# THE INFLUENCE OF CANON LAW ON THE MODERATION OF DEFENSIVE ACTION. A STUDY ON THE PROPORTIONALITY BETWEEN LEGAL ASSETS IN SELF-DEFENSE[1]

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***Abstract***
The aim of this paper is to investigate whether the content of the adverb "moderately", provided for in the regulation of self-defense in the Brazilian criminal legal system, should be interpreted in the sense of a requirement of proportionality in the strict sense. In structural terms, the work is divided into two parts. In the first, we sought to analyze the influence of Canon Law on the moderation of defensive action. Later, in the second part, using the inductive method, the arguments at stake in the debate about whether a proportionality judgment (*stricto sensu*) applies were analyzed. In the end, it was concluded that it is impossible to impute to the term "moderately" the requirement that the defender weigh up the legal assets at stake.

***Keywords***
Imputation of content, Self-defense, Proportionality.

***Summary***


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## 1. INTRODUCTION

Article 25 of the Brazilian Penal Code (CP) regulates self-defense with the following wording: "Those who, using the necessary means moderately, repel unjust aggression, actual or imminent, against their own rights or the rights of others, are considered to be in self-defense". While the legislator's requirement that the defensive action be moderate is evident on the one hand, its exact content remains unclear on the other. In this context, the following question arises: should the adverb "moderately" be interpreted in the sense of a requirement of *proportionality in the strict sense* (= weighing up legal assets)? This is the issue that will be addressed in this study.

To provide an answer to the problem in question, it is necessary to establish some theoretical assumptions. The first is to break with the idea that words, especially in a normative context, as is the case with the adverb "modernly", have only one possible meaning;[3] in reality, the key point seems to be to distinguish between signifier and signified. The term *signifier* refers to the law as a source of law, i.e. the linguistic symbols used by the legislator, while the *signified* corresponds to the norm, as a meaning attributed by the interpreter.[4] This leads to the understanding that "the action of interpreting consists of a rhetorical strategy that aims to suggest meanings for signifiers chosen in the face of a 'real' conflict, i.e. referring to a concrete event".[5] This reasoning leads to a second assumption: "through words *we impute* meanings to things".[6] So, starting from a *broad notion of imputation*, the main objective

[3] CASTRO JÚNIOR 2013, 129.

[4] ADEODATO 2011, 103.

[5] ADEODATO 2015, 48. The same difficulties encountered by Law in the interpretative process to impute meaning to the law (= signifier) are verified by theology in the dichotomy between the letter of the law and the Spirit (*gramma-Pneuma*). For an approach between these two areas based on hermeneutics, as a common point, see OLIVEIRA; BRANDÃO 2017, 32 *et seq*.

[6] MIR PUIG 2003, 6.

of this work is to determine, by means of argumentation,[7] whether or not the weighing up of legal assets should be imputed as the content of "moderately". [8]

In structural and methodological terms, the first step will be to investigate the origin of moderation in self-defense in canonical doctrine, so that we can understand the reasons why, at a given historical moment, this requirement was demanded, and, above all, the meaning attributed to it. Once the impact of Canon Law on the contemporary understanding of the dogma of self-defense has been understood, attempts to impute the requirement of weighing up legal assets to the moderation of defensive action will be analyzed. Thus, using the inductive method, some cases will be presented to analyze the performance of the theoretical propositions.

## 2. THE ORIGIN OF THE NEED FOR MODERATION IN SELF-DEFENSE IN CANON LAW

The dogmatic study of self-defense - more precisely with regard to the requirement of *moderation* in defensive action - is closely related to Canon Law.[9] This is due to the fact that this branch of law was responsible for introducing the requirement called *moderamen inculpatae tutelae* (=

[7] "Given the need to argue, the cultural sciences, especially law, cannot remove rhetoric from their method. In the context of legal science, argumentation is also a constitutional necessity - since every legal decision needs to be motivated - and therefore, instead of having its method based on syllogism, it has it based on what the Greeks called entymema" (BRANDÃO 2014, 80).

[8] According to ZAFFARONI 1998, 188, when analyzing the *decision-making function of* dogmatics, he argues that "[e]very dogmatic construction tends towards a model of rules that makes the exercise of power by jurists predictable and rational (...)". The question that arises is: considering that the meanings of the signifiers are imputed by the dogmata, is there, in fact, a predictability of judicial decisions or is this just a belief of the jurists? The answer to this question requires an independent study and, for this reason, will be left for a more opportune moment.

[9] On this relationship, see GÓES 2021, 28 *et seq.*

"moderation of guardianship without fault"[10]), which completely influenced the understanding of self-defense[11] and is therefore present in various legal systems.[12]

The imposition of *moderamen inculpatae tutelae* represented a real *limitation* on defensive action,[13] since, in addition to the prior existence of an unjust aggression and an immediate response to that aggression, a further requirement was made: *that the defender act with moderation.*[14] This moderation meant, on the one hand, an analysis of the right affected to the detriment of the right defended, "in other words, an adequacy between the attack, including its seriousness, and the consequent reaction, taking into account the quality of the legal assets",[15] and, on the other hand, the use of the mildest form to repel the unjust aggression. [16]

The reason for demanding moderation in self-defense in this period is anchored in the principles of charity, justice, and love of neighbor, in other words, some of the virtues that guide Christianity.[17] Thus, although there is a Christian commandment not to kill, it is considered that self-love is what underpins love for one's neighbor. In other words, if an individual doesn't defend their life (*i.e.* lacks self-love), how can they love their neighbor as themselves?[18] This is the reason why self-defense is considered by canonical

[10] LINHARES 1989, 10.
[11] In this sense, GÓES 2021, 29.
[12] Either explicitly, as is the case in the Brazilian legal system, or implicitly, as required by the doctrine in the Portuguese context: TAIPA DE CARVALHO 1995, 317. On the need for moderation today, see SIQUEIRA 2012, 546.
[13] Cf. FIORETTI 2002, 40.
[14] ALMADA 1975, 38.
[15] SIQUEIRA 2012, 546. In the same vein: LINHARES 1989, 50.
[16] LINHARES 1989, 47.
[17] GÓES 2021, 29.
[18] GÓES 2021, 206.

doctrine to be a licit act, provided, of course, that it is used in a moderate way. [19]

The formula *moderamen inculpatae tutelae*, incorporated by canonical jurisprudence in the 13th century, in the case involving Father Laurentius and the church thief,[20] received intense criticism from legal positivism. This was because it was argued that Christian principles caused Canon Law to add "other logical and emotive elements that increasingly hampered the development"[21] of the institute, in other words, resulting, in short, in an excessive limitation of self-defense. [22]

However, this criticism did not prosper, and the need for moderation in defensive action was expressly incorporated into Brazilian criminal law. Therefore, once the historical aspects of this requirement have been exposed, it remains to *impute a content to* the adverb "moderately", provided for in art. 25 of the Criminal Code; more precisely, to determine whether or not this provision requires a *proportionality* of legal assets.

## 3. WEIGHING LEGAL ASSETS IN SELF-DEFENSE? POSING THE PROBLEM

To better understand the problem at hand, imagine the following example: individual *"A"* decided to steal *"B*'s*"* vehicle during the early hours of the morning. To do so, *"A"* climbed over the wall of *"B*'s" house and entered the vehicle. The noise from the garage woke up *"B"*, who went to investigate. When he got there, *"B"* found the garage open and *"A"* getting ready to leave in reverse. At that moment, *"B"*, who only had a firearm at

[19] Cf. AQUINO 2012, 144.

[20] With an overview of the evolution of *moderamen inculpatae tutelae in* Canon Law: GÓES 2021, 226.

[21] FIORETTI 2002, 39.

[22] Cf. FIORETTI 2002, 41 *et seq*.

his disposal, chose to fire a shot in *"A*'s*"* direction. The shot fatally hit *"A"* in the chest. *That said,* the *question is: is "B's" conduct justified by self-defense*?
In this example, while there are no major problems with the configuration of a defense situation, given the existence of an unjust aggression (theft of the vehicle), current (happening at that moment), to the agent's legal asset (A's property), what is at issue in this example is the possibility of defending a legal asset of lesser value (property) to the detriment of a legal asset of greater value (life). In other words, what is decisive here is to determine whether the adverb "moderately" can be *blamed* for the need to *weigh up* legal assets; it is this understanding that will allow the construction of a dogmatically appropriate response to the example described.

## 3.1. THE DISCUSSION AROUND A GENERAL PROPORTIONALITY JUDGMENT

The first line of argument - in favor of proportionality - can be presented as follows: in the case of homicide, the Brazilian legal-penal order, which protects life, provides for sentences ranging from 6 (six) to 30 (thirty) years in prison (taking into account the maximum penalty in the abstract of the qualifiers); while for theft, which protects property, the sentences are lower, ranging from 1 (one) to 8 (eight) years. This means that the Law establishes a hierarchy between the values protected and, for this reason, the incidence of self-defense in cases involving the protection of property of lesser value, in the face of property of greater value, would represent a violation of the constitutional principle of the dignity of the human person.[23] Therefore, according to this reasoning, it is not possible to apply self-defense to justify *"B*'s" conduct.
On the other hand, countering this reasoning, there are those who attribute to self-defense a double foundation (dualist theory), namely: (i) the self-

[23] NUCCI 2023, 203.

protection of the individual legal asset and (ii) the *affirmation of the right.*[24] From the first foundation, focused on the individual, is drawn the understanding that "justification by self-defense always presupposes that the typical action is necessary to prevent or repel an unlawful aggression against an individual legal asset";[25] whereas, from the second basis, it is understood that when the legislator authorizes individual protection - on the part of the citizen himself - what is intended is a general preventive purpose,[26] that is, it is "desirable for the legal order to assert itself in the face of aggressions against individual legal assets, even if the state bodies that would be in a position to carry out the defense are not present".[27] This last foundation of self-defense is what supports the non-requirement of proportionality, because, in short, *the just should not give way to the unjust.*[28] Thus, for the authors who adhere to this position, there is no question, in *principle*,[29] of the need for a weighting judgment between the legal assets in confrontation. For all these reasons, in the example presented, the resolution would be that *"B*'s*"* conduct would be justified by self-defense.[30]

Some argue that this argument for the affirmation (prevalence) of the Law is insufficient to justify the lack of proportionality in self-defense,[31] since it is not clear why, on the one hand, the penalty should be proportional to the fact, while, on the other hand, the defensive action does not meet this same

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[24] ROXIN 1997, 608; CIRINO DOS SANTOS 2005, 154-155; VIANA 2022, 384-385; JESCHECK; WEIGEND 2014, 496.

[25] ROXIN 1997, 608.

[26] ROXIN 1997, 608; VIANA 2022, 385.

[27] ROXIN 1997, 608.

[28] For example, VIANA 2022, 385: "(...) the law must *never* give way in *the* face of unjust aggression".

[29] It is said, in principle, because, as will be seen below, these authors believe that, in the case of *gross disproportionality*, there will be a limitation on self-defense.

[30] Thus, ROXIN 1997, 609; WELZEL 1997, 103.

[31] Cf. PALERMO 2006, 99.

limit.[32] In other words, why can't the judge exceed the limits of proportionality when applying the penalty, while proportionality is not required in self-defense?[33] Well, the same argument of affirmation of the Law could be inverted by the State to justify imposing a penalty without any requirement of proportionality.[34]

The justification for the lack of proportionality in self-defense does not lie in the need to affirm the Law, but rather in the understanding that "the victim, as the person not responsible for creating the conflict, has no reason to bear any harmful consequences, whatever the goods at stake in the conflict".[35] In other words, it would not be appropriate to impose a duty on the victim to bear the damage to their legal property if it was the aggressor who created the environment of confrontation. Therefore, it is the aggressor - and not the victim - who has the duty to bear the damage.[36] This explains why the weighting of legal assets is not required in the above example, which should reach the resolution of applying self-defense to *"B*'s*"* conduct.

## 3.2. GROSS DISPROPORTIONALITY BETWEEN AGGRESSION AND DEFENSE

The partial conclusion so far is that self-defense, in principle, does not require proportionality between the legal assets in conflict. However, the question is still open for discussion about the so-called *gross disproportionality* (*i.e.* cases of extreme disproportion) between defense and aggression. To better understand this problem, we will use the following case as a reference: a child climbs into an orchard to steal an apple. The owner of the orchard,

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[32] PALERMO 2006, 99-100.
[33] According to PALERMO 2006, 100.
[34] Cf. PALERMO 2006, 100.
[35] PALERMO 2006, 104.
[36] PALERMO 2006, 104.

a paralyzed old man, is faced with the situation. With only a shotgun at his disposal, he shoots the child in order to prevent the theft.[37] That said, what is important in this case is to determine whether, in situations of gross disproportionality, there will be a limitation on self-defense based on a weighing up of the legal assets at stake.

Contemporary criminal law literature has endeavored to discuss the imposition of certain ethical and social restrictions on defensive action,[38] among which is the situation of gross disproportion.[39] As such, some argue that if - based on a weighing up of legal assets - the defense of an asset of minimal value is found to be to the detriment, for example, of the aggressor's life, the incidence of self-defense will be hindered on the basis, on the one hand, of the reduction in the need for self-protection, and, on the other, of the absence of interest on the part of the Law in asserting itself.[40] For this reason, even if the shotgun is the only suitable means available to the paralyzed (= assaulted) elderly man, "there is no point in protecting a property of minimal value to the detriment of a life". [41]

However, this line of argument is not appropriate from a dogmatic point of view, since it could lead to the idea that it is *never* possible to kill the aggressor to defend a low-value asset. This would imply ignoring the factual and normative-axiological differences between a low-value asset and a *bagatelle-type aggression*.[42] Therefore, it can be seen that the "crux of the problem is not

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37 ROXIN 1997, 632; ZAFFARONI; BATISTA *et al* 2017, 67; BRANDÃO 2021, 182.

38 "There is no exaggeration in saying that the recent history of self-defense has been the history of its ethical and social restrictions" (MOURA 2015, 373). Pointing out, however, the lack of studies on this discussion in Brazilian literature: MARTELETO; MOURA 2021, 234.

39 Regarding the other sets of cases that are generally classified as favorable to restrictions, with additional references: MARTELETO; MOURA 2021, 229-230.

40 JESCHECK; WEIGEND 2014, 512. Also defending the weighing up of legal assets in this case without, however, expressly using the same grounds: BRANDÃO 2021, 182.

41 BRANDÃO 2021, 182.

42 LOBATO 2022, 136.

exactly the value of the good, but what the good *in concrete* represents and how, in the concreteness of life, the victim is or is being attacked".[43] In other words, "this is not so much about the hierarchy or (legal) value of the conflicting values, but above all about the objective comparison of the legal-social significance of the defense with the weight of the aggression for the victim." [44]

This argument is more appropriate, precisely because it considers that an aggression can hit a property of little value (*e.g.* a cell phone), but that in the specific situation this aggression is not of a bagatelle nature,[45] which would justify defensive action, even with the result of the death of the aggressor (provided, of course, that the other requirements of self-defense are respected, especially with regard to the selection of the means and its use). The case involving the paralyzed elderly man is different, as there is no doubt that the theft of an apple is bagatelle (= irrelevant) and, therefore, based on the duty of minimum solidarity,[46] the aggressor, even though he used the only means available (a shotgun), should have borne the brunt.

## 4. CONCLUSIONS

In view of the above, it can be concluded that Canon Law played a crucial role in the development of self-defense, since it was responsible for inserting moderation as one of the requirements of defensive action. This requirement - although it was originally introduced because of Christian virtues - is still present in various legal systems, and this is dogmatically appropriate. Firstly, because by justifying conduct through self-defense, the

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[43] LOBATO 2022, 137.
[44] FIGUEIREDO DIAS, 2007, 429.
[45] According to LOBATO 2022, 137, note 41, "[i]n regular terms, the importance of a matchstick is none. However, the same cannot be said of a *smartphone* that has countless personal information, bank details, stored immaterial properties, etc."
[46] For example, PALERMO 2006, 105.

law is authorizing the carrying out of conduct that was previously antinormative (there has already been damage to the legal asset protected by the criminal type) and, for this reason, the need for moderation becomes essential to distinguish legitimate (= moderate) defense from abusive (= immoderate) defense. Secondly, because moderation prevents the aggressor from being at the mercy of the arbitrary actions of the defending party.

About imputing content to moderation, arguments that seek to demand a weighing up of the legal assets in conflict must be rejected. A general judgment of proportionality would represent a distortion of the duty to bear the injury, which falls to the aggressor (responsible for creating the conflict) and not to the defender (who has been unjustly attacked). Similarly, in so-called situations of gross disproportionality, the value of the good should not be considered (whether it is high or low) to weigh it up. Instead, a two-step analysis should be carried out: can the injury to the defender's legal asset - in its concrete form - be considered bagatelle? (*i.e.* is it an irrelevant injury to the defender's legal asset, such as stealing an apple?); if the answer is yes, then a restriction is imposed on the defensive action. In short, in self-defense, there is no place for the proportionality of legal assets.

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