

# **The juridical status of the service firearm ownership and utilization procedure and the armament and munitions operations within the Romanian penitentiary administrative system**

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## **Abstract**

*The general activity of the special status civil servants from within the Romanian penitentiary administration system, involves, due to the nature of the work-related duties, particular risks and tasks, therefore this activity cannot be conducted without ensuring a distinct and efficient juridical regime, ensuring the protection and safeguarding the fundamental rights of people deprived of their freedom. This paper aims to present the adoption of the current juridical regime of the procedure of owning and using the work-supplied weapons and the weapons and ammunition operations in the Romanian prison system, the no. 23/2016 Law regarding the possession and use of the work-supplied weapons and the weapons and munitions operations in the penitentiary administrative system, namely the use of weapons, munitions and military devices, by the civil servants with a special status from the penitentiary administrative system, being allowed only in the specially designed, approved and authorized shooting ranges, for this purpose; the situations in which the civil servants from the penitentiary administrative system, carrying lethal weapons, in the line of duty, are entitled to use their lethal or nonlethal weapon, depending on the case, only after the official warning has been made, as well as the situations in which they can use their weapons, without warning, if there is no time for this: in case of self-defense or in case of a state of emergency.*

**Keywords:** *particular regime; special legal regulation; possession; use; weapons; penitentiary system.*

**JEL Classification:** K14, K33, K40

## **1. The necessity of adopting the normative act**

The adoption, by the Romanian Parliament, on March the 3<sup>rd</sup> 2016, of the No. 23 Law regarding the possession and use regime of the work-supplied weapons and the weapons and munitions operations in the penitentiary administrative system<sup>3</sup>, which complements the common legislation in matters regarding the weapons and munitions regime<sup>4</sup>, has determined us to publish in this issue of the

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<sup>3</sup> Published in the Official Journal of Romania, No. 174 of March 8<sup>th</sup> 2016.

<sup>4</sup> Law No. 295/2004 regarding the weapons and munitions regime, published in the Official Journal of Romania No. 583 of June 30<sup>th</sup> 2004, modified no less than 11 times and republished twice, the last amendment took place via the No. 319 Law of December 2015, published in the Official Journal of Romania No. 929 of December 15<sup>th</sup> 2015.

magazine, a slightly atypical article, somewhat lacking the jurisprudence in the field, trying to highlight, through our approach, the necessity and importance of the new regulation, in the new penal reforms<sup>5</sup>.

When drafting the new law, the first things taken into consideration were the obligations assumed by Romania, which resulted from the perspective of harmonizing the national legislation with the European one<sup>6</sup>, and last but not least, the harmonization of the national legislation, meaning that nationally, most institutions within the national security, public order and defense system have adopted, through special laws that regulate the ownership, carrying and use or other operations with weapons, munitions and related devices, except for the penitentiary administrative system in Romania.

Pending the adoption of this special law, the juridical regime in the matter had been governed by the provisions of the No. 295/2004 Law, which states in art. 67, paragraph 1 the categories of legal entities that can acquire, hold and use weapons and munitions, which are public institutions with attributions in the field of defense, public order and national security, which are authorized to acquire, dispose and use lethal and nonlethal weapons, as well as the corresponding munitions, for arming their own personnel, as determined by special laws<sup>7</sup>.

According to Art. 41 of the same law, the conditions under which people exercising a public authority may carry and use lethal weapons, in the line of duty, are established by special laws regulating their attributions. Based on these provisions, a series of special laws have been drafted and entered into force, which nationally regulate procedures regarding the ownership, holding and use and the operations with weapons, munitions and related devices, of which we mention the No. 155/2010 Local Police Law<sup>8</sup>; the No. 122/2011 Law regarding the regime of weapons, military devices and munitions owned by the Ministry of Defense and the foreign armed forces on Romania's territory<sup>9</sup>; the No. 104/2001 Government's

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<sup>5</sup> Reformation was the desire of all countries of the world, for more details see Alice Ristroph, *Regulation or resistance? A Counter-narrative of Constitutional Criminal Procedure*, „Boston University Law Review”, Vol. 95, number 5, 2015, p.1555-1617; Charles E. Cobb, "Behavior modification" in the prison system, *The Black Scholar*, Vol. 5, issue 8, (May 1974), pp. 41-44; Andrés Antillano, Iván Pojomovsky, Verónica Zubillaga, Chelina Sepúlveda, Rebecca Hanson, *The Venezuelan prison: from neoliberalism to the Bolivarian revolution*, „Crime, Law and Social Change”, April 2016, Volume 65, Issue 3, pp 195–211; Frank Valentino Ferdik, Hayden P. Smith, *Maximum Security Correctional Officers: An Exploratory Investigation into Their Social Bases of Power*, „American Journal of Criminal Justice”, September 2016, Volume 41, Issue 3, pp 498–521.

<sup>6</sup> The implementation of the *acquis communautaire* in this respect had as main objective the implementation of the provisions of the No. 477/1991 Directive of the European Council, on the control of the acquisition and possession of weapons, as amended by the No. 2008/51/CE Directive. For more details, see *Legea penală română în condițiile postaderării*, „Revista de drept penal” no. 2/2008 (April-June), p. 9-23.

<sup>7</sup> For details, see Ilie Pascu, *Infrațiuni la regimul armelor și al munițiilor*, „Revista de drept penal” no. 4/2006 (October-December), p. 47-52.

<sup>8</sup> Published in the Official Journal of Romania No. 488 of July 15<sup>th</sup> 2010, republished in the Official Journal of Romania No. 339 of May 8<sup>th</sup> 2014.

<sup>9</sup> Published in the Official Journal of Romania No. 426 of June 17<sup>th</sup> 2011.

Emergency Ordinance regarding the organization and functioning of the Romanian Border Police<sup>10</sup>, up to date.

Last but not least, there is a pressing need to adopt a distinct law in the field and, for a different reason, the inexistence of a homogenous standard of protection of the fundamental human rights is why the European Court of Human Rights has sanctioned Romania lately, namely the incapacity of the current Romanian juridical system to ensure that the positive obligation to the applicants' right to life is respected. In this regard, we find relevant the cases *Soare and others vs Romania*<sup>11</sup>, in which the Romanian state was convicted for violating Art. 2 of the Convention, in the sense that the *legal framework was not regulated sufficiently to ensure the level of protection, "by law", of the right to life, imposed by the European Convention of Human Rights, as well as in the Cobzaru vs Romania* case<sup>12</sup>, in which the Court accuses the Romanian state, i.e. *the Romanian authorities, did not do all that could have been reasonably expected of them, at the time of the events, in order to provide the citizens with the necessary protection level, especially in the cases regarding the use of lethal force, as well as to counter the actual and immediate risks to their lives, which can be generated by the police operations, even in exceptional circumstances.*

In these cases, the European Court of Human Rights reiterated the need to adopt the legal framework determining the juridical regime of the procedure in matters of arrest, meaning the subordination of resorting to the use of a firearm, to a thorough assessment of every given situation, as well as the assessment of the nature of the crime committed by the fugitive and of the actual danger that it poses.

## 2. The scope

Apparently, the time for Romania's penitentiary administrative system and its civil servants with special status has come, to benefit from a law that, along with the No. 293/2014 Law<sup>13</sup> which governs their activity, to provide them with a

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<sup>10</sup> Published in the Official Journal of Romania No. 351 of June 29<sup>th</sup> 2001, amended numerous times, the last amendment being made via the No. 314/2013 Law, published in the Official Journal of Romania No. 728 of November 26<sup>th</sup> 2013.

<sup>11</sup> In case no. 24329/02 of February 22<sup>nd</sup> 2011, the request referred to the arrest circumstances of a 19 year old young man by the police and, especially, to the fact that a police agent shot him in the head – the plaintiff survived, but he remained partially paralyzed. For more details, see [http://www.echr.coe.int/Documents/FS\\_Life\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Life_ENG.pdf) (consulted on September 1, 2016).

<sup>12</sup> Case no. 48254/99 of October 26<sup>th</sup> 2007, see [http://www.echr.coe.int/Documents/CP\\_Romania\\_ENG.pdf](http://www.echr.coe.int/Documents/CP_Romania_ENG.pdf) (consulted on September 1, 2016).

<sup>13</sup> According to art. 2, paragraph 1 of the No. 293/2014 Law on the status of civil servants with special status from the Penitentiaries' National Administration, published in the Official Journal of Romania No. 581 of June 30<sup>th</sup> 2014, republished in the Official Journal of Romania No. 264 of April 10<sup>th</sup> 2014, *The Penitentiaries' National Administration and all subordinate entities are part of the state's public defense, public order and national safety institutions.* Also, according to art. 3 paragraph 3 of the same law, *In exercising their work-related duties, the civil servant with a special status is bestowed with the exercise of public authority, within the limits established by the law. In carrying out missions of guarding, escorting and surveilling inmates as well as in other duly justified cases, the civil servant with a special status may use, within the boundaries of the law, the technical means and weapons they are equipped with. The authority of the function cannot be used for personal interests.*

separate, independent and coherent legal framework, in order to ensure strict procedures within the penitentiaries' administration.

The scope is indicated in Article 1 of the law, i.e. the regulation of owning, holding, using weapons, military devices and their munitions, within the penitentiary administrative system. Consequently, the jurisdiction in this matter rests with the Penitentiaries' National Administration and its subordinate entities, which will be authorized to acquire, dispose, hold and use lethal and nonlethal weapons, military devices, as well as the corresponding munitions, for arming their personnel, according to their organization status, to the equipment programs and the responsibilities they have, according to the specific regulations.

The provisions of this law shall be supplemented by those of the No. 254/2013 Law regarding the execution of the custodial measures and sentences ordered by the judiciary entities, throughout the criminal trial, with the subsequent amendments<sup>14</sup> and with the provisions of Art. 36 of The Penitentiary Personnel's Statute<sup>15</sup>, in the sense that the holding and use of weapons in the penitentiary administrative system is done in accordance with this law, since they are exclusively destined for training and the performance of work related attributions, having technical and tactical characteristics that allow the achievement of established objectives, in accordance with the international, European and national regulations.

The Penitentiaries' National Administration and its subordinate entities may operate with weapons, military devices and munitions, as well as *transport, store, dispose of them, repair and quash them*; the procedures for these operations and specific norms concerning the tracking, use and technical control of the weapons, military devices and munitions will be regulated by an order of the Minister of Justice. In other words, they can conduct operations both inside as well as outside the penitentiary area, provided the safety of the inmates, personnel and citizens in general is ensured.

Also, in order to conduct these operations, the Penitentiaries' National Administration and its subordinate entities are required to periodically organize professional training sessions, for all civil servants with a special status, in order for them to acquire a behavioural reflex concerning the use of weapons, in accordance with the legal norms and the proper response expected in such situations.

Regarding the weapons, military devices and munitions which are the subject of this law, their definitions can be found<sup>16</sup> and classified<sup>17</sup> by the No.

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<sup>14</sup> Published in the Official Journal of Romania No. 514 of August 14<sup>th</sup> 2013

<sup>15</sup> According to art. 36 paragraph m of the No. 293/2004 Law, *The civil servant with a special status from the penitentiary administrative system has the right to: ... m). the permanent carrying of the service weapon or the personally purchased one, within the boundaries of the law.*

<sup>16</sup> According to art. 2 point I.1. of the No. 295/2004 Law, the **weapon** is *any object or device whose functioning determines the throwing of one or more projectiles, explosives, lit or bright, incendiary mixtures or the spreading of spreading noxious, irritant or neutralizing gas, as far as it can be found in one of the categories listed in the annex.* According to art. 3 paragraph c of the No. 122/2011 Law regarding the weapons, military devices and munitions regime owned by the

295/2004 Law regarding the weapons and munitions regime, in banned weapons and munitions<sup>18</sup>, lethal weapons and munitions<sup>19</sup> and nonlethal weapons and munitions<sup>20</sup>.

### 3. The procedure of owning and using weapons, munitions and military devices in the penitentiary system

The special status civil servants from the penitentiary administrative system are equipped with lethal and/or nonlethal weapons, and the law regulates the use of weapons, munitions and military devices differently than it does the use of lethal weapons. Chapter II of the law regulates only the situations in which the personnel from the penitentiary system uses weapons, munitions and military devices in a broad sense (both lethal and nonlethal ones), whilst chapter III only the use of lethal weapons.

Regarding the use of weapons, munitions and military devices by civil servants from the penitentiaries' administrative system, it implicitly involves both the holding, i.e. the act of receiving, storing of lethal weapons and/or nonlethal ones subject to authorization and/or munitions, as well as their carrying, without the time span having any relevance.

The use of weapons, munitions and military devices for training is imperatively and exhaustively allowed, only in specially designated, approved and authorized places for this purpose, i.e. shooting ranges. Also, the carrying of lethal/nonlethal weapons by the people within the penitentiary administrative system, who have no specialized training regarding the use of weapons, is

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Ministry of Defense and by the armed foreign forces in Romania, by **military devices** we refer to *the ensemble of components which operated jointly perform a function in a technical system, by triggering an initiation or percussion mechanism which determines the throwing of one or more projectiles, explosive substances, lit or bright, incendiary mixtures or the spreading of noxious, irritant or neutralizing gas.* According to art. 2, point I.5 of the No. 295/2004 Law, by **munitions** we refer to *the ensemble comprised of a cartridge shell, flinging load, blast fuse and, depending on the case, a projectile.*

<sup>17</sup> For details see I. Pascu, *op. cit.*, pp. 48-50.

<sup>18</sup> According to art. 2, point II.1. of the No. 295/2004 Law, by **banned weapons and munitions** we refer to *the weapons and munitions listed in the A category from the annex, whose procurement, ownership, carrying and use are forbidden for people and legal entities, except for public institutions with competences in the field of defense, public order and national security, of units subordinated or coordinated by them, established by laws, as well as national companies regulated by the No. 31/1990 Law, republished, with the subsequent amendments, established by laws in order to produce this type of weapons and munitions.*

<sup>19</sup> According to art. 2 point II.2. of the No. 295/2004 Law, by **lethal weapons and munitions** we refer to *the weapons and munitions whose use may cause the death or grave injury of people and which are listed in the B category of the annex*

<sup>20</sup> According to art. 2 point II.3. of the No. 295/2004 Law, by **nonlethal weapons and munitions** we refer to *the weapons and munitions intended for a utilitarian purpose or for leisure or self-defense, made so as to not cause the death of people when used; old weapons are also included in this category.*

forbidden, if done without prior preparation and without establishing a control of the conducted operations.<sup>21</sup>

As a general rule, regardless of the characteristics of the weapons – lethal or nonlethal, their use is possible only in the case of justificatory causes<sup>22</sup> - self-defense or the state of emergency<sup>23</sup>, as appropriate.

Regarding the use of lethal weapons, it involves both its possession as well as its use, namely discharging a lethal weapon, which can be done only in the case of civil servants with a special status from the penitentiary administrative system, equipped with lethal weapons, carrying out their work-related duties.

As a general rule and abiding by the principle of proportionality, the civil servant with a special status from the administrative penitentiary system should only use the service weapon if they could not employ other efficient, less harmful alternatives; both the use of the nonlethal as well as the lethal armament must be done gradually and proportionally, depending on the circumstances, after the prior notice and after enough time has been granted for the actions to stop and for the implementation of the provisions without exceeding the actual requirements of preventing a hostile act<sup>24</sup> or neutralizing the aggressors in their actions aimed at the civil servants with a special status from the administrative penitentiary system, aimed at the personnel of the other entities with which cooperative missions are conducted and aimed at the inmates, their detention places or against the means of transportation pertaining to them.

The special law expressly and exhaustively lists the cases in which the civil servants with special status from the penitentiaries can make use of their lethal weapon in the line of duty, after the legal notice<sup>25</sup>:

<sup>21</sup> *The preceding preparations and the establishment of the control of conducted operations are regulated via an order from the minister of justice.*

<sup>22</sup> Chapter II (art. 18-22) of Title II – General part Penal Code, regulates the so-called Supporting causes.

<sup>23</sup> For more details, Alexandru Roman, *Unele particularități referitoare la depășirea limitelor legitimei apărări*, „Dreptul” no. 11/2013, p.192-203

<sup>24</sup> By *hostile action* we mean in the sense of art. 4 paragraph a of the special law, *any action or use of force against the units of the penitentiary system or means of transport pertaining to them, against civil servants with a special status from the penitentiary administrative system, against inmates in custody or against the personnel of the other structures with which cooperation missions are in effect, which is aimed at preventing said missions from being completed.*

<sup>25</sup> The notice is done through the word: "Stop!". In case of noncompliance, another notice is given through the words: "Stop, or I will shoot!". If the person is question still refuses to comply, a notice is given by firing the weapon vertically or in a safe direction that does not endanger the life, physical integrity or goods of any person.

In the case of those who want to break into buildings or means of transport under the administration or used by the penitentiaries, the weapon will be used only after having repeated 3 times, at intervals sufficient to allow the participants' dispersal, the notice: "Leave . . . . . , we will use lethal weapons!"

In the case where a vehicle is used, a shot will be fired vertically or in another safe direction that does not endanger the life, physical integrity or goods of any person, after which the tires are shot at or the components that ensure the movement of the vehicle, to the extent of immobilizing it. In extreme cases, where the immobilization of the vehicle has failed, its driver may be shot at, if he imminently endangers the life of another person or the objective guarded by the latter.

a) against those who attack detention facilities or the guarded perimeters or areas that are visibly demarcated;

b) against those who, by the act they have committed, endanger the life or physical integrity of the civil servants with special status from the administrative penitentiary system, the life of the inmates or the objective under guard;

c) against the people seeking to illegally enter or leave the detention places, the guarded perimeters or areas that are visibly demarcated, buildings or headquarters with a purpose other than the specified one;

d) against the people who attack any building or means of transport under the administration of or used by the entities of the administrative penitentiary system;

e) to prevent the escape of legally detained people from their escort or of those in detention, if they endanger the life of a person or cannot be stopped by other means;

f) during search, discovery and capture missions of escaped inmates, if they endanger another person's life or cannot be stopped through other means;

g) against people or groups of people trying to unrightfully and violently breach the perimeters, buildings, constructions or means of transport under the administration of or used by the administrative penitentiary system;

h) against those who attack or impede civil servants with a special status from the administrative penitentiary system to carry out their specific tasks;

i) in carrying out the intervention meant to prevent, diminish or eliminate the risk of terrorist attacks on human and/or material factors in the penitentiary system;

j) against those who attack the civil servants with special status from the administrative penitentiary system and/or the members of the other structures from the institutions of the defense, public order and national security system, when carrying out joint missions;

k) against any vehicle used by people who commit the acts referred to in subparagraphs from a) to j), as well as against its leader, who refuses to stop, if they endanger the life of a person or cannot be stopped by other means;

l) against animals that endanger the life or bodily integrity of the civil servants with special status from the administrative penitentiary system, of inmates or the integrity of goods belonging to the penitentiary system and whose action cannot be stopped by other means.

The special law expressly and exhaustively lists the cases in which the civil servants with special status, from within the penitentiaries, can make use of a nonlethal weapon, in the line of duty, after the legal notice<sup>26</sup>:

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When using animals, the notice is only given if the animal is accompanied and it is addressed to their owner.

<sup>26</sup> The provisions regarding the notice are also applied *mutatis mutandis* in the use of nonlethal weapons.

a) to restore the order disrupted by the inappropriate behavior of inmates, which is a generator of critical or operational incidents, in detention places and outside them;

b) in the designedly limitative specified situations in the case of lethal weapons;

c) against people deprived of liberty, in the case of failure to carry out the legal provision of the civil servant with a special status from the administrative penitentiary system, only if there is a legitimate fear that the actions of the detainees can endanger the life, physical integrity or goods of any other person.

By exception, the civil servants with a special status from the administrative penitentiary system, who are equipped with lethal weapons, in the line of duty, are entitled to make use of a lethal or nonlethal weapon, without warning, if there is no time for it, in case of self-defense, or in case of emergency; if the danger subsides, they are obliged to immediately act to provide first aid to the injured person; if they are unable to do so, they are required to seek out specialized help.

The use of weapons is done in such a manner as to lead to the immobilization of those against whom the gun is being used, aiming for the legs, as much as possible, to avoid killing them; if using the weapon has served its purpose, one will immediately cease to use it.

The use of a lethal or nonlethal weapon against children, visibly pregnant women and people with obvious disabilities is prohibited, except when the aforementioned are committing an armed or group attack, which endangers the life or physical integrity or one or more people, as well as the situations in which the life of other people would be endangered or the territory, airspace or the national waters of a neighboring state violated.

Also the use of weapons against women and the elderly should be avoided, as much as possible, and, during the use of a nonlethal weapon, the head area should be avoided.

#### **4. Instead of conclusions**

Mainly, this law completes and tries to correct the shortcomings of the legislative framework in the field of the use of nonlethal and/or lethal weapons used by the civil servants with a special status from the penitentiaries' administration, which have been reported for Romania by the European Court of Human Rights, in some cases in which our country has been sanctioned, in the sense that the signatory states' agents are required, among other positive obligations, to also protect the right to life of its citizens.

Not establishing a legal framework and allowing the arbitrary nature of the actions of the state's agents are incompatible with the upholding of human rights. This means that, aside from the authority conferred to them by the national legislation, the state agents' operations must be sufficiently limited by this right,

within a system of adequate and effective guarantees against the arbitrary nature and power abuse, and even against accidents that can be avoided.

Also, by adopting this regulation, it can be considered that the state has fulfilled its positive obligation of supplying and putting to use a legislative and administrative framework, necessary in order to safeguard the human rights and taking the necessary measures to protect the lives of the people within the state's jurisdiction, in the context of the domestic juridical context.

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7. Ilie Pascu, *Infracțiuni la regimul armelor și al munițiilor*, „Revista de drept penal” No. 4/2006 (October-December).

### II. Legislation

1. Directive of the European Council, on the control of the acquisition and possession of weapons, as amended by the No. 2008/51/CE Directive;
2. Law No. 286/2009 regarding the Penal Code;
3. Law no. 23/2016 regarding the possession and use of the work-supplied weapons and the weapons and munitions operations in the penitentiary administrative system;
4. Law No. 254/2013 regarding the execution of the custodial measures and sentences ordered by the judiciary entities, throughout the criminal trial;
5. Law No. 122/2011 regarding the regime of weapons, military devices and munitions owned by the Ministry of Defense and the foreign armed forces on Romania's territory;
6. Local Police Law No. 155/2010;
7. Law No. 293/2004 on the status of civil servants with special status from the Penitentiaries' National Administration;
8. Law No. 295/2004 regarding the weapons and munitions regime;
9. Governmental Emergency Ordinance No. 104/2001 regarding the organization and functioning of the Romanian Border Police.