Back to Beginnings: Revisiting the Preambles of European Treaties

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In recent years, discussions about crises in – and the future of[1] – Europe have been at the centre of European legal studies. In light of this, we propose that it is time to take a step back and return to the (literal) beginnings of the European legal order – namely, the preambles of European treaties. Preambles have existed for as long as there have been treaties.[2] Although they have become longer and more substantial over time,[3] their normative status and the meaning attributed to them have remained controversial.

The Vienna Convention on the Law of Treaties[4] mentions the word «preamble» only once. Pursuant to its Article 31(2), the preamble forms an integral part of the text of the treaty. Accordingly, the recitals[5] of the preamble are relevant to the interpretation of the substantive provisions of the respective treaty. In some cases, this may even make the preamble «close to being enforceable».[6] The interpretative value is one

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1 See, e.g., the topic of the third Young European Law Scholars Conference 2020 in Salzburg, Austria. A first series of articles was recently published in a special issue edited by Sandra Hummelbrunner, Lando Kirchmair, Benedikt Pirker, Anne-Carlijn Prickartz, and Isabel Staudinger: «Shaping the Future of Europe – First Part», 6 European Papers (2021), 229–334.

2 Max H. Hulme, «Preambles in Treaty Interpretation», 164 University of Pennsylvania Law Review (2016), 1281–1346, at 1283.

3 Jan Klabbers, «Treaties and Their Preambles», in: M. Bowman & D. Kritsiotis (eds), Conceptual and Contextual Perspectives on the Modern Law of Treaties, Cambridge 2018, 172–200, at 176–182.

4 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331.

5 On the fluctuating terminology, see Klabbers, supra n. 3, at 174. Eventually, the author chooses «recital» as the «least loaded term».

6 Klabbers, supra n. 3, at 172.

of the most commonly agreed upon characteristics of the preamble.[7] The preambular recitals may reveal both the *telos* of the treaty and the historical motives of the contracting parties. They further provide information on the context in which the treaty arose.[8] In doing so, the preamble may have an influence on the interpretation of the rest of the treaty text, which forms the natural starting point of the interpretative process. This also explains why the precise wording of the preamble is often subject to extensive negotiations at the drafting stage.[9] Yet, beyond the interpretative value of preambles, little scholarly attention has so far been paid to their legal meaning and function.

It is against this backdrop that we decided to invite young European law scholars to revisit the preambles of European treaties, including the treaties of the European Union and the treaties of the Council of Europe. Do European treaties live up to what they promise in their preambles? Are member states, international organisations and supranational organisations on track to achieve the objectives expressed in the preambles, based on which they have concluded specific treaties? Or are preambles largely aspirational – and potentially merely symbolic or even empty – phrases?

In response to our call for papers, which we published in summer 2020, we received numerous convincing ideas and suggestions for addressing these questions. Following a careful and anonymised selection process, thirteen young European law scholars from seven countries were invited to present their research at the fourth Young European Law Scholars Conference, which took place on 20 and 21 May 2021. The conference was organised in cooperation with the University of Zurich and the Liechtenstein Institute, and was supported by the European Society of International Law. Financial support was gratefully received by the Graduate Campus of the University of Zurich, as well as by the Liechtenstein Institute. Twelve established senior scholars of European law contributed to the success of the conference by commenting on each presentation. Professor Dr. Juliane Kokott, Advocate General of the Court of Justice of the European Union (CJEU), delivered an inspiring keynote speech titled «The Rule of Law in the Preamble of the European Treaties». While the event was set to take place in Zurich, the conference eventually had to be moved online due to the ongoing uncertainties surrounding the COVID-19 pandemic. This, however, allowed presenters, commentators and attendees from all over Europe to participate and benefit from insightful presentations and fruitful discussions elucidating the complexity and multifaceted character of preambles.

7 For further legal effects and «functions», see e.g. Patricia Egli, «Preambles in International Treaty Law», 22 Aktuelle Juristische Praxis (2013), 717–727, at 719 et seq.; Klabbers, supra n. 3, at 182–195; Makane Moïse Mbengue, «Preamble», in: Max Plank Encyclopedia of Public International Law, September 2006, at paras 2–14.

8 Cf. Mbengue, supra n. 7, at para 1.

9 Cf. Klabbers, supra n. 3, at 172.

This special issue brings together four excellent papers presented at the conference, which both critically and substantially analyse the preamble to a European treaty and thoroughly engage with the informed comments of the distinguished scholars and other conference participants.

Nicholas Otto's article, titled «A Matter of Democracy? How (Not) to Interpret Provisions on Institutions and Procedures in EU Constitutional Law. On the Interpretation-Guiding Function of Preambles in EU Law», focuses less on the interpretative potential of preambles than on the difficulty of using them as interpretive guides. The author makes this argument based on the notion of democracy, which is mentioned several times in the preamble to the Treaty on European Union (TEU). As *Otto* shows, democracy within the EU is a highly indeterminate concept that only takes shape once it is linked to institutional and decision-making rules. Using the notion of democracy to interpret EU law bears the risk of merely reflecting the value judgments of the interpreter. Moreover, interpreting provisions on institutional and procedural matters in light of an overarching democratic principle may result in the neglect of the specificities of these various provisions. Another risk highlighted by *Otto* is that of overlooking the fact that the preamble is, first and foremost, the reflection of a compromise between the drafting member states. The author further notes that in the case law of the CJEU, the guiding interpretative principle appears to be institutional balance, not democracy.

In his contribution «Brexit and a Breach of Good Faith?», *Darren Harvey* addresses the question of whether recent actions by the UK government in relation to its departure from the European Union constitute a breach of the good faith obligations enshrined in Article 4(3) TEU and Article 5 of the UK-EU Withdrawal Agreement (WA), respectively. In order to do so, he examines the role played by the preambles to these two treaties in the determination of the scope and content of their good faith obligations. While the CJEU has not relied on the preamble to the EU treaties in relation to Article 4(3) TEU, *Harvey* argues that the preamble of the WA will likely play an important role in fleshing out the obligations arising from the good faith clause in its Article 5. He accordingly concludes that as the source of the UK's good faith obligations changes from Article 4(3) TEU to Article 5 WA, so too does the significance of the preamble in determining their nature and content.

In her article «Is Europe Failing its ‹Humanist Inheritance›? – Critical Normative Humanism and EU Immigration Law», *Nicole Nickerson* asks why human rights, namely those of migrants and asylum seekers, continue to be violated in Europe despite the Old Continent's vigorous human rights discourse and the European Union's preambular commitment to its humanist inheritance (TEU, 2nd recital). According to *Nickerson*, an answer to this question appears if one looks at the blind spots of Europe's commitment to the principles of human dignity and the equal value of all human beings: Europe's liberal humanist approach stops short of fighting systemic, longstanding social injustices, or so *Nickerson* argues. In her view, Europe must

read its humanist inheritance through the lens of critical normative humanism if it wants to take its commitment to human dignity and equality seriously.

In his article «The Descriptive Value and the Normative Force of the Preambles to the Treaties making up the European Social Charter System», *Stefano Angeleri* discusses the preamble to the European Social Charter (ESC), the counterpart of the European Convention on Human Rights, from a historical, descriptive and normative perspective. *Angeleri* conducts an in-depth textual analysis of the five different preambles to the ESC system, analysing the jurisprudence of the European Committee of Social Rights and the *travaux préparatoires* of the Charter Treaties, as well as scholarly material. He concludes that the normative role of the preamble to the ESC underlines the importance of strengthening social rights jurisprudence in Europe.

We hope that these four contributions will inspire readers to reflect on the preambles of European treaties, and that the authors, as well as the other participants, benefited from the engaging exchanges during the fourth Young European Law Scholars Conference. Last but not least, we would like to thank the Liechtenstein Institute for its financial support for this special issue.