

## **The interpretations that establish the constitutional judiciary and the role of the constitution in it**

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### **Abstract**

It is useful to say that the interpretation of the constitutional texts is a must to keep pace with the renewal, and some may object to the idea of the constitutional role of the judge as he interprets the constitution without strictly adhering to the letter of the texts on the grounds that creating new provisions means making the constitution bear what is not in it, which is in violation of the principle of separation of powers. Such a possibility is mentioned in constitutions that are new to democracy, as the procedures for amending the constitution may be difficult, so the interpretation developed by the judiciary is the solution, because the constitution is not written for a specific generation. The constitution because it includes the general philosophy on which the constitution is based. In order to implement this, the constitutional judiciary has interpreted the constitution in a way that is considered a development in the provisions of the constitution, so that it has created new provisions and changed other provisions with the new reality, in many countries of the world, and this is why the preamble plays an important role in this aspect, because it contains guiding, philosophical and explanatory rules that the judiciary uses. In the structural interpretation that develops the provisions of the constitution.

**Keywords:** Law; constitutional judiciary; explanatory rules

### **Introduction**

It is possible to reconsider the interpretation of constitutional rules according to scientific developments, economic progress and political change. It is illogical to limit these rules to traditional issues that are outdated and not to include emerging issues. Reconsideration or the developed interpretation is possible and not impossible because it also leads to the noble goals and the contents of the constitutional rules. Interpretation is a spirit and a text, not just a text, and the one who reconciles the spirit and the text is the trustee of justice, because he is the one who obeys the legal rule through interpretation in order to It is valid to keep pace with new cases for the purpose of protecting a right worthy of legal protection, or the interpretation aims to reveal a provision that must exist so that the legal rules are alive and responsive to reality and not far from it, and that this is useful when the constitutional rule can be interpreted and developed without having to process Constitutional amendment every time, the amendment may not be possible at one time due to circumstances.

The structural interpretation approach makes the constitutional rules alive and permanent and responds to developments and developments through interpretation, but this approach may entitle the judges to a high degree in deciding the moral principle complementing the text of the constitution. Does it reflect the judges' desire to adopt their own beliefs in judicial rulings? While the rest of the curricula do not give judges this advantage as the literal and intentional approach, but the jurisprudence may be necessary, but does this jurisprudence affect the developed interpretation of the principle of separation of powers?

## **The first requirement**

### ***Distinguishing between structural and non-structural jurisdiction***

It is necessary to distinguish between two types of interpreted judiciary, the first is the judicial rulings arising from the interpretation of the text, and the second is the judicial rulings arising in the context of the texts, and the latter is the structural judiciary, as it is not subject to higher oversight considering that it is outside the framework of stable judicial interpretation, and it is noted that this judiciary has the advantage of being He always tries to link between judicial developments and the evidence derived from texts, no matter how far from them, and thus this judiciary can end up in a text, even if it is remote, even if the relationship that links the judicial trend to the text at the time of its emergence is close to the impossibility for the observer of the text at the moment of its emergence and not for a moment Interpretation. (P. Deumier., 2017. n. 170)

It is noteworthy that the criterion for distinguishing between judicial interpretation and structural judiciary lies in the nature of the relationship that links the text itself to the judiciary

From that, the US Federal Supreme Court focused on completing what is emerging through the developmental interpretation of the constitutional rules, and not limited to the rigidity of the texts drawn up by the founding fathers. (Stewart, 2010, p. 196)

For example, the Supreme Court in the United States of America ruled the structural pattern at a constitutional moment born 32 years after the entry into force of the Constitution in 1787. Perhaps the court saw in it the need to add a jurisdiction of a financial nature to the federal authorities that is not expressly provided for in the Constitution, due to the necessity of growing the competencies of the federal authorities financially during that period in light of the political and legal conflict between the union and the states. In the case of "McCoults" v. Maryland in 1819, the court ruled to grant the federal authorities implicit powers not directly provided for in the constitution, including the power to establish financial banks, and the court relied in deriving this provision To the twelfth paragraph of the eighth paragraph of Article One of the Constitution of the United States of America, which states that Congress has the power to make all laws that are necessary and appropriate to carry out the aforementioned powers, although some jurisprudence affirmed in this regard that "the Constitution did not provide for this power." Clearly and explicitly, but this authority was due to acceptable conclusions of the mandates delegated at that period. (Khaled, 2012, pp. 60-61)

The facts of this case are summarized in the establishment of a national bank in the United States of America in 1791, due to the economic crises that the country was facing at the time. A state that has the power to impose taxes on financial institutions located in its territory, the legislative authority in the state of Maryland has imposed a tax on, including the branch of the National Bank, as it is unlicensed, as well as imposed an annual fine of \$ 15,000, and the representative of the branch of the National Bank in the said state did not comply with this decision and refused pay this tax, so the state government proceeded to file a lawsuit against

the bank demanding it to pay the tax, and the state also objected in the same lawsuit to the authority of Congress to establish the bank, claiming that there is no explicit constitutional provision authorizing Congress such authority. The state of Maryland decides to impose the said tax on a branch of the National Bank, and the representative of the National Bank in the state filed an appeal to the Federal Supreme Court, claiming that the decision In order for the state to impose taxes, the Federal Supreme Court examined the matter and concluded that the actions issued by Congress are not only a direct application of the express texts as much as they are facilitating the application of one or more of the explicit competencies, and that the Congress's authority to establish the National Bank is based on the implicit exercise of the constitutional texts (Holterman, 2005, pp. 16-17).

Therefore, the position of the Constitutional Court in Italy did not escape the jurisprudence's opposition to the constitutional judge's commitment to stable judicial interpretation, as jurisprudence affirms that the judiciary should grant freedom of interpretation, whether in the face of texts, whatever the circumstances, and the judge in the eyes of this jurisprudence should be given the freedom to freely reconstruct the facts of the dispute In order to confront it with the applicable legislative rule, and it is certain that such freedom inevitably requires that the judge be able to rebuild the content of the legal rule by interpreting it in a way that is relatively independent from the past and does not deviate from the principles, but rather generates new rulings that are consistent with the new without canceling and replacing the legal rule, and this is what It establishes the idea of the permanence of the vitality of legal rules and their ability to develop automatically, and it is closer to the spirit of justice (zanaj, 2010, p413), given that the provisions of the judiciary protect freedoms and rights constitutionally, because the state has two constitutions, the first is the political and the second is the lofty document, which requires the continuation of the relationship between them, a continuous and sophisticated interpretation ( zou, 2021. p85)

### ***The second requirement: the effectiveness of the constitution's preamble in the constructive role of judicial interpretations***

The meaning of the constitution's preamble or preamble refers to the first preamble, which includes - in most cases - an explanation of the history of the people, their national, religious and cultural identity, their lofty goals and lofty ideals, the source of sovereignty in the state, and the principles, values and directions towards which the people aim, and through which the shape of the state is drawn. The nature of the system of government and the foundations and general features of the state, whether at the level of its internal or external policy (Faruqi. 2007. p92), and we will explain the functions of the preamble mainly and its relationship to the explanatory function, then we refer to a number of preamble phrases for some constitutions:

## **The first section**

### ***the relationship of the preamble to the explanatory function :***

The preamble to the constitution aims at three functions, the first is a celebration of a new or emerging constitution that achieves national unity. Objectivity is a source of rights; hence the preamble occupies a prominent position in aiding interpretation as the first documentation of the beginning of the constitutional moment in the life of the state. (El-Shinawy, 2020, p. 10) This is why the preamble is described as keeping pace with subsequent eras as it includes principles, whether those principles are in a written constitution Or not, for example, that the British Constitution was absolutely not codified in a written document that reflects the political theories of a particular group of men or the bias of a certain era, as it

includes declarations and legislative milestones witnessed in its historical development from the “Magna Carta” to the Statute of Westminster. (Amery. 1964. P.1)

In the modern era, the interest in drafting the preamble to constitutions has increased to the extent that it contained the quotation on rights and freedoms that were not included in the other texts in the lofty document. By looking at these introductions as an objective source of rights, or as a wise guide to the interpreter of the constitution.

It is noteworthy that the analysis of a sample of fifty democratic countries showed that the majority of them included formal preambles in their constitutions. Constitutions that do not include a preamble often include organizational articles that contain texts with the same contents as introductions and preambles, and in the form of introductory issues.

In our minor belief, we do not support the belief that the preamble to the constitution includes general, guiding, non-binding provisions, given that the preamble to the constitution is not just theoretical terms, as it was not placed in vain and out of intellectual luxury. Hence, the preamble to the Constitution is the chief appointee of the constitutional judge in clarifying the purposes and extracting the meanings and represents an interpretative reference for it, as the principles and rules can be drawn through the words and indications mentioned in the preamble, and through its flexible phrases that accommodate the supreme constants, allowing the constitutional judge while he is trying to interpret the Constitution to delve into deepening Commitment to these concepts and to reduce the restrictions that limit the activation of these ideals.

For example, we find that the preamble to the 2005 Constitution of Iraq included several phrases that could be made an appropriate reference in the constitutional interpretation. It emphasized the adoption of the democratic framework in governance, the management of religious and cultural diversity, the emphasis on the (fair) distribution of national wealth, and the embrace of the principle of the rule of law. Considering neutrality closer to the constitutional approach of establishing friendly relations with the external environment, and other democratic principles, and then the constitutional judge should develop and develop interpretations that are consistent with the constitutional moment in which the preamble was formulated, given that the preamble includes general frameworks and guiding provisions that guide everyone involved in applying the preamble. Constitution and giving its provisions the importance of application to all other rules.

In general, the legal moment that outlines the frameworks of the state and the visions of transformation in it are embodied at the beginning of documenting this moment, which is a dividing line between the past and the present, between the ended era and the future that is on the horizon. As this point of view reflects the narrow-mindedness and visions of the one who amends the lofty document or the platform for its interpretation, he neglected or neglected this opinion that the legal rules themselves are the product of a supreme philosophy that derives its existence from the legal moment in which it was formed, and therefore the sublime value of the preamble is considered the substantive substantiveness of the entire constitution Considering that the preamble is a source of many rights and freedoms, but rather it is the last resort of the constitutional judge, through which he can approve principles that are intractable to the provisions of the constitution itself.

In historical moments in the problems of implementing democracy, the preamble to the Iraqi constitution for the year 2005 fed the court’s rulings, which the Federal Supreme Court followed. The preamble to the constitution included: Takfir and terrorism did not deter us from

moving forward to build a state of law, nor did sectarianism and racism stop us from marching together to strengthen national unity, pursue peaceful transfer of power, adopt a method of equitable distribution of wealth and grant equal opportunities to all.

### *The second section*

#### *Examples of explanatory phrases in the preamble of some constitutions:*

A number of phrases of an explanatory, indicative nature were included in the constitutions. For example, the preamble to the 2005 Constitution of the Republic of Iraq stated: “Let us make our new Iraq, the Iraq of the future, without sectarian strife, racism, regional complexity, discrimination or exclusion. We are moving forward to build the rule of law. To consolidate national unity, pursue peaceful transfer of power, adopt the method of equitable distribution of wealth, and grant equal opportunities to all. Looking forward with confidence to its future through a pluralistic, democratic, republican system. On respecting the rules of law, achieving justice and equality, rejecting the policy of aggression, taking care of women and their rights, children and their affairs, spreading a culture of diversity, and defusing terrorism. He decides, by his own freedom and choice, to unite himself. Commitment to this constitution preserves for Iraq its free union as a people. land and sovereignty.”

Perhaps these ends are found in the conscience of the group, that pronoun often expressed in the folds of the preamble to the constitution, and then the interpretation of any text related to a topic of lofty goals should be subject to interpretation in the light of these goals, even if the apparent words are different, considering that The criterion of (the foundational moment) revolves around existence and non-existence with the momentary circumstances that accompanied the writing of the constitution and showed the main borders and lines of latitude in which I want to write the constitution exclusively, so that moment would inevitably rule over interpretation (Kluwer, 2014. P79).

The lofty principles can be clarified through the preamble to the constitution (Menno, 1997.p48), because they include the guiding provisions, and they are of a supreme philosophical value and not an intellectual luxury or mere slogans because the constitution has a supreme legal value and that the principles contained in it express the conscience of the community in what they believed in and expressed. Through their representatives in writing the constitution.

For example, the American Constitution of 1787 wrote its preamble by saying: “We, the people of the United States, may constitute a more integral union. The French Declaration of the Rights of Man and the Rights of the Citizen of 1789 embraced the sovereignty of the nation in paragraph (3) that: “The nation is the source of all sovereignty; no individual or body may exercise power except on the grounds that it emanates from it.”

As for the Constitution of the Republic of Iraq for the year 2005, “. we walk together to strengthen national unity, pursue peaceful transfer of power, and adopt the method of equitable distribution of wealth. We, the people of Iraq, have just risen from their repression, and are confidently looking forward to their future through a federal, democratic, pluralistic republican system. We resolved, with our men and women, our old men and youth, to respect the rules of law and achieve justice and equality.”

And in the preamble to the Constitution of the United Arab Emirates of 1971. And also desiring to lay the foundations of federal government during the coming years on sound foundations, in line with the reality of the Emirates and its capabilities at the present time. in

order to advance our country and its people to the position that qualifies them to occupy their proper place among civilized countries. and its nations (Fikry, 2001, p. 314.)

In the preamble to the German Basic Law of 1949 the German people, in the exercise of their constituent power, aware of their responsibility before God and men, and inspired by the determination to promote peace as an equal partner in united Europe, have approved this Basic Law.” In the preamble to the Turkish Constitution of 1982 The fact that sovereignty is fully and unconditionally vested in the Turkish nation and that no individual or body authorized to exercise this sovereignty in the name of the nation should deviate from the free democracy referred to in this Constitution and the legal system established by its requirements.

As for the preamble to the Constitution of Brazil of 1988, it stated, “The establishment of a democratic state seeks. to refer to brotherhood or solidarity to ensure the exercise of social and individual rights, freedom, security, well-being and development, equality and justice as lofty values in a fraternal, pluralistic and impartial society, based on social harmony...”. In the preamble to the Constitution of the Swiss Confederation of 1999, “.and that the strength of a group is measured by the well-being of its weakest members.”

## **Conclusion**

The structural interpretation of the constitutional judge depends on the formulation of the constitutional text. The relationship may be direct between the issue in question and the text to be interpreted, meaning that the text talks about that issue, but the relationship may be indirect between the text and the issue, the matter here is related to the structural judiciary, and such The type of relationship often appears when there is a long time lag and cumulative events between the time of the text's origin and the time of its interpretation. That is why the constitutional judge can play a role similar to implicitly amending the constitution through developmental interpretations of the constitution, in other words (the constitutional judge balances the text and the moment of its application when he interprets the constitution.

It became clear that the most prominent role in the structural interpretations is due to the preamble of the constitution, because it includes the principles and general philosophy of the constitution, and therefore it is the basis that paves the way for the structural interpretation, which in turn harmonizes and through which the constitutional judge performs a process (reconciliation) between the constitutional text, no matter how long it is, and the moment of its application. . This will lead to preserving the life of the constitution, avoiding repeating the amendments, and overcoming the political crises that occur due to the failure to carry out the constitutional amendments for political reasons, so this interpretation will be the renewal and developer of the provisions of the constitution. And the constitutional judge is more worthy of this task because of the principle of judicial independence, which is the guarantee of just interpretations.

That is why we suggest that the law of the Federal Supreme Court in Iraq be legislated and that it includes a text allowing the constitutional judiciary to follow this explanatory approach, especially since the Iraqi constitution of 2005 stipulated the competencies of the Federal Supreme Court, including the interpretation of the constitution, and emphasized the independence of the judiciary.

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