

THE BASIC PROBLEMS OF INTERPRETING PREAMBLES OF CONSTITUTIONS

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Abstract

In this article, we touch on the preambles of constitutions, their importance, and manner of interpretation with a purposeful analysis of these issues as the main objective of this paper. We look at constitutional law in its entirety, as well as preambular issues, to evaluate the segments of the legal act that represent its non-normative part. To significantly contribute to the understanding of the very goal of the constitution and similar acts is the most important issue of this topic. By analysing different methods of interpreting the constitution and its preamble, we provide a comprehensive account of errors in interpreting the constitution that penetrate every segment of our lives.

Keywords: interpretation of law; preamble; originalism; theory of law; constitution; constitutional law

Introduction

The constitution of every country in the world is the foundation of its state's legal order as the highest legal act. It is the only legal act in the legal order of a state that also exhibits certain political characteristics (Kuzmanović, 2007, pp. 11-24; Savić, 2000, p. 55). It is the most important formal source of law and can be viewed in a material and formal sense. In the material sense, the constitution is a text that regulates most of the basic issues of social, state, and legal organization of a country. Therefore, it is a set of norms that determines the organization and competence of supreme state authorities and sets the principles of state organization and overall legal order (Popović, 1997, p. 46). In the material sense, it is determined according to the content, the matter of constitutional norms, and according to the content of social relations which are regulated by those norms. In the formal sense, the constitution is determined depending on the form of the legal act, including its competence, procedure, and materialization. Thus, in the formal sense, the constitution is the highest general legal act passed by a special body with constitutional competencies, either a special constitutional body, or political or national representation, under a special procedure, drafted by a strictly defined nomotechnics and amended by a specifically determined procedure (Kuzmanović, 2002, pp. 36-44; Savić, 2005, pp. 270-272). In addition to these, the constitution has many other important features, for instance as a reflection of the society (slave-owning, feudal, capitalist, socialist), as an act of statehood, and as an ideological-political act.

It is precisely these specifics, but also the significance it has for state and society, that raise particularly tricky questions about its interpretation, meaning the interpretation of the most general and most abstract norms in a legal order. Who interprets these norms? Or rather, who can interpret them? In what way? Using which methods? What is the purpose of that interpretation? These are all questions that arise after the adoption of this basic law. According to Visković (1981), the basic function of interpretation is to de-

termine several possible meanings of one vague and/or ambiguous legal act and to opt for one, namely the most favorable meaning (Harašić, 2011, pp. 61-62; Visković, 1981, p. 373). Savić (2005) states that the interpretation or hermeneutics of law is a way or procedure used to make something that is vague clearer and more understandable (Gadamer, 1978, p. 215; Savić, 2005, p. 348). Interpreting law is the daily activity of those who deal with legal norms, especially lawyers. Indeed, legal norms, and especially constitutional norms, as a psychic creation cannot be understood without interpretation. The interpretation mostly seems imperceptible, because while performing this daily activity, the interpreter does not even notice that he is engaged in some important, but also difficult, special activity. The interpreter does that during the very process of learning legal norms, or as Lukić and Košutić (2003) state, “imperceptibly, naturally and easily” (p. 396). It is usually only at times when the interpretation becomes difficult, for instance when a certain norm is not clear and comprehensible “in itself,” that the interpretation of law stands out and is recognized as a special activity. Interpretation of the Constitution as the most general legal act is an even greater and more difficult activity, which can be left only to exceptional legal experts with a wide range of legal knowledge and experience.

The constitution is written according to strictly established nomotechnics, which separates it from other legal acts, and must have its own structure. The constitution, as a rule, consists of two parts: the preamble and the normative part. However, practice has shown us that a number of constitutions deviate from this model and have several parts. Therefore some constitutions possess a preamble, introductory or basic principles and a normative part, while others have a preamble, a normative part and annexes. The most important part of any constitution is the normative part, which contains the constitutional matter (*materiae constitutionis*). This part can differ in scope (the Constitution of Bosnia and Herzegovina has 12 articles while the Indian Constitution has 407 articles) and writing technique (it can be presented in the form of essays or in a short, precisely and clearly way)

(Đorđević, 1977, pp. 127-131; Kuzmanović, 2002, pp. 48-50; Perić, 1968, pp. 128-140). The notion that the normative part of the constitution has the greatest legal force and that it is the only one that contains constitutional matter has been ruling since constitutions were differentiated as such. But the situation has changed significantly today. Perceptions have emerged that other parts of the constitution also contain constitutional matter and as such produce legal force, like preambles.

Since preambles are usually not included in the operative part of constitutional texts, they were underestimated by legal scholars and researchers, and did not occupy a significant and visible place in legal discussions (Ginsburg et al., 2014, p. 104). Constitutional preambles are thus somewhat of an enigma. There are many reasons why legal science has neglected them, but the most significant is the exclusively declarative nature of the preamble of the constitution, and that it lacks prescriptive value (Frosini, 2012, p. 22). However, as already mentioned, interpreting a constitution's preamble as a special part of the constitution that has a certain legal force has recently become a trend in law. To contribute to the understanding of the legal nature of the preamble, but also to the interpretation of the constitution in general, we will focus on the issues and theoretical and legal understandings of the legal nature of preambles. This article discusses the types of interpretation of the constitution in general and in the context of the interpretation of the preamble, theories on the interpretation and presentation of problems that have arisen and may arise in national and comparative practice (imaginary but not impossible cases) and those that have already occurred in legal practice.

The legal nature of preambles

In legal theory, the legal nature of preambles is still controversial and their legal status is not entirely clear. That is why there are different, often conflicting, opinions about it. Some believe that the preamble is a political dec-

laration, without any legal significance, that it is not a legal regulation and that as such it is not obligatory, while others believe that the preamble is a legal regulation with more or less legal force. According to Kelzen (1998), the preamble has declarative, ideological, and political significance rather than a legal one, because if the preamble was simply rejected, there would be no real changes in the constitution itself, meaning that the legal force of the constitution would hardly change (p. 323). Kelzen's opinion was shared by most legal writers regardless of their legal school or legal field. However, we believe that it would not be out of place to clarify the meaning of the word preamble and its purpose. "Preamble" is a word taken from the Latin language (lat. *preambulum*, *preambulus*) and means "introduction," something that precedes. So, figuratively speaking, the preamble is an overture to something yet to come. On the other hand, in the formal legal sense, it is a part of a legal act that emphasizes the goal of passing that act, its basic principles, reasons for passing and the like, and which precedes the act itself, i.e. its normative part (Savić, 2000, pp. 58-59).

Its political and declarative character, solemn and informative significance, diversity of content are all reasons for dilemmas about the legal nature of the preamble. The most common elements of preambles show it to be a bearer of sovereignty, historical narrative, main goals, peoples and/or national identity and invocation of God or religion (Orgad, 2010, pp. 715-718). There is no dilemma about the nature of the preamble only when the drafter of the constitution explicitly and unambiguously determines its significance and legal nature. However, such cases are rare in practice and only in a few countries has the legislator explicitly determined the legal nature of the preamble, such as Turkey, Croatia, Indonesia, Togo, and Papua New Guinea (Mikić, 2014, p. 436; Radovanović, 2020, p. 97; Simović, 2020, p. 17). To provide one concrete example: Article 151 of the 2012 Constitution of the Syrian Arab Republic states that "the preamble of the Constitution is considered an integral part of the Constitution."

Regarding preambles of which the legal effect was not determined by the writer/s of the constitution, three points of view exist in constitutional law theory. The first states that only the solemn declaration of a purely political nature has changed and that a preamble represents a symbolic overture to the normative part of the constitution; therefore, it lacks operational legal value. Proponents of the second view believe that the preamble has legal significance, but that it is extremely limited and should be considered only as an aid in interpreting vague and overly abstract constitutional norms by placing them in an appropriate socio-political context. The third opinion considers the preamble as an integral part of the constitution and equates its legal effect with the effect of the normative part of the constitution (Simović, 2020, p. 18). Authors representing different views on the legal nature of the preamble can be divided into several groups: (a) classicists, (b) formalists, (c) materialists, (d) modernists, and (e) radicalists.

The classical doctrine of constitutional law has long denied any kind of legal effect of the preamble because many arguments were in favor of this very thesis. We mentioned earlier that the word “preamble“ originates from Latin, meaning “something that precedes something,” therefore, a kind of introduction. Thus, the preamble is only an introduction to a legal act without a normative, but only declarative effect. Hence, it is considered that elements that should not have a normative character, but which should serve as reasons for adopting what follows, are often included in the preamble (Simović, 2020, p. 18). Classicists argue that besides constitutions, other legal acts also have certain introductions, such as laws, charters, and decrees. This is more common in the Anglo-Saxon legal field (Jovičić, 1977, p. 124). However, these preambles, while containing some basic principles, reasons, and goals of passing an act, do not produce a legal effect, so classicists question why a constitutional preamble would be an exception. Thus, they base their arguments on analogy (Roach, 2001; Simović, 2020, p. 19). However, there is reason to reject this argument because unlike laws that represent organizational and operational legal acts that more specifi-

cally regulate certain legal areas, the preamble as an act derives its force from the constitution and as such is normatively lower on the hierarchical scale in relation to the constitution (Perić, 1968, pp. 140- 144; Savić, 1996-1997, pp. 93-104). On the other hand, one of the basic characteristics of the constitution and its essential properties is that the constitution is an ideological-political, but also a declarative act (Kuzmanović, 2002, pp. 41-42). Thus, we conclude that this is not an ordinary legal act that contains only norms that regulate something. At its core, it also contains ideological and political elements that reflect the spirit of the time in which the constitution was adopted and proclaim the basic principles and principles of the state legal order.

The formalists, i.e., those who base their arguments on the formal role that the preamble has in the constitution, state that it precedes the constitution and as such is not an integral part of it (Marković, 2015, p. 43). As a counterargument to this claim, it is often stated that this would indeed be the case if the preamble precedes the text of the constitution, which in practice is not the case with all constitutions. In addition to this argument, the instrumentalism of the formalists also includes the fact that the preamble differs significantly in its structure from the substantive part of the constitution. The preamble, unlike the normative part, does not contain certain wholes, such as individual parts, chapters, articles, paragraphs, and points, but is written homogeneously, harmoniously, paying attention to the solemnity and declarativeness of each sentence. Thus, since the preamble does not consist of several classification units as a substantive part of the constitution, the formalists conclude that it has no legal effect. In addition, the preamble is characterized by insufficiently defined, undefined, or unclear content, which is contrary to the character of constitutional and legal norms in general (Jovičić, 1977, p. 125). Precisely because of its content, the preamble may not be considered a part of the text, but a separate essence that seeks its own special place (Orgad, 2010, p. 716). However, if this is taken as an argument for the negation of the legal effect of the preamble, then

we could deny any essay and insufficiently defined norm, which would include a substantial part of Anglo-Saxon and Anglo-American law (Kutlešić, 2010, p. 74; Kuzmanović, 2002, pp. 48-49; Simović, 2020, p. 20).

As the arguments of the formalists did not provide a complete answer to the questions of the legal nature of the preamble, several authors decided to base their arguments on the shortcomings of the material properties of the preamble. The legislators use the preamble as a tool, as a means by which they introduce citizens to a legal act and communicate something to them. Here, the preamble has a more rhetorical, oratorical, and solemn character. Through the preamble, the citizens are given reasons for adopting the constitution, and they are introduced to the principles on which the future state legal system will stand so that it can then be considered a political pamphlet. That pamphlet would then have more of an instructive function than it would represent the substantive part of the constitution. The preamble does not prescribe norms for certain human behavior, which is why some authors conclude that it lacks legally relevant content and if it were rejected, almost nothing in the normative part of the constitution would change (Kelzen, 1998, p. 360; Simović, 2020, p. 20). Some authors also conclude that it points to the prepositive basic and/or religious truths of a political community, and as such is more of a scientific, academic introduction to the constitution, a set of proclamations and programmatic principles that should be applied in the future (Đorđević, 1980, p. 120; Haberle, 2002, p. 185; Jovičić, 1977, p. 125; Kuzmanović, 2002, p. 41; pp. 49-50; Simović, 2020, p. 20). The preamble often emphasizes the irrelevant historical, cultural, and civilizational foundations of a society, emphasizes the basic ideas of the constitution-maker that should be realized through the constitution, reminds and relies on a positive past, marks the present, and projects the future (Kuzmanović, 2002, p. 49). The goal of every legal act, including the constitution, is to present the ideas and principles in the preamble and realize them, that is, turn them into a normative form, meaning legal norms, because only they are binding. Legal norms are statements about need (Ger-

man, *sollen*) which, due to the character of the state legal order, most often turn into being (German, *sein*), whereby the function of the state and law is fulfilled (Petrov, 2009, pp. 235-245; Savić, 2000, p. 61). Materialists, therefore, emphasizing the illegal side of the content of the preamble, believe that it has no legal effect. Constitutional preambles, when we apply the comparative law method, seem to differ in their structure, content, scope, and functions they have (Simović, 2020, p. 21). These differences vary from state to state, and from legal system to legal system. Constitutions with longer preambles include those of the SFRY from 1963 and 1974, the Constitution of the People's Republic of China from 1954 and 1982, constitutions that contain a shorter preamble include the U.S. Constitution, the French Constitution, and the Constitution of Bosnia and Herzegovina, while there are also cases of constitutions without any preambles. Such constitutions, in principle, contain so-called preamble provisions in the first few articles; Häberle calls the constitutional norms in these articles "catalogue of preamble articles" (Forsini, 2012, p. 29), i.e. provisions that have no legal but declarative character. For this reason, some authors distinguish between preambles in the formal and preambles in the material sense. Such provisions are, for example, the Constitution of the Kingdom of Denmark, the Constitution of the Kingdom of Norway, and the Constitution of Cyprus (Kuzmanović, 2002: 49; Orgad, 2010: 715- 716; Radovanović, 2020: 100-104; Simović, 2020: 21). It can thus be concluded that the arguments offered by the materialists are not entirely complete and reliable due to the exceptions where the preamble is not necessarily a separate part, but its content can be found in the normative part of the constitution.

Trying to reconcile opposing views, modernists are of the opinion that not all preambles are the same, and that this is the reason why a final and generally accepted judgment cannot be given. We should look for answers to the question related to the legal nature of preambles in each individual case. Therefore, by analyzing structure and content, we can determine whether or not a preamble has a legally relevant character. If it is concluded that

the text of the preface has legally relevant properties, then its legal effect cannot be disputed. Interpreting the preamble of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Bobbio (1974) came to the conclusion that preambles should be divided into “preambles of” and “preambles for” (p. 437). In the first case, the preamble consists of general and introductory principles that form an integral part of the constitutional document, while in the second case, the preamble is a ceremonial introduction to the constitutional act, together with an explanation of why and how the constitution was adopted (Forsini, 2012, p. 147; Simović, 2020, p. 21). This interesting thinking is often mentioned by the authors with the intention of presenting the different legal significance that too many may have, in order to approach their analysis in more detail. A large number of contemporary legal writers hold that the preamble has a primarily non-legal function, regardless of the growth of the movement for the affirmation of the legal relevance of the preamble. According to them, the preamble does not contain legal norms but ideological and political theses and ideas, and thus should not be treated as a normative part of the constitution. Its role is exhausted through the interpretation of constitutional provisions (Beoinoravičius et al., 2015, p. 139; Simović & Petrov, 2018, pp. 87-89). Therefore, there is a subtle view that the preamble is an integral part of the constitution, but unlike other parts of the text of the constitution, it does not have a normative character. It does not contain constitutional norms, but ideas from which those norms should originate (Fira, 2002, p. 63). Thus, some authors believe that with the help of the preamble, and when interpreting them, constitutional provisions should be placed in a certain historical or ideological-political context (Voermans et al., 2017, p. 44). Some lawyers believe that the legal value of the preamble of the constitution depends on its content. Thus, if it is written in legal language and contains legal constructions, even if it were only basic principles, it should be given legal effect. This is even more true if there are constructions in the preamble that identify with legal norms (Orlović, 2019, p. 48;

Simović, 2020, p. 22; Trnka, 2006, p. 44). Preambles more often do not have a normative character, but that does not mean that they should be taken into account during the constitutional interpretation (Stojanović, 2007, p. 62). In that sense, Judge of the Constitutional Court of Poland, Zbigniew Cieslak, stated that “the preamble as an integral part of the normative act, at the same time helps the body that applies the act to determine and systematize the content of protected values.” He also said that the preamble is “an extremely important source for the teleological interpretation of the act” (Simović, 2020, p. 22). The preamble, however, is binding, but in a political way. It obliges the creators of law to translate the principles set out in it into legal norms, of which the constitution, in the material sense, is the only one. Observed from the legal aspect, constitutional norms represent the result of the action of a political will which is expressed only declaratively in the preamble, while in the normative part of the constitution it acquires its true meaning (Savić, 2000, p. 62).

Finally, in legal theory, there are those positions that completely equate the preamble with the normative part of the constitution and consider that its legal effect is equivalent to the substantive provisions of the constitution. Namely, the authors that advocate this position explain that the preamble was adopted in the same special procedure, by the same, specially authorized body, as the constitution itself (Vedel, 2002, p. 326). The 1958 Constitution of France is often cited as an example here. Namely, in this case, all parts of the constitution were put to a referendum (hence both the preamble and the normative part) and they were confirmed by the citizens so that it is a single whole (Rousseau, 2006, p. 125). In addition, as radicals, they cite as an argument the competence of the French Constitutional Council, which refers to the control of the constitutionality of the law, and that it is not limited to the normative part of the constitution as a measure of constitutionality. The Constitutional Council adheres to the preamble of the French Constitution as a measure of constitutionality, stating that “the French people solemnly proclaim their commitment to human rights and

the principles of national sovereignty as defined by the Declaration of the Rights of Man and of the Citizen of 1789.” Because of that, the Constitutional Council did not adhere to the preamble when assessing the constitutionality of the law, the French legislature could delve deeply into the sphere of basic human rights and freedoms since the French Constitution does not contain such provisions in its normative part. The Declaration of the Rights of Man and of the Citizen has, over time, grown in the spirit of French constitutionality and as such is inextricably linked to the Constitution, and should be interpreted within it. As another argument for this thesis, it is stated that the Declaration was adopted by the same body that proclaimed the modern French state – the National Constituent Assembly (Frosini, 2012, pp. 65-66). One of the parents of modern French constitutional law theory, Leon Duguit (2007), considered that the constitutional position of the Declaration was unquestionable, and that any law contrary to the Declaration was unconstitutional (p. 218). In philosophical and legal circles, this debate lasted until 1971, when the Constitutional Council recognized the legal effect of the preamble and used it as a criterion for assessing the constitutionality of the law (Simović, 2020, p. 23). Thus, this is a position that recognizes the pre-integral character on the basis of the formal characteristics of the constitution, namely: (1) the enactor and (2) the procedure (Kutlešić, 2010, p. 75). In other words, if the preamble together with the normative part of the constitution was issued by a specially authorized constitutional body in accordance with a specially established constitutional procedure, then the preamble must be considered an integral part of it and should be interpreted as such.

Types, methods and problems of interpretation

The interpretation of law in general is one of the most complex human activities that is most pronounced when interpreting the constitution as the highest legal act, which explores the meaning and content, as well as the scope of positive constitutional norms and principles (Savić, 2017, pp. 14-

15; Stojanović, 2005, p. 119). The interpretation of the constitution may initially seem like the interpretation of any other legal act. That would be true, if we had some other, hierarchically higher legal act from which we could draw substantive and formal determinants for interpretation. It is for this reason that the interpretation of what we can see in the constitution is significantly more difficult and requires a special approach (Vrban, 2003, p. 457). In this regard, we can cite a few examples from the case law of the U.S. Supreme Court. In the *Case of Dred Scott v. John F. A. Stanford* of 1857, U.S. Supreme Court President Roger Taney argued that “the constitution speaks not only in words, but in the same meaning and purpose it spoke of when it flowed from the hands of its creators and when it the people of the United States voted and accepted.” Similar to Taney, Justice George Sutherland, in the *Case of the Home Building and Loan Assoc. v. Blaisdell* of 1934, pointed out “that the meaning of the constitution cannot be changed with the ebb and flow of economic events ... the constitution has the meaning as the people made it, until the people themselves, not their official representatives, make it different.” On the other hand, Justice John Marshall in 1819, in the *Case of McCulloch v. Maryland*, took the position that interpreters must never forget that what they interpret. It is meant to last for years to come and that, for this very reason, it is adapted to the different crises that people will face. The authors believe that Justice Oliver Holmes went the furthest in interpreting the constitution when he warned that the provisions of the constitution are not mathematical formulas that have essence in their form, they are living organic institutions transplanted from English soil, their meaning should not be derived by taking words from the dictionary, but by considering their origins and the line of their growth. However, some authors believe that it was the American lawyer and judge Benjamin Cordozo when he pointed out that “the constitution it expresses the rules for the time that passes, rather than the principles for the future” (Stepanov & Despotović, 2004, pp. 137-138; Vasić & Čavoški, 1999, pp. 279-280).

In almost all countries of the world, the interpretation of the constitution is, at least indirectly, binding, and is entrusted to either regular, supreme, or specialized constitutional courts, although the constitution may also be interpreted by its enactor (Lombardi, 1985, pp. 67-68). Regardless of who is responsible for interpreting the constitution, the question of techniques and methods of interpretation arises. There has long been an opinion that it is impossible to define a general method of interpreting the constitution that will be applied by all interpreters and which all interpreters will unreservedly adhere to, regardless of (legal) space and time. The reasons for this are reflected in the very differences between legal spaces, specific situations in different countries and the self-limitations adopted by the constitutional judiciary in certain countries. Interpreters have been working on the so-called traditional methods of interpretation, which originated from the sayings of Roman jurists, and now there is a trend that interpretation is done by applying constitutional principles in a less positivist way, and to take as a basis standard, universally valid legal-dogmatic methods of interpretation (Lombardi, 1985, p. 69; Savić, 2017, p. 19). However, due to the character and level of constitutional norms, and the properties and functions of the constitution itself, general methods of interpretation require significant modification (Stojanović, 2005, p. 119). This is supported by the unreservedly accepted position that the constitution is adopted in order to focus on the regulation of the state legal order for a long time, although in practice there are exceptions, e.g. in temporary and transitional constitutions, as well as constant processes of change in the state legal order (Savić, 2017, p. 19). These dynamics of state and legal life are primarily the reason why constitutional norms are written with a certain amount of abstractness, vagueness and openness, in contrast to legal texts (Stojanović, 2005, p. 119). Many of the terms contained in the constitution do not belong to legal life and their definition is often of a social and political nature. These notions are often imprecise, political, and ambiguous. Therefore, corrections of the general methods of interpretation that we use when interpreting lower legal acts, i.e., legal acts of lesser legal force, are required.

Special interpretation or correction of standard methods of interpretation is not required if there is no doubt on the part of the interpreter about the literal linguistic meaning of the term in constitutional norms. Interpreting the constitution becomes a problem when an answer must be given to a constitutional question which, starting from the literal text of the constitution, cannot be clearly answered. Some authors believe that the following modified methods of interpretation should be used in this situation: (1) linguistic interpretation (grammatical or verbal interpretation), (2) systematic interpretation, (3) teleological (or target) interpretation which can be differentiated into subjective (target) interpretation and objective (target) interpretation, (4) historical interpretation, and (5) comparative (law) interpretation (Savić, 2017, p. 20). In addition to these methods, we find it equally useful for the interpreter to use: (6) subjective interpretation, (7) objective interpretation, (8) subjective-objective (mixed) interpretation, (9) logical interpretation, (10) static interpretation, (11) evolutionary interpretation, and (12) the method of interpreting exceptions and filling legal gaps. We will explain all the methods of interpretation and demonstrate them using practical examples. When interpreting the constitution, the interpreter must adhere to the following principles: (1) the principle of objective interpretation of the will, (2) the principles of concretization of the constitution, (3) the principle of unity of the constitution, (4) the principles of harmonization of constitutional norms, (5) the principle of state integration (6) the principle of functional immutability, and (7) the principle of constitutional-conformal interpretation of the law (Stojanović, 2005, pp. 120-126).

Two theories of interpretation

There are five basic sources that guided the interpretation of the Constitution: (1) the text and structure of the Constitution, (2) the intentions of those who drafted it, (3) previous precedents, usually court decisions, (4) social, political, and the economic consequences of alternative interpretations, and (5) natural law. There is a general consensus that the first three of these

sources are suitable guides for interpretation, but they significantly disagree about the relative weight to be given to the three sources when pointing in different directions. Many interpreters of the Constitution suggest that the consequences of alternative interpretations are never relevant, even when all other considerations are balanced. Natural law is now seldom proposed as a guide for interpretation, although many constitution-makers have recognized its appropriateness. People who prefer to rely heavily on original sources are usually called “originalists” as opposed to “non-originalists” who advocate giving more weight to precedents, consequences, or natural law. In practice, disagreements between originalists and non-originalists often concern whether the enhanced judicial review should be applied to certain fundamental rights that are not explicitly protected in the text of the constitution. In accordance with the above, we can divide the interpreters of the constitution into several groups: (1) textualists (who give primary weight to the text and structure of the constitution), (2) intentionalists (who give primary weight to the intentions of the creators of the constitution), (3) pragmatists (who give significant weight to judicial precedent or the consequences of alternative interpretations), (4) positive law theorists, who give more weight to the thesis that the existence and content of law depend on social facts rather than merit, and (5) natural law theorists who believe that higher moral law needs to transcend inconsistent positive law (Murill, 2018, pp. 5-24). Each interpreter advocates a different thesis on interpretation, but for the purposes of this paper, we will deal with two, lately, the most interesting ones.

So, a multitude of discussions on this topic has given rise to a multitude of different theoretical approaches to interpretation, but we will analyze only a few. We will first deal with the *theory of originalism*, or the *theory of intention*. According to this concept of interpreting constitutions, it is emphasized that all provisions of the highest legal act should be interpreted according to the original understanding at the time when the constitution was adopted. Proponents of this view argue that the constitution is a stable act

from the moment of its adoption, and that the meaning of its content can be changed only in a specially prescribed procedure by a specially authorized body (Boyce, 1996, p. 915). This theory contradicts the concept of a living constitution which argues that the constitution should be interpreted on the basis of the context of current time and political identities, even if such an interpretation differs from the original interpretations of the document. A common argument in favor of this theory is that this interpretation results in “value-neutral judgment,” a situation in which the personal values of the interpreter do not affect the outcome of the case (Chemerinsky, 2001, pp. 3-4). Value-neutral judgment is closely related to the idea of judicial restraint. Renowned U.S. Supreme Court Justice Antonio Scalia, who is most associated with the idea of originalism, once defended his approach, writing: “which is not bound by a text or a special, recognizable tradition is not a law at all” (Simović, 2020, pp. 24-29; Tracz, 2020, pp. 101-102). The theory of originalism has two doctrines: (a) the doctrine of original intention (the doctrine of the subject’s intention) and (b) the doctrine of original meaning (the doctrine of objective intention). One of the earlier understandings of the theory of originalism was known as the doctrine of subjective (original) intention or the doctrine of intentionalism, a theory that predicted that all legal acts should be interpreted based on the subjective intention of the author, including the constitution (Thomas, 2011, p. 6). Thus, for example, when interpreting the U.S. Constitution, the writings written by the authors of the Constitution, which were presented at the Constitutional Convention in Philadelphia, should be used, as well as other works authored by the authors of the constitutional matter.

Criticisms directed at the doctrine of original intent have led to a modification of the doctrine. Original authors, judges, and commentators have suggested that instead of trying to discern the subjective intent of the compilers of the Constitution, one should focus on seeking the objective meaning of the terms used (Thomas, 2011, p. 8). As explained by Scalia (1997), who was involved in providing the theoretical basis for this change, the consti-

tutional analysis should focus on “the original meaning of the text, not on what the writers of the Constitution originally intended” (p. 38). This doctrine of objective original meaning emphasizes how the text of the constitution should be understood rationally, in the historical period in which the constitution was proposed, adopted, and first implemented. because of the above, this doctrine is widely criticized. Namely, some authors state that this doctrine is only one form of historical interpretation of the constitution, but a special method for its objective understanding. As the constitution is a living matter, it evolves and develops, and with that the understanding of its objective meaning should be developed, i.e. its provisions should be objectively understood depending on the moment of interpretation. Thus, we interpret the objective intention of the legislators at the time the disputed situation arose. However, this doctrine has also created many dilemmas in practice. The most significant is the one that addresses the question of whether and if the obvious objective meaning of a constitutional phrase would create a flexible standard that could change over time? Thus, for example, in the text of the U.S. Constitution there are important phrases and sentences that are so widely written that it can be argued that they were intended for interpretation at a high level of generality.

Although the theory of originalism is somewhat attractive to interpreters of the constitution because it is particularly committed to the intention of the legislator and value-neutral judgment, the authors state that in practice there is a clear circumvention of the basic principles of this theory (Tracz, 2020, p. 107). This is the reason why some legal writers have taken the position that it is necessary to find a better method for interpreting the real intention of the issuer of the highest legal act. This is exactly what caused the creation of a new theory, the *theory of interpretation of the constitution based on the preamble* or *preamble-based theory of constitutional interpretation*, which is gaining momentum in the United States. It is often presented as a solution to fill the vacuum that can arise in the interpretation of the most general provisions of the constitution. It is a three-part (or tripartite

analysis) process of interpretation based on the Preamble and which would include: (1) determining the constitutional norm according to which the provision of a lower normative act is challenged, (2) determining which of the goals or basic principles of the constitution stated in the preamble, implement or concretize the interpretation of the provision, and (3) determine whether the disputed norm of the lower normative act is in accordance with the purpose that the constitutional provision wishes to implement. The first part of the analysis is based on the identification of the constitutional provision based on which the legal norm from the lower normative act is challenged, and this part is quite simple, and can be taken as a simple formality, as a starting point for further interpretation. The second part of the analysis deals with the purpose of the constitutional provision in question. By some logic of things, constitutional provisions should promote the basic principles and postulates proclaimed by the preamble of the constitution. U.S. Supreme Court Justice Stanley Reed stated that

in the presentation of the U.S. Constitution, every word must have its due force and proper meaning, because it is clear from the whole instrument that no word is used or added unnecessarily, just as the legislature takes care of by words through which he communicates his wishes through the law, which is the most convincing proof of his purpose. (Tracz, 2020, p. 107).

The words chosen by the legislature are often sufficient to determine the purpose of the law. It is reasonable to assume that the same logic applies to constitutional provisions. The words used to express the purpose of the U.S. Constitution are found in the preamble. According to the Preamble of the U.S. Constitution, the purpose of this legal act is to form a more perfect community, establish justice, ensure domestic peace, ensure common defense, promote the common good, and ensure the blessing of freedom (... *in Order to form a more perfect Union, establish Justice, insure domestic*

Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity...), and American authors state that these should be the guidelines for interpreting constitutional provisions (Kuzmanović, 2000, p. 235). The third, and probably the most complicated, part of the analysis is to determine whether the provision of the lower normative act that is being challenged is in line with the purpose of the constitutional provision under which it is being challenged. The language in the constitution's preambles can often be vague and indefinite, so it is necessary to use modified methods of interpretation to interpret the preamble itself, because each indent in the preamble can often have more meaning, and therefore the interpreted provision of the constitution can have multiple purposes. Precisely because of this complexity, it is possible to expand the interpreter's room for maneuver when using one's own preferences in interpretation, which can be very dangerous.

Examples from practice

While the theory of interpretation of the constitution based on the preamble can work on paper, the question of practical application, because the theory is as good as its application (each theory has its expression in the practical life of man, and the measure of its success is practical life man). In other words, the truth of an intellectual conception can be discerned only from the practical effects of its application. To this end, we believe that this paper should consider the practical application of methods of interpreting the constitution based on the preamble to real cases, or cases that may arise in practice. In this regard, we will present several cases from domestic and foreign constitutional and judicial practice, specifically from the practice of the Constitutional Court of BiH and the Supreme Court of the United States. We will first present the position taken by the Constitutional Court of Bosnia and Herzegovina in partial decisions U-5/98-I, U-5/98-II and U-5/98-III of 29 January, 18 February and 1 July 2000, so-called decisions on the constitutivity of the people. The second case is the one found in the

practice of the U.S. Supreme Court, which refers to the right to hold and carry weapons protected by the Second Amendment to the U.S. Constitution. These cases were not chosen because of their controversial outcomes, but rather because of their recentness and significance for constitutional law.

Interpreting the BiH Constitution, the Constitutional Court of Bosnia and Herzegovina, whose reason was the appeal of the then BiH Presidency Chairman Alija Izetbegović to examine more than 20 members of the entity constitutions, took the position that the preamble is equal to the normative part of the Constitution, and thus has equal legal effect (Vehabović, 2006, p. 77). The Constitutional Court explained its principled position in the three above-mentioned partial decisions. In the opinion of the BiH judges, Bosnia and Herzegovina has an atypical Constitution. First of all, this is a Constitution that is not written in the traditional continental nomotechnics that existed in BiH. It is written in Anglo-American nomotechnics and contains abstract essay-written norms. Furthermore, it is the Constitution that was adopted as an integral part of an international agreement so one can ask here whether the signatories of the General Framework Agreement for Peace in BiH could amend the previous Constitution in such a way. This is precisely the reason why the Constitutional Court considered it appropriate to apply Article 31 of the Vienna Convention on the Law of Treaties, as it applies to the Dayton Peace Agreement and all its annexes (the BiH Constitution is Annex IV of the Dayton Agreement). Namely, according to Article 31, every treaty, including the Dayton Agreement, must be interpreted in good faith, according to the usual meaning of the terms from the treaty in their context and in the light of the subject and purpose of the treaty. For the purpose of interpreting the contract, in addition to the text, *including the preamble and annexes*, the context shall include any agreement relating to the contract entered into by all parties in connection with the contract; related to the contract, which the other parties accept as a document relating to the contract. Along with the context, the interpreter will also take into ac-

count: any subsequent agreement between the parties on the interpretation of the treaty or the application of its provisions, any subsequent practice in the application of the treaty establishing an agreement between the parties on the interpretation of the treaty and any applicable rule of international law between the parties. Finally, Article 31 states in paragraph 4 that special meaning will be given to an expression if it is established that this was the intention of the parties. Therefore, in accordance with the above, the Constitutional Court equated the legal force of the preamble to the Constitution of BiH with its normative part (Savić, 2011, pp. 23-38).

The Second Amendment to the U.S. Constitution is a good example of how preamble-based theory of constitutional interpretation can be applied for one specific reason: the text of the amendment itself states its purpose (Tracz, 2020, p. 108). The text of the Second Amendment reads: “Since a well-organized militia is necessary for the security of a free state, the right of every citizen to keep and carry weapons cannot be violated” (Kuzmanović, 2000, p. 122). Examining how interpretations are based on the preamble in interaction with the Second Amendment is best illustrated in the case of *District of Columbia v. Heller*. Namely, Richard Heller was a special police officer with the authority to carry a weapon while performing his duties in the court building where he was deployed. Heller, meanwhile, asked for a license to hold a handgun because he wanted to keep it at home. D.C. refused Heller’s request. Heller appealed the decision to the Federal District Court, which has jurisdiction over the District. The appeal was not upheld, and Heller appealed to a higher court. The Court of Appeals overturned the District Court’s decision, finding that the court erred based on District regulations which, in the Court of Appeal’s view, were inconsistent with the Second Amendment, guaranteed by that amendment to the U.S. Constitution. The Supreme Court of the USA confirmed the decision of the Court of Appeals by a majority of votes. Judge Scalia explained the Court’s opinion in this case. Namely, Scalia divided the Second Amendment into two parts: (1) the introductory part (“A well-regulated Militia, being nec-

essary for the security of a free State”) and (2) the operational clause (“the right of the people to keep and bear Arms, shall not be infringed”). He subsequently excluded the introductory part because he considered that it did not limit or extend the scope of the operating clause. Thus, the introductory part has no material significance in this case. Scalia concluded that only the operational part of the Second Amendment guarantees the right. This case helps us to apply the tripartite analysis we have already talked about. The first thing we need to determine is which provision of the Constitution violates the mentioned decision – the decision of D.C. violates the Second Amendment. The second step is equally simple, we need to determine what the introductory part (preamble) of the Second Amendment requires – it wants to form a well-organized militia to protect the community and society. Here Scalia made an interesting maneuver, arguing that the Second Amendment has its own preamble, by analogy we can conclude that the situation is the same with other amendments, and the preamble of the Second Amendment, which is an integral part of the Constitution, is also part of the Constitution. The third and final step concerns the determination of whether the contested act infringes the purpose for which the Second Amendment was adopted. In this case, the Supreme Court answered in the affirmative.

Conclusion

The preamble is the most common introduction to the normative part of the constitution, which contains some important elements, in principle, of a declarative nature. As the authors of the paper elaborated on the topic and problem of the preamble of the constitution, several most important attitudes and problems stand out, which must necessarily be addressed. The most important of which is the question of the legal significance and effect of the preamble itself, whether it is binding or not.

The three main tendencies boil down to different interpretations of this issue. While the first says that the preamble is a binding part of the consti-

tution and is an integral part of the legal act itself, the second refers to the need to consider the legal effect of the preamble, because it is not a normative part of the constitution but only a mere introduction to constitutional matter. The authors, so to speak, adhere to the third tendency and believe that the preamble, like the rest of the constitution, should be interpreted in the spirit of time and social reality.

Interpreting a constitution based on a preamble, as a practical method of interpretation, relies on the preamble and encourages fidelity to the text of the Constitution, a feature that perhaps all jurists might like. Equally important, a preamble-based interpretation is a progressive theory that attacks originalism on its own soil. No theory of constitutional interpretation is without flaws, but a theory of interpretation based on a preamble is certainly worth further research. Preambles, despite the small importance that has long been attached to it, deserve special attention, if not because of the legal, at least because of their declarative character. Every clarification and study of the constitutional spirit is useful in its interpretation.

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