

RYSZARD PIOTROWSKI*

The Importance of Preamble in Constitutional Court Jurisprudence

Abstract. The Constitution comprises general clauses and notions whose meaning it does not specify in detail—and this meaning can be established by Constitutional Court. In the Polish doctrine of Constitutional law, opinions about the legal status of the Preamble are diversified. The dominant view in the contemporary doctrine of Constitutional law is that the Preamble has a normative character. The Constitutional Court has many times drawn upon the provisions of the Preamble in its rulings. The provisions of the Preamble dealing with Constitutional principles and values form a “bridge” between natural law and positivist law, which may be conducive to a fuller protection of human rights in the state, and consequently a better operation of Constitutional democracy. But the higher the frequency of principle- and value-invoking notions in the Constitutional text (usually in the Preamble), the greater and the more real is the authority of those who interpret these notions—and impart sense to them—in conditions of a particular constitutional dispute.

Keywords: Constitution, preamble, constitutional law, constitutional democracy, constitutional court, values, jurisprudence

1. The jurisprudence of values has an important role to play in interpreting the Constitution in the legal culture of a democratic state ruled by law.¹ The Constitution comprises general clauses and notions whose meaning it does not specify in detail—and this meaning can be established in the light of principles and values set out in the Preamble to the Constitution.
2. The opening statements of the Polish Constitution² define the axiological identity of Constitutional democracy and they identify the system’s underlying principles, including some which are mentioned only in the Preamble and not elsewhere in the Constitution (such as subsidiarity).
3. In the Polish doctrine of Constitutional law, opinions about the legal status of the Preamble are diversified.

The normative importance of the Constitution lies in that its particular provision may serve as a benchmark, a point of reference in respect of “norms, principles and values”. All this holds for the Preamble, too. The dominant view in the contemporary doctrine of Constitutional law is that the Preamble has a normative character. An opinion expressed in literature on the subject posits that “irrespective of its specific features, the Constitution’s introductory part indeed has a normative character. It also plays an important role in

* Ph.D., Department of Law and Administration, University of Warsaw, Krakowskie Przedmieście 26/28, 00-927 Warszawa.
E-mail: r.j.j.piotrowski@uw.edu.pl

¹ Values make possible a grounding “in the post-modern law—fuzzy and indeterminate, polycentric and multilayered as it is”. See Giaro, T.: Wartości w języku prawnym i dyskursie prawniczym (Values in legal language and discourse). In: *Trybunał Konstytucyjny: Preambula Konstytucji Rzeczypospolitej Polskiej* (Constitutional Court: Preamble to the Polish Constitution). Warszawa, 2009, 15.

² The English-language text is provided online at www.sejm.gov.pl

mapping out the lines of interpretation of the basic law's individual norms. And in addition, it serves for the Constitution to perform other-than-legal functions, such as integration or public education".³ It is also argued that an assessment of the Preamble's normative character must always be made in respect of a particular Constitution, and that this assessment does not have to be the same for all provisions of the Preamble. It is pointed out in literature that a tendency towards "normativation" of Constitutional preambles is inevitable within the framework of statutory law, where the Constitution is the fundamental legal act of the highest import—and this also applies to the Preamble as an integral part the Constitution.⁴

In the past, it was asserted that "the Constitution's opening remarks are its integral part; and the different manner in which these are formulated ... does not suffice to conclude that the framers of the Constitution wanted to deprive the Preamble of its normative character".⁵ The view was also presented that the Preamble—even if being of a normative character, as part of the Constitution—may also include parts of propagandist and political nature, or formulations serving as pointers to interpret the entirety of Constitutional provisions.⁶ According to yet another opinion, the fact that the Preamble is part of the Constitution does not necessarily determine the legal status of its provisions.⁷ And A. Gwiżdż claimed that individual sentences in the Constitution's introductory part "take on a normative character".⁸

According to theorists of law, the Preamble is not of an obligatory nature and as such it does not contain norms which would bind an interpreter of the Constitution.⁹ And in the more recent literature on the theory of law, we can find the opinion that "the texts of Preambles do not contain material from which to directly construct legal norms" and that preambles "should rather serve as an aid to be drawn for the purpose of interpretation, and especially when applying the articles laid down in the normative acts to which these preambles are attached."¹⁰

Nowadays, it is proposed in the doctrine of Constitutional law that Preamble provisions should be divided into those "of a normative character" which "themselves form a legal norm or a major part of such norm", and those which do not meet this condition and as such

³ See Banaszak, B.: *Prawo konstytucyjne porównawcze współczesnych państw demokratycznych* (Comparative Constitutional law of modern democratic states). Kraków, 2004, 130.

⁴ Cf. Jamróz, A. In: *Prawo. Administracja. Obywatele* (Law. Administration. Citizens). Białystok, 1997, 107.

⁵ Cf. Rozmaryn, S.: *Konstytucja jako ustawa zasadnicza PRL* (Constitution as the basic law of the Polish People's Republic). Warszawa, 1967, 61.

⁶ Cf. Burda, A.: *Polskie prawo państwowe* (Polish Constitutional law). Warszawa, 1977, 158.

⁷ Cf. Siemieński, F.: *Prawo konstytucyjne* (Constitutional law). Warszawa–Poznań, 1980, 30.

⁸ Cf. Gwiżdż, A.: Wstęp do konstytucji–zagadnienia prawne (Constitutional Preamble–legal aspects). In: Trzeciński, J. (ed.): *Charakter i struktura norm konstytucji* (Nature and structure of Constitutional norms). Warszawa, 1997, 183. Cf. also Bałaban, A.: Prawny charakter wstępu do polskiej Konstytucji z 2 kwietnia 1997 roku (The legal character of the Preamble to Polish Constitution of 2 April 1997). In: Kudej, M. (ed.): *W kregu zagadnień konstytucyjnych* (Around Constitutional issues). Katowice, 1999, 120.

⁹ Cf. Lewandowski, S.: Kontrowersje wokół preambuł (Controversies over Preambles). *Studia Iuridica*, (1996) 31, 88.

¹⁰ Cf. Jabłońska-Bonca, J.: *Wstęp do nauk prawnych* (Introduction to Legal Sciences). Gdańsk, 1992, 89.

are of “normative importance”.¹¹ According to Constitutional interpreters,¹² the following dimensions of a Preamble’s normative nature should be differentiated:

1. interpretative dimension—the provisions belonging in this dimension “indicate how other Constitutional provisions, and all provisions in the entire body of Polish law, should be understood”. This dimension embraces all provisions of the Preamble, which formulates the axiological foundation of the Constitutional order and which specifies the direction along which detailed provisions should be interpreted;

2. constructional dimension—the provisions of the Preamble belonging in this dimension may be used in the construction of Constitutional norms, by deriving elements of the constructed norm from these provisions. According to L. Garlicki, only some provisions of the Preamble may be handled in this way. But it is “almost always” that the Preamble and other Constitutional provisions are applied jointly, because “almost always” a principle formulated in the Preamble is enlarged upon or repeated in the articles of the Constitution. The normative importance of Preamble provisions may consist in that they express on their own a Constitutional principle of a normative character (subsidiarity principle).¹³

4. The Constitutional Court has many times drawn upon the provisions of the Preamble in its rulings.¹⁴

The Constitutional Court said: “Freedom, justice, cooperation and dialogue—these are among the values clearly expressed in the preamble to the Constitution of 1997, which must be used as criteria in assessing any activities by the public authorities, including the legislative activity aiming to realise the principle of a democratic state, ruled by law and implementing the tenets of social justice. These requirements unequivocally invoke the so-called material understanding of the rule of law, and they categorically rule out arbitrary law-making” (memorandum of explanation to ruling in case K 34/97).

Given the Preamble’s provision which counts “truth, justice, good and beauty” among “universal values”, the Constitutional Court said: “The notion of truth is a normative one, and not only purely factual. This can be seen in the wording of the Constitution itself. The framers of the Constitution refer in the Preamble to truth as a universal value upon which the system of government of the Republic is founded” (memorandum of explanation to ruling in case SK 13/05).

In the memorandum of explanation to its ruling in case K 20/00, asserting the constitutionality of a provision in the Environment Act,¹⁵ the Constitutional Court pointed out that “the Preamble to the Constitution lists among an individual’s basic obligations the obligation of solidarity with others”, which is further fleshed out in Art. 20 of the Constitution. According to the Constitutional Court, “the arrangements introduced under

¹¹ Cf. L. Garlicki’s comments on the Preamble. In: Garlicki, L. (ed.): *Konstytucja RP. Komentarz* (Polish Constitution. A commentary). Warszawa, Vol. V, 2.

¹² Cf. Garlicki: *op. cit.* 18.

¹³ *Ibid.*

¹⁴ Stefaniuk, M.: Preambuła do Konstytucji RP z 2 kwietnia 1997 roku w orzecznictwie Trybunału Konstytucyjnego (Preamble to Polish Constitution of 2 April 1997 in jurisprudence of the Constitutional Tribunal). *Annales UMCS*, 2003/2004. Constitutional Court rulings are posted online at www.trybunal.gov.pl

¹⁵ Uniform text in *Dziennik Ustaw* (Journal of Laws of the Republic of Poland) of 1994, No. 49, item 196, as amended.

the referred provision do serve the implementation of the Constitutional principle of solidarity of citizens living in different municipalities”.

Citing the Preamble’s provision about the “need for cooperation with all countries for the good of the Human Family”, the Constitutional Court found that the “interpretation of the law of the country should take into account the Constitutional principle of favourable attitude towards the process of European integration and cooperation among states (cf. Preamble and Art. 9 of the Constitution). Interpreting the law in a way which serves the implementation of this Constitutional principle is correct in Constitutional terms and preferable” (memorandum of explanation to verdict in case K 11/03).

In some of its rulings, the Constitutional Court not only cites the provisions of the Preamble, but it also makes direct use of the Preamble by affirming a compliance of the referred regulation with the provisions of the Preamble. In such instances, the Preamble, cited by the plaintiff as part of the benchmark of Constitutional control, is referred to by name in the text of the ruling.

And so, when assessing the conformity of Poland’s Europe Agreement and the Accession Terms Act with the values indicated in the Constitutional Preamble, the Constitutional Court analysed the significance of the Preamble (case K 18/04). In the opinion of the Constitutional Court, the Preamble “contains a characterisation of Poland’s system-of-government pathway, emphasising the universal pro-independence and democratic experiences and pointing to the universal Constitutional values and to the underlying principles organising the life of community living in the state, such as democracy, respect for human rights, cooperation between the public powers, social dialogue and the principle of subsidiarity”. Simultaneously, the Constitutional Court said, these values and the principle of subsidiarity, are among the underlying foundations of the European Communities and the European Union—and this remains relevant for the fundamental European values indicated in the Treaty of Lisbon.

In the memorandum of explanation to its ruling in case K 18/04, the Constitutional Court stated that legal norms *sensu stricto* cannot be derived from the text of the Constitutional Preamble. What the Preamble does provide are “indications, based on the Constitution framers’ authentic pronouncement, of the lines along which to interpret the provisions of the Constitution’s normative part, these lines of interpretation being in compliance with the intentions of the framers of the Constitution”. According to the Constitutional Court, the Preamble also retains such status with regard to the benchmarks of Constitutional control indicted by the plaintiffs in case K 18/04. This translates into seeing to it that in the process of European integration there is “concern about a sovereign and democratic determination of the present and future existence of the Homeland and about guarantees of civil rights as well as the efficiency and diligence in the work of public bodies” (memorandum of explanation in case K 18/04). An opinion has been expressed in the Polish doctrine of Constitutional law that the statement of the Constitutional Court “legal norms *sensu stricto* cannot be derived from the text of the Constitutional Preamble” means in fact that “certain parts of the Constitution cannot be presented in the form of a traditionally understood legal norm”.¹⁶

The Constitutional Court is currently examining motions from Sejm Deputies and Senators about the compliance of certain provisions of the Treaty of Lisbon with the

¹⁶ Garlicki, L.: Uwagi do wstępu (Comments on the Preamble). In: Garlicki, L. (ed.): *Konstytucja RP. Komentarz* (Polish Constitution. A commentary). Warszawa, Vol. V, 20.

provisions of the Preamble on the sovereign and democratic determination of the fate of the Homeland. The provisions of the Preamble defining the axiological identity of Poland and the European Union may, therefore, play an important role legitimising Poland's membership of the European Union.

When ruling on a competences dispute between the Polish President and the Prime Minister as to which of the state's central Constitutional bodies is authorised to represent the Republic of Poland and communicate the position of the state at meetings of the European Council, the Constitutional Court based its ruling on the Preamble. It found that in discharging their Constitutional duties and competences, the Polish President, the Council of Ministers and the Prime Minister are guided by the principle of cooperation between the public powers, as laid down in the Preamble and Art. 133.3 of the Constitution of the Republic of Poland (memorandum of explanation in case Kpt 2/08).

The Constitutional Court has ruled on the compliance of a referred regulation with the provisions of the Preamble in a case involving the understanding of the subsidiarity principle, whose binding nature is recognised only in court jurisprudence. In the Constitution, that principle is only laid down in the Preamble.

And so, for example, in its ruling in case U 5/04, the Constitutional Court found the Council of Ministers' regulation on border delineation and change of name and seat of authority for some municipalities and towns and on raising to township the status of some localities¹⁷ is in compliance with the Preamble to the Polish Constitution to the extent where the Preamble cites the principles of cooperation between the public powers, social dialogue and subsidiarity.

The significance of the subsidiarity principle was taken up by the Constitutional Court in the memorandum of explanation to its ruling on case K 24/02. The Constitutional Court then said that the principle of subsidiarity, defined in the Preamble as one which strengthens the powers of citizens and their communities, "warrants the taking of activities at a higher-than-local level where such an arrangement turns out to be better and more effective than the activities of bodies of local-level communities. The subsidiarity principle should be viewed in all its complexity, which means that the strengthening of citizen and local-community powers does not mean abandoning above-local activities by public authorities. Such activities are actually a must where it is not possible for the local-level bodies to solve problems."

In its ruling in case K 14/03, the Constitutional Court said that the "diligence and efficiency of public bodies, and especially those public bodies, which have been created to implement and protect the rights guaranteed by the Constitution, is among the values of Constitutional importance". This, in the opinion of the Constitutional Court, "clearly results from the text" of the Preamble, which "lists the two main objectives of the Constitution: guarantying civil rights and ensuring diligence and efficiency in the work of public bodies".

The Court therefore may examine "whether the regulations on the activity of these institutions are so designed as to enable their diligent and efficient operation. A regulation whose design is not conducive to the diligence or efficiency of institutions protecting the Constitutional rights actually represents a violation of these rights, and it is therefore warranted to declare it unconstitutional". A similar opinion was expressed by the Constitutional Court in the memorandum of explanation to its ruling in case K 20/00.

¹⁷ *Dziennik Ustaw* of 2003, No. 134, item 1248.

In case K 54/05, the Constitutional Court ruled that a provision in the Spatial Planning and Development Act¹⁸ complies with the Preamble to the Polish Constitution to the extent, where this Preamble expresses the principle of cooperation between the public powers, the subsidiarity principle and the requirement of efficiency and diligence of the public bodies.

In its ruling in case K 31/06 Constitutional Court attested to the constitutionality of the whole Act of 6 September 2006 amending the rules governing elections to municipality councils, county councils, and regional assemblies.¹⁹ The principle of diligence and efficiency in the work of public bodies, espoused in the Preamble, was used by the Constitutional Court as a benchmark of Constitutional control of the referred regulations.

The jurisprudence of the Constitutional Court also includes the opinion that the charge of Preamble violation by a normative act on the basis of which a final ruling has been issued about Constitutionally defined rights, freedoms and obligations must not by itself provide a basis for Constitutional complaint. The Constitutional Court said so in the memorandum of explanation to its ruling in case SK 10/03: “The Constitutional complaint is warranted only where Constitutional freedoms or rights have been violated, and only where the violation comes as a result of unconstitutionality of the normative act on the basis of which the final judgment, injuring the plaintiff, was issued. Therefore, not every Constitutional provision may serve as a benchmark of Constitutional control in a proceeding launched in response to a complaint”. Consequently, among benchmarks in a Constitutional complaint proceeding, “the Preamble to the Constitution must be ruled out because—leaving out doubts about its normative character—it certainly does not comprise norms from which arise freedoms and rights” (memorandum of explanation in case SK 10/03). It is thus inadmissible for the Constitutional Court, acting in response to a Constitutional complaint, to rule on the referred regulations’ compliance with the Preamble to the Constitution.

The issue looks a bit differently in the light of the Constitutional Court’s ruling in a constitutional-complaint case SK 39/06. The complaint pointed to the Preamble as a benchmark of Constitutional control, and the Constitutional Court found in its response that the “Preamble is part of the Constitution, and its pronouncements may be of a normative character, in the context of a given case and especially in connection with particular provisions of the Constitution”. However, the Constitutional Court went on, “the plaintiff did not indicate the relevant pronouncements of the Preamble and, consequently, did not indicate the norms which could be constructed on the basis of such pronouncements. Nor did the plaintiff indicate which civil-law right was violated as a result”.

But the part of the Preamble evoking the times “when fundamental freedoms and human rights were violated in our Homeland” was actually cited by the Constitutional Court in explaining its ruling in constitutional-complaint case SK 42/01. It found then that the “negative identification of a group of judges” (deprived of a retirement right), who have “worked for, or served in, the security services, and their separation from other judges, shows no signs of arbitrariness and complies with the principle of fairness. For this reason, it is relevant to characterise people holding the office of judge as participating in the apparatus of repression in the indicated period. Consequently it is acceptable, perhaps even advisable, (...) that these persons be not treated as equal with the other judges, who did not embark on such work for, or collaboration with, the security apparatus”. In the opinion of

¹⁸ *Dziennik Ustaw* of 2003, No. 80, item 717, as amended.

¹⁹ *Dziennik Ustaw* No. 159, item 1127.

the Constitutional Court, such reasoning is premised on the indicated part of the Preamble to the Constitution.

In its ruling in case Kp 5/08, the Constitutional Court found a particular provision of the Act of 4 September 2008 amending the passport act and the stamp fee act to be in compliance with the Preamble. The ruling, in a way, sums up the opinions presented in earlier rulings and the doctrine of Constitutional law.

In its memorandum of explanation in case Kp 5/08, the Constitutional Court recalled that “doubts exist as to the normative character of the Preamble to the fundamental law”. In the opinion of the Constitutional Court, these doubts “result from the circumstance that it is not possible to derive legal norms *sensu stricto* from the text of this Preamble”. But on the other hand, “the introductory part of the Constitution of 1997 contains a characterisation of Poland’s system-of-government pathway, emphasising the universal the pro-independence and democratic experiences and pointing to the universal Constitutional values and to the underlying principles organising the life of the community living in the state, such as democracy, respect for human rights, cooperation between the public powers, social dialogue and the principle of subsidiarity”. The Constitutional Court further said that “in the light of the most recent Constitutional doctrine, this suffices to recognise the normative character of the Preamble to the Constitution”. In the opinion of the Constitutional Court, “a tendency towards ‘normalisation’ of Constitutional preambles is inevitable within the framework of statutory law, where the Constitution is the fundamental legal act of the highest import—and this also applies to the Preamble as an integral part the Constitution”.

5. The Constitutional Court has often cited Preamble provisions in its rulings. In particular, the Court checked the compliance of particular regulations with the provisions of the Preamble, these provisions constituting for the Court a benchmark by which to control the referred regulations. In other rulings, the Court cited the Preamble when “supplementing arguments with regard to the assessment of norms with other benchmarks, contained in articles of the Constitution” (memorandum of explanation in case Kp 5/08). That was about the provisions of the Preamble, especially those concerning the sovereignty of the Polish People, the cooperation between the public powers, subsidiarity, and also diligence and efficiency in the work of public bodies.

It looks like the Preamble, which largely found itself in the Constitution in order to emphasise the continuation of Constitutional tradition,²⁰ has been gradually gaining in importance in the Constitutional Court’s jurisprudence as material to construct Constitutional principles and norms, in search of solutions to major problems related to the system of governance.

Constitutional commentators point out that the Preamble “provides an important clue to interpreting the provisions of the act which it opens”. According to representatives of doctrine, “a modern constitutional court cannot adjudicate without invoking various kinds of values. And their largest collection is provided in the opening credits to fundamental laws. In addition to stating the overarching ideas and underlying principles, the Constitutional Preamble also expresses the framers’ other statements of the most important points of law”.

²⁰ See Stefaniuk, M. E.: Tradycje preambuł w polskich konstytucjach i ich wpływ na rozwiązania współczesne (Traditions of Polish Constitutional Preambles and their influence on modern arrangements). In: Witkowski, W. (ed.): *W kręgu historii i współczesności polskiego prawa* (The past and present of Polish law). Lublin, 2008, 696.

If the Preamble were ignored in Constitutional Court rulings, this would “put in question the legality and correctness of the decisions taken. Without steadily taking note of the Constitution’s opening part, these decisions would be flawed and would fail to reflect in full the rich contents of the Polish supreme law. (...) A progressing juridisation of the whole Constitutional text stands in contradiction to the opinions regarding the introductory part as just an ideological and political declaration.”²¹

By invoking provisions of the Preamble, it is easier to find rules legitimising the country’s membership of the European Union—and this is also conducive to a polycentric system of sources of law. It transpires from the Preamble that the Constitution should be understood and applied in conformity with a common European tradition, while respecting national sovereignty and identity. The provisions of the Preamble dealing with Constitutional principles and values form a “bridge” between natural law and positivist law, which may be conducive to a fuller protection of human rights in the state, and consequently a better operation of Constitutional democracy.

From this viewpoint, how Preamble is understood may also serve to strengthen the capacity to defend the Constitution against hypothetical changes contradicting its function of human rights’ guarantee and, consequently, compromising the tenets of constitutionalism.

For the Constitution to be understood in a way commensurate with the constitutionalist approach, one first needs to assume that the authorities should be constrained by human rights.²² Thus, the public authorities, even if backed by a majority, cannot just do “anything”²³—even if they observe the rules laid down in the text of the Constitution. In particular, the constitutionalist approach contests the opinion that we enjoy human rights because they are inscribed in the Constitution. On the contrary, they are inscribed in the Constitution because they are human rights. This means that not all provisions of the fundamental law can be changed without risking that it will lose features of a Constitution. Constitutionalism is opposed by theories of Constitution which posit that by observing the relevant procedural requirements, it is possible to arbitrarily determine the contents of the fundamental law.²⁴

The injunction to respect “the inherent dignity of the person, his or her right to freedom and the obligation of solidarity with others” is described in the Preamble to the Constitution as “the unshakeable foundation of the Republic of Poland”. The way in which the Constitution is applied must rest of a foundation of principles, not on fluctuating political configurations reflecting election results. A serious approach to the Constitution requires that we notice the special significance of the Preamble’s conclusive part. Having regained the possibility of a sovereign and democratic determination of Homeland’s fate, we now bar the authority—including a majority-backed authority—from legitimising violations of the state’s axiological foundations. These foundations must remain “inviolable”, meaning “resistant to being revised, undermined, moved or overturned”.²⁵ In this way, the Preamble defines the limits of legitimate authority, including the authority to revise the Constitution.

²¹ See Boć, J.: *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 r.* (Polish Constitutions and comment on the Constitution of 1997). Wrocław, 1998, 12.

²² See Murphy, W.: *Constitutional Democracy: Creating and Maintaining a Just Political Order*. Baltimore, 2007, 6.

²³ Cf. Memorandum of explanation of Constitutional Court ruling in case U 4/06.

²⁴ Cf. Murphy: *op. cit.* 15.

²⁵ See Dunaj, B. (ed.): *Słownik współczesnego języka polskiego* (Modern Polish Dictionary). Warszawa, 1996, 616.

And it is precisely through the prism of Preamble provisions that we should understand the rules governing Constitutional change, as provided in Chapter XII. That chapter contains procedural provisions which take on a substantive importance precisely due to the Preamble which serves as an “important axiological clue in the process of interpreting other Constitutional provisions, as phrased in individual articles”.²⁶ Chapter XII does not set the limits to change, because it deals with procedure. It is in the introductory part that the limits are defined (in the form of “unshakeable foundation”), the principles are named which must not be breached, and the overriding objective to be sought by the changes is indicated: “the good of the Third Republic.” Other objectives are ruled out by the Preamble, which thus constrains the authority wielded by a majority capable of bringing about changes in accordance with the procedure defined by the Constitution.²⁷

The obligation to respect the provisions of the Preamble rests upon all those who apply the Constitution, including the Constitutional Court, in all its functions. Now, if we accept that the Constitution must not infringe “the inherent dignity of the person, his or her right to freedom and the obligation of solidarity with others”, it remains to be explained who else—other than the legislators and the electorate—shoulders the responsibility for the observance of these principles and values. Given the Preamble’s closing passage, where respect for principles is described as the unshakeable foundation of the state, one could hardly rule out an extension of the Constitutional Court’s terms of reference to embrace the content of Constitution-revising statutes—precisely from the viewpoint of those principles and values which are described in the Preamble as “unshakeable”. As has been pointed out in doctrine, the Constitutional Court may examine the constitutionality of Constitution-revising procedure as part of preventive control²⁸ (exercised before a Constitution-changing statute is signed by the president). But if such examination is accepted as part of *ex ante* control, this means that we recognise the Court’s competence to make pronouncements on Constitution revising laws. It is my belief that the terms of reference of the Constitutional Court may include the control of such statutes (both *ex ante* and *ex post*) not only in its procedural aspect but also in the material aspect—precisely because of the Preamble’s closing part. Supporting this position is the specific nature of the Constitutional Revision Act, remembering that the Constitution—strictly speaking—is not a new constitution but rather a statute revising the existing constitution. In a situation, where its is found acceptable to examine the constitutionality of a statute ceding state bodies’ competences in some matters to an international body or organisation—even though the passage of such statute requires special procedure in both chambers (including the requirement of two-thirds majority in both chambers)—, then constitutional control of a Constitution-revising statute no longer looks out-of-the-question from the viewpoint of procedural requirements. If a statute approving the previously mentioned cession of competences comes within the terms of reference of the Constitutional Court—as defined by the notion of “statute” in Art. 188 of the Constitution²⁹—then a “Constitution-revising statute” may likely come within these terms

²⁶ See Garlicki, L.: *Polskie prawo konstytucyjne* (Polish Constitutional law). Warszawa, 2009, 42.

²⁷ Cf. Piotrowski, R.: Preambula i zagadnienie granic zmian w Konstytucji RP (The Preamble and the question of limits to revision of Polish Constitution). In: *Trybunał Konstytucyjny, Preambula Konstytucji Rzeczypospolitej Polskie*. Warszawa, 2009, 139.

²⁸ Cf. W. Sokolewicz’s comments on Art. 235 of Polish Constitution. In: Garlicki, L. (ed.): *Konstytucja RP. Komentarz* (Polish Constitution. A commentary). Vol. II, Warszawa, 2001, 72.

²⁹ See L. Garlicki’s comments on Art. 188 of Polish Constitution. In: Garlicki, L. (ed.): *Konstytucja RP. Komentarz* (Polish Constitution. A commentary). Vol. V, Warszawa, 2007, 14.

as well. Consequently, the statute referred to in Art. 188 of the Constitution also means a Constitution-revising statute.³⁰ It would indeed be hard to accept a situation where, in a democratic state ruled by law, the framers of the system of governance are not bound by the requirement of decent legislation within the area subject to Constitutional Court's examination, while they are so bound in their capacity as legislators. And besides, it is only natural that the framers of the system of governance should act on the basis of law and within the bounds of the law.

The interpretation of the provisions of the Preamble to the Polish Constitution may provide an instrument with which to defend Constitutional democracy's axiological identity against potential threats from a majority susceptible to pressure from politicians and media. This line of defence may prove useful in avoiding a situation where the creators of public opinion (as reflected in the results of public opinion polls) will become the creators of Constitutional changes. The proposed interpretation reflects neither the position of doctrine of Constitutional law nor the jurisprudence of the Constitutional Court which has had no reason to take up the question of limits to Constitutional change. The Polish Constitution, in its part phrased in articles, does not regard any provisions as unchangeable. Doctrine rules out the existence of unchangeable provisions in the Polish Constitution. It has been demonstrated, though, that there are restrictions on Constitutional change, stemming from Poland's membership of the European Union.³¹ On the other hand, the importance of external factors, related to membership of the European Union, seems to be fairly limited by the Constitutional Court's recognition of the primacy of the fundamental law over European law.

It is my opinion that the Polish Constitutional Preamble, in its closing part, contains a clause on the immutability of the Constitution. The formulation of this clause and identification of an internal benchmark on limits to Constitutional change leads us to the conclusion that the clause itself must be regarded as unchangeable—as long as there exists the world of values defining the identity of a Constitutional culture in which it belongs.³² The values in question—coessential to the constraint on authority due to the dignity of the person—have been present in European culture since the times of Homer and Sophocles. They have survived triumphs of violence, and they remain relevant despite manifestations of the “intelligence of evil”—and despite the ambivalence of all political forms connected with phenomena such as “voluntary enslavement” or “instinctive, suicidal ineffectiveness of systems of power”.³³ The unshakeable Constitutional foundation, laid down in the Preamble, thus represents a steadfastness of values which constitutionalism accepts as an authority higher than the highest “powers that be”—an anchor for dignity of the person. At the same time, this unshakable nature makes of the Preamble a barrier to virtualisation,

³⁰ Cf. Sokolewicz: *op. cit.*, who however argues that “from the very essence of a Constitutional-revising statute it transpires that control must not be applied to the statute's substantive provisions which by definition have been designed to modify Constitutional provisions”. Similarly, L. Garlicki: *ibid.*

³¹ Cf. Garlicki, L.: Aksjologiczne podstawy reinterpretacji konstytucji (Axiological basis for reinterpretation of the Constitution). In: Zubik, M. (ed.): *Dwadzieścia lat transformacji ustrojowej w Polsce* (Twenty years of systemic transformation in Poland). Warszawa, 2010, 99.

³² Cf. Piotrowski: *op. cit.* 142.

³³ Cf. Baudrillard, J.: *Pakt jasności. O inteligencji zła* (The Lucidity Pact, or The Intelligence of Evil). Warszawa, 2005, 136.

which poses a threat to the Constitution in the same degree as other contraptions of the social world, where “anything, any moment, can turn into anything else”.³⁴

6. But the higher the frequency of principle- and value-invoking notions in the Constitutional text (usually in the Preamble), the greater and the more real is the authority of those who interpret these notions—and impart sense to them—in conditions of a particular constitutional dispute. This holds in particular for situations where, in particular circumstances of a particular case, the values declared in the Preamble stand in conflict among themselves, which requires that some of these values be either preferred over, or counter-balanced by, others. The judges empowered to interpret the Preamble, and also interpret the Constitution from the Preamble’s viewpoint, are thus awarded with the right of last word in particular political disputes—and they will hold this prerogative at least as long as the Constitution stays. This requires an appropriate restraint in invoking the Constitutional Preamble in Constitutional Court rulings and appropriate prudence in appointing the Justices of the Court, whose legitimacy stems from the special role of the Constitution under democracy and from the Constitutional Court’s mastery of the art of passing judgement on what is good and what is bad—in accordance with the maxim *ius est ars boni et aequi*. The existence of Preamble to the Constitution, and its application in Constitutional jurisprudence, is conducive to an inter-penetration of statutory-law culture and the culture of judge-generated law—which is an element of the common Constitutional tradition of European countries.

The transformations of the notion of national sovereignty, linked to its restriction by human rights, offer a great deal of legitimacy to the activities of the Constitutional Court which thus becomes a guardian of the limits to sovereignty, understood as exercise of authority based on the force of values referred to in the Preamble to the Polish Constitution—and simultaneously restricted by these values. Such re-definition of the notion of sovereignty legitimises the activities of the Constitutional Court, and at the same time makes this legitimacy contingent on the Constitutional Court’s involvement in the protection of human rights—remembering that respect for human rights provides a yardstick of sovereignty.³⁵

The impact exerted by the Preamble on the Polish Constitutional Court’s jurisdiction is both positive (from the standpoint of the tenets of constitutionalism) and restricted. The provisions of the Preamble proved useful for the purpose of legitimising the process of European integration and legitimising the public authorities because, when it comes to the application of the Constitution, the Preamble basically favours a balance between the realm of ideas and values on the one hand and the sphere of social practice on the other, between the need for change and the necessity of continuity in state affairs—and that, one might venture to suggest,³⁶ is what constitutions are for.

³⁴ Arendt, H.: *Między czasem minionym i przyszłym* (Between Past and Future). Warszawa, 1994, 117.

³⁵ Cf. Piotrowski, R.: Uwagi o ustrojowym znaczeniu sądownictwa konstytucyjnego [Comments on the systemic importance of Constitutional courts]. In: Budziło, K. (ed.): *Księga XXV-lecia Trybunału Konstytucyjnego* (In commemoration of the 25th anniversary of Constitutional Court). Warszawa, 2010, 323.

³⁶ Cf. Spadaro, A.: *Contributo per una teoria della costituzione*. Milano, 1994, 47.