

**SELF DEFENSE IN THE NEW REGULATION.
ELEMENTS OF COMPARED CRIMINAL LAW
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***Abstract:** Article aims to bring in the most important aspects of self-defense. The paper refers to issues of comparative criminal law regarding self-defense. The second chapter of the new Romanian Criminal Code describes those justifiable causes, certain circumstances which eliminate the second essential trait of crime - the unjustified character. The New Criminal Code chose to divide the causes which eliminate criminal liability in justifiable causes, those causes which make a deed lose its illegal character and non punitive causes, which remove the third essential trait of crime – accountability.*

Key words: Romanian Criminal Code, self defence, justifiable causes, illegal.

Introduction

The second chapter of the new Romanian Criminal Code describes those justifiable causes, certain circumstances which eliminate the second essential trait of crime - the unjustified character. This regards *in rem* circumstances, as their effects extend to the participants as well. The New Criminal Code chose to divide the causes which eliminate criminal liability in justifiable causes, those causes which make a deed lose its illegal character and non punitive causes, which remove the third essential trait of crime – accountability. The difference between these two criteria is obvious. First of all, unjustified causes do not question whether the crime was committed by the person who benefits from the justifiable cause. It comes from the will of the person who commits the deed fully aware and responsible for his actions. Still, although the fact exists, it is committed in certain circumstances which make room for the presumption that the person who committed it must have had a serious legal reason, as stated by law. Thus, the deed appears as "justified" and the incompatibility between the deed and the regulation created by the lawmaker no longer exists. Second of all, the non punitive clauses question the freedom of the person to act (as is the case of physical or moral constraint), the judgment (minority and irresponsibility) or the contribution of other factors which have either affected the perpetrator's ability to act and think (intoxication) or have hid the existence of a state, situation, circumstance (error). In regard to accidental circumstances, it goes without saying that the person couldn't have foreseen that he will commit such a deed for reasons outside of his will.

In regard to self defense, several opinions were considered, opinions expressed by doctrine and the experience of other laws (article 15 of the Swiss Criminal Code, article 20 of the Spanish Criminal Code, article 122-5 of the French Criminal Code); in the light of all these regulations, the condition of grave danger generated by the attack was eliminated, as the gravity of the danger and the actions for its removal being appreciated from a proportionality point of view. Also, we will notice that the title used by the Romanian lawmaker, namely "justifiable causes" is not one seen in other European states' law, which preferred to regulate these causes without distinctive names, as they are found in the section which regulates that certain crime. Furthermore, we will notice that not all justifiable causes stated by the Romanian law are found in other European states' law and those who are found, comprise different regulations, either more strict or more permissive in regard to what the lawmaker wished to achieve at the time of the regulation.

**Differences between the old regulation and the new Criminal Code
(article 19 of the Romanian Criminal Code and the former article 44
of the Romanian Criminal Code)**

Article 19 of the new Romanian Criminal Code, which regulates self defense, as opposed to the former article 44 of the Romanian Criminal Code, which states, in the first alignment, that the deed stated by criminal law which is committed in self defense is justified. According to the provisions of the second alignment, the person who acts to remove a material, direct, immediate and unjust attack on his person, on others, on the rights of others or a general interest, acts in self defense as long as the defense is proportional to the severity of the attack; alignment (3) states that the person who commits the deed, under the circumstances regulated in alignment (2), in order to prevent the wrongful, violent, devious breaking in of a person inside a house, room of other surrounded place, during the night, is presumed to have acted in self defense. Under these new conditions, the report between the severity of the danger generated by the attack and the actions undertook in order to remove it will be analyzed from the perspective of proportionality between the attack and the defense. The removal of the serious character of the danger generated by the attack widens the area of self defense, thus creating a reason for applying the most favorable criminal law. According to the new Romanian Criminal Code, the condition that the attack be serious enough to endanger the person and its rights will no longer be considered; neither will be the condition of the proportionality of the defense. The analyzed aspects will regard only the proportionality conditions.

Alignment (2): the spaces considered by the presumption of self defense no longer include the spaces marked by clear distinctive marks, only involving houses, rooms, dependences and other surrounded spaces. This was as a turn back to the phrasing of article 44 second alignment of the Romanian Criminal Code, as it was before being modified by Law no 247/2005.

The area of the presumption is limited, as the conditions become more specific, requiring the location be surrounded and connected to a domicile. From this perspective, the old law will be the most favorable criminal law. The content of the new regulation, in regard to spaces considered by the presumption of self defense, is identical to that of the trespassing crime (*see article 244 of the new Criminal Code*).

It was also stated that the breaking in must be illegal; the statement didn't seem to be necessary considering that the wrongful character of the breaking in was already regulated.

Otherwise said, as long as the breaking in occurs without right and the means by which it is accomplished will also be illegal (we are in the presence of a hypothesis of an analogy clause with a homogenous character). As illegal and without right are synonyms, the text may seem redundant, may even cause some difficulty in being applied; probably the lawmaker wished to strengthen and make the existence of the analogy clause even more obvious, a hypothesis in which there is no analogy contrary to the principle of legality. The phrasing "other such illegal ways" replaces the phrasing "other such means".

When listing the ways of breaking in, the one committed during night time was added; in order to identify night time, the criteria already stated by doctrine will be applied, since they have already proven to be quite useful in practice. Night time is the period of time when there is darkness outside, regardless of the astronomical time of sunrise and sunset. According to the text, it would appear that breaking in during the night would be enough, without there having to be committed by violent, devious ways.

Another significant difference in the current regulation is that it no longer regulates as self defense the so-called justified excess of self defense regulated by article 44 third alignment of the Romanian Criminal Code. This becomes, according to the new Romanian Criminal Code, a cause which eliminates guilt (*see article 26 of the new Romanian Criminal Code*).

If in the Romanian law we can find the existence of four justifiable causes: self defense, state of necessity, exercising a right or fulfilling an obligation, consent from the injured person, in German law only two are regulated, as the other two are just variants of the first ones. Thus,

we will find self defense and state of necessity as well as the exceeding the limits of self defense and justifiable excess, as a variant of the state of necessity¹; these are all regulated in “Self defense and the state of necessity”. Thus, article 32 of the German Criminal Code states that “the deed regulated by criminal law but committed in self defense is not punished”. The German lawmaker defines self defense as “that defense which is necessary for avoiding an immediate and illegal attack against a person or a third party”. Although the regulation seems to be a general one, we can distinguish the conditions for self defense and for the attack.

In regard to the defense, it must consist of a deed regulated by criminal law, it must be necessary in order to avoid (and reject) an attack, and by it the defense of a person or a third party must be accomplished. By expressly regulating the need for defense, the German lawmaker wished to point out that it must be able to reject or avoid the attack and it also must be proportional to the attack. As for the defense, it must be said that it should be able to protect the person who commits it (the person under attack) or a third party; the area of things which can be protected is much more limited than the one stated by Romanian law.

The German lawmaker expressed the idea that the attack which is rejected by committing a deed regulated by criminal law in self defense must be immediate, illegal and directed against the person (who acts in self defense) or a third party. As we can see, the conditions of the attack as regulated by the German lawmaker are found in the ones regulated by the Romanian lawmaker as well, who was more rigorous by clearly expressing it. Another difference regarding the attack is that it is directed only against a person; the deed regulated by criminal law committed in order to protect a right or a general interest will not be qualified as self defense. As for exceeding the limits of self defense, this will be considered only if it is owed to the state of confusion, fear or terror of the person who commits the criminal act, as we can see from the regulations of article 33. This provision, which is correctly tied to self defense by the German lawmaker, is found in Romanian law under the name of “non imputable excess”².

The French Criminal Code doesn’t regulate the justifiable causes regulated in Romanian law; they are described and regulated together with the regulation of the crime itself; they are named “causes which eliminate or mitigate criminal liability”. In French law we will find self defense, presumed self defense, state of necessity, the exercising of a right or fulfilling an obligation³.

As for self defense, the French lawmaker states two such situations: when “the person who commits a deed regulated by criminal law in self defense, in order to protect itself or others from an unjust attack directed at him or at another person, except for the situation in which the means used are disproportionate in regard to the severity of the attack” and when “the person who, in order to reject a crime or an offence directed against a good, commits an act of defense (thus committing a deed regulated by criminal law), except for murder, as long as that act is necessary for the desired purpose and the means used are proportional to the severity of the attack”.

In regard to the first situation, we can see that, in order to have self defense, it will have to comprise several conditions: to be a deed regulated by criminal law, to be committed with the purpose of protecting a person and to be proportional to the severity of the attack. It is worth noticing that, in case the latest condition is not fulfilled, there will be no self defense, as the French lawmaker does not regulate justified excess. As for the attack, it must be unjust and directed against a person, regardless of whether that person is the one who is protecting himself or he is protecting another person.

As for the second situation, the conditions of attack and defense are a little different in regard to what is to be protected by the defense. Thus, the defense must comprise of a deed

¹ In Romanian law, no imputable excess – the former justified excess – in case of self defense and state of necessity are regulated in the chapter regarding the non punitive clauses.

² This provision replaces justifiable excess from the old regulation.

³ It is worth mentioning that the legal provisions have no marginal names in the French Criminal Code; they were used merely to ease their description.

regulated by criminal law, it must be committed in order to stop a crime or an offence against a good, it must be necessary for the desired purpose⁴, it must be proportional to the severity of the attack and it must not be murder. The specific element to take into consideration is the negative condition which is expressly regulated. In regard to the attack, the only difference from the previously described situation is represented by the fact that attack is directed against a good.

Article 122-6 regulates presumed self defense as follows “It is presumed that the person who committed a deed regulated by criminal law 1. in order to reject the attempt of breaking into a living space by violence or devious means during the night; 2. in order to protect himself from the authors of a theft or robbery⁵,”.

The first described situation is similar to the Romanian regulations regarding the presumed self defense, except for the fact that the French lawmaker makes no distinction between “breaking in” and “the attempt to break in”; this first one (breaking in) must be deduced by way of interpretation. Also, we can notice that the French lawmaker is stricter in, as opposed to the Romanian lawmaker who provides an example listing.

The second situation is not found in Romanian law, as this is the most obvious difference between the two laws in regard to presumed self defense.

Another law in which justifiable causes regulated by the Romanian lawmaker have a correspondent is the Italian law; the regulations of justifiable causes don’t have a distinctive title and are listed along with the general provisions about crimes. The Italian Criminal Code regulates “self defense” (and, as a corollary, “the legitimate use of a weapon”), state of necessity, exercising a right or fulfilling an obligation and the consent of the holder of the right; we can even notice that the provisions of the Italian Criminal Code are the closest to those of the Romanian Criminal Code.

In regard to self defense, the lawmaker states in article 52 first alignment that “the person who committed a deed regulated by criminal law while being forced by the need to protect a right of his own or belonging to others from the present danger of a unjust attack, as long as the defense is proportional to the attack, will not be punished”.

As we have done in case of the previously analyzed laws, we will distinguish between the conditions of self defense and the conditions of the attack. In order to have self defense, the defense must be accomplished by committing a deed regulated by criminal law, to be necessary for protecting a personal right or a right belonging to another person, to be proportional with the attack. These conditions must all be fulfilled. Furthermore, by means of interpretation, we can deduce that the deed committed this way must be the only available means to protect this right. As a similarity to all other analyzed laws, we notice the condition of the proportionality between the deed and the attack. In regard to the latter, it must be unjust, it must be directed against a right and it must be a present danger.

Another variant of self defense is found in alignment (2)⁶ of the same article, the novelty being that the person who commits the deed regulated by criminal law uses a weapon which he owns legally or another means to produce the defense. In the second case, the attack can be directed against his own safety or the safety of a third person, as well as personal or third party goods. In case the attack is directed against a good there must be no desist and, as a second condition, there must be the danger of an aggression (physical or otherwise). These regulations can be applied in any situation, except for when the defense was made at where the person exercising the defense practices his job, profession or business.

⁴ So, as a result, we can deduce that this (the deed regulated by criminal law) must be the only way to protect the good from the attack.

⁵ In the French Criminal Code, theft is the equivalent of robbery from the Romanian Criminal Code.

⁶ In the cases regulated by article 614 alignment (1) and (2), the proportionality report exists as regulated by alignment (1) of the present article in case a person who is legally present at a determined place uses a legally owned weapon or another mean to produce defense in order to reject an assault:

- a. own safety or the safety of a third party;
- b. own or third party goods, when there is no desist and there is a threat of aggression.

As a novelty in regard to the limiting of liability, the Italian lawmaker regulates in article 53 “the legitimate use of a weapon”. As a result, according to the provisions of the first alignment of the same article “the public servant who, while exercising his duties, uses a weapon or any other means of physical constraint when he is forced to do so by the circumstances in order to reject an act of violence or to defeat an act of resistance regarding the exercising of authority and by this course of action he prevents crimes such as murder, shipwreck, drowning, plane crash, train wreck, homicide, armed robbery or kidnapping is not punished”.

The person who commits the deed regulated by criminal law is a public servant in the line of duty and his actions are meant to prevent a crime. Unlike self defense, the action which is rejected must be one of those specifically listed by the lawmaker. Furthermore, we will see that these regulations are applied “to any person whose assistance was requested by the public servant”. By way of interpretation, we can deduce that the request of the public servant must be previous or at least simultaneous with the deed, as the simple acknowledgement will not exonerate the person from criminal liability. Finally, the third alignment states that “the law can establish other cases in which the use of a weapon or another mean of physical constraint is allowed”.

In regard to all these clauses, whose main effect is the removal of the criminal character of the deed, the Italian lawmaker regulated in article 55, the culpable excess, which can be applied in regard to any of the clauses. Thus, when “by committing a deed regulated by article 51, 52, 53 or 54 the limits imposed by the law or authority order are exceeded, the provisions regarding the deed committed without guilt are to be applied”. As a result, the Italian Criminal Code states that culpable excess does not remove the criminal character of the deed, but is a legal extenuating circumstance.

In order to underline the facts described above regarding the Romanian law, we will provide an example of judicial practice – a criminal trial solved in 2009, before the coming into force of the new Romanian Criminal Code (Law no 286/2009).

By the indictment of Bacau County attorney at law registered under the number 710/P/2009 complaints were filed against the defendant B.M. for committing manslaughter, a crime regulated by articles 174-175 alignment 1 letter c) of the Romanian Criminal Code by applying article 73 letter c) of the Criminal Code. Thus, in the evening of November 19th, 2009, while she was at her house, as a result of the fact that her husband, the victim B.S., while under the influence of alcohol, provoked her by trying to engage in sexual intercourse with her, she hit the victim in the head with an axe, thus causing massive bleeding, which led to the victim’s death over night.

Conclusions

As we have seen from the previously analyzed laws, the Romanian lawmaker is the only one who uses the concept of justifiable causes. In the French law, these are called “causes which eliminate or extenuate criminal liability”. In German and Italian laws, these are regulated along with the general content of the crime, without having a distinctive title.

The provisions of the German Criminal Code are much stricter as opposed to other laws, covering a small number of situations. The French law has a middle position, as it is located somewhere between the German and the Romanian law. Thus, the French Criminal Code regulates three such causes (presumed self defense is a corollary of self defense); as we have noticed, the French lawmaker thinks that the injured party’s consent is not reason to commit a deed regulated by criminal law.

Finally, the Italian law covers the widest area of situations among the analyzed laws; unlike the other criminal codes, in the Italian one we can find “the legitimate use of a weapon” but also “culpable excess”, which can be applied in regard to all listed causes.

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