

THE PUNITIVE MEASURE OF DEMOTION AFTER AMENDMENTS TO THE CRIMINAL CODE INTRODUCED ON 7 JULY 2022

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Abstract. Demotion is considered to be one of traditional measures of repressive nature imposed on soldiers. This punitive measure is an important element of the punishment system in Polish military criminal law. This article is aimed at determining whether the amendment of the Criminal Code of 7 July 2022 fulfilled all the goals intended by its drafters. The author of this article intends to reconstruct and provide a critical analysis of the currently applicable model of ordering the punitive measure of demotion. A number of research methods were applied to conduct the assumed research. Most of the paper uses the formal dogmatic method earmarked at analyzing the legal provisions currently in force. Additionally, the paper uses the method of axiological analysis of the law. That method was used to determine socially relevant values, which the legislature brought to the forefront while enacting the amendments. The historical legal method was used as an auxiliary tool, to a small extent, while analyzing the legal provisions previously in force.

Keywords: punitive measures; military service; demotion; military rank.

INTRODUCTION

Demotion is considered to be one of traditional measures of repressive nature imposed on soldiers. The measure can be viewed as kind of “infamy affecting also the aspects of the service associated with honour, dignity, prestige” [Stefański 2022, 232]. As held by the Supreme Court: “Demotion is not ‘a monetary penalty’ but a measure involving a repression mechanism, which evokes honour-related penalties traditionally imposed on soldiers. The *ratio legis* behind this punitive measure is to protect the authority arising from the fact of holding a military rank, without which proper functioning of the army would be impossible as it has an inherent hierarchical structure.”¹

¹ Judgment of the Supreme Court of 16 April 2019, ref. no. VI KA 5/19, Lex no. 2677119.

The Act of 7 July 2022 amending the Criminal Code act and some other acts² entered into force on 1 October 2023. The amending act broadened the scope of application of the punitive measure of demotion. This article is aimed at determining whether the amending act fulfilled all the goals intended by its drafters. The author of this article intends to reconstruct and provide a critical analysis of the currently applicable model of ordering the punitive measure of demotion. A number of research methods were applied to conduct the assumed research. Most of the paper uses the formal dogmatic method earmarked at analyzing the legal provisions currently in force. Additionally, the paper uses the method of axiological analysis of the law. That method was used to determine socially relevant values, which the legislature brought to the forefront while enacting the amendments. The historical legal method was used as an auxiliary tool, to a small extent, while analyzing the legal provisions previously in force.

1. *RATIO LEGIS* BEHIND THE AMENDMENTS INTRODUCED

Placing the legal provisions concerning demotion in the military part of the Criminal Code resulted in that courts of general jurisdiction could not apply that measure in cases of reservists and veterans who committed a criminal offence while not being active soldiers. Thus, the result of placing demotion in the general part of the Criminal Code makes it possible to apply that measure also to reservists and veterans. Broadening the scope of application of the punitive measure of demotion was intended by the drafters to stress that high ethical standards and principles of criminal liability should apply equally to all soldiers, both the ones who are on active duty, and those who are reservists or veterans. As indicated in the draft act: “In the current legal regime, it is impossible to impose that measure on reservists and veterans if, at the time of committing the offence, they were not soldiers (on active duty). It is an erroneous solution since letting a person who, after completing their military service, breached their still binding military oath and the duty of loyalty keep the military rank held is obviously contrary to the principles of community life and social co-existence. It is so as it shows the state’s passive acceptance of glaring and ostentatious violation of legal norms by a person who should be characterized by exceptional law-abiding attitude and integrity. After one becomes a reservist or veteran, the vocational skills become irrelevant as the profession is no longer actively pursued, but the ethical and moral qualifications never cease to be of importance. Therefore, the draft act provides for broadening the scope of potential application of the punitive measure at issue and consequently it will be possible to apply demotion

² Journal of Laws item 2600 as amended.

not only to a person who, at the time of committing a criminal offence, was an active soldier, but also to reservists and veterans. This will ensure axiological coherence of criminal law as in the current legal regime there is a lack of equal treatment in that respect and unjustifiably preferential treatment of reservists and veterans.”³

2. GENERAL CHARACTERISTICS OF PUNITIVE MEASURES

Punitive measures are a significant tool of the state’s criminal policy. Jurisprudence asserts that transformations in the system of punitive measures introduced quite frequently in recent years confirm the increasing role of that form of the state’s reaction to a crime. As stated by Damian Szeleszczuk: “One may predict that their significance will even increase in the future. They have become very flexible tools, by means of which the legislature shapes the criminal policy, especially where there is a need to make adjustments to it and steer it in a more repressive and generally preventive direction” [Szeleszczuk 2022b, 33]. Punitive measures may fulfill a wide range of functions: repressive (e.g. making a judgment public, deprivation of public rights), preventive (e.g. prohibition on entering a mass event; prohibition on entering gambling centres and on participation in gambling; order to temporarily leave the premises occupied jointly with the injured person; vehicle driving ban) and compensatory (e.g. monetary compensation) [Ziółkowska 2023, 271]. As a result of the amending act discussed here, the punitive measure of demotion was placed in the general part of the Criminal Code⁴ in the list of punitive measures set out in Article 39 of the act concerned. As aptly noted by Marek Siwek: “the composition of that list indicates a variety of punitive measures and *ipso facto* the possibility of application in case of a perpetrator’s violation of the legal order in various fields” [Siwek 2010, 106]. The above mentioned punitive measures may be divided into measures for a term (e.g. deprivation of public rights; prohibition on occupying a specific position; prohibition on pursuing a specific profession or carrying on a specific business; ban to contact certain people; ban to approach certain people) and one-off punitive measures (e.g. demotion, monetary compensation, making a judgment public).⁵ In the light of the currently applicable Criminal Code, it is possible to order punitive measures: individually, collectively; using security instruments or using probation instruments [Ziółkowska 2023, 271]. In line with settled

³ Draft act – Sejm Print No. 2024 Sejm of the IX Term, <https://orka.sejm.gov.pl/Druki9ka.ns-f/0/2851BC6F8739C593C12587F10042EF6E/%24File/2024.pdf> [accessed: 22.03.2025].

⁴ Act of 6 June 1997, the Criminal Code, Journal of Laws of 2025, item 383 [hereinafter: CC].

⁵ Judgments of the Supreme Court: of 30 September 2020, ref. no. IV KK 274/20, Lex no. 3126178; of 3 March 2022, ref. no. IV KK 7/22, Lex no. 3408495.

court rulings and opinions of jurisprudence [Kala and Klubińska 2024, 83] measures which are not for a term, i.e. compensatory measures, monetary compensation, making a judgment public, demotion and forfeiture, cannot be combined.⁶ Combining solely punitive measures which are for a term is justified mainly by the nature of such penal measures, but also by the need to rationalize to a certain extent the execution of the punitive measures ordered [Kosierb 2015, 141].

3. RANGE OF PERSONS WHO MAY BE SUBJECTED TO DEMOTION

Pursuant to Article 43bb CC a court may order demotion with regard to a person who at the time of committing the offence was a soldier, reservist or veteran. Only a person holding a military rank higher than ‘a private’ may be subjected to demotion [Kozłowska-Kalisz 2025]. That is because that punitive measure consists in one’s losing the military rank held and returning to the rank of a private. The amending act broadened the range of persons who may be subjected to demotion. Under previous legal provisions, that measure could be applied only to soldiers on active duty. At present, demotion may also be ordered when *tempore criminis* the perpetrator was a reservist or a veteran [Karnat 2023]. The professional literature of the subject provides that “it is inadmissible to subject to demotion a person who at the moment of committing the criminal offence was not a soldier, reservist or veteran. Obtaining a higher military rank in the period between committing the criminal offence and ruling does not prevent a court from ordering that punitive measure” [Szeleszczuk 2024, 264]. Nevertheless, differentiating between soldiers on active duty and reservists may give rise to certain doubts. Pursuant to Article 115(17) CC a soldier is person who is on active duty, except for territorial military service provided on a call. On the other hand, pursuant to Article 130(1)(3) of the Homeland Defence,⁷ active military service consists in providing: recruit military service; territorial military service; service in active reserve on the days of such service and while participating in military training as part of passive reserve; professional military service; service in case of mobilization and at the time of war. Thus, a reservist while providing service in active reserve on the days of such service and while participating in military training as part of passive reserve has the status of a soldier. Such regulation of Article 43 bb CC may give rise to justifiable doubts in terms

⁶ See: Judgment of the Court of Appeal in Białymstok of 17 October 2013, ref. no. II AKa 123/13, Lex no. 1391845; judgment of the Supreme Court of 24 March 2011, ref. no. IV KK 27/11, Lex no. 794513.

⁷ Act of 11 March 2022, the Homeland Defence, Journal of Laws of 2024, item 248 as amended [hereinafter: HDA].

of interpretation, and consequently raise concerns as to the jurisdiction of courts of general jurisdiction and military courts. Ewa Płocha aptly states that adequately formulated Article 43bb CC should cover soldiers, reservists not on active duty (passive reserve) and veterans [Płocha 2024].

It is worth mentioning that the amending act discussed here introduced also another change consisting in replacement of the phrase “the moment of committing the offence” with the phrase “the time of committing the criminal offence” with a view to adjusting that phrase to the terminology present in the Criminal Code. As stated in the justification of the draft act: “Under Article 6(1) CC, a criminal offence is considered to be committed at the time when the perpetrator acted or omitted to act as he was obliged. The Criminal Code does not define “the moment of committing the criminal offence,” which results in inability to apply the provision on demotion on the basis of linguistic interpretation, and the application becomes possible only after rectifying the error of the legislature and applying the *analogia legis* interpretation. The legislature should, however, where possible, strive at excluding the necessity to apply such interpretation and enact precise legal provisions. Otherwise, theoretical discrepancies may arise in terms of determining the scope of meaning of the term set out in the act as it is not defined in Article 6(1) CC e.g. whether or not it determines only a point in time when the perpetrator begins or ends the conduct instead of referring to a time period mentioned in Article 6(1) CC, which defines the term “the time of committing the criminal offence.”⁸

4. PREREQUISITES FOR ORDERING DEMOTION

In the light of Article 43ba(2) CC, a court may order demotion in case of conviction of an intentional crime if the type, method and circumstances of its commission allow the court to deem the perpetrator to have lost the characteristics required to hold a military rank. As noted by D. Szeleszczuk: the fact of having lost the characteristics required to hold a military rank has to result from an assessment of the type of offence, as well as the method and circumstances of its commission. Such assessment should be comprehensive and should take into account all the components (the type of the offence, the method and circumstances of its commission). It cannot be based solely on some factors which are decisive as to losing the characteristics required to hold a military rank [Szeleszczuk 2022a, 127]. It is specified in the justification of the draft amending act that providing professional military service inseparably entails not only high professional qualifications, satisfaction of applicable physical and mental requirements, but also social respect,

⁸ Draft act..., p. 13.

specific ethical standards and appropriate ethical approach.⁹ A similar view is presented by the Supreme Court in its rulings. In one of the rulings, it was held that: "The circumstance of 'excellent military service' is not a sufficient reason to decide that there are no grounds to order demotion. In order to decide whether it is advisable to order such measure or not, one must look at the type of the offence, the method and circumstances of its commission indicating that the perpetrator has lost the qualifications required to hold a military rank. The Supreme Court is of the view that as the accused, together with civilians, committed crimes related to management of public funds, showing considerable involvement in the criminal joint conduct, and his conduct was aimed at obtaining a proprietary gain, then it should be assumed that he has lost the ethical and moral values, as well as the prestige and social acceptance to such an extent that he should not hold the rank of an officer, even in reserve."¹⁰ According to the Supreme Court: "having good opinions as to one's work or having been subjected to other punitive measures cannot effectively withhold ordering demotion as a punitive measure. That is because such measure removes from the military community soldiers who held a specific military rank but who by their actions contravened the principles of military service construed as 'a social mission of exceptional significance and particularly dignified nature.'"¹¹ In another ruling, the Supreme Court ruled that: "The circumstance that the crime committed by a soldier does not violate the military and service-related interests but concerns a private or personal aspect of life does not prevent a court from ordering an additional penalty in the form of demotion."¹² What is also important in terms of the capability to hold a rank and provide military service is the wording of Article 83(1) HDA. In line with that provision a person who satisfies the following requirements may be called to provide military service (and at same time to obtain the first military rank – a private): has Polish citizenship; has unblemished reputation; has physical and mental capacity to provide military service; is at least 18 years old; has not been convicted of an intentional crime; is not assigned to substitute service; is not exempt from the duty to provide active military service in case of mobilization and at the time of war; has not been assigned, on an organizational and mobilization basis, to serve in a militarized unit and has the education required for a given military rank. Pursuant to Article 140(12)(1-3) HDA soldiers on active duty may be awarded at the time of peace a higher military rank if

⁹ Ibid., p. 12.

¹⁰ Judgment of the Supreme Court of 17 October 2006, ref. no. WA 28/06, OSNwSK 2006, No. 1, item 1964.

¹¹ Judgment of the Supreme Court of 25 August 2005, ref. no. WA 20/05, OSNwSK 2005, No. 1, item 1566.

¹² Resolution of the Supreme Court of 20 August 1970, ref. no. RNw 42/70, OSNKW 1970, No. 11, item 136.

they satisfy jointly the following requirements: have obtained positive results in military training; have obtained evaluation at least at the very good level in an opinion as to their work; have completed a military course or training if it is required for the military rank that they are to be awarded.

The legislature, while transferring on an editorial basis the wording of normative demotion from the military part to the general part, decided to delete, in the prerequisites for ordering that measure, the phrase “especially in the case of acting with a view to obtaining a proprietary gain”. That phrase constitutes “a typical contextual particle, the function of which is to make the preceding text more specific. At the same time, it contains certain preferential content exemplifying designations forming a set of situations proving the loss of characteristics required to hold a military rank” [Szeleszczuk 2023, 109-10]. The legislature resigned from that phrase, taking into account the remarks made repeatedly by the jurisprudence. The professional literature of the subject indicated that the punitive measure of demotion is ordered solely in the case of committing an intentional crime which causes considerable social harm and in the case of which the circumstances, motives of the perpetrator and the method of commission are particularly reprehensible. This being the case, putting emphasis on acting with a view to obtaining gains would be “seriously exaggerated” [Marek 2010, 683; Hoc 2010, 1337; Kutzmann 2019]. As indicated in the justification of the draft act, the court’s putting emphasis on situations where that punitive measure may especially be applied “results in unjustifiable stress on specific categories of crimes and omitting other crimes which may be even more deserving of penalty (e.g. murder or rape).”¹³

The punitive measure in the form of demotion has a facultative nature and its application is at the discretion of the court [Karnat 2023]. As indicated in the justification of the draft, a court at its own discretion will be able to “determine whether *in concerto* ordering such punitive measure is not too severe for the perpetrator. It will be possible for the criminal reaction to take into account special circumstances justifying not ordering it.”¹⁴ According to the Supreme Court: “demotion cannot be ordered in separation from the significance of the crime committed by the soldier – the type of the crime, the extent of social harm caused, the method of action, and the personality aspects of the accused. It should be ordered in the case of conviction of a crime that is an act causing considerable social harm if the method of its commission, the circumstances and motives of the perpetrator are particularly reprehensible and it is sufficient to determine that the perpetrator has lost the characteristics required to hold a military rank.”¹⁵

¹³ Draft act..., p. 13.

¹⁴ Ibid.

¹⁵ Judgment of the Supreme Court of 19 April 2021, ref. no. I KA 2/20, Lex no. 3232219.

5. CONSEQUENCES OF ORDERING DEMOTION

Pursuant to Article 43ba(1) CC demotion entails in its essence the loss of the military rank held and return to the rank of a private¹⁶. In that respect there is no need to specify in more detail the consequences of demotion in the operative part of a criminal judgment [Filipczak 2025, 140]. Demotion to a certain extent overlaps, in terms of contents, with the punitive measure of deprivation of public rights. That is because deprivation of public rights causes further reaching consequences than demotion, therefore somehow it “encompasses” demotion and, as a consequence, also results in the loss of the military rank held and return to the rank of a private [Budyn-Kulik 2015, 112]. The Supreme Court also held that in the case of ordering deprivation of public rights the order of demotion is non-applicable as these punitive measures have the same consequences.¹⁷

Under Article 237 of the Executive Criminal Code¹⁸ in case of ordering with regard to a soldier expulsion from professional military service or demotion a court orders the execution of the measure imposed by an appropriate commander and notifies a military body competent for staff-related matters about the wording of the ruling. A court competent for issuing the order concerned is the court which issued a judgment in the first instance [Płocha 2024]. The act does not specify precisely which body will perform the role of the “appropriate commander” [Postulski 2017, 1078]. In line with a resolution of the Supreme Court of 1971, the term “appropriate commander” means a superior having disciplinary authority of a commander of a regiment (of equivalent level).¹⁹ On the other hand, in the case of a soldier who is not subject to disciplinary authority of such commander, “the appropriate commander” shall be construed as an adequately higher disciplinary superior. The professional literature of the subject indicates continued relevance of the above mentioned resolution [Dąbkiewicz 2020]. As noted by Piotr Karlik, a court, while ruling on the execution of the demotion ordered, should send to the appropriate commander, together with an instruction, an official copy of the ruling or an official copy of an excerpt from the ruling. As regards the issue of notifying the military body competent for staff-related matters, it will be sufficient to send short information in that respect [Karlik 2023, 700]. Pursuant to Article 71(2)(2)(d) HDA, information about demotion ordered on a final and non-appealable basis is collected and processed in military records. The records are kept by the Minister of National Defence with assistance of competent authorities.

¹⁶ More about military ranks see: Articles 134 and 135 HDA.

¹⁷ Judgment of the Supreme Court of 8 July 1983, ref. no. Rw 548/83, OSNKW 1984, No. 1, item 18.

¹⁸ Act of 6 June 1997, the Executive Criminal Code, Journal of Laws of 2024, item 706 as amended.

¹⁹ Resolution of the Supreme Court of 1 February 1971, ref. no. U 3/70, OSNKW 1971, No. 6, item 93.

Pursuant to Article 128(1)(5) HDA a soldier who provides military service is exempt from military service, except for professional military service, compulsory recruit military service, and service provided in case of mobilization and at the time of war, in the case of having lost the military rank or demotion. Under Article 226(11) HDA a professional soldier is exempt from professional military service as a result of having lost the military rank or demotion. On the other hand, pursuant to Article 229(2) and (3) HDA, exempting from professional military service in case of ordering demotion occurs by operation of law as from the date when the ruling becomes final and non-appealable. Should this be the case, the commander of the military unit in which the professional soldier provides service confirms the fact of exempting the soldier from professional military service by way of a personal order issued for record-keeping purposes.

In line with Article 142(2) HDA, if a judgment of court ordering the punitive measure of deprivation of public rights or demotion becomes final and non-appealable, the soldier loses the military rank held, at the same time keeping the military rank of a private (a mariner). It is an exception from the rule provided by Article 135(5) HDA, according to which military ranks are life-long. Under Article 142(3) HDA if a final and non-appealable court judgment in which the punitive measure of deprivation of public rights or demotion was applied is reversed, the soldier regains the formerly held military rank. In the light of Article 142(4) and (5) HDA, a soldier may be re-awarded a military rank for exceptional achievements at work or exceptional services for the benefit of the Republic of Poland. The Minister of the National Defence decides on the restitution of the military rank by way of an administrative decision.

Pursuant to Article 10 of the Act of 10 December 1993 on Retirement Benefits for Professional Soldiers and their Families,²⁰ the right to retirement benefits under the act is not vested in a soldier who has been convicted by way of a final and non-appealable court judgment of a crime specified in Article 130 CC or with regard to whom the punitive measure of deprivation of public rights or demotion has been ordered for a crime committed before release from service. As specified in the justification of a draft act: "Since, while ordering the punitive measure of demotion, it is deemed that the perpetrator has lost the characteristics required to hold a military rank, it is not justifiable for such person to have the right to retirement benefits conditional upon holding such military rank and their retirement benefits should be solely determined on the basis of generally applicable rules."²¹

²⁰ Journal of Laws of 2025, item 305.

²¹ Draft act..., p. 12.

CONCLUSION

The amending act discussed in this article fulfills all the goals intended by its drafters and deserves praise. Demotion was given the status of a generally applicable punitive measure. Placing demotion in the general part of the Criminal Code resulted in the possibility of ordering that measure also with regard to reservists and veterans. That changed the previous situation of inequality and unjustifiably preferential treatment of reservists and veterans.

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