology (*Fachsprache*).[3]

One of the few other scholars who has devoted research to constitutional preambles, Liav Orgad, divides preambles into five groups: 1) preambles that concern the concept of sovereignty; 2)—and of particular interest in the context of this symposium—preambles containing a historical narration; 3) preambles that indicate the aims that the Constitution should reach; 4) preambles that deal with the identity of the nation; and 5) preambles that make reference to God and more generally to religious values of one sort or another.[4] These categories are similar to the classification made in 2012 where we distinguished between: 1) preambles as a gateway of entry for other sources of law; 2) the people are sovereign; 3) the form of state and the form of government; 4) historical references; 5) God and preambles; and 6) territorial identity.[5]

One should underline, however, that inevitably many preambles will contain elements of more than one of these categories, and, indeed, it can often be very difficult to make the distinction, for example, between references to the identity of a nation or territory and a historical narration. The truth of the matter is that these classifications are useful for knowing more about what preambles contain, but their usefulness essentially stops there.

3. *See* FROSINI, *supra* note 2, at 47 (citing PETER HÄBERLE, PRÄAMBELN IM TEXT UND KONTEXT VON VERFASSUNGEN, IN DEMOKRATIE IN ANFLECTUNG UND BEWÄHRUNG. FESTSCHRIFT J.BOERMANN (1982)).

4. FROSINI, *supra* note 2, at 47 (citing Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT'L J. CONST. L. 714, 716–18 (2010)).

5. FROSINI, *supra* note 2, at 31–46.

III. THE PREAMBLE TO THE CONSTITUTION OF THE UNITED STATES

A. "We the People . . . .": the U.S. Prototype

The Preamble of the U.S. Constitution reads as follows:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[6]

The Preamble of the American Constitution bypasses the idea of representation by rendering the narrator and the listener one in the same. The Constitution is established *by* the people of the United States *for* the people of the United States. The fact that the speaker and the addressee are put on an equal footing is in stark contrast with the articled provisions of the U.S. Constitution, where the narrator becomes the legislature and no longer corresponds to the listener (the People). The legal scholar and philosopher James Boyd White, for example, talked of "[t]he Two Voices of Authority and of Silence: Separating Powers and Establishing Trust."[7]

It is interesting to underline the fact that, in terms of content, the Preamble of the U.S. Constitution is reminiscent of the Declaration of Independence of 1776. Indeed, the pursuit of happiness can be found in the expression "in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity." The notion of life can be found in the passage "provide for the common defence, promote the general Welfare," and the concept of freedom is enshrined in the part of the Preamble that talks of the need to "secure the Blessings of liberty to ourselves and our Posterity" (freedom).[8]

B. The Debate Among American Scholars on Recourse to the Preamble

Legal scholars in the United States are clearly divided as to how Preambles (both of the Constitution and statutes) can be used in interpretation.

When the law is clear and unambiguous then certain authors argue that the *no-recourse rule* should be used, meaning no reference should be made to the Preamble;[9] whereas other authors give the Preamble a *contextual role.* In other words, they consider the Preamble to be part of the

6. U.S. CONST. pmbl.

7. FROSINI, *supra* note 2, at 51 (citing JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 241 (1984)).

8. *Id.* at 52.

9. *Id.* at 53 (citing Dan Himmelfarb, *The Preamble in Constitutional Interpretation*, 2 SETON HALL CONST. L.J. 127, 128–30 (1991–1992)).

constitution and therefore should be read and interpreted like any other article.[10]

That said, most commentators do not believe the Preamble can be regarded as a source of law.

The Supreme Court's case law clearly shows that the rules of interpretation applied to the preambles of statutes are also employed with regard to the Preamble to the Constitution. Daniel Himmelfarb points out that the rules concerning the Preamble to the American Constitution "seem unexceptionable, and consistent with the principles of statutory construction."[11]

Max Handler is extremely critical of the fact that the Preamble is used so little by the courts as a tool of interpretation.[12] He argues that given the fact that, like preambles to statutes, the Preamble to the Constitution is not considered a source of law has "chilled almost all reliance on the preamble in interpreting the Constitution."[13]

Commentators like Raymond Marcin have argued that the Preamble should be given a more prominent role. Indeed, Marcin claims that the phrase "in order . . . to secure the blessings of liberty to ourselves and our Posterity . . ." contained in the preamble could be used to declare abortion unconstitutional.[14] Other scholars like Carrasco and Rodino argue that even if the Preamble does not emanate substantive power, this "does not mean, however, that the Preamble is irrelevant. On the contrary, the Preamble should be the focal point in constitutional interpretation."[15]

On the contrary, by examining the case law of the Supreme Court, Himmelfarb argues that precaution should be used with regard to the Preamble because its aims are somewhat vague and even contradictory and, indeed, the Preamble "has been invoked with plausibility by either side in virtually every case . . . ."[16] He then states that "the phrases of the preamble can be given so many meanings and can support so many different interpretations of the Constitution, that they can be used for virtually any purpose at all."[17]

10. *Id.* (citing 2 FRANK E. HORACK JR., SUTHERLAND STATUTORY CONSTRUCTION § 4804, at 349 (3d ed. 1943)).

11. *Id.* (citing Himmelfarb, *supra* note 9, at 130).

12. *Id.* (citing Milton Handler et al., *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117 (1990)).

13. *Id.* at 118 (emphasis removed).

14. *Id.* at 53 (citing Raymond B. Marcin, "*Posterity" in the Preamble and the Positivist Pro-Life Position*, 38 AM. J. JURIS. 273, 275 (1993)).

15. *Id.* at 53–54 (citing Gilbert Paul Carrasco & Peter W. Rodino Jr., *"Unalienable Rights," the Preamble, and the Ninth Amendment: The Spirit of the Constitution*, 20 SETON HALL L. REV. 498, 508 (1989–1990)).

16. *Id.* at 54 (citing Himmelfarb, *supra* note 9, at 13).

17. *Id.* (citing Himmelfarb, *supra* note 9, at 209).

C. The Supreme Court's Case Law and the Preamble

The 1793 case *Chisholm v. Georgia*, a conflict between states and the federal government, is the first decision of the Supreme Court that makes reference to the Preamble of the Constitution.[18] Recourse to the Preamble is made by Chief Justice Jay—one of the authors of *The Federalist Papers*—and Justice Wilson.[19] Both justices gave the Preamble a prominent role by using it as the first tool to interpret the Constitution.[20]

In *Sturges v. Crowninshield*, John Marshall talked about the fact that the spirit of an instrument, in particular a constitution, had to be taken into consideration just as much as the rules themselves.[21] "There is no doubt that the 'spirit' of the Constitution is found above all in the preamble, which embraces the political vision and desires of the framers."[22]

Justice Tanney, however, stated in *Holmes v. Jennison* that "to apply the Constitution every word has its force and it is evident that in the entire constitution no word has been used or added unnecessarily."[23] One is left with little doubt that Tanney is referring to the Preamble.[24] Tanney was cited 100 years later in *Richfield v. State Board*,[25] and, more significantly, in *Kesavananda v. State of Kerala AIR*—one of the most important decisions ever handed down by the Supreme Court of India.[26]

Jacobson v. Commonwealth of Massachusetts is the only case where the Preamble was referred to in judicial review of constitutionality.[27] This case concerned the constitutionality of a Massachusetts statute requiring vaccination; Jacobson was prosecuted in a lower court for violating the law.[28] In brief, the Board of Health of Cambridge required the vaccination and revaccination of all the inhabitants of the state for reasons of public health and safety, and Jacobson had refused to comply with such a requirement.[29]

Jacobson argued that he was innocent.[30] The State argued that Jacobson had been informed of the fact that if he refused to be vaccinated he would violate the law. Free vaccination had been offered, but the defendant still refused.[31]

18. *Id.* at 55 (citing Chisholm v. Georgia, 2 U.S. 419 (1793)).
19. *Id.* (citing *Chisholm*, 2 U.S. at 470–71).
20. *Id.* (citing *Chisholm*, 2 U.S. at 469–72).
21. *Id.* (citing Sturges v. Crowninshield, 17 U.S. 122, 202 (1819)).
22. *Id.* (citing Himmelfarb, *supra* note 9, at 135).
23. *Id.* (citing Holmes v. Jennison, 39 U.S. 538, 570–71 (1840)).
24. *Id.* (citing *Holmes*, 39 U.S. at 570–71).
25. *Id.* (citing Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 77–78 (1946)).
26. *Id.* (citing Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225 (India)); *see infra* Part VII.
27. *Id.* at 56 (citing Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 22 (1905)).
28. *Id.* (citing *Jacobson*, 197 U.S. at 23).
29. *Id.* (citing *Jacobson*, 197 U.S. at 23).
30. *Id.* (citing *Jacobson*, 197 U.S. at 13).
31. *Id.* (citing *Jacobson*, 197 U.S. at 13).

Jacobson argued that "137 of chapter 75 of the Revised Laws of Massachusetts was in derogation of the rights secured to the defendant by the preamble to the Constitution of the United States and tended to *subvert and defeat the purposes of the Constitution as declared in its preamble.*"[32] All of Jacobson's arguments were rejected and he was ultimately vaccinated.[33] Justice Harlan's opinion was the core of that judgment:

> We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question is in derogation of rights secured by the preamble of the Constitution of the United States. Although that preamble indicates the general purposes for which the people ordained and established the Constitution, *it has never been regarded as the source of any substantive power conferred on the government of the United States*, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and as such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless, *apart from the preamble*, it be found in some express delegation of power, or in some power to be properly implied therefrom.[34]

Jacobson not only put an end to the notion that the Preamble might be used in judicial review of constitutionality, but it also excluded the idea that the Preamble can have any legal value whatsoever. That said, in Supreme Court case law one can find the Preamble mentioned in several concurring and dissenting opinions. A good example of this is the famous *U.S. Terms Limits, Inc. v. Thornton*, a case involving Arkansas' "Term Limitation Amendment," where senators can only be elected for two terms.[35] Declaring the amendment unconstitutional, Justice Stevens concluded his motivational opinion with the following words:

> We are, however, convinced that allowing several States to adopt terms limits for congressional service would effect a fundamental change in the constitutional framework. Any such change must come not by legislation adopted either by Congress or by an individual State, but rather—as having other important changes in the electoral process—through amendment procedures set forth in Article V. . . . In the absence of a properly passed constitutional amendment, allowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the Framers, a structure that was designed, *in the words of the Preamble to our Constitution* to form a "more perfect Union."[36]

32. *Id.* (citing Jacobson, 197 U.S. at 13–14 (emphasis added)).
33. *Id.* (citing Jacobson, 197 U.S. at 14).
34. *Jacobson*, 197 U.S. at 22 (emphasis added).
35. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783–84, 837 (1995).
36. *Id.* at 837 (emphasis added) (quoting U.S. CONST. pmbl.).

Making reference to Madison and *The Federalist No. 39*, Justice Thomas turned Justice Stevens' theory completely around, affirming that: "the popular consent upon which the Constitution's authority rests was given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong."[37]

In particular Justice Thomas argued that:

> The ringing initial words "We the People of the United States" convey something of the same idea. (In the Constitution after all "the United States" is consistently a plural noun. See Art. I, §9, cl. 8; Art. II, §1 cl. 7; Art.III, §2, cl. 1; Art. III, §3, cl. 1.). *The Preamble that the Philadelphia Convention approved* before sending the Constitution to the Committee of Style is even clearer. It began: "We the people of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina and Georgia. . . ." Scholars have suggested that the Committee of Style adopted the current language because it was not clear that all the States would actually ratify the Constitution.[38]

Justice Thomas thus concluded that states have every right to dictate the rules with which their representatives are elected and, as a result, the term limits imposed in Arkansas were constitutional.[39]

In concluding this examination of the case law of the American Supreme Court let us now turn to *Holder v. Humanitarian Law Project*, which centred on the Material Support Statute ban—banning "material support or resources" to non-U.S. organizations that are involved in terrorist activity.[40] This case concerned two organizations—the Partiya Karkeran Kurdistan ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE")—accused of terrorist activities.[41] The plaintiffs argued that the application of the material-support law was unconstitutional because they were simply trying to help with the lawful, nonviolent purposes of those groups.[42]

The Supreme Court came to the conclusion that the statute was not vague nor did it go against the freedom of speech or of association—in other words, it did not violate the Constitution.[43] In particular the Supreme Court held that "the dispositive point here is that the statutory terms are clear in their application to plaintiffs' proposed conduct," *i.e.*,

37. *Id.* at 846 (Thomas, J., dissenting) (quoting JAMES MADISON, THE FEDERALIST NO. 39, at 243 (Clinton Rossiter ed. 1961)).
38. *Id.* at 846 n.1.
39. *Id.* at 845.
40. Holder v. Humanitarian Law Project, 561 U.S. 1, 7 (2010) (quoting 18 U.S.C. § 2339B(a)(1) (2012)).
41. *Id.* at 9–10.
42. *Id.* at 7.
43. *Id.* at 2.

financial support, legal aid, and political advocacy.[44] The Court thus held that plaintiffs' vagueness challenge must fail.[45]

The possible violation of the freedom of association was quickly brushed aside when the Court underlined that "The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group[.] What § 2339B prohibits is the act of giving material support . . . ."[46]

Finally, in dealing with the possible breach of freedom of speech the Court held that "the considered judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization."[47] The Court underlined that it was not renouncing its right to exercise judicial review, but highlighted the fact that the government's take on this was "entitled to significant weight."[48]

In this judgment, the Preamble came into play in the very last part of the majority decision and was used—and this should be stressed in the context of the symposium herein—to provide *historical* support for its decision to defer to the government by writing:

> The *Preamble to the Constitution* proclaims that the people of the United States ordained and established that charter of government in part to "provide for the common defence." As Madison explained, "[s]ecurity against foreign danger is . . . an avowed and essential object of the American Union." The Federalist No. 41, p. 269 (J. Cooke ed. 1961). We hold that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments.[49]

Thus, to conclude our analysis of the case law of the Supreme Court, there is no doubt that since 1905 *Jacobson* has been upheld, *i.e*, the Preamble was never considered to be a parameter in judicial review of the constitutionality. But, having said that, the Court still often feels the need to use the Preamble in formulating and reinforcing its *ratio decidendi.*

44. *Id.* at 21.
45. *Id.* at 21–23.
46. *Id.* at 39.
47. *Id.* at 36.
48. *Id.*
49. *Id.* at 40 (emphasis added).

IV. THE PREAMBLE TO THE CONSTITUTION OF THE FRENCH FIFTH REPUBLIC

A. The French Preamble as Another Archetype

The American and French preambles are very different in the way they are formulated. The Preamble of the Constitution of the French Fifth Republic of 1958 reads as follows:

> The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004.
>
> By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories that express the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived with a view to their democratic development.[50]

As stated in other research on preambles to constitutions, the French Preamble is rather like a "Matrioska Doll" because it contains, *inter alia*, the Declaration of the Rights of Man and Citizens of 1789 and the Preamble of the Constitution of the Fourth Republic.[51]

One should remember that the Preamble of the Fourth Republic makes ample reference to second generation social and economic rights with the objective, after World War II, of finding a compromise between the social rights typical of the Marxist regimes and the respect of individual rights and freedoms typical of Anglo-American countries.

The way rights and freedoms are codified is typical of what one may consider a form of French "constitutional exceptionalism," because just as was the case for the previous constitutions, the 1958 text does not contain a Bill of Rights in the articled provisions, and the Preamble refers to documents belonging to different historical periods (from the Declaration of the Rights of Man and the Citizen of 1789 to the Charter on the Environment of 2005).

B. The Dispute Between French Scholars on the Role of the Preamble

The discussion concerning the legal value of the Preamble is closely linked to the traditional dispute regarding the legal value of the Declaration of 1789. For example, two famous French authors—Raymond Carré de Malberg and Adhémar Esmein—were of the opinion that the Declaration did not produce any binding legal effects on the lawmaker because

50. 1958 CONST. pmbl. (Fr.).
51. FROSINI, *supra* note 2, at 64.

it was simply an ideological and cultural manifesto of a philosophical nature.[52]

On the contrary two other famous jurists—Léon Duguit and Maurice Hauriou—argued that the Declaration of 1789 and the Constitution of 1791 were part of the same "process of foundation" of the modern state[53] and were thus legitimized by the same source: the Constituent Assembly.

Looking historically back to 1958, one should underline that essentially two arguments have been used to deny that the Preamble to the Constitution is legally binding. First, the classic argument is to say that the Preamble is separate from the rest of the text of the Constitution and, as a result, this means that when the French people voted in the constitutional referendum on September 28, 1958 they were under the presumption that the Preamble was not part of the Constitution.[54] The second argument is similar to the one used to deny that the 1789 Declaration had any legal force (*i.e.*, the formulation of the text), which is more similar to philosophical principles rather than legal rules.[55] The eminent French constitutionalist Dominique Rousseau, however, rightly criticizes these two arguments. First, he underlines that both the Preamble and the rest of the Constitution were subject to the same referendum thus putting them on par.[56] Second, Rousseau emphasizes that the new Constitutional Council was assigned the power to carry out judicial review of constitutionality, and the parameter to be used had not been delimited (unlike the case of the Constitutional Committee under the Fourth Republic), which meant that the Preamble could be included at some point (as indeed happened in 1971, as discussed later).[57] There is of course a logic here because, as underlined above, the actual articles of the French Constitution do not address fundamental rights and freedoms. Therefore, if one were to prevent the Constitutional Council from using the Preamble as a parameter in judicial review, then legislation would be able to breach these rights and freedoms without running the risk of being struck down.

C. The Case Law of the French Constitutional Council

When, in 1962, the Constitutional Council did not consider the referendum with which Charles De Gaulle introduced direct election of the president of the Republic as a breach of the Constitution, it looked like

52. *Id.* at 65.
53. MAURICE HAURIOU, AUX SOURCES DU DROIT: LE POUVOIR, L'ORDRE, LA LIBERTÉ (1933).
54. FROSINI, *supra* note 2, at 66. *See also* ERIC OLIVA, DROIT CONSTITUTIONNEL–LIBERTÉS (1998).
55. *Id.*
56. *See* DOMINIQUE ROUSSEAU, DROIT DU CONTENTIEUX CONSTITUTIONNEL (4th ed. 1995).
57. FROSINI, *supra* note 2, at 66; OLIVA, *supra* note 54.

the *Conseil* would play a marginal role.[58] Indeed, in handing down that decision, the Constitutional Council argued that it was merely a "*régolateur de l'activité des pouvoirs publics*."[59]

Two core judgments—DC 70-39 and DC 71-44—with which the Council attributed constitutional value to the Preamble radically transformed France's system of judicial review.[60]

When the Council used the phrase "[v]u la Constitution et notemment son préambule" in the 1970 judgment, it carried out a 'revolution'.[61]

The 1970 case concerned an international agreement, and the Council held that it was in pursuance of the Constitution, making reference to the "principles that are particular necessary for our times."[62] Indeed, many believe the Council's jurisprudence on rights and freedoms began in 1971, but as the French jurist François Luchaire underlines, it actually started in 1970.[63]

1. France's Marbury v. Madison*?*

DC 71–44 is, without any doubt, the leading case of the *Conseil Constitutionnel* because it overturns one of the fundamental principles of French law up until that point, *i.e.*, the *principe de légalité*.[64] Just as the U.S. Supreme Court did in 1803, the *Conseil* transformed itself into a true and proper guardian of the Constitution (albeit with important differences in comparison to the Kelsenian model of constitutional courts).

The 1971 case concerned *Les amis de la cause du peuple* associated with Jean-Paul Sartre and the Left Proletarian Party; in other words, it concerned the possible violation of the freedom of association.[65] In essence, the prefect refused to provide a receipt for the deposit of the association's statute given that the association *de facto* reconstituted a party which had just been dissolved.[66] The prefect's refusal was based on a 1936 statute.[67]

Inter alia, the prefect justified his decision by underlining the fact that the assocciation *Les amis de la cause du peuple* was also about to be

58. Peter L. Lindseth, *Law, History, and Memory: "Republican Moments" and the Legitimacy of Constitutional Review*, 3 COLUM. J. EUR. L. 49, 71–72 (1997).

59. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 62–20DC, Nov. 6, 1962, Rec. 27 (Fr.).

60. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 70–39DC, June 19, 1970, Rec. 15 (Fr.); Lindseth, *supra* note 58, at 51.

61. Lindseth, *supra* note 58, at 52.

62. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 70–39DC, June 19, 1970, Rec. 21 (Fr.) (emphasis added).

63. François Luchaire, *Le Conseil Constitutionnel et la Protection des Droits et Libertés du Citoyen*, *in* 2 MÉLANGES OFFERTS A MARCEL WALINE: LE JUGE ET LE DROIT PUBLIC 563 (1974).

64. *See* George D. Haimbaugh Jr., *Was it France's* Marbury v. Madison*?*, 35 OHIO ST. L.J., 910, 910 (1974).

65. *Id.* at 910–11.

66. *Id.*

67. *Id.* at 910; Lindseth, *supra* note 58, at 66.

banned.[68] This measure was then declared null and void by the State Council.[69]

As a result, the Government decided to amend the famous Waldeck-Rousseau Law of 1901 on freedom of association. In particular, the bill reintroduced the system of prior authorization for the acquisition of legal personality, which would be provided by the courts following a request by any interested party or the minister of the Interior.[70] This bill was considered to be in gross violation of the freedom of association.[71]

The law was thus challenged in front of the Constitutional Council by the president of the Senate. One should note that this type of petition had not been filed since the challenge to the 1962 referendum on direct election of the president of the Republic, as discussed previously.[72]

This case had enormous political implications, but above all it posed a fundamental legal question regarding whether the freedom of association was a constitutional principle or not and, as a result, whether the Preamble to the Constitution could be used as a parameter in judicial review.

In handing down its decision, the Council held that "[c]onsidering the fundamental principles recognised by the laws of the Republic and *solemnly reaffirmed in the preamble of the Constitution* the freedom of association may also be included. . . ."[73] The "revolution" had taken place: the Constitutional Council had finally put the Preamble on an equal footing with all of the other articled provisions of the 1958 Constitution.

This obviously implied that the Declaration of the Rights of Man and of the Citizen and the Preamble to the 1946 Constitution were also put on par with the rest of the Constitution.[74]

And of course this also meant a new parameter for judicial review had been introduced—*i.e.*, the fundamental principles "recognised by the laws of the Republic."[75]

The effects of this decision are both *quantitative* and *qualitative*. The breadth of parameters that could be used in judicial review were widened enormously, but at the same time this decision transformed the Constitutional Council into a true and proper guardian of fundamental rights and

68. *See* Lindseth, *supra* note 58, at 74–75.

69. FROSINI, *supra* note 2, at 68.

70. James E. Beardsley, *The Constitutional Council and Constitutional Liberties in France*, 20 AM. J. COMP. L. 431, 434–35 (1972).

71. Lindseth, *supra* note 58, at 77.

72. *See* PIERRE AVRIL & JEAN GICQUEL, LE CONSEIL CONSTITUTIONNEL 37–39 (3d ed. 1995).

73. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 71-44DC, July 16, 1971, J.O. 7114 (Fr.) (emphasis added).

74. Cynthia Vroom, *Constitutional Protection of Individual Liberties in France: The Conseil Constitutionnel Since 1971*, 63 TUL. L. REV. 265, 274–75 (1988).

75. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 71–44DC, July 16, 1971, Rec. 29 (Fr.).

freedoms (albeit within the limits of preventative review, which was the only type of control that existed at the time).[76]

As J. Pascal has stated, this judgment was "the founding act of a new constitutional justice, directed at the regulation of the public authorities and the guarantee of fundamental rights,"[77] which occurred through a "deviation of the object of review"[78] from a mere review of the "external regularity"[79] of the rule to an "internal control."[80]

2. *The Incorporation of the Declaration*

In 1973, the Constitutional Council took the Preamble and judicial review a step further when it specifically used, for the first time, the Declaration of the Rights of Man and of the Citizen.

In this case, the *Conseil Constitutionnel* reviewed two provisions in the Tax Code: Article 168, concerning evident discrepancies between the amount declared and the person's lifestyle, and Article 180, concerning taxation *ex officio*.[81] In 1974, the budget law introduced the possibility for those required to pay income tax *ex officio* to obtain a reduction of the amount charged.[82] But Parliament only applied it to those whose taxable income did not exceed the limit by more than 50%.[83] The Constitutional Council stated that this provision:

> Tend[ed] to discriminate between citizens regarding their ability to provide rebuttal evidence to a decision to tax them *ex officio* by the administrative authorities; therefore, the aforementioned provision violate[ed] the principle of equality before the law contained in the *Declaration of the Rights of Man of 1789 and solemnly reaffirmed in the preamble to the Constitution*.[84]

The Council thus explicitly incorporated the 1789 Declaration into the parameters for its judgment.[85]

As James E. Beardsley has pointed out, this decision overturned the original perspective according to which only the provisions of the Preamble relating to human rights and the principles of national sovereignty could be used by the Council.[86]

76. Lindseth, *supra* note 58, at 51.
77. Jan Pascal, *Le Conseil Constitutionnel*, 99 POUVOIRS, 71, 72 (2001).
78. Dominique Rousseau, *Les Évolutions de la Einquième République—La Place du Juge Constitutionnel*, *in* LES CAHIERS FRANÇAIS 40 (2001).
79. *Id.*
80. *Id.*
81. Loïc Philip, *La Portée du Contrôle Exercé par le Conseil Constituionnel*, *in* REVUE DE DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ETRANGER 531, 532–35 (Marcel Waline & Georges Berlia eds., 1974).
82. James Beardsley, *Constitutional Review in France*, 1975 SUP. CT. REV. 189, 231–32 (1975).
83. *Id.*
84. DC 73-51 (emphasis added).
85. OLIVA, *supra* note 54, at 112.
86. Beardsley, *supra* note 70, at 449.

The "constitutionalization" was extremely significant because it meant that review would not be "of equality before the law, but of equality within the law."[87]

3. The First Reference to the 1946 Preamble

The decision taken on January 15, 1975 by the Constitutional Council was of the utmost importance first and foremost because of the issue being addressed: abortion. The *Conseil* was thus very clear in asserting the limits of its competence so as to avoid becoming "another cog in the machine for approving laws," to use the words of Louis Favoreu and Loïc Philip.[88] Just as other constitutional courts had done,[89] the *Conseil* recognized the right of women to an abortion only in cases of absolute necessity, and doctors could object conscientiously to performing an abortion.[90]

Secondly, the Council ruled that it lacked competence to recognize the status of constitutional law to international treaties ratified by France.

Mostly importantly, in the context of this study, Decision DC 74-54 was the case where, for the first time, the Constitutional Council used the 1946 Preamble as a parameter in judicial review.[91]

With regard to the right to life, the *Conseil* could not recognize that it was an absolute right, because otherwise the death penalty and abortion in special cases would both have been unconstitutional. Therefore, in deciding whether the right to life was enshrined in the 1946 Preamble or whether there was a right to life protected by articled provisions of the Constitution, the *Conseil* chose the latter.[92] Indeed the Council held that derogations to the right to life were only allowed in very exceptional cases, and, therefore, while a provision which authorized free abortion would be struck down, the law as it stood was constitutional.[93]

Then (and this is extremely important) the Council went on to say that the law under scrutiny did not encroach the Preamble of the 1946 Constitution.[94]

The Council did not grant protection to conception,[95] and therefore protection for the embryo. All of this emerged from the debates prior to the approval of the 1946 Preamble, when the drafters decided to exclude

87. LOUIS FAVOREU & LOÏC PHILIP, LES GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL 284 (8th ed. 1995).

88. Louis Favoreu & Loïc Philip, *Chronique Constitutionnelle et Parlementaire Française*, *in* REVUE DE DROIT PUBLIC 165, 185 (Marcel Wline & Georges Berla eds., 1975).

89. FAVOREU & PHILIP, *supra* note 87, at 320–23.

90. *Id.*

91. Conseil Constitutionnel [CC] decision No. 71–44DC, July 16, 1971, J.O. 7114 (Fr.).

92. CC decision No. 74–54DC, Jan. 15, 1975, J.O. (Fr.).

93. *Id.*

94. *Id.*

95. FAVOREU & PHILIP, *supra* note 87, at 318.

the following sentence: "the right of the child to life and to health shall be guaranteed prior to birth."[96]

4. Protection of the Environment

Through a much disputed amendment in 2005, the Charter of the Environment was added to the Preamble.[97]

Not long after, the Constitutional Council handed down two important judgments concerning sustainable development,[98] in which the Council, using the Charter of the Environment of 2004 as a parameter, held that "[p]ublic policy must promote sustainable development. With this aim in mind, conciliation must be found with regard to the protection of the environment, economic development and social progress."[99]
On this basis, the Council quashed a claim lodged by 120 members of parliament and held that the lawmaker had taken all the measures to ensure protection of the environment and maritime security.[100] To conclude, in a 2007 decision the Constitutional Council used three different parts of the Preamble (the 1789 Declaration, the 1946 Preamble, and the 2004 Charter of the Environment) in exercising judicial review.[101]

To sum up, after being inserted in the Preamble, the Charter of the Environment was clearly given the same legal status as the other parts of the Preamble and the articled provisions of the 1958 Constitution.[102]

V. THE PREAMBLE OF THE INTERNATIONALLY IMPOSED CONSTITUTION OF BOSNIA AND HERZEGOVINA

A. Who are the Constituent Peoples?

The central role of the Preamble of the Constitution of Bosnia and Herzegovina[103] emerges very starkly from the landmark decisions handed down by the country's Constitutional Court in 2000, commonly referred to as the "Constituent People's Case."[104]

96. FROSINI, *supra* note 2, at 73.
97. Marie-Claire Ponthoreau & Fabrice Hourquebie, *The French* Conseil Constitutionnel*: An Evolving Form of Constitutional Justice*, 3 J. COMP. L. 269, 270 (2008).
98. *See* CC decision No. 2005–514DC, Apr. 28, 2005, J.O. 7702 (Fr.).
99. *Id.*
100. *Id.*
101. *See* CC decision No. 2007–562DC, Feb. 21, 2008, J.O. (Fr.).
102. The central role played by the preamble to the 1958 French Constitution was yet again confirmed when, in January 2008, then-French President Nicolas Sarkozy called for a committee, chaired by Simone Veil, to explore an amendment to the preamble that would accommodate greater diversity. *See* FROSINI, *supra* note 2, at 74.
103. The Constitution is Annex 4 of the Dayton Peace Agreement. *See* Dayton Peace Accords, Bosn. & Herz.–Croat.–Yugoslavia, annex 4, Dec. 14, 1995.
104. *Implementing Equality: The "Constituent Peoples" Decision in Bosnia & Herzegovina*, EURACTIV (May 7, 2002), http://www.euractiv.com/section/security/opinion/implementing-equality-the-constituent-peoples-decision-in-bosnia-herzegovina/.

The case began on February 12, 1998, when Alija Izetbegović—at that time Chair of the Presidency of Bosnia and Herzegovina—instituted proceedings before the Constitutional Court for an evaluation of the consistency of the Constitution of the Republika Srpska ("Constitution of RS") and the Constitution of the Federation of BiH ("Federation Constitution") with the Constitution of Bosnia and Herzegovina ("Constitution of BiH").[105]

With regard to the Constitution of RS, Izetbegović contested various provisions such as "the right of the Serb people to self-determination" (contained in the Preamble); the claim that "the Republika Srpska is a State of the Serb people and of all its citizens";[106] the reference to "the *border* between the Republika Srpska and the Federation";[107] "the possibility for the Republika Srpska to establish special parallel relationships with the Federal Republic of Yugoslavia and its Member Republics";[108] and so forth.

With regard to the Federation Constitution, Izetbegović challenged various provisions such as "Bosniacs and Croats as being the constituent peoples;[109] "Bosnian and Croatian as the official languages of the Federation";[110] "dual citizenship";[111] "the authority of the Federation to organise and conduct the defence of the Federation";[112] and so forth.

Due to the complexity of this case the decision of the Constitutional Court was divided into four parts.

1. The Challenge to the Sovereignty, Territorial Integrity, and Political Independence of Bosnia and Herzegovina

In the first partial judgment, the Court addressed the challenge to Article 138 of the Constitution of RS (and subsequent amendments), which enabled the authorities of the RS to "arbitrarily adopt enactments and undertake measures," *contrary to Paragraph 6 of the Preamble of the Constitution of BiH*.[113]

The defendant, the People's Assembly of the Republika Srpska, contested this challenge. In addition to other arguments, it claimed that the Preamble of the Constitution of BiH *was not included in the normative part of the Constitution and could not, therefore, serve as a basis for review* of Amendments LI and LXV.[114]

105. Constitutional Court of Bosnia and Herzegovina, Partial Decision U 5/98 III of 1 July 2000, http://www.jus.unitn.it/download/gestione/jens.woelk/20111028_1108U-5-98-DO-2.pdf.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*

The Constitutional Court struck down the provisions under scrutiny using the Preamble as one of the parameters for judicial review.[115]

2. The Challenge to the Laws of Property

The second part of the decision concerned the scrutiny of various provisions concerning property rights.[116]

Once again, the Preamble was brought into play given that the "goal of a market economy" is contained in paragraph 4 of the latter. As a basis for handing down its decision, the Constitutional Court concluded that,

> there are at least two *constitutional rules* imposed by the said constitutional provisions that must *serve as a standard for judicial review*. Demonstrated by the relationship between "the protection of privately owned property" and a *market economy in the text of the Preamble* and Article II of the Constitution of BiH, the right to property is not only an individual right, which requires judicial protection against any illegitimate state interference, but also an institutional safeguard of one of the prerequisites for a functional market economy.[117]

In part two, the Constitutional Court undoubtedly used the Preamble as a tool for judicial review, just like any other provision of the Constitution. Indeed, it defines the Preamble as a "rule" from which an "obligation" derives.

3. The Preamble Is Legally Binding

Part three finds few equivalents in comparative law, especially given its ample reference to both the scholarly debate on the role of constitutional preambles and foreign case law.

The main objection of the defendant—the People's Assembly of the Republika Srpska—is that "the preamble was not an operative part of the Constitution of RS and had no normative character."[118]

From both a comparative and historical perspective one should highlight the fact that the applicant makes reference to the 1971 decision of the French Constitutional Council discussed in detail above.[119] As a consequence it is also interesting to note that the defendant tries to make the case that France is an exception to the rule according to which constitutional preambles do not have binding force.

The Court pointed out that

115. *Id.*
116. *Id.*
117. FROSINI, *supra* note 2, at 107.
118. Constitutional Court of Bosnia and Herzegovina, U-5/98 (Partial Decision Part 3), para. 11, July 1, 2000.
119. *Id.*

> [a]s far as the scholarly opinions on the legal nature of preambles of constitutions in general were concerned (which were quoted by the representatives of the parties *in abstracto*), it is certainly not the task of this Court to decide on such scientific debates, but to restrain itself to the judicial adjudication of the dispute pending before it.[120]

The Constitutional Court drew the following conclusion: "simply *an overgeneralization* by the party in this dispute before the Constitutional Court to conclude that a Preamble or even the Preamble to the GFAP has no normative force as such."[121]

The Constitutional Court then went on to make a very important argument on the normative force of the Preamble:

> Contrary to the constitutions of many other countries, the Constitution of BiH in Annex 4 to the Dayton Agreement is an integral part of an international agreement. Therefore, Article 31 of the Vienna Convention of the Law on Treaties – providing for a general principle of international law which is, according to Article III.3 (b) of the Constitution of BiH, an "integral part of the legal system of Bosnia and Herzegovina and its Entities" – must be applied in the interpretation of all its provisions, including the Constitution of BiH.[122]

This passage, according to which Article 31 of the Vienna Convention of the Law on Treaties has to be applied, is of the utmost importance given the fact that paragraph two of said Article states that "[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text and including its *preamble* and annexes . . . ."[123]

The reasoning of the Court was that, according to the wording of paragraph two of that Article, the text that is interpreted includes the Preamble and annexes. Hence, the Preamble of the Constitution of BiH must be viewed as an *integral part* of the text of the Constitution.

The Court also considered the Preamble of the Constitution of RS an integral part of the latter, but for another reason. In fact, the text of the Preamble of the Constitution of RS had been modified by Amendments XXVI and LIV whereby it had been explicitly stated that "these amendments form an integral part of the Constitution of the Republika Srpska . . . ."[124]

Significantly, at this point, the Constitutional Court specified the parameters on the basis of which it had handed down part two of the decision (something it had not done at the time, as underlined above) by stating that it had found there to be no "normative difference between the provisions and the '*fundamental principles*' of the Constitution."[125]

120. *Id.* at para. 18.
121. *Id.* (emphasis added).
122. *Id.* at para. 19.
123. *Id.*
124. *Id.* at para. 20.
125. *Id.* at para. 22.

The Court then explained the "nature" of constitutional principles to be found both in the provisions of the Preamble and the so-called "normative part" of a constitution. The Court cited one of the landmark cases of the Canadian Supreme Court, *Reference re Secession of Québec [1998], 2.S.C.R.*[126] and, more precisely, paragraphs forty-nine through fifty-four.

As a result the Constitutional Court of BiH, still citing *Reference re Secession of Québec*, declared that "the principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments."[127]

The constitutional judges of BiH then made recourse to another leading case of the Canadian Supreme Court concerning the use that can be made of these underlying principles incorporated into the Constitution by the Preamble, *i.e.*, *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, where in paragraph 95 the Canadian justices stated:

> As such, the Preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of those organizing principles to *fill out gaps* in the express terms of the constitutional scheme. It is the means by which *the underlying logic of the Act can be given the force of law*.[128]

The Constitutional Court of BiH proceeded by explaining that by referring to the principle of the "promotion of a market economy," according to paragraph four of the Preamble to the Constitution of BiH in Partial Decision II, it implied that the Constitution of BiH contains basic constitutional principles and goals for the functioning of Bosnia and Herzegovina, which must be viewed as constitutional guidelines or restrictions for the exercise of the responsibilities of both Bosnia and Herzegovina and its Entities.[129]

Then, by referring to previous case U 1/98, the Court concluded that the first sentence of Article VI.3 of the Constitution of BiH, which states "the Constitutional Court shall uphold this Constitution," must also apply to the Preamble.[130] "Hence, the 'normative meaning' of the Preamble of the Constitution of BiH cannot be reduced to an 'auxiliary method' in the interpretation of that very same Constitution."[131]

From a comparative standpoint, there can be no doubt that the Constituent People's case of 2000 is a landmark case and is of particular significance given the presence of three foreign judges (an Austrian, a Frenchman, and a Swede) and the ample reference that is made both in

126. The Canadian Supreme Court handed down this landmark decision, holding that Québec did not have the right of unilateral secession.
127. *Id.* at para. 23.
128. *See id.*
129. *Id.* at para. 24.
130. *Id.*
131. *Id.*

the majority judgment, but also in the dissenting opinions to foreign case law and legal scholarship and to international treaty conventions.

VI. THE PREAMBLE TO THE CONSTITUTION OF COLOMBIA

There is no doubt that in Latin America, the country where the Preamble has played a truly central role is Colombia: indeed, just as in France, the Preamble is considered part of the *bloque de constitucionalidad*, that is to say that the set of parameters that can be used in carrying out constitutional review. As Catalina Botero Marino has pointed out, the Preamble of the 1991 Constitution: "[I]s not a paragon of brevity, beauty or linguistic purity. In actual fact, it is a broad and confused text, not only in semantic and grammatical terms, but also politically."[132]

Despite the "linguistic ugliness" of the Preamble, most authors have no doubt that the provisions it contains can be interpreted in a harmonic manner, but regardless of Colombian legal scholarship, the central role played by the Preamble in Colombia's legal system has been firmly established by the Constitutional Court set up in 1991. Indeed, before this Court started operating, it is interesting to underline that the Supreme Court of Justice had a far more "tepid" position with regard to the Preamble. In a judgment handed down in 1988, the Supreme Court stated:

> The legal effects of the ideological content of the *preamble* remain limited to its function as a basis for interpretation (. . .) which means, under the theory of constitutional review, that there can be no violation of the Constitution which, on this point, as mentioned above, *is not normative*.[133]

In other words, the Supreme Court denied the Preamble normative value. On the contrary, the new Constitutional Court, clearly influenced by French scholarship and constitutional case law, today considers the Preamble to be one of the parameters that can be employed in constitutional review. More precisely, the Constitutional Court stated that the *bloque de constitucionalidad* "is comprised of the *Preamble to the Political Charter*, and Articles 1, 5, 39, 53, 56 and 93 of the Constitution."[134]

Three fundamental elements have been used by the Constitutional Court to explain why it considers the Preamble to be on an equal footing with the rest of the Constitution.[135]

132. Catalina Botero Marino, *Colombia, in* LOS PREÁMBULOS CONSTITUCIONALES EN IBEROAMÉRICA, 115, 127 (Antonio Torres del Moral & Javier Tajadura Tejada eds., 2001) (source on file with author).

133. *See* Corte Suprema de Justicia [Supreme Court], Sala. Plena mayo 19, 1988, H. Gómez Otálora y J. Sanín Greiffenstein 1780-51, Gaceta Judicial (No. 2434, p. 469) (Colom.); *see also* Botero Marino, *supra* note 162, at 129 (emphasis added) (source on file with author).

134. *See* Corte Constitucional [C.C.] [Constitutional Court], agosto 10, 1999, Sentencia T.568/99, http://www.corteconstitucional.gov.co/relatoria/1999/T-568-99.htm (Colom.) (emphasis added) (source on file with author).

135. Botero Marino, *supra* note 132, at 129.

First, the Preamble was approved in the same way as the other articles of the Constitution.[136] Second, according to the Constitutional Court, Colombian constitutional law goes beyond the articles of the Constitution (as seen in the judgment *supra*).[137] Third, just because the Preamble contains mainly values and principles does not automatically mean that it is not legally binding. In fact, the Colombian Constitutional Court is of the opinion that constitutional provisions may be formulated differently.[138]

That the Preamble constitutes a core part of the Constitution is confirmed by ample case law handed down by the Constitutional Court.[139]

With regard to the specific contents of the Preamble, the case law of the Colombian Constitutional Court is extremely rich. With regard to the "invocation of the protection of God," the Court has affirmed that "[t]he invocation of the protection of God in the preamble is general in nature and does not refer to any one church in particular."[140]

This decision is of great significance because while, on one hand, the Constitutional Court reaffirmed the normative value of the Preamble, on the other hand, with regard to the reference to God, it clearly underlined that this does not imply that Colombia is to be considered a confessional state.

Another important decision was related to the aim of "reinforcing the unity of the Nation." Once again, the Court clearly provided a progressive interpretation of this concept by stating that "the strengthening of the unity to which the *preamble* of the Constitution alludes is not the *old conception of unity as a synonym for centralism*."[141] On the contrary, the notion contained in the Preamble is that of unity within diversity through the recognition of biological, legal, political, territorial, and religious difference.[142]

Finally, one may briefly examine other judgments delivered by the Constitutional Court that cite the Preamble. With regard to the "protection of life," the Court clearly stated that it is "not only biological life," but also "dignified life";[143] with regard to "peace," the Court affirmed that "from a constitutional perspective, peace should not be considered the absence of conflicts, but the instrument for managing the latter peacefully."[144] With regard to labour (considered one of the fundamental

136. *Id.* at 129–31.

137. C.C., agosto 13, 1992, Sentencia C-479/92, http://www.corteconstitucional.gov.co/relatoria/1992/c-479-92.htm (Colom.) (source on file with author); *see also* Botero Marino, *supra* note 132, at 131.

138. *See* C.C., agosto 13, 1999, Sentencia C-479/92 (Colom.) (source on file with author).

139. C.C., mayo 12, 1992, Sentencia T-006/92 (Colom.) (source on file with author).

140. C.C., agosto 4, 1994, Sentencia C-350/94 (Colom.) (source on file with author).

141. C.C., febrero 25, 1993, Sentencia C-075/93, (Colom.) (emphasis added) (source on file with author).

142. *Id.*

143. C.C., febrero 10, 2000, Sentencia T-121/2000, (Colom.) (source on file with author).

144. C.C., mayo 18, 1995, Sentencia C-225/95, (Colom.) (source on file with author).

objectives of the Constituent Assembly), the Court clearly underlined that "dignified and just conditions" must be ensured to workers in conformity with the characteristics of a welfare state.[145]

What undoubtedly emerges from this far-from-exhaustive analysis is that the Constitutional Court of Colombia clearly considers the Preamble to be on an equal footing with the rest of the Constitution.

VII. THE BASIC STRUCTURE OF THE CONSTITUTION IS IN THE PREAMBLE

The Indian Supreme Court clearly stated that the Preamble was "part of the Constitution" in *Kesavananda v. State of Kerala*, the leading case of 1973,[146]

Kesavananda is a landmark decision.[147] The Supreme Court had to decide whether the articles of the Constitution concerning fundamental rights could be amended and came to the conclusion that Parliament could not abrogate fundamental rights nor change the "basic structure" of the Constitution. The basic structure includes: the supremacy of the Constitution; a democratic and republican state; secularity, separation of powers, and federalism.[148] The Court made ample use of the Preamble.[149]

In this case it was very clear that the chief justice of the Supreme Court, Sarv Mittra Sikri, intended to overrule previous case law according to which the preamble was not part of the Constitution and where the Court had affirmed that the Preamble was not a "grant of power."[150]

The judgment began by underlining the difference between the interpretation of ordinary statutes and the Constitution in common-law countries:

> I need hardly observe that I *am not interpreting an ordinary statute, but a Constitution* which apart from setting up a machinery for government, has a noble and grand vision. *The vision was put in words in the Preamble* and carried out in part by conferring fundamental rights on the people. The vision was directed to be further carried out by the application of directive principles.[151]

The issue of whether any part of the fundamental rights provisions of the Constitution could be revoked or limited by amendment of the Constitution itself had already been addressed in *Sri Sankari Prasad Singh Deo v.*

145. Corte Constitucional, Sentencias SU-342/95; SU569/96; SU-570/96.

146. Kesavananda v. State of Kerala AIR (1973) SC 1461, 1503.

147. *See* T.R. ANDHYARUJINA, THE KESAVANANDA BHARATI CASE: THE UNTOLD STORY OF THE STRUGGLE FOR SUPREMACY BY THE SUPREME COURT AND PARLIAMENT (2011).

148. *Id.* at 42–43.

149. It is important to point out that, in any case, a minority of the Indian legal scholarship considers that the fundamental principles of the Indian Constitution are contained only in its actual text, not in the preamble. MOHAMMAD HIDAYATULLAH, CONSTITUTIONAL LAW OF INDIA 25–26 (1984).

150. Sajjan Singh v. State of Rajasthan AIR (1965) SC 845, 861.

151. Kesavananda v. State of Kerala AIR (1973) SC, 15. *See also* A. WINCKEL, THE CONSTITUTIONAL AND LEGAL SIGNIFICANCE OF THE PREAMBLE TO THE COMMONWEALTH CONSTITUTION, PAST, PRESENT AND FUTURE 145 (2000) (emphasis added).

Union of India and State of Bihar (handed down in 1952);[152] *Sajjan Singh v. State of Rajasthan* (1965);[153] and *Golak Nath v. State of Punjab* (decided in 1967).[154]

In particular, in the first two cases the Supreme Court had upheld the power to amend the rights on the basis of Article 368 (*i.e.*, the constitutional provision that indicates the procedure for amending the Indian Constitution).

Sikri recalled a passage from *Sajjan Singh v. State of Rajasthan* by Justice Hidayatullah:

> Our Preamble is more akin in nature to the American Declaration of Independence (July 4, 1776) than to the preamble to the Constitution of the United States. *It does not make any grant of power* but it gives a direction and purpose to the Constitution . . . .[155]

Still referring to *Sajjan Singh v. State of Rajasthan*, Sikri then recalled the words of Justice Mudholkar, which appeared to indicate the idea that the Preamble may constitute a limit to constitutional amendment.

The second part of *Kesavananda v. State of Kerala* was devoted to interpretation of Article 368 of the Indian Constitution, *i.e.*, the provision concerning the constitutional amendment procedure. After a lengthy disquisition on the meaning of the terms "amendment," "to amend," "to repeal," and so forth—in which Sikri cited the words of Justice Tanney in *Holmes v. Jennison*[156] —Sikri concluded that "in order to appreciate the real content of the expression 'amendment of this Constitution', in Article 368 I must look at the *whole structure* of the Constitution. The Constitution opens with a *preamble* . . . ."[157]

Sikri then stated:

> I may here trace the history of the shaping of the Preamble because this would show that the Preamble was in conformity with the Constitution as it was finally accepted. *Not only was the Constitution framed in the light of the Preamble but the Preamble was ultimately settled in the light of the Constitution.*[158]

With copious citations of B. Shiva Rao's *The Framing of India's Constitution*, Sikri described how the Preamble was framed.[159]

The chief justice then overturned *Re. Berubari Union & Exchange of Enclaves 1960*.[160] Then, he stated that "it is not necessary to decide in the present case whether Article 368 enables Parliament to amend the Preamble. Parliament has not *as yet* chosen to amend the Preamble."[161]

152. Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar [1952] S.C.R. 89.
153. Sajjan Singh v. State of Rajasthan [1965] 1 S.C.R. 933I.C.
154. Golak Nath v. State of Punjab [1967] 2 S.C.R. 762.
155. Sajjan Singh v. State of Rajasthan [1965] 1 S.C.R. 933I.C. (emphasis added).
156. *See supra* Part III.C.
157. *Id.*
158. Kesavananda v. State of Kerala AIR (1973) SC 2184 (emphasis added).
159. *See* THE FRAMING OF INDIA'S CONSTITUTION (Benegal Shiva Rao ed., 1966).
160. Re. Berubari Union & Exchange of Enclaves. [1960] 3 S.C.R. 250.
161. Kesavananda v. State of Kerala AIR (1973) SC 2184.

One has the clear impression that the Cambridge-educated jurist from Lahore was already anticipating what would occur a few years later, in 1976, when Indira Gandhi's majority approved a controversial amendment to the Preamble so as to insert, among others, the expression "socialist," thus providing a legal base for the further pursuance of her left-wing economic reforms.

In a comparative perspective one should not forget that Sikri makes ample reference to Indian, Commonwealth, and American case law[162] and literature[163] on preambles.

Sikri also utterly ignored the issue of whether the Preamble should be regarded as part of the Constitution or not.[164]

On the basis of several years of research on this topic, one can safely say that *Kesavanda* is one of the most important supreme or constitutional court decisions concerning the role of constitutional preambles.

One final, but important, note with regard to India should be remembered, as anticipated above, that on December 18, 1976, during the state of emergency that had been proclaimed in India, the Indira Gandhi government pushed through several changes to the Constitution by means of the Forty-Second Amendment, through which, among other things, the words "socialist" and "secular" were added to the Preamble between the words "sovereign" and "democratic," and the words "unity of the Nation" were changed to "unity and integrity of the Nation."[165] The objective of this amendment was to permit Indira Gandhi to go full speed ahead with her economics policies, but it turned out to be a failure because Morarji Desai became India's first non-Congressional prime minister after Indira Ghandhi's party was heavily defeated at the general election in March, with the incumbent prime minister losing her seat in Uttar Pradesh.[166]

From a political standpoint the amendment of the preamble of the Constitution proved to be a boomerang for Indira Gandhi; however, in the light of *Kesavananda*, from a legal point of view, the decision to revise the Preamble was the ultimate demonstration that the Preamble is at the heart of India's constitutional system.

162. The case law included, among others, Behram Khurshed Pasikaka v. The State of Bombay [1955] 1 S.C.R. 613; *In re* The Kerala Education Bill [1959] S.C.R. 995 handed down by the Indian Supreme Court and the landmark case *Attorney-General v. Prince Ernest Augustus of Hanover* [1957] A.C. 436 decided by the House of Lords.

163. Sikri cites, among others, WILLIAM ANSTEY WYNES, LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA 506 (4th ed., 1970); HENRY THRING, PRACTICAL LEGISLATION 36 (1902); G.C. THORNTON, LEGISLATIVE DRAFTING 137 (1970).

164. Kesavananda v. State of Kerala AIR (1973) SC 2184.

165. *See* INDIA CONST. amend. 42 (1976).

166. *India 6th Lok Sabha (General) Election Results—1977*, ELECTIONS http://www.elections.in/parliamentary-constituencies/1977-election-results.html (last visited Nov. 22, 2016).

VIII. CONCLUSIONS

In this Article we have endeavored to highlight the importance that constitutional preambles assume. Certainly one must distinguish between "hard" preambles and "soft" preambles, whereby the former are preambles that are on equal footing with all the other provisions of a constitution (*e.g.*, France's Preamble), while the latter include preambles that are not given the same legal value as the rest of the Constitution. Even when a preamble is denied legal value, however, one cannot escape the fact that it still plays an important role in the decision-making of constitutional or supreme courts. Indeed, as we have seen, although never used as a true and proper parameter in judicial review, the Preamble to the United States Constitution has played an important role in the decision-making of the U.S. Supreme Court and, moreover, it has undoubtedly exercised a paradigmatic function: just think how many constitutional preambles today begin with those prophetic words "We, the People . . . ."

In a nutshell, what clearly emerges from this research is that preambles are not just the hortatory language that introduces a series of operative provisions; they are not just the "ornately designed cover" of a book called "the Constitution." If a preamble has been written, the words it contains have a reason. However rhetorical the preamble may sound, it is there to remind us why the constitution was approved. Future constitutional framers should bear this in mind and, therefore, to paraphrase Ronald Dworkin, constitutional preambles should be taken very seriously.[167]

167. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).