1. Introduction*

Many constitutions in the world are equipped with preambles, that is, preliminary statements hanging over the body of the constitution explaining the reasons for adopting the constitution, its purpose or its justification. They come in a wide variety of sorts and sizes and most of the time make good reading because the framers of constitutions all over the world tend to invest in the quality of their preambles.

Constitutional preambles are very popular nowadays. The vast majority of modern constitutions have one. This may be due to the fact that countries in the world are more connected than they ever were before and therefore can more easily learn from each other’s (best) practices. They are so appealing, by virtue of the potential system-legitimacy they can command, that even countries that have a well-established constitution with a long tradition – but no preamble – consider having one. Where typically a preamble is enacted at the same moment as the constitution, countries like Australia and the Netherlands have been considering a preamble ‘ex post’. Where the Australians rejected a proposed ex post-one just before the turn of the century, the Dutch decided to study preambles first. In 2008 the Dutch Ministry of the Interior and Kingdom Relations commissioned a study from Leiden University, which was published in 2009.¹ The study in this book partly builds upon the analysis and insights from the 2009 report but takes on board many more preambles.

This book provides a comparative analysis of constitutional preambles from 190 recorded written constitutions worldwide. One reason for writing it is that constitutional preambles have received only scant attention in academic literature, while their use and significance seem to have increased. There is literature on specific preambles, in particular the preamble of the

* The authors wish to express their gratitude to Machteld Zee who worked on the translation into English of the Dutch 2009 report of the study of preambles, commissioned by the Dutch government in 2008. All quotes from the preambles are based on the text of the preambles as contained in Appendix 2 and as such are not referenced in the footnotes.

Constitutional preambles

United States constitution, but very little comparing them. This lack of academic attention may partially be explained by the widespread assumption that constitutional preambles do not constitute enforceable law or even do not have legal value at all. As will be shown in this book, this assumption is not entirely justified. A second trigger for writing this book was the fact that nowadays almost all written constitutions are available in translation. This, of course, is of great help for the purposes of comparison.

The phenomenon of constitutional preambles raises a variety of questions. To start with, how many constitutions are actually preceded by a

---

2 The only book in English that explicitly undertakes a comparison between constitutional preambles is J.O. Frosini, Constitutional Preambles: At a Crossroads between Politics and Law, Santarcangelo di Romagna: Maggioli 2012 (with a focus on the legal value of constitutional preambles). Winckel limits herself to the preambles of constitutions of Commonwealth states, see A. Winckel, The Constitutional and Legal Significance of the Preamble of the Commonwealth Constitution: Past, Present and Future, Melbourne: University of Melbourne 2000. Other important contributions in English are A. Addis, ‘Constitutional Preambles as Narratives of Peoplehood’, Tulane University School of Law Public Law and Legal Theory Working Paper Series, Working Paper No. 16-2, available at http://ssrn.com/abstract=2754290 (analysing the way preambles imagine the identity of political communities); B. Breslin, From Words to Worlds: Exploring Constitutional Functionality, Baltimore: The Johns Hopkins University Press 2009, pp. 46–68 (a chapter on constitutional aspirations, discussing preambles); T. Ginsburg, N. Foti & D. Rockmore, ‘“We the Peoples”: The Global Origins of Constitutional Preambles’, The George Washington International Law Review 46/2 (2014), pp. 101–36 (focusing on constitutional culture); S. Levinson, ‘Do Constitutions have a Point? Reflections on “Parchment Barriers” and Preambles’, Social Philosophy and Policy 28/1 (2011), pp. 150–78 (focusing on the non-legal functions of preambles) and L. Orgad, ‘The Preamble in Constitutional Interpretation’, International Journal of Constitutional Law 8 (2010), pp. 714–38 (focusing on the legal value of constitutional preambles). The most extensive contribution in German is from P. Häberle, in his Verfassungslehre als Kulturwissenschaft, Berlin: Duncker & Humblot 1998 (in particular pp. 920–61, with a focus on constitutional culture). Books in Spanish are J.T. Tejada, El preámbulo constitucional, Granada: Comares 1997 (focusing on the Spanish constitutional preamble, but with a more general introduction) and A. Torres del Moral & J.T. Tejada (eds), Los preámbulos constitucionales en Iberoamérica, Madrid: Centro de Estudios Politicos y Constituciona 2011 (dealing with the preambles of Latin American constitutions). 3 For the sources we have used, see Appendix 1. It may be asked whether a constitutional preamble – or any other legal text, for that matter – can be productively studied in any language but the original. However true this may be, we restrict ourselves to English translations, as we simply lack the knowledge, time and resources to use the original versions. In constitutional adjudication, the original language has to be used, of course. Cf. Article 452 of the constitution of Myanmar: ‘Interpretation of the preamble, Sections, Sub-Sections, expressions, individual words and ideas of this Constitution shall be based only on the Myanmar text.’
Introduction

preamble, and are there any trends in this respect? As they come in all sorts and sizes, another question is whether they show some similarity in their content. What elements do they contain? And to what extent and why do they differ from each other? Next, how are constitutional preambles formulated? What style do they have? The fact that not all constitutions are preceded by a preamble raises the question what ‘added value’ preambles have. What functions do they fulfil? From a strictly legal point of view, questions concerning the legal status of constitutional preambles are of particular interest. Do they play any role in judicial review? If so, how are they interpreted? And do they have the capacity to limit constitutional amendments? This book aims to answer these and related questions.

This book covers only preambles of constitutions that are currently in force. Furthermore, it covers only constitutional preambles of states that are members of the United Nations. This book does not consider the constitutional preambles of sub-state entities and other territories.

The methodological starting point of our research is a basic quantitative analysis, followed by a textual analysis. We are well aware of the limitations of textual analysis. The text of a constitution does not necessarily represent the reality of the actual constitutional order and perhaps this is true in particular in respect to constitutional preambles, which often contain very lofty ideals and aspirations.4 Our aim, however, is not to provide a realistic description of the actual working of constitutions. Constitutional preambles qua texts also deserve attention. They may contain ideological fictions, or even deliberate distortions of facts, but this in itself could be very interesting. Preambles tell us a story about how the drafters of constitutions try to legitimize their products.

Another obvious limitation of textual analysis is that the meaning of words depend on their context and that, as a consequence, grasping the meaning of constitutional preambles requires contextual background information – concerning the history, the social and political reality, the legal system, and so on, of the relevant countries. We do not claim to have extensive knowledge in this respect. Nevertheless, we believe that textual analysis is a necessary and valuable first step towards understanding constitutional preambles.5 Furthermore, given our ambition to cover

Constitutional preambles

all preambles of constitutions currently in force, which means that we have to consider a vast number of texts, this seems to be the only feasible approach.

Finally, our textual analysis implies that we treat all preambles, in principle, as equal. For the purposes of this book, the preamble of a tiny country in the Pacific, let us say Nauru, may be as interesting as the preamble of a large and politically important state, India for example.

For a selected number of countries we conduct a more in-depth analysis, focusing on the legal value and legal functions of constitutional preambles. This analysis is mainly based on case law and related academic literature.

We consider the constitutional preambles of the United States and France as prototypes; for that reason we will discuss them at length. Among scholars, there is common agreement that the preamble to the American constitution cannot be considered as an independent source of law and in fact, the federal Supreme Court has never used the preamble as a parameter for constitutional review. In France, by contrast, the Constitutional Council has declared the preamble to be an integral part of the constitution and has used it directly to review the constitutionality of legislation. Besides the United States and France, we have selected countries where the preamble has played a role in constitutional adjudication and where the relevant case law is either in English or available in English translation.

The structure of this book is as follows. Chapter 2 introduces the notion of a preamble more extensively and provides a general quantitative analysis of constitutional preambles. It describes the sample that has been used for our research and some of its basic characteristics, for example relating to the length of preambles.

The next two chapters, which are based on textual analysis, provide a more substantial analysis. Given the great variety of their content, it is not possible to strictly classify constitutional preambles. Nevertheless, groups of preambles share certain features. On this basis, chapter 3 discusses a number of elements that recur in many preambles. Chapter 4 analyses the different styles of preambles, that is, the particular language in which they are formulated. It distinguishes between solemn language, plain language and legal language and illustrates these different styles with examples. It also addresses the question of who are the authors of preambles and who its addressees.

Chapter 5 discusses the different functions constitutional preambles possibly fulfil. It distinguishes between legal and non-legal functions. With regard to non-legal functions, the chapter differentiates between an expressive, evocative, identifying and educational function and examines how and to what extent constitutional preambles can fulfil these func-
The chapter also discusses the role of preambles as a ‘bridge in time’ – between the past, the present and the future. The legal functions of preambles that are discussed in this chapter will be illustrated later on in the book, in chapters 6 and 7. Based on examples, chapter 5 also discusses whether and how preambles can be amended. Furthermore, it discusses cases where preambles have been the subject of political conflict.

The following two chapters discuss the legal status and functions of constitutional preambles on a case-by-case basis. Chapter 6 concerns the United States and France, whereas chapter 7 concerns a selection of other countries. These chapters provide in-depth legal analyses and extensively rely on case law and related academic literature. They give examples of states where the constitutional preamble plays an important role in judicial review and can even prohibit constitutional amendments.

Finally, chapter 8 recalls the aforementioned questions that were raised by the phenomenon of constitutional preambles and presents the answers found in the course of this book. It concludes with a reflection on the significance of constitutional preambles.

There are two appendices to this book. Appendix 1 describes the sources used for our research and provides a concise overview of all constitutions currently in force. Appendix 2 provides the text of all current constitutional preambles.

This book will be of particular interest to researchers in the field of comparative constitutional law. Given the current interest in comparative constitutional law, we believe the book comes at a very timely moment. Constitution-building processes throughout the world produce a community of experts beyond lawyers and legal scholars. This book aims to address this community as well. The book, therefore, should also be of interest for governmental and NGO advisors who have to think about issues related to constitution drafting.