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The issue of the development of the preamble to the Armenian Constitution: from theory to practice

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SUMMARY

The article considers the issues of axiological characteristics of constitutional preambles and possibilities of their amendment. The author concludes that the constitutional preamble, besides the declaratory significance, has a constitutional value, practical importance. The unchangeability of the constitutional preamble, its citation among the unchangeable constitutional articles and other circumstances with regard to this are conditioned by the contentual peculiarities of the preamble and are subject to assessment in each concrete situation. The Armenian constitutional preamble should be unchangeable from the textual viewpoint. At the same time, it can be developed via other alternative ways, having as a key point the circumstance that the above-mentioned regulations are subject to dynamic interpretation, within the frames of which changes of perception of their separate elements are possible, simultaneously, the elements, constituting the „core", „kernel" of these principles, should be unchangeable.

***Key-words**: constitutional preamble, constitutional developments, Constitution, dynamic interpretation.*

Problema dezvoltării preambulului din Constituția Republicii Armenia: de la teorie la practică

SUMAR

Articolul abordează probema caracteristicilor axiologice ale preambulului constituțional și posibilitățile de modificare ale acestuia. Autorul concluzionează faptul că preambulul constituțional, pe lângă semnificația declarativă, are o valoare constituțională și o importanță practică. Lipsa posibilității de modificare, includerea acestuia în categoria prevederilor care nu se pot modifica în Constituție și alte circumstanțe în acest sens sunt condiționate de particularitățile contextuale ale preambulului și sunt supuse evaluării în fiecare situație concretă. Preambulul din Constituția Armeniei nu ar trebui să fie posibil de modificat din punct de vedere textual. În același timp, poate fi dezvoltat prin alte căi alternative, având în vedere că reglementările menționate mai sus sunt supuse unei interpretări dinamice, în cadrul căreia este posibilă schimbarea percepției asupra elementelor lor separate, dar elementele care constituie „nucleul" acestor principii ar trebui să fie de neschimbat.

***Cuvinte-cheie:** preambul constituțional, evoluții constituționale, Constituție, interpretare dinamică.*

I. Introduction

„Stability", „changeability" and „development" of the Constitution are not mutually exclusive terms. The essence of stability isn't based on the idea of preserving the system from changes, but on the idea of establishing opportunities for taking the mentioned changes into account. At the same time, the above-mentioned shouldn't presuppose a possibility to thoroughly change the „core", „kernel", the essence of the system. Moreover, in order to be considered as a development, amendments should have a qualitative nature, that is, there should be a transition from one qualitative condition of a system to another [13, p. 524-525], and a qualitatively new condition of a system, in this case a Constitution, should be formed. At the same time, as it was mentioned above, we should take into account that the notion „development of the Constitution" presupposes just such qualitative changes, which preserve the main quality of a system, the „core" of the Constitution. The reason is that each system has a concrete integrative quality, which forms the mentioned whole system and the initial condition, from which the transition to new positions takes place. Hence, in case of the absence of the given qualitative peculiarity the object ceases to be the discussed concrete system, in which case it is also impossible to speak about its stability or development [14, p. 21-31].

In this regard it should be noted that according to Article 203 of the Constitution of the Republic of Armenia, Articles 1, 2, 3 and 203 of the Constitution shall not be subject to amendment.

The content of the mentioned non-amendable constitutional provisions is the following:

„**Article 1.** The Republic of Armenia is a sovereign, democratic, social state governed by the rule of law.

Article 2. In the Republic of Armenia, the power belongs to the people.

The people shall exercise their power through free elections, referenda, as well as through state and local self-government bodies and officials provided for by the Constitution.

Usurpation of power by any organization or individual shall be a crime.

Article 3. The Human Being, His or Her Dignity, Basic Rights and Freedoms

1. The human being shall be the highest value in the Republic of Armenia. The inalienable dignity of the human being shall constitute the integral basis of his or her rights and freedoms.

2. The respect for and protection of the basic rights and freedoms of the human being and the citizen shall be the duty of the public power.

3. The public power shall be restricted by the basic rights and freedoms of the human being and the citizen as a directly applicable law".

Therefore, the constitutional legislator considers these provisions as the basis for social relations and the fundamental elements, constituting the constitutional identity of the concrete constitutional system, hence also, prohibiting their amendment.

With regard to the above-mentioned issue it should be noted that there are not many constitutions, which include norms regarding unchangeability of particular provisions. The technique, when certain principles of the Constitution are declared as non-amendable, is more widespread [2]. To our mind, the latter is a more expedient approach, as it allows to preserve the initial elements, underlying the mentioned principles, simultaneously, giving an opportunity for certain changes regarding their perception, parallel to the development of the social relations. Undoubtedly, such concepts, as, for instance, „democracy", „sovereignty", „fundamental human rights and freedoms", etc, have been and are continuously developing during a time. In the 21st century their perception does not thoroughly coincide with the one, which was, for instance, in 19th or 20th centuries. The perception of many terms was essentially changed even during a few decades. Hence, we believe that from this aspect the key point should be the following: the mentioned principles are subject to ***dynamic interpretation***, within the frames of which there can be changes in the perception of certain elements of the latter, but at the same time, the elements, constituting the basis for these principles, should stay unchangeable. The Indian practice can be mentioned in this context. Notwithstanding the fact that the Constitution of India prescribes a possibility for the amendment of all the constitutional provisions, in one of its decisions the Supreme Court of India stated that the mentioned amendments cannot touch „the main structure and system" of the Constitution [12].

In this context we consider necessary to touch upon an important circumstance with regard to the discussed issue – possibilities of amendment of the constitutional preambles.

II. Axiological characteristics of constitutional preambles

There are almost no states, which prescribe special regulations on amendment or unchangeability of the constitutional preamble. Even in states, where unchangeable constitutional regulations are defined, no special reference is made to the preamble of the Constitution within the frames of them [1]. No reference is made to the constitutional preamble also in constitutional norms on the peculiarities of amendments of various constitutional provisions.

The Republic of Serbia can be mentioned among the states studied by us, the Constitution of which prescribes special regulations on the amendment of the preamble. Article 203 of the Serbian Constitution, particularly, states that the National Assembly shall be obliged to put forward the act on amending the Constitution in the republic referendum to have it endorsed, in cases when the amendment of the Constitution pertains to the preamble of the Constitution, principles of the Constitution, human and minority rights and freedoms, the system of authority, proclamation the state of war and emergency, derogation from human and minority rights in the state of emergency or war or the proceedings of amending the Constitution [7].

From the viewpoint of constitutional preambles their ideological significance is emphasized as a rule, which is also, to our mind, of an undoubted primary importance. At the same time, we believe that preambles also have no less practical legal significance, which cannot be disregarded in the context of analysis of the peculiarities and possible development of preambles.

At first, it should be mentioned that there are about 54 states, the constitutions of which have no preamble, for instance, Italy, Austria, Belgium, Malta, Luxemburg, Jordan etc. [11; 4].

What about the constitutions with preambles, it should be noted that these preambles have a lot of peculiarities conditioned both by their scope, as well as the content and legal force.

Various implemented research show that from 200 constitutional preambles 103 have up to 300 words, 26 – have from 300 to 500 words, 12 – more than 500 words [11]. The longest constitutional preamble is the preamble of the 1979 Constitution of the Iran Islamic Republic, which contains more than 3000 words. Preamble of the Chinese Constitution is also extensive – more than 1000 words. While the shortest preamble is the preamble of

the Constitution of Greece, which contains just 11 words [9, pp. 29-30; 6].

It is obvious that preambles differ also from the viewpoint of their content. Researchers emphasize 15 constitutional preambles, which contain just a solemn text without any intrinsic meaning, for instance, preambles of Constitutions of Greece, Monaco, Lebanon, Liechtenstein.

At the same time, the majority of constitutional preambles have more concrete content, and, as a rule, contain information on the following main elements: goals, values, history, national identity, God and religion, references to other acts [11; 9, p. 47].

It is interesting that in international practice there are cases of amendments of constitutional preambles in separate exceptional situations. As an example, the amendment made in the preamble of the Latvian Constitution can be mentioned [5]. It should be noted that the Constitution adopted in 1922 and restored in 1993 is now in force in the Republic of Latvia. The preamble of the Constitution of India was also amended in 1976, when words „socialist" and „secular" were added between the words "sovereign" and „democratic" [9, p. 140]. The preamble of 1958 French Constitution was also amended, when a reference was added in it to the rights and duties as defined in the Charter for the Environment of 2004 [3].

From the viewpoint of the discussed issue we consider necessary to analyze the following circumstances: Does the constitutional preamble have a practical significance? Can it be realized with the aim of regulating the social relations or is it just a declaratory text?

It should be noted that there are different views on the legal force of constitutional preambles in literature, which is conditioned by different examples of legal application of preambles in international practice. In the United States, for instance, though constitutional preamble is studied within the frames of the science of constitutional law, it is not a part of the constitutional text with an independent legal force and can be found in judicial acts rather rare [10, p. 105]. Though in some acts of the US Supreme Court references to the constitutional preamble can be found, this, as it is mentioned in literature, is realized in the context of the so called „cherry-on-the-cake" technique. In other words, the decision is based on other norms of the Constitution („the cake"), but in order to make the reasoning more persuasive, a reference is made also to the preamble as an additional interpretative tools. Hence, the main aim of these references is to make the reasoning more persuasive, to strengthen the decision. At the same time, the preamble is not considered as a source with an independent legal force. The German constitutional law provides the preamble of the Basic Law of Germany with no independent legal force. At the same time, the preamble is sometimes used in the decisions of the German Constitutional Court as an interpretative tools [9, p. 53-64, 80].

The same cannot be stated with regard to the preamble of the French Constitution, as the French Constitutional Council has repeatedly based the reasoning part of its decisions on the preamble of the Constitution since 1970s, considering it as a criterion for assessing the constitutionality of norms and factually providing the preamble with an independent constitutional value. The reason is probably in the content and form of the French constitutional preamble. It makes a reference to the Rights of Man and the principles of national sovereignty as defined by the ***Declaration of 1789***, confirmed and complemented by the ***Preamble to the Constitution of 1946***, and to the rights and duties as defined in the ***Charter for the Environment of 2004,*** in the result of which it is called „Matrioska Doll". In Poland also the constitutional preamble has a key role and has repeatedly underlie the decisions of the Constitutional Tribunal and their reasoning. The Indian Supreme Court also emphasized that the preamble is „the part of the Constitution" and reasoned a number of its decisions, having as a basis the preamble [9, pp. 64-76, 92-99]. Article 176 of the Constitution of the Republic of Turkey directly defines that the preamble, which states the basic views and principles the Constitution is based on, shall form an integral part of the Constitution [8].

III. Preamble to the Constitution of the Republic of Armenia

Preamble of the Constitution of the Republic of Armenia has the following content: "The Armenian people – taking as a basis the fundamental principles of the Armenian Statehood and the nation-wide objectives enshrined in the Declaration of Independence of Armenia, having fulfilled the sacred behest of its freedom-loving ancestors for the restoration of the sovereign state, committed to the strengthening and prosperity of the fatherland, with a view of ensuring the freedom of generations, general well-being and civic solidarity, assuring the allegiance to universal values — hereby adopt the Constitution of the Republic of Armenia" [17].

It is obvious that the text of the preamble contains provisions with various content, within the frames of which both historical and national identity aspects, as well as goals and values of the concrete social society are touched upon, and a reference is made to another act – Declaration of Independence of Armenia, more concretely – to the fundamental principles of the Armenian Statehood and the nation-wide objectives enshrined in it. To our mind, except the latter, all other norms have general character and state ideas, which are of universal recognition and significance. The same cannot be stated with regard to the Declaration of Independence of Armenia and the fundamental principles of the Armenian Statehood and the nation-wide objectives enshrined in it, as they have a content directed to concrete issues and a clear orientation, which is presented below:

„DECLARATION OF INDEPENDENCE OF ARMENIA

The Supreme Council of the Armenian Soviet Socialist Republic: Expressing the united will of the Armenian people;

Aware of its historic responsibility for the destiny of the Armenian people engaged in the realization of the

aspirations of all Armenians and the restoration of historical justice;

Proceeding from the principles of the Universal Declaration on Human Rights and the generally recognized norms of international law;

Exercising the right of nations to free self-determination;

Based on the December 1, 1989, joint decision of the Armenian SSR Supreme Council and the Artsakh National Council on the„Reunification of the Armenian SSR and the Mountainous Region of Karabakh";

Developing the democratic traditions of the independent Republic of Armenia established on May 28, 1918;

DECLARES

The beginning of the process of establishing of independent statehood positioning the question of the creation of a democratic society based on the rule of law;

1. The Armenian SSR is renamed the Republic of Armenia (Armenia). The Republic of Armenia shall have its flag, coat of arms, and anthem.

2. The Republic of Armenia is a self-governing state, endowed with the supremacy of state authority, independence, sovereignty, and plenipotentiary power. Only the constitution and laws of the Republic of Armenia are valid for the whole territory of the Republic of Armenia.

3. The bearer of the Armenian statehood is the people of the Republic of Armenia, which exercises the authority directly and through its representative bodies on the basis of the constitution and laws of the Republic of Armenia. The right to speak on behalf of the people of the Republic of Armenia belongs exclusively to the Supreme Council of Armenia.

4. All citizens living on the territory of Armenia are granted citizenship of the Republic of Armenia. Armenians of the Diaspora have the right of citizenship of Armenia. The citizens of the Republic of Armenia are protected and aided by the Republic. The Republic of Armenia guarantees the free and equal development of its citizens regardless of national origin, race, or creed.

5. With the purpose of guaranteeing the security of the Republic of Armenia and the inviolability of its borders, the Republic of Armenia creates its own armed forces, internal troops, organs of state and public security under the jurisdiction of the Supreme Council. The Republic of Armenia has its share of the USSR military apparatus. The Republic of Armenia determines the regulation of military service for its citizens independently. Military units of other countries, their military bases and building complexes can be located on the territory of the Republic of Armenia only by a decision of Armenia's Supreme Council. The armed forces of the Republic of Armenia can be deployed only by a decision of its Supreme Council.

6. As the subject of international law, the Republic of Armenia conducts an independent foreign policy; it establishes direct relations with other states, national-state units of the USSR, and participates in the activity of international organizations.

7. The national wealth of the Republic of Armenia – the land, the earth's crust, airspace, water, and other natural resources, as well as economic and intellectual, cultural capabilities are the property of its people. The regulation of their governance, usage, and possession is determined by the laws of the Republic of Armenia.

The Republic of Armenia has the right to its share of the USSR national wealth, including the supplies of gold and diamond, and hard currency funds.

8. The Republic of Armenia determines the principles and regulation of its economic system, creates its own money, national bank, finance-loan system, tax and custom services, based on the system of multiple forms of property ownership.

9. On its territory, the Republic of Armenia guarantees freedom of speech, press, and conscience; separation of legislative, executive, and judicial powers; a multiparty system; equality of political parties under the law; depolitization of law enforcement bodies and armed forces.

10. The Republic of Armenia guarantees the use of Armenian as the state language in all spheres of the Republic's life; the Republic creates its own system of education and of scientific and cultural development.

11. The Republic of Armenia stands in support of the task of achieving international recognition of the 1915 Genocide in Ottoman Turkey and Western Armenia.

12. This declaration serves as the basis for the development of the constitution of the Republic of Armenia and, until such time as the new constitution is approved, as the basis for the introduction of amendments to the current constitution; and for the operation of state authorities and the development of new legislation for the Republic" [16].

In this context a question arises whether the Declaration of Independence is a part of the Constitution itself, and whether its regulations acquire a value of constitutional norms due to the preamble of the Constitution. At first, it should be mentioned that in the text of the constitutional preamble not the Declaration of Independence is noted, but the fundamental principles of the Armenian Statehood and the nation-wide objectives enshrined in it. The study of the Declaration leads to a conclusion that the majority of regulations prescribed in it are statements of just such principles and objectives. At the same time, there are also such provisions in the text of the Declaration, which have just an aim of solving an ongoing issue at a certain historical stage, prescribe a thoroughly other regulation than the current Constitution defines, cite bodies, which now, according to the Constitution, do not exist, hence, they do not define a fundamental principle or a nation-wide objective from this viewpoint. For instance, Article 3 of the Declaration defines that the right to speak on behalf of the people of the Republic of Armenia belongs exclusively to the Supreme Council of Armenia. Article 5 prescribes that the armed forces of the Republic of Armenia can be deployed only by a decision of its Supreme Council. At the same time, we believe that the content of

such provisions is multilayer and though it mostly contains concrete solutions to ongoing problems, the logic, underling these solutions is also important, which is itself expressed in the form of the fundamental principles of the Armenian Statehood and the nation-wide objectives. For instance, the basis for the provision of the Declaration that the armed forces of the Republic of Armenia can be deployed only by a decision of its Supreme Council, is not just the logic to define the concrete body, but the idea that the authority to deploy the armed forces belongs to the body, representing the people of the Republic, and not external or other bodies.

Anyway, it's obvious that there are separate regulations prescribed in the Declaration, which cannot function at this stage, hence, also cannot have a constitutional value.

It should be added that according to Article 2 of the RA Law „On Normative Legal Acts" normative legal act is the written legal act adopted by the people of the Republic of Armenia, as well as by bodies or officials defined by the Constitution, which contains mandatory rules of behavior for an uncertain number of people. We think that from the viewpoint of the discussed law the Declaration of Independence of Armenia is not a normative legal act and the legal force of the Declaration derives from the factual legal significance given to it by the preamble of the Constitution, in which context the fundamental principles of the Armenian Statehood and the nation-wide objectives enshrined in the Declaration have received a constitutional value. At the same time, it should be emphasized that to our mind, besides the mentioned legal significance, the Declaration of Independence of Armenia definitely has an important symbolic value for the constitutional system of the Republic of Armenia, which should be taken into account both during its realization and also during the development of the Constitution.

Summarizing the above-mentioned, it should be noted that notwithstanding the peculiarities of the presented norms and their content, one thing is obvious – the logic of the preamble of the Constitution from the viewpoint of the Declaration is to provide the fundamental principles of the Armenian Statehood and the nation-wide objectives enshrined in it with a constitutional value, which should be taken into account both while assessing the legal value of the constitutional preamble and the Declaration of Independence of Armenia, and also while considering the issues of the development of the Constitution.

It should be noted that the references to the preamble of the Constitution in the RA Constitutional Court decisions aren't very frequent. At the same time, such citations can be found in some cases. For instance, in the decision of the RA Constitutional Court DCC-850 of 12 January 2010 the RA Constitutional Court stated: „The RA Constitutional Court also finds that the provisions of the Protocol on Development of Relations between the Republic of Armenia and the Republic of Turkey cannot be interpreted or applied in the legislative process and application practice of the Republic of Armenia as well as in the interstate relations in a way that would contradict the ***provisions of the Preamble to the RA Constitution and the requirements of Paragraph 11 of the Declaration of Independence of Armenia*** (our underlining – A.M.)" [15].

What does the mentioned terminology of the RA Constitutional Court pressupose, what kind of role does it predetermine for the preamble of the Constitution?

We believe that using the mentioned wording, the RA Constitutional Court considered the preamble to the Constitution as a criterion for assessing the constitutionality along with other constitutional provisions, thus besides the declaratory significance, providing the preamble with a legal force and constitutional value equivalent to other norms of the Constitution.

At the same time, in this context the circumstance that the Constitutional Court cited autonomously both the preamble to the Constitution and the Declaration of Independence, is worth discussing. Taking into account the presented analysis, we think that the main goal of using such a technique was not to clearly differentiate the mentioned provisions from each other, but the necessity to point out the concrete Article of the Declaration.

IV. Issues with regard to the development of the preamble to the Armenian Constitution

Considering the possibility of the amendment of the preamble, it should be noted that the RA Constitution, defining regulations with regard to the adoption and amendment of the Constitution, doesn't touch upon the preamble of the Basic Law. This concerns both the unchangeable constitutional articles and also the peculiarities of amendment of various constitutional norms. Hence, in this context a question arises whether the preamble to the Constitution can be subject to changes both from the viewpoint of making textual amendments and from the aspect of developing the content of the latter via alternative ways.

To our mind, the analysis of the presented constitutional regulations leads to a conclusion that the logic that it is not possible to speak about the amendment of the preamble at all underlies them.

Moreover, the content of the RA Constitution, its logic and terminology leads to a conclusion that historical, national identity aspects, goals and values of a concrete social society are listed in the preamble of the Constitution, as well as a reference is made in it to the fundamental principles of the Armenian Statehood and the nation-wide objectives enshrined in the Declaration of Independence of Armenia, and the main aim of listing all these elements is to point out what the Armenian people took as a basis, while adopting the RA Constitution.

To our mind, the peculiar regulations, which are prescribed in the preamble of the RA Constitution, form the „core", „kernel" of the Constitution. Hence, from the viewpoint of their content they cannot be subject to fundamental changes. It is also obvious that the preamble of the Basic Law enshrines the values and goals of the given

social society, which underlie the adoption of the Constitution, and after the adoption of the Basic Law it is not logical from the chronological viewpoint to speak about their amendment. Hence, preamble is the qualititive peculiarity of the RA Constitution, in the absence of which it is impossible to speak about the discussed concrete system, in this case – the Constitution.

At the same time, notwithstanding the mentioned conclusion on the prohibition of the textual changes of the preamble, we believe that the preamble, besides the declaratory significance, has a constitutional value, practical importance, and can be developed via other alternative ways, for instance, via interpretation. Moreover, as in case of other unchangeable constitutional articles, in case of preamble also the key point should be the circumstance that notwithstanding the prohibition of textual changes, the above-mentioned regulations are subject to dynamic interpretation, within the frames of which changes of perception of their separate elements are possible, at the same time, the elements, constituting the „core", „kernel" of these principles, should be unchangeable.

V. Conclusion

Summarizing the above-mentioned, it should be noted that unchangeability of the constitutional preamble, its citation among the unchangeable constitutional articles and other circumstances with regard to this are conditioned by the contentual peculiarities of the preamble and are subject to assessment in each concrete situation.

What about the preamble of the RA Constitution, we think that from the textual viewpoint it should be unchangeable. At the same time, it has a constitutional value, practical importance, and can be developed via other alternative ways, having as a key point the circumstance that the above-mentioned regulations are subject to dynamic interpretation, within the frames of which changes of perception of their separate elements are possible, at the same time, the elements, constituting the „core", „kernel" of these principles, should be unchangeable. Moreover, to our mind, not citing preamble among unchangeable provisions prescribed in Article 203 of the RA Constitution is not problematic, as the textual peculiarities of the latter itself pressupose textual unchangeability of the preamble.

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