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Reference to Criterion of Necessity in Democratic Society in the European Convention on Human Rights: Context of Legal Interpretation and Jurisdictional Role*

Odesłanie do kryterium konieczności w demokratycznym społeczeństwie w Europejskiej Konwencji Praw Człowieka. Kontekst wykładni prawa i roli orzeczniczej

ABSTRACT

The study covers a theoretical analysis of the criterion of necessity in democratic society, which appears in several provisions of the European Convention on Human Rights and plays an important role in the assessment by the European Court of Human Rights of the activities of authorities of member states of the Council of Europe involving interference with such important rights as the right to privacy protection or freedom of speech, religion, assembly and association. Apart from the linguistic analysis of the phrase, it was found that this criterion can be considered as a component of the general reference clause in the context of its application and interpretation. Its axiological content associated with the type of references has been placed within the area of classic axiological choices related to the interpretation of phrases expressing extra-legal criteria. The unification of axiology of

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human rights standards in Europe has been recognized as the main function of this criterion since it is judicially used not only by the European Court of Human Rights, but also by national courts of Council of Europe member states.

Keywords: necessity; democratic society; legal interpretation; law application; Polish courts; European Court of Human Rights

INTRODUCTION

The study[1] seeks to determine the role of the criterion of necessity in democratic society in the European order of human rights protection. In particular, it is important to answer the question whether it can be regarded as a component of a general reference clause in the context of its application and interpretation, and whether its content, despite its distinct linguistic form in comparison with clauses found in national legal orders, falls within the classical axiological choices related to the interpretation of phrases expressing extra-legal criteria.

The above-mentioned findings will be established, on the one hand, based on the use of theory of law achievements concerning reference clauses and theories of legal interpretation, as well as the literature on the system of human rights protection functioning within the Council of Europe as a regional order of international law, and, on the other hand, on the basis of research of the case law of the European Court of Human Rights (ECtHR) and of Polish courts, in particular of the Constitutional Tribunal and the Supreme Administrative Court, regarding the interpretation and the manner of use of this reference in decision-making processes of the law application.

DISCUSSION

1. Language versions and components of the normative expression

1. The reference to the criterion of necessity in democratic society as one of the most important legislative constructs of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) is expressed in Articles 8, 9, 10 and 11 of the Convention and in Article 2 of Protocol No. 4 to the Convention.

[1] The study has been developed as part of the research project "Axiological Judicial Discretion: Between Legislator's Intentions and Autonomy of Judiciary", funded by the National Science Centre under contract no. 2016/21/B/HS5/00139.

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In the English version of the text of the Convention, this term has a uniform linguistic form of all the above-mentioned regulations as "necessary in a democratic society". A similar situation exists in the French language version, in which the construct reads as "constituent des mesures necessaires, dans une societe democratique", and only in Article 8 it has a slightly different grammatical form ("qu'elle constitue une mesure qui, dans une societe democratique"), without, however, introducing different terms to the name of the criterion.

In the Polish language version of the Convention,[2] this phrase appears in a homogeneous form in Articles 9, 11 and 2 of Protocol No. 4 ("konieczne w demokratycznym społeczeństwie", "necessary in democratic society"), and in a slightly altered form in Article 8 of the Convention (Pol. "przypadków koniecznych w demokratycznym społeczeństwie", "cases that are necessary in democratic socjety"). However, it takes a distinct form in Article 10 of that legislative act, where the Polish words "niezbędne w demokratycznym społeczeństwie" ("indispensable in democratic society") appear.

2. These expressions, notwithstanding the linguistic differences noted above, meet the characteristics of a phrase that is vague in terms of content, semantically open, the elements of which are names referring to the estimation of the degree (scale) of occurrence of certain phenomena (events, facts), as is the case with the terms 'necessary' or 'indispensable' and the names referring to the qualification of those characteristics which allow the society concerned to be designated a 'democratic society'.

The difference between the aforementioned components of the name of the criteria is that the term 'democratic society' is an abstract concept, which, attracting the attention of legal, sociological and political scholars as well as official political or ideological statements, has somewhat objectified content, appropriately generalised at least as regards its basic components,[3] while the adjective *necessary* (*indispensable*), related to the above-mentioned degree or scale estimation, has a clear situational context caused by specific events, to which reference must be made in order to classify them from the point of view of being 'placed' at the appropriate level of the 'necessity' scale. This makes the whole phrase more similar to the estimative evaluation phrase,[4] in which the situational setting of this level for the events concerned is then confronted with the general concept of democratic society

[2] Convention for the Protection of Human Rights and Fundamental Freedoms done in Rome on 4 November 1950, subsequently amended by Protocols no. 3, 5 and 8 and supplemented with Protocol no. 2 (Journal of Laws 1993, no. 61, item 284).

[3] On the features of democratic political order, see e.g. G. Sartori, *Teoria demokracji*, Warszawa 1998; A. Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven–London 1984.

[4] Cf. L. Leszczyński, *General Reference Clauses in the Judicial Process: Context of Legislative Intentions and Interpretative Discretion*, Berlin 2021, pp. 17–19.

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in order to determine the content of the whole standard. Thus, this 'situationality' affects not only the 'measurement' of necessity, but also its alignment with the standard of democratic society.

In view of the foregoing, it will be right to state that the 'replacement' of the word *konieczny* (*necessary*) with the word *niezbędny* (*indispensable*) in Article 10 of the Polish version of the Convention does not essentially change the properties of the whole normative phrase, particularly in the light of the meanings attributed to both terms by the dictionaries of the Polish language, from which their relative interchangeability arises. The term *konieczny* ('necessary') is defined in those dictionaries as 'niedający się uniknąć, bezwzględnie potrzebny, nieuchronny, nieodzowny, niezbędny, przymusowy' ('unavoidable, absolutely essential, inevitable, requisite, vital, compulsory'), whereas the term *niezbędny* ('indispensable') is referred to as 'taki, bez którego nie można się obejść, koniecznie potrzebny, nieodzowny' ('which one cannot do without, absolutely needed, requisite').[5] Various semantic equivalents are attributed to these terms by Polish–English dictionaries,[6] which should be of paramount importance for the development of the Polish text based on the official languages of the Convention.

The introduction of a different term in Article 10 of the Polish version of the Convention seems to demonstrate certain technical negligence of the Polish legislature when transposing the text of the Convention into the Polish legal order, particularly given the ECtHR's opinion, which clearly assesses the meaning of the two terms ('necessary' and 'indispensable') as lacking synonymousness.[7]

2. Criterion of necessity as a component of reference clause

1. The theoretical perspective of the analysis allows asking the question of whether the term 'necessary in democratic society' is a component of a construct defined in legal theory as a general reference clause, essentially associated with national normative orders, and rooted in the 19th-century European civil law codifications. In other words: does this phrase have the characteristics of such phrases as

[5] Cf. M. Szymczak (ed.), *Słownik języka polskiego*, vol. 1: *A–K*, Warszawa 1978, p. 989; M. Szymczak (ed.), *Słownik języka polskiego*, vol. 2: *L–P*, Warszawa 1979, p. 374.

[6] Cf. *Wielki słownik polsko-angielski PWN Oxford* (Warszawa 2005), where the Polish word *konieczny* is attributed to *necessary* (p. 382) and the word *niezbędny* to the word *indispensable* (p. 600). A similar approach is adopted in J. Stanisławski, *Wielki słownik polsko-angielski*, vol. 1, Warszawa 1999, p. 402 and 618 (the word *neccessary* appears as an equivalent of the word *niezbędny* too, but at the second place).

[7] "The Court notes at this juncture that, whilst the adjective *necessary*, within the meaning of Article 10 para. 2, is not synonymous with *indispensable* (…) neither has it the flexibility of such expressions as *admissible* (…), *ordinary* (…), *useful* (…), *reasonable* (…) or *desirable*" (see judgment of the ECtHR of 7 December 1976, *Handyside v. the United Kingdom*, 5493/72).

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the principles of equity, good mores, good faith, social interest, the good of the child, or the principles of social coexistence still present in the Polish normative system?

It seems that there is no reason for that phrase not to be classified as a general reference clause (at least in the functional perspective),[8] if the construct is understood as an element of a legal provision that authorises the law-applying entity to base its decision on specified but not quantified extra-legal criteria.[9] However, a caveat should be made in this context that the phrase, having obtained an original and even unique wording within the collection of modern general clauses, does not refer to non-systemic (not linguistically defined within the legal system) and axiologically established norms (rules, directives), but to a standard understood as a value (democratic society).[10]

2. The presence of references to this criterion in the Convention should be linked to the fact that general reference clauses do not appear in international law regulations to the same extent as they do in national law, regardless of whether private law or public law is concerned. This is related to the different construction of the sources of international law, assuming an important role, in addition to treaty regulations, of the universally recognised principles of that law and of customs, resulting in strengthening the functional and axiological argumentation of its interpretation.[11] And this means that the constructs of general reference clauses opening up the regulatory system to extra-legal axiology are not necessary here to make the application of law more flexible to a degree comparable to national law. Sufficient for this purpose is the axiological dimension of the regulation, reinforced by normatively defined directives on the interpretation of treaties (Articles 31–33 of the Vienna Convention on the Law of Treaties of 28 May 1969[12]), based on which the axiological content (e.g. in the form of the criterion of good faith),

[8] This construct is clearly classified as a general clause by A. Michalska (*Klauzule generalne w Europejskiej Konwencji Praw Człowieka*, [in:] *Teoria prawa, filozofia prawa, współczesne prawo i prawoznawstwo*, Toruń 1998, pp. 181–184), who refers to it as second type general clause, characterised in that it affects not only law-applying bodies but also the national legislature. The national legislature as an addressee of the construct of necessity in democratic society is also pointed to by K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, p. 143; B. Liżewski, *Wpływ systemu Rady Europy na stanowienie aktów normatywnych przez ustawodawcę krajowego*, [in:] *Dyskrecjonalność w prawie*, eds. W. Staśkiewicz, T. Stawecki, Warszawa 2010, pp. 411–413.

[9] Cf. L. Leszczyński, *General Reference Clauses…*, p. 22 ff.

[10] Which may be a basis for classifying this construct as a first-type general clause. Cf. Z. Ziembiński, *Teoria prawa*, Poznań–Warszawa 1978, pp. 144–145.

[11] See L. Antonowicz, *Podręcznik prawa międzynarodowego*, Warszawa 2001, pp. 17–21, 28–34. On the individual components of interpretation, see A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka*, Warszawa 2006, pp. 339–341. Cf. A. Aust, *Modern Treaty Law and Practice*, Cambridge 2000, p. 184 ff.

[12] UNTS vol. 1155, p. 331.

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combined with the teleological and functional context accompanying the drafting of the regulation, determines the content of the norms (and thus the normative basis for the decision to apply the law) more strongly than the linguistic and systemic properties of the regulation.

These properties are further strengthened in the context of the objective features of international human rights regulations. For their axiological dimension is even more strongly outlined,[13] resulting in human rights regulations being classified as structurally axiologically justified principles of law, both as principles-standards and principles-norms.[14] This, in turn, results in that the test of semantic and syntactic precision of the text, fundamental for national law regulations, gives way, as an interpretative argument, to the test of the identifiability of the axiology of the standard (also valid for national constitutional regulations of human rights). This justifies the less frequent presence of general reference clauses in international law in general and in human rights regulations in particular.

This does not mean, however, that the clauses do not appear in such acts. In the Convention itself, in addition to the construct of necessity in democratic society analysed herein and the functionally related definitions of the aims of interference, the following phrases should be considered to fall within the category of open constructs having the features of criteria of reference clauses: 'absolutely necessary' in Article 2 (2), 'interests of morals', 'public order' or 'interests of justice' in Article 6 (1), 'public emergency' in Article 15 (1), or 'public interest' or 'general interest' in Article 1 of Protocol No. 1 to the Convention.[15]

3. Judicial function

1. 'Necessity' as a component of the phrase thus appears as a pragmatic criterion to be clearly connected to the situational context of measuring the scale of the contribution to maintaining the values of democratic society. It has no axiological character on its own, because the content marks its presence only with regard to the

[13] Cf. C. Mik, *Koncepcja normatywna prawa europejskiego praw człowieka*, Toruń 1994, p. 227 ff.

[14] On contemporary concepts of legal principles, see M. Kordela, *Zasady prawa. Studium teoretycznoprawne*, Poznań 2012, p. 13 ff., especially pp. 44–61, 87–100; G. Maroń, *Zasady prawa. Pojmowanie i typologie a rola w wykładni prawa i orzecznictwie konstytucyjnym*, Poznań 2011, p. 73 ff. On the relationship between legal principles and other sources of reconstruction of legal norms, see A. Bröstl, *A Jigsaw Puzzle for Rainy Days – How to Put Together the Pieces: Sources of Law, Forms of Law, Principles, Standards, Rules and Norms – to Get a Consistent Picture of Law?*, "Studia Iuridica Lublinensia" 2020, vol. 23(3), pp. 13–29.

[15] These criteria are applied in such ECtHR's judgments as: judgment of 25 September 1996, *Buckley v. the United Kingdom*, 20348/92 (RJD 1996); judgment of 25 May 1994, *Keegan v. Ireland*, 16969/90 (A.290); judgment of 27 October 1994, *Kroon and Others v. the Netherlands*, 18538/91 (197-C); judgment of 23 September 1982, *Sporrong and Lönnroth v. Sweden*, 7151/75, 7152/75 (A.52); judgment of 21 February 1986, *James and Others v. the United Kingdom*, 8793/79 (A.98).

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whole phrase in relation to the standard of democratic society, which undoubtedly emphasizes the social context of the very axiology, leading to a balance between the values of the abstract model of democratic society and the actual conditions for its protection in the area of applicability of the Convention.

In this perspective, the function of the entire normative expression should be understood as a component of the sanctioned norm, requiring the institutions of the Member-State to take into account the whole of the standard as a criterion limiting the exercise of the right to interfere with the rights and freedoms regulated in para. 1 of the above-mentioned provisions of the Convention. It should be at the same time treated as an element of the sanctioning norm addressed both to review bodies in the national legal order of the state-party (e.g. administrative appellate bodies and first of all national courts) and, a kind of ultimately, to the ECtHR, for which this standard is a criterion for review.

The foregoing function means that this criterion may be a component of the normative basis for law application decisions taken both by the Court in Strasbourg as well as national courts, tribunals, and administrative bodies in various decision-making configurations. Activities of all the above-mentioned types of national authorities are in general ultimately reviewed by the ECtHR in terms of fulfilment of this criterion by the Member State, limiting in a specific case a right or freedom enshrined in the Convention. However, this criterion within the framework of national processes of law application may also become, regardless of the review by the constitutional court focused on national legislation, the subject of review of the activities of the public administration, both as part of judicial review of administrative actions and in the form of instance review in the course of administrative proceedings. This is the way in which this criterion acquires the status of a multiple review criterion, constituting a component of the 'system' that applies, regardless of the indirect impact on national legislation, to the activities of administrative bodies, administrative courts, the constitutional court and finally the ECtHR itself. This is also the case with the Polish legal order.

2. As part of building the normative basis for the ECtHR's law application decision, this criterion is used as a component of a three-element system for measuring the margin of assessment in relation to the Member State's action restricting the rights and freedoms set out in the main part of the provision.[16] Its use requires, i.a., the measurement of necessity, including the criterion of 'provided for by law'

[16] Cf. L. Garlicki, *Wartości lokalne a orzecznictwo ponadnarodowe – „kulturowy margines oceny" w orzecznictwie strasburskim*, "Europejski Przegląd Sądowy" 2008, no. 4, pp. 4–13. On the role of individual criteria in the review of assessment margin, see A. Wiśniewski, *Koncepcja marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Człowieka*, Gdańsk 2008, especially pp. 99–109, 125 ff. See also D.J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, London 1995, pp. 290–297.

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repeatedly occurring in all those provisions, and in the context of the objective of State interference defined for each of those laws.

The 'necessity in democratic society' clause is the most universal criterion for those regulations in this 'triple construct' and most general in terms of content (relatively least dependent on the conditions of a particular social and legal order in the Member States to the Convention).[17] In this context, the criterion of 'provided for by law' has a clear juridical background, being the expression of a 'systemic axiology'[18] and being most dependent on the nature of the legal sources (mostly legislative regulations) determining the basis for national decisions on the application of law. On the other hand, criteria linked to the determination of the basis for the justified and proportionate objective of state interference may have a structurally broader dimension of openness to extra-systemic axiology, but they are not so universal, being more functionally linked to the conditions of the national legal and social order under which a particular case is decided. However, even in the case of the most open ones, such as the criterion of protection of 'morality' or 'public order', the scale of being extra-systemic is not comparable to such clauses of national legal orders as the 'principle of equity' or the 'principles of social coexistence'.

All these criteria combined form the basis for the measurement of subsidiarity with regard to the ECtHR's review standards.[19] The order of 'reaching' the final qualification of the actions of a Member State established in the case law,[20] leading from the finding of a legal basis for the actions of agencies of the state in the fields of the legislation and application of the law, embodying their discretion margin (the interference is supposed to be provided for by law), expanded by the possibility of implementing a legal policy by reference to the stated aims of interference, should be necessary for preserving the essential properties of a democratic society and proportionate for the possibility (sufficiency) of achieving the stated aim. The criteria of legality and necessity have the same general degree of standardization, enclosing more detailed criteria of proportionality of actions with regard to the aim of the interference, but with which the measure of necessity is ultimately associated.

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[17] See P. van Dijk, H.G. van Hoof, *Theory and Practice of European Convention on Human Rights*, The Hague 1998, p. 771. This does not mean, naturally, that there is no evolutionary change in the content of that criterion (as pointed out by B. Latos, *Klauzula derogacyjna i limitacyjna w Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności*, Warszawa 2008, pp. 175–177).

[18] The axiological context of this criterion is seen, e.g., in the requirement of openness of law or clarity of regulation. See judgment of the ECtHR of 26 April 1979, *The Sunday Times v. the United Kingdom*, 6528/74; judgment of the ECtHR of 25 March 1983, *Silver and Others v. the United Kingdom*; judgment of the ECtHR of 24 April 1990, *Kruslin v. France*.

[19] See M.A. Nowicki, *Wokół Konwencji Europejskiej*, Warszawa 2009, pp. 342–346. A special emphasis on the need to measure the necessity locally is put in the ruling in *Handyside* (§ 49).

[20] See L. Leszczyński, B. Liżewski, *Ochrona praw człowieka w Europie. Szkic zagadnień podstawowych*, Lublin 2008, pp. 37–39.

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The criterion of necessity does not therefore operate independently but as part of that 'triple construct',[21] the elements of which do not link one with another in an 'alternative' way, as is the case in most constructs in national law,[22] but cumulatively. However, this does not mean that it cannot decide, in certain situations, about the outcome of the review of the exercise by a Member State of a 'margin of assessment'.[23] It also remains linked with the content of the rule laid down in Article 18 of the Convention defining the general objectives of the restrictions of the rights and freedoms laid down therein.[24]

4. Content of the criterion

The adjudicative content of the criterion of necessity in democratic society is shaped both by the ECtHR and by the national courts of the member states of the Council of Europe.

1. The ECtHR has repeatedly defined the content of the whole standard.[25] With regard to the criterion of 'democratic society', it emphasizes primarily the presence of the values of pluralism and tolerance.[26] The ECtHR also nuances the scope of the necessity test according to the type of law or even the type of good protected by the law in question.[27] It is important for the application of the standard that it be superimposed on a specific (usually axiological) objective of state's interference (e.g. national security interest, public security, public order, economic prosperity, or protection of morals) which can justify it when the mere interference, being provided for by law,[28] resulted from urgency and the measures themselves were

[21] Which means combining the necessity test with the legality test and advisability test. See R. Mizerski, *Test legalności w systemie Europejskiej Konwencji Praw Człowieka*, Warszawa 2009, p. 96.

[22] For example, in Article 7 of the Polish Administrative Procedure Code, or Article 5 of the Polish Civil Code, where the above-mentioned criteria can operate jointly (even if their content, as is the case with the criteria of Article 7 of the Administrative Procedure Code may potentially cause conflicts) or independently.

[23] See, e.g., the judgment of the ECtHR of 22 October 1981, *Dudgeon v. the United Kingdom* (7525/76), in which the criterion of necessity is the basis for a negative assessment of legislative interference, despite being considered appropriate from the point of view of protecting morals.

[24] See P. Hofmański, *Konwencja Europejska a prawo karne*, Toruń 1995, p. 128.

[25] See D.J. Harris, M. O'Boyle, C. Warbrick, *op. cit.*, pp. 283–301.

[26] See § 49 of the ECtHR's judgment of 7 December 1976, *Handyside v. the United Kingdom*, 5493/72 (A.24), or § 42 of the ECtHR's judgment of 19 February 1998, *Bowman v. the United Kingdom*, 24839/94 (RJD 1998-J).

[27] For example, see the ECtHR's judgment of 25 March 1985, *Barthold v. Germany*, 8734/79 (A.90), in which the Court has stated that the assessment of necessity of interference for commercial expression is less restrictive than for political or artistic expression.

[28] This condition has also a more universal significance than merely formal definition of interference by national law, referring to axiologically relevant rule of law standards common for all

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proportionate. That is what it means not to exceed the limits of necessity, 'measured' each time in the context of a particular legal situation.[29]

The key interpretative conclusions arising from the ECtHR's case law and the decision-making practice of the Commission on Human Rights, which operated until 1998 with regard to the criterion of necessity in democratic society, include:

- attaching greater importance than in the application of references in the law of individual member states to linguistic rules of interpretation, which can be seen in the clarification of the concept, and both as to the word *necessary* (in the context of juxtaposition with related but separately understood terms: 'indispensable', 'admissible', 'ordinary', 'useful', 'reasonable', 'desirable',[30] associated with the emergence of a pressing social need when the interference itself is proportional to the legitimate purpose[31]), as well as to the phrase 'democratic society';[32]
- the relationship of the established content of this criterion with both moral values (deeply rooted in society) and political values, treated not ideologically but pragmatically (especially where the interests of state security or public order are concerned), but also (to some extent) with economic values (e.g. in the context of the protection of property under Article 1 of Protocol No. 1 to the Convention[33]);
- the absence (despite the presence of a political context in assessing whether state interference with the rights under Articles 8–11 of the Convention was reasonable) of the practice of politicizing the content of this criterion,[34] which

Council of Europe member states. For example, see § 49 of the ECtHR's judgment of 25 June 1997, *Halford v. the United Kingdom*, 20605/92 (RJD 1997-III).

[29] For example, see § 52 of the ECtHR's judgment of 26 September 1995, *Vogt v. Germany*, 17851/91 (A. 323), or the ECtHR's judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, 7525/76 (A.45), defining this relationship with respect of, i.a., the protection of morals, or § 55 of the ECtHR's judgment of 25 November 1997, *Zana v. Turkey*, 18954/91 (RJD 1997-V), defining this relationship in the context of public order protection.

[30] "The Court notes at this juncture that, whilst the adjective *necessary*, within the meaning of Article 10.2, is not synonymous with *indispensable* (...) neither has it the flexibility of such expressions as *admissible* (…), *ordinary* (…), *useful* (…), *reasonable* (…) or *desirable*" (judgment of the ECtHR of 7 December 1976, *Handyside v. the United Kingdom*, 5493/72, A.24).

[31] For example, see judgment of the ECtHR of 24 March 1988, *Olsson v. Sweden*, 10465/83 (A.130); judgment of the ECtHR of 29 October 1992, *Open Door v. Ireland*, 14234/88, 14235/88 (246-A).

[32] For example, see judgment of the ECtHR of 7.12.1976, Handyside v. the United Kingdom, 5493/72 (A.24); cf. also M.A. Nowicki, *Wokół Konwencji Europejskiej*, Kraków 2000, p. 238.

[33] For example, see judgment of the ECtHR of 21 February 1986, *James and Others v. the United Kingdom*, 8793/79 (A.98); judgment of the ECtHR of 8 July 1986, *Lithgow and Others v. the United Kingdom*, 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81 (A.102).

[34] On the possible misuse and abuse of the extra-legal references, see L. Leszczyński, *Open Axiology in Judicial Interpretation of Law and Possible Misuse of Discretion*, "Studia Iuridica Lublinensia" 2020, vol. 23(3), pp. 39–54.

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is related to proportioning the extent of protection of the public interest by the actions of state authorities and the possible exceeding of the sphere of discretion in the actions of administrative bodies;[35]

- the dominance of teleological and functional rules of interpretation in determining the content of the entire phrase, covering the aims of interference and the necessity and proportionality of the means used to achieve the aims of state interference, indicated also using extra-legal criteria;[36]
- the absence, despite having established the general content of the criterion, of the practice of excessive generalization, which is due to the superimposition of the content of the criterion, on the one hand, on the specific circumstances of the case, and on the other – on the conditions existing in the state whose activities are subject to the judicial qualification of the ECtHR[37] (which means that this court, often recognizing as better the position of national courts in determining the basis for assessing the action of its authorities and the possibility of abuse of references by these authorities, points to the need to determine their content in direct relation to the law of the state concerned)[38];
- combining the content of this criterion with other criteria, including primarily the criterion of public interest, which provides a rationale for state's interference with the rights granted by the Convention, but is reviewed in the context of the ECtHR's assessment of these actions under the criterion of necessity in democratic society (with the content of this criterion depending not only on its importance and objectivity, but also on the justifiability of the interest invoked by the intervening state).[39]

2. In the Polish legal order, the criterion of necessity in a democratic society is used mainly in the case law of the Constitutional Tribunal and administrative courts.

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[35] Non-extension of the sphere of discretion by state authorities is considered by the ECtHR as a condition for complying with the rule of law. As the ECtHR noted: "It would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power" (judgment of the ECtHR of 2 June 1984, *Malone v. the United Kingdom*, 8691/79, A.82; see also M.A. Nowicki, *op. cit.*, p. 230 ff.).

[36] For example, see judgment of the ECtHR of 22 October 1981, *Dudgeon v. the United Kingdom*, 7525/76 (A.45).

[37] Cf. judgment of the ECtHR of 20 September 1994, *Otto Preminger-Institut v. Austria*, 13470/87.

[38] For example, see judgment of the ECtHR of 7 December 1976, *Handyside v. the United Kingdom*, 5493/72 (A.24); judgment of the ECtHR of 26 April 1979, *The Sunday Times v. the United Kingdom*, 6528/74 (A.30).

[39] For example, see judgment of the ECtHR of 26 April 1979, *The Sunday Times v. the United Kingdom*, 6528/74 (A.30); judgment of the ECtHR of 7 December 1976, *Handyside v. the United Kingdom*, 5493/72 (A.24).

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The criterion appears in the case law of the Constitutional Tribunal in the decision-making context aimed, as a rule, at reviewing the conformity of national normative acts (legislative regulations) with the Constitution and the Convention. In practice, however, there is a more complicated normative situation, as the Constitution of the Republic of Poland of 1997 does not use a language identical to the Convention construct, since it contains in its regulations the phrase 'necessary in a democratic state', which similarly but still differently identifies the subjective side of democracy. The significance and function of this normative construct is potentially even broader than its counterpart in the Convention, because, being found in Article 31 of the Constitution, and thus in this part of Chapter II ("The freedoms, rights and obligations of persons and citizens"), which is titled "General principles", is a universal component of the standard for any restrictions on the exercise of all rights and freedoms regulated in the Constitution[40] and in other normative acts.

However, the Constitutional Tribunal makes no general and common reference either to the constitutional construct of necessity in a democratic state or to the Convention's construction of necessity in democratic society. It does not do so, at least in such an argumentatively clear way so as to connect the meaning of the criterion as defined by the Tribunal with the direction of the decision.[41] In the case of the Constitutional Tribunal, a closer reference, if any, to the content of both or of one of these criteria does not reach a level of detail similar to that of invoking clauses of national law.[42]

The judicial practice of the Supreme Administrative Court and voivodeship administrative courts juxtaposes the application of this criterion with the assessment of public administration activities. Focusing the review on legality in the context of the legalism standard is not conducive to the strengthening of the role of the criterion of necessity in democratic society, especially since the administrative authorities themselves tend not to use it.

Most often, this criterion is invoked on an 'incidental' basis, which entails mentioning the criterion as a constituent of the construct, in principle without making a substantive analysis of its content.[43] This is sometimes supplemented by an indi-

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[40] See B. Gronowska, [in:] *Prawo konstytucyjne*, ed. Z. Witkowski, Toruń 2002, pp. 109–110. However, this construct does not usually have a prominent position in constitutional law textbooks. For example, see W. Skrzydło (ed.), *Polskie prawo konstytucyjne*, Lublin 2003, p. 167.

[41] For instance, see the following judgments of the Constitutional Tribunal: of 11 May 2007, K 2/07; of 8 June 2009, SK 26/07; of 20 March 2010, K 17/05; of 19 May 2011, K 20/09; of 9 July 2012, P 8/10; of 23 October 1012, SK 11/12.

[42] For example, see judgment of the Constitutional Tribunal 5 May 2004 (P 2/05) wherein both criteria are referred to, additionally confronted with the content of other international law regulations.

[43] For example, see the following judgments of the Supreme Administrative Court: of 27 March 2013, I OSK 932/12; of 26 September 2012, I OSK 1476/12; of 5 January 2011, I OSK 1907/10 (all the rulings of administrative courts referred to herein are contained in the Central Database of Rulings of Administrative Courts – www.nsa.gov.pl/orzeczenia). In one of its rulings (of 5 February

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cation of the ECtHR case law, which is usually related to the matter of the case.[44] Exceptionally, the reference to the case law of the ECtHR entails the identification of the specific criteria which all make up the content of the main standard.[45] Its relationship with the matter of the case is therefore not as close as that of clauses of national law. There is also no argumentative style of reasoning typical of court decisions, determining the content of particular elements or even the general content of the criterion, and the relationship of that criterion to the *stricti iuris* criteria is not subject to further detailing (strengthening, supplementing, correcting it, etc.).

CONCLUSIONS

In view of the foregoing, it must be assumed that the criterion of 'necessity in democratic society' forms part of a general reference clause, despite having a different language form than the most common clauses. Combining the general characteristics of the reference clauses and the principles of law, the criterion focuses on the interpretation of open axiology, concurrently linking it to intra-legal axiology.[46] It therefore forms part of the assumption of a limited presence of clauses in international human rights regulations, the standards of which, having their content located at the so-called interpretative axiological edge between intra-legal and extra-legal axiologies,[47] do not 'need' extra-legal references as constructs intended to open the system and make the application of law more flexible.

This is also valid in relation to the criterion analysed herein, which forms part of the definition of 'limits on the application of restrictions on human rights',[48] established at the first, a kind of potential, level of review based on national courts case law, and at the second (final) level, based on the case law of the ECtHR. The axiological content associated with the criterion is distinguishable at the level of

2008, I OSK 37/07) the Court slightly developed the arguments related to the content of that criterion, relating it also to EU law criteria. On the other hand, in another ruling (of 6 August 2010, I OSK 155/10), the criterion of necessity in democratic society has been juxtaposed with the criterion of necessity in a democratic state, and both standards were used to enhance the argumentation from a legal provision. The reference to the criterion of necessity not always entails invoking the relevant provision of the Convention itself. For example, see resolution of the Supreme Administrative Court of 25 March 2013, II GPS 1/13.

[44] For example, see judgment of the Supreme Administrative Court of 19 June 2013, II OSK 475/13.

[45] For example, see judgments of the Voivodeship Administrative Court in Warsaw: of 30 July 2013, IV SA/Wa 2855/12; of 16 November 2007, V SA/Wa 1569/07.

[46] See M.A. Nowicki, *op. cit.*, pp. 336–337.

[47] See M. Kordela, *Inter- and Extra-Legal Axiology*, "Studia Iuridica Lublinensia" 2020, vol. 23(3), pp. 29–38.

[48] See B. Latos, *op. cit.*, p. 55.

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individual societies and states,[49] but it also has a universal dimension, as especially seen in the case law of the ECtHR,[50] then adapted by the courts of the Member States. Thus, it plays an important role from the point of view of the substance of the Convention and the system of the Council of Europe, as part of the 'measurement of subsidiarity' of the functioning of the Convention mechanism in relation to national human rights systems. However, forming a basis for extending interpretative discretion, the ECtHR specifies in more detail and ultimately limits the scope of the interpretative freedom of the Council of Europe Member State's authorities, thus contributing to the 'universalisation' of human rights standards in Europe.

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[49] See the following judgments of the ECtHR: judgment of 20 September 1994, *Otto Preminger-Institut v. Austria*, 13470/87 (295-A); judgment of 7 December 1976, *Handyside v. the United Kingdom*, 5493/72 (A.24); judgment of 10 April 2007, *Evans v. the United Kingdom*, 6339/05; judgment of 25 November 1997, *Zana v. Turkey*, 18954/91 (RJD 1997-V).

[50] For example, see § 49 of the ECtHR's judgment of 25 June 1997, *Halford v. the United Kingdom*, 20605/92 (1997-III).

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ABSTRAKT

Przedmiotem opracowania jest teoretycznoprawna analiza kryterium konieczności w demokratycznym społeczeństwie, występujące w kilku przepisach Europejskiej Konwencji Praw Człowieka i odgrywające ważną rolę w dokonywanej przez Europejski Trybunał Praw Człowieka kwalifikacji działań organów państwa członkowskiego Rady Europy polegających na ingerencji w tak ważne prawa jak prawo do ochrony prywatności czy wolność słowa, religii, zgromadzeń i stowarzyszeń. W opracowaniu przeprowadzono analizę językową zwrotu oraz rozważono, czy kryterium to może być traktowane jako składnik generalnej klauzuli odsyłającej w kontekście jego zastosowania i wykładni prawa. Analizie poddano także aksjologiczną treść w kontekście rodzaju referencyjnych wartości pozaprawnych, mieszczących się w ramach klasycznych wyborów aksjologicznych związanych z interpretacją zwrotów wyrażających kryteria pozaprawne. Za istotną funkcję tego kryterium uznano ujednolicanie aksjologicznych standardów ochrony praw człowieka w Europie, jako że jest ono wykorzystywane orzeczniczo nie tylko przez Europejski Trybunał Praw Człowieka, lecz także przez sądy krajowe państw członkowskich Rady Europy.

Słowa kluczowe: konieczność; demokratyczne społeczeństwo; wykładnia prawa; stosowanie prawa; sądy polskie; Europejski Trybunał Praw Człowieka