

POLISHNESS IN THE PREAMBLE OF THE 1997 CONSTITUTION OF THE REPUBLIC OF POLAND

According to its dictionary meaning, the term “Polishness” means Polish character, features pertaining to the group of Polish characteristics.²¹³ In this paper, we aim to answer the following questions: *Is the Preamble of the 1997 Constitution of the Republic of Poland²¹⁴ a holder of Polishness, and does it express Polishness?*

Several methods and tools are available for us to examine the notion of Polishness. These come from various academic disciplines, including sociology, linguistics, ethnography, etc. Jurisprudence can also contribute to the examination and analysis of Polishness.

In this paper we set out to apply methods of comparative jurisprudence. Our comparative analysis is based on the most important Polish constitutions. Indeed, the historic continuity of Polish legal culture in itself reflects Polishness. Furthermore, with regards to legal texts, Polishness derives from Polish legislative tradition, Polish history and values contained in laws of particular importance to the Polish nation.

We can also put the subject-matter of this research in another way: *When reading the Preamble of the 1997 Constitution of the Republic of Poland, does an outsider (foreigner) learn anything about Poland, the Poles, or about the values and legal traditions of the Republic of Poland?*

Any scientific research conducted in this matter can be regarded, *prima facie*, as superfluous. Speaking of the Preamble in the Constitution of the Republic of Poland, we can presume, *ab ovo*, that it will definitely carry the features of Polishness. However, taking into account that Polish law has been influenced by foreign legal systems, and that international law has also had an impact²¹⁵ (including in the preparatory phase of drafting the Constitution), it

213 See: *the entry for Polishness*, Słownik ed. Doroszewski, <https://sjp.pwn.pl/doroszewski/polskosc;5476593.html> (31.12.2018).

214 Constitution of the Republic of Poland, 2 April 1997 [Dz.U. (Dziennik Ustaw, Journal of Laws of the Republic of Poland) No. 78, item 483].

215 Cf. B. Banaszak, *Przedmowa*, [w:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz 2012*, wyd. 2, Legalis.

remains reasonable to ask whether the Preamble of the Constitution has any Polish characteristics.

Furthermore, any facts established by this research may be of significance to the constitutional amendment announced by politicians. Since, according to the Preamble, the Constitution is the fundamental law of the state, as well as “the supreme law of the Republic of Poland” (Article 8 para 1 of the Constitution), which prevails over any other norms of the legal system²¹⁶.

For any constitutional amendment that affects the Preamble, it must be ensured that the Preamble embodies Polishness to the highest degree possible. These attempts can prove difficult insofar as, in our days, Polish law is affected to a very significant degree by European law. Nevertheless, it is expedient to realise these attempts, taking into account the role of the Preamble, which is to serve as a collection of interpretation guidelines for the legal provisions contained in the normative part of the Constitution. A Preamble that becomes a means to convey Polishness can assure an interpretation of the Constitution and other normative acts that support Polishness, which can thus counterbalance the kind of pro-Union interpretation imposed on Member State courts by the European Union²¹⁷.

1. Nature and functions of the Preamble and its application in the Polish legislative tradition

Before analysing the Preamble of the Constitution, we must describe the characteristics of the text at issue.

The Preamble constitutes a specific part of the normative act, playing the role of an introduction of sorts to the operative part of the Constitution. Up to this day, its nature and function have been debated among the representatives of Polish legal doctrine. A number of studies are available on the matter²¹⁸.

216 Judgment of 11 May 2005 of the Constitutional Court (K 18/04), *Legalis* 68382: “(...) The Constitutional Court establishes that the Constitution prevails over the entire legal system as regards the sovereignty of the Republic of Poland.”

217 M. Gutowski, P. Kardas, *Wykładnia i stosowanie prawa w procesie opartym na Konstytucji 2017*, Warsaw 2017, s. 180-209; Cf. Constitutional Court Judgment 27 May 2003. (K 11/03) OTK-A 2003, No. 5, item 43

218 Np. S. Lewandowski, *Charakter normatywny preambuły „Studia Iuridica”* 36 (1998), pp. 113-136; A. Jamróz, *Kilka uwag o wartości normatywnej preambuł konstytucyjnych*, [w:] *Prawo. Administracja. Obywatele. Profesorowi Eugeniuszowi Smoktunowiczowi*, Białystok 1997, pp. 103-109; M. Stefaniuk, *Preambuła aktu normatywnego. W doktrynie oraz pro-*

A fundamental issue is whether the Preamble is normative in nature. Neither Polish legal doctrine nor the Polish judicature have given a clear answer to this question. Positions differ, and the entire spectrum of opinions is represented²¹⁹. In the following, we present two extreme standpoints.

The first takes the stance that the Preamble has a normative content in the same way as the operative part of the normative act. Simply put, this means that the Preamble is an “introductory paragraph” to the act. For instance, in the pre-World War II case law of the Supreme Court, the introductory part of the Constitution was placed on an equal footing with the operative part. According to the supporters of this doctrine, the Preamble of the 1952 Constitution also contains parts with normative legal characteristics²²⁰.

The contrary opinion is expressed in the Constitutional Court Judgment of 11 May 2005 (K 18/04)²²¹. This judgment states that “In the strict sense of the term, it is not possible to derive legal norms from the text of the Preamble to the Constitution”. A similar interpretation is represented in the Supreme Court ruling of 25 February 2016, which states that “the text of the Preamble to a law does not contain any legal norms that could be interpreted as supplementing the norms coded in the operative part”²²².

Neither of the above standpoints has achieved a position of total supremacy, but there is a slight majority in favour of supporters of the second doctrine. Without indicating a clear choice between the two standpoints, we can establish that, as stated by the Constitutional Court in its Judgment of 11 May 2005 (K 18/04), the Preamble of the Constitution certainly “formulates guidelines relying on the authentic declarations of the legislator and in line with its intent with regards to the interpretation of the laws in the normative part of the Constitution.”²²³²²⁴

cesie stanowienia i stosowania polskiego prawa w latach 1989–2007, Lublin 2007; A. Kotoski, *Raz jeszcze o normatywnym statusie preambuły – glosa do postanowienia Sądu Najwyższego – Izby Karnej z 25.02.2016 r. (I KZP 17/15) – glosa aprobująca*, „Przegląd Prawa Publicznego” 12 (2016), pp. 115-127;

219 For a comparison and critical analysis of standpoints, see: P. KroczeK, P. Skonieczny, *Preamble of Law: Perspective of Legislator and Interpreter*, „Angelicum” 90 (2013) fasc. 4, pp. 869-888

220 Vö. J. Grzelak, *Funkcje preambuł w polskiej kulturze prawnej*, [w:] *Prawo wobec wyzwań współczesności*, red. B. Guzik, N. Buchowska, P. Wiliński, t. 5, Poznań 2008, p. 44.

221 Dz.U. 2005, No. 86, item 744.

222 Supreme Court ruling of 25 February 2016, I KZP 17/15, LEX no. 1991137.

223 OTK-A 2005, No. 5, item 49

224 Thus, without deciding on the normative nature of the Preamble, it would be reasonable to use the term “operative”.

As regards the applicability of the Preamble, in the Polish legislative tradition (considering the most important constitutional acts), it has been applied by the following:

- 1) Government Decree. Act adopted on 3 May 1791²²⁵,
- 2) Act of 17 March 1921 Constitution of the Republic of Poland²²⁶,
- 3) Constitution of 22 July 1952 of the Republic of Poland²²⁷.
- 4) Constitution of the Republic of Poland - Act of 17 October 1992 on the mutual relationship between the legislative and executive powers of the Republic of Poland, and on territorial self-governance²²⁸.

It is worth mentioning that

- 1) the Constitution of 22 July 1807 of the Duchy of Warsaw²²⁹,
- 2) the Constitution of 27 November 1815 of the Kingdom of Poland²³⁰,
- 3) the Constitution of 23 April 1935²³¹ did not have a preamble.

Article 1 of the Constitutional Act of 19 February 1947 on the state structure and functioning of the main institutions of the Republic of Poland preceded the text of the law (Chapter I of the Act started with Article 1).²³² This Article contained the circumstances under which the normative act had been established, thus it was of a preambular nature.

We can add that there are further acts in the Polish legal system that contain a preamble, such as:

- 1) the Act of 26 October 1982 on sobriety education and the prevention of alcoholism²³³,
- 2) the Act of 7 January 1993 on the protection of human fetuses and the conditions under which the termination of pregnancy is permissible²³⁴.

225 hereinafter: Constitution of 3 May

226 Dz.U. No. 44, item 267

227 Dz.U. 1976, No. 7, item 36

228 Dz.U. 1992, no. 84, item 426

229 *Konstytucje w Polsce: 1791-1990*, wybór i oprac. T. Kołodziejczyk, M. Pomianowska, Warsaw, 1990, pp. 37-41.

230 *Dziennik Praw Królestwa Polskiego* (Journal of Laws of the Kingdom of Poland) from 15/27 November 1815, Volume I (1816), no. 1, pp. 2-103 and the Constitutions of Poland 1791-1990, selected and edited by: T. Kołodziejczyk, M. Pomianowska, Warsaw, 1990, pp. 48-56.

231 Dz. U. No. 30, item 227.

232 Dz.U. 1947, No. 18, item 71.

233 Consolidated text Dz.U. 2018 item 2137.

234 Consolidated text Dz.U. No. 17, item 78.

These are acts of special relevance to society. Preambles serve to make the *ratio legis* intelligible to subjects applying the act, and to make the norms more understandable.

Based on the statements made above, we can state that the mere fact that the Constitution has a Preamble is already an expression of Polishness, as this forms a part of Polish constitutional tradition.

2. Analysis of the Preamble of the 1997 Constitution

In the following, we present the individual sentences of the Preamble grouped according to thematic criteria, and analyse the extent to which they comprise features of Polishness.

World view

Polishness can be expressed in the legislator's world view, which is partly reflected in the Preamble. The 1997 Constitution of the Republic of Poland does not start with an invocation to God, as opposed to the Constitution of March, which begins: "In the name of the Omnipotent God", or the Constitution of 3 May: "In the name of One God in the Holy Trinity". Our current Constitution starts with a reference that the legislator seeks to care for mortal life, as well as the future on this earth of the state and its citizens. The first sentence of the Preamble of the Constitution reads: "Having regard for the existence and future of our Homeland". This sentence could be contained in the Constitution of any country in the world. As a matter of fact, the initial sentences of the currently effective Constitution do not acknowledge God as the fundamental source of the act, or the purpose and sense of all acts of man – that is, the legislator – which would, in any case, be characteristic of Polishness, and which is also justified by the Polish legislative tradition.

Although the text of the Preamble contains a sentence about "our responsibility before God or our own consciences", this should be treated as "a link between the state and natural law"²³⁵ rather than a reference to God. This matter will be elaborated on in the following part of the paper.

235 Vö. B. Banaszak, Wprowadzenie [w:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz* 2012, wyd. 2, Legalis, nb. 10.

Axiology

The current Preamble contains sentences rich in axiological content. One of them reads as follows: “Both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources.” The division into believers and non-believers is crucial in this sentence. As it covers the full spectrum of the division, it is logically superfluous. The parts “our culture rooted in the Christian heritage of the Nation and in universal human values” and “our responsibility before God or our own consciences” contain an *implicitly* dichotomic division, but in this case, they do not cover the full spectrum of this division.

Such a list of the elements of entirety, and thus the highlighting of differences, is unknown in Polish constitutional tradition. Therefore the highlighting of differences in the fundamental law does not embody the characteristics of Polishness, and it contradicts the general integrative purpose of the fundamental law. On the other hand, this could also be interpreted in a way that highlighting differences is an expression of the tolerance of, among others, religious and philosophical beliefs, which Polish history has shown to be a characteristic of Polishness.²³⁶

Another axiological element of the currently effective Preamble is the equality of the citizens comprising the nation. This equality is formulated as being “equal in serving the common good, that is the laws and obligations of Poland”. Equality is also stressed in the Constitution of March, while the terms “common good”, “general interest” or “the interest of the whole, united and independent home country” are contained in the Constitution of 3 May and the Constitution of March. This kind of egalitarianism between individuals that comes from the legislative tradition of Constitutions also carries the features of Polishness, as it is characteristic of the Polish legal system.

Similarly, some other sentences in the Preamble are straightforward expressions of how state and public institutions function, such as “reliability and efficiency”, “respect for freedom and justice, cooperation between the public powers, social dialogue as well as the principle of subsidiarity in the strengthening the powers of citizens and their communities”, “the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others”. While these form a part of the Polish legal system, they are not – just like

236 An example could be the famous saying of Augustus II: “I am not king of your conscience”.

the principle of equality before the law – solely characteristic of the former. Still, they can be recognised as elements that encode Polishness.

History

The reference to Polish history can be accepted, beyond all doubt, as an expression of Polishness. One sentence of the Preamble states that we “recovered, in 1989, the possibility of a sovereign and democratic determination of Poland’s fate”. This sentence refers to the history of the Polish state and the parliamentary elections of 4 July 1989 as a decisive event, which means (although not in complete agreement or in a general sense) a historic census and a symbolic transformation of the Polish People’s Republic into the 3rd Republic of Poland.

This sentence should be read in conjunction with the sentences “Recalling the best traditions of the First and the Second Republic”, “Beholden to our ancestors for their labour, their struggle for independence achieved at great sacrifice”, “Obliged to bequeath to future generations all that is valuable from our over one thousand years’ heritage” and “Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland”. These historical references and historical awareness are also characteristic features of Polish Constitutions. Similar references were also included in the Constitution of March and the Constitution of the Polish People’s Republic, with the latter featuring a particularly detailed version.

The sentence of the Preamble which reads: “Bound in community with our compatriots dispersed throughout the world” refers to the experiences of the Polish nation regarding emigration. Emigration has been a part of Poland’s fate on several occasions during its history. A mention of it thus highlights Polish history and, as such, Polishness.

Taking into account the richness of Poland’s history and other historic references are obvious reflections of Polishness. The sentences mentioned above declare and underline the continuity of the existence, tradition and efforts of the Polish state²³⁷, which is a fundamental element of Polishness.

Internationalism

The sentence: “Aware of the need for cooperation with all countries for the good of the Human Family” is a clear expression of Polishness. Cooperation

237 W. Komarnicki, *Polskie prawo polityczne. Geneza i system*, Warszawa 1922 (reprint, Warszawa 2008) pp. 215-216.

with other nations, shared struggles, and participation in the human community all count as Polish characteristics. A symbolic expression of this attitude is the text on the flag of the Warsaw demonstration held on 25 January 1831 in honour of the Decembrists. The words attributed to Joachim Lelewel read: "In the name of God for our liberty and your liberty". However, it must be noted that the only Constitution of a strong internationalist nature was that of the Polish People's Republic.

Reference to natural law

Although the Polish legal system is based on positivism, the Preamble of the currently effective Constitution contains two references to natural law. First the legislator declares that the Constitution has been adopted "Recognizing our responsibility before God or our own consciences". The other reference to natural law follows in the last line of the Preamble, which states that all those who will apply the Constitution should "do so paying respect to the inherent dignity of the person". Both of these passages imply that the Constitution recognises natural law as a source of law ranking lower than the Constitution itself, as well as a possible criterion for the assessment of the constitutionality of acts of law²³⁸.

We can also find references to natural law in other Polish constitutions. The Constitution of March contains a sentence that states that the independence, force, security and social order of Poland should be based on the eternal rules of law and freedom. Such eternal rules of law are definitely meant as a reference to natural law.

Legislative techniques

If the elements of legislative techniques are characteristic of the tradition of legislation, they can be a representation of Polishness. The present Preamble features two techniques: definitions and exhortations.

This Preamble (regardless of whether or not we attribute any normative value to it) certainly contains a definition of the "Polish nation": "We, the Polish Nation – all citizens of the Republic". This sentence (which is actually a rule) contains *expressis verbis* an element of Polishness. The next definition is contained in this sentence: "establish this Constitution of the Republic of Poland as the basic law for the State". So the Constitution is a "basic law", which

238 Cf. B. Banaszak, Wprowadzenie [w:] Konstytucja Rzeczypospolitej Polskiej. Komentarz 2012, wyd. 2, Legalis, nb. 10 oraz J. Krukowski, Głos w dyskusji, [w:] System źródeł prawa w Konstytucji Rzeczypospolitej Polskiej, red. M. Granat, Lublin 2000, pp. 116-120.

is to be understood as “the supreme law of the Republic of Poland” (Article 8 para 1 of the Constitution).

Only the Preamble to the Constitution of the People’s Republic of Poland, of all constitutional preambles, applied this legislative technique and declared that “the People’s Republic of Poland shall be the republic of the working people”. Thus, we can establish that the application of definitions is not a component reflecting Polishness.

The other legislative technique applied is exhortation, that is, it solemnly addresses its readers. The current Preamble contains similar statements. For instance, this sentence says: “We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland.” No such element is contained in the preambles of the other Constitutions.

Language is also part of legislative techniques, more precisely, the register of language. The current Preamble uses more solemn language than that of the operative part. Examples include the continuity of the text, multiple-complex sentences, or the use of plural verbs – for instance in the Constitution of March, or terms (in the same Constitution) such as “great tradition”, “historic constitution” or (in the Constitution of the People’s Republic of Poland) “historic admonitions”, “fullest flourishing”, etc. It can be assumed that, to a certain extent, the preamble texts of the constitutions of all states are written in a flowery and dignified style.²³⁹ Still, due to its presence in the Polish preambles, we recognise it as a feature reflecting Polishness.

3. Conclusions

In analysing the Preamble to the 1997 Constitution of the Republic of Poland, it is possible to answer the questions raised in the introduction. Although not in a very marked manner, the Preamble to the 1997 Constitution of the Republic of Poland does carry Polishness and expresses it as well. We

239 E.g. Constitution of the United States of America: “We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America”.

can state that the part of the Fundamental Law that we have analysed conveys Polishness to a moderate extent. It only partially positions itself in the Polish legislative tradition, contains minor historical references and the axiological tradition of the nation is not taken into consideration sufficiently. By reading the Preamble of the 1997 Constitution of the Republic of Poland, an outsider (foreigner) can acquire some knowledge of Poland, the Poles, or the values and legal traditions of the Republic of Poland, but this knowledge will not be detailed.

A constitutional amendment should attempt to draft a Preamble that expresses Polishness to a greater extent. Considering its role in guiding the interpretation of the legal provisions contained in the operative part, it can ensure an interpretation that is consistent with Polishness.

Finally, we can establish, with optimism, that should the new Constitution lack a preamble or have a preamble of a merely technical nature, that is a text showing no elements of Polishness, Polish law could still be interpreted, *sit venia verbo*, in a way that supports Polishness because of the anthropological belonging of those applying the law. Anyone who interprets the Polish text is himself/herself culturally and linguistically determined (assuming that he/she possesses the features of Polishness), in the same way as the legislator is (assuming that the law is of Polish origin in an endogenous way). In this respect, it is especially the Polish language that plays a dominant role. As Ludwig Wittgenstein put it: "The limits of my language mean the limits of my world"²⁴⁰. Consequently, we can state that Polishness is indelibly (although reducibly) contained in Polish law and is detectable in the norms, irrespective of the guidelines enshrined in the Preamble to the Constitution.

Conscious references to our own legislative tradition definitely reinforce the Polish characteristics of normative acts, including the Constitution. This demonstrates the legislator's respect for itself and its own Polish identity, as well as a recognition of the achievements of its predecessors. This direction should be shown and recommended to the Polish legislator.

240 L. Wittgenstein, *Tractatus Logico-Philosophicus*, translated by: B. Wolniewicz, Warszawa 1997, teza 5. 6.