The Legislator's Monologue - Notes on the History of Preambles

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NOTES ON THE HISTORY OF PREAMBLES

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"Nothing seems to me more dull or more foolish than a law with a preamble."¹ Such was Poseidonius's opinion in the first century B.C. About 2000 years later, however, an entirely different sentiment was common: "The guiding principles," in other words, the prologues, "of the legislators of our time are, directly and in the most intensive way, positive law." This statement was said in 1935 by Carl Schmitt, the leading German scholar in constitutional law and political theory of the Third Reich.² So, what is the matter with introductions to laws which one calls prologues, preambles, prefaces, preludes, or prooimia? Are they silly and boring as Poseidonius said, or of utmost importance and direct legal validity as Schmitt claimed? Two laws and their preambles serve as examples and historical cornerstones for a short analysis of the history of preambles. Both laws happen to be concerned with economy. First, this Article discusses the Edict on Prices of the emperor Diocletian in A.D. 301.³ Second, this Article addresses the law on merger of the European Council in A.D. 1989.⁴

¹ Nihil videtur frigidius, nihil ineptius quam lex cum prologo, quoted by Seneca, 94th letter, Seneca VI (Loeb) 36. Poseidonius argues for short laws: "For a law should be brief, in order that the uninitiated may grasp it all the more easily ... Warn me, tell me what you wish me to do! I am not learning but obeying." (ibid.); Seneca disagreed on this point.
² C. Schmitt, "Kodifikation oder Novelle? Über die Aufgabe und Methode der heutigen Gesetzgebung," in: Deutsche Juristenzeitung, 40.Jg., Heft 15/16, 1935, 919-925: "Die Leitsätze des heutigen Gesetzgebers sind unmittelbar und in der intensivsten Weise positives Recht" (923). That "Leitsatz" (guiding principle) is the German word for "prologue" or "preamble" is explained by Schmitt: "Ein erstes, besonders wichtiges Kennzeichen des neuen Stils sind die richtunggebenden, das Gesetz tragenden Leitsätze ... Solche Leitsätze werden heute meistens noch 'Vorsprülche' oder 'Präambeln' genannt ..." (922: "The first and extremely important feature of the new [i.e. the national socialist] style are the guiding principles, which support the law ... These Leitsätze are still nowadays usually called 'Vorsprüche' or 'preambles ...'").
I. DIOCLETIAN’S EDICT ON PRICES

Galloping inflation, supply shortage, a monetary crisis, staggering prices, and the avarice of the well-to-do motivated the emperor Diocletian to intermingle in the economic process. He fixed the maximum prices for goods and wages, and had more than 1000 prices chiseled in stone slabs, of which 126 pieces have been excavated since the eighteenth century. The text was written in Greek and Latin so that no citizen, merchant, or craftsman could argue not to have understood the edict, which was set up on the forum or the agora of the towns.

Diocletian’s Edict on Prices is sensational in two respects. First, it is the first law that tried to influence and guide the economic process completely,\(^5\) i.e., in respect of all essential goods and geographically the whole empire.\(^6\) Second, Diocletian is the first Roman emperor who decorated his laws with extensive preambles.\(^7\) He introduced his Edict on Prices with a prologue—a text of five pages in print—that was approximately ten meters on stone. Although some scholars regarded the prologue as “extremely pompous,”\(^8\) others considered it

\(^5\) Emperors before Diocletian had, of course, more than once interfered in economics, also by fixing maximum prices, \textit{cp.} the evidence in \textit{Lauffer, supra} note 3, at \textit{5 n.19}. But, in these earlier cases we are dealing with locally and time limited subsidies, privileges, and distributions of money and goods, and thus with distributive acts and not, as in the case of Diocletian, with a general normative act. This difference was pointed out by K. Bücher, “Die diokletianische Tax-ordnung vom Jahre 301,” \textit{Zeitschrift für die gesamte Staatswissenschaft} 50 (1894) 189-219 (195). The extraordinary range of Diocletian’s edict also is emphasized by Giacchero (\textit{supra} note 3), 96f.: “... di un gigantesco, quasi sovrumano, sforzo quale forse mai, di tanta ampiezza, fu tentato nella storia del mondo antico.” The importance of the edict in this respect was rather played down by P. Herz, \textit{Studien zur römischen Wirtschaftsgesetzgebung. Die Lebensmittelversorgung}, Stuttgart 1988, 215, who sees it in the tradition of the preceding legislative activity which was “merely” extended.

\(^6\) Because pieces of the edict were found in the Eastern part of the empire only, it was presumed that it was published only there. However, the emperor himself understood his edict as an imperial law for the whole empire: \textit{Placet igitur ea pretia ... ita totius orbis nostri observantia contineri}, Pr. L116-118.

\(^7\) Most of the pre-Diocletian imperial constitutions are delivered through only Justinian’s Code, where prologues presumably were cut off. Thus, we are not on absolutely firm ground for the assumption that, only with Diocletian, prologues became a fashion in legislation. On the other hand, the evidence by inscriptions and papyri shows that before Diocletian the emperors (perhaps with the exception of Augustus) were rather timid and reserved in formulating preambles (\textit{cp.} G. Ries, \textit{Prolog und Epilog in Gesetzen des Altertums}, München 1983, 162-185). \textit{From} Diocletian himself two further prologues are delivered, one to his law on marriages (= Mosai-carum et Romanarum legum collatio 6.4, in: \textit{Iurisprudentia antejustiniana}, ed. E. Hutschke, E. Seckel, B. Kübler, (Leipzig 1911, repr. 1988), and the other one to his edict against the Manichees (\textit{ibid.} 15.3).

\(^8\) Bücher, \textit{supra} note 5, at 192 (“außerordentlich schwülstig”).
“written in a correct and skillful style of the chancery.” The prologue explains the motives and aims of the edict.

According to Diocletian, the Romans had been freed—with the help of the deities and the efficiency of the emperor—from an external enemy. But, after they obtained this freedom they were confronted with an even more cruel internal adversary: the greed and avarice of certain people. According to Diocletian, this terrible vice raged against everybody without any respect for mankind (sine respectu generis humani, Pr. 1.27-28), and without care about the needs of the common welfare (nullum communis necessitudinis habere dilectum, Pr. 1.37-38). Furthermore, against all hopes and expectations, the human kind (humanitas ipsa, Pr. 1.46) was not able to heal itself (ipsa se emendaret humanitas, Pr. 1.53), or be healed through the “laws of nature” (iura naturae, Pr. 1.52). Therefore, Diocletian stated that he and his co-emperors were forced to interfere, because “we are the fathers of mankind!” (parentes sumus generis humani, Pr. 1.44-45). Inhabitants of our provinces,” Diocletian exclaimed, “the sorrow for general humanity persuades [us] to set limits to the greed of those people” (eorum avaritiae modum statui, provinciales nostri, communis humanitatis ratio persuadet, Pr. 1.84-85). Thus, the text declared that whoever, in selling or buying, exceeded the fixed prices, or worse, hoarded up goods causing an artificial shortage, would—because human nature rarely appreciates a beneficial rule voluntarily—be punished by the death penalty (Pr. 1.129-136).

All components of good rhetoric are used by Diocletian. The introduction’s praise of recent fortunate events and imperial success puts the audience in a kind mood. Then, the narration dramatically describes the evil deeds of avaricious men. Next, the argumentation tells why the emperor was forced to act. This argumentation is followed by a short epilogue that explains that the emperor fought against certain individuals for the welfare, not only of single towns, provinces, or people, but of “the whole world” (sed universo orbi provisum esse videatur, Pr. 1.149-150). The text culminates with the message that there is no hope and no salvation for mankind except through the benevolent and forceful intervention of the emperor. Thus, the preamble appears as an attempt to convince the audience of the necessity, the efficiency, and the legitimacy of the law which followed.

9. Lauffer, supra note 3, at 3 (“in sprachlich korrektem, kunstvollem Kanzleistil”).
10. For an analysis of the text, see Ries, supra note 7, at 186-190.
II. The European Regulation of Merger

Today's Europe is somewhat smaller than Diocletian's Roman Empire, but is hardly easier to administer and govern. To regulate or de-regulate the economy and the movement of goods within the European provinces has always been the main assignment of the rulers of the Union: the Commission, the Council, and the Court. One of the newest products of these efforts is the "Regulation on the control of concentrations between undertakings." The Council of the European Community introduced the regulation—as it did in the case of all preceding laws, provisions, and directives—with a preamble. The text of five printed pages, which is about the same size as Diocletian's preamble, explains to the public the reasons, the necessity, and the goals of the law: the Council had observed changes in the structure of the European market, which "must be welcomed as being in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living." But, the Council also is obliged and legitimized (according to Articles 87 and 235 of the Treaty) to prevent lasting damage to competition as a consequence of this process of reorganization. Therefore, the Community law must provide rules which guarantee that efficient and free competition is not affected. These rules are necessary because the decisions of the European Court of Justice, though useful and commendable, are no longer sufficient. Case law has to be substituted by general provisions. These provisions must take into consideration the often contradictory interests between the undertakings and the individual Member States. The preamble aims to achieve a delicate balance of national policies and supranational economic structures, establishing the European Commission as the fair guardian and empowered judge over both of them. Because big companies are no more able and ready than the avaricious human nature to appreciate beneficial regulations, "the compliance with this Regulation must be enforceable by means of fines and periodic penalty payments." All in all, the preamble outlines a concept of competition under the conditions of antagonistic national and economic interests.

Although the prologues of European regulations certainly maintain the tradition of international treaties in style and language, it is

obvious that this tradition has merged with the rhetorical pattern of preambles nearly 2000 years older. The solemn opening remarks (exordium)\(^1\) are followed by the narration of past experience and present problems (narratio). Then, the aim and the legitimacy of the specific regulation are explained (argumentatio) to make the provisions (dispositio) understandable and acceptable.

The structural affinity of an ancient and a modern preamble raises the question of why these rather pompous texts are written, and why ancient, as well as modern legislators, thought it necessary and appropriate to introduce and explain the legislative program to the public. Indeed, Poseidonius seems to stand alone with his belief that there was nothing as dull and foolish as laws with a preamble. To understand why legislators spent their time drafting prologues while others preferred to issue bare laws, a short survey of the history of preambles between antiquity and modern times may be helpful.\(^13\)

III. FROM PLATO TO THE MIDDLE AGES

In the “Politeia,” education, reason, and virtue appeared as the main warrant for the desirable social and political order. In the “Nomoi,” Plato switched to legislation as a means of control and enforcement.\(^14\) However, the idea that man can be convinced to act reasonably and virtuously is partly maintained also in the “Laws.” Here, Plato criticizes that “no legislator has ever yet observed . . . to make use in their law-making of two methods,—namely, persuasion and force. . . . In their legislation they do not temper compulsion with persuasion, but used untempered force alone.”\(^15\) But Plato also states that like all utterance—music, as well as oration—legislation too should be preceded by a prelude. Accordingly, Plato differentiated “unblended law” (nómos ákratos) and “persuasive law” (peistikós nómos), calling the latter the “prelude to law.” The function of the prelude was:

\(^{12}\) “Having regard to the Treaty establishing the European Economic Community . . . Having regard to the proposal from the Commission, . . . Having regard to the opinion of the European Parliament, . . . Having regard to the opinion of the Economic and Social Committee . . . .” Preamble of the Regulation of Merger, supra note 4.

\(^{13}\) The studies of Ries (for Antiquity, supra note 7), Fichtenau (mainly for the Middle Ages, infra note 23), Hunger (for Byzantium, infra note 19), and Walder (for the Ancien Régime and the French Revolution, infra note 31) were extremely helpful for the present paper. For modern times, see D. Rethorn, “Verschiedene Funktionen von Prämien,” in: Studien zu einer Theorie der Gesetzgebung, ed. J. Rödig, Berlin-Heidelberg-New York 1976, 296-327. Rethorn’s analysis, however, lacks a solid historical background.

\(^{14}\) Cp. Ries, supra note 7, at 104ff.

\(^{15}\) The Laws, 722B-C (Loeb).
To ensure that the person to whom the lawgiver addresses the law should accept the prescription quietly—and, because quietly, in a docile spirit—that, as I supposed, was the evident object with which the speaker uttered all his persuasive discourse. . . . The lawgiver must never omit to furnish preludes, as prefaces both to the laws as a whole and to each individual statute. . . . One ought to preface each enactment with the prelude that naturally belongs to it—for the statement that is to follow the prelude is one of no small importance, and it makes a vast difference whether these statements are distinctly or indistinctly remembered.\textsuperscript{16}

The preamble, thus, should be written for three reasons: to put the recipient in the right mood, to meet the professional standard of rhetoric, and to sharpen the reader’s memory for a certain statement by explaining its specific motives.

Discussions on the value of preludes and the relation of force and persuasion continued after Plato;\textsuperscript{17} in practice, however, preambles came into fashion slowly. There are some examples of rather short and sober introductions in the early Roman Empire, but the grand career of preambles began only with Diocletian in the late third century.

As we have already noticed, Diocletian used his preamble to the Edict on Prices for various purposes. The following example helps illustrate the various messages that a preamble could convey. Justinian I, legislating in the year A.D. 535 on inheritance and statutory shares, declared in the introduction to novel 1:

\begin{quote}
We are troubled with the care for the whole Empire and take heed of affairs of no small importance as: how the Persians can be appeased, if the Vandals and the Moors will obey, how the people of Carthago will keep their recuperated freedom, and how the Tzani, who were recently and for the first time subjugated to the Roman Empire, will become perfect subjects—[a conquest] which God had never granted to the Romans until the days of our emperorship. [While we take care of all this,] our subjects inundate us continuously with their private problems to each of which we reply by an appropriate decision. But, what has the advantage to help frequently in single cases may—summarized in a general law—also serve everybody in similar cases. Regarding this as useful, we pro-
\end{quote}

\textsuperscript{16.} \textit{Ibid.} 723A-C (Loeb).
\textsuperscript{17.} \textit{Cp.} the Greek and Latin literature in \textit{Ries, supra} note 7, at 113ff. Cicero adopted Plato’s theory in \textit{De legibus} 2.6.14:

\begin{quote}
But I think that I should follow the same course as Plato . . . . Therefore, before I recite the law itself, I will speak in praise of that law. I note that Zaleucus and Charondas did the same thing . . . . Clearly Plato agreed with their opinion that it was also the function of law to win some measure of approval, and not always compel by threats of force. (Loeb, Cicero, vol. 16, 387). On the famous preambles of Zaleucus and Charondas, see R. Dull, “Prooimia Nomon,” in: \textit{Studi in memoria di Emilio Albertario}, vol. 1, Milano 1953, 315-333 (322ff.) and \textit{Ries}, 83-87, 117f.
vide a law and thus enable the subjects to help themselves instead of always demanding an imperial order.\textsuperscript{18}

In these few lines, Justinian characterizes himself as very busy and responsible for the welfare of the empire.\textsuperscript{19} He also hints at God's special fondness of him. Furthermore, the emperor gives a short report on the political situation of the "nation," reminding his audience of recent successes. Finally, he shows his benignity, and his paternal care for the citizens, who only with the help of the farsighted emperor—the father of mankind, as Diocletian formulated it—can be helped and help themselves.

Plato recommended writing preludes so that the audience might accept the law in a quiet and docile spirit. Justinian, however, does not worry about the acceptance of his law, which he considers to be a donation to the people. Rather, he uses the opportunity for a "one-man-show" of imperial rectitude and dignity. Like Diocletian, he imparts to his audience an impression of the luck and the greatness of the empire.

Justinian's repertory of topics in preambles was extraordinarily huge. Nevertheless, one constant characteristic was the declaration that imperial power is of divine derivation, from which follows, according to the Eusebian concept, the emperor's duty—and right!—to imitate God on earth.

Divine origin of political power, paternal solicitude for the subjects, and the commemoration of historical events are the characteristics of Latin preambles of the early Middle Ages as well. For example, The Edict of King Rotary (a.D. 643) begins:

I, Rotary, in the name of God, most magnificent man and seventeenth king of the Langobards . . . How much we cared and still solicitously care for the welfare of our subjects becomes clear from the tenor of the following text. [This is true] especially with respect to the constant oppression of the poor as well as the exaggerated collections by those who hold superior power. That they [the poor] have to endure force, we know well. Considering this and with the grace of the omnipotent God we were anxious to issue the following improved law which renews and amends all former ones and which adds what was lacking and cuts off what was superfluous. We intend to have it bound in one volume, so that everybody may peacefully live according to law and justice and, having faith [in such a life], will struggle against the enemies and defend himself as well as his

\textsuperscript{19} Restlessness for the sake of the subjects is a prominent feature of prooimia; see the examples in \textit{H. Hunger, Prooimion. Elemente der byzantinischen Kaiseridee in den Arengen der Urkunden}, Wien 1964, 94ff.
country. Nonetheless and be it as it is, we thought it useful for the
memory of future times to have the names of our predecessors—
since in our nation of Langobards kings were proclaimed—noted
down in this parchment, in so far as we know them from our ances-
tors. The first king was Agilmund of the Gugingus stirpes, the sec-
ond Laamisio... the seventeenth is I, Rotary, king in the name of
God, son of Nandinig of the Harode stirpes.20

This preamble refers to God, imperial magnitude, and “national”
memory—three prominent categories of preambles that neither Plato
nor Poseidonius ever imagined. As was true for Justinian, the pro-
logue also served Rotary21 as a declaration of creed, as a document of
imperial legitimacy, and as a record of history.

If we take a look at the High and Late Middle Ages, we are con-
fronted with thousands of preambles.22 Fichtenau, nearly forty years
ago, paved the way through this jungle,23 so that a few remarks on the
main features suffice: the catalogue of the topoi by which the ruler
describes himself becomes stereotyped; it is the ancient catalogue, in-
cluding the cardinal virtues of benignity, clemency, moderation, hu-
manity, prudence, soliciitude, and piety. These virtues, derived from
the ancient Greek philosopher-king, were then ascribed to Roman
emperors, and later to the Christian God, from where they reflected
on earth as virtues of the emperors of Late Antiquity as well as the
Middle Ages. An example from Charles VI (a. 1414) states:

20. Ego in dei nomine rotari, uir excellentissimus, et septimo decimum rex gentis
langobardorum... Quanta pro subiectorum nostrorum commodo nostro fuit sollici-
tudinis cura, et est, subter adnexa tenor declarat; precipe tam propter adsiduas fatiga-
tiones pauperum, quam etiam superfluas exactiones ab his qui maiore uirtute habentur;
quos uim pati cognouimus. Ob hoc considerantes dei omnipotentis gratiam, neces-
sarium esse prospemixim presentem corregere legem, quae priores omnes renouet et
emendet, et quod deest adiciet, et quod superfluum est absicidat. In unum preuidimus
volumine conpletendum, quatinus liceat unicuique salua lege et iustitia quiete uiuere,et propter opinionem contra inimicos laborare, seque suosque defendere fines. Tamen
quamquam haec ita se habeant, utilem prospemixim propter futuris temporis
memoriam, nomina regum antecessorum nostrorum, ex quo in gente nostra
langobardorum reges nominati coeperunt esse, in quantum per antiquos homines
didicimus, in hoc membrum adnotari iussimur. Fuit primus rex agilmund, ex genere
gugingus. Secundus laamisio... Septimusdecimus ego in dei nomine qui supra rotari
rex, filius nandining, ex genere harodos.

Quoted from Die Gesetze der Langobarden, Ubertragen und bearbeitet von F. Beyerle,
Weimar 1947, 2ff.

21. For the close relationship between the two prologues, see B. Paradisi, “Il prologo e
l’epilogo dell’editto di Rotari,” in: idem, Studi sul Medioevo Giuridico, vol. I, Roma 1987, 189-

22. Cp. the 3856 prologues in: Arengenverzeichnis zu den Königs- und Kaiserurkunden von
den Merowingern bis Heinrich VI. Zusammengestellt von H. Hausmann und A. Gawlik,
München 1987 (Monumenta Germaniae Historica, Hilfsmittel 9).

23. H. Fichtenau, Arenga. Spätantike und Mittelalter im Spiegel von Urkundenformeln,
Graz-Köln 1957.
One of the main virtues by which all rulership is guarded... is the virtue of prudence; because of prudence earthly politics are donated and entrusted to rulers and governors. Because of prudence they have knowledge of past events and access to the past, an experienced feeling for things to happen in the present and... foresight into ventures which may take place. With this virtue and by means of it, with justice, strength and moderation, all kingdoms must be governed.\(^{24}\)

The catalogue was copied more and more, whereby, after the rediscovery of Roman law, preambles of Late Antiquity frequently served as direct models. One of the more popular topoi was the restless care for the empire and the subjects, as was common in Justinian's preambles as well as, *exempli gratia*, in a prologue of Charles IV (a. 1324):

> Besides the continuous care and immense solicitudes which oppress the office of imperial majesty it was at our convenience to think about the condition of the inhabitants of our Empire, so that... the beatitude of tranquility and calmness may flourish among them.\(^{25}\)

The preamble became a symbol of rulership, whose shape changed as little as that of any other visible symbol, such as the crown, dress, and the rite of ceremony. The freely styled narration of the specific reasons for a law, privilege, or treaty, or the history and pre-history in general became rare. Instead, the collective memory is fed for centuries with stable, rather abstract symbols.

Thus, compared to prologues in Antiquity and Early Middle Ages, which transmitted the creed, the magnitude of the ruler, and the recent or not so recent history, the messages of High and Late Middle Age preambles changed: they told the audience of the *longue durée* of emperorship, of everlasting identity, of timelessness, and of self-evidence. The Christian Empire had achieved its stability. Rather than making docile the spirit of the audience for a new law, the preamble of the Middle Ages provided a persistent self-assurance that nothing ever changes.

24. L'une des principaux vertus par lesquelles toutes seignouries sont gardées... est la vertu de prudence, par laquelle sont données et administrées aux seigneurs et gouverneurs des polices terriennes, connaissance des choses faictes et avenues ès temps passez, sentiment par experience des choses qui aviennent ès temps présens et... provision contre les aventures qui pevent escheoir,... sous laquelle vertu et moyennant icelle, avecques justice, puissance et moderâtion, doivent tous royaumes estre gouvernez.

Quoted from *Fichtenau*, supra note 23, at 185.

25. Inter curas assiduas et immensas sollicitudines, quae ministerio regiae maiestatis incumbunt, de statu regnicolarum nostrorum cogitare nos convenit, ut... vigeat inter omnes tranquillae beatitudo quietis.

Quoted from *Fichtenau*, supra note 23, at 185.
A quite different situation emerged in the contemporary East, which—in comparison with the medieval West—preserved the full vir-
tuosity of preamble-drafting. The Greek tradition certainly kept the
classical register of topoi and virtues, but Byzantine emperors by no
means failed to vary and to supplement them. Masterpieces can be
found in the 113 novels of Leo VI (886-912), where approximately
two-thirds of the whole text consists of preambles. His law on thieves
of public property, where he replaced the death penalty with a milder
punishment gives a taste of his style (Nov.105):

> It is right that punishments and penalties established by the laws put
in order what is lawless, and repulse those, who are inclined toward
crime, from their tendency to do evil. But, it is good when the pun-
ishment preserves the philanthropy which is due to laws. Thus, the
punishment should neither withdraw from this principle nor contra-
dict it, nor should it show a most rough attitude under the pretext to
chasten. A father, as long as he punishes his guilty child in a philan-
thropical manner, should be praised for his foresight and chastise-
ment. But as soon as he gives up the attitude of a true father, and
punishes his child not with paternal humanity, but in a cruel way, he
no longer brings up the child like a good father and does not de-
serve any applause for his harshness. If, then, the laws are indeed
like fathers—and this is so—then it follows logically that they must
also fix the penalties in the proper relation to the crimes committed.
And they must not impose a violent punishment which exceeds the
crime. Where, in fact, would legitimate education be, where would
be the healing, if somebody were sentenced to death who was not
convicted of having caused somebody else's death? And the doc-
tors do not brusquely vote for the amputation of limbs, but the laws
which incomparably promise sympathy, greater than the sympathy
of doctors—if indeed the aim of the latter is taking care of the bod-
ies, the laws benefit the soul as well as the bodies—how could they
show such cruelty against those whom they propose to heal?27

The old motive of a good father is varied in Leo's text: the em-
peror had occupied this role since Roman imperial times, but now the
laws take over this position. Through this shift, Leo touches upon the
archaic concept that not the ruler as a person is the "animated law"
(nómos émpsychoi), but rather that the law itself is the ruler of every-
thing.28 The motive of "care for body and soul" too is old, but nor-

26. See the examples in Hunger, supra note 19.
28. "Nómos ho pánton basileús thanátón te kai athánatón" ("Law, the lord of all, mortals
and immortals"), Pindar, fragment 169 (The Odes of Pindar [Loeb] 604).
known since Greek Antiquity. Consequently, although Leo used traditional topics, he combined them in a new manner: his preamble is not the well-known veneration of the superb emperor, but a declaration of reverence for what is greater—the law. In other prologues, Leo speaks generally of humanity, equality, justice, and liberality, in other words, of values rather than of (imperial) virtues. He thereby sketches a global concept, a philosophy of society: "We think it right that those who contribute equally to the common welfare should also partake equally in the privilege of legal rights according to which akin citizens live in freedom" (Nov.40, 163/5-7). Or: "If it is typical for a law to assign to each individual that to which he is entitled [suum cuique distribuere] how could something be called a 'law' which does not do this?" (Nov.29, 117/4-5).

Remember Plato: Certainly, these magnificent preludes may put the reader in a docile spirit. But here they achieved much more. Leo's preambles are large-scale propaganda, not for a tiny regulation, but for a whole Weltanschauung.

Summarizing thus far: from Antiquity until the High Middle Ages we have seen different types of preambles that served several functions. Preambles of Late Antiquity constructed and confirmed the emperor's image, as well as the history and idea of an empire. Then, preambles of the Western Middle Ages slowly moved to stereotypes and symbols that solidified the concept and guarantee of stability and continuity. Finally, the inventive preambles of the medieval East designed new programs for a better society.

What Plato could never have known turns out to be the central purpose of all these preambles, apart from their important differences discussed above: the text before the law became the best opportunity for a ruler to express his idea of himself, of his country, and of the basic principles of government. Where else but in preambles did an emperor have a better chance, and a nicer platform to express his personal maxims or his commitment to safeguard common convictions and the status quo? In other words, one could say that preambles fulfilled the job that later would be done by constitutions.

29. See the examples in Hunger, supra note 19, at 130ff.
IV. THE FRENCH REVOLUTION

On September 27, 1789, the same year the French Revolution began, and the National Assembly (La Constituante) established itself, Louis XVI issued a decree containing the following preamble:

Louis, by the grace of God king of France and Navarre, to whom it may concern, salve! The National Assembly which partakes in our solicitude and our worry about the expense of grain and the difficulties of its distribution within the kingdom, thought it necessary to issue several dispositions in its orders (arrêtés) of August 29th and September 18th, which we were supplicated to sanction. Turning to these and other matters, and with the advice of our council and according to our own firm knowledge, unlimited power and imperial authority, we have said, declared and ordered, and by the present documents, signed by ourselves, we say, declare and order that we wish and approve what follows . . . .

This preamble perfectly reflects the new situation. Although the National Assembly now proposed new laws, the king still claimed to have full power and authority in legislation, treating the Assembly as a new, but not entirely different form of his traditional royal council. Obviously, because of the apparent conflict, this state of affairs could not endure. And indeed, in October of the same year, 1789, discussions began in Parliament about the role of the king in the new legislation. Robespierre pleaded for the most radical solution:

You can no longer agree, Mister Robert-Pierre said, to the form of royal decrees, nor to the formula which is used in the old declarations. It is impossible to reconcile the national law with the forms which have been employed up until today: de notre pleine puissance [by our unlimited power], car tel est notre plaisir [because this is our pleasure]. I would prefer that all decrees of the legislative power be formulated in the uniform terms of laws and that the formulas used before today for the promulgation of laws are abandoned. They should be replaced by a noble and simple formula which points out that it is national law and expresses the sacred character of law. I propose that after the words “Louis, King of the French people”


32. Louis, par la grâce de dieu, roi de France et de Navarre, à tous ceux qui ces présentes lettres verront, salut. L’assemblée nationale, partageant notre sollicitude et nos alarmes sur la cherté des grains et les difficultés qu’éprouve leur circulation dans l’intérieur du royaume, a cru devoir décréter diverses dispositions par ses arrêtés des 29 août dernier et 18 septembre présent mois, qu’elle nous a supplié de sanctionner. A ces causes et autres à ce nous mouvant, de l’avis de notre conseil et de notre certaine science, pleine puissance et autorité royale, nous avons dit, déclaré et ordonné, et par ces présentes, signées de notre main, disons, déclarons et ordonnons, voulons et nous plaît ce qui suit . . . .

Quoted from Walder, supra note 31, at 145f.
one copies literally the decree of the National Assembly which ends with the words: “This law shall be inviolable and sacred for everybody”; it shall be sealed by a uniform seal and sent to the courts, administrative boards and municipalities in order to be read, published and executed.33

Robespierre also proposed alternative formulas to be used by the king, such as: “Here then, people, the law, which your representatives have made and to which I added the royal seal.”34 He argued against the “absurdly despotic”35 traditional formula, and thereafter the question arose whether the king should have any rights at all, especially the right of absolute veto, in legislation. The majority did not follow Robespierre.36 Instead, in the session of October 8, 1789, it adopted the ideas of the more moderate Mirabeau:

I confess that presently I do not see any reason for nations to refrain from the old formulas, especially in so far as they appeal to religious feelings and cannot have bad consequences. Certainly, [the terms] “firm knowledge,” “absolute power,” and “to our convenience,” are not to be accepted and are not up-to-date. They offend the common sense. A “firm knowledge” which constantly varies, changes, and contradicts itself, an “absolute power” which vacillates, retrogrades and cannot do anything, [these terms] belong to despotic regimes. But the words “by the grace of God” are in reverence of religion, a reverence which all peoples of the world owe. It is a religious model without any danger and should precisely be conserved as a meeting-point of human beings. . . . If kings are kings by

33. Oeuvres de Maximilien Robespierre, tom. VI: Discours 1789-1790, M. Boulolseau, G. Lefebvre, A. Soboul, eds., Paris 1950, 111:
Vous ne pouvez plus vous contenter, disoit M. Robert-Pierre, de la forme des arrêts du conseil, ni [de] la formule usîtée des déclarations anciennes. Il est impossible de concilier le droit national avec les formes employées jusqu'à ce moment, de notre pleine puissance, car tel est notre plaisir. Je voudrois que tout les décrets du pouvoir législatif soient exprimés par le terme uniforme de loi, que les formules usitées jusqu'à présent dans la promulgation des loix soient abolies; que les formes soient remplacées par une forme noble et simple, qui annonce le droit national et le caractere sacré de la loi. Je propose qu'apres ces mots, Louis, Roi des Françoys, on transcrire littéralement le décret de l'Assemblée Nationale, terminé par ces mots: Que cette loi soit inviolable et sainte pour tous; il sera scellé d'un sceau uniforme, adressé aux tribunaux, aux assemblées administratives, et aux municipalités, pour être lu, publié et exécuté.

34. “Peuple, voici la Loi que vos représentants ont faite et à laquelle j'ai apposé le sceau royal,” ibid., 113.

35. Ibid.: “Ici M. Robespierre s'est élevé contre les formules absurdement despotiques . . .”

36. Gazette Nationale, ou Le Moniteur Universel, no.69 du 8 au 9 octobre 1789, 283:
Mr. Robespierre proposes an amendment on which he speaks long-windedly amidst the tumult which incites the differences of opinions. He tires the Assembly by the redaction of a too nice formula and he always wanted to read it when people were not quiet, and he did not read it when everybody was silent. His formula seemed to most members of that sort which one calls “caustic.” (“M. Robespierre propose un amendement, sur lequel il parle long-temps au milieu du tumulte qu'excite la divergence des opinions. Il fatigue l'Assemblée par la rédaction d'une formule très-plaisante, et qu'il voulait toujours lire quand on ne se taisait pas, et qu'il ne lisait pas quand on faisait silence: sa formule a paru telle à plusieurs membres, qu'ils l'ont appelée caustique.”)
the grace of God, nations are sovereign by the grace of God. One can easily reconcile both principles: first of all, preambles must be banished from the laws. As long as just one individual person legislates in his name and according to his will, he, of course, seeks consent. But, the representatives of the people speak in the name of the people and express the general will (volonté générale). Therefore, it is sufficient that they state this will so that everybody obeys. This is the formula which I therefore propose: “Louis, king of the French people by the grace of God and the constitutional law of the nation! In accordance with the deliberations and the will of the National Assembly, we order the following . . . .”

Additionally, although a few members of Parliament vigorously argued that the king owed his dignity to the people instead of God, the “royalist” party won the battle. It referred to the high cultural value of kingship and its long tradition as explained by Mirabeau:

We are by no means savages who arrive naked at the shore of the Orinoco to establish a society. We are an old nation and certainly too old for the times. We have a pre-existing government, a pre-existing king, and pre-existing prejudices.

It was the memory of a nation, the sense of its ever-lasting cultural identity, which prevented the Assembly—at least for the time being—from eliminating the intitulatio, and with it the king as the master of legislative power. Instead, Louis XVI was expelled by the people who stormed the king’s palace, the Tuileries, on August 10, 1792. The next day, “the Assembly decreed that from then on all de-

37. A présent j’avoue que je ne vois aux Nations aucun intérêt à renoncer aux formules anciennes, surtout lorsqu’elles portent sur des sentiments religieux, et ne peuvent avoir de mauvaises conséquences, sans doute celle-ci: certaine science; pleine puissance; tel est notre plaisir, n’ont pas été respectées, et ne pretendent pas l’être aujourd’hui; elles heurtent le bon sens; une certaine science qui sans cesse varie, essaie et se contredit, une pleine puissance qui vacille, retrogradent, et ne peut rien, n’appartient qu’à la chancellerie du despotisme. Mais ces mots, par la grace de Dieu, sont un hommage à la religion, et cet hommage est dû; par tous les Peuples du monde, c’est un plan religieux sans aucun danger, et précieux à conserver, comme point de ralliement parmi les hommes. . . . Si les rois sont rois par la grace de Dieu, les Nations sont souveraines par la grace de Dieu. On peut aisément tout concilier: d’abord, tout préambule doit être banni des lois. Lorsqu’un seul ordonne en son nom, et d’après sa volonté, il est tout simple qu’il cherche à se rallier les opinions; mais les représants de la Nation, parlent au nom de la Nation, et expriment la volonté générale, il suffit donc qu’ils l’exposent pour qu’on y obéisse. Voici la formule que je propose: “Louis, par la grace de Dieu, et par la loi constitutionnelle de l’Etat, roi des Français, conformément à la délibération et au voue de l’Assemblée nationale, nous ordonnons ce qui suit . . . .”

Gazette Nationale, ou Le Moniteur Universel, no.69 du 8 au 9 octobre 1789, 283.


Quoted from Walder, supra note 31, at 150.
crees shall be printed and published without a preamble and... that they be signed by the Minister of Justice in the name of the Nation.”

This first and, as far as I know, only explicit prohibition of preambles in history, makes, of course, perfect sense. There was no more king, and therefore no longer an author to write and issue preambles. Furthermore, and more important for the future of the genre of prologues, there was no more addressee of preambles. Since the people, and only the people, held the legislative power, why should they write a prologue to instruct themselves about why, how, by which right, and for which purposes they had made a law? Or, to recall Plato, why should they put themselves in a “docile spirit” to receive and accept a law issued by themselves? It was exactly this merger of law-giver and law-recipient, the idea of the volonté générale, that caused the end of preambles.

It did not take too long for the rest of Europe to follow in France’s footsteps. The idea of democracy, spreading out in most European countries in the course of the nineteenth century, eliminated the art of persuasion by preambles because there was nobody left to be convinced of that which he himself had decided. Consequently, neither the European codifications of the nineteenth century, nor other major law codes, were introduced by prologues. Conversely, however, it is not by chance that preambles kept their regular and genuine place in constitutions, as constitutions are political agreements or contracts, rather than legislation.

V. PREAMBLES IN THE TWENTIETH CENTURY

And the people at Brussels? As I showed in the beginning, the European Union continued with the old technique of drafting preambles in their legislation, ignoring the sudden death of this genre in the French Revolution. This death, however, was actually only a suspended animation. Preambles were revived more than once in the twentieth century. To illustrate in which situations and for what reasons Plato enjoyed a comeback, I offer four prominent examples from:

39. “L’Assemblée décrète qu’à compter de ce jour, tous ses décrets seront imprimés et publiés sans préambule, et... signé par le ministre de la justice au nom de la nation.” Décret no.2, Aug. 11, 1792 (No.2021), Collection générale des Lois, tom. III.2, Paris 1818, 609. Cp. also the decree of Aug. 15, 1792 (No.2080), ibid., 633: “The promulgation of laws shall be made in the following form: The decrees of the National Assembly bear the title of the law; no kind of formula shall precede; they end with the following formula only: ‘In the name of the nation...’” (“La promulgation des lois sera faite dans la forme suivante. Les décrets de l’Assemblée nationale seront intitulés du nom de loi; ils ne seront précédés d’aucune formule, et seulement terminés par la formule suivante: ‘Au nom de la nation...’”).
(1) the Third Reich; (2) the legislation of the Allies after the Second World War; (3) the German Democratic Republic; and (4) the recent legislation in Germany and Europe.

1. The Third Reich

Although it is hardly possible to translate the preamble kitsch produced by the chief instructors of Nazi ideology, I will try to give you at least a taste. The preamble of the law on hunting, which was initiated by Hermann Göring, reads:

Love for nature and its creatures, and the pleasure of walking in the woods and fields have deep roots in the German people. Built on ancient Germanic tradition, the noble art of the German hunt was developed in the course of centuries. For the eternal future, game and hunting shall be preserved for the German people as precious German Volksgüter. The love of the German man for his native soil shall be thereby deepened, his vitality strengthened, and he shall recover from daily work . . .

It is easy to recognize in this short example some familiar features: the recurrence to national history and identity; and the figure of the ever-caring paternal legislator. Dozens of preambles were written during the Nazi era, and some of them convey the tone of urgency, use the terms of drama, and include invocations and feelings of solemnity that can compete with the preambles of Diocletian, Justinian, Rotary, and Leon VI. Others are short but powerful:

The institution of professional officialdom, is one basic pillar of the national socialist state, rooted in the German people, pervaded by a national socialist Weltanschauung and linked in faith to the Führer of the German Reich and people, Adolf Hitler.


Reichsgesetzblatt I, supra note 40, at 549.

42. See the already long list for the years 1933-1939 in H.-H. Dietze, Der Gesetzesvorspruch im geltenden deutschen Reichsrecht, Berlin-Wien 1939, 107ff.

43. Deutsches Beamtengesetz, Jan. 26, 1937, Reichsgesetzblatt I, 39:

The future of the German people depends on its youth. The total German youth must therefore be prepared for their duties to come.\textsuperscript{44}

Instilled with the idea that the purity of the German blood is the condition of the continuance of the German people, and inspired by the unbending desire to secure the German nation for all future, the Reichstag has unanimously voted for the following law . . . \textsuperscript{45}

The aim of the training of future lawyers [Rechtswahrer] is the education of a servant of the law, with thorough knowledge about his profession and of irreproachable character, who lives among and with the people, and who is willing and able to be their incorruptible and unerring helper and leader for the lawful arrangement of their lives. To achieve this, the training must seize the whole person, must bring body and spirit into pleasant harmony, must stabilize the character and strengthen the mind. The Volksgemeinschaft must become an unforgettable experience for the youths, and the training must provide a wide-ranging knowledge on the basis of which solid professional skills can be set up.\textsuperscript{46}

Do these qualify as “dull and foolish,” as Poseidonius said? Perhaps the rhetoric of nature and hunting appears silly to modern readers. Yet, the rhetoric of these texts certainly is not ridiculous. Most of what was said in these preambles became wicked reality for twelve years. Reality was the totalitarianism announced in nearly every one of the Nazi preambles: the urge to take hold of the whole individual for the sake of the Volksgemeinschaft; the seizure of body and mind; and the usurpation and elimination of individuality in favor of conformity (Gleichschaltung). These preambles do not care for the “docile spirit,” nor are they a means of soft persuasion. They are tough, demanding, and aggressive propaganda.

\textsuperscript{44} Gesetz über die Hitlerjugend, Dec. 1, 1936, Reichsgesetzblatt I, 993:
Von der Jugend hängt die Zukunft des Deutschen Volkes ab. Die gesamte deutsche Jugend muß deshalb auf ihre künftigen Pflichten vorbereitet werden.

\textsuperscript{45} Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre, Sept. 15, 1935. Reichsgesetzblatt I, 1146:

\textsuperscript{46} Justizausbildungsordnung, Jan. 4, 1939, Reichsgesetzblatt I, 6:
Ziel der Ausbildung des Rechtswahrers ist die Heranziehung eines in seinem Fach gründlich vorgebildeten, charakterlich untadelhaften Dieners des Rechts, der im Volk und mit ihm lebt und ihm bei der rechtlichen Gestaltung seines Lebens ein unbestechlicher und ziel sicherer Helfer und Führer sein will und kann. Um dies zu erreichen, muß die Ausbildung den ganzen Menschen ergreifen, Körper und Geist zu gutem Zweiklang bringen, den Charakter festigen und den Willen stärken, die Volksgemeinschaft im jungen Menschen zu unverlierbarem Erlebnis gestalten, ihm eine umfassende Bildung vermitteln und auf dieser Grundlage ein gediegenes fachliches Können aufbauen.
To understand the inflation of preambles during the Nazi Regime, we need to look at how the contemporary jurists treated the relation of law and politics. Educated in the Weimar Republic, the jurists remembered perfectly well that prologues had been discredited in democratic times: "As time went by the prologue descended to a legally meaningless phrase and was generally made a laughing stock as monologue of the legislator."47 This occurrence was so, they argued, because it did not make sense to explain the meaning of a law which represented a "mere formal order deprived of sense."48 While the former laws "resulted from compromises and were therefore diluted and aimless," Nazi-legislation established "signposts" and "flares."49 Moreover, although the jurists knew that political enlightenment and information were mainly the business of the newly erected Department of Propaganda,50 nobody doubted that preambles—as we are reminded nearly literally of Plato's words—were the appropriate place to persuade the people, not merely to force them.51 Further-


Denn wenn der Zweck eines Vorspruchs darin besteht, den geistigen Grundgehalt des ihm folgenden Gesetzes kurz darzulegen, so konnte es eine derartige Einweisung in den Sinn eines Gesetzes dort nicht geben, wo die Sinnlosigkeit des 'Kampfes aller gegen alle' herrschte und wo das Recht zur sinnentleerten Formalordnung erstarrte.


51. For example Dietze, Vom Wesen, supra note 47, at 1552 and 1553:

The laws do not want to force the people, but to guide and convince them. Therefore it is reasonable to publish the program of a law in the law itself, so that everybody may inform himself about the purposes of the legislator and may support the legal regulations by joining the legislator in giving them actively and creatively concrete shape. For this aim preambles prove to be the most suitable means. . . . They tie a new bond of confidence between people and state. (die "Gesetze wollen das Volk nicht zwingen, sondern lenken und überzeugen. Daher liegt es nahe, den Plan eines Gesetzes im Gesetz selber mitzuteilen, damit jeder Einzelne sich von den Zielen des Gesetzgebers unterrichten und die gesetzgeberischen Maßnahmen selber aktiv und schöpfervor mitzutun in der Gestalt des Gesetzgebers helfen kann. Die Gesetzesvorsprüche erweisen sich als hierfür hervorragend geeignete Mittel. . . . Sie knüpfen ein neues Band des Vertrauens zwischen Volk und Staat") . . . .

In the first place one must notice the importance of preambles for the legal education of the people . . . . They meanwhile gained acceptance as remedy against the people's
more, preambles were supposed to bind the judges to certain purposes, \(52\) and “prevent that the law in practice and execution becomes disloyal to the political will.” \(53\) The preamble had to keep the law’s will, i.e., the Führer’s political will, \(54\) on the right track—this is why Carl Schmitt, quoted earlier, \(55\) was so anxious to declare that the prologue is “directly and in the most intensive way positive law.” \(56\) The invasion of Nazi preambles and the rise of their status to “positive law” signified that in these years lawyers, judges, and the entire legal system, became directly bound to a more or less diffused political program:

The binding power of preambles is generally accepted nowadays, one is even prone to regard the preamble as the most important part of the law, because . . . preambles serve to articulate circumstances which one cannot formulate in the imperative language of law sections. \(57\)

unfamiliarity with law which is at least as large as the law’s unfamiliarity with the people used to be. (“sie haben sich inzwischen als ein Mittel zur Behebung jener Volksfremdheit des Volkes durchgesetzt, die mindestens ebenso groß wie die Volksfremdheit des Rechts war”).

52. For example Hedemann, supra note 50, at 27: “Always also the judge is addressed [by the preamble] and thereby invited to adopt its maxim. This is a commitment.” (“Immer aber ist auch der Richter angeredet und damit eingeladen, sich diesen Spruch zu eigen zu machen. Das ist Bindung.”).

53. Freisler, supra note 49, at 62: “In Wirklichkeit sind diese Vorsprüche und Programmsätze gerade das, was dem Gesetz Richtung gibt; sie verhüten, daß es in seiner Anwendung und Ausführung dem in ihm niedergelegten politischen Willen untreu wird.”

54. “The law is the Führer’s program and will; every single legal rule which is promulgated can be put down to the Führer” (“Das Gesetz ist Plan und Wille des Führers, jeder Rechtssatz, der erlassen wird, läßt sich auf den Führer zurückführen”), Wachtendorf, supra note 40, at 20; “In the national socialist Reich laws became an instrument of leadership which shapes by this means the order of the community. By its origin laws are decisions of the Führer . . .” (“Im nationalen sozialistischen Reich ist das Gesetz ein Instrument der Führung, die mit seiner Hilfe die Ordnung der Gemeinschaft gestaltet. Es ist seinem Ursprung nach eine Entscheidung des Führers . . .”), C. Dernede, “Die Bedeutung der Gesetzesbegründungen für die Rechtsanwendung,” in: Reichsverwaltungsblatt 58 (1937) 509-511 (511).

55. See supra note 2.

56. There were rather subtle discussions of the question if the preamble had to be regarded as “the law itself,” “part of the law” [Gesetz], or “law” in general [Recht]. Cp. for example, K. Pracht, Der Gesetzesvorspruch, Diss.iur. Erlangen 1937, 108ff. and Wachtendorf, supra note 40, at 20ff. The question was an academic one as far as it was mostly agreed that the preamble had obliging force in either case. The even higher value of the preamble as Recht, not Gesetz, is pointed out by Pracht, 112ff., whose book is one of the meanest and most primitive products of these years.

57. Die Rechtsverbindlichkeit der Gesetzesvorsprüche ist daher heute allgemein anerkannt und man neigt sogar dazu, die Präambel für den wichtigsten Teil des Gesetzes zu halten, weil . . . die Gesetzesvorsprüche zur Umschreibung von Sachverhalten dienen sollen, die man nicht in die befehlende Form des Paragraphen gießen kann.

It hardly could be said any clearer: the division of law and politics, painstakingly elaborated in the nineteenth century, was annulled, and the union re-established—with all the terrifying consequences. The preambles of the Third Reich were, in the most intensive way, a means to constitute a new revolutionary order; they were, as a contemporary saw it,\(^{58}\) no less than the substitute for the non-existing national socialist constitution.

2. Postwar Legislation of the Allies

When the nightmare ended in 1945, one of the first Allies' enactments was the repeal of Nazi laws.\(^{59}\) Although twenty-five laws were annulled completely, others were kept. But, for the latter, the British Military Government made sure that the laws were interpreted and applied according to their plain wording, which meant explicitly that their preambles had to be disregarded.\(^{60}\)

Conscious of the effects of preambles, the Control Council began to draft prologues right away. Whereby most of its laws began with the plain formula: "The Control Council enacts as follows," several topics appear to have required, or at least prompted, a preamble. Some of the prologues restrict themselves to short explanations of the law's reason:

- In view of the extreme shortage of coal and other fuel, the Control Council enacts as follows: . . . \(^{61}\)
- In order to make reasonable provision for the protection, expansion, survey, allocation and utilization of existing housing space, the Control Council enacts as follows: . . . \(^{62}\)

Other prologues present reasoning on the grounds of mismanagement:

The Control Council, disturbed by the increased incidence of cases of venereal disease and convinced that one of the causes of this in-

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58. *Hedemann, supra* note 50, at 23f.: "National socialism, as one knows, refrained consciously and clearly from squeezing the ingenious new construction of the state into the general constitutional declaration. . . . Later, at moments of highly political affairs, single laws of constitutional character did not refrain from preambles." ("Der Nationalsozialismus hat bekanntlich bewußt und klar darauf verzichtet, den genialen Neubau des Staates in ein allgemeines Verfassungs-dokument einzuzwängen.").


crease lies in the ineffectiveness of the German law at present in force, directs as follows... 63

But, aside from these rather simple texts—the addition or non-addition of which seems erratic—we also find preambles of high political tension, for example the famous Law number 46, dated February 25, 1947:

The Prussian State which from early days has been a bearer of militarism and reaction in Germany has de facto ceased to exist. Guided by the interests of preservation of peace and security of peoples and with the desire to assure further reconstruction of the political life of Germany on a democratic basis, the Control Council enacts as follows: Article 1: The Prussian State together with its central government and all its agencies is abolished... 64

The statement that Prussia was a "bearer of militarism and reaction" certainly is plausible. Nonetheless, it had long become the business of historians, not of legislators, to pronounce such sophisticated opinions. In a preamble, the sentence represents a damnatio memoriae of a state which was already dead, but whose ghost still needed exorcism. The judgment on the past and the official declaration of death are connected with the shaping of future on a democratic basis. Thus, the short ensemble expresses the control over the past, the present, and the future.

The same combination of judging the past, planning the future, and acting presently can be found in the earlier preamble of the Law number 9, dated November 30, 1945:

Providing for the Seizure of Property owned by I.G. Farbenindustrie and the Control thereof:
In order to insure that Germany will never again threaten her neighbours or the peace of the world, and taking into consideration that I.G. Farbenindustrie knowingly and prominently engaged in building up and maintaining the German war potential, the Control Council enacts as follows... 65

We have seen that preambles since Diocletian's times have served the collective memory by reminding the audience of recent or ancient events, and also constructing the history of the people. The preambles of the Allies, on the contrary, make and write history for a different purpose: these preambles present a definition of what was wrong in the past and what will be right in the future. Their reference to the past was not, as we had known it so far, affirmative and conservative,

64. Official Gazette of the Control Council for Germany no.14, 262.
but rather normative: *historia magistra vitae!* Indeed, the Allies acted both as historians and magistri of a people which had given up the basic principles of civilized behavior and humanity:

By the elimination of the Hitler tyranny by the Allied Powers the terrorist system of Nazi Courts has been liquidated. It is necessary to establish a new democratic judicial system based on the achievements of democracy, civilization and justice. The Control Council therefore proclaims the following fundamental principles of judicial reform which shall be applied throughout Germany. I: All persons are equal before the law . . . .66

The Germans quickly copied this new fashion of applying historiography and stating future prospects in preambles. The “Law on Liberation from National Socialism and Militarism” begins:

National Socialism and militarism have exercised a despotic regime in Germany for twelve years, have committed the gravest crimes against the German people and the whole world, have plunged Germany into poverty and misery, and have destroyed the German Reich. Liberation from National Socialism and militarism is the indispensable condition for political, economic, and cultural recovery. During the months which followed the capitulation, the American military government carried out the removal and exclusion of Nazis and militarists from government and other offices . . . .67

Obviously, there was a strong need to formulate the disaster as well as the more recent events for the reconstruction. Consequently, the preambles served as confessions as well as elements of hope.

3. *German Democratic Republic*

Far from these rather naive and credulous confessions and statements are the preambles of the German Democratic Republic (GDR) legislation, which surpass even the Nazi-prologues in frightening fantasy, disgusting phraseology, and pompous propaganda.68 For example:

67. Gesetz zur Befreiung von Nationalsozialismus und Militarismus, Mar. 5, 1946, in: Gesetz- und Verordnungsblatt für Groß-Hessen, 1946, Nr.7-8, 57:

68. GDR preambles seem not only to pick up the Nazi-German tradition of preamble-drafting, but also to join a specific socialist skill in this field. See Cs. Varga, “The Preamble: A Ques-
The aim of the uniform socialist system of education is the high education of the whole people, the formation and education of universally and harmoniously developed socialist personalities, which consciously will shape social life, reform nature, and lead a full and happy life befitting a human being.69

Of course, we already have seen the well-known greedy grab for the individual human being. But, GDR preambles exceeded the traits of preambles since the time of Plato in one decisive feature: the declaration of the full party manifesto combined with statements on the recent and actual political situation in the world. Here is an example from the preamble of the labor code of 1961:

The labor code regulates the new socialist labor conditions in the first German Arbeiter-und-Bauern-Staat, the German Democratic Republic. This state is the product of the working class, which is guided by the revolutionary Marxist-Leninist party and which, together with the cooperative farmers and the other working strata, holds the power. This German state, the only legitimate one, has drawn lessons from two World Wars, the lessons from the history of our people. The basis of imperialism and militarism was pulled out at its roots. Thereby, the contradiction of the interests of the peace-loving working people and the interests of imperialists was once and forever extinguished in the German Democratic Republic. In the German Democratic Republic the working class liberated itself from capitalistic exploitation and raised itself to the class, which together with its allies, controls the state and the economy and guides the masses in consciously shaping their destiny. With the liberation from exploitation and suppression the working class achieved fundamental freedom for itself, for the working farmers, the intelligentsia, and all other working strata . . . . But because of the domi-

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69. Gesetz über das einheitliche sozialistische Bildungssystem, Feb. 25, 1965 (Gesetzblatt I, 83): 1:

Das Ziel des einheitlichen sozialistischen Bildungssystems ist eine hohe Bildung des ganzen Volkes, die Bildung und Erziehung allseitig und harmonisch entwickelter, sozialistischer Persönlichkeiten, die bewußt das gesellschaftliche Leben gestalten, die Natur verändern und ein erfülltes, glückliches, menschenwürdiges Leben führen.
nance of the imperialists in West Germany, there remains a basic contradiction between the peaceful interests of the people and the imperialistic interests of monopolistic capital. . . . The exploitative and predatory character of monopolistic capital is the reason for the aggravation of class struggle and international conflicts. . . . With the help of militarism, and by use of fascist methods, the German monopolistic capital tries to secure its dominance. It seeks its rescue in the alliance with the financial capital of the USA and gave up the national interests of the German people. In Germany, two social systems fight each other, capitalism and socialism. The historic assignment of the first German Arbeiter-und-Bauern-Staat in this struggle provides evidence of the superiority of socialism for the whole German people. . . . The socialist labor relations, though, are so far developed that for the first time in Germany a concise labor code became possible and necessary. . . . By codifying the rights and duties of workers in the period of struggle for the victory of socialism in the German Democratic Republic, labor law gains an active role in the development of productive capacities and the perfection of the conditions of socialist productivity. It helps to develop further socialist labor discipline and morals and it supports the education and self-education of the working people as they become new, socialist human beings.70

70. Gesetzbuch der Arbeit der Deutschen Demokratischen Republik, Apr. 12, 1961 (Gesetzblatt I, 27), revised: Apr. 17, 1963 (Gesetzblatt I, 63):
This monstrous preamble—I quoted only a small part of its six pages—was published a few months before the Berlin Wall was built. It is a record of history as well as a newspaper commentary, a party platform, and an appeal for stronger commitment from the people. Overall, it represents one of the many outbursts of socialist rhetoric made on the radio, in the stadium, at the party convention, or, as evidenced here, in a preamble. Plato’s advice that preambles should provide “docile spirit” was long forgotten, as was the lesson from the French Revolution to refrain from preambles because an autonomous people does not need them. Instead, these preambles resembled those of Diocletian and Justinian. They legitimized rulership, told the history of the struggle against enemies, polarized the good and bad, and demonstrated that somebody was taking care of the “destiny,” the education, and self-education of the people.

4. Recent German and European Preambles

From the examples of Nazi and GDR preambles, one might easily get the impression that preambles in the twentieth century are a specific feature of totalitarian systems. This impression, however, is incorrect. Without a doubt, totalitarian societies produced monstrous preambles without a restraint of shame: they had a message to tell. Democratic societies were much more scrupulous. Normally, in modern West-German preambles, the few messages that one might find are bashfully “hidden” in the first section of a law:

The aim of adult education is to enable adults and young persons to enlarge, renew, and deepen their knowledge and abilities in order to meet the demands of daily life, a profession, and social activities.

This preamble is short and inconspicuous, but tells something of the political program and its expectations: there are demands for which adults have to be prepared. In other words, nobody is supposed to enlarge his knowledge just for fun.

aktive Rolle bei der Entfaltung der Produktivkräfte und der Vervollkommnung der sozialistischen Produktionsverhältnisse. Es hilft, die sozialistische Arbeitsdisziplin und Arbeitsmoral weiterzuentwickeln und fördert die Erziehung und Selbsterziehung der Werktätigen zu neuen, sozialistischen Menschen.

71. For further examples, see J. Rödig, E. Baden, H. Kindermann, Vorstudien zu einer Theorie der Gesetzgebung, Gesellschaft für Mathematik und Datenverarbeitung Bonn, 1975, 107ff.
72. Hessisches Erwachsenenbildungsgesetz, June 24, 1974, § 1:
Ziel der Erwachsenenbildung ist es, Erwachsene und Heranwachsende in die Lage zu setzen, ihre Kenntnisse und Fähigkeiten zu erweitern, zu erneuern und zu vertiefen, um den Anforderungen gerecht zu werden, vor die sie in Leben, Beruf und gesellschaftlicher Tätigkeit gestellt sind.
The Hessian law of 1974 regarding legal education declares its purpose in a form which, contrary to the majority of similar declarations, clearly bears the title "preamble":

The aim of the reform of legal training is the critical, enlightened and rational lawyer, who is well aware of his duty to uphold the free democratic and social Rechtsstaat, and who is able to realize the objectives of the law in action.\[^{73}\]

Short and concise as it is, this preamble still reveals traces of the spirit of 1968: rationality, enlightenment, and responsibility. Consequently, although legislators may have been "bashful," there is no preamble that can hide its socio-political context and commitment.

This outcome is true also for the preamble of every law, directive, and regulation issued by the European Union, as one last example demonstrates. This example is the "Antidumping and Subsidies Regulation"\[^{74}\] of 1988, which has a five page preamble. Part of the preamble is concerned with history: "Whereas experience gained from the implementation of Regulation (EEC) No. 2176/84 has shown . . . ."

The main matter of concern to the Council, however, is to "clarify," "confirm," "lay down," "provide," and "define" what it thought was "appropriate" (fifteen times), "necessary" (thirteen times), "advisable" (five times), "desirable" (three times), and "essential" (two times). Then, of course, the law does exactly what the preamble longs for. So, is this redundant harangue? In a community of nations which had been getting used to—since the French Revolution—issuing plain laws, expecting their citizens to obey plain laws, and adopting the custom of storing the political reasons and arguments for their laws in minutes and records for the sake of future historians, in such a community, I think, the publication of this material in a preamble is neither a redundancy, nor a meaningless coincidence. Instead, I have the impression that the Member States of the European Union feel the need to set up their own history, wrap up their conflicts and compromises in the unanimous words of the preamble, document their minimio consent, and convince, if not the public, at least themselves that their laws are rational and just. I will try to explain this phenomenon in a summary of the history of preambles.

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73. Hessisches Juristenausbildungsgesetz, Mar. 12, 1974:
Ziel der juristischen Ausbildungsreform ist der kritische, aufgeklärte rational handelnde Jurist, der sich seiner Verpflichtung als Wahrer des freiheitlich demokratischen und sozialen Rechtsstaats bewusst ist und der in der Lage ist, die Aufgaben der Rechtsfortbildung zu erkennen.

VI. An Attempt at Conclusion

The obvious diversity of preambles in Antiquity, the Western and Eastern Middle Ages, and modern times clearly does not allow any general interpretation. Accordingly, a few remarks suffice on structurally common features.

Preambles from the time of Plato always indicated and attested the current relation between ruler and subjects, of authority and obedience, of those holding the power of definition and those being defined, of those writing history and those being objects of history. Furthermore, preambles shaped and reflected the basic principles of non-constitutional political societies. Then, with the French Revolution, the abolition came of the difference between law-giver and law-recipient, and preambles disappeared. Their subsequent appearance is for two different reasons.

First, in fully developed democratic societies with elected parliaments, preambles, at least symbolically, indicate a relapse into pre-democratic times. This lapse can be explained best, I suppose, by an atavistic desire of political rulership, the desire to immortalize itself in the law, to not emancipate it from political paternity, and to make sure that the political will be documented (on stone or paper) and observed forever. We now know that this desire usually turned out to be an illusion. Therefore, preambles to laws which pass debate in parliament simply look naive. Rooted in political pathos, they are more an emotional lapse than a serious relapse into non-democratic traditions.

Apart from these rather innocent cases, preambles also may indicate that something is wrong in the democratic basis of legislation—a suspicion which in most of the mentioned twentieth century cases appears not to be totally groundless. Well-operated parliaments used to have debates in public and then publish laws, without further comment or guideline. In doing so, they do not forget the insight and the message of the French Revolution: people do not need to be enlightened or need to instruct themselves in the reasons of legislation promulgated by themselves. Non-parliamentary legislation, on the contrary, compensates for the lack of public discussion with a published monologue. This result seems to be true regardless of the reasons for the lack of parliamentary procedure, be they the totalitarianism of the Third Reich and the GDR, the exceptional situation of the Allies in postwar-Germany, or the immature political structure of the European Union, which legislates with increasing in-
fluence and socio-economic impact, but without an appropriate and competent parliament.

Therefore, preambles in modern times appear to tell us just as much about ruler-subject relations as they did in the times of Plato, Diocletian, Justinian, Rotary, Leo VI, or Louis XVI. Indeed, a modern Poseidonius possibly would say: “Nothing seems to me more foolish and more suspect than a law with a preamble.”