

DRAFT

## CHAPTER 3: PREAMBLE

A. Introduction

A preamble is an introduction which sets out the purpose, context and principles underpinning a legal document such as a constitution or international treaty or statute. While unusual in domestic legislation, inclusion of a preamble is not unknown. Preambles are, however, particularly common in bills of rights, and examples can be found at both the international and national level. International bills of rights containing preambles include the Universal Declaration of Human Rights 1948, the European Convention on Human Rights 1951, the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966. Domestic bills of rights containing preambles include the Canadian Charter of Rights and Freedoms 1982, the New Zealand Bill of Rights Act 1990, the Victoria Charter of Human Rights and Responsibilities Act 2006, and the Australian Capital Territory Human Rights Act 2004. Many national constitutions, containing bills of rights within them, are also introduced by a preamble, for example, the United States Constitution 1789, the Constitution of Ireland 1937 and the Constitution of the Republic of South Africa 1996. As a domestic statute, the Human Rights Act 1998 is not unusual in not having a preamble; however, as a bill of rights, it is unusual in this respect.

B. The content of preambles

While there is no one model or form for preambles, many have common features and identify:

- the source of authority or legitimacy of the legal instrument;
- the history of the legal instrument;
- a summary or description of the main ideas of the legal system or instrument;
- the aims or values of the people and the system; and
- statements about the beliefs of the people to encourage unity.

Preambles are generally written in the present verb tense. Moreover, in any legal instrument, it is usually preferable to have one preamble at the beginning of the legal instrument to introduce the instrument in its entirety, rather than have different preambles introducing different sections of the particular instrument.

Preambles can be long or short. Short preambles are found in the New Zealand Bill of Rights Act 1990<sup>1</sup> and the Canadian Charter of Rights and Freedoms 1982.<sup>2</sup> An example of a longer preamble is that of the European Convention on Human Rights 1950.<sup>3</sup>

### C. The effects of preambles

#### Legal effects

While not strictly legally binding, a preamble in a document such as a bill of rights may have a degree of legal effect, and can generally be used by courts in two ways.

First, a preamble may be invoked for interpretive guidance; it informs the courts and others as to the intention behind the bill of rights and thus how the rights it contains should be interpreted. The European Court of Human Rights has often

---

<sup>1</sup> The Preamble to the Act reads as follows: 'An Act— (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights'.

<sup>2</sup> The Preamble to the Charter reads as follows: 'Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.'

<sup>3</sup> The Preamble to the Convention reads as follows:

*The Governments signatory hereto, being Members of the Council of Europe,  
Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948;  
Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;  
Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which the aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms;  
Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;  
Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration;  
Have agreed as follows:*

noted that the Convention rights must be interpreted 'in light of the Preamble of the Convention'.<sup>4</sup> Irish courts have observed that, since the Preamble declares the purpose of the people in adopting the Constitution, it may help in determining the meaning to be given to particular provisions.<sup>5</sup> The preambles of the New Zealand Bill of Rights Act<sup>6</sup> and the South African Constitution<sup>7</sup> have also been deemed capable of interpretive effect. There is always a limit to the interpretive effect of a preamble, and it cannot override the plain and clear language in the text of the particular legal instrument.

A second way in which a preamble can have legal effect is through supporting or assisting judicial reasoning. A preamble can be invoked to strengthen a particular judicial argument, where the argument also relies on other grounds. In other words, the preamble can be used to bolster a particular line of reasoning. For example, the preambles to the Canadian Charter,<sup>8</sup> the South African Constitution,<sup>9</sup> the Constitution of Ireland,<sup>10</sup> and the European Convention on Human Rights<sup>11</sup> have been used in this way.

#### Educative effects

A preamble to a bill of rights can also have non-legal effects. In particular, it can play a useful educational role in presenting rights to the public, since it provides information, in a very accessible form, on the basic values underpinning the legal document. In this way, a preamble can be used to promote a sense of ownership of the bill of rights in the community at large.

This value of a preamble provided particular motivation for the Victoria Human Rights Consultation Committee to recommend

---

<sup>4</sup> See, e.g., *Macovei v Moldova* (2007) 45 EHRR 48, para. 41.

<sup>5</sup> See, e.g., *AG v Southern Industrial Trust* (1960) 94 ILTR 161, 175; see also *Buckley v AG* [1950] IR 67.

<sup>6</sup> See, e.g., *Hansen v The Queen* [2007] NZSC 7, para. 11.

<sup>7</sup> See, e.g., *First National Bank of SA Limited t/a Westbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Westbank v Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC), para. 50.

<sup>8</sup> See, e.g., *Reference Re Manitoba Language Rights* [1985] 1 SCR 721, 747-750; *Re B.C. Motor Vehicle Act* [1985] 2 SCR 486.

<sup>9</sup> See, e.g., *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* (CCT58/06) [2006] ZACC 15, para. 28.

<sup>10</sup> See, e.g., *The State (Burke) v Lennon* [1940] IR 136, 155.

<sup>11</sup> See, e.g., *Salah v Netherlands* (2007) 44 EHRR 55, para. 68.

a preamble for Victoria Charter of Human Rights and Responsibilities Act 2006. The Committee proposed that the Charter,

should ... include a preamble that sets out the community values that underpin it. In this form, the Charter could be used in schools and for broader community education, such as for new migrants to Victoria.<sup>12</sup>

The Committee added, 'The preamble serves as an overarching statement of values underpinning the Charter and could be a useful educative and interpretive tool'.<sup>13</sup>

Similarly, the Australian Capital Territory Bill of Rights Consultative Committee recommended that the Australian Capital Territory Human Rights Act 2004 contain a preamble, on the basis that the 'value' of the legislation would be 'enhanced by the attachment to [it] of a short, simply written preamble that sets out in plain English the purpose of the law'.<sup>14</sup>

## CHAIR'S PROPOSAL

1. The Bill of Rights should have a short preamble at its beginning.
2. The Preamble should contain the following elements:
  - the historical context giving rise to the Bill of Rights, in particular, the human rights violations and suffering associated with the conflict in Northern Ireland;
  - the dignity and equality of all human beings and their entitlement to the full enjoyment of all human rights and fundamental freedoms on a just and equal basis;

---

<sup>12</sup> *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, November 2005, p. ii.

<sup>13</sup> *Ibid.*, p. 23, para. 1.5.

<sup>14</sup> *Report of the ACT Bill of Rights Consultative Committee*, May 2003, p. 5, Recommendation 2.

- the responsibility of human beings and communities to act towards each other with mutual respect consistent with their human rights and fundamental freedoms;
- the relevance of international and European human rights standards;
- the role of the Bill of Rights as an expression of hope for a positive future, and in promoting reconciliation, tolerance, mutual trust, and the protection of the human rights of the people living here, and the values of partnership, equality and mutual respect.