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References to Philosophers in the Polish Case Law

Abstract

The article deals with the practice of invoking philosophers in the reasons for judgments of the Polish courts. A quantitative and qualitative analysis of the case law of the common courts, administrative courts, the Supreme Court and the Constitutional Tribunal allowed for the formulation of several main conclusions. First, although judgments containing references to philosophers constitute only a small fraction of all the case law, at the same time, when measured in absolute numbers, cases of quoting philosophers are not marginal. Second, in the two last decades there has been a clear intensification in the use of philosophical references in judgments. Third, references to philosophers exercise a number of different functions falling within the clarification and persuasive purposes of grounds of judgments. Fourth, there is no one attitude among courts and the parties towards the presence of philosophical arguments in the judicial process. The titular issue is not the further stage of the legal scholarship's discourse on "judges as philosophers" in the likeness of Dworkin's "Judge Hercules". The practice of referring to philosophers by the courts is primarily an issue of the style of reasons for judgment and the role of non-legal sources in the rationalisation of judicial decisions – and not so much in the making of them. In the author's view, the case law study reveals the utilitarian potential of philosophy for judicial argumentation.

Keywords: philosophers, reasons for judgment, judicial argumentation, Poland

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Introduction

The issue of relations between a judge and a philosopher and of philosophy as a source of inspiration for judges has repeatedly been raised in legal literature, especially the philosophical-legal one. The most famous example of a scientific reflection oriented in such a way is the concept of “Judge Hercules” by Ronald Dworkin.² This issue was also raised in the Polish jurisprudence, which was expressed in e.g. asking questions of “the judge as a philosopher” or “the judge as a positivist”³ (craftsman).⁴

The attention of the Polish legal science has not been drawn to the issue of references to philosophers in the reasons for judgements so far. Moreover, this issue did not meet wider interest in the case of the legal scholarship abroad, either.⁵ This paper presents the results of research on the judgements of Polish courts as regards the presence of references to philosophers. The conducted study of the case law is quantitative-qualitative in nature. On the one hand, a research intention underlying this article was determining the scale of cases of making references to philosophers in the reasons for judgements, showing the titular practice in the chronological aspect, with a breakdown by individual types of courts, determining the preferred catalogue of philosophers in the judicature. On the other hand, the goal was to recognise and apply a typology to the functions of the references to philosophers in the reasons for judgements. Characterising the

² R. Dworkin, *Imperium prawa*, Warszawa 2006, passim. See Ch. Eisgruber, *Should Constitutional Judges be Philosophers?*, [in:] S. Hershovitz (ed.), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin*, New York 2008, pp. 5–22.

³ Own translation [translator's note].

⁴ E.g. M. Safjan, *Wyzwania dla państwa prawa*, Warszawa 2007, pp. 202–208. See M. Najda, T. Romer, *Co mają do powiedzenia sędziom wielcy filozofowie?*, [in:] idem, *Etyka dla sędziów. Rozważania*, Warszawa 2007.

⁵ Only several scientific papers by representatives of the Anglo-Saxon legal doctrine are about the issue of referring to philosophers in the reasons of judgements. See N. Rao, *A Backdoor to Policy Making. The Use of Philosophers by the Supreme Court*, “University of Chicago Law Review” 1998, 1, pp. 1371–1401; T. Brooks, *Does Philosophy Deserve a Place at the Supreme Court?*, “Rutgers Law Record” 2003, 1, pp. 1–17; K. Schulz, *Backdoor use of philosophers in judicial decision-making? Antipodean reflections*, “Journal Griffith Law Review” 2016, 3, pp. 441–470; N. McCormack, *When Canadian Courts Cite the Major Philosophers. Who Cites Whom in Canadian Caselaw*, “Canadian Law Library Review” 2017, 2, pp. 9–28.

analysed issue from the functional perspective, specific cases of the courts' usage of the references to philosophers and their works were used as examples.

Methodological Assumptions

For the purpose of this paper, I adopted a broad understanding of the titular category of "philosophers", not identifying them with lecturers or graduates of philosophy. To me, the philosophers include not only scholars and thinkers who address ontological, epistemological issues or ones regarding logic, but also those who are active in the field of ethics, historiosophy, political philosophy or who engage in a philosophical-economic and philosophical-theological reflection.

The status of specific persons as philosophers may raise some doubts due to the non-obvious delimitation of philosophy and other scientific fields, and due to the interdisciplinary interests of those persons, e.g. the inclusion of Jesus Christ and the last three Popes in the conducted study as representatives of religious-ethical thinking. Similar problems with featuring philosophers are a concern of e.g. the authors of dictionaries and lexicons of philosophers.

When it comes to the scope of the research, I excluded cases of references to philosophers of law, understood as persons who received a degree in law (and who are alternatively philosophers at the same time), who are professionally associated with faculties of law and focus on philosophical-legal issues in their academic work, in the reasons for judgements. The mid-19th century is generally given as the caesura of the separation of philosophy of law. In my analyses, I did not include references, present in the Polish case law, to e.g. Ronald Dworkin, Herbert Hart, Hans Kelsen, Chaim Perelman, and many acclaimed Polish philosophers of law. Neither do I question the philosophical aspects of their scientific work, nor I deprecate the quality of their philosophical reflection. I only state that due to their juridical "specialisation" (legal training, work at law schools), the case-law references to them are more reasonably treated in terms of references to representatives of jurisprudence than philosophers such as e.g. Aristotle, Immanuel Kant or Jürgen Habermas who are outside the legal environment.

In the analysis undertaken, I did not include references to philosophers in the statements of the legal doctrine, which were quoted by the courts.⁶ I also omitted judgements in which the references to philosophers were directly connected with the issue of a given case, e.g. the issue of changing the name of

⁶ Judgement of the Constitutional Tribunal [hereinafter referred to as: the CT] of 19 April 2011, P 41/09 [Aristotle].

ulica Karola Marksa⁷ or the case related to infringement of personal interests by emitting a fragment of Leszek Kołakowski's book in a radio programme.⁸ Moreover, I did not treat cases of mentioning a philosopher without any reference to his views, e.g. the mere statements that Sigmund Freud is considered to be the father of psychoanalysis,⁹ and Rudolf Steiner and Carl Gustav Jung were representatives of philosophical Gnosticism,¹⁰ as the titular "references to philosophers".

I made the case law of the common courts, administrative courts, the Supreme Court, and the Constitutional Tribunal the research subject. In my study, I included the judgements collected in the Internet System of Legal Information¹¹ LEX up to the end of January 2019.¹² The entries which I looked up were the personal details of the most popular and recognised philosophers and such terms as "philosopher", "ethicist", "thinker", "scholar". I subjected every judgement in which a searched entry appeared to a content analysis in order to verify whether it included a reference to a philosopher in the sense adopted for the purpose of this paper.

Quantitative Analysis

The result of the conducted analysis of the case law of the Polish courts was the recognition of references to 52 philosophers in the reasons for 80 judgements.¹³

⁷ Judgement of the Supreme Administrative Court [hereinafter referred to as: the SAC] of 15 November 2018, II OSK 2385/18; Judgement of the Voivodeship Administrative Court [hereinafter referred to as: the VAC] in Wrocław of 25 April 2018, III SA/Wr 72/18.

⁸ Judgement of the Court of Appeal [hereinafter referred to as: of the CA] in Warsaw of 9 January 2007, VI ACa 720/06.

⁹ Judgement of the VAC in Warsaw of z 28 August 2012, III SA/Wa 3226/11.

¹⁰ Judgement of the SAC in Wrocław of 11 February 1991, SA/Wr 57/91.

¹¹ Internetowy System Informacji Prawnej [translator's note].

¹² <https://sip.lex.pl/>

¹³ John Acton (1x), Kazimierz Ajdukiewicz (2x), Hannah Arendt (1x), Aristotle (10x), St. Augustine of Hippo (1x), John Langshaw Austin (3x), Alexander Bain (1x), Zbigniew Bauman (2x), Pope Benedict XVI (2x), Isaiah Berlin (1x), Boethius (1x), Zdzisław Cackowski (1x), Barbara Chyrowicz (1x), Cicero (2x), Gerald Dworkin (1x), Emil Durkheim (1x), Friedrich Engels (2x), Michel Foucault (1x), Pope Francis (1x), Benjamin Franklin (2x), Sigmund Freud (1x), Jürgen Habermas (3x), Friedrich August von Hayek (4x), St. Jerome (1x), David Hume (2x), Pope John Paul II (3x), John of Salisbury (1x), Jesus Christ (4x), Immanuel Kant (4x), Leszek Kołakowski (1x), Krzysztof Kosior (1x), Tadeusz Kotarbiński (9x), Quintilian (1x), Gottfried Wilhelm Leibniz (1x), Karl Marx (3x), James Mill (1x), John Stuart Mill (7x), John Milton (1x), Wilhelm Ockham (5x), Maria Ossowska (3x), Plato (1x), Karl Popper (1x), John Rawls (9x), Jean-Jacques Rousseau (1x), Jacek Salij (1x), Arthur Schopenhauer (1x), Adam Smith (2x), Andrzej Szostek (1x), Tadeusz Ślipko (1x), Józef Tischner (1x), St. Thomas

Despite diligence, the numbers given should be read more as “at least that much”, not “exactly that much”.

One may observe a clear intensification in the practice of referring to philosophers in the reasons to court judgements and decisions over three decades. The references to philosophers were noted in 10 judgements from the 1990s, 21 judgements from the first decade of the current century, and 47 judgements from 2010–2019. There are also two pre-1990 judgements.

When it comes to the types of the courts – when measured in absolute numbers – philosophers were most frequently referred to by the administrative courts (29 judgements), common courts (23 judgements), the Constitutional Tribunal (21 judgements) and the Supreme Court (7 judgements), respectively. These statistics, however, do not allow for the formulation of conclusions on the degree of the inclination or readiness of the individual types of courts to make use of the references to philosophers. In order to articulate a conclusion in this regard, it would be necessary to proportionally refer the numerical data given above to the totality of the judgements of a given category of courts. This is not allowed by a disproportion in the percentages of the judgements of the individual types of courts available online. While the bases of the judgements of the Constitutional Tribunal and the administrative courts are complete, the bases of the judgements of the common courts and the Supreme Court are highly fragmentary.

In the case of the Constitutional Tribunal, the references to philosophers concerned both the constitutional court (13 judgements), and individual judges as the authors of separate opinions (9 separate opinions to 8 judgements). All the references to philosophers in the case law of the administrative courts, common courts and the Supreme Court were formally the statement of the courts themselves.

There are 13 Poles in the group of 52 philosophers. As far as the number of judgements including a reference to a philosopher is concerned, the most popular philosophers in the Polish judiciary are Aristotle (10x), John Rawls and Tadeusz Kotarbiński (9x), John Stuart Mill (7x) and William Ockham (5x).

Out of 52 philosophers mentioned in the judgements of the Polish courts, 21 were also referred to in the Strasbourg case law and/or in the opinions of the Advocates General of the Court of Justice of the European Union. In the context of the titular issue, however, each of these legal orders follows slightly different preferences in the selection of philosophers. For instance, in the Polish case law, there is not even one reference to philosophers who are most frequently mentioned in the opinions of the Advocates General and in the Strasbourg case law,

of Aquinas (1x), Slavoj Žižek (2x). The number of judgements including references to a given philosopher was given in the brackets.

that is, to Charles Montesquieu (11 opinions) and Thomas Hobbes (separate opinions to 6 judgements of the ECHR).¹⁴ However, a common regularity for the Polish and Strasbourg case law and the opinions of the Advocates General is a clear increase in cases of referring to philosophers in the reasons for judgements (opinions) in the last two decades.

The fact that the only recognised references to philosophers in pre-1989 judgements were references to Karl Marx and Friedrich Engels¹⁵ may suggest that the titular issue remained under the influence of political and ideological factors then. A relatively small number of judgements from that time, collected in the database considered, and out of those judgements identifying only two which referred to philosophers makes it, however, significantly more difficult to formulate representative conclusions on the subject matter.

The Perception of References to Philosophers in the Judicial Decision-Making Process by Courts and Parties to the Proceedings

The attitude of courts towards the role of philosophical reasons in the judicial decision-making process is not uniform. Next to the cases analysed in this paper, where the courts themselves refer to the work of philosophers, there is no shortage of judgements in which the courts criticised the philosophical argumentation – or at least the one that the court deemed as such – of the party to the proceedings. Due to quite laconic remarks of the courts in this regard, it remains unobvious whether the judiciary's objections generally concerned referring to philosophical reasons or came down to the inadequacy of these reasons on the grounds of a specific case. In general, the courts presented the philosophical reflections of the party to the proceedings in opposition to “the exchange of factual arguments, suitable for the decided case”¹⁶ or “the real circumstances of the decided event.”¹⁷

¹⁴ G. Maroń, *Odwolania do filozofów w opiniach rzeczników generalnych Trybunału Sprawiedliwości Unii Europejskiej*, “Europejski Przegląd Sądowy” 2019, 3, pp. 87–104; idem, *Odwolania do filozofów w orzecznictwie Europejskiego Trybunału Praw Człowieka*, “Przegląd Prawa Publicznego” 2018, 12, pp. 27–43.

¹⁵ Judgement of the SAC in Wrocław of 26 August 1988, SA/Wr 773/87; Resolution of the Supreme Court [hereinafter referred to as: the SC] of 14 March 1950, KO 46/50.

¹⁶ Judgement of the Regional Court [hereinafter referred to as: the RC] in Elbląg of 17 October 2014, IV Ua 40/14.

¹⁷ Judgement of the District Court [hereinafter referred to as: the DC] in Jelenia Góra of 5 November 2013, II K 1029/12.

One sometimes may get the impression that the court, defining the party's statements as "a philosophical standpoint" or "philosophical reflections", thereby felt exempt from the obligation to assume an attitude towards those statements.¹⁸

The cases of a court referring to a philosopher or more or less clearly undermining the philosophical argumentation of the party to the proceedings do not exhaust the courts' attitude towards philosophers and philosophy that can be reconstructed from the analysis of the reasons for judgements. It happens that the courts determine some legally relevant terms in their judgements as derived from philosophy or constituting its prime object of interest.¹⁹ There is also no shortage of cases when they emphasise the overlap in meaning of specific terms on the grounds of law and philosophy,²⁰ or their non-identity.²¹ They sometimes directly point out a philosophical inspiration for the establishment of certain provisions by the legislator, e.g. the statement that the genesis of Article 1 of the Act of 21 August 1997 on the Protection of Animals – ordering a human being to provide "respect, protection and care" for animals – is connected with, among other things, "the philosophical perception of the nature of a living creature."²² Another time, the courts, labelling an issue as philosophical, expose its complexity and the non-uniformity of opinions which accompany it. At the same time, they emphasise that the philosophical nature of a given issue does not exempt them from the evaluation of that issue on the grounds of the law. For instance, a court stated in one of the cases: "Despite the implication of the philosophical concept of human dignity, several basic features of this principle may be distinguished."²³ Another court raised that "In civil law, somewhat independently from basic philosophical and axiological disputes, the conditional legal capacity of the *nasciturus* can be seen."²⁴

The perception of the presence of philosophical argumentation in the judicial decision-making process is equally non-uniform for the parties to the proceedings. In the reasons for several judgements, the courts reported a reference to philosophers which was made by the party to the proceedings in the articulation of that

¹⁸ Judgement of the AC in Gdańsk of 2 December 2015, ACa 487/15; Judgement of the SAC of 30 March 2010, II FSK 337/10; Judgement of the VAC in Rzeszów of 6 May 2011, II SA/Rz 205/11.

¹⁹ Judgement of the VAC in Warsaw of 26 February 2016, VII SA/Wa 2913/15 [human dignity as "the basic issue of philosophical anthropology"]; Judgement of the AC in Katowice of 8 October 2013, III AUa 2342/12 [the understanding of justice derived from "social philosophy"].

²⁰ Judgement of the SC of 5 April 2002, II CKN 1095/99 [term "truth"].

²¹ Judgement of the SAC in Warsaw of 19 March 1999, II SA 135/99 [term "thing"].

²² Judgement of the RC in Łódź of 5 April 2018, III Ca 23/18.

²³ Judgement of the RC in Częstochowa of 18 March 2016, IV U 1470/12.

²⁴ Judgement of the RC in Łódź of 12 February 2014, III Ca 1074/13.

party's own procedural standpoint²⁵ or the party's calling of his or her reasoning by the name of "a philosophical analysis."²⁶ Sometimes, in the case of the parties to the proceedings, similarly to the case of the judges, one may notice contradistinguishing of "the pragmatism" of law and "the abstractness" of philosophy. In one of the cases, the party to the proceedings raised that if "law is supposed to have practical use", then "abstract, philosophical and theoretical concepts" cannot be adopted as a reference point in juridical considerations.²⁷

Cases when a court's reference to a philosopher was criticised by the party to the proceedings, or even became the object of a plea are singular. In one of the cases, the court – represented by a court referendary – justifying the decision to reject the accuser's application for dispensation from payment of the costs of proceedings, indicated that leasing is "a model example for the classic definition of wealth according to Aristotle who stated that it involves using more than possessing." This way, it noted the circumstance that the leasing of luxury cars by the accuser shows that person's not bad financial situation.²⁸ In the objection to this decision, the accusing party raised that, among other things, "the Referendary's argument that the accuser has numerous leasing contracts and that leasing is an example of Aristotelean wealth" is not legitimate. In the party's opinion, "the use of philosophical arguments from Aristotle is non-normative in nature. Aristotle's statement does not constitute a source of the law, was not illustrated by a quotation, and is not verifiable because of that. Aristotle is not an acclaimed legal or economic authority, either, so his reflection cannot be treated as in terms of voices of the legal doctrine or literature." The court deciding on the objection did not refer to these specific objections.²⁹ In another case, the attorney of the party to the proceedings made allegations against the judge in connection with the latter's supposed references to philosophy in the judicial decision-making

²⁵ Judgement of the SAC of 30 May 2014, II OSK 1/13 [Charles Montesquieu]; Judgement of the VAC in Gliwice of 30 October 2012, I SA/GI 474/12 [Adam Smith]; Decision of the SC of 29 August 2006, IV KK 126/06 [Isaac Newton]; Judgement of the VAC in Warsaw of 16 January 2012, III SA/Wa 1168/11 [Cicero]; Judgement of the VAC in Szczecin of 5 December 2012, II SA/Sz 817/12 [Zbigniew Musiał, Bogusław Wolniewicz]; Judgement of the SAC of 19 March 2008, II GSK 427/07 and Judgement of the VAC in Warsaw of 6 April 2017, VI SA/Wa 2389/16 [Tadeusz Kotarbiński].

²⁶ Judgement of the AC in Łódź of 13 September 2012, III AUa 57/12.

²⁷ Decision of the SAC of 22 May 2009, I OSK 535/09.

²⁸ Decision of the VAC in Cracow of 23 October 2015, III SA/Kr 1095/15, III SA/Kr 1094/15; Decision of the VAC in Cracow of 1 December 2015, III SA/Kr 1443/15.

²⁹ Decision of the VAC in Cracow of 12 January 2016, III SA/Kr 1443/15.

process. The motion for recusal of the judge was justified by “[the judge’s] usage of the non-literary language when using philosophical revelations.”³⁰

The Functions of References to Philosophers in the Reasons for Judgements

The references to philosophers in the reasons for judgements have various, frequently mutually crossing, functions. Most frequently, the courts refer to the philosophers by determining and explaining concepts of both philosophical and legal importance. The constitutional term of “social justice” (Article 2) was explained in the case law by referring to i.a. Aristotle’s reflections or John Rawls’s concept of justice.³¹ Presenting criminal punishment in terms of retributive justice, Immanuel Kant was cited, in turn.³² In the context of the constitutional equality in law (Article 32 section 1), reference was made to Aristotle’s view, according to which “equality means equal treatment for equals, and unequal treatment for unequals”³³ and John Rawls’s standpoint.³⁴ The philosophers’ determinations were also referred to during interpreting such concepts as “ethics” and “morality” (Maria Ossowska, Tadeusz Ślipko),³⁵ “dignity” (Leszek Kołakowski, Immanuel Kant),³⁶ “subjective right” (Zdzisław Cackowski, Maria Ossowska),³⁷ “truth”

³⁰ Decision of the VAC w Bydgoszcz of 27 February 2006, II SO/Bd 1/06. See Judgement of the VAC w Gliwice of 1 July 2005, I SA/GI 44/05. The court indicated in the reason that in the action against the decision of the Self-Government Board of Appeals, “the accuser raised that the reason for the contested decision was ‘unjust and philosophical.’”

³¹ Ruling of the CT of 22 August 1990, K 7/90; Ruling of the CT of 4 February 1997, P 4/96; Judgement of the CT of 22 December 1997, K 2/97; separate opinion of Z. Cieślak to the judgement of the CT of 17 December 2008, P 16/08; separate opinion of M. Granat to the judgement of the CT of 19 December 2012, K 9/12; Judgement of the SAC of 13 April 2016, II OSK 1991/14; Judgement of the CT of 2 December 2008, P 48/07. See Judgement of the VAC in Poznań of 8 August 2012, I Sa/Po 272/12; separate opinion of M. Zdyb to the judgement of the CT of 9 June 2003, SK 5/03.

³² Judgement of the SC of 30 November 2016, IV KK 225/16.

³³ Judgement of the CT of 23 November 2010, K 5/10; Judgement of the VAC in Cracow of 6 July 2011, III SA/Kr 186/11.

³⁴ Judgement of the RC in Bydgoszcz of 22 March 2018, VI Pa 126/17.

³⁵ Judgement of the CT of 23 March 2006, K 4/06; Judgement of the CT of 10 December 2014, K 52/13.

³⁶ Judgement of the RC in Szczecin of 26 March 2010, I C 28/10; Decision of the VAC in Warsaw of 25 March 2008, III SA/Wa 318/08.

³⁷ Judgement of the VAC in Warsaw of 8 May 2014, IV SA/Wa 472/14.

(Aristotle),³⁸ “freedom” (John Acton, Isaiah Berlin, John Stuart Mill, Karl Popper, Józef Tischner).³⁹

The courts also refer to philosophers, explaining the genesis of specific legally relevant concepts or principles of the law. In criminal cases, the courts stated several times in the reasons for their decisions that the theory of the equivalence of the causal link “is derived from John Stuart Mill’s philosophical assumptions.”⁴⁰ By signalling the ancient origin of the *lex retro non agit* principle, reference was made to Cicero’s utterance⁴¹. Mentioning a work by St Augustine of Hippo, *The City of God*, and *Paradise Lost* by John Milton, was of different nature. It was meant to show that the genesis of the words “see darkness” – the use of which in a commercial became the subject of a court dispute with regard to copyright law – precedes the film *Sexmission*.⁴²

The courts sometimes invoke philosophers, pointing out the genesis and the essence of specific concepts, their evolution and factors determining that evolution simultaneously. For instance, this kind of more extensive references to 11 philosophers was made by the Constitutional Tribunal, explaining the concept of conscience in the context of the constitutionality of doctors’ conscience.⁴³

The philosophers’ works also turned out to be helpful for the courts in exposing the defectiveness of reasoning used by the party to the proceedings or a lower court in interpreting the law or characterising the facts of the case. For instance, in one of the cases, the court referred to so-called Hume’s guillotine, explaining that the accuser “cannot conclude what ought to be on the basis of what is, and vice versa.”⁴⁴ The courts made references to a principle which is called “Ockham’s razor” several times. What they deemed as a symptom of multiplying entities more than necessary was attributing elements which a specific legal institution does not have to that institution,⁴⁵ the introduction of reflections on “absolutely

³⁸ Judgement of the VAC in Warsaw of 29 May 2018, III SA/Wa 2589/17; III SA/Wa 2590/17.

³⁹ Judgement of the SC of 28 September 2000, V KKN 171/98; separate opinion of M. Granat to the judgement of the CT of 30 July 2014, K 23/11.

⁴⁰ Decision of the SC of 26 April 2001, II KKN 104/99; Judgement of the AC in Gdańsk of 17 December 2013, II AKa 366/13. Similarly Judgement of the RC in Łódź of 16 February 2016, VII Ua 149/15; Judgement of the Gdańsk-Południe DC in Gdańsk of 25 August 2015, VI P 279/14.

⁴¹ Judgement of the CT of 6 July 1999, P 2/99.

⁴² Judgement of the AC in Cracow of 5 March 2004, I ACa 35/04.

⁴³ Judgement of the CT of 7 October 2015, K 12/14 [Alexander Bain, Boethius, Barbara Chyrowicz, Emil Durkheim, St. Jerome, David Hume, Krzysztof Kosior, James Mill, John Stuart Mill, A. Szostek, St. Thomas of Aquinas].

⁴⁴ Judgement of the VAC in Poznań of 21 June 2017, IV SA/Po 147/17.

⁴⁵ Judgement of the VAC in Łódź of 10 May 2011, I SA/Łd 351/11.

all possible scenarios (versions of the occurrence of the event, result)” into the process of establishing the substantive truth in the taking of evidence,⁴⁶ covering further issues with the court’s explanations, despite the fact that these issue did not remain “within the scope that is essential for deciding the controlled case”,⁴⁷ an unnecessary indication in a cassation appeal of provisions “the violation of which the reason does not refer to.”⁴⁸ The court referred to Kazimierz Ajdukiewicz, arguing that the implication method is inadequate as part of formal logic for the interpretation of a provision of a law expressed in a natural language.⁴⁹ In another case, the court evaluated the correctness of the opinions of experts through the definition of “reasoning” and “concluding” by Ajdukiewicz.⁵⁰ In yet another case, the court called the use of the term “indisputable” by the Self-Government Board of Appeals Schopenhauer’s eristic, in the situation when the evidence was equivocal.⁵¹ The courts also referred to Tadeusz Kotarbiński, more specifically, to his book *Kurs logiki dla prawników*,⁵² explaining the nature of different categories of reasoning.⁵³

The courts referred to philosophers also within the framework of logical-semantic determinations accompanying the interpretation of the law. When it comes to the meaning and usage of the words “perhaps” and “if”, John Langshaw Austin was referred to.⁵⁴ In turn, an analysis of Pope Benedict XVI’s encyclical led the court to the conclusion that a donation for “charity and care” purposes may achieve the objectives of “a religious cult” under the tax law.⁵⁵

A part of the references to philosophers was used by the courts to strengthen the legitimisation of legal provisions. Support for restricting an individual’s

⁴⁶ Judgement of the AC in Łódź of 20 November 2012, II AKA 162/12; Judgement of the AC in Łódź of 19 March 2013, II AKA 4/13.

⁴⁷ Judgement of the SAC of 19 February 2014, II OSK 2234/12.

⁴⁸ Judgement of the SAC of 5 September 2017, II GSK 3552/15.

⁴⁹ Decision of the SC of 22 October 1993 r., III SW 59/93.

⁵⁰ Decision of the RC in Cracow of 5 February 2016, II Ca 2355/15.

⁵¹ Judgement of the VAC in Szczecin of 29 November 2012, II SA/Sz 891/12.

⁵² “Logic for Lawyers” [translator’s note].

⁵³ Judgement of the SAC in Poznań of 25 February 1993, SA/Po 2462/92; Judgement of the AC in Lublin of 19 June 2006, II AKA 166/06; Judgement of the VAC in Białystok of 10 July 2007, I SA/Bk 361/07; Judgement of the CT of 28 November 2007, K 39/07; Judgement of the AC in Lublin of 7 July 2009, II AKA 44/09; Judgement of the VAC in Warsaw of 8 September 2016, VII SA/Wa 2068/15; Judgement of the SAC of 14 November 2018, II OSK 2236/18. See Judgement of the VAC in Wrocław of 24 February 2014, II SA/Wr 835/13; Judgement of the SAC of 24 September 2015, II OSK 1630/14.

⁵⁴ Judgement of the SAC of 21 August 2015, II FSK 1703/13; Judgement of the SAC of 3 September 2013, II FSK 2414/11; Judgement of the VAC in Cracow of 27 June 2014, I SA/Kr 2189/13.

⁵⁵ Judgement of the SAC of 6 September 2013, II FSK 2608/11.

freedom by obligating one to fasten seat belts in a car was found in the views of the representatives of liberal philosophy, including Gerald Dworkin, on paternalism.⁵⁶ Justification for the obligation of military service was found in John Paul II's words.⁵⁷ Pope Francis's utterance was invoked to in favour of the penalisation of insulting religious feelings.⁵⁸ The legitimisation of tax law obligations was supported with examples from the life and teachings of Jesus Christ.⁵⁹

The courts also explained certain aspects of the facts of the decided case with the philosophers' determinations. In one of the cases, the court, pointing out the need for interpreting the defendant's threat posed against the victim considering the context of relations between the two, referred to Jürgen Habermas's theory of communication.⁶⁰

Some references to philosophers communicated regularities which constitute so-called common knowledge. In the context of the punishable threat offence, the court noted, quoting Plato that "concerns are raised not by the evil that happened, and not by the one that is now, but by the evil that is expected."⁶¹ In another case, the court indicated that a witness's testimony concerning the defendant's utterance is not disqualified by the circumstance by the fact that the witness heard that utterance "through the wall". The court quoted Quintilian who stated that "a person's voice is as easy to distinguish for the ear as the face is easy to distinguish for the eye."⁶²

The references to philosophers sometimes have an illustrative function, that is, they serve a clearer and more distinct expression of certain statements. Judges Ewa Łętowska and Andrzej Rzepliński, arguing for the necessity of covering the possibility of sharing also arguably false information with constitutional freedom of speech, referred to Benjamin Franklin's utterance. Judge Łętowska used a literal quotation from "the founding father" of the United States: "If all printers were determined not to print anything until they were sure it would offend

⁵⁶ Judgement of the CT of 9 July 2009, SK 48/05.

⁵⁷ Judgement of the SAC in Katowice of 5 August 1992, SA/Ka 678/92.

⁵⁸ Judgement of the RC in Gdańsk of 22 December 2015, I C 279/12.

⁵⁹ Judgement of the VAC in Poznań of 13 August 2009, I SA/Po 463/09; Judgement of the VAC in Poznań of 4 June 2009, I SA/Po 363/09; Judgement of the VAC in Poznań of 6 December 2007, I SA/Po 1052/07 and 1053/07; Judgement of the VAC in Poznań of 19 April 2006, I SA/Po 2448/03, 2449/03 and 2450/03.

⁶⁰ Judgement of the RC in Łódź of 6 April 2017, IV K 191/16. Similarly Judgement of the RC in Łódź of 5 May 2016, IV K 214/15. See Decision of the RC in Częstochowa of 29 November 2013, IV U 1251/10.

⁶¹ Judgement of the RC in Cracow of 29 April 2015, IV Ka 245/15.

⁶² Judgement of the RC in Elbląg of 30 June 2014, IV Pa 20/14.

nobody, very little would be printed.”⁶³ In turn, Judge Rzepliński used its paraphrase: “If ordered journalists not to publish anything until they were sure it would not show the truth, very little would be printed.”⁶⁴

An important – though rather small from the proportional perspective – group of references to philosophers constitutes those by means of which the court attempts to rationalise its position as regards complex legal issues or those which are directly philosophical-legal and/or strongly involve axiological or political matters. Such references are not reserved only for the Constitutional Tribunal, nor they are limited to so-called hard cases. They also appear in the common courts’ argumentation, especially when these courts deviate from the linguistic interpretation of legal provisions, and make a judgement that is “controversial” compared to the judgements of other courts in analogous cases. On the grounds of the case concerning the amount of a retirement pension for a former officer of the security service of the Polish People’s Republic, the Regional Court in Częstochowa made very extensive reflections regarding the philosophy of law, in which it raised the issue of understanding the rule of the law, collective responsibility, social rights, justice, and the arbitrariness of the employer and the courts. The court invoked such philosophers as Zygmunt Bauman, Michel Foucault, Friedrich August von Hayek, Karl Marx, Jean-Jacques Rousseau, Slavoj Žižek⁶⁵ in its arguments. In another case, the same court criticised the possibility for ZUS⁶⁶ or the judiciary to establish decent pay and thereby the amount of insurance contributions, on the basis of the criteria of equity. The court referred to Immanuel Kant who “emphasised that a judge is forbidden from basing their decision on the principle of equity. It would only be possible if the judge financed with their own money what they took away from one party in favour of the other in the name of equity. The judge guided by the principles of equity transforms into a legislator.”⁶⁷

The Warszawa-Śródmieście District Court, justifying the behaviour of a demonstrator who blocked passage on a public road in protest against the government, emphasised the importance of the freedom of speech and assembly for the essence of democracy and pluralist society. In its argumentation, the court referred to John Rawls and Hannah Arendt.⁶⁸

⁶³ Separate opinion of E. Łętowska to the judgement of the CT of 30 October 2006, P 10/06.

⁶⁴ Separate opinion of A. Rzepliński to the judgement of the CT of 29 September 2008, SK 52/05.

⁶⁵ Judgement of the RC in Częstochowa of 18 March 2016, IV U 1470/12.

⁶⁶ ZUS – Zakład Ubezpieczeń Społecznych – Social Insurance Institution [translator’s note].

⁶⁷ Judgement of the RC in Częstochowa of 22 March 2018, IV U 515/14; Decision of the RC in Częstochowa of 12 November 2014, IV U 515/14.

⁶⁸ Judgement of the Warszawa-Śródmieście DC in Warsaw of 22 January 2019, XI W 59/18.

In a case concerning the submission of lustration declarations, the Supreme Court invoked Aristotle who “noticed that the absolute performance of duties resulting from law can in certain situations lead to effects which are unwanted from the ethical point of view. It may be added that this can also lead to effects which are unwanted from the point of view of state interests, and it can sometimes lead to simply absurd effects.”⁶⁹

In the context of historical justice associated with the issue of lustration, two judges of the Constitutional Tribunal also referred to philosophical-theological argumentation. Despite the fact that they relied on similar sources, they justified different conclusions with them. Judge Bohdan Zdziennicki, questioning the constitutionality of the Act of 18 October 2006 on Revealing Information on the Documents of the State Security Authorities from 1944–1990 and the Content of the Those Documents, referred to, among other things, the encyclicals and utterances of John Paul II and Benedict XVI. In the judge’s opinion, they communicate the need for respect and love for another human being, and the need for abstinence in judging others.⁷⁰ In turn, Judge Zbigniew Cieślak, supporting the constitutionality of several – questioned by the Tribunal – provisions of the act mentioned above, found a call for respect for the truth and the homeland in John Paul II’s teachings and Jacek Salij’s views.⁷¹

Finally, it occasionally happens that a reference to a philosopher is mainly or exclusively decorative, and is more of a linguistic form of expression, adding some colour to the reason of a judgement, than a typical argumentative tool, e.g. quoting Cicero’s sentence *O tempora, o mores!*⁷²

Conclusions

Law and philosophy are not realities hermetically separated from each other. Juridical reflections, also those made by judges in the judicial decision-making process, are frequently philosophical to some extent. It is impossible to avoid this in a situation when the object of legal regulations is collaterally the object of philosophical delving. This concerns the case-law practice of constitutional

⁶⁹ Decision of the SC of 20 March 2013, II KK 230/12.

⁷⁰ Separate opinion of B. Zdziennicki to the judgement of the CT of 11 May 2007, K 2/07.

⁷¹ Separate opinion of Z. Cieślak to the judgement of the CT of 11 May 2007, K 2/07.

⁷² Judgement of the RC in Piotrków Trybunalski of 22 March 2017, IV Ka 91/17.

courts.⁷³ Therefore, Judge Zdzisław Czeszejko-Sochacki's claim that "the Tribunal does not comment on general issues of political, philosophical or medical nature and cannot become involved in such disputes",⁷⁴ is not convincing.

An erroneous belief that the judicial decision-making process remains completely free from "philosophical issues" is firstly a consequence of anticipating the very tight framework of philosophy itself. The philosophical issues are not exhausted in questions about "the sense of life, what happens to a human being after one's death",⁷⁵ but they also refer to e.g. the area of axiology and politics. Secondly, law is not fully conclusive. In the case-law practice, so-called hard cases occur, and settling them requires reference to extralegal sources, e.g. morality, philosophy or religion. As Jerzy Zajadło notes, an absolute alternative "either the judge as a positivist or the judge as a philosopher" is wrong.⁷⁶

This does not mean that the discourse of the judges and the discourse of the philosophers regarding the same issue are identical in terms of purposes, adopted assumptions, exposed aspects, preferred arguments, etc. The Constitutional Tribunal is right when in the context of the constitutionality of Article 56 § 1 of the Fiscal Penal Code, penalising the provision of "untruth" in a tax declaration by a taxpayer, it states: "The constitutional doubt is thus not **directly** [emphasis G.M.] included in the philosophical question *quid est veritas?* (Vulgate J 18,38)."⁷⁷

In the introduction to this paper, interest of the legal doctrine, including the Polish one, in the topic of "the judge as a philosopher" was signalled. Anna Rossmannith points out the need for "distinction of the disposition of a philosopher and a humanist among the attributes of the modern judge." In her opinion, the judge as a philosopher, contrary to the judge as an official, is characterised by axiological sensitivity in the process of pursuing justice in decided cases.⁷⁸ Similarly, Marek Safjan emphasises the necessity of the judge's axiological sensitivity manifesting itself in "referring to the basic rights of an individual and the principles of the system" headed by "a human being's dignity." Thus, the judge's mission is not so much "settling moral disputes" as "looking for justice on the basis of the law." However, when the judge "decides to look for an answer in the

⁷³ J. Zajadło, *Sędzia konstytucyjny – profil filozoficznoprawny*, [in:] T. Stawecki, W. Staśkiewicz (eds.), *Dyskrecjonalność w prawie*, Warszawa 2010, pp. 15–33.

⁷⁴ Separate opinion of Z. Czeszejko-Sochacki to the ruling of the CT of 28 May 1997, K. 26/96.

⁷⁵ Judgement of the AC in Gdańsk of 29 June 2015, I ACa 131/15.

⁷⁶ J. Zajadło, *Po co prawnikom filozofia prawa*, Warszawa 2008, p. 16.

⁷⁷ Judgement of the CT of 12 September 2005, SK 13/05.

⁷⁸ A. Rossmannith, *Wrażliwość aksjologiczna sędziego*, [in:] T. Stawecki, W. Staśkiewicz (eds.), *Dyskrecjonalność...*, p. 253.

principles and values of the legal system, in its axiology”, then “both currents of legal and philosophical reflection may find convergence points at a certain level”, and simultaneously still “retain their autonomy and own ways of development.”⁷⁹

Despite possible associations, the titular issue is, however, not another version of the doctrinal discussion on “judges as philosophers”. The practice of referring to philosophers by the courts is primarily a part of the issue of the style of justifying judgements and the role of extralegal sources in the rationalisation – and not so much in undertaking – judicial decisions. While the question of justifying the judicial decision, including the theme of the style of that justification, has been drawing the attention of the Polish jurisprudence for many years, the question of the place and functions of references to materials *extra legem* in the judgements is still yet to be explored scientifically.

A judge who refers to a philosopher in the reasons for judgement is not necessarily marked by axiological sensitivity, and the process of his reasoning which led him to the decision did not have to have much to do with the thinking of Dworkin’s Hercules. Moreover, justifying the decision by the sole fact of referring to a philosopher does not become discursive, it may still be expressed in the so-called magisterial style.

Referring to philosophers in the reasons for judgements is primarily an argumentative operation and not an indicator of the nature of the judicial deliberation preceding the decision on a particular case or of the method adopted by individual judges.

The analysis of the case law shows the utilitarian potential of philosophy for judicial argumentation. Invoking extralegal sources in judgements has nothing to do with undermining the paradigm of settling cases on the basis of the law and within its limits. Naive reductionism marks a belief that the sole quoting of Cicero, St Thomas of Aquinas or John Paul II shows that the court made normative grounds for the decision on applying law from those persons’ views and not the law. The use of extralegal references in the judgements is calculated to realise the clarifying and persuasive function of the reasons for the judgement. More detailed functions described above are only their instantiations. Such references serve the courts as more communicative, in the sense of understandable for the addressee, explanations of determinations made regarding the facts, the results of the interpretation of the law, the content of the decision and the reasoning leading to individual conclusions. At the same time, these references are to support the court in convincing the addressee of the legitimacy and rightness of the determinations made and conclusions drawn. They do not replace – because

⁷⁹ M. Safjan, *Wyzwania...*, p. 207.

they cannot do it – the typical legal argumentation, but they complement it subsidiarily as one of the measures of the judicial rhetoric.

The reasons for the judgements of the Polish courts are frequently and not unreasonably accused of excessive formality and linguistic juridical “jargon” which make them more difficult to perceive and understand.⁸⁰ Some judgements resemble – as sarcastically noted by the Regional Court in Piotrków Trybunalski – “a peculiar textbook of provisions and commentaries because most of the text is quotations from legal acts and compilations.”⁸¹ One may get the impression that in many cases, the courts forget that the addressees of the reason include – next to higher courts, the representatives of the legal practice and legal doctrine – also, and perhaps primarily, the parties to the proceedings who did not receive legal training. When a judgement settles an issue that is legally important to a wider social group, refers to axiologically or politically controversial matters, was made in a case involving a public figure, concerns an event that is an object of social outrage, the addressees of its justification also include the representatives of the mass media and the public opinion. The judges themselves frequently indicate the need for “a simpler and more communicative language of the reasons for judgement.”⁸²

One needs to be careful in seeking remedies for the accusations against the linguistic form of the judgements in the references to philosophers. The philosophical knowledge of citizens, including the judges, is limited, and the philosophers’ delving can be complex and tricky. On the other hand, however, it would be an exaggeration to perceive the entirety of philosophical reflection in terms of specialist knowledge available only for few. It seems that in many of the mentioned judgements, the courts used references to philosophers which were clear and communicative for a wide audience with average humanistic competences. This, in turn, conditions, but does not guarantee, that a reference will achieve its explanatory and persuasive objectives.

Moreover, the presence of references to philosophers in the judgements shows the usefulness of such subjects as theory and philosophy of law and history of political and legal doctrines in legal academic education. The reduction of both subjects present in the curriculum of the students of law to abstract, effusive

⁸⁰ A. Makosz, *Sędziowie piszą niezrozumiałe uzasadnienia do wyroków*, <https://prawo.gazetaprawna.pl/artykuly/368582,sedziowie-pisza-niezrozumiale-uzasadnienia-do-wyrokow.html>

⁸¹ Judgement of the RC in Piotrków Trybunalski of 27 September 2016, IV Ka 491/16.

⁸² M. Szczęsny, *Kafejka “Prosto o prawie” – wywiad z Prezes warszawskiej Iustitii*, <https://kruczek.pl/wywiad-iustitia/>

reflections which are supposedly not useful for the legal trainees in the future legal practice should be considered unfounded and harmful.

Despite the claims of some authors, the presence of references *extra legem* in the case law is not an indication of peculiar “delegalisation of law”⁸³ and redefining the essence of the process of applying law, but it is a testament of certain transformations in the judicial argumentation itself and in the manner of the court’s communication with the parties to the proceedings, the media and the general public. Argumentative formalism and purism are not necessarily best for the accomplishment of the both the procedural and extraprocedural goals of the reason.⁸⁴ Although it’s unavoidable to some extent, when it is subject to absolutisation, it becomes counterproductive. The references to philosophers, and even references to even more “exotic” – from the perspective of the judicial decision-making process – extralegal sources, such as e.g. fiction⁸⁵ or the Bible⁸⁶ do not have to be only decorative, but may contribute to the judicial argumentation. Although it would be an exaggeration to claim that they are necessary for the correct administration of justice,⁸⁷ at the same time, their presence in the reasons for a judgement is not necessarily redundant and pointless.

⁸³ F. Schauer, V. Wise, *Nonlegal Information and the Delegalization of Law*, “The Journal of Legal Studies” 2000, 29, p. 495–515.

⁸⁴ E. Łętowska, *Pozaprocesowe znaczenie uzasadnienia sądowego*, “Państwo i Prawo” 1997, 5, pp. 3–17.

⁸⁵ G. Maroń, *Odwolania do literatury pięknej w uzasadnieniach sądowych orzeczeń*, “Przegląd Sądowy” 2019, 1, pp. 87–104.

⁸⁶ Idem, *Integralność religijna sędziego oraz argumentacja religijna w amerykańskim procesie orzecznictwym*, Rzeszów 2018, pp. 377–387.

⁸⁷ Artur Kotowski rightly notes that “an accurate reason, but in an aphiloosophical style will as correct as accurate in a philosophical style, under the condition that they both meet the normative requirements of a given procedure.” [own translation – translator’s note]. A. Kotowski, *Teoretyczno-prawna analiza pojęcia uzasadnienia*, [in:] M. Grochowski, I. Rzucidło-Grochowska (eds.), *Uzasadnienia decyzji stosowania prawa*, Warszawa 2015.