

SPECIAL RIGHTS OF SOLDIERS, AND OFFICERS OF THE POLICE AND THE BORDER GUARD WITH REGARD TO THE USE OF THE ASSISTANCE OF COUNSEL FOR THE DEFENCE

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ABSTRACT

This article is scientific and research-oriented, analysing the right, granted by the Act of 26 July 2024,¹ which amends certain acts to improve the functioning of the Armed Forces of the Republic of Poland, the Police, and the Border Guard in the event of a threat to state security. The right concerns a request for the appointment of public counsel for the defence by a soldier, a police officer, or a Border Guard officer accused of a crime committed as a result of the use of direct coercive measures, weapons, or other armaments, or the application or use of coercive measures or firearms in connection with the performance of specific official activities or tasks (Article 78a of the Code of Criminal Procedure). The article also examines the broader possibilities of providing financial support to soldiers for covering the costs of legal assistance incurred in cases concerning crimes committed in connection with the performance of official tasks and activities (Article 296(5) and Article 316(5) of the Act on the Defence of the Homeland). Additionally, provisions authorising the reimbursement of legal assistance costs to officers of certain other services are analysed. The main scientific objective is to assess the justification for introducing these amendments to criminal procedure law, as well as existing solutions that privilege soldiers and officers of certain services in terms of access to counsel for the defence. The main research theses aim to demonstrate that these changes result in

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¹ Journal of Laws of 2024, item 1248, hereinafter referred to as the '2024 Amendment'.



a violation of the principle of equality before the law. The results of the study are original, as they highlight the need for legislative intervention. The study holds significant value for both academia, as it offers a dogmatic analysis and substantial theoretical insights, and for practical application, as it suggests directions for interpreting the criteria for applying the new provisions, potentially contributing to their uniform application.

Keywords: police officer, Border Guard officer, costs of appointing counsel for the defence, public defence counsel, defence counsel of choice, reimbursement of costs, soldier

INTRODUCTION

The right to defence (*ius defensionis*) encompasses all procedural actions aimed at proving the innocence of the accused or limiting or mitigating their liability.² The essence of this right is to afford the accused the opportunity to conduct a personal defence against charges and their legal consequences, as well as to utilise the assistance of counsel for the defence.³ The Supreme Court *expressis verbis* emphasises that

'The principle of the accused's right to defence is a directive derived not only from the provisions of the Constitution (Article 42). Two aspects of the principle should be considered: formal defence, which entails the procedural activity of counsel for the defence, and material defence, i.e., the defence activities undertaken by the accused personally. These two elements interpenetrate and complement each other, as only then can it be said that the right to defence in criminal proceedings is something real and effective.'⁴

The real possibility of using defence counsel is essential for the accused to fully exercise their right to defence, and it is one of the most important manifestations of this right.⁵ It may be implemented by appointing a defence counsel through the authorisation of the accused, in accordance with Article 81 of the Code of Criminal Procedure (CCP), by selecting a specific lawyer or legal advisor to act as their defence counsel (defence counsel of choice – Article 83(1) CCP), or through the appointment of a defence counsel by a court president's ruling or a court's decision (public counsel for the defence – Article 81(1) CCP). Originally, public defence counsel was appointed at the request of an accused who did not have a defence counsel of their choice, provided they adequately demonstrated that they were unable to cover the costs of defence without detriment to the necessary maintenance of themselves and

² Dąb, A., Cincio, K., 'Prawo do obrony', in: *Zagadnienia prawne Konstytucji PRL*, Vol. III, Warszawa, 1954, p. 244; Kalinowski, S., *Postępowanie karne. Zarys części ogólnej*, Warszawa, 1963, p. 267.

³ Murzynowski, A., *Istota i zasady procesu karnego*, Warszawa, 1976, p. 272; Kruszyński, P., *Stanowisko prawne obrońcy w procesie karnym*, Białystok, 1991, p. 13; Kruszyński, P., in: Bieńkowska, B., Kruszyński, P. (ed.), Kulesza, C., Piszczek, P., Pawelec, P., *Wykład prawa karnego procesowego*, Białystok, 2003, p. 69; Stefański, R.A., *Obrona obligatoryjna w polskim procesie karnym*, Warszawa, 2012, p. 25.

⁴ Supreme Court judgment of 1 December 1997, III KKN 168/97, *Prokuratura i Prawo*, 1998 supplement, No. 4, item 7.

⁵ Cieślak, M., *Polska procedura karna. Podstawowe założenia teoretyczne*, Warszawa, 1971, p. 302; Wiliński, P., *Zasada prawa do obrony w polskim procesie karnym*, Kraków, 2006, p. 295.

their family (Article 78(1) CCP). In cases of mandatory defence (Article 79(1) and (2) and Article 80 CCP), if the accused did not have counsel of their choice, public defence counsel would be appointed (Article 81(1) CCP).

The 2024 Amendment introduced the following regulations:

- granting the right to request the appointment of public defence counsel for a soldier, police officer, or Border Guard officer accused of a crime committed as a result of the use of direct coercive measures, weapons, or other armaments, or the application or use of direct coercive measures or firearms in connection with the performance of specific official activities or tasks (Article 78a CCP);
- broadening the possibilities for providing financial support to soldiers in relation to legal assistance costs incurred in cases concerning crimes committed in connection with the performance of official activities and tasks (Article 296(5) and Article 316(5) of the Act of 11 March 2022 on the Defence of the Homeland).⁶

APPOINTMENT OF PUBLIC DEFENCE COUNSEL FOR SOLDIERS, POLICE OFFICERS AND BORDER GUARD OFFICERS

In accordance with Article 78a(1) CCP, a soldier, police officer, or Border Guard officer accused of a crime committed as a result of the use of direct coercive measures, weapons, or other armaments, or the application or use of direct coercive measures or firearms in connection with the performance of specific official activities or tasks, who does not have defence counsel, may request the appointment of public counsel for the defence. This concerns the performance of official activities or tasks:

- (1) by Border Guard officers or soldiers of units or subunits of the Armed Forces of the Republic of Poland in response to state security concerns, ensuring the inviolability of the state border, a threat to public security, or the disruption of public order within the territorial scope of border crossings, the border zone, or Polish maritime areas. This includes: (1) a direct threat of an attack on the inviolability of the state border or its actual commission; (2) creating a direct danger to the life, health, or freedom of citizens; (3) a direct threat of an attack on premises or facilities used by the Border Guard; (4) a threat of a terrorist act or its actual commission against premises or facilities used by the Border Guard, or any act that may endanger human life (Article 78a(1) CCP in conjunction with Article 11b of the Act of 12 October 1990 on the Border Guard);⁷
- (2) by soldiers of units and subunits of the Armed Forces acting independently in counteractions required for state security reasons, ensuring the inviolability of the state border, or addressing threats to public security within the territorial scope of border crossings, the border zone, or Polish maritime areas (Article 78a(1)(1) CCP in conjunction with Article 11c (1) ABG);
 - by officers of Police units or subunits and soldiers of units and subunits of the Armed Forces of the Republic of Poland in the event of a threat to public

⁶ Journal of Laws of 2024, item 248, as amended, hereinafter 'ADH'.

⁷ Journal of Laws of 2024, item 915, as amended, hereinafter 'ABG'.

security or disruption of public order, including: (1) creating a common danger to life, health or freedom of citizens; (2) a direct threat to property of significant value; (3) a direct threat to premises or facilities important for the security or defence of the state, the seats of central state authorities or the justice system, the facilities of the national economy or culture, and diplomatic missions and consular offices of foreign countries or international organisations, as well as facilities under the supervision of armed security formations established in accordance with separate provisions; (4) a threat of a terrorist act that may endanger the life or health of participants in cultural, sports or religious events, including mass events or gatherings (Article 78a(1)(1) CCP in conjunction with Article 18(1) of the Act of 6 April 1990 on the Police).⁸

Their scope also includes official activities or tasks performed during a military operation conducted within the territory of the Republic of Poland in peacetime, as defined by: (a) an organised action by the Armed Forces carried out to ensure the external security of the state, which does not constitute training or exercise; (b) an action involving foreign troops as part of the military reinforcement of the Armed Forces of the Republic of Poland or the forces of the States Parties to the North Atlantic Treaty, drawn up in Washington on 4 April 1949⁹ – provided that the circumstances require an immediate response, particularly in situations involving a threat to the state border, critical infrastructure, or the safety of people and property of significant value, including instances where the forces and resources of the Ministry of the Interior or those under its supervision may prove insufficient due to the nature of the actual threat (Article 87a(1)(1) *in fine* in conjunction with Article 2(18a) of the Act of 11 March 2022 on the Defence of the Homeland);¹⁰

- (3) in the event that there is a need to repel a direct, unlawful attack on one's own or another person's life, health, or freedom, or the inviolability of the state border, or to counteract actions directly aimed at carrying out these attacks, or to perform counter-terrorist activities – defined as actions against perpetrators, persons preparing, or assisting in the commission of terrorist crimes (Article 115(20) CC) – carried out to eliminate a direct threat to the life, health, or freedom of individuals or property, using specialist forces and measures, as well as specialist tactics (Article 87a(1)(1) CCP in conjunction with Article 2(2) of the Act of 10 June 2016 on Counter Terrorist Activities).¹¹

The request for the appointment of public counsel for the defence is limited to soldiers, police officers, and Border Guard officers (subjective limitation), and it applies only in situations where they are accused of committing any of the above-mentioned crimes (objective limitation).

⁸ Journal of Laws of 2024, item 145, as amended, hereinafter 'AP'.

⁹ Journal of Laws of 2000, No. 87, item 970.

¹⁰ Journal of Laws of 2024, item 248, as amended.

¹¹ Journal of Laws of 2024, item 92.

According to the statutory definition in Article 115(17) CC, a soldier is defined as a person performing full-time military service, excluding territorial military service performed on the basis of availability.

There are two types of military service: (a) full-time military service, and (b) reserve service (Article 129 ADH).

Full-time military service consists of:

- (1) basic national military service, which can be: (a) voluntary basic national military service, or (b) compulsory basic national military service (Article 130 ADH);
- (2) territorial military service, carried out: (a) on the basis of availability, where a soldier of the Territorial Defence remains outside a military unit but is prepared to report for duty at the location and time determined by the military unit commander; (b) on the basis of a shift system, in which a soldier serves at a military unit or another location determined by the commander of the military unit, on service days scheduled by the commander, at least once a month during the soldier's two days off. On other days, the TD soldier is on availability status and may also perform shifts on other days as required by the Armed Forces, as agreed with the soldier or at the soldier's request. Due to the explicit exclusion of soldiers in territorial military service on availability status, as set out in Article 115(17) CC, these individuals are not considered soldiers within the meaning of the provisions of the Criminal Code;
- (3) full-time reserve service on service days and military exercises within the part-time reserve, which consists of: (a) full-time reserve, composed of individuals who volunteered to serve in the full-time reserve, have sworn a military oath, are not serving in another military formation, and are still under the age of 60, or in the case of non-commissioned or commissioned officers, under the age of 60; (b) part-time reserve, composed of individuals whose relationship with military service has been regularised, are not serving in any other military formation, are not subject to militarisation, and are still under the age of 60, or in the case of non-commissioned and commissioned officers, under the age of 63 (Article 131 ADH);
- (4) professional military service, where professional soldiers are appointed through a personal order calling them up for professional military service based on voluntary recruitment (ex Article 185(2) and Article 186(1) ADH). A professional soldier performs professional military service: (a) in an official position; (b) at a military college, a non-commissioned officer's school, or a training centre where they receive education; and (c) on the basis of availability (Article 191 ADH);
- (5) service in the event of mobilisation and during wartime.

In the context of the definition of a soldier in Article 115(17) CC, doubts may arise regarding the meaning of this term in Article 78a(1) CCP, due to the fact that the Act on the Defence of the Homeland distinguishes between a soldier and a professional soldier. The statute defines a soldier as a person performing full-time military service (Article 2(40) ADH), and a professional soldier as one carrying out professional military service (Article 32(29) ADH). Therefore, considering the distinction between these two types of soldiers, it may appear that the term used in Article 78a(1) CCP does not include a professional soldier. This interpretation could be supported by the absence of a definition of the term in the Code of Criminal Procedure, which

may lead to applying a definition from a statute that is fundamental in the relevant field.¹² It can be assumed that, with regard to the definition of a soldier, the Act on the Defence of the Homeland serves as such a statute. However, such a conclusion leads to *reductio ad absurdum*, as there are no rational grounds to deprive professional soldiers of this right. Due to their role in performing the tasks assigned to them, they should be among the foremost to exercise this right. When interpreting the term, it is essential to remember that the interpretation of the word 'soldier' in the Code of Criminal Procedure serves to implement the norms of substantive criminal law. This is an argument for referring to the definition provided in the Criminal Code. Similar reasoning, focusing on interpreting a concept in the Criminal Code as specified in the Code of Criminal Procedure, was adopted by the Supreme Court, which held that:

'Since the Criminal Code does not contain its own definition of the entities listed in Article 245, the correct determination of the semantic scope of these concepts must be based on the legal act closest to it, which is the Code of Criminal Procedure. Pursuant to Article 245 CC, logical and teleological interpretation supports using the term "accused" in a general sense and, in accordance with Article 71(3) CCP, applying relevant provisions concerning the accused also to a suspect.'¹³

The definition in Article 115(17) CC clearly implies that a person performing territorial military service on the basis of availability is not a soldier within the meaning of the Criminal Code, despite holding such status under the Act on the Defence of the Homeland.¹⁴

A soldier, police officer, or Border Guard officer, regardless of their financial status, is entitled to request the appointment of public counsel for the defence. It is sufficient that the suspect or accused is charged with committing a crime resulting from the use of direct coercive measures, weapons, or other armaments, or the application of direct coercive measures or firearms in connection with performing the above-mentioned official activities or tasks.

Although Article 78a(1) CCP refers to the 'accused', in accordance with Article 71(3) CCP, the term 'accused' in the Code of Criminal Procedure also generally covers a suspect.

The suspicion or accusation must concern a crime committed: (a) as a result of the use of direct coercive measures, weapons, or other armaments, or the application or use of direct coercive measures or firearms; (b) in connection with the performance of the above-mentioned official activities or tasks. It does not need to be a crime that inherently involves the application of direct coercive measures, the use of weapons or other armaments, or the application or use of direct coercive

¹² Zieliński, M., *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa, 2010, p. 212.

¹³ Supreme Court judgment of 8 April 2002, V KKN 281/00, *Orzecznictwo Sądu Najwyższego Izba Karna i Izba Wojskowa (OSNKW)*, 2002, No. 7–8, item 56 with a gloss of approval by Murzynowski, A., *Orzecznictwo Sądów Polskich (OSP)*, 2002, No. 12, pp. 650–653.

¹⁴ Jastrzębski, W., Wnorowski, K., 'Status żołnierzy terytorialnej służby wojskowej w świetle polskiego prawa karnego materialnego i procesowego', *Wojskowy Przegląd Prawniczy*, 2023, No. 1, p. 20.

measures or firearms. It is also not required that the crime involves failure to fulfil or exceeding the powers related to the performance of official activities or tasks.

The accused soldier, police officer, or Border Guard officer may also request the appointment of public counsel for the defence in order to perform a specific procedural activity (Article 78a(2) CCP). The court may withdraw the appointment of defence counsel if it is found that the circumstances upon which the appointment was based no longer exist. The decision to withdraw the appointment of defence counsel may be appealed to an equivalent bench of the court (Article 78a(3) CCP). These regulations mirror those provided for the appointment of public defence counsel on the grounds of poverty (Article 78(1a) and (2) CCP).

Article 78a CCP also applies to soldiers, police officers, and Border Guard officers accused, before the 2024 Amendment came into force, of committing a crime as a result of the use of direct coercive measures, weapons, or other armaments, or the application or use of direct coercive measures or firearms in connection with the performance of the above-mentioned official activities or tasks, in cases initiated but not concluded before the amendment's entry into force (Article 11(1) of the 2024 Amendment).

FINANCIAL SUPPORT FOR PROVIDING OF LEGAL ASSISTANCE TO PROFESSIONAL SOLDIERS AND SOLDIERS AFTER THE CONCLUSION OF CRIMINAL PROCEEDINGS

In accordance with Article 296(1) ADH, a professional soldier is entitled to reimbursement of costs incurred for legal assistance, provided that the criminal proceedings initiated against them for an offence committed in connection with the performance of official tasks and activities were concluded with a final ruling discontinuing the proceedings due to the absence of statutory features of a prohibited act or the non-commission of a crime, or with an acquittal.

The 2024 Amendment introduced identical provisions for soldiers performing full-time military service (Article 316(1) ADH). Prior to this amendment, soldiers were entitled to reimbursement of legal assistance costs, provided that the preparatory proceedings initiated against them for an offence committed in connection with the performance of official duties were concluded with a final ruling of discontinuation (Article 316(1) ADH). The 2024 Amendment clarified that this condition applies specifically to the discontinuation of proceedings due to the absence of statutory features of a prohibited act, the non-commission of a crime, or an acquittal.

Costs shall be reimbursed in an amount corresponding to the remuneration of one defence lawyer for activities specified in the provisions of the Regulation of the Minister of Justice of 22 October 2015 on fees for solicitor's activities,¹⁵ and the Regulation of the Minister of Justice of 22 October 2015 on fees for legal advisors' activities¹⁶ (Article 296(2) ADH).

¹⁵ Journal of Laws of 2023, item 1964, as amended.

¹⁶ Journal of Laws of 2023, item 1935, as amended.

Determining the reimbursement of costs based on the type of final judgment that concludes the proceedings leaves no doubt that reimbursement can only occur after the final conclusion of the proceedings. This means that, pursuant to these provisions, costs will not be reimbursed during an ongoing criminal proceeding.

It is noted in the literature that the terms 'official task' and 'official activity' are used interchangeably in the Act on the Defence of the Homeland (e.g., in Article 105(1), Article 170(5), Article 225(1)–(5) and (7)–(8), Article 266(4), Article 296(1), Article 297(1), Article 333(1)–(2), Article 353(2)(4), etc.). It is therefore rightly concluded that a professional soldier performs official tasks (official activities) when fulfilling any obligation arising from military service (the professional military service relationship). This includes a professional soldier's duties arising from: (1) the official position held; (2) duties assigned during the period of secondment to perform official tasks outside the military unit; (3) conducting internal, garrison, patrol, convoy, and other services; (4) participation in disaster relief, counter-terrorist activities, property protection, search and rescue operations, protection of human health and life, protection and defence of cyberspace, clearing areas of military-origin explosives and hazardous materials, and crisis management tasks (Article 11(3) ADH); (5) orders and commands issued by superiors authorised by law (Article 353(1) ADH); and (6) legal provisions concerning military service.¹⁷

Reimbursement of the costs of legal assistance is made upon a professional soldier's written request, which must include: (1) the soldier's full name; (2) military rank; (3) the soldier's address and telephone number; (4) a brief presentation of the circumstances of the case.

The application must be accompanied by the following attachments: (1) a document confirming the soldier's payment for the legal assistance provided; (2) a declaration that the soldier did not exercise the right to the appointment of public counsel for the defence due to their inability to cover the defence costs without detriment to their own and their family's necessary maintenance (Article 78(1) CCP) and that no other sources of assistance were obtained; (3) a final and binding decision on the discontinuation of the proceeding due to the absence of statutory features of a prohibited act, non-commission of a crime, or an acquittal; (4) a statement concerning the form of payment of the amount due. A professional soldier must submit the application for reimbursement of legal assistance costs, along with the required documents, to the commander of their military unit. Upon receiving the application with all necessary documents and obtaining the consent of the immediate superior, the commander must, without delay and no later than 14 days, decide on the reimbursement of legal assistance costs, taking into account the actual costs incurred by the soldier and the decision on the costs of the proceedings (§ 3 of the Regulation of the Minister of National Defence of 26 May 2022 on the reimbursement of costs and financing legal assistance for professional soldiers).¹⁸

¹⁷ Krempeć, E., in: Królikowski, H. (ed.), *Obrona Ojczyzny*, Warszawa, 2023, pp. 590–591.

¹⁸ Journal of Laws of 2022, item 1242. The Regulation shall remain in force until the entry into force of the implementing provisions issued on the basis of Article 297(4) ADH, as determined by the Amendment of 26 July 2024. However, it shall be in force for no longer than six

Officers of the Police, Border Guard, Prison Guard, Protection Service, and Fiscal and Customs Service have the same rights. However, they are required to submit an application, and the actual costs incurred, which are subject to reimbursement, cannot exceed four times the average remuneration of the officer in the year preceding the application's submission date (Article 66a(1)–(2) of the Act on the Police, Article 71a(1)–(2) of the Act on the Border Guard, Article 164(2)–(3) of the Act of 9 April 2010 on the Prison Guard, Journal of Laws of 2023, item 1683, as amended; Article 142a(1)–(2) of the Act of 8 December 2017 on the State Protection Service, Journal of Laws of 2024, item 325;¹⁹ Article 211(1)–(2) of the Act of 16 November 2016 on the National Fiscal Administration).²⁰

Officers of the Central Anticorruption Bureau, the Internal Security Agency, and the Intelligence Agency are also entitled to reimbursement of costs incurred for legal assistance, but no limit has been set (Article 76(1) Act of 9 June 2006 on the Central Anticorruption Bureau,²¹ Article 84(1) Act of 24 May 2002 on the Internal Security Agency and the Intelligence Agency).²²

FINANCIAL SUPPORT FOR THE PROVISION OF LEGAL ASSISTANCE TO PROFESSIONAL SOLDIERS AND SOLDIERS BEFORE THE CONCLUSION OF THE CRIMINAL PROCEEDING

In particularly justified cases, and for the benefit of the service, financial support for legal assistance may be granted to a professional soldier when a criminal proceeding has been instigated against them for an offence committed in connection with the performance of official tasks and activities, even before the conclusion of the proceeding. The costs incurred for legal assistance are not subject to repayment by the professional soldier, regardless of the outcome of the criminal proceeding (Article 296(4) ADH). As a result of the 2024 Amendment, any soldier performing full-time military service may be granted such support (Article 316(4) ADH). The amount of costs subject to reimbursement is the same as after the conclusion of the criminal proceeding (Article 296(4) *in fine*, Article 319(4) *in fine* ADH).

The support is granted upon a professional soldier's written request. The application must include: (1) the soldier's full name; (2) military rank; (3) the soldier's address and telephone number; (4) a brief presentation of the circumstances of the case along with justification for the request for assistance. The application must be accompanied by: (1) a document confirming that the soldier

months from the date the Amendment entered into force, and it may be amended based on the provisions that were previously in force (Article 12(3) of this Amendment).

¹⁹ The provisions were introduced by the Act of 14 August 2020 on Special Solutions Concerning Support for Uniform Services Supervised by the Minister Responsible for Internal Affairs amending the Act on the Prison Guard and Certain Other Acts (Journal of Laws of 2020, item 1610).

²⁰ Journal of Laws of 2023, item 615, as amended.

²¹ Journal of Laws of 2024, item 184.

²² Journal of Laws of 2024, item 812.

has entered into an agreement for the provision of legal assistance; (2) an opinion from the commander of the military unit, or a body representing professional soldiers, regarding the soldier's extraordinary situation and the benefit to the service; (3) a declaration that the soldier does not benefit from the appointment of public counsel for the defence because they cannot cover the costs of defence without detriment to their own and their family's necessary maintenance (Article 78(1) CCP) and that no support for this purpose has been obtained from another source; (4) documents confirming the soldier's extraordinary situation, including personal, family, and financial circumstances; (5) a statement on the preferred method of payment for the amount due. A professional soldier must submit the application for financial support for legal assistance, along with the required documents, to the commander of their military unit. After receiving the application and complete set of documents, and having obtained consent from the immediate superior, the commander shall, without delay and no later than within 14 days, decide on granting financial support for legal assistance, taking into account the actual costs incurred by the soldier (§ 4 of the Regulation of 26 May 2022). The same rights are granted to police officers (Article 66a(3) of the Act on the Police), officers of the Border Guard (Article 71a(3) of the Act on the Border Guard), officers of the Prison Guard (Article 164(4) of the Act on the Prison Guard), and officers of the State Protection Service (Article 142a(3) of the Act on the State Protection Service). Other officers are not entitled to financial support for the provision of legal defence during a criminal proceeding against them when accused of an offence in connection with the performance of official duties; they must bear these costs themselves.²³

The mode and method of documenting costs incurred for legal protection by an officer, as well as by entities involved in the reimbursement of legal protection costs, are determined by the following regulations:

- Regulation of the Minister of the Interior and Administration of 30 September 2020 on the mode and methods of documenting costs incurred for the legal protection of police officers, as well as entities authorised to reimburse these costs;²⁴
- Regulation of the Minister of the Interior and Administration of 28 September 2020 on the mode and methods of documenting costs incurred by an officer of the Border Guard for legal protection, as well as entities authorised to reimburse these costs;²⁵
- Regulation of the Minister of Justice of 7 July 2023 on the reimbursement of costs incurred for the legal protection of officers of the Prison Guard;²⁶
- Regulation of the Minister of the Interior and Administration of 30 September 2020 on the costs incurred for the legal protection of officers of the State Protection Service.²⁷

²³ Musolf, G., in: Melezini, A., Teszner, K. (eds), *Ustawa o Krajowej Administracji Skarbowej. Komentarz*, Warszawa, 2024, p. 1140.

²⁴ Journal of Laws of 2024, item 522.

²⁵ Journal of Laws of 2020, item 1671.

²⁶ Journal of Laws of 2023, item 1409.

²⁷ Journal of Laws of 2020, item 1684.

The assistance granted to soldiers performing full-time military service was extended by the 2024 Amendment, which provided obligatory support in the form of reimbursement of trial costs to professional soldiers against whom criminal proceedings were initiated for an offence committed as a result of the use of direct coercive measures, weapons, or other armaments in connection with the performance of official tasks and activities, and who do not exercise the right to public counsel for the defence, even before the conclusion of the proceedings (Article 296(5) ADH). The support is granted in the amount specified in the legal assistance agreement, corresponding to the remuneration of one defence lawyer, but not exceeding 20 times the rates for activities specified in the above-mentioned regulations of the Minister of Justice on fees for solicitors' activities and the Regulation of the Minister of Justice on fees for legal advisors' activities.²⁸ The costs of legal assistance incurred are not subject to repayment by the professional soldier, regardless of the outcome of the criminal proceeding (Article 296(5) *in fine* ADH). The same rights were granted to soldiers performing full-time military service (Article 316(5) ADH).

LEGAL ASSISTANCE FOR SOLDIERS WHO ARE VICTIMS OF CERTAIN CRIMES

A professional soldier, or a soldier performing full-time military service, who is a victim of a crime involving a violation of the bodily integrity of an officer (Article 222 CC) or active assault on a public official (Article 223 CC) in connection with the performance of official activities or tasks, is entitled, upon request, to free legal assistance in a criminal proceeding in which they participate as the aggrieved party or as an auxiliary prosecutor. The assistance is provided by the Armed Forces. If the Armed Forces are unable to provide legal assistance, the victim is entitled to reimbursement of legal assistance costs (Article 297(1)–(3), Article 316a ADH).

This right is also granted to:

- the Police organisational unit where the aggrieved police officer serves shall provide this assistance. If this unit does not have legal services provided by legal advisors or solicitors, legal protection shall be provided by the appropriate provincial police headquarters or the Metropolitan Police Force. If a Police organisational unit is unable to provide legal protection, the officer is entitled to reimbursement of the actual costs incurred, but not exceeding four times the police officer's average remuneration paid in the year preceding the submission of the application (Article 66b(1)–(3) ADH);
- officers of the Border Guard: the assistance is provided by the Border Guard organisational unit where the aggrieved officer serves. If the unit does not have legal services provided by legal advisors or solicitors, legal protection shall be provided by the relevant command of the Border Guard division or the General Command of the Border Guard. If the Border Guard unit or command is unable to provide legal protection, the officer is entitled to reimbursement of the actual

²⁸ Journal of Laws of 2023, item 1935, as amended.

- costs incurred, but not exceeding four times the officer's average remuneration paid in the year preceding the submission of the application (Article 71a ABG);
- officers of the Prison Guard: in a slightly different manner, the organisational unit of the Prison Guard where the aggrieved officer serves shall provide legal protection. If it does not have legal services provided by legal advisors or solicitors, legal protection shall be provided by the district inspectorate of the Prison Guard or the Central Directorate of the Prison Guard (Article 164(1 and 2) APG);
 - officers of the State Protection Service: legal protection is provided by the State Protection Service (SPS). If the SPS is unable to provide legal protection, the officer is entitled to reimbursement of legal protection costs in the amount of the actual costs incurred, not exceeding four times the officer's average remuneration paid in the year preceding the submission of the application (Article 142b(3) ASPS).

ASSESSMENT OF THE REGULATION

The regulation in Article 78a CCP violates the principle of equality for the accused in exercising the right to defence. Therefore, it contradicts the constitutional principle of equality before the law (Article 32(1) of the Constitution of the Republic of Poland), which implies that:

'all legal entities (addressees of legal norms), characterised by a given essential (relevant) feature, shall be treated equally, i.e., according to the same measure, without discrimination or favouritism. (...) Differentiating citizens in such situations should align with the values cherished in society, moral attitudes, or ideological assumptions. The basic criterion for assessing the classification of entities (addressees of norms) in law is that these classifications, apart from compliance with other pragmatic criteria, must be socially just.'²⁹

This principle requires 'equal treatment of citizens in the same legal situation'.³⁰ Entities that share the same relevant feature to the same extent must be treated equally. However, the relevant feature that distinguishes a group of people must always relate to the purpose and essential content of the statute.³¹ As the Constitutional Tribunal has emphasised, these criteria refer to: (1) the relevance of the differentiation – the introduced distinctions must 'be directly related to the purpose and essential content of the provisions in which the controlled norm is contained and must serve to achieve this purpose and content. In other words, the distinctions must be rationally justified and cannot be made according to any arbitrarily established criterion'; (2) proportionality of the arguments for introducing differentiation – 'the weight of the interest to be served by differentiating the situation of the addressees of the norm must be in appropriate proportion to the weight of the interest that will be violated as a result of unequal treatment of similar entities'; (3) the constitutional importance of arguments for introducing differentiation – 'the arguments must

²⁹ Constitutional Tribunal ruling of 9 March 1988, U 7/87, *Orzecznictwo Trybunału Konstytucyjnego* (OTK), 1988, No. 1, item 1.

³⁰ Supreme Court resolution of 16 March 2000, I KZP 56/99, OSNKW, 2000, No. 3–4, item 19.

³¹ Constitutional Tribunal judgment of 28 March 2007, K 40/04, *OTK-A*, 2007, No. 3, item 33.

be connected in some way with other values, principles, or constitutional norms justifying different treatment of similar entities. (...) The principle of social justice is one of these constitutional principles'.³² This differentiation cannot be made based on an arbitrary criterion.³³ In light of constitutional principles and values, the criterion should be justified with appropriately convincing arguments.³⁴ The weight of the interest to be served by differentiating the situation of the addressees of the norm must be in proportion to the weight of the interests that will be violated as a result of unequal treatment of similar entities. Furthermore, this criterion must be connected to constitutional principles, values, and norms justifying the different treatment of similar entities.³⁵ The principle of equality constitutes a systemic and a general principle that is important for the entire catalogue of constitutional rights and public subjective right to equal treatment.³⁶ The Constitutional Tribunal recognises this right as a second-degree right because it most often determines the legal situation of an individual in conjunction with other freedoms or constitutional rights.³⁷

In the context of this principle, every accused person should have equal access to the assistance of a defence lawyer. Compliance with this principle is ensured by the possibility for the accused to request the appointment of public counsel for the defence if they are unable to bear the costs of defence without detriment to their own and their family's necessary maintenance (Article 78(1) CCP). Based on this provision, only the difficult financial circumstances of the accused constitute the criterion for appointing public counsel for the defence, and this criterion is an important one that distinguishes such accused persons from others.

The accused who holds the status of a soldier, police officer, or Border Guard officer, and the manner of committing an offence as specified in Article 78a(1) CCP, are difficult to recognise as valid criteria. They are not of this nature because they concern, firstly, officers who are required to have special ethical and moral values and should not commit offences; and secondly, acts committed by them as a result

³² Constitutional Tribunal ruling of 3 September 1996, K 10/96, *OTK*, 1996, No. 4, item 33; Constitutional Tribunal judgment of 16 December 1997, K 8/97, *OTK*, 1997/5-6/70; Constitutional Tribunal judgment of 24 March 1998, K 40/97, *OTK*, 1998, No. 2, item 12; Constitutional Tribunal judgment of 9 June 1998, K 28/97, *OTK*, 1998/4/50; Constitutional Tribunal judgment of 21 September 1999, K 6/98, *OTK*, 1999, No. 6, item 117; Constitutional Tribunal judgment of 5 December 2000, K 35/99, *OTK*, 2000, No. 8, item 295; Constitutional Tribunal judgment of 18 December 2000, K 10/00, *OTK*, 2000, No. 8, item 298; Constitutional Tribunal judgment of 6 March 2001, K 30/00, *OTK*, 2001, No. 2, item 34; Constitutional Tribunal judgment of 24 October 2001, SK 22/01, *OTK*, 2001, No. 7, item 216; Constitutional Tribunal judgment of 16 October 2006, K 25/05, *OTK-A*, 2006, No. 9, item 122; Constitutional Tribunal judgment of 25 May 2009, SK 54/08, *OTK-A*, 2009, No. 5, item 69; Constitutional Tribunal judgment of 5 July 2011, P 14/10, *OTK-A*, 2011, No. 6, item 49; Constitutional Tribunal judgment of 2 October 2012, K 27/11, *OTK-A*, 2012, No. 9, item 102; Constitutional Tribunal judgment of 18 March 2014, SK 53/12, *OTK-A*, 2014, No. 3, item 32.

³³ Constitutional Tribunal ruling of 12 December 1994, K 3/94, *OTK*, 1994, Part II, item 42.

³⁴ Constitutional Tribunal judgment of 16 December 1997, K 8/97, *OTK ZU*, 1997, No. 5-6, item 70; Constitutional Tribunal judgment of 24 February 1999, SK 4/98, *OTK ZU*, 1999, No. 2, item 24.

³⁵ Constitutional Tribunal ruling of 23 October 1995, K 4/95, *OTK*, 1995, Part II, p. 93.

³⁶ Tuleja, P., in: Tuleja, P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2023, p. 127.

³⁷ Constitutional Tribunal decision of 24 October 2001, SK 10/01, *OTK*, 2001, No. 7, item 225.

of abuse of power. These offences result from violations of the principles governing the use of direct coercive measures and weapons, as specified in Articles 5–9, Articles 14–25, and Article 48 of the Act on Coercive Measures and Firearms, and in relation to soldiers, also Article 11a ADH. Such behaviour is reprehensible, and there are no valid arguments for privileging them in criminal proceedings. It cannot be ignored that, in criminal procedural law, the principle of equality is one of the elements that define the content of the right to defence and co-determine the standard of a fair trial.³⁸ Access to a defence lawyer is a key element that directly influences the course of proceedings and often determines the use of other guarantees falling within the framework of the right to a fair criminal proceeding.³⁹ This access should be equal for every accused person, regardless of their social status or the type of crime.

The legislator should not have introduced this provision because equality before the law also entails the obligation to enact laws in a way that ensures equal treatment of entities belonging to the same category.⁴⁰

There is no justification for granting financial support for legal assistance to a professional soldier or a person performing full-time military service, against whom criminal proceedings have been initiated for a crime committed in connection with the performance of official tasks and activities, before the conclusion of those proceedings. This is because it is not yet known whether the final judgment will result in a conviction or acquittal, and from this perspective, it may be that the support granted was undeserved. This is especially concerning as the legal assistance costs incurred are not subject to repayment, regardless of the outcome of the criminal proceedings (Article 296(4) and Article 316(4) ADH). While it is true that such support may be granted in particularly justified cases and when it is for the benefit of the service, this does not exclude the possibility of a conviction. Such a condition is not included in the provisions concerning obligatory assistance for a professional soldier and a soldier performing full-time military service under Article 296(5) and Article 316(5) ADH, respectively. Given that the crime may have been committed through the use of direct coercive measures, weapons, or other armaments in connection with the performance of official tasks or activities, these could involve serious crimes, such as murder (Article 148(1) CC), for which the perpetrator may face a severe penalty.

Therefore, the provisions granting the right to reimbursement of defence costs incurred during criminal proceedings, as contained in the Act on the Defence of the Homeland and other acts concerning other services, should be repealed. Compensation for defence expenses could be awarded by introducing the possibility of claiming damages and redress from the State Treasury for harm suffered as a result of an undoubtedly unjust accusation or the general filing of charges against

³⁸ Kardas, A., Kardas, P., 'Zasada równości w prawie karnym (zarys problematyki)', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2019, No. 1, p. 34.

³⁹ Koncewicz, T.T., Podolska, A., 'Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim', *Palestra*, 2017, No. 9, p. 11.

⁴⁰ Kardas, A., Kardas, P., 'Zasada równości...', op. cit., p. 20.

all accused or suspects,⁴¹ not just officers of certain services, and not only officers of certain services.

Financial support for legal assistance for professional soldiers, soldiers performing full-time military service, and the above-mentioned officers of other services after the conclusion of criminal proceedings raises no concerns. The final conclusion of the proceeding, in the form of its discontinuation due to the absence of statutory features of a prohibited act, non-commission of a crime, or acquittal, demonstrates that the charges or accusations were wrongly brought. In such cases, reimbursement of legal assistance costs is just, as the suspicion or accusation was related to the performance of official duties.

The provision of free legal assistance in criminal proceedings in which a professional soldier, a soldier performing full-time military service, or an officer of other services participates as a victim or auxiliary prosecutor in cases concerning certain crimes committed against them in connection with the performance of official activities or tasks should be assessed in the same way.

CONCLUSION

The 2024 Amendment granted the possibility of appointing a public counsel for the defence for soldiers, police officers, or Border Guard officers accused of an offence committed as a result of the use of direct coercive measures, weapons, or other armaments, or the application or use of direct coercive measures or firearms in connection with the performance of official activities or tasks (Article 78a(1) CCP). This regulation violates the constitutional principle of equality before the law because it favours this group of defendants in terms of access to a defence lawyer, despite the fact that they share the same relevant characteristics to the same extent as others and should therefore be treated equally.

The concept of granting reimbursement of legal assistance costs to soldiers, including those performing active military service, and officers of other services after the conclusion of a criminal proceeding concerning an offence committed in connection with the performance of official tasks or activities – when such proceedings result in a final ruling discontinuing the case due to the lack of statutory features of a prohibited act, non-commission of a crime, or acquittal – should be approved. It serves to compensate for the harm suffered by a soldier or officer unjustly suspected or accused of committing a crime in connection with the performance of official tasks and activities.

The possibility of granting financial support for legal assistance to a soldier, or a soldier performing full-time military service, or an officer of certain services, against

⁴¹ For more see Stefański, R.A., 'Odpowiedzialność za niesłuszne skazanie, niewątpliwie niesłuszne oskarżenie, przedstawienie zarzutów lub zastosowanie nieizolacyjnego środka zapobiegawczego', *Prokuratura i Prawo*, 2012, No. 12, pp. 31–50; Mik, B., 'O potrzebie dodatkowego, szczególnego unormowania odpowiedzialności odszkodowawczej Skarbu Państwa za niesłuszne skazanie oraz niewątpliwie niesłuszne oskarżenie, przedstawienie zarzutów lub zastosowanie nieizolacyjnego środka zapobiegawczego', *Prokuratura i Prawo*, 2012, No. 12, pp. 50–72.

whom criminal proceedings were initiated for a crime committed in connection with the performance of official tasks and activities before the conclusion of the proceedings should be assessed negatively. Granting such support is questionable because it is not known how the proceedings will conclude, and it cannot be ruled out that the defendant may be sentenced to a severe penalty.

There is no axiological justification for the 2024 Amendment granting obligatory support in the form of reimbursement of trial costs to a soldier, or a soldier performing full-time military service, against whom criminal proceedings were initiated for a crime committed as a result of the use of direct coercive measures, weapons, or other armaments in connection with the performance of official tasks or activities, and who does not exercise the right to public defence counsel before the conclusion of the proceedings (Article 296(5), Article 317(5) ADH). It should be remembered that this concerns a crime committed as a result of the use of direct coercive measures, weapons, or other armaments in connection with the performance of official tasks or activities, which may constitute a serious crime, such as murder (Article 148(1) CC), the gravity of which is an argument for the imposition of a severe penalty.

The provision of free legal assistance in criminal proceedings involving a professional soldier, a soldier performing full-time military service, or an officer of other services who is a victim or an auxiliary prosecutor in cases concerning certain crimes committed against them in connection with the performance of official activities or tasks should be assessed positively.

BIBLIOGRAPHY

- Dąb, A., Cincio, K., 'Prawo do obrony', in: *Zagadnienia prawne Konstytucji PRL*, Vol. III, Warszawa, 1954.
- Cieślak, M., *Polska procedura karna. Podstawowe założenia teoretyczne*, Warszawa, 1971.
- Jastrzębski, W., Wnorowski, K., 'Status żołnierzy terytorialnej służby wojskowej w świetle polskiego prawa karnego materialnego i procesowego', *Wojskowy Przegląd Prawniczy*, 2023, No. 1.
- Kalinowski, S., *Postępowanie karne. Zarys części ogólnej*, Warszawa, 1963.
- Kardas, A., Kardas, P., 'Zasada równości w prawie karnym (zarys problematyki)', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2019, No. 1.
- Koncewicz, T.T., Podolska, A., 'Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim', *Palestra*, 2017, No. 9.
- Krempeć, E., in: Królikowski, H. (ed.), *Obrona Ojczyzny*, Warszawa, 2023.
- Kruszyński, P., *Stanowisko prawne obrońcy w procesie karnym*, Białystok, 1991.
- Kruszyński, P., in: Bieńkowska, B., Kruszyński, P. (ed.), Kulesza, C., Piszczek, P., Pawelec, P., *Wykład prawa karnego procesowego*, Białystok, 2003.
- Mik, B., 'O potrzebie dodatkowego, szczególnego unormowania odpowiedzialności odszkodowawczej Skarbu Państwa za niesłuszne skazanie oraz niewątpliwie niesłuszne oskarżenie, przedstawienie zarzutów lub zastosowanie niezolacyjnego środka zapobiegawczego', *Prokuratura i Prawo*, 2012, No. 12.
- Musolf, G., in: Melezini, A., Teszner, K. (eds), *Ustawa o Krajowej Administracji Skarbowej. Komentarz*, Warszawa, 2024.
- Murzynowski, A., *Istota i zasady procesu karnego*, Warszawa, 1976.

- Murzynowski, A., 'Glosa do wyroku SN z dnia 8 kwietnia 2002 r., V KKN 281/00', *Orzecznictwo Sądów Polskich*, 2002, No. 12.
- Stefański, R.A., *Obrona obligatoryjna w polskim procesie karnym*, Warszawa, 2012.
- Stefański, R.A., 'Odpowiedzialność za niesłuszne skazanie, niewątpliwie niesłuszne oskarżenie, przedstawienie zarzutów lub zastosowanie nieizolacyjnego środka zapobiegawczego', *Prokuratura i Prawo*, 2012, No. 12.
- Tuleja, P., in: Tuleja, P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2023.
- Wiliński, P., *Zasada prawa do obrony w polskim procesie karnym*, Kraków, 2006.
- Zieliński, M., *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa, 2010.

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