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# ESSAYS

## Access to Justice and the Permissive State: The Brazilian Experience

CARMEN HEIN DE CAMPOS\*

*The Maria da Penha Law emerges as the result of recommendations from international mechanisms and treaties protecting the human rights of women, as well as from the condemnation of Brazil by the Inter-American Commission on Human Rights. On the one hand, the creation of the law can be seen as a positive aspect against state tolerance towards violence. On the other hand, the difficulties in implementation indicate its intrinsic limits. This essay analyzes the obstacles to overcoming those limits.*

### INITIAL CONSIDERATIONS

The *Maria da Penha v. Brazil*<sup>1</sup> case offers important elements for analyzing the responsibility of the Brazilian state in condoning violence against women and its influence towards the creation of the Law of Protection and Punishment of Violence (the “Act” or “Maria da Penha Law”).<sup>2</sup> The case is important not only for being the first case decided by the Inter-American Commission on Human Rights based on the Convention of Belém do Pará, but for being a groundbreaking case in relation to the traditional legal framework regarding violence against women in the country. Since the decision in *Maria da Penha* and the creation of the Act, the social perception of domestic violence has changed and Brazilian society seems less tolerant. Although that may be a positive aspect of the Act, many obstacles remain in accomplishing an effective implementation of the law.

This article analyzes the challenges inherent in the domestic vio-

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1. *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01 (2001).

2. Lei No. 11.340, de 7 de Aug. de 2006 (Braz.) [hereinafter *Maria da Penha Law*]; see also *Brazil Enacts Law on Violence Against Women*, UNIFEM (Aug. 9, 2006), [http://www.unifem.org/news\\_events/story\\_detail.php?StoryID=503](http://www.unifem.org/news_events/story_detail.php?StoryID=503).

lence laws and the difficulties for its incorporation in the national legal framework.

In *Maria da Penha Maia Fernandes v. Brazil*, the Inter-American Commission on Human Rights (the "Commission") considered Brazil a state tolerating domestic violence and, therefore, responsible for violating the human rights of women protected by the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("the Convention of Belém do Pará").<sup>3</sup> The Commission found Brazil responsible for its failure to fulfill the obligations of Article 7(b) and (d)–(g), of Article 3 in relation to the right to a life free from violence, and of the following subsections of Article 4: (a) the right to life, (b) the right to physical, mental and moral integrity, (c) the right to freedom and safety, (d) the right not to be subjected to torture, (e) the right to dignity and to protection of her family, (f) the right to equal protection before the law and of the law, and (g) the right to simple and prompt recourse to a competent court. The Commission also considered violations of Articles 8 (Fair Trial) and 25 (Judicial Protection) of the American Convention on Human Rights in connection with the obligation to respect and ensure the rights set forth in Article 1(1) because of the unwarranted delay and negligent processing of this case.<sup>4</sup>

The *Maria da Penha* case illustrated, in a dramatic way, the violence against women perpetrated by their intimate partners and the tolerance of the State regarding this type of violence. The aggressions suffered during Maria's marriage, including the shots she received in her sleep (that left her paraplegic at the age of thirty-eight) and the later attempt to electrocute her, are not isolated incidents. Instead, they reveal both a systematic pattern of domestic violence against women in Brazil and the state's permissiveness.

Following the condemnation of Brazil by the Inter-American Commission on Human Rights, the feminist movement began advocating the creation of a special law for the prevention and punishment of domestic violence against women. The creation of the Act marks a process of great internal mobilization and articulation of feminism with many important institutions such as the government, the parliament, and the women's movement for the achievement of the Act, which occurred in 2006.<sup>5</sup>

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3. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women: "Convention of Belém do Pará," Org. of Am. States, Inter-Am. Comm'n on Human Rights, 24th Sess. (June 9, 1994), available at <http://www.cidh.oas.org/Basicos/English/basic13.Conv%20of%20Belem%20Do%20Para.htm>.

4. See *id.* ¶¶ 37, 44.

5. Feminists created a coalition of NGOs to present a proposal for the law. The coalition was composed of the following five organizations: CLADEM/Brasil, Themis, Advocacy, CFEMEA,

The Act provides a comprehensive vision for addressing violence by proposing the integration of the three levels of government (local, state, and national) through joint network services. It also creates protective and restrictive measures available to victims against their aggressors and creates civil and criminal penalties.<sup>6</sup> These measures address one of the biggest obstacles to the implementation of the Act: the lack of a coordinated network of various services. While many services have been created with the support of the Ministry of Women (the “SPM”), the deficit still remains high, making it difficult for women to access other resources to overcome violence, such as joining a work program, accessing psychological counsel, and obtaining other remedies under the law.

These difficulties vary depending on the region. Thus, most of the services are unavailable in rural areas. On the other hand, the women’s rights movement is more well-established in the urban areas and is thus better able to demand services for women and to obtain government resources and priority. All these factors affect the implementation of the Act.

#### THE FIGURES FOR VIOLENCE AGAINST WOMEN

According to a report by the Call Center (“Call 180”),<sup>7</sup> which receives calls from all over the country twenty-four hours a day and seven days a week, 923,878 calls were recorded from April 2006 to December 2009.<sup>8</sup> This shows an increase of 1,890% between the number of calls received during the first year and the total number of calls received at the end of 2009. Factors such as the Act, the National Pact to Combat Domestic and Family Violence Against Women, technological improvements, and the training of call attendants contributed to this growth.<sup>9</sup> Of the 98,326 reports of violence recorded between 2006 and 2009, the attacker was usually the victim’s own partner.<sup>10</sup> Of all these reports, 59,314 were of physical violence, 27,688 of psychological violence, 7,624 of moral violence, 1,785 of sexual violence, 1,428 of violence against property, 421 of false imprisonment, and 66 of trafficking

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and Cepia. See *Breve Histórico*, SECRETARIA ESPECIAL DE POLÍTICAS PARA AS MULHERES, <http://www.sepm.gov.br/subsecretaria-de-enfrentamento-a-violencia-contra-as-mulheres/lei-maria-da-penha/breve-historico> (last visited Apr. 28, 2011).

6. Maria da Penha Law, *supra* note 2, Art. 8, 9, 14, 22 & 23.

7. The Women’s Assistance Center (“Call 180”) is a telephone service connected to the federal government’s Secretariat of Policies for Women. It was established in 2005 for the purpose of receiving reports of violence against women. See *Ouvidoria: Relatório Annual das Atividades*, SECRETARIA ESPECIAL DE POLÍTICAS PARA AS MULHERES, <http://www.sepm.gov.br/ouvidoria/botelim-bimestral> (last visited Mar. 26, 2011).

8. *Id.* at 5.

9. *Id.*

10. *Id.*

of women.<sup>11</sup> Since 2007, searches for information about Domestic and Family Violence Against Women accounted for 338,143 records—about a third of the total calls taken.<sup>12</sup>

In 2009 alone, the Call Center registered a total of 401,729 calls. In 2010, 734,416 calls were received.<sup>13</sup> Of these, 40.5% involved complaints of threats, incitement to crime, moral and sexual harassment, false imprisonment, sexual exploitation, human trafficking, and discrimination.<sup>14</sup>

According to data from the latest survey by the Perseu Abramo Foundation, the ratio of women (currently 18%, before 19%) across the country who have suffered “some sort of violence inflicted by a known or unknown man” has not changed in ten years.<sup>15</sup> Of the twenty types of violence identified, two out of five women (40%) reported suffering some kind of violence at least once in their lives, especially some sort of control or restriction (24%), psychological or verbal violence (23%), or some kind of threat, or physical violence itself (24%).<sup>16</sup>

The survey also reveals that in addition to threats of spanking (13%), one out of ten women (10%) has actually been beaten at least once in her lifetime.<sup>17</sup> Considering the last time that these occurrences happened and the number of women represented in both surveys, the number of Brazilian women who have been spanked remains very high—one woman was spanked every twenty-four seconds, or five women every two minutes.<sup>18</sup>

Another important fact presented by the survey is that women’s pleas for help are more frequent (half to two-thirds of the cases) after threats or physical violence. Women often resort to their mothers, sisters, and other relatives. *But in none of the forms of violence investigated did complaints to any police or judicial authority exceed one-third of the cases.*<sup>19</sup>

Among men, one out of ten (10%) claimed to have suffered sponta-

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Mulheres Brasileiras e Gênero no Espaço nos Espaços Público e Privado*, PERSEU ABRAMO FOUNDATION, <http://www.fpa.org.br/sites/default/files/pesquisaintegra.pdf> (last visited Mar. 26, 2011). This survey was an update to another one made in 2001 and this time included violence against men. *Id.*

16. *Id.* at 4.

17. According to the same research in 2001, 12% of women reported threats of spanking and 11% were beaten. *Id.*

18. *Id.* at 5.

19. *Id.*

neous violence inflicted by a woman (not including the mother).<sup>20</sup> Of the eleven types of violence identified, almost half (44%) had suffered some kind of violence, especially some sort of control or restriction (35%), but also some threat or physical violence (21%), especially slaps and pinches (14%).<sup>21</sup> Finally, nearly six out of seven women (84%) and men (85%) have heard of the Act and about four out of five (78% and 80%, respectively) have a positive perception of it.<sup>22</sup>

In another survey, the Public Prosecutor of Rio Grande do Sul State<sup>23</sup> reveals that between 2008 and 2010, 36,904 procedures related to the Maria da Penha Law were registered in 140 counties.<sup>24</sup> Of these procedures, 14,280 (38.7%) refer to threats and 9,472 (25.7%) to bodily injuries against wives and partners. During this period, 13,966 (37.8%) protective measures were requested and 10,301 (27.9%) granted.<sup>25</sup> In addition, 16,368 restraining orders (44.4%) and 13,678 (37.1%) orders prohibiting contact were granted. However, only 516 arrest warrants (1.4%) were issued against offenders.<sup>26</sup> This data shows that the punishment of offenders is not the main measure adopted by judges. This may be because the judges assess the death risk as low.

Nowadays, in the Family and Domestic Violence Court in Porto Alegre (the state capital), there are only two judges to handle over 16,000 procedures concerning the Maria da Penha Law.<sup>27</sup> The number of new cases each month is around 1000 and the profile of the victims consists predominantly of poor and socially disadvantaged women.<sup>28</sup> These numbers show an imminent collapse of the justice system, i.e., the impossibility to judge all procedures according to the law, mainly due to the small number of judges. The figure of 16,000 procedures does not suggest that all procedures necessitate an exhaustive investigation by the police because the majority of procedures include requests for protective measures.

#### FEMINISM AND VIOLENCE AGAINST WOMEN IN BRAZIL

In the past twenty years, Brazil has returned to a democratic regime

20. *Id.*

21. *Id.*

22. *Id.* at 5.

23. *Report of Registration of Cases of Domestic Violence from the Public Prosecutor of Rio Grande do Sul State* (2010) [hereinafter *Prosecutor's Report*] (on file with author). The report was presented by a prosecutor in a meeting with a women's movement in December 2010.

24. *Id.* County is the name used by the judiciary to refer to the existence of a court.

25. *Prosecutor's Report*, *supra* note 22, at 1.

26. *Id.*

27. *Judge of the Domestic Violence Court, Remarks at the Forum for the End of Domestic Violence Against Women in Porto Alegre* (Jan. 28, 2011).

28. *Id.*

with free and fair elections and with social policies that seek to give millions of people access to material and cultural goods.<sup>29</sup> Brazilian feminism has played an important role in this reconstruction. Joining the battle for democracy with gender issues, our feminism sculpted important rights in the new Constitution of 1988 and in public policies for women.

Without retelling the story of Brazilian feminism, I would like to mention what I consider relevant to the argument of this article. The story of the resurgence of most Latin American feminisms from 1960 to 1970, including the Brazilian one, is related to the struggle against military dictatorship and the quest for civil liberties and democratic institutions.<sup>30</sup> The concern with human rights is therefore constitutive of our feminism.

From the 1970s to the 1990s, Brazilian feminism changed its "autonomous" character.<sup>31</sup> It was institutionalized as NGOs and, from the democratization on, many feminists became part of important progressive governments.<sup>32</sup>

The NGO feminists had privileged conversations with the feminists in the government, establishing partnerships and constructing, through dialogue, the main public policies for women in health and violence sectors. The creation of police stations just for women, shelters, service centers for women who are victims of violence, specific mechanisms such as the Secretariat of Policies for Women, the organization of Conferences on Policies for Women<sup>33</sup> with the participation of the government and civil society, the National Plan of Policies for Women,<sup>34</sup> and the Maria da Penha Law show the particular characteristics of our Latin American feminism: a profound link with the protection of human rights as fundamental to democracy and a strategic alliance between government and civil society to foster the rights and public policies for women. This dialogue can be interpreted as an association of the women's movement by the state, but considering the characteristics of the Brazilian

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29. Brazil was under military dictatorship between 1964 and 1985. In 1988, the new Brazilian Constitution was enacted, establishing a democratic state of law.

30. See Nancy Saporta Sternbach et al., *Feminisms in Latin America: From Bogotá to San Bernardo*, 17 SIGNS: J. OF WOMEN IN CULTURE AND SOC'Y 393, 399 (1992).

31. See Sonia Alvarez, *Feminismos Latinoamericanos*, 2 REVISTA ESTUDOS FEMINISTAS 267 (1998).

32. Sonia Alvarez et al., *Encountering Latin American and Caribbean Feminisms*, 28 SIGNS, J. OF WOMEN IN CULTURE AND SOC'Y 537, 548 (2003).

33. The Conferences on Policies for Women take place in the local, state, and federal spheres and have the participation of governments at the three levels and of the civil society, but are mostly constituted by activists from women's movements and feminists.

34. The National Plan of Policies for Women of SPM (2005) stemmed from the National Conference on Policies for Women (2004).

state and the fact that the feminists remained critical and at the same time collaborative, the perspective of uncritical adhesion (in Portuguese, *cooptação*) must be taken with a grain of salt.<sup>35</sup> These characteristics may explain, in part, the criticism of foreign models that favor legal strategies focusing on repression as the main way to tackle violence against women.

#### LEGAL REFORM AND DOMESTIC VIOLENCE IN BRAZIL: NEW CHALLENGES

Since the 1970s, feminists have been fighting for legal reforms and changes in judicial interpretation of domestic violence laws. Important achievements have occurred, such as the Supreme Court rejecting the defense of “legitimate defense of honor” that was used to absolve husbands and partners who killed women allegedly engaged in adultery.<sup>36</sup> Adultery, in turn, has also ceased to be a crime. There has also been the exclusion of domestic violence from the sphere of offenses of minor offensive potential, and finally, the creation of specific legislation. However, despite these changes, resistance has been observed in the enforcement of the law.

Despite having been created from a project of feminist organizations<sup>37</sup> and having relied on the broad participation of the women’s and judges’ movements, enforcement of the law has met resistance. Some judges want to extend the protection to men, and the law has generated a debate over its constitutionality.<sup>38</sup> In addition, there is still difficulty in obtaining protective orders, and the greatest difficulty lies in establishing networks of support and protection for women and on measures involving the use of government social programs aimed at promoting the economic autonomy of women.

On the other hand, the number of arrests in Brazil as well as in other countries is very small.<sup>39</sup> In Brazil, the courts are reluctant to

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35. There are, however, some feminists allied with the government that have trouble criticizing wrong policies or the lack of policies for women.

36. The courts are divided as to accept the thesis, as shown by Pimentel and Pandjarjian. PIMENTEL, SILVIA, ESTUPRO: CRIME OU CORTESIA? ABORDAGEM SÓCIOJURÍDICA DE GÊNERO (Sergio Antonio Fabris ed., 1998). In 1991, the High Court of Justice rejected the use of this thesis. See Pimentel, Silvia, Pandjarjian, Valéria & Belloque, Juliana, “*Legítima Defesa da Honra*,” *Ilegítima Impunidade de Assassinos*, available at <http://www.ifch.unicamp.br/pagu/sites/www.ifch.unicamp.br/pagu/files/colenc.04.a04.pdf>.

37. See *supra* note 5.

38. Since 2006, a lawsuit has been pending in the Supreme Court to establish whether the law is applied to both women and men.

39. According to the Annual Report of National Council of Justice, arrests represent 10% of the sentences. See Annual Report of National Council of Justice 16 (2010), available at [http://www.cnj.jus.br/images/relatorios-anuais/cnj/relatorio\\_anual\\_cnj\\_2010.pdf](http://www.cnj.jus.br/images/relatorios-anuais/cnj/relatorio_anual_cnj_2010.pdf); see also Sally F. Goldfarb, U.N. Office on Drugs and Crime, *The Legal Response to Violence Against Women in*

imprison offenders, preferring to send them to treatment programs (if they exist), or even to attempt reconciliation or other measures different from incarceration. However, the small number of convictions may suggest that protective measures are effective. Thus, the low number of imprisonments must be analyzed carefully because it does not mean that the law is not fulfilled or that the perpetrators go unpunished.

In order to try to overcome the difficulties in applying the law, the Secretariat of Policies for Women (“SPM”) of the federal government has encouraged many public policies. Among them is the National Pact to Combat Violence against Women, which has the implementation of the Maria da Penha Law as one of its main pillars. For this purpose, the SPM has worked together with the judiciary in many states to create domestic violence courts across the country. It has spoken with local governments so that they would sign the Pact, and has released funds to allow the creation of services intended to help women aligned with the new domestic violence law.

The Domestic Violence Law underscores gender-based violence and proposes a comprehensive treatment, but the reports filed in the criminal justice system do not exceed one-third of the attacks that take place.<sup>40</sup> This under-representation raises the hypothesis that, although the law provides for non-criminal measures, when the situation of domestic violence reaches the criminal justice system, it offers very few alternatives for women.

If on the one hand criminalization of the offender may be important to deter an imminent or future attack, on the other hand, criminal law should offer other alternatives to women. This seems to be a great paradox in the legal reforms in Latin America and particularly in Brazil. They offer few alternatives to criminalization and disregard the variety of subjects (women that are very poor, black, white, living in slums, unemployed, underemployed, homeless, drug addicts, that have had little schooling, etc.). In this sense, the context in which violence occurs is very important.<sup>41</sup>

Accordingly, besides the need to build a network of support and assistance for women, it is also necessary that criminal law goes beyond its own limits and offers an effective response to women in situations of violence. However, scholars have shown that the criminal justice system reproduces the patriarchal system and have advocated for its abandon-

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*the United States of America: Recent Reforms and Continuing Challenges*, EGM/GPLVAW/2008/EP.06 (July 30, 2008).

40. See *supra* note 13.

41. See generally Jennifer K. Wesely, *Considering the Context of Women's Violence: Gender, Lived Experiences, and Cumulative Victimization*, 1 FEMINIST CRIMINOLOGY 303 (2006).

ment.<sup>42</sup> In view of its nefarious effects on women, such as double victimization, it does not solve the problem but acts only on the consequences rather than the causes.<sup>43</sup>

The problem is that at this point we may not be talking about criminal law anymore. The diversity of women using the criminal justice system, the wide variety of problems, and the many contexts in which violence is perpetrated prevents a single criminal response from being effective. In this sense, it seems that the question posed in this seminar—"Is justice possible when the legal principles do not consider the needs and economic and social realities of women, especially those in greater conditions of risk?"—can only be answered negatively. This seems to be one of the major obstacles in the criminal system, whose classical principles do not allow for contemplating a diversity of subjects in the context of social disadvantage.

#### CONCLUSION

The Maria da Penha Law establishes a diversity of public services that are meant to offer more services to women. However, the resistance to the justice system as the means to enforce the law and deficiencies in the public services prevent the law from being more effective. Furthermore, in its regulatory domain, non-criminal alternatives need to be extended to encompass the complexity of the situations of violence that women face. Otherwise, the criminal system will not be able to provide justice for women.

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42. See Elena Larrauri, *La Mujer ante el Derecho Penal*, 11 CIENCIAS PENALES 13 (1996), available at <http://www.cienciaspenales.org/revista8f.htm> (last visited Mar. 26, 2011).

43. See *id.*

