

THE FRAGILE RELATION BETWEEN THE CONSTITUTION AND SOCIETY: *GLASS and SILVER*

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ABSTRACT

The idea of the modern constitution, which emerged with the secularization of political power, was born from the understanding that this new power, which does not derive its source from divine grounds, should again be limited by the superior nondivine rules of the human mind. Thus, every new beginning of societies after this intellectual break has been crowned with a new constitutional text; It has become common practice to accompany these texts with the preambles that describe the philosophy, legitimacy and spirit of the new order in a literal language. Although it is widely accepted that constitutions reflect the society's general will, this new relationship between the society and constitution, which is usually produced after some national or global struggles, is fragile. Essentially, the text of the constitution is like a thin *glass*, through which the political and legal grounds behind can be seen. The preambles, on the other hand, undertake the function of the material called "*silver*", which transforms the *glass* into *mirror* with the holy, emotional and literary expressions found in its content. Silvered by the traditional and sacred references of the preamble, the constitution has now become a mirror in which the political area behind it is rendered invisible. Although the preambles are rarely included in the main text of the constitution, they mostly regarded as symbolic texts without legal value; however, it has been observed that in some examples even some expressions in preambles with symbolic value are included in the block of constitutionality by the judicial bodies charged with the constitutional review. In this case, the preambles, which contain vague and hard to interpret expressions, have become a legal instrument of the constitutional order, partially or completely. In this study, the analogy of *glass and silver* established for constitutional texts was tested comparatively over various constitutional texts; after analyzing the practices regarding the legal value of the preambles, the effects of operating some unclear expressions in the constitutional order have been revealed as part of the *glass-silver* analogy and solutions have been proposed.

Keywords: Modern Constitutions, Preambles, Review of Constitutionality, Block of Constitutionality, Legal Value.

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ANAYASA İLE TOPLUM ARASINDAKİ KIRILGAN İLİŞKİ:

CAM ve SIR

ÖZET

Siyasi iktidarın dünyevileşmesiyle ortaya çıkan modern anayasa fikri, kaynağını ilahi temellerden almayan bu yeni iktidarın yine ilahi olmayan, insan aklının mahsulü üstün kurallar yoluyla sınırlandırılması anlayışından doğmuştur. Böylelikle, toplumların bu düşünsel kopuştan sonraki her yeni başlangıcı yeni bir anayasal metinle taçlandırılmış; bu metinlere, kurulan yeni düzenin felsefi temellerini, haklılığını ve ruhunu edebi bir dille anlatan başlangıç kısımlarının eşlik etmesi yaygın bir uygulama haline gelmiştir. Her ne kadar toplumun genel iradesini yansıttığı yaygın olarak kabul görse de, genellikle ulusal ya da küresel birtakım mücadelelerden sonra üretilen anayasalar ile toplum arasındaki bu yeni ilişki kırılmalıdır. Esasen anayasa metni, tek başına, dayandığı politik ve hukuki temelleri açıkça gösteren ince bir *cam* gibidir. Başlangıç metinleriyse, içeriğinde rastlanan kutsal, duygusal ve edebi ifadelerle, *camı* aynaya dönüştüren “*sır*” adı verilen materyalin işlevini üstlenir. Başlangıç metninin geleneksel ve kutsal referanslarıyla sırlanan anayasa, artık arkasındaki politik alanın görünmez kılındığı bir aynaya dönüşmüştür. Başlangıç kısımları nadiren anayasanın temel metnine dahil edilmiş olmakla birlikte, çoğunlukla hukuki değeri olmayan sembolik metinler olarak değerlendirilmiş; ancak kimi örneklerde sembolik değerdeki başlangıç metinlerinde yer alan bazı ifadelerin dahi anayasallık denetimiyle yetkili organlar tarafından anayasallık bloğuna dahil edildiği gözlemlenmiştir. Bu durumda denilebilir ki, içerisinde muğlak, yorumlanması güç ifadeler barındıran başlangıç metinleri kısmen veya tamamen anayasal düzenin hukuki bir enstrümanı haline gelebilmiştir. Bu çalışmada, anayasal metinler için kurulan *cam ve sır* benzerliği, çeşitli anayasa başlangıç metinleri üzerinden karşılaştırmalı olarak incelenmiş; başlangıç metninin hukuki değeri hususundaki uygulamalar analiz edildikten sonra *cam-sır* benzerliğinin bir parçası olarak hukuki olmayan kimi ifadelerin kullanımının anayasal düzende yarattığı etkiler ortaya konmuş ve çözüm önerileri sunulmuştur.

Anahtar Kelimeler: Modern Anayasalar, Anayasaların Başlangıç Kısımları, Anayasallık Denetimi, Anayasallık Bloğu, Hukuki Değer.

INTRODUCTION

This article is based on the idea that constitutions mirror societies' will.¹ Firstly the interest in studying the process of the formation of constitutional texts was brought forth by the incertitude if legal texts would have the necessary power to reflect the society on their own, and then the grounds of the disintegration between the traditional and the modern set the historical starting point. Preparation of written constitutional texts in search of a new order led the study to examine the instruments used by these texts to create their own legitimacy, thus the chapters generally called "*Preambles of Constitutions*" have come to light.

Based on disengagement in an intellectual meaning –secularization of the power-, constitutions intend to explain and legitimize themselves and emphasize their powerful nature in the first place. At this point a task and a need of a dialogue between the constitution and the society² comes into

¹ The idea of *constitutions mirror or reflect the societies* is a very common analogy mostly used in the field of daily politics. Accordingly, its simple, basic and literal meaning is considered with regard to general principles of constitutional law in this study. However, it must be stated that there are some remarkable authors who mention this analogy with reference to different points of view. As one of these few authors, to HABERLE, a constitution is not only a "normative set of rules", but also "a mirror of cultural heritage and the foundation of its expectations". see **Häberle, Peter** (2000) "The Constitutional State and its Reform Requirements", *Ratio Juris*, V:13, I:1, p.77-79. Similarly, CHAMBERS sees the constitutions as superior texts created to reflect the identity of the society. see **Chambers, Simone** (2004) "Democracy, Popular Sovereignty, and Constitutional Legitimacy", *Constellations*, V.11 I.2, p. 158-160. On the other hand, TRIBE questions whether "a constitution is simply a mirror in which one sees what one wants to see" in one of his academic works on how the constitutional interpretation should work while criticising several decisions of US Supreme Court. see **Tribe, Laurence H. / Dorf, Michael C.** (1991) *On Reading the Constitution*, 1. Edition, Harvard University Press.

² The term "society" is preferred in this article to name the people of a/any defined country mostly because of its inclusive broad meaning independently of the new modern determinants. On various points of this article, this term can be understood in relation with the other social ties such as citizenship or nationality etc. with respect to the main subject of the chapter or the paragraph in question. But in general terms, the relation claimed in this article is considered as a relation between the constitution and "the society" which reflects

question, and I think that the mentioned preambles undertake the critical role. Such that, for the societies who had lived in the shadow of the natural law or by obeying divine norms for a thousand years without a constitution claimed to be made by their own, long before the occurrence of modern constitutions, this fresh relationship with the constitution in the new and secular order is fragile and is natural to be so. So let's think that the constitution is a fragile, smooth, thin glass; and preambles are like the "silver" metal which is used in silvering process. When *silver* is coated over the glass, it makes us forget how fragile the glass is; it turns it into a mirror. The political area behind the silvered side becomes invisible. What is seen when looked at the constitution from the axis of preamble is surely the society itself. In this study, whether the transformation we claimed can actually be granted by preambles will be discussed; meanwhile, various preambles of constitutions will be addressed in their own historical process.

I. HISTORICAL PROCESS AND THE TRANSFORMATION THAT LED TO WRITING A CONSTITUTION

Today, the concept of constitution is explained emphatically as the *organization and functioning of the state and the guarantee of the freedom of individuals*³, *the structure and the transfer of the power and the freedom of individuals against the authority*⁴ by many studies including the definition of the constitution. Of these underlined contents, the institutions equivalent to the state authority or the ruling power had existed before the 18th century, which is accepted as the beginning of constitutionalist movements; the functioning of the system in city states, feudal systems or empires was bound to written or unwritten rules. A superior body of divine rules of which the rulers weren't able to assert the contrary or the antecedent comprehension of natural law in those times show that the difference put forward by the concept

basically to the social ties of the people under the same political authority, inspiring by the common naming of "social contract" for the constitutions.

³ **Maddex, Robert L.** (2008) *Constitutions of the World*, 3. Edition, Washington, CQ Press, p. xi.

⁴ **Teziç, Erdoğan** (2019) *Anayasa Hukuku*, 23. Edition, İstanbul, Beta, p. 10, 171-172.

of constitution doesn't derive from an understanding of a powerful superior norm. Hence, it will be more convenient to seek the difference in a relatively new concept: *the individual*. This doesn't direct the search to the appearance of the individual in the constitutions by no means; on the contrary, it points to the historical transformation that granted the power to establish constitutions, in other words, a new set of rules of a supreme level. The modern constitutions, "*practically without exception, (...) were drawn up and adopted because people wished to make a fresh start, so far as the statement of their system of government*".⁵ The principle of a *fresh start/new beginning* is important; it requires the rejection of the old. The adjective *modern* is even more important; it expresses the separation of the current time from the *traditional* and it is the most familiar word of the transformation debated in this study.

The history of the constitution is co-written with the history of disengagement and diffractions. Numerous breaking points can be seen before the greatest disengagement, summarized as *secularization of the political power*; this disengagement -which introduced the concepts of modernization and westernization to the recent history, in fact, set these concepts as the ultimate aim and identify, mostly, Europe as the center- separates the Eastern and Western understandings of public life and the ruling authority. Modern constitutions made by people of modern period are filtered texts following this path and linking what is left to a new path after each disengagement. It is necessary to follow the same paths to understand these texts, more importantly, intellectual-oriented "preamble" parts of these texts, which will be studied further later.

While *Renaissance, Reformation, Enlightenment and French Revolution* – among others- can be sorted as the most significant experiences mentioned as the breaking points during the process of disengagement from the traditional understanding; constantly *energetic and outward-looking*⁶ during aforesaid

⁵ **Whare, K. C.** (1966) *Modern Constitutions*, 2. Edition, London, Oxford University Press, p. 6.

⁶ **Mcneill, William H.** (Senior Editor) (2005) *Berkshire Encyclopedia of World History* Vol. 4, Massachusetts, Berkshire Publishing Group, p. 1591.

period, Europe, on its own, had somehow set its course which enabled this transformation long before. First of all, though “*not unique to Europe*”, feudalism⁷ and the divided regime of the feudal system⁸ which are claimed to facilitate understanding modernism for they were put forward in the same geography, must be mentioned. The new “estate” consisting of town representatives and the fact that Kings would consult local lords and merchants when necessary, led Europe open to economic developments and the transformation accompanying them.⁹ Secondly, the translation of artifacts of Ancient Greek into Latin turned into the effort to base Christianity upon rational grounds, and Christianity and the Church became an increasingly powerful figure in the social and political life.¹⁰ Finally came “*discovery*” of – and *the conquests* on- the new world, which led to numerous qualitative changes in the history of humanity.¹¹ It disorganized economic relationships with the price revolution in Europe, led to an uncertain perception of the future and put a grim nature causing intellectual conflicts in every sense in the center of the period.¹²

In an abovementioned environment, as the difference between the idea to reach the divine and secular practices became more apparent, a door to the complementary movements of Renaissance and Reformation which coincided in the same period was opened.¹³ On one hand, the individual who severed ties with the past and moved forward with Renaissance which is defined as “*renewal of life*”, “*rebirth*”, awoke; Machiavelli explained politics, thus being in

⁷ For the claim see **Pierson, Christopher** (2011) *The Modern State*, 2. Edition, London, Routledge, p. 32.

⁸ For detailed information on feudalism see **Poggi, Gianfranco** (1978) *The Development of the Modern State*, 1. Edition, California, Stanford University Press, p. 16-35.

⁹ **McNeill** (2005), p. 1602-1603.

¹⁰ For the new activity of Christianity in the period and for “*The Theory of Two Swords*” see **Ağaoğulları, M. Ali / Köker, Levent** (2011) *Tanrı Devletinden Kral Devlete*, 6. Edition, İmge, p. 198-202.

¹¹ **Harman, Chris** (2002), *A People’s History of the World*, 2. Edition (Reprinted), London, Bookmark, p. 161-178.

¹² **McNeill, William H.** (1999) *A World History*, 4. Edition, Oxford, Oxford University Press, p. 302-308.

¹³ **McNeill** (1999), p. 311-325.

power, as technical; and he severed them from religious dogma and moral values.¹⁴ On the other hand; the tension between the Church that got used to being a part of the power, and those who believe that the Church diverged from Christianity induced Reformation; and finally Martin Luther claimed that, though originated from the God, the ruling power is entrusted to secular people by the God; secular rulers who must obey divine laws can't be judged by any institutions in the World.¹⁵

The transformation found and suggested openly or vaguely by these two movements was ensured in the period of Enlightenment, which is defined as the period between English Revolution and French Revolution¹⁶, and sometimes as the period between “*Age of Faith and Age of Ideologies*”¹⁷. With Enlightenment, people of the time were saved from the darkness they were trapped into and from “*immaturity*”¹⁸; and the greatest obstacle before this salvation and progression was marked as the Church.¹⁹ In the pursuit of a virtuous life, mind had to be trained and rendered critical; this critical mind had to be guided to free actions with the notion of equality.²⁰ This guidance not only put the individual to the center, willingly or unwillingly, but also stood the consent of people against divine grounds as a source of legitimacy with *Montesquieu and Rousseau*.²¹ Once the source of legitimacy was separated from the divine, the law steered the wheel to positive law from natural law;

¹⁴ **Ağaoğulları, M. Ali / Köker, Levent** (2013) *Kral Devlet ya da Ölümlü Tanrı*, 4. Edition, Ankara, İmge, p. 159-160, 165-227.

¹⁵ **Ağaoğulları / Köker** (2013), p. 96-97, 115-122.

¹⁶ **Ağaoğulları, M. Ali** (2012) “Aydınlanma: Düşünceler Yumağı”: Ağaoğulları, M. Ali (Editor), *Sokrates'ten Jakobenlere Batı'da Siyasal Düşünceler*, 3. Edition, İstanbul, İletişim, p. 517.

¹⁷ **Lee, Stephen J.** (1984) *Aspects of European History 1494-1789*, 2. Edition, London and New York, Routledge, p. 194.

¹⁸ **Ağaoğulları, M. Ali / Zabcı, F. Zulha / Ergün, Reyda** (2009) *Kral Devleten Ulus Devlete*, 2. Edition, Ankara, İmge, p. 239-240.

¹⁹ **Çiğdem, Ahmet** (2013) *Aydınlanma Düşüncesi*, 8. Edition, İstanbul, İletişim, p. 49.

²⁰ See. **Ağaoğulları/Zabcı/Ergun**, p. 245-318.

²¹ **Ağaoğulları/Zabcı/Ergun**, p. 321-353.

enhanced and empowered by the predictability and security, positive law rendered the future of modern people predictable.²²

Although continually advanced modern concept of law, having progressed to the maximum point on the axis of predictability and certainty, approached natural law again, from which it was separated after a point; what is remarkable at first glance is the line outstretching to the written texts. During the process ongoing in the transition of natural law - positive law – and *again* natural law, the fact that natural rights theories - which are maintained from the Enlightenment movement - surprisingly fostered positive law wasn't that it refused that people had inborn rights. The gravitation to what is written and signed should be explained as; the desire that most people will choose to protect their rights and the belief that they will control the government whose authorities are determined and limited by the society. Thus, the transformation of the laws- that will re-establish the equality, disrupted in contradiction to the state of nature by the society; according to Montesquieu²³- into the concept of positive law that holds the line of human rights in legal texts is not seen as a good and expected result. The effort to limit those in power that started over the reflex – and occasional experiences – that the king or the ruler won't obey what belongs to the people, or the will of people, finally crowned this limit with a constituting, legitimate and supreme document free of divine foundations:

A constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and wherever it cannot be produced in a visible form, there is none. A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting its government. It is the body of elements, to which you can refer, and quote article by article; and which contains

²² **Saygılı, Abdurrahman** (2014) Kutsallık ile Rasyonellik Sarkacında Devlet, 1. Edition, Ankara, İmaj, p. 203.

²³ **Cohler, Anne M. / Miller, Basia C. / Stone, Harold S.** (Editors) (1989) Montesquieu: The Spirit of Laws (Cambridge Texts in the History of Political Thought), 1. Edition, London, Cambridge University Press, p. 114.

*the principles on which the government shall be established, the manner in which it shall be organised (...).*²⁴

The inclination to protect individual freedoms from the intervention of the government first showed up in written texts listing the rights, firstly in England starting from 17th century, consequently in America during the 18th century.²⁵ Due to the allegiance to the British crown by written agreements, US Colonies' appointing written rules for separation from the crown and for the division of power while organizing as a federal state was taken naturally; the constitution of 1787 of US Colonies is accepted as the first modern constitution.²⁶ After 1789 Revolution, in line with the *Declaration of Rights of Man and of the Citizen* which set forth that the constitution is not only a document to organize the structure of the state, but also to limit its power; with the help of the tradition that written and explicitly set rules must be implemented in the activities regarding the business of the French bourgeoisie, French Constitution of 1791 became the first written constitution of the continental Europe.²⁷

In today's modern world - where constitutional law is accepted as a discipline and historical data is analyzed comparatively, moreover where "the constitution" as a concept is molded with numerous elements aforementioned -, search of the oldest text closest to a constitution – which can be deemed as the starting point of constitutionalism movement- goes back to Magna Carta of 1215. Even though it is questionable whether it is a "declaration (or bill) of rights" or not, Magna Carta is a document limiting the authority and the power of the King in England in favor of feudal aristocracy, in fact, it is the remainder of four consecutive royal charters in ten years which integrated at

²⁴ **Paine, Thomas** (2017) *The Writings of Thomas Paine: Including All Four Original volumes*, 1. Edition, North Charleston, Createspace, p.73.

²⁵ **Gemalmaz, M. Semih** (2007) *Ulusalüstü İnsan Hakları Hukukunun Genel Teorisine Giriş*, 6. Edition, İstanbul, Legal, p. 63. Gemalmaz uses this description specifically for American texts. For detailed information on *Virginia Declaration of Rights* of 1776 and *United States Declaration of Independence* of the same date see **Gemalmaz**, p. 63-68.

²⁶ **Teziç**, p. 161.

²⁷ **Teziç**, p. 161-162.

last one.²⁸ According to Plucknett, the fact that Magna Carta is referred such momentarily - despite the documents of the rights recognized for the people by the King in Europe in almost same years such as Royal Charter of Spain of 1215 and Royal Charter of Hungary of 1222- doesn't derive from the content, but from the fact that the text was used in the history: "*The Charter (Magna Carta) gradually grew bigger than the mere feudal details which it contained and came to be a symbol of successful opposition to the Crown (...)*"²⁹, as he said.

The fact that the text is discussed and interpreted in this manner prompts us to question a problematic hypothesis with regard to the social adoption of constitutional texts. Not certain if necessary, but the claim from the beginning is; constitutions made by the people reflect people's will, in a way, it is the mirror of the political orientation of the society. However; the accuracy of this thesis becomes to be examined by the antithesis that "*what a constitution says one thing, and what actually happens in practice may be quite another*".³⁰ Produced hastily in the pursuit of a new beginning - and in spite of everything, in the name of this pursuit-, constitutions raise a fragile relationship with the society to which it addresses. Indeed, "*We must be ready to admit that although almost all countries in the world have a constitution, in many of them the constitution is treated with neglect or contempt*".³¹

What is expressed hereby is not a suggestion that the fragility between the constitution and the society can be overcome by suspending the constitutional limits on the state authority until they are socially accepted, nor by abolishing the constitutions. However; our desire is to draw the attention on the danger of turning constitutional texts into holy texts and of ensuring this transformation through newly produced moral concepts, in a way leading this fragility to a literal breaking point.

As is seen, for the constitutions written with the aim of a new order by rejecting the old, the most significant determinant that prompts the state to

²⁸ Gemalmaz (2007), p. 22-26.

²⁹ Plucknett, Theodore F. T. (1948) A Concise History of Common Law, 4. Edition, London, Butterworth & Co. Ltd, p. 25.

³⁰ Wheare, p. 4.

³¹ Wheare, p. 4.

the new is the historical and the intellectual process in the state itself and in the World. The primary problem we put forward here regarding these new constitutional texts is the *exceeding* instruments and concepts used to legitimize the new order, to teach their necessity, or occasionally, to impose them. These instruments that cause -contrary to its purpose- complexity and indifference rather than improve the social and legal significance of constitutional texts generally take place in preambles of constitutions along with many other comprehensible and pacifying legal values that don't pose such a danger.

II. CONSTITUTIONS' TENDENCY OF SELF-EXPRESSION: THE PREAMBLES

Preambles, as literary texts explaining reasons and philosophical grounds of preparation of the constitution³² or as "powerful motivators" expressing the "end of the constitutional project"³³, are chapters defined with the fact that they set forth the fundamental thoughts and principles of the constitutions³⁴ and of the social collectivity ties³⁵, and they mostly are not included in the constitutional text³⁶.

Although the origins of a preamble to legal instruments traces to the writings of Ancient Greek philosopher Plato³⁷, the first constitution including a preamble is the US Constitution of 1787, accepted as the first modern

³² **Özbudun, Ergun** (2005) *Türk Anayasa Hukuku*, 8. Edition, Ankara, Yetkin, p. 71.

³³ **Ginsburg, Tom / Foti, Nick / Rockmore, Daniel** (2013) "We the Peoples': The Global Origins of Constitutional Preambles", *George Washington International Law Review*, University of Chicago Coase-Sandor Institute for Law & Economics Research Paper, No. 664; U of Chicago, Public Law Working Paper No. 447, p. 105.

³⁴ **Tanör, Bülent / Yüzbaşıoğlu, Necmi** (2005) *1982 Anayasası'na Göre Türk Anayasa Hukuku*, 11. Edition, İstanbul, Beta, p. 46.

³⁵ **Göncü, Levent** (2007) "Siyasal İktidar Kavramı Bağlamında Anayasa Çalışmaları İçin Bir Kavramsal Çerçeve Önerisi", *AÜHFD*, C: 56, S: 1, p. 150.

³⁶ However, the Constitution of the Republic of Turkey (1982) as the former Constitution of 1961 stated through a norm that the Constitution includes the part of the Preamble. See **Tanör/Yüzbaşıoğlu**, p. 29-30.

³⁷ **Ginsburg, Tom / Foti, Nick / Rockmore, Daniel**, p. 107 (with reference to *Laws by Plato*).

constitution; the text is only one sentence comprising of 52 words putting forth federal states' aim of uniting and future objectives:

*We the People of the United States, 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, do ordain and establish this Constitution of the United States of America.*³⁸

The reference to the people in the preamble of the US Constitution was a major influence on other constitutions³⁹; claiming to be produced by people and through the will of people, the tendency of these texts to repeat the claim from the very beginning took place in Constitutions of France and Poland of 1791, followed by Constitutions of Canada in 1876, Columbia in 1887 and Germany in 1886 and became almost a custom practice.⁴⁰ However; it must be noted that in the constitutions produced in Europe after the Second World War, the emphasis shifted to the expression that institutions would use the authority to write constitutions *on behalf of people*⁴¹; which clearly is not accidental. After the spread of the idea that the constitutions have determined the organization of the state and will do so, it became unnecessary to re-mark the constitution as the production of people's will; the authority given to the representatives gained importance.⁴²

³⁸ **The Constitution of the United States of America** (1789) <<https://www.law.cornell.edu/constitution/preamble>> l.a.d. 30.03.2020.

³⁹ **Wheare**, p. 54.

⁴⁰ **Sunay, Zühal Aysun** (2006) "Türk Anayasa Hukukunda Anayasaların Başlangıç Kısımları" (Master's), Ankara University, Institute of Social Sciences, p. 9.

⁴¹ **Wheare**, p. 55.

⁴² For instance; the **Spanish Constitution** (1978) links the preamble to the main text as: "Therefore, the Cortes pass and the Spanish people ratifies the following." <http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf>, l.a.d. 27.09.2019. **Constitution of Portuguese Republic** (1976), with an emphasis on "the people's legitimate representatives" and continues as: "Meeting in plenary session on 2 April 1976, the Constituent Assembly does hereby pass and decree the following Constitution of the Portuguese Republic." <<https://dre.pt/constitution-of-the-portuguese-republic>>, l.a.d. 27.09.2019.

The constitutional preambles can be divided into various categories according to their content. For example Orgad speaks about five themes related to general theme of a preamble as the *sovereign, historical narratives, supreme goals, national identity and god or religion*⁴³, while Frossini examines the preambles under diverse subtitles some of which are similar to the Orgad's classification, but also adding the themes of *the form of state and the form of government, and territorial identity (terra nostra)*.⁴⁴ Existence of all these categories in a defined constitution generally depends on the reasons behind the necessity of writing a constitution with a preamble. The reasons prompting the states to write a constitution including a preamble can be grouped under three headings, as Sunay does, relying on the idea that the dynamics of adding a preamble are similar to the dynamics of constitutional reforms⁴⁵: *establishment of a new state and declaration of independence of a state freed from an occupation; the change of political regime of a country after a revolution, coup d'état or reforms; and positive influence of other constitutions*.⁴⁶ While it is easy to give examples of the constitutions of a newly-established state⁴⁷ – almost all of whom refers to the source of sovereignty and the fundamental goals reflecting some certain categories of Orgad⁴⁸ - with regard to the adoption to a specific ideology, in particular, and to the specification of the principles on which the state is based; the story and the importance of the war of independence is prominent in the texts of the states that gained independence after an occupation.⁴⁹ The emphasis on independence and the

⁴³ **Orgad, Liav** (2010) "The Preamble in Constitutional Interpretation", International Journal of Constitutional Law, Vol.8 N.4, p.716-718.

⁴⁴ **Frosini, Justin O.** (2012) Constitutional Preambles at a Crossroads between Politics and Law, 1. Edition, San Marino, Maggioli Editore, p. 34-47.

⁴⁵ For the mentioned similarity Sunay based on, please see **Atar, Yavuz** (2000) Demokrasilerde Anayasal Değişmenin Dinamikleri ve Anayasa Yapımı, Konya, Mimoza, p. 21.

⁴⁶ **Sunay**, p. 10-20.

⁴⁷ Given the full version in the previous chapters of the study, the US Constitution's preamble puts forward clear and short principles for the new order.

⁴⁸ **Orgad, Liav**, p. 216-217.

⁴⁹ Different from the others which are written after a war which just finished, even though Poland, which defines its recent history over disputes, conflicts and suppression, gained its

opposition against colonialism mentioned in the preamble of the Constitution of Indonesia is a striking example of this first category:

*Whereas independence is the inalienable right of all nations, therefore, all colonialism must be abolished in this world as it is not in conformity with humanity and justice; And the moment of rejoicing has arrived in the struggle of the Indonesian independence movement to guide the people safely and well to the gate of the independence of the state of Indonesia which shall be independent, united, sovereign, just and prosperous; By the grace of God Almighty and motivated by the noble desire to live a free national life, the people of Indonesia hereby declare their independence (...).*⁵⁰

Preambles of the constitutions in the second sub-class that derive from a reform or a revolution concentrate on the philosophy of revolution; because as long as political objectives that cause a revolution in the constitutions are not adopted, revolutionary forces will not abdicate and let the country run its course.⁵¹ The preambles in this sub-class are generally considered as long texts

independence after the Second World War along with lost lands, it was suppressed by the regime until 1989, the end of socialism and it mentioned the struggle of independence that lasted throughout its history in the preamble of the **Constitution of the Republic of Poland** (1997): “*Having regard for the existence and future of our Homeland, Which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate, We, the Polish Nation - all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, (...)Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values, Recalling the best traditions of the First and the Second Republic, Obligated to bequeath to future generations all that is valuable from our over one thousand years’ heritage, Bound in community with our compatriots dispersed throughout the world, Aware of the need for cooperation with all countries for the good of the Human Family, Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland, (...)*”, <<https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>>, l.a.p. 27.03.2020.

⁵⁰ For the full text of **The Constitution of Republic of Indonesia** (1945), <<https://www.wipo.int/edocs/lexdocs/laws/en/id/id048en.pdf>>, l.a.p. 27.03.2020.

⁵¹ **Sunay**, p. 13-14. (with reference to **Preuss, Ulrich K.** (1991) “The Politics of Constitution Making: Transforming Politics into Constitutions”, *Law and Policy*, V:13, N:2, p. 107-123.) For quotes from the preambles of the Constitutions of China and Iran established in this manner see **ibid**, p. 15-16. For instance, these historical expressions are in the preamble of

since they speak about the soul of the revolution and the political structure as in the instance of Iran, including *historical narratives*.⁵² For a current example, the (*new*) Constitution of the Republic of Cuba (2019) which provides a long preamble starting by “We Cuban Citizens” and with a historical narrative of the war of independence against Spanish colonists, determines the political background of the revolution of 1959 as the philosophical identity of the text:

(...) by those who promoted, participated in, and developed the first organizations of laborers, farm workers, and students; disseminated socialist ideas; and founded the first revolutionary, Marxist, and Leninist movements (...) GUIDED by the most advanced revolutionary, anti-imperialist, Cuban-Marxist, Latin American, and universal thought, in particular by the ideal and example of Martí and Fidel, as well as the social emancipation ideas of Marx, Engels, and Lenin; SUPPORTED in proletariat internationalism, fraternal friendship, the help, cooperation, and solidarity of the peoples of the world, particularly those of Latin America and the Caribbean; Reference to fraternity/solidarity DETERMINED to carry forward the triumphant Revolutions of Moncada and Granma, of the Sierra (...); COMMITTED to Cuba never returning to capitalism as a regime sustained by the exploitation of man by man, and that it is only in socialism and communism that a human being can achieve his or her full dignity; CONSCIOUS that national unity and the leadership of the Communist Party of Cuba; IDENTIFIED with the tenets displayed in the concept

the **Constitution of Islamic Republic of Iran** (1979) after the Islamic Revolution: “After slightly more than a year of continuous and unrelenting struggle, the sapling of the evolution, watered by the blood of more than 60,000 martyrs and 100,000 wounded and disabled, not to mention property damage, came to bear fruit amidst the cries of “Independence! Freedom! Islamic government!” (...) On 12 and 13 February 1979, the world witnessed the collapse of the monarchical regime... Unanimously, the Iranian people declared their final and firm decision, in the referendum on the Islamic Republic, to bring about a new political system, that of the Islamic Republic”, <https://www.constituteproject.org/constitution/Iran_1989.pdf?lang=en>, l.a.p. 27.03.2020.

⁵² Frosini (2012), p. 29. For the division of long – short preambles also see Frosini (2012), p. 29-30. For detailed information on historical narratives see Orgad, p. 717 and Frosini (2012), p. 37-30.

*of Revolution, as expressed by the Commander in Chief Fidel Castro on the 1st of May of the year 2000 (...).*⁵³

Finally, the effect of trends, as named by Sunay, is non-negligible when it comes to constitutional developments, as in every field; thereby, when a concept becomes widespread, other constitutions will get their share.⁵⁴ This effect which can also be defined as *borrowing the language* of other constitutions, does not only mean taking the same words but borrowing and using them in an innovative way.⁵⁵ Particularly after the Second World War, increase in constitutions with reference to international human rights law and principles led to similar contents in preambles with different forms of similar expressions; while on the other hand the phrase “we the people” as having a more direct sense of democracy gained popularity, unlike Europe, among the new constitutions of decolonized countries, instead of “we the representatives”.⁵⁶

Justice, equality, peace, freedom, tolerance, reconciliation and agreement can be listed as the values and principles mentioned in the preambles the most.⁵⁷ These notions presents a picture such as the constitutions including

⁵³ **The (new) Constitution of the Republic of Cuba** (2019), <https://www.constituteproject.org/constitution/Cuba_2019.pdf?lang=en> and for original text see <<http://www.granma.cu/file/pdf/gaceta/Nueva%20Constituci%C3%B3n%2040%20KB-1.pdf>> l.a.p. 30.03.2020. It should be stated that the **former constitution of Cuba (1976)** also had a long preamble as the new one and conserved the points of political backround and nearly all the political objectives and ideology: “(...) *GUIDED by the ideology of José Martí, and the sociopolitical ideas of Marx, Engels, and Lenin; AND HAVING DECIDED to carry forward the triumphant Revolution of the Moncada and the Granma, of the Sierra and of Girón under the leadership of Fidel Castro, which, sustained by the closest unity of all revolutionary forces and of the people, won full national independence, established the revolutionary power, carried out democratic changes, started the construction of socialism and, under the direction of the Communist Party, continues said construction with the objective of building a communist society.*” **The Constitution of the Republic of Cuba (as amended to 2002)** (1976), <<http://constitutionnet.org/sites/default/files/Cuba%20Constitution.pdf>> l.a.p. 30.03.2020.

⁵⁴ Sunay, p. 18-20.

⁵⁵ Ginsburg, Tom / Foti, Nick / Rockmore, Daniel, p. 106.

⁵⁶ Ginsburg, Tom / Foti, Nick / Rockmore, Daniel, p. 118-120.

⁵⁷ Sunay, p. 23-24.

them adopt the traditional values and determinants, but it must be stated that the intense repetitions of these terms create an impression that constitutions on their own are not sufficient to evoke an agreement or consensus.⁵⁸ On the other hand; following the historical process, concepts such as human rights, democratic government, state of law, separation of powers are seen to be included epidemically in preambles.⁵⁹ Here, concerns over the consolidation of legitimacy of the states led to the creation of a cover that will succor when the ideals, which should be ensured through loyalty to these principles in the constitutional text itself, are not provided. Furthermore, expressions as ‘customs, language and culture and the common history will *try to be protected*’ or ‘*efforts for this will be made*’ draw picture of a constitutional order that is relatively better than the old one but could still come short and make excuses for it, rather than an ideal constitutional order in which those principles are compulsorily and certainly applied. In this context, Spanish *people*, who have a rather assertive constitution, after a 36-year dictatorship, compared to its counterparts with respect to the main text, adopted a tone off from certainty in the preamble produced on their behalf:

The Spanish Nation, desiring to establish justice, liberty, and security, and to promote the wellbeing of all its members, in the exercise of its sovereignty, proclaims its will to: Guarantee democratic coexistence within the constitution and the laws, in accordance with a fair economic and social order; Consolidate a State of Law which ensures the rule of law as the expression of the popular will; Protect all Spaniards and peoples of Spain in the exercise of human rights, of their culture and traditions, languages and institutions; Promote the progress of

⁵⁸ For example; *The Constitution of the Slovak Republic* emphasizes the awareness of being a state and underlines the idea of living together despite all: “*We, the Slovak nation, bearing in mind the political and cultural heritage of predecessors and the experience gained through centuries of struggle for our national existence and statehood (...)*”. **The Constitution of the Slovak Republic** (1992) <<https://www.prezident.sk/upload-files/46422.pdf>> l.a.p. 30.03.2020.

⁵⁹ For a table with the most popular phrases in the preambles see **Ginsburg, Tom / Foti, Nick / Rockmore, Daniel**, p. 122 (Table 3) ; For diverse instances on popular words used in preambles from all around the World see **Uran, Peri** (2015) *Anayasaların Başlangıç Kısımları*, İÜHFİM, C: LXXIII, S: 1, p. 224-225.

*culture and of the economy to ensure a dignified quality of life for all. Establish an advanced democratic society, and cooperate in the strengthening of peaceful relations and effective cooperation among all the peoples of the earth.*⁶⁰

Specifically the expressions bedighting preambles, such as *respectful, desiring, believing, bearing in mind* etc., display a weak and ambiguous nature compared to the constitutional norms of the main text laying similar responsibilities on the government more severely. Indeed, being general or vague does not directly mean that this kind of phrases has no operative role in constitutional order, as Gözler mentions.⁶¹ Operational characteristic of the preambles will be briefly discussed in the next part of the study, but the problem here looks more like linguistic rather than operational by speaking of weak “personal” preferences. By those emotional expressions, not essentially the text of constitution, but individuals who personally - or through representatives- generate constitutions, namely the society is described and defined.⁶² Although we find the idea that constitutions are the mirror of the society in dispute, through an optimistic reading, we can say that not the constitution itself, but their preambles reflect the will and choices of not the entire society, but of those who win –at war, civil war, politics etc.-.⁶³ In this respect, preambles change the outlook of the written document, the concrete product of the fragile relationship between the main idea of constitution and the society as the reader. Before any additional effect, the main written text of the constitution on its own is a smooth, thin glass. When looked across, the political field behind it can be seen.

⁶⁰ **Spanish Constitution** (1978) l.a.p. 30.03.2020.

⁶¹ **Gözler, Kemal** (1999) *Anayasa Normlarının Geçerliliği Sorunu*, 1. Edition, Bursa, Ekin, p.45. (Also, for a general and in depth evaluation on the normativity, legality and validity see the same work).

⁶² For a detailed discussion on the changing content of term “people” see **Forkosch, Morris D.** (1968) *Who are the People in the Preamble to the Constitution*, *Case Western Reserve Law Review*, V:19, I:3, p.674-707.

⁶³ For the claim of “constitutions as autobiographies” or as a “self definition” see **Addis, Adeno** (2018) “Constitutional Preambles as Narratives of Peoplehood”, *ICL Journal*, 12 (2), p.139-142.

The metal layer called “*silver*” renders the part of the glass over which it spreads into a mirror and shows those who face it themselves; however, it also makes what is behind the part that turned into a glass invisible. Preambles are the substance that turns glass into a mirror; “*the silver*”. Starting with familiar, euphonic concepts and literary expressions, preambles turn these into a set of constituted values which are hard to understand and interpret, furthermore, they extract the transparency of the glass by marking entire society as the part of the process of production; instead put the mirror behind of which can’t be seen and, in time, is forgotten. The mirror is also fragile but what “the silver” does is to make us forget that the mirror also can be broken. While the first thought that comes to mind when looking at a glass is that it is breakable, what is seen in the first place when looking into a mirror is the person himself. The fact that the mirror can also be broken is remembered after a long time; maybe when looked continuously without a break. “We, the people (...)” in the mirror tidy not the one in the mirror, but what is in us up.

It hereby must be noted that as said for constitutions in the previous chapter, we are not discussing the necessity of preambles. What is determined as the problem is not that preambles adopt clear principles as democracy, unitary state, human rights etc.; it is that preambles, along with these, present concepts – either new ones or sometimes adding weak intentions to the certain principles- which are difficult to be adopted or applied, or whose content and necessity of adoption can be better explained in the main constitutional text such as *national peace, a quality life, in the name of God* or *morals* as indispensable divine-like values. This, for certain, is the result of the aim of adapting -by maintaining the same influence- the sacred whose effective, instructive and binding selves are not questioned.⁶⁴ Nevertheless, an effort of

⁶⁴ However, in a manner to improve the effect of the texts and to endorse the legitimacy of the holy to the text, there are direct emphasis on Christianity. **The Constitution of Ireland** (1937) uses expressions that might be considered as a reciprocal search of holiness: “*In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, (...)*”. <<http://www.irishstatutebook.ie/eli/cons/en>>, l.a.p. 30.03.2020. For other examples on the

this nature causes loss of value of what is legal and creates the impression that unless placed in literary chapters of constitutional texts, values respecting a rightful and pacific order and the faith in law will not be embraced.

Foregoing loss of value becomes the most controversial while silvering of the glass –as a judicial activity- and when some expressions in preambles are used as legal instruments. The proof of this fragile relationship must be sought where preambles are used operatively by the constitutional courts. This naturally leads us to the subject of preambles' legal meaning.

III. LEGAL VALUE AND OPERATION OF PREAMBLES

As abovementioned, whether to add preambles to the constitutions, determining the content of these texts or declaring these texts as a part of the original text through a constitutional norm – despite the fact that general practice is negative⁶⁵ – are up to the constituent assembly to decide. In this case, legal force of a preamble can be determined, firstly, through instruction of the assembly and in cases that there are no instructions or rules, through interpretation and looking at implementation of constitutional adjudication.⁶⁶ Preambles can be grouped under three separate categories according to their legal value as; nonbinding *symbolic/ceremonial texts* helping to organize a auto-disciplined society, *interpretive texts* as guiding frameworks for constitutional courts and *substantive texts* as self-contained resources with respect to fundamental rights.⁶⁷ As for the preamble of the Constitution of France (1958); while it is under substantive texts category that the scope of the preamble was extended and the Declaration of the Rights of Man and of the Citizen (1789) and the preamble of the former French constitution (1949) was

subject *see* **Smith, Peter J. / Tuttle, Robert W.** (2017) “God and State Preambles”, 100 *Marquette L. Rev.* 757.

⁶⁵ **Ginsburg, Tom / Foti, Nick / Rockmore, Daniel**, p.104; **Sunay**, p. 73.

⁶⁶ **Frosini, Justin O.** (2017) “Constitutional Preambles: More Than Just a Narration of History”, *University of Illinois Law Review*, N: 2, p. 628.

⁶⁷ **Orgad**, p. 722, 724, 726.

included in the Constitutional text by interpretation⁶⁸, it is usually the *Constitutional Courts (or Supreme Courts)* that determine the legal value of the preambles. As a matter of fact, the following was added to the *block of constitutionality* within the history of the preambles: fundamental principles of the republic by a decision by *Conseil Constitutionnel* of France⁶⁹; the expression “We the People...” by *Supreme Court* in the United States strengthening the idea of federal government⁷⁰; the whole text of the preamble as a real legal norm especially in relation with the constitutional principles (art. 1) by the *Corte Constitucional* of Colombia⁷¹; the entire preambles of both constitutions of Bosnia and Herzegovina and Republic of Srpska, as being integral parts of the constitutional texts, by *The Constitutional Court of Bosnia and Herzegovina* and again the entire preamble by the *Indian Supreme Court* as being a key instrument to clarify the constitutional norms.⁷²

The block of constitutionality (*bloc de constitutionnalité, bloque de constitucionalidad*) comprises of the norms taken as standards – even if they are not *articulated* directly in text of the constitution - during the review of constitutionality on the laws.⁷³ In this respect, while the positivist approach upholds the necessity of implementation of only the constitutional text with normative base during the constitutionality review⁷⁴; the natural law approach, which built up a reputation with the influence of human rights theory and international and regional conventions, suggests considering other principles

⁶⁸ **Orgad**, p. 727. For the analogy of “Matrioska Doll” for French system on preambles see **Frosini** (2012), p. 64-65.

⁶⁹ **Frosini** (2012), p. 67-75.

⁷⁰ **Welch, John W. / Heilpern, James** (2018) “Recovering Our Forgotten Preamble”, *Southern California Law Review*, V: 91, p.1080-1083. However, different from the French Conseil, the Supreme Court refers very rarely to the preamble only in case the constitutional norm is *vogue*. **Frosini** (2017), p. 608-611.

⁷¹ **Quinche Ramírez, Manuel F.** (2009) *Derecho Constitucional Colombiano de la Carta de 1991 y Sus Reformas*, 3a Edición, Rosario, Universidad de Rosario, p. 72-73.

⁷² **Orgad**, p. 728-730; **Frosini** (2017), p. 618-622.

⁷³ **Arango Olaya, Mónica** (2004) “El bloque de Constitucionalidad en la Jurisprudencia de la Corte Constitucional Colombiana”, *Presedente Revista Juridica*, p. 79.

⁷⁴ **Gözler, Kemal** (2000) “Türk Anayasa Yargısında Anayasallık Bloğu Kavramına İhtiyaç Var mıdır?”, *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi*, C:55, S:3, p.98-99.

and standards such as general principles of law – whether or not it directly takes place in the Constitution-.⁷⁵ With regard to positive approach, the debate goes through only whether the preamble is determined as a part of the main constitutional text, but for the perception of natural law, the content of the block of constitutionality is not limited to the constitutional text and this extension brings up the problem of usage of principles in preambles as *reference norms*, as an important subject of this study.

As stated before, while referring to the qualities of the republic in the Article 2 of the Constitution of the Republic of Turkey, the expression of “fundamental tenets set forth in the Preamble” is used, and the Article 176 states the preamble as the integral part of the text of the constitution.⁷⁶ Reminding that this is not a common practice, the Constitution of Syria of 2012, as the former constitution of 1973, declares the preamble a part of the constitution, as well.⁷⁷ While the impact of the preambles on the interpretation by the constitutional courts whose authority includes determining the legal force of these texts is evident by the examples above, the possible major effect of the preambles on constitutional review in case they are normatively included in the constitution is worth seeing.⁷⁸ Being a unique instance for substantive texts, the preamble to the Constitution of the Republic of Turkey consists of a long single sentence including diverse expressions and principles:

⁷⁵ **Turhanoglu, Pinar** (2007) “Türk Anayasa Yargısında Ölçü Normlar Bloğu” (Masters), Anadolu University, Institute of Social Sciences, p. 24; **Yüzbaşıoğlu, Necmi** (1993) Türk Anayasa Yargısında Anayasallık Bloku, İÜHF Yayınları, İstanbul, p. X.

⁷⁶ **Tanör/Yüzbaşıoğlu**, p. 56.

⁷⁷ **Constitution of the Syrian Arab Republic** (2012), article 151 states that “*The Preamble of the Constitution is considered part and parcel of the Constitution*”, <https://www.constituteproject.org/constitution/Syria_2012.pdf?lang=en> I.a.d. 30.03.2020. Article 150 of the former constitution (1973) stated “*The preamble of this Constitution is considered an integral part of it.*” <<https://carnegie-mec.org/diwan/50255?lang=en>> I.a.d. 30.03.2020.

⁷⁸ For the division of substantive – supportive reference norms and more detailed information on the issue see **Tanör / Yüzbaşıoğlu**, p. 523-545. For a critique on and refusal of this division see **Gözler, Kemal** (2011) *Anayasa Hukukunun Genel Teorisine Giriş* Cilt II, 1. Edition, Bursa, Ekin, p. 787-788.

Affirming the eternal existence of the Turkish Motherland and Nation and the indivisible unity of the Sublime Turkish State, this Constitution, in line with the concept of nationalism introduced by the founder of the Republic of Turkey, Atatürk, the immortal leader and the unrivalled hero, and his reforms and principles; Determining to attain the everlasting existence, prosperity, material and spiritual wellbeing of the Republic of Turkey, and the standards of contemporary civilization as an honourable member with equal rights of the family of world nations; (...) That no protection shall be accorded to an activity contrary to Turkish national interests, Turkish existence and the principle of its indivisibility with its State and territory, historical and moral values of Turkishness; the nationalism, principles, reforms and civilizationism of Atatürk and that sacred religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism; (...) With these IDEAS, BELIEFS, and RESOLUTIONS to be interpreted and implemented accordingly, thus commanding respect for, and absolute loyalty to, its letter and spirit; Has been entrusted by the TURKISH NATION to the democracy-loving Turkish sons' and daughters' love for the motherland and nation.⁷⁹

Constitutional Court of the Republic of Turkey used the expressions in the preamble as reference norms in the period of the Constitution of 1982 as in the period of the former Constitution of 1961; moreover, it operates the fundamental principles mentioned in the preamble while reviewing the constitutional amendments as these principles are included in principles of the republic (art. 2) whose amendment are prohibited by the article 4 of the constitution.⁸⁰ The principles in the preamble are sometimes considered as the most significant instrument of an interpretation compatible to the spirit of the constitution and sometimes are expressed as the base of Republic's nature; and yet the court occasionally attributed the principles of the preamble as more important even within constitutional norms.⁸¹ During the review of the

⁷⁹ **Constitution of the Republic of Turkey** (1982), <https://global.tbmm.gov.tr/docs/constitution_en.pdf> l.a.d. 30.03.2020.

⁸⁰ For the legal value and applicability of the principles mentioned in the preamble see **Yüzbaşıoğlu** (1993), p. 116-129.

⁸¹ **Turhanoğlu**, p. 34.

constitutionality on the laws, the principles of the preamble were used as instruments of interpretation, furthermore, in the framework of interpretation, the principles were studied in detail and redefined⁸²; particularly concepts of “*nationalism of Atatürk*”, “*Turkish national interests*” “*an honorable member with equal rights of the family of world nations*” “*secularism*” attained unique meanings.⁸³ For sure it is the constitutional courts who clarify the meaning and content of the constitutional principles⁸⁴, but along with the debates on judicial operation of the preamble, the problem of ‘whether or not all the expressions in preamble are applicable for constitutional interpretation’ is also argued among Turkish scholars.⁸⁵ In this point, Oder’s reminding is worthy of attention: using the pure political or beyond-the-law concepts of the preamble does not accord with the legal interpretation.⁸⁶ Undoubtedly, some expressions in the preamble can be brought into a legal meaning by interpretation as Turkish Constitutional Court did for *nationalism of Atatürk* or being *an honorable member with equal rights*

⁸² **Göl, Mevlüt** (2015) “Anayasaların Başlangıç Kısımlarının Hukuki Değeri” (Masters), İstanbul University, Institute of Social Sciences, p. 259-262.

⁸³ **Turhanoglu**, p. 37-46.

⁸⁴ **Gözler, Kemal** (2019) Türk Anayasa Hukuku, 3. Edition, Bursa, Ekin, p. 194.

⁸⁵ While most of the authors agree on the direct applicability of those which correspond to a concrete norm in the main constitutional text, SOYSAL and GÖZLER are the opinion of that whole text of the preamble has legal force to be operated in the constitutional review. GÖZLER adds that not only the principles in the preamble but also the principles mentioned in the articles 1, 2, 3 of the constitution should be rarely referred; the other clear constitutional norms should be preferred instead. ÖZBUDUN suggests using undetermined expressions only as supportive norms while YÜZBAŞIOĞLU claims that principles in the preamble are superlative over all the other norms of the constitution, reminding at the same time that it is not easy to produce directly-operative norms from the preamble. Finally, ODER claims that some of the principles in the preamble can be concretized reviewing with the other constitutional norms by a systematical interpretation. *see Oder, Bertil Emrah* (2010) *Anayasa Yargısında Yorum Yöntemleri*, 1. Edition, İstanbul, Beta, p. 29; **Yüzbaşıoğlu** (1993), p. 118; **Özbudun**, p. 71-72; **Gözler** (2000), p. 194, 201; **Soysal, Mümtaz** (1990) *100 Soruda Anayasanın Anlamı*, 8. Edition, İstanbul, Gerçek, p.173.

⁸⁶ **Oder, Bertil Emrah** (2010) *Anayasa Yargısında Yorum Yöntemleri*, 1. Edition, İstanbul, Beta, p.28. Oder, here, refers to the similar emphasises of Tanör and Yüzbaşıoğlu on the same issue citing **Tanör /Yüzbaşıoğlu**, p.75-77.

of the family of world nations but operating all the text encircled by beyond-the-law phrases as a legal instrument leads to multifarious suggestions about the principles produced from the preamble, in other words a confusion in constitutional order.

As can be seen in the examples, preambles as literary texts, whether or not attributed a legal force in advance, have potential to be dealt with along with the most important documents which determine and limit the fundamental organization of the state and human rights and freedoms, and to become limitlessly stronger. This potential could either pave the way to progression toward the ideal claim of the constitution with dulcet emphasis – such as freedom, equality-, or to the contrary, it could pave the way of restraint and suppression.⁸⁷ While an unholy, ready- to-be-changed legal discussion medium based on political orientation only to be accepted through a rational view could free and strengthen the social awareness; these values and concepts, which are attributed holiness, only serve to suppress social opposition and to name the opposite thinking as enemy. Besides, the variant practices of the constitutional courts (or *supreme courts*) on the operation of the preambles and the endeavours by the constitutional law scholars to place these texts on the legal grounds, applying diverse methods, create an uncertainty and this uncertainty feeds the same suppression.

Consequently, solely with the long debates on their legal value, preambles, which are seen before the constitution itself when the booklet of the constitution is opened, blur the main text. Here comes the need to repeat the claim at the beginning of the article. Preambles freezes the fragile transition between the constitutional norms and the society with a thicker layer of *silver* this time; moreover, the silvered glass – *the mirror* – increases the visible distance once more. To overcome this and raise that awareness once again are important not to break the glass in a tick once it is fragility is realized but to, approach it –being aware of its fragility- with caution, to change, update and adopt it.

⁸⁷ Uran, p.227.

IV. CONCLUSION

Constitutional texts - claimed to establish the state, assign its elements, guarantee human rights and draws the social line without changing its nature - are products of the secularization of political power as the result of many breaking points throughout the historical process. This new era, radically diverged from the old concept that bases its legitimacy on divine grounds, have a reputation for being predictable and producing its rules completely in real World by unsacred hands. This relatively new concept turned into a movement of constitutionalism in time; establishment of new governments, salvation from an occupation, wars of independence, changes of regime, in a word, “*each new beginning*” of people was crowned with superior legal texts. While the preparation of these texts stood upon the categorical rejection of the past, mostly with the instinct to prove its necessity, or rather its obligation, it somehow turned into embracing the same old divine instruments. The concern to remark or adopt the necessity, rather the indispensability, of the constitution required the emphasis that they are products of the people to which they are addressed; and while this emphasis was placed at the beginning of the texts, it also led to the need of divineness of customs, fancy expressions and the glow of literary descriptions. If what is formed between the society improving from the old to the new and the constitution that is closer than the one celestial is a fragile, smooth glass; what is going to provide the glow needed and stabilize it is the metal “*the silver*”. What is hereby called *the silver* is the preamble that hides the merits, accessibility and the content of the main text of constitution.

Preambles implicitly set forth the historical process, the great and rightful struggle at the background of the constitution and fundamental principles of the new beginning and at the same time names and marks the people that establishes the constitution. The opposition against the constitutional norms becomes a self-denial. That constitution – as a whole - was written as there were no other options. Apparently, there was no trust in that legal values, the text of the constitution must include, can be apprehended through reason and no faith in that what is legal can persuade people.

The comfort of the holy was hung onto, to the contrary of the aim and to the opposite of the claim; the constitutions that should be the product of political choices turned into constituted, modern divine obligations. Nevertheless, it must be reminded that non-existence of a written constitution is an alternative. As in the example of the British who weren't less interested than the others in limiting the government action and defend rights and freedom of the people, it became possible to limit the parliament that won a victory against the King and attained the honor of the supreme legal institution through legal understanding and values adopted by people.⁸⁸ To repeat, what makes Magna Carta so privileged is the awareness of opposition off of which still something can be produced even after eight hundred years.⁸⁹ What is hereby stated is not the non-necessity of the written constitutions indeed; on the contrary, the possibility of a legal order where people are aware of the power and the limits of the state authority and are on guard against the potential violation of their rights by the governmental institutions without a newly produced text referring to beyond-the-law values and highlighting its necessity constantly in the first place. The claim is not that the example of United Kingdom fully corresponds to this proposal; as is seen it is only used as the starting point to carry the fundamental discussion of *divine-like unclear values in constitutions* upon the further debates after having read this article. Thus, it is neither necessary nor required to turn principles that should remain legal into holy words by covering them in *silver*, or to liken legal texts into holy books. Constitutions should be built indeed, but without ignoring the fundamental principles of the constitutionalism and the historical background that caused the necessity of a constitution produced by human reason. Preambles can be added to the constitutional texts for sure, but remembering the potential threats of beyond-the-law expressions on constitutional order. While leaving the preambles as symbolic texts is an option, the most proper solution is using certain expressions with a legal terminology in case of determining them as an equal part of the constitution. Because constitutional norms, ideally, draw the lines and limits of the state authority and guarantee

⁸⁸ **Whare**, p. 10-11.

⁸⁹ **Plucknet**, same in *footnote 28*.

rights and freedoms as legal products of historical challenges and political preferences effected by national and global incidents. So, the spirit of the constitution arises in these preferences reflecting to the constitutional text as a whole and it must be open to be tested instead of covering it by divine and beyond-the-law expressions in order to strengthen the supremacy and the social adaptation of constitutional norms as legal values. A contrary situation, the most, could lead to a disintegration in constitutional order, or the least, loss of value of the law itself.

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