# The constitutive content of weapon use offense in the New Criminal Code

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***Abstract*****:** *The entry into force of the New Criminal Code, especially in terms of including in its content new offenses, requires their examination and implicitly their knowledge. Within the paper it is examined the constitutive content of the offense, with a particular emphasis on the essential requirement which complements the material element of the objective side. The novelty is in the examination of the objective side, the essential requirements and the subjective side, in terms of the new law. We also have propositions of lege ferenda that regard the replacement of the term "offense" with the "act under the criminal law" and the reformulation of all necessary requirements for weapon use under the law. The paper can be useful for prosecuting authorities, other categories of practitioners, academics and law students.*

***Keywords*****:** *offense; use of weapon; the objective side; the subjective side; prerequisite; ferend law*;

## Introduction

The use of weapon without the right, an offense under article 343 of the New Criminal Code is not provided in the current Criminal Code, having as correspondence article 133 and article 135 of Law no. 295/2004 regarding the regime of weapons and ammunition, republished [1].

The offense provided in the New Criminal Code consists of the act of the person that uses the lethal, nonlethal or prohibited weapon from the authorized category, without the right (violation of the conditions imposed by the law).

In the current law, in article 133, it is provided the use of a deadly weapon offense, without the right, which is in fact the act of the person who uses a weapon in violation of the laws, and in article 135 it is referred to the offense of use of non-lethal weapon from the authorized category, without right, that is the person's action that makes use of non-lethal weapon from the authorized category, in violation of legal provisions.

According to the assessment of the provisions of the current and the new law there are differentiating elements, the first of which being the fact that in the applicable law the legislator has incriminated separately, in two separate articles, two facts, namely the use of a lethal weapon and the use of nonlethal weapons, while the new law, the act is incriminated in a single article, in two paragraphs, keeping still the incrimination separate for the use of lethal and nonlethal weapons.

A second difference between the two incriminations consists of the addition into the of article 342 paragraph (1), the use of prohibited weapon, a claim which is not covered by the current law.

A final difference is in the range of punishment which in the New Criminal Code, is reduced from 1 year to 5 years imprisonment for the use of a deadly weapon referred to in article 133 of the special law, to 1 to 3 years imprisonment for use of a lethal or prohibited weapon under article 343, paragraph (1) of

the New Criminal Code. Such differences exist in the case of use of non-lethal weapon offense, but only in terms of the maximum sentence, which in article 135 of the special law is of 3 years imprisonment, while in the new law [(article 343, paragraph (2) of the New Criminal Code], the maximum penalty being of 2 years.

The new regulation is in our opinion superior to that of the current law, as there were incriminated two facts, in the content of the same article, being included offenses sanctioning the use of weapons, without right, in the case of the three main categories of weapons, namely: prohibited, lethal and non-lethal.

## 1. The objective side of weapon use offense

***The material element of the objective side in the case of the use of weapon without right offense***, consists of the action by which it is used a weapon.

The ***use of a weapon***, according to article 46 of Law no. 17/1996 regarding the regime of weapons and ammunition means firing the firearm to persons or property.

Given the definition of the term "use of weapon" by the legislator, firing a firearm in circumstances other than to persons or property, will not meet the constitutive elements of the offense of use of a weapon without right.

In order to complete the material element of the objective side it is necessary to fulfill the ***essential requirement***, which consists of firing a gun (use of weapon), without the right.

"***Use a gun without the right***" means the execution by firing a lethal, non-lethal or prohibited weapon from the category of those subject to authorization, to a person or an asset, in violation of the conditions imposed by the law [1].

According to the current regulations, the lawful use of weapon force (use of weapons according to the law) is regulated at general and special level, with direct reference to some specific activities of institutions from the domain of public order and safety.

The general regulation is provided for in article 46-52 of Law no. 17/1996 on the regime of firearms and ammunition [2].

We should add that according to article 146 paragraph (2) of Law no. 295/2002, republished, above mentioned legislative act was repealed, except article 46-52, which remain in force for each institution that has employed individuals occupying positions involving the exercise of public authority, armed with weapons of defense and security, until the establishment of the laws referred to in article 41 of the conditions under which they can carry and use weapons.

Under these circumstances, *the general framework under which we can make use of the weapon according the law remains the one regulated in article 46-52 of Law no. 17/1996.*

Thus, according to article 47 of Law no. 17/1996, individuals who are equipped with firearms can make use of a weapon to fulfill duties or military missions in the following situations:

a) against those who attack soldiers in the service of guard, watch, escort, protection, maintenance and restoration of the rule of law, and against those who, by the committed act, by surprise, threaten the guarded target;

b) against those who attack the people invested with the exercise of public authority or which, by law, it is provided protection;

c) against those who seek to enter or to exit unlawfully in or out of military units or subunits, or the perimeters or guarded areas - clearly defined - established by instruction;

d) for restraining criminals, who after committing a crime, they are trying to escape;

e) against any means of transport used by people provided for at letter b) and c), and against their leaders who refuse to stop at the signals authorized by the regulatory bodies, being solid clues cause that they have committed a crime or that it is imminent the commitment of an offense;

f) to restrain or arrest people on whom there are evidence or solid clues that they have committed a crime and that fights back or try to fight back with weapons or other objects that may endanger the life or physical integrity of another person;

g) to prevent escaping under escort or escaping those who are in the legal status of detainees;

h) against groups of persons or isolated persons trying to enter without right in the premises or perimeters of authorities and public institutions;

i) against those who attack or impede the military to execute combat missions;

j) in the execution of anti-terrorist intervention on the attacked objective or captured by terrorists in order to retain or annihilate them, freeing hostages and reestablish the public order;

Persons authorized to hold, carry and use weapons for security or self-defense can use weapons for self-defense or in an emergency, according to the law.

According to article 49 of the mentioned regulation, the cases referred to in article 47 letters c), d), g), h) and i), it may be used a weapon only after being legally summoned.

The summons is the word "Stop!". In case of disobedience it says the words: "Stop, or I'll shoot!". If the person does not obey still, it is summoned by firing upward, vertically.

If, after the execution of the legal summons, according to paragraph 2, the person fails to comply, it can be used the weapon against that person.

In the case referred to in article 47 letters h) and i), the weapon will be used only after repeating three times at intervals of time sufficient to disperse the participants, using the summations: "Leave the area….., we will use firearms!".

In the cases referred to in article 47 letters a), b), f) and j), and article 48, it can be used a weapon without warning, if there is no more time for that.

When using weapons against vehicles it is fired vertically and then it will be fired into the tires in order to secure the asset.

In article 50 there are provided special provisions relating to military structures of the state, according to which commanders or military chiefs can make use of a weapon against subordinates, in order to restore order, if other measures to prevent or coercion were not possible; when their actions are clearly directed towards betrayal of the country or thwarting their fighting mission or seriously jeopardize the combat capability of the unit. In these cases, it makes use of a weapon, under the legal provisions relating to the legal summons.

According to article 50, the use of weapon, the conditions and circumstances set out in this chapter are done in such a way as to lead to the immobilization of the person against which the weapon is used, firing as far as possible, to the feet, in order to avoid causing death.

If the use of a weapon reached its goal provided in paragraph 1, the use of such a means is not applied.

The injured person should receive first aid and medical care.

At the same time, the law provided some restricting provisions regarding the use of weapons, firing in certain circumstances and against certain categories of people.

Thus it will be avoided as much as possible, the use of weapons against children, women and elderly.

It is also prohibited the use of weapons:

a) against children, visibly pregnant women, unless participating in an armed attack or in group, threatening the life or physical integrity of a person;

b) in situations that would endanger the lives of other people or would violate the territory, airspace or national waters of a neighboring state.

After examining the above provisions, we conclude that the legislator has provided a general framework that allows the use of weapons, under certain conditions.

The regulation aims at using the weapon in general situations, which regards, on the one hand, institutions of public order and security with specific tasks, and on the other hand other categories of individuals, legal owners of such categories of weapons.

Thus, the essential requirement is not met, whenever the use of weapons regards situations in which the above mentioned provisions are complied.

At the same time, the essential requirement will be met and therefore the person in question will be held criminally responsible, in the cases where the depositions of article 47-52 of the Special Law are not complied.

As an example we present the cases where the person fires with the firearm without making the legal summons, in the cases referred to in article 47 letters c), d), g), h) and i), or in cases provided for in article 52 letter a) when firing against children, visibly pregnant women, although these people have not participated in an armed or group attack that endangered the life or physical integrity of others.

Note that the legislator does not require these categories of persons to fire firearm, but he establishes a general procedure that creates the possibility of firing, in order to fulfill duties.

This means that in situations where the enforcement of duties requires also measures other than the use of a weapon, they will have priority.

In addition to these general provisions regarding the use of weapons, there are some special stipulations that complement the provisions of firing firearms for certain structures of public order and safety.

Such provisions are set out in article 44 of Law no. 14/1992 on the organization and functioning of the Romanian Intelligence Service [3], article 27 of Law no. 191/1998 on the organization and functioning of the Protection and Guard Service [4], article 12 paragraph (2) of Law no. 92/1996 on the organization and functioning of the Special Telecommunications Service [5], article 19 of G.D. No. 520/2013 on the organization and functioning of the National Agency for Fiscal Administration [6] etc.

For all the mentioned structures, and others, the use of weapons, as the action of state bodies is complemented by the provisions of the special law (article 46-52 of Law no. 17/1996). This means that when firing on a person or property, the person must comply with these provisions.

In the current legislation, there are two institutions in the system of public order and national security where the use of weapons involves other responsibilities as well, distinct from the other state's institutions with specific responsibilities in the national order system and public safety.

The first is the Romanian Gendarmerie, whose staff, according to Law no. 550/2004 on the organization and functioning of the Romanian Gendarmerie [7], in the performance of duties, may use weaponry with ammunition and other means, in the cases provided by law, aiming at neutralizing the aggressive actions of people who disturb seriously the public order, entering without right in the premises of public authorities, etc. (article 29 of the special law).

In case of absolute necessity and when using other means of restraint or coercion did not work, the gendarme may use weapons under strict conditions, according to the law (article 30 of the special law).

No doubt that in the absence of other special law regulations, the phrase "under strict conditions prescribed by law", the legislator has referred to the provisions of article 46-52 of Law no. 17/1996.

A separate regulation also appears in Law no. 218/2002 on the organization and functioning of the Romanian Police [8], as amended and supplemented, where article 35 paragraph (1) provides that in case of necessity the police may use in the cases and under the conditions provided by law, the force of white weapons or firearms. Firearms are used after the summons: "Stop or I'll shoot!".

In paragraph (2) of the same article it provides that in case of self-defense, the police may use firearms without notice.

In order to prevent some abuses, and also to protect police officers who use weapons under the law, in paragraph (3) of the same article it states that the use of weapons to fulfill their duties, under the conditions and in the cases provided by law, eliminates the criminal nature of the act.

In connection to the phrase "in the cases provided and according to the law", we believe that the legislator makes direct reference to the provisions of article 46-52 of Law no. 17/1996 regarding the regime of firearms and ammunition.

Use of force of the white weapons or firearms represents the ultimate possible variant, an action taken after using other means that did not lead to the restoration of the infringed order.

Under the provisions of article 36, the special law prohibits the use of the means provided for in article 34 and 35 against women with visible signs of pregnancy, people with obvious signs of disability and children, unless they conduct an armed or group attack, threatening the life or physical integrity of one or more persons.

Each situation in which it was used a weapon it relates on a hierarchy, and when it resulted in bodily injury or death of persons, the act shall be communicated forthwith to the competent prosecutor, who will also conduct the investigations.

A special provision which does not appear in the special laws governing the organization and functioning of other institutions of the public order and national security is provided in article 39, text under which the policeman is obliged to take the necessary steps to eliminate hazards that threaten public order or safety in all situations where it faces directly or when it is notified about it.

The essential requirement will be met in all cases in which, it turns out that the policeman in the line of duty, has made use of a weapon in violation of the special law's stipulations or articles 46-52 of Law no. 17/1996.

Although these situations are very diverse, we present the following as examples:

- firing the firearm on a child;
- firing the firearm on a person without making the legal summons;
- firing the firearm on a person after it had stopped running;

- firing the firearm on a person who committed an act which did not endanger the life or physical integrity of the policeman, etc.;

Regarding the second category of persons possessing legal firearms, we mention that by law, they can make use of the weapon only when it is in self-defense or a state of emergency, in which case there will not be held criminal responsible (both having justifying causes provided in the article 19 and 20 of the New Criminal Code).

This aspect is governed by the provisions of article 32 paragraph (1), according to which the owners of the right to carry and use weapons of defense and security can make use of the weapon only in authorized ranges or in self-defense or emergency state.

A special provision regards the owners of the right to carry and use hunting weapons, which, except the right to make use of the weapon in hunting or polygons, as an exception, it can use the hunting weapon in self-defense, state of emergency or unforeseeable circumstances.

Within these categories of people, there will be the essential requirement whenever it is found that the use of weapons was carried out without the weapon holder to be in self-defense or in a state of emergency (and in the case of a hunting weapon under unforeseeable circumstances as well).

In the judicial practice it was decided that the act of the person who fired with a hunting shotgun, which he owned it illegally, which caused injuries that led to the victim's death, it meets the constitutive elements of the offense of manslaughter, failure to respect the weapons and ammunition regime and weapon use without right, acts that are punishable under articles 174-175, paragraph (1), letter j) of the Criminal Code, article 279 paragraph (1) and (2) of the Criminal Code, and article 133 of Law no. 295/2004, republished, with the application of article 33 letter a) of the Criminal Code [9].

We believe that this essential requirement will be satisfied also in the case where the active subject of the offense is not the legal holder of the lethal, prohibited and non-lethal weapons in the authorized category. In this case, the examined offense will compete with the one provided in article 342 (failure to comply with weapons and ammunition regime), or some offense against life, integrity or person's health or destruction.

The ***immediate result*** is to create a state of danger to life, bodily integrity or health of physical entities, or private or public patrimony.

The ***causal link*** between the incriminated action and the socially dangerous consequence must not be demonstrated by the judicial body, it results directly from the materiality of the committed offense.

## 2. The subjective side of weapon use offense

From the examination of the incrimination text it results that ***the guilt form with which the active subject of the offense operates is the intention with both forms***.

There will be ***direct intent*** when the active subject of the offense foresees the result of its action which consists of its execution without the right to use the weapon, and pursues this result by committing the act.

There will be ***indirect intent*** when the legal owner of a lethal, prohibited or non-lethal weapon from the category of those submitted to authorization, foresees the result of his action which consists of use a weapon, without right, and although he does not pursue it, he accepts the possibility of that happening.

The motive and purpose are not requirements of the subjective side of the examined offense, but establishing them (when available) is absolutely necessary, as they will be taken into consideration in the process of individualizing the sentence.

### 3. Some critical observations

The weapon use offense, without the right, may be considered as one of threat and of result, when the effect is in bodily injury, health or killing a person or the destruction of a property.

We believe that the current regulation under the provisions of article 47 of Law no. 17/1996, which sets out the conditions under which it can make use of the weapon is outdated and it does not meet the current realities.

We particularly take into consideration the article 47, letter d), which states that it is allowed the use of a weapon to immobilize criminals, who after committing a crime, try to escape. In judicial practice and in the doctrine, this provision has caused many discussions, all based on the wording used by the legislator, which shows that the use of weapons can be achieved against criminals, who, after committing a crime, are trying to escape.

It is known the fact that in all the circumstances it is an incident principle of innocence and the existence of a crime in its materiality and the culpability are determined only by the court, given that its decision remained final. Or in this circumstance, using in the text terms as crime and perpetrator are not likely to clarify the situation.

In these circumstances, we propose as "ferend law" the change of the term "offense" with "act under the criminal law", a term that is more appropriate for these extremely complex situations.

### Conclusions

The use of weapons is in its essence a complex action, intended to ensure public order and safety in the country.

Introducing the use of weapon without right offense in the New Criminal Code is, in our view, a positive element, the act itself being likely to present a certain general interest for society.

The examination of the constituent content of this crime, especially the objective side, with particular reference to the essential requirement was necessary due to the novelty brought by its inclusion in the content of article 343 of the New Criminal Code.

At the same time, through this examination, we took into consideration the need of understanding the complexity of weapon use, seen as a complex activity circumscribed to the execution of some attributions job-related by certain state authorities.

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