

## Self-Defense - the unjust character of the attack

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**Abstract:** This paper follows a thorough analysis of the unjust character of the attack; this approach is one that involves all legal layers: legislation, doctrine and jurisprudence. At the onset, an attempt has been made to establish the notion of "lack of legal basis", as accurately as possible, afterwards the study continues with the question of admissibility or inadmissibility of the status of self-defense in cases of brawl or connected to the mental ability of the attacker, to finally pay attention to the delicate and controversial issue of whether against an unjust attack from a public official one can act in self-defense. The legislation under consideration is the Romanian one with its new criminal codes; yet, for a wider and clearer perspective on how the issues are addressed the comparative method is used too, and similar provisions in the Criminal Code or the European Convention on Human Rights are analyzed, too; the position of the European Court of Human Rights occupies a central place in our argumentation.

**Keywords:** self-defense; conditions; attack; unjust; legal basis.

### Introduction

The institution of self-defense, as well as all other justifiable acts or causes of impunity, is a form of complex systems of interdependent conditions, in the presence of which, the offense committed, although provided in the criminal law, is not a crime.

For the existence of self-defense some conditions must be met: not only the main conditions of the existence of the attack, of the danger and defense but also a series of subsequent conditions specific to each of the three. Thus, the attack to justify a defense under the law [1], must be material, direct, immediate and unjust.

It is considered unjust (*contra jus*) any attack on social values enumerated in Art.19 Para.(2) New Criminal Code if it was committed in violation of legal norms.

### 1. Lack of legal basis

The attack is considered unjust if the person resorting to aggressive behavior against another person or against their rights thereof or against a general interest, has *no legal basis, legal or factual*, to allow or justify this behavior [2].

We believe, along with most of the authors of criminal law [3], *that in order for the attack to be unjust, it should not necessarily meet the elements of an offense [4], it is sufficient that the aggression be contrary to law (contra jus)*. The practice has proved that an act committed in self-defense can be brought against an unjust attack, which is not yet a crime. In this regard, it was found [5] that in self-defense is the one who, through violence, prevents a person to commit suicide, although suicide attempt is not prescribed by law as a crime. However, the right to life is protected by the state, irrespective of the will of the subject and an attempt to suicide can only be considered an unjust attack, non-criminal as it might be, on a protected value.

From the above it follows that the unjust nature of the attack must be regarded as existing when "... it is wholly unjustified in law"[6], that is, when it materializes in actions or inactions legally banned or prohibited, **so when it is a violation of objective norms or when it is directed against individual rights, recognized as such by law**, protected against any damage, whether such recognition or protection arising explicitly or implicitly from a legal norm (of objective law) or a fundamental principle of the legal system or any of the principles governing its various branches. Consequently, it is to be inferred that the allegation that the attack is considered unjust when it has no factual basis "to allow or justify this behavior"[7] must be tackled with precaution, that is the "factual basis" should always be reported to law, hereunder.

In order to establish that an act is unjust, "*contra jus*" meaning against the law or against what is

considered as law in society, in order that this finding gain legal criminal relevance there is - in our opinion – no other criterion but the law, whether it is the rules or principles of objective or subjective rights of individuals or companies. Thus, if the attack is immoral, for example, that fact does not justify the legitimacy of defense because even if in its most general sense the attack is unfair, in the legal sense it is not necessarily *contra jus*. Therefore, the claim that the attack may be considered unjust when lacking a "factual basis" must necessarily be correlated with the lack of a legal basis too. The lack of a "factual basis" treated separately in the proper sense of the term, could lead to unfounded attacks, without a clear purpose and moreover to the idea of an irresponsibility of the aggressor, in which case the question of just or unjust attack can no longer be taken into consideration.

**So, the unjust attack should not necessarily constitute a crime and can consist of any wrongful act or omission likely to cause danger to the values protected.**

Practice shows that there are situations where **the lack of legal basis** for the attack may consist not only of *the nonexistence of a legal right*, but in cases where *there is such a right, the very manners and means of obtaining or exercise it thereof are themselves contrary to the law* [8].

"Even when the abuser exercises its right, the action can be unjust if for the realization of this right the aggressor has to resort to intervention and post of an authority. It is unjust that the creditor attacks the debtor to compel them to pay the debt." [9] Also, "if the owner of goods held without right by another person wants to regain the goods by committing a violent act he or she commits an unjust attack, a distinction being made between *the attack which endangers the person holding the goods wrongly* – in which case there is self-defense - *and the attack which only endangers the rights of the person that is attacked* ", in which case there would be no self-defense "because the attack does not jeopardize the legitimate interests of the defender, his property being owned without right" [10].

Unjust attacks can also be considered the demolition of buildings or cutting of trees in his own backyard –which is a legal action – if through faulty implementation it seriously threaten the neighbor's house or outbuildings, gaining thus unjust character; or catching a thief in the act - act permissible by law - but which, if prolonged in time, unjustifiably, will acquire a criminal character, constituting the crime of illegal deprivation of liberty provided for by art. 205 New Criminal Code.

Seemingly, the defense that is clearly exaggerated - exceeding the limits of a proportionate defense - from the person who attempts to reject an unjust attack by becoming a source of serious danger to the original raiser, can thus transform from self-defense into an unjust attack (e.g.: the person initially under attack appealing to remove the action of hitting the aggressor, prepares to fire a gunshot to the aggressor) [11].

Unlike the Romanian criminal law, the Moldavian Criminal Code [12] does not provides among the characteristics of the attack that of being unjust. However, Moldovan specialized doctrine [13] discusses this issue in a default manner, stressing that the attack must be generated by a person required to create a state of self-defense; because, when the attack might come from an animal, protection would be performed under the auspices of the state of emergency. So, although not discussed in an explicit manner, the condition that the attack be unjust is assumed tacitly, its essential role in differentiating between the two institutions: self-defense and state of necessity being recognized nonetheless.

Given all these considerations which state unequivocally the great importance of the **unjust condition** of self-defense, which defines it together with the other attributes; we **consider it imperatively necessary as de lege ferenda, the Criminal Code of the Republic of Moldavia should provide the condition under which the attack must be unjust, too.**

## **2. The mental position of the aggressor**

Related to the unjust character of the attack, the question arose whether the law should take into consideration *the mental position of the abuser*, whether it should require that the latter have the psychophysical capacity to realize that his act constitutes an aggression. Opinions are divided from this point of view.

**First opinion** [14] - which until recently seemed to be historically obsolete, yet due to changes made by the new Criminal Code, returns to date, [15] (so *history does repeat itself*), it is alleged that *injustice be determined objectively*, independently of any relationship with the psychical capacity of the aggressor, considering that the question of "subjective irresponsibility" does not remove the objective character of aggressive acts, what matters being the real fact that the attacked person is faced with an aggression that puts to serious and illegitimate danger their person or rights.

According to this view, where unjust is any human act contrary to the rules of law, *both mentally ill persons*

and minors [16] can thoughtlessly commit unjust attacks and, as such, one can retaliate against them in self-defense.

A **second opinion** [17], to which we subscribe and which is shared by most authors, **the attack is unjust only if the abuser realizes the nature of their action or inaction, the attack having thus to be examined both from the point of view of the abused and the abuser.** Thus, it is considered that the one who resorts to defense must be "convinced that they are facing attacks from a responsible person. If they know that he who attacks is irresponsible, then they will be in the state of emergency, and if they do not know, because of actual error, they will be in self-defense. The distinction is necessary because in the first case it is required that the one in danger may not have saved other than committing the offense under criminal law which is not necessary for self-defense" [18].

The main reason for this view is that **the attack originated from a person who does not have the legal significance of his act, cannot be characterized as just or unjust.**

On the other hand, if one takes into account the mental state special individual who attack would create a situation deeply inequitable even between man and animal, because in terms of legal protection, the animal - which in case supports a retaliatory attack under the state of emergency - would hold a privileged position in relation to the irrational person that would support a more virulent reaction in the realm of self-defense.

**An attack initiated by a legally responsible person against an irresponsible, although it will create a state of self-defense; the impunity of the alienated person will be made on the basis of irresponsibility and not of self-defense [19].**

### 3. Self-defense in brawls

Another problem that has appeared in theory and practice is one of the **admissibility or inadmissibility of the status of self-defense in brawls**, where the attacks do not succeed one another, but are **concurrent**, so one cannot determine the causal record nor establish the part that triggered the attack, creating a state of peril to justify a legitimate defense. In a *first opinion*, promoted especially in *judicial practice* [20], it is argued that the state cannot withhold the existence of legitimate defense precisely because those people attacking each other are reacting mutually and simultaneously. Another opinion, supported by *criminal doctrine* [21] recognizes that there may withhold legitimate defense since each attack meets the legal requirements for a legitimate defense. However, due to the simultaneous and mutual character of the initial attacks, each participant in the brawls will have to criminally take responsibility for it, only subsequent attacks having a character of mutual self-defense.

Given these doctrinal and jurisprudential positions and starting from the definition [22] of the brawl - offense provided and punished by art. 198 New Criminal Code - which consists of clashes, usually between two groups or opposite sides, characterized by a complex of acts of violence, pushing and hitting one other randomly, being difficult, because of the hustle and congestion of people, to determine the actions of each of the participants; we believe that this issue can be *relatively easy to solve in terms of theory* and *difficult in practice*, where things are more complicated and complex and, especially, *much harder to prove*.

For these reasons, we consider that the proposed *solution of the legal practice in the sense of incompatibility between self-defense and brawl*, seems more justified, more motivated in relation to the factual situations and relevant legal provisions, especially with regard to the very elements of the offense of brawling/fight. Thus, *the material element of the objective side of the fight* - called *rix* - consists of *an action to participate, to take part in a brawl* between several people and committing acts of violence by all participants. Inherent characteristics of any brawl are hitting, pushing, tearing clothes, being impossible to determine which action was committed by which participant [23].

So, the multitude of acts shared by several people, actions which are interwoven in such a way that are difficult to distinguish and each action cannot be determined separately, [24] characterizes the material element and defines brawl as a distinctive offense.

Given *these defining characteristics of the brawl* - without which it cannot be conceived and legally applied - *it is impossible to establish the facts of each participant and therefore the initial attack that would legitimize defense.* This impossibility of establishing shares for each participant in their materiality, we think it is the essence of the brawl and makes it incompatible with self-defense.

**The attack can become unjust by overcoming the limits of a defense proportionate with the seriousness of the initial attack and the circumstances under which it occurred**, in which case defense becomes an unjust attack, incompatible with the law and entailing criminal liability of the perpetrator. As pointed out in the legal literature [25], if the abuser cannot invoke self-defense in the case of a proportionate

defense, because he does not face an unjust attack, when a riposte is made by exceeding the limits of self-defense, the aggressor sees himself exposed to an unjust attack, which legitimates the act of defense. In other words, **the initial state of self-defense is superposed by a second self-defense** in which the position of the subjects is reversed: *correlative attacks*. [26] Another question was whether **in the event of a challenge from the one being bullied, the latter can still plead as being in self-defense**.

We believe that *in case of exceeding the limits of self-defense, the original raiser may invoke self-defense*, and all the more can the provoker invoke this state too, the provoker whose act does not constitute an attack within the meaning of criminal law to justify a legitimate defense [27]. Therefore, if the *response of the provoked meets the conditions of an attack, it can justify the reaction of legitimate defense from the provoker*, who in his turn responds by an attack, the so-called *excuse of provocation* provided by Art.75 Para. (1) Lett. a). New Criminal Code.

#### 4. Admissibility of self-defense against an unjust attack of the civil servant

The legal world has long been concerned with the question whether before an unjust attack by an organ of public authority it is possible to riposte during the state of self-defense. Although views were split, the dominant opinion [28] **is that an unjust attack of a public official gives the right of whom it is directed to, to retaliate**, and the latter will benefit from the effects of self-defense. The historical dispute [29] on this issue presents less importance today, as long as the legal system promotes the rule of law, at the service of the general interests of the society and serving the citizens, who have the freedom to oppose any unjust attacks and more so if they come from representatives of public authorities because the primary statutory duty is just to observe and enforce citizens' rights and people's in general.

If in **its infancy** [30] of legal recognition of the right of retaliation against an unlawful act of the civil servant [31], the only way to achieve it was through *courts notification* [32] the **direct physical riposte** being considered a **rebellion, a denial of social order** [33], so illegal in its turn, today this right to defense is recognized by most contemporary laws.

The European Convention on Human Rights, in Art.1, *Obligation to respect human rights*, states: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention" [34]; article under which **the European Court** held that **"the responsibility of a State may be engaged for acts of all organs, agents or its officials** on the ground that, as is generally accepted in international law, their rank is of no interest, because the deeds of those acting within their official duties are in any event, attributable to the State to which they belong. In particular member's obligations under the Convention can be violated by persons exercising official functions entrusted to them"[35]. The Court during the trial of cases - under Art.2 Para. 2 (*authorization of causing of death through the use of force*) **ECHR** - established with the status of principles, a set of rules that must be considered by contracting states and their agents in such situations. Thus, *states are under positive obligation to create an appropriate legal framework to provide a level of protection of the right to life required of a democratic society*, [36] *a system of adequate and effective guarantees against arbitrariness and abuse of force of any kind* [37] *operations that may involve death of persons should be prepared and controlled by the authorities so that the use of force be minimized to the extent possible*, [38] **the use of force must be absolutely necessary** [39] **use of force is allowed only if based on reasonable and unmistakable conviction of the existence of a dangerous situation** [40]. **The Court conducts a strict control** whenever such **exceptions are invoked to the right to life**.

Returning to the doctrine, I. Tanoviceanu, argued, referring to **the unjust attack "... the law does not distinguish from whom it comes: an ordinary person or any civil servant and where the law does not distinguish, we do not need to distinguish either"** [41] or, in other words, the law takes into account the intrinsic legitimacy of the act, not of the person who performs this act. Although an official is presumed to know better the law he applies, "when the citizen certainly knows about the illegality of an act committed by an official, he has the right to resist at his own risk" being "in the public interest that citizens have the right of resistance, and in case of need the one of self-defense" [42]. Also, the same professor, I. Tanoviceanu considers, rightly, that **the attack of the civil servant is all the more unjust (as opposed to an attack from an ordinary citizen), as he performs, simultaneously, a deviation from his official duty**, as he is paid by the citizens to protect them against unjust attacks and not for himself to commit such attacks.

The unjust attack by officials generates self-defense, [43] and the reaction of the aggressed cannot be considered a crime, not even the special crime of outrage - with or without violence - because defense does not dispute the authority and its legitimacy, but the unjust act of an abusive official, deliberately violating the law, thus situating himself outside the very authority whose representative he is supposed to be.

If the status of self-defense against unjust aggression of representatives of the authority is granted in principle, then it is implicit that there is in self-defense the one who intervenes to defend another person, his rights or to defend a general interest against such an attack [44].

Regarding the assessment of just or unjust acts of authority various options to resolve were analyzed and proposed, including intermediate variants [45]; in the Romanian criminal doctrine [46] the theory espoused by Professor V. Dongoroz is accredited and supported, theory that states [47] that "**there may be legitimate defense against an unjust attack coming from an organ or a public authority when the attack is obviously illegal, arbitrary and made without guard from legal forms**".

*Although we tend to appreciate this attribute: obviously* - inspired by Italian doctrine and proposed in the French doctrine as an interim solution in assessing the unjustness of acts by the authority (the term commonly used being a synonym of the *obvious*, namely: *manifest*) [48] – it would be an *addition to the bill, unjustifiably* so, because the legislature did not intend to provide it expressly or exceptionally. *We consider it natural, however, that against the acts of authority one must not retaliate easily, casually, because it would amount to contempt, a violation of the law itself.*

For the same reason, we think it justified the opinion [49] that the attack perpetrated by the authority organs having an appearance of legality, (but which, in fact, is an illegal act) should not legitimate self-defense if there is another way of attack, such as the possibility of complaint to the superior authorities, referral to courts etc. because in practice, people are not able to verify immediately and in depth whether those acts of authority are lawful or not (as in the case of an arrest warrant presenting certain irregularities that may attract cancellation [50]). Therefore, we agree that "what gives arbitrary character to acts of civil servants and therefore legitimizes resistance can only be the abuse committed by acts carried out without considering the prescribed forms and in contempt of law or a manifest incompetence" [51]. Also in support of this view it has been said [52] that, insofar as a complaint to higher authorities is possible, this attack will not justify a legitimate defense, otherwise it would come to accept that the victim of a judiciary error should be in self-defense for killing a guard to regain freedom.

**The quality of qualified active subject, as a representative of state authority determines the impugned provision of unjust attack as a specific crime or as aggravating form** of the basic type, because of the special *importance of social values such endangered*, representing the *very legal background* to these facts, *such as the social relations on justice*, social relationships regarding the *correctness of an official in carrying out his public service obligations*, social relations on *equal rights and non-discrimination of persons etc.*

In all cases, determining whether an attack is just or unjust is a matter of fact, but only by reference to what is just, to what law allows or prohibits. In this operation a number of factors must be taken into account such as: the cause of the attack, the mental state of the aggressor and the aggressed, the importance of social value that the attack was directed against, the previous relationships between the aggressor and the person attacked etc. [53].

Some **actions or inactions provided or allowed** - implicitly or explicitly - **by law are not considered unjust attacks**. Thus, aggression manifested in certain sports disputes (boxing, judo, karate, etc.) - within the rules – are not considered an unjust attack precisely because it is provided and permitted by these regulations, known and accepted by all players. [54] The transgression of their limits, however, is unjust and creates a state of self-defense (e.g.: knocking out opponent out of the boxing ring).

They are also considered just attacks the detention of a person who has just committed a flagrant offense, preventive arrest in the cases and conditions provided by law, carrying out house searches within the frame of the rules and norms of the Criminal Procedure Code etc.

So, the **attack is always considered just if committed under a law or statutory provisions within the limits and conditions set by them.**

## Conclusions

Thorough knowledge of all the conditions imposed by the law of self-defense, as well as of the other justifiable acts or causes of impunity is a goal for both jurists in view of achieving a fair justice, and for all people, in general, in order to be able to legitimately defend the protected values so as not to turn themselves from victims into aggressors.

The attack is unjust to the extent that it *has no legal basis*; however it is not necessarily to be a crime. The lack of legal basis for an attack does not only regard the lack of the right to have or not to have a certain behavior, but if such right does exist, *the manner or means of exercising thereof must not be contrary to the law.*

Unjust character, one of the most important attributes of attack is also the *main difference between self-defense and state of necessity*. Classifying an attack as unjust can be achieved only if the attacker *has the mental ability to discern this aspect*. If the attacked *is unaware that the aggressor is irresponsible* the former will be in *self-defense*, while *knowing about the irresponsibility of the aggressor* will trigger the *state of emergency*.

Concerning the issue of *an unjust attack of a public official*, we can indisputably conclude *it can legitimize a defense* under Art. 19 New Criminal Code, in the sense that we have highlighted that most modern laws - including the European Convention on Human Rights provide for such provisions.

*In brawls, the conclusion is the inadmissibility of self-defense* because of their characteristics, the plurality of simultaneous attacks and the practical impossibility of establishing the deeds of each participant, namely of the initial attack that would legitimize defense.

Comparative study with *Moldavian law*, has allowed us to critically observe *the lack of provision concerning the unjust character of the attack*, which is why, given the importance of this particular institution for self-defense, we proposed *de lege ferenda* to include it among the requirements of unjust attack in the Criminal Code of the Republic of Moldavia, too.

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- [36] Case Makaratzis v. Greece, Decision of 20 December 2004, Para.71, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67820#{%22itemid%20%22%20%22001-67820%22%22}};](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67820#{%22itemid%20%22%20%22001-67820%22%22}})
- [37] *Ibid*, Para 58;
- [38] Case McCann and Others v. The United Kingdom, decision of 27 September 1995 {<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57943#%22itemid%20%22%20%22001-57943%22%22>}, Para.194;
- [39] *Ibid.*, Para. 200;
- [40] *Ibid.*;
- [41] I. Tanoviceanu, op. cit., p. 902;
- [42] *Ibid.*;
- [43] In this regard, see also: T. Vasiliu et al., op. cit., p. 333, V. Dobrinoiu, Gh. Nistoreanu et al., op. cit., p. 293, M. A. Hotca, op. cit, p. 519;
- [44] See cases from England and Belgium jurisprudence *apud* I. Tanoviceanu, op. cit., pp. 903-906;
- [45] See: I. Tanoviceanu, op. cit., p. 906, V.A. Ionescu, op. cit., p. 87;
- [46] V. Dongoroz, op. cit., p. 361, V.A. Ionescu, op. cit., p. 88, F. Streteanu, op. cit., p. 413, C. Mitrache, C. Mitrache, op. cit., pp. 146-147;
- [47] V. Dongoroz, op. cit., loc. cit.;
- [48] V.A. Ionescu, op. cit., p. 87;
- [49] *Ibid*, p. 88;
- [50] See also: F. Streteanu, op. cit., p. 413;
- [51] I. Tanovioceanu, op. cit., p. 908;
- [52] See the distinctions made by I. Tanovioceanu, op. cit., p. 926 regarding the existence or otherwise inexistence of self-defense in killing the guard in order to escape from the prison in which one was unjustly imprisoned;
- [53] See: T. Vasiliu et al., op. cit., p. 333;
- [54] See also the explanations of: *Juridical Aspects of the exercises of the right or of the Fulfillment of Obligations* by E.G. Simionescu in: Annals of the "Constantin Brancusi" University of Targu-Jiu, Letter and Social Science Series, Issue 2/2014, pp. 35-41.