



# Comparative Study of Legitimate Defense in the New Iranian Criminal Law and the Laws of France and UK

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## Abstract

*As one of the instances of justified crime factors, legitimate defense is one of the ways in which the legislator has explicitly authorized necessary action and has removed the adjective Penal from that. As in other legal institutions and in parallel with preservation of individuals' rights and freedoms as well as public discipline, legitimate defense is subject to fulfillment of several conditions. Some of these conditions have been decided on the strength of the clear text of law and some other may be inferred from the contents of general rules and principles of penal regulations. Efforts have been made in this research to compare legitimate defense, which is one of the most important instances of justified factors, in three countries, namely Iran, France and UK. Except for the general concepts to which we referred at the beginning of the paper, defense-related subjects are divided into four subtitles including the conditions governing aggression, the conditions governing defense, subject of defense and mistake in defense. Each of these subtitles are separately discussed for each of the three countries so that their similarities and differences may become clear and an appropriate solution can be input in their laws in cases where there is a deficiency. This is in turn one of the advantages of comparative study and one of the objectives of this research as well.*

**Keywords:** Legitimate defense, justified factors, Iranian law, French law, UK law.

## Introduction

Defense against enemy which is an innate and instinctive issue and is deeply rooted in man and other animals has been input as a legal establishment in the laws of different countries of the world since a long time ago. Despite changes and developments in the penal policy of these countries, this legal entity has still remained over many years and has become firm. All communities and groups require rules that adjust the behavior of community members<sup>1</sup>. On this basis, the principle is that punishments should be considered for inappropriate behaviors which are contrary to the community disorder. Therefore, there should remain no crime without any punishment. This principle requires that when a crime is committed and its elements are completed, the person who has committed that should be certainly punished. In this way, there are crimes within the domain of criminal law that the person who has committed them is not punished. From technical viewpoints of world's jurists, this may have two reasons; i. Special conditions which are considered as justified reasons of crime, and ii. Factors that remove the attribution of penal act to the doer which are called the factors that remove penal responsibility (excuse). Legitimate defense is one of the important and recognized elements of criminal law which is placed under one of these two groups and leads to exoneration of the person from any punishment<sup>2</sup>. Efforts have been made in this paper to compare legitimate defense in the laws of three countries, namely Iran, France and UK. It should be noted that Iranian Law was reapproved in 2012 and legitimate defense was changed in it. For this reason, the authors of this paper decided to compare the new law to the

laws of the two other said countries. From among five recognized comparative studies<sup>3</sup>, this paper is in terms of "Comparison of foreign and local systems in order to specify similarities and differences". In this way, the deficiencies in new laws are easily found and the laws of other countries will automatically serve as proposals for changing the existing law.

## Nature, Fundamentals and Generalities of Legitimate Defense

Considering the above introduction and former discussions, it is necessary in the first part of this section to study the meaning of legitimate defense and the fundamentals to recognize this legal establishment. It should be also added that the possibility of review and conducting a comparative study requires understanding and awareness concerning the structure and nature of legal system of the said countries as well as discussing the necessity of study and research which will be addressed in the next part of this section.

## Meaning of Legitimate Defence in Criminal law

Affirmative defense (eg. In murder) is a defense in which the accuser uses a serious force necessarily to defend from himself<sup>4</sup>. Legitimate defense is generally considered as one of the justified actions like necessity and order of the lawful superior<sup>5</sup> and includes the capability to remove an imminent and unreasonable aggression which puts into risk the life, reputation, honor, property and freedom of the body of oneself or another<sup>6</sup>. The jurists in French Law also agree that attacking to a person

may be related to his health, chastity and honor<sup>7</sup>. Legitimate defense is one of the ways in which the legislator has explicitly authorized necessary action and has removed the adjective *Penal* from that<sup>6</sup>. According to the said explanations, given that all conditions are present, legitimate defender is not only guilty, but also will not be responsible for the damages or losses caused to the other person<sup>6</sup>.

## Fundamentals of Legitimate Defense

The western meaning of legitimate defense is rooted in the contexts of the Holy Writ. In the Holy Writ, the owner of a house is permitted to kill the person who violates his property<sup>2</sup>. It is interesting to know that according to the studies obtained by the researchers of this paper, legitimate defense existed at the time of Hittites about 13th century BC<sup>8</sup>. In articles 37 and 38 of the Hittites Law, some instances of legitimate defense murder can be found<sup>9</sup>. Legal scholars have stated different theories on the legitimacy of penal action during defense. One group has considered moral obligation as the basis for defense legitimacy<sup>10</sup>. They believe that any person who is threatened cannot control his actions due to will disorder and excitement and will have to commit a crime. Some of the jurists have even gone farther and have declared that fulfillment of this duty is useful in parallel with establishment of justice in the society and defending from that<sup>6,11</sup>. Another theory that can be introduced is the theory of performing the duty and defending from interests<sup>10</sup>. Contemporary scientists are more tended towards the theory of defending from individual and social interests and performance of duty. They claim that any person who defends from himself or another person not only morally commits no inappropriate action, but also he has performed his social duty in the best manner; otherwise, the community will have no interest in the punishment of such defender. The French judicial precedent has used the same theories and has extended them to several other cases even outside the legal stipulations, e.g., upon physician's acceptance to save the patient's life, all surgeries performed by the physicians and surgeons to save the lives of their patients. There are also other theories on this issue such as "Social Contract", "Decline of Spiritual Element", etc. which have been criticized by the critics which are merely named here. It seems that the Iranian legislator has inspired from the theory of preservation of rights and performing social duties because in addition to defending from the life, honor and chastity of the attacked person, it has authorized defending from life, honor, chastity and freedom of other people as well<sup>11</sup>. As it was said, although the development of legitimate defense differs in different legal systems, four main characteristics are stipulated for legitimate defense in most criminal laws, namely: i. Immense, ii. Necessity, iii. Proportionality, iv. Intention to repel the attack<sup>12</sup> which will be discussed later in the next sections. Finally, it has been said that in the Islamic law, the basis for accepting legitimate defense, whether for the property or the person or another person and his relatives is based on duty and the traditions quoted from innocent imams<sup>13</sup> concerning the action and executing that<sup>14</sup>. According to Islam, man is a

creature with munificence. Each human enjoys munificence because he is a human. On this basis, the defender will be entitled in parallel with protecting from his munificence to parry any undue attack that damages his non-attackable principle<sup>13</sup>. Although there is a statute concerning legitimate defense in the UK Law, various interpretations have been made in most cases. This has resulted to multiple views and several ambiguities in the law of that country. Legitimate defense in UK Law has been recognized since a long time ago; however, as for the case that if the legal nature of legitimate defense in the UK Law is among the factors resolving penal responsibility there are different viewpoints among legal scholars.

## Structures of the Laws of the Questioned Countries

To make a comparative study among a few countries, it is necessary to become familiar with the structure and nature of their legal systems which are presented below.

**Iran:** The first Iranian substantial criminal law was written in 1879 by Kenneth Dumont Frets, an Italian citizen who was the chief police at the time of King Nasereddin. That law which was known as the Kenneth's legal booklet was sent to all cities of the country for execution after it was confirmed by the king<sup>15</sup>. Then, the Constitutional Law which was the first Iranian codified law in today's form was approved in 1906. This law was recognized as the first law that explicitly accepted the principle for legitimacy of crimes and punishments<sup>15</sup>.

Resources of the Iranian criminal law are generally divided into two groups. Some of these resources are obligatory (formal) and others are of guidance nature (supplementary) which are not obligatory for the courts, but they just help the judges to make judicial decisions<sup>16</sup>. Obligatory resources include: i. Constitutional law, ii. Ordinary law, iii. Approvals and bylaws of the administrative power, iv. Precedent procedure of general committee of the Supreme Court, v. International treaties approved by the Islamic Consultative Assembly. Guidance resources include: i. Judicial precedent, ii. Custom and habit, iii. Jural resources or authentic judgments, iv. Opinions of legal scholars (doctrine)<sup>16</sup>. Pursuant to the most recent changes made to the Iranian criminal law, Islamic Punishment Act was approved in 2013 which enjoys modern innovations and advancements in parallel with guaranty of the procedure as compared to the former similar Act.

**France:** France is governed by the "Roman - German" system whose preliminary establishment goes back to Napoleon Code. The French Criminal law of 1810 (known as Napoleon Code of 1810) was replaced by the Modern Criminal law in 1994 AD. The modern Criminal law of 1994 AD is important in some aspects. First of all, it completely superseded the Criminal law of 1810 AD; in other words, the criminal law of 1810 AD from which most of the world's criminal laws inspired was completely abolished. Secondly, this code is the result of 20

years of continuous efforts. In this regard, Jean Pradel writes, "This code is the result of continuous efforts made within one-fifth of a century. Some of the articles of the modern criminal law have already been amended and some modern rules have been added to that for prevention from crime repetition"<sup>17</sup>.

**UK:** Law in England and Wales is constituted of three main factors: Rules which are made by the parliament, common law, and EU direct enforceable Acts. Parliament law is sometimes attributed to the statute which is considered as the highest form of UK Law<sup>1</sup>.

Generally, many divide UK Law into two types, namely Common Law and Statute. Common law includes fundamental principles of law applied in the former claims (judicial precedent) for which no specific rules or regulations have been set up by the parliament. On the other hand, statute is comprised of special rules approved as parliament rules. Statute is superior to the common law to the extent it encompasses the cases under review. In the event that these rules provide no specific guidance, judges will apply common law and will make effort as much as possible to perform what they think the parliament would ask them if it were aware of the case under review<sup>18</sup>.

### **Necessity of a Comparative Study**

Developed relations of the nations and emergence of new legal issues in this relation increased the necessity of their familiarity with law to the extent that comparative study of law became one of the necessary elements of law studies. Further to that, a movement entitled "Uniformity of Law" was gradually formed aimed at facilitating the relations of the citizens of different countries. If there were uncertainties until before two previous decades concerning the necessity of comparative studies on the law, today no jurist can be found who denies the importance of comparative law. In fact, strong international collaborations in the second half of the twentieth century occurred along with scientific and technological advancements as well as changes in the political, economic and cultural life of the communities. Alliance of the European countries in EU, a great scientific evolution called "European Rights" and the thoughts on the European modern legal discipline changed the comparative law to an unavoidable part of educational programs of faculties of law in most of the faculties of law<sup>19</sup>.

Generally, comparative law has several aspects and has been widely recognized as an effective solution in betterment of legal system of a country as well as learning other legal cultures. In other words, the objective of comparative law is to propose a vision through which we can criticize our legal culture in a better way<sup>20</sup>. One of the clear examples of comparative law is cases which the national criminal court ought to use law of other countries in its own country to issue judgments in special cases<sup>21</sup>. As a result, by assuming the aforesaid descriptions and accepting the necessity of comparative study, efforts have been made in this paper to review in detail the legal establishment of

legitimate defense in the Iranian, French and British laws.

### **Human Rights and Legitimate Defense**

According to the studies made on a broad range of international law references, it has been said that personal legitimate defense is the man's right and has been well confirmed according to the international law and is an important fundamental of the international laws. Moreover, it has been gradually accepted in many countries that no government is legally entitled to prohibit anyone from applying his human rights to defend from himself against barbaric attacks or to prohibit him from addressing stages and obtaining necessary tools to apply that rule<sup>22</sup>.

### **Conditions for Fulfillment of Legitimate Defense Establishment and the Governing Effects**

Fulfillment of legitimate defense will be recognized as part of natural rights only if the necessary conditions and requirements governing the two elements, namely "Aggression" and "Defense" are addressed and included and ultimately the judges who review the cases can issue judgments on fulfillment of legitimate defense by proving the below mentioned conditions and assuming that all the anticipated cases are present. In this section, these conditions are studied and reviewed in details.

### **Conditions Governing Aggression**

A defense made against an aggression and attack will be supported by the legislator only if the intended conditions for that defense have been addressed in that. An aggression shall necessarily be current, imminent and illegal whose effects and judgments are discussed below.

**Actuality or Imminence of Aggression:** Four modes are considered for an attack or an act of aggression: i. It will be done in the future; ii. Reasonable evidences indicate that it is going to happen and will happen in a few moments, iii. It is happening, iv. An aggression is performed and the danger is finished. There is no disagreement on act among common law jurists, Islamic jurists and/or the jurists of other countries. All of them believe that in the first and fourth modes, there is no right for any legitimate defense. As for the third mode, all of them unanimously and absolutely believe in establishment of a defense right for the person. What is disputed is the second mode. If fact, progress of the case and the extent to which the preventive defense shall be permitted provide ambiguity. In other words, it is the overlap of the first and second modes which is problematic<sup>23</sup>.

By current aggression it is meant that the intention of aggression has been put into actuality and reality and it is imminent<sup>24</sup>. In other words, the defender should be certain that the aggression is going to happen and this certainty shall be documented by reasonable grounds. Therefore, suspicion to any aggression or danger which is not imminent, such as a verbal threat, will not

entitle a person to defend from himself by outsmarting. The response made in the future to an aggression committed in the past will be considered as revenge and not defend. Just as a mere fear from a possible attack cannot be documented to justify the committed crime(s) in a legitimate defense, revenge motive cannot be documented by the defender and cannot result in his exemption from punishment<sup>7,25</sup>. The philosophy of simultaneousness and necessity of defense coincidence with attack may be put forward by assuming the escape of the offender<sup>26</sup>, i.e., assuming the escape of the offender and lack of current danger and its removal, legitimate defense will not be acceptable and the committed crimes will be punishable.

Imminence of an attack is specified by considering the conditions and situations particular to a file. Moreover, evaluation of defense actuality is the responsibility of the judge. In French law, an attack against a person or a property does not justify an offense unless it enjoys actuality and inappropriate characteristics. The condition for actuality of an attack which is anticipated in article 122-5 of the French modern criminal law and refers to performance of an act at the same time includes the threat of an immediate evil which could not be defended unless by committing a crime. Such immediate evil should be probable in respect of subject and it should not be only in the mind of the person committing the crime. Although it is assumed in legitimate defense that the necessity of defense is current, it is not necessary that the person who commits a murder or an injury while defending from himself is exposed at the risk of death. In the French law, any reaction against a former attack (the aggressor has receded) is considered as revenge and not legitimate defense. It is also the same for threatening to an evil in the past. A person who is exposed to severe threats should prosecute by the courts and he cannot administer justice by himself<sup>27</sup> unless there is no possibility or time to remove the danger until before referring to the court and in such presumption, there would be no other remedy except resorting to legitimate defense. Assuming that the necessity for coincidence of aggression and defense is not observed, adherence to the necessity condition by relying on the possibility of referring to the police and disciplinary force will be removed. As a result, upon deterioration of legal element and legitimacy of defense, there will be no longer any possibility to rely on that to prove any criminal responsibility<sup>28</sup>. Article 156 of the Iranian Islamic Punishment Law (approved on 21.04.2013) has explicitly specified actuality and imminence as conditions to attain a legitimate defense. Now, the answer to the question that whether or not it is possible to use legitimate defense if an aggression is probable in the future, it should be said that even if the threat is quite severe considering the relations of the parties, their conditions and the threatening party, the person who has been threatened cannot outsmart for legitimate defense because it is possible to resort to governmental force and this has been stipulated in the law<sup>10</sup>. In the UK law, a person does not have to wait until the aggressor strikes him or begins to attack and beat him. As soon as an aggressor shows his clear and obvious intention for an attack, in the manner that such intention is along

with an obvious physical threat, the other person can defend himself. For example, if a person threatens to punching and he shows his fist to perform his threat, you can begin to defend from yourself<sup>2</sup>.

An issue which is disputed the most is a type of defense which is referred to as Proportionality. In this type of defense, there are convincing evidences not merely indicating the danger or threat, but to the effect that there is an imminent attack and therefore an attack is probably going to happen. This type of defense is discussed most of all in the international law<sup>29</sup>. What seems in the UK law is the lack of a general consensus on this case.

Another issue is retaliatory actions to take revenge from the aggressor. Vengeance is considered as contrary to defense because force has been used quite late in that. Legitimate defense should neither be performed very early nor very late<sup>12</sup>.

**Illegality of Aggression:** Legitimate defense is true when it is made against an illegal or unfair offense. There are seemingly aggressive acts against illegal offense whose base is the order of a competent authority or law, such as arrest of offenders or imposing a punishment to the judgment debtor. Attacks that conform to the legal judgments will provide no condition for its removal<sup>6</sup>. In this regard, article 157 of the Islamic Punishment Law approved in 2013 stipulates as follows: "Resistance against disciplinary force and other justice administration authorities while they are performing their duties will not be considered as defense" This confirms the argument for necessity of illegality of aggression. It is worth noting that non-inclusion of the term *Legitimate Defense* against legal judgment and measures of authorities relates to the presumption that the said authorities do not exceed their scope of duties. Therefore, in case of any act beyond the scope of authorities assuming that other conditions intended by the legislator are present, it will be possible to attain the conditions and to execute regulations of legitimate defense. And if not considering the said assumption, any resistance against the said forces not only will not be considered as legitimate defense, but also it will be considered as rebellion<sup>30</sup>.

In the French law too, inappropriate and unjustified nature of aggression has been explicitly mentioned in article 122-5 of the modern criminal law and non-punishment or commutation of any person who defends from himself against an inappropriate sentence has never been objected. The idea that inspires revolutionary legislator and criminal laws of 1810 and 1992 considers legitimate defense as a justification factor for crime. A person who has taken action in legitimate defense condition shall be considered as executor of a right. Self-defense which is basically prohibited (no one is authorized to personally administer justice for his own rights) will become legitimate against an inappropriate attack as the result of lack of social interference. In contradiction between the rights of the attacker and the attacked person, respectability of life and physical entirety of the attacker seems to be less than those of the attacked person. Even it has been accepted that by self-defense,

the defender not only administer a right, but also performs justice duties because a person who rejects an inappropriate attack, campaigns for right and defending from the community and by his response he establishes the threatened right<sup>27</sup>. In this regard, UK law considers that in justifying the use of defensive force, the attacker should establish a threat for an unjustifiable damage to the interest which is defended and supported by law. As a result, if he is in fact an attacker who intends to conceal his legal status behind the opaque plate of legitimate defense, no defense shall be applied to him<sup>31</sup>. Therefore, if an attack is in such a manner which is not supported by law, then, defense against such attack shall not be justified. According to the law of UK therefore, defense against the police will be considered illegal and the defender will be punished. Even if the police has to apply harshness against the defender and the defender injures the police to defend himself, since he has resisted against a legitimate and legal action, he will be considered guilty and will be punished<sup>12</sup>.

### Conditions Governing the Defense

Defense against an invasion in which the conditions considered by the legislator are present shall be necessarily urgent and shall be proportional to the act of the aggressor. In this section, the conditions governing the defense are reviewed in detail in two paragraphs.

**Necessity:** Despite the silence of the Iranian Punishment Act approved in 1925 concerning the mode of necessity<sup>10</sup> as well as the implicit reference of the Iranian punishment Act of 1973 as amended<sup>10</sup>, finally on the strength of note (a) under article 156 of the Iranian Islamic Punishment Act approved in 2013, the condition for necessity of a committed action to reject aggression or danger has been stipulated. Undoubtedly, the most important reason that the legislator has authorized defending against an illegitimate aggression is its necessity in a condition where no other way has remained for the defender. Therefore, a criminal act to reject aggression will be considered legitimate only if it is somehow the only way for relief. Whenever a defender can reject a danger in any way except committing a crime yet he resort to a crime against the offender, his defense will not be considered as legitimate<sup>6</sup>. In this regard, the French law refers to "Required Action by Way of Necessity" and considers necessity as one of the required and non-omissible elements of legitimate defense<sup>32</sup>.

In French law, the possibility of escaping will not necessarily be contrary to legitimate defense. The judges do not agree in this regard. They believe that in some cases, the escape of defender may be more dangerous than facing with attack situation<sup>28</sup>.

The necessity of defense in UK law goes back more than anything else to a dispute which is related to the possibility of defender's escape. In other word, it is discussed in the UK law whether or not legitimate defense will be confirmed for a person for whom it is possible to escape, which is an easier thing to do

and a more reasonable alternative for attack, but he attacks instead of escaping.

Article 3(1) of the UK criminal law in 1967 not only does not consider retreat as a duty, but also it prescribes to avoid committing a crime by using a reasonable violence and resistance in that situation and it legally facilitates the grounds for that as well. Retreat is generally faced with some ambiguities in the UK law. Basically, despite the former UK, retreat is today not a necessity and a prerequisite for defense; instead it is merely one of the factors used by the jury to evaluate the case whether or not violence applied by D has been reasonable. Despite the past when this element was considered as one of the main and basic elements for confirmation of legitimate defense<sup>12</sup>. Generally, it seems in the current judgments of the UK courts that the condition of necessity is recognized considering that the individual was not inclined to quarrel<sup>33</sup>.

**Proportion:** One of other conditions for legitimacy of defense is to be concerned about the proportion between aggression and danger. Discretion of the proportion between defense and aggression is a difficult task and that it is a duty of court. Proportion means that there is logical relationship between probable hurt incurred due to aggression and the hurt, which is necessary to avoid the said violence. For example, a defender has not the right to murder the aggressor in order to reject the impacts on him intending at trivial hurt<sup>6</sup>. Also, according to the opinion given by some jurists, type of the weapons, used by a defender and an aggressor may be a case of non-fulfillment of the condition for proportion. For instance, the defender defends himself using a machine-gun against an individual, who has attacked him using a thin stick<sup>33</sup>.

Despite the fact that it has been ascertained by the Iranian legislator on the strength of Clause 1 of Article 61 in 1991, because of observance and substantiation of the condition for proportion, unfortunately, the aforesaid condition has been ignored in compiling Islamic Punishments Law dated April 21, 2013.

In the French law, the condition for proportion is ascertained first by virtue of judicial procedure and then by the law (La Loi). And equally, the result includes the necessity for defense. Thus, if there is no proportion between the approaches used for defense and the severity of assault, it is not supposed that the committed crime creates no penal responsibility. For example, a simple cuff shall not be defended using a revolver<sup>26</sup>. Considering UK Law about proportion, it should be mentioned that British jurists have answered the questions stating that to what extent violence is reasonable in relevant conditions and what is the criterion to recognize such violence in different ways. This reveals the degree of ambiguity of the aforesaid subject in the said country. One of the reasons for such ambiguities refers to respective ambiguities stated in Criminal law in 1967 in Article number 3.

All in all, it may be said what is regarded as reasonable violence in the UK Law is a typical criterion and rule. Furthermore, it depends on the jury to recognize the case that if a common and reasonable person was in the conditions, which was observed or imagined by the accused, whether or not he would use such violence. Respective verdicts rendered in the UK reveal that regarding the reasonability of defender's violence, the defender is seriously supported. In general, a series of issues in the UK law have been accepted by the British jurists: i. The jury should assess the extent of reasonability of an act. ii. This case should be taken into consideration that the accused is under pressure while he is committing a defense. Furthermore, he has no possibility to use enough time and opportunity to adopt completely logical decisions. iii. The rule of the proportion between interests and values are assessed according to Black Stan's Rule: "No violence can be prevented using deathful violence unless the said behavior is in such a way as it would be followed by punishment to death if the said behavior is committed". Thus, since no punishment to death is predicted for trivial burglaries in the UK, the defender can't use a deathful force for defense of financial interests, which are not of great importance. iv. A defender may only use that kind of violence, which is reasonable and logical in relevant conditions and situations. For example, an individual has no freedom and is not authorized to shoot or to kill a theft, who is roaming around his house without fear of loss of his life<sup>3,32</sup>. Consequently, it has explicitly been stated in the French Law and this important issue has been taken into consideration in the UK Law regarding the files, which are open indicating that full observance of the condition for proportion is one of the fundamental provisions. Furthermore, it is crystal clear that the said case must be necessarily ascertained by the legislator as well. In fact, it is not clear that in spite of acceptance of this condition (need and necessity) in the former Islamic Punishments Law of Iran, why the said provision has been omitted and nullified by the legislator upon ratification of revised Islamic Punishment Law in 2013. Some jurists do believe that the term of "observance of defense procedure" prescribed by Article 158 of the revised Law, governs the condition for proportion<sup>13</sup>. However, it seems that the aforesaid term has been prescribed with respect to observance of the principle for necessity. Finally, in spite of prescribing and ascertaining the said condition, such act as taken by the legislator, who has mentioned the term of "observance of defense procedure" once again, may be criticized. Such muteness and no stipulation of the legislator, confirming the aforesaid condition, despite the fact that it has been mentioned by contemporary jurisprudents<sup>34</sup>, and judicial procedure of most countries may be regarded as negligence, which is can't be justified with any cause, proof and reasoning. Finally, under existing conditions governing Iran and in consideration of ratification of the Islamic Punishments Law for justifying legitimacy of defense, there will be no need for confirmation of the proportion between the act and defense and that of the aggressor. This conclusion is contrary to unanimity of the Iranian jurists and jurisprudents and respective doctrines of other nations and that it has not rational and logical justification

either. It is recommended that an Iranian legislator should necessarily take statistics and ascertain the aforesaid condition for justifying and proving legitimate defense and removes existing ambiguity, gap and fault with the law by giving his decision in this regard. It may be commented that by virtue of Article 15 of Civil Liability Law ratified on April 27, 1960 stating: "If an individual causes bodily or financial damage, incurred by the aggressor while committing a defense, he is not liable for such damage on the condition that the said damage is proportionate to defense in term of common law", necessity for fulfillment of the condition for proportion could be confirmed. However, as authors of this paper believe and concerning that upon ratification of the law, the legislator was silent and that he has referred the case to other rules, especially to judicial rules for confirmation of the conditions are far from procedure prescribed by common legislation and they are not justifiable either.

### Subject of Defense

In the Iranian Islamic Punishment Law, considering the extensiveness of aggression which includes life, honor, reputation, soul and bodily freedom of oneself or another, it is possible to extend this concept and finally to argue in favor of the accused persons towards relying on one of these subjects in order to remove their criminal responsibility. But in the French and UK laws, this legal establishment is merely accepted within the scope of properties and life of the defender or another person. It should be added that in respect of defending from honor and reputation, most of the French jurists have voted to the fulfillment of legitimate defense. Now, whereas the French legislator's stipulation is limited to two subjects including life and property and also considering the principle of legality of crimes and act within the scope of law and that these two subjects are unanimously agreed in the UK by the jurists and legal procedure, the two subjects agreed by the two said countries are discussed and reviewed.

**Legitimate Defense with Respect to Persons:** People believe that legitimate defense firstly and more than anything else includes defending from persons. Anyone defends from himself/herself personally and/or defends from another person. As a result, a person who against an illegitimate damage to him/her or another person commits an action which is necessary for legitimate defending from him/her or another person, assuming that all stipulated conditions are fulfilled, shall not be responsible. Undoubtedly, the philosophy established concerning the basis for legitimate defense and intended by the legislator makes no difference between legitimate defending from the person himself or another person<sup>35</sup> and includes both instances subject to such legal exemption. In the UK law, defending from oneself or another person is accepted. In fact, many British jurists consider this type of defense as *Private Defense* some of whose subsets include defending from oneself or another person<sup>36</sup>. However, it should be borne in mind that both rationality of defense and conditions of legitimate defense

should be observed for defending another person as well.

**Legitimate Defense with Respect to Property:** Most of the jurists of the 19<sup>th</sup> century especially in France, relying on legal texts, did not defend from defense legitimacy except in cases where a person's life would be at risk. Their reasoning for illegitimacy of defense against aggression to property included the followings: i. Any loss arising from stealing the property may be compensated and the property will be returned. ii. The condition for proportion with respect to properties could not be observed. iii. Compared to body, property is of less importance, especially considering that no capital punishment is enacted for stealing the properties. Thus, nobody is allowed to kill an aggressor for aggressing one's property<sup>7</sup>. However, upon passage of time, many countries such as French, which extended the scope of legitimate defense in 1964 and that it officially included the defense from properties in its law<sup>37</sup>. Legitimate defense from properties was unknown in the code of 1810 of France<sup>17</sup>. Finally, it was prescribed in article 122-5 of the French modern criminal law: "Any person who commits a defensive action except intentional murder in order to stop a murder or a crime which is being committed against a property shall not be criminally responsible if the said action for that purpose is actually necessary and the used tools are proportional to the importance of the crime<sup>38</sup>". As for the properties however, paragraph 2 of article 122-5 rejects all defensive actions for intentional murder and such act shall be exactly necessary for the intended goal. Anyway, it is the courts that should decide on this issue. After the new punishment law, the criminal courts can issue as before an acquittal judgment for the accused despite excess in defending from the property<sup>27</sup>. As for defending from the property, the French legislator has not required necessity and proportion despite defending from life. In other words, given that a crime is committed by the defender towards applying his/her right of defense, it is the defender himself/herself who must prove that the crime committed by him/her was necessary and was proportional to the importance of the aggressor's action as well. As for defending from property in the UK law, it can be referred in summary to what Russell Heaton has said in this regard: "The main rule is similar (to defending from life), but a lower extent of violence will be reasonable as compared to attacking to a person<sup>39</sup>". Generally, in order to defend from a person or a property in the UK law, the principle mentioned in the *Beckford v R* quarrel can be referred to: "A defendant is entitled to use reasonable force to protect himself, others for whom he is responsible and his property. It must be reasonable"<sup>40</sup>.

### Mistake in Defense

If a person thinks that the aggressor wants to violate his life and honor or his property and cause a loss to the aggressor in order to defend from himself/herself or murders the aggressor but later is becomes evident that he was wrong and the aggressor had no such intention, the defending person shall be responsible for the loss caused to the aggressor or for murdering him<sup>34</sup>. As

long as it has not become evident that the aggressor had intended to violate the life, property or reputation of a person, that person shall not have the right to defend and if he attacks as defense and later it is revealed that he has made a mistake, he will have no criminal offense, instead he will be responsible for. In the French law, mistake in defense and acquittal of the committed person is not considered justifiable, like a father who kills his child by mistake imagining that a thief is at the kitchen. In other words, the ground for issuance of an acquittal judgment as the result of fulfillment of legitimate defense is the confirmation of goodwill<sup>26</sup>. Mistake in the UK law was first reviewed based on rationality, i.e., if a person defended from himself with a wrong imagination, the jury considered this subject if the mistake was ration. But this viewpoint changed overtime and was replaced by honesty. It means that it should be investigated if the person has really made a mistake or he claims so based on a false basis. However, the criterion has changed from typical to personal<sup>2</sup><sup>39</sup>. On the other hand, if a defender thinks that he is exposed to a legal attack (for example by the police) but the fact is that police illegally arrests him and in this case if he defends from himself against violence and injures a policeman, it will not be considered as a crime according to the UK law although the defender imagined that he is doing an illegal act. However, some of the courts disagree with this subject<sup>36</sup>. It seems that if legislator and judicial precedent in the questioned countries address the fulfillment and effects governing mistake in the aggressor's intention, disagreements and issuance of conflicting opinions will be avoided.

### Proof of Legitimate Defense

Like the legislator of the French Modern Criminal Law in 1994, legislator of 1810 had anticipated presumptions in this regard and on the strength of the regulations of article 122-6 of that, the defender was prior to the aggressor. After the discussions established in this regard by legal teaching and judicial precedent, the French Supreme Court interpreted the said statistic as a statistic which was defeated in cases where there is a reason for disagreement. Therefore, the aforesaid statistic is not an absolute and invincible statistic<sup>17</sup> and it is always possible that the contrary is proved by the attorney general. In other words, the judges who review a file can decide that the case is not included in the instances of legitimate defense by proving that no aggression has occurred or that defense has been excessive<sup>28</sup>. It seems that the contents of article 122-6 of the French Criminal Law should not be underestimated because despite other cases, the article exempts legitimate defense of the person under prosecution from the responsibility of proof. Therefore, in the presumptions anticipated in article 122-6, it is the responsibility of the pursuer to prove that the person has not acted in a legitimate defense condition<sup>17,41</sup>. Note 2 under article 155 of the new Islamic criminal code of 2013 prescribes: Whenever the original defense is confirmed, it is the reasonability of the aggressor to prove non-observance of defense conditions. As a result, after proving that the action was a defensive action, the legislator has assumed all defense

conditions. The critique to the Iranian legislator is that given that the aggressor is killed, who should be responsible to prove that which will not be easy in many cases? In the present conditions of the Iranian law therefore, not only the proportion condition has not been explicitly mentioned and has been omitted, but also necessity has under some circumstances been assumed. In the UK law, in case legitimate defense is proved by the accused person, it is the duty of attorney general to prove beyond all rational doubts that the defender has in fact committed no legitimate defense<sup>42</sup>. Maybe we can here come to the same conclusion that the UK law tries to support the defender.

## Conclusion

In spite of our imagination and expectation, any criminal action shall not necessarily be followed by a penal reaction and that legitimate defense is one of the legal organizations, which has officially been recognized by the legislator, justifying the crime.

Realization of legitimate defense will officially be recognized as part of natural rights of individuals if necessary conditions and requirements governing the two elements of "Aggression" and "Defense" are taken into consideration and that eventually the honorable judges investigating respective files would render an order for realization of legitimate defense and acquittal of the accused based on the same by substantiating prescribed conditions and assuming gathering predicted items. Thus, the defender is not free to enact his defense in such a way as he would defend himself by any means using his entire power. But, he must fully observe respective conditions predicted by the law or corresponding rules extracted from obvious principles of law as well. For example, one of the conditions required for violation is that respective danger will be an act or it will occur imminent. In other words, the defender will become certain that an aggression shall occur and such certainty is relied on rational reasons. Thus, in the event that a crime has occurred before, reaction to such reaction is regarded as reverence and that the person committing the same shall be entitled to punishment. Instead, if there is a possibility for an aggression in the future, it can't be regarded as an imminent danger because if a threat is really serious considering the relationships between the two sides, their position and regarding the threatening person, the threatened party can't anticipate to defend himself since relevant dangers associated with far future shall be defended by governmental powers. If respective condition is not met for defense against the aggressions, which confirm to law, it will predicate the necessity for acceptance of illegitimacy of condition for violation. From among the required conditions, which should be considered for defense, one may point out a defensive act that should be necessary to stand off an aggression or danger in the situation where there is no other choice for the defender. Thus, whenever the defender can stand off a danger by any means rather than committing a crime, but he resorts to a crime, his defense shall not be legitimate either. Another condition for defense is to fully observe the principal of

proportion between the act of the defender and severity of attack.

In the Iranian, French and UK laws, necessity, realization and confirmation of such conditions are officially recognized. Unfortunately, in the revised Islamic Punishments Law ratified in 2013, the necessity for realization and substantiation of the condition for "Proportion" has not been ascertained by the legislator without any rational and reasonable justification. Considering the concept of proving the legitimate defense in the French Law under respective conditions where realization of legitimate defense is taken for granted by virtue of Article 122-6 of Criminal Law, the main goal is to support the defender and to grant point to him accordingly. In other words, the French legislator has taken steps toward fairness and justice and considering defending one's life, he has taken necessity and proportion for granted and contrary to full observance of respective principles, he has regarded that necessity and proportion do need required proof and reasoning be presented. While with respect to defending the property, the legislator considered the principle for no necessity and proportion of the act taken by the defender as an aggressive act and that he has put substantiation of the said case to the defender. However, in Iranian law, revised Islamic Punishment Law ratified in 2013, Note 2 to Article 156, using ambiguous words with criticism, assuming substantiation of the principle of defense, the legislator has put the case of confirming non-fulfillment of the conditions for defense up to the aggressor. Contrary to what has been imagined by many researchers, in the UK Law, there are respective ambiguities, which are evident in many cases of legitimate defense. As for defense imminence for example, several discussions have been made and several judgments have been issued by the criminal courts. Moreover, there have been several discussions and theories concerning the issue of proportion resulting in several different judgments by the UK penal courts. This in turn shows non-observance of justice. The reason may be the ambiguities in article 3 of the UK criminal law of 1967. Moreover, common law as one of the main elements of UK law has caused many of the courts to act based on their opinion or reasoning concerning the previous files. The authors of this research propose that the positive points of the laws of other countries shall be studied through comparative law so that the current problems may be removed for better observance of justice because as it was mentioned in this research, comparative law is one of the best ways for better understanding of the rules. Although in some laws it may seem that appropriate rules have been approved/are available in legal norms, by comparative laws we find that there are several important problems concerning this subject.

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