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**Disputing the application of laws:
The Constitutionality of the Brazilian Statute against Domestic Violence in the Courts^a**

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Abstract: This study aimed to map the key positions regarding the constitutionality of the Maria da Penha Law (Law 11.340/2006) in the Brazilian judicial system. The law, the result of political struggles by the Brazilian feminist movement, has been the subject of discussions in the public sphere and actions aimed at consolidating its constitutionality before the Federal Supreme Court. We examined and discussed the arguments used in the Courts, intending to show that the creation of law is not limited to the legislative moment, but rather that its social meaning is also constituted through disputes within the Judiciary.

Keywords: Maria da Penha Law; constitutionality; Judiciary; public sphere; theory of law.

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“We want this country to have less than zero tolerance [towards domestic violence]. Because this crime shames society; this crime shames the family; this crime shames men and women.”
Brazilian President Dilma Rousseff⁷

1 Introduction

The quote above is taken from a speech of Brazilian President Dilma Rousseff, made on July 13th, 2013 during the announcement of the federal program *Mulher: Viver sem Violência* (Woman: Living without Violence). The program involves the investment of over US\$118 million dollars between 2013 and 2014 to install reference centers to serve women afflicted by domestic violence.

The quote from our President’s speech and its calls for zero tolerance towards domestic violence illustrates one of the main features of the design of the Brazilian public policy on domestic violence: its punitive approach. We will explain in this text how this punitive approach takes juridical form and how it became one of the most important reasons for disagreements over the application of the 2006 law.

The measure also serves as a lens through which we can view larger themes about the application of reformist legislation in Brazil: the lack of structural support for novel legal initiatives and inadequate institutions of enforcement. In terms of the network of services offered to women, various diagnoses (Observe, Final Report, Nov/2010, Final Report, March/2011) converge towards a deficiency in the policy’s institutions and implementation of services, and, thus, ultimately its protection of victims of domestic violence. Apart from being insufficient and inadequate, the legal support network for women is unsystematic, revealing that different public agencies (and partner organizations) use different designs, flows and interfaces, have different references and methodologies, and include professionals with quite heterogeneous skills and competence levels.

⁷ The original quote is: “Queremos que esse país seja um país com tolerância abaixo de zero. Porque esse crime envergonha a sociedade, esse crime envergonha as famílias, esse crime envergonha homens e mulheres.”

The National Pact to Face Violence against Women, launched in 2007 and resumed in 2011, recognizes this urgent need to expand the network of institutions, to improve the adequacy of infrastructure, to standardize services and to train staff to accomplish the objectives of the law. This anti-domestic violence initiative has come into public debate years after the period of time considered in this text, which focuses on the first six years after the passing of the Brazilian statute on domestic violence in 2006. The study focuses' on the novel legal institutions created by the 2006 legislation, and with specific focus on the judiciary implementation of the Law.

If this is the main question currently addressing the enforcement of the Law, we can say that it also represents a shift in the terms of public debate. Although the lack of infrastructure was present since the first moment of the law's enactment, it was the resistance of the judiciary towards the statute that dominated the debate around its enforcement in its first decade.

This text focuses on this early resistance: the early questioning of the law's constitutionality in the judiciary. The emergence of positions resistant to its application, particularly focused on its constitutionality, has generated a sense of distrust regarding its enforcement by the Judiciary among some public sphere participants, in particular social movements.

This study thus begins by giving an overview of the first reactions towards the Law in the judiciary and the strategy of the Secretariat for Women to challenge doubts about its constitutionality and empower the Law through a Brazilian constitutional procedure called a "trial of actions of concentrated control" before the Supreme Court⁸ (STF). We also dissect the arguments mobilized in this discussion. As we will see, the arguments used by judges to question the constitutionality of the Law come from a myriad of often quite different grounds. Some of them are radical liberal arguments that reject special measures for women, arguing that it breaks the equality principle as provided for in the Federal Constitution. Others did not question the Law itself but rather some specific articles that structure its punitive strategy towards the aggressor. The study of these distinct reasons describes better the resistance towards the Law and shows it is

⁸ Brazil is a country with 27 states. Each has a State Appellate Court (TJ) with jurisdiction to try appeals against decisions of single trial courts. The judges from the State Appellate Courts are called justices. The highest courts in the judiciary are the Superior Court of Justice (STJ) and the Federal Supreme Court (STF). The first is mainly responsible for trying, among others, all cases from the State Appellate Court. The Federal Supreme Court, on the other hand, is responsible for trying cases involving constitutional matters.

more complex than simply that judges are against women's' interests or insensitive to gender issues.

In terms of the current situation in the judiciary, it is impossible to say that the application of the Law is anywhere near settled. This is always an issue in Brazil, where all individual judges have the power to declaring a statute unconstitutional. We could even say that today the focus of disputes over the Law often appear in other ways and not simply in terms of questioning the constitutionality of the Law, especially since the pronouncement of the Brazilian Supreme Court. And these other questions – decisive to define the scope of the Law – now frequently come up. For example, the Appeal Court of Rio de Janeiro recently decided, in a case involving a famous actress that was beaten by her boyfriend, that the Law should not be applied in the case, as she is not “opressed” and “subjected” to her boyfriend and the Law is designed for the vulnerable women⁹.

What is important to stress in this scenario is the great importance of every dimension involved in the effective application of the law: the passing of the Law in parliament, its application by the judiciary and other ancillary institutions involved in guaranteeing legal rights.

The recent history of Brazil regarding the strategies of social movements towards the Law shows that they were mostly concentrated on the passing of the Law, and did not consider its application to be a future site of conflict. There are many cases of complaints and general distrust about how the judiciary enforces a statute whose passing was considered a victory. This seems to us to thus be only a partial framing of the strategies towards Law. Therefore, researching the judiciary alongside the design and function of other legal institutions is a necessary analytic frame for understanding how the Brazilian state is really dealing with legal issues following the promulgation of any new law.

Thus, the case of the Maria da Penha Law – and all the disputes around it – sheds light on an important issue both regarding the relationship between social movements and studies on legal mobilization: the importance of looking to strategies addressing others institutions dimensions implicated in the enforcement of a statute.

⁹ Decision issued by the 7a. chamber of the Appeal Court of Rio de Janeiro, process n, 0376432-04.2008.8.19.0001, in June 25th, 2013.

This framing of the question is underneath our program of empirical research on the relationship between the public sphere and the Law. Our theoretical assumption is that the role of law is not just to obtain univocal resolutions for specific cases that are submitted to the judiciary. Rather, the judiciary is a space for deliberative disputes regarding the meaning of legal norms. This is a normal and natural quality of judiciary and not a flaw in how it operates. This approach rejects the traditional view of the separation of powers, in which the interaction between the Law and the public sphere is believed to take place outside of the Law and solely within the field of politics; it also rejects the idea that statutes should be applied mechanically by the courts, because their role is to enforce the actual will of the people who express them.

These assumptions are also supported by the fact that the traditional, formalistic view of legal enforcement has been losing its explanatory power. Our alternative theory of law frames the decision-making moment as being problematic, that is, as a moment of choice between different possibilities of interpretation. It is evident, therefore, why the study of the justification of judicial decisions is critical. This context can clarify the premise behind this research: that the process of fighting for the creation of rights does not end with the creation of laws, and that therefore the resolution of actual cases constitutes a new space for debate. From this perspective, empirical studies of cases regarding the application of law are essential in order to understand how power is exercised in the legal field, how it is open to democratic debate and, if so, what are the obstacles to the participation of society in these decisions.

2 Domestic violence in Brazil and the Maria da Penha Law

Domestic violence against women has been one of the main themes addressed by the Brazilian feminist movement in recent last decades. Domestic violence is a pervasive phenomenon in the country, concretely affecting a huge number of women that are living in at-risk conditions, without freedom and safety.

Although there are many difficulties measuring the true depth of the problem – especially because of the high number of unrecorded case rates – the last numbers taken from recent research by the Federal Senate shows that 1 in 5 women recognizes that they have been victim of domestic violence perpetrated by a man; 13.5 million recognize that have been victim of some

kind of aggression by a man (19% of the population of women); 31% still live with the aggressor; and there are at least 700,000 women in Brazil living under a permanent situation of violence (Research DataSenado 2013). Further, the number of homicides against women has increased 230% in the last 30 years. It means in absolute numbers 92,000 women were killed (43,700 just in the last decade), among which 41% of the cases happened at home. In an international ranking of domestic violence in 84 countries, Brazil is the 7th more violent country, only after El Salvador, Trinidad Tobago, Guatemala, Russia, Colombia and Belize (CEBELA; FLACSO, 2012)

The urgency of the situation regarding violence and the extreme deprivation of women's right to a life without violence have dominated the Brazilian feminist agenda and public debate for years, although these numbers have to be understood in light of the deeper disparities in the way relationships between men and women are built and in the context of permanent cultural, political and structural socio-economic inequalities.¹⁰

If we go back to examine the articulation of the issue in the national public sphere, we discover that the seriousness of the problem gained momentum because of the mobilization of the Brazilian feminist movement. The movement has been organizing itself in a more visible way

¹⁰ In this sense, just to give idea general idea of the Brazilian context, it is worth mentioning that Brazil ranks 80 out of 146 countries evaluated by the 2011 Gender Inequality Index (GII)¹⁰, an index created by the UNDP to reflect gender-based inequality in three dimensions - reproductive health, empowerment and economic activity (See: <http://hdr.undp.org/en/media/HDR_2011_EN_Table4.pdf>; and the report about Brazil: <<http://hdrstats.undp.org/images/explanations/BRA.pdf>>. One of the most worrisome themes regarding reproductive health involves female mortality, which has been decreasing in the last years but it is still very high: for every 100,000 live births, 58 women die from pregnancy related causes (According data produced by the Ministry of Health: <http://tabnet.datasus.gov.br/tabdata/sim/dados/indice.htm>). Regarding the structure of the Brazilian labor market, according to the last statistics produced by the IBGE (Brazilian Institute of Geography and Statistics), in 2011, although access of women to formal education and employment has been increasing in recent years, it is still unequal compared to men. While they represent the majority of the population (53.7%), women are not the majority among the employed population (45.4%). Women are the majority in the most vulnerable positions and among domestic servants. Men occupy 62.3% of the formal jobs while women stand for 40.4% and the average income received by women in 2011 is 72.3% of the average men income (<http://www.ibge.gov.br/home/estatistica/indicadores/trabalhoerendimento/pme_nova/Mulher_Mercado_Trabalho_Perg_Resp_2012.pdf>). When it comes to political representation it is clear that the election of Dilma Rousseff as President in 2010 was a turning point in Brazilian history, as well as the recent increase of number of women occupying important positions in the government. But the disparity in women's representation in the Parliament is striking: in the same election (2010) only 45 women were elected to the Federal Chamber of Deputies – 8.77% of the chairs – contrasted with the 468 men elected. Among the 54 senators elected, only 8 were women. These (dis)proportions are more or less the same when we observe the elections for legislative institutions in the sphere of Federal States and Municipalities. For more detailed information, see Araujo, Clara. *As mulheres e o poder político – desafios para a democracia nas próximas décadas*. In: Cepia – Cidadania, Estudo, Pesquisa, Informação e Ação, p. 90-136, e ONU Mulheres. **O progresso das mulheres no Brasil 2003-2010**. 2011. Available at: <<http://www.cepia.org.br/progresso.pdf>>.

since the 1975 Conference for Women in Mexico City and the subsequent signing of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1982 and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women in Belém do Pará in 1994. In addition, Brazil's condemnation by the Inter-American Commission on Human Rights of the Organization of American States (OAS) in the Maria da Penha case played a decisive role in pushing the subject to the national agenda.

Maria da Penha was an emblematic case of disfunction within the Brazilian judicial system. She became paraplegic after being battered several times by her husband, and it took 13 years for the juridical system to prosecute and punish the aggressor¹¹. The case was taken to the Inter-American Commission that concluded there were numerous mistakes and negligence committed by the Brazilian State in the solution the case¹². The IAC's decision prompted the Conference of Brazilian Women (2002), followed by the National Conference of Public Policies for Women (2004), in which a National Plan of Public Policies for Women was discussed and a National Consortium of organizations was created.

In other words, the international input precipitated a long process of political discussion in the national public sphere about the urgency to fight domestic and gender violence, which paved the way for the enactment of a new statute against domestic violence in Brazil, the Law n. 11.340/2006, which gained the informal name of the Maria da Penha Law.

The Maria da Penha Law sought to regulate Article 226, 8th, of the Brazilian Constitution, which requires that the State to “ensure assistance to the family in terms of every single member of the family through mechanisms to prevent violence in their relationships,” and to respond to demands made by international treaties to which Brazil is a signatory, such as the Women's Convention (1979), the Belém do Pará Convention (1994) and the Beijing Conference (1995). The new statute changes completely the normative scenario about domestic violence and can be considered a turning point in the Brazilian legal system regarding women and gender protection against violence.

¹¹ The complaint filed by Maria da Penha Maia Fernandes with the Commission on Human Rights (Organization of American States) concluded that the State tolerated domestic violence. Maria da Penha is a Brazilian bio-pharmacist who was the victim of double attempted murder by her husband in 1983 and appealed to the committee in 1998 due to irregularities and undue delay in the Brazilian judicial system.

¹² Report 54/2001 at <<http://www.cidh.oas.org/annualrep/2000port/12051.htm>>.

The Law introduced several changes in how the Brazilian legal system handles domestic violence. It contains a comprehensive package of measures addressing prevention, social assistance, emergency protection, civil provisions about family law and punitive measures—which are the core of the law.

The Law includes a chapter specifically addressing the care provided to victims by the police, modifies criminal procedure provisions and allows for the preventive detention of the perpetrator when the physical or psychological integrity of the victim is at risk. It also provides for the possibility that the police request the court grant a number of urgent protective measures for victims (including suspension of the aggressor's license to carry a gun, removal of the aggressor from the home, keeping the victim away, among others). The Law also creates Courts of Domestic Violence against Women, granting them civil and criminal powers, so that the judges of these courts have the power to hear crimes as well as family issues and even to ensure that an employment contract be maintained in case removal of the woman from the workplace becomes necessary for protection.

The most disputed subject in the discussion of the Law was the design of the police measures and the judicial procedures regarding the possibility of applying alternative paths to criminal law and punishment to the aggressor in these cases.

After great controversy on this theme in the public debate – involving different actors such as activists, members of the state Special Secretariat, judges, women heard in public hearings etc. – the Law ended up prohibiting the alternative measures that have been applied to domestic violence cases since 1995, the so called Law of Small Criminal Claims Courts.

The Small Criminal Claims Courts were responsible for bringing Brazilian criminal procedure closer to the “adversarial system.” The Law n. 9.099 established the jurisdiction of the Small Criminal Claims Courts to prosecute *less offensive potential crimes*. It established a special and faster procedure for prosecuting these cases and introduced certain measures called “depenalizing” measures, all of them providing alternative paths to the ordinary criminal procedure track.

Among the alternative paths were three different possibilities: (i) a civil resolution between perpetrator and victim, ending criminal liability. To structure this solution in legal terms, the Law 9.099 established that these cases would be prosecuted through a “conditioned criminal

action”¹³. This means that the victim is given the power to decide if the case should be started or not by the public prosecutor. This is an exception to our criminal procedure system, based – as with many civil law systems – on the legality principle, that is, the obligation to prosecute offenses, independent of the will of the victim. As we will see, this is one of the points that have been very controversial in the judiciary.

If the victim decides the case should be started, the second alternative is (ii) a plea bargain-like institution, called *criminal transaction* (“*transação penal*”). This occurs between the prosecutor and the perpetrator before a criminal prosecution is initiated. The prosecutor may propose to the perpetrator the immediate application of a non-imprisonment sentence, in return for not initiating the criminal prosecution. If the perpetrator accepts the proposal, the judge will apply a penalty restricting rights or a fine, and the case will be closed.

Both the transactions with the victim and with the prosecutor take place before initiating a criminal proceeding. Once the criminal action has been initiated, there is one more chance of avoiding the continuation of the process for the cases covered by the competence of these Courts: the (iii) *conditional suspension of the criminal proceeding*. The prosecution may propose this if he considers it adequate to the case and the judge will then set specific conditions (for example, damage reparation, giving account to the activities regularly to the judge, not going to certain places). The case remains suspended for a period of two to four years while the defendant submits himself to these conditions¹⁴.

Key to our discussion here, after the passage of Law 9099 physical injuries against women were being processed according to these mechanisms – i.e. subjected to the authorization of the victim to be prosecuted; with the possibility to end up with negotiation between perpetrator-victim, negotiation between perpetrator-prosecutor or conditional suspension of the case.

By the time of the discussion of the new Law against domestic violence there was strong dissatisfaction with the results of these mechanisms among activists and women heard in public

¹³ Brazilian criminal procedure provides (at least as of now, November 2011) for three modes of action: a) unconditioned public criminal prosecution, b) a conditioned public criminal prosecution, and c) a private criminal prosecution. In the first and second cases, the State itself (via the Prosecution Office) has the power to file a criminal procedure. However, in the second case, the State needs the victim to file a complaint in order to act.

¹⁴ Once the suspension term has expired and the defendant has complied with the terms of the imposed conditions, the criminal case is closed with finality. If the defendant does not comply with the conditions and/or if he is caught in a second violation of the law the suspension is revoked and the criminal procedure follows its ordinary track (in the latest case, he would have to face two processes).

hearings. They were seen as a trivialization of violence against women. First, symbolically, the Law 9.099 was formally addressed to *less offensive potential crimes*. Furthermore, there were many reported shortfalls about the conduct of the cases in the judiciary: the conciliation was made poorly; women were not heard and were pressured to conciliate; women were subjected to the pressure of the aggressor to unauthorize the prosecution; and – what became most popular – most of the negotiations between aggressor and prosecutor resulted in the payment of menial fines or the donation of a “basket of goods” (a basket with food and essential items) to charity organizations.

To illustrate this scenario, we bring the statement of two key public figures in the process of the passing of the Law:

When we analyze 10 years of the functioning of the Special Courts we see that the results reinforce impunity, giving path to re-incidence and the aggravation of the violence – 90% of the cases are dismissed or ended up in negotiation with the public persecutor.¹⁵

For me impunity was associated with two things: first, there was no commitment from the Brazilian state government to fight domestic violence. The scenario regarding the fight against domestic violence in Brazil can be divided into two eras: before and after Maria da Penha Law. For the first time we have specific legislation that states that the Government must seek a solution to this problem, for it affects the whole of Brazilian society. Second, the question of the penalties applied. More than the morality, the question that remained in the imaginary of the people was the ‘basket of goods’ associated with the alternative penalties. The cases were treated like boy’s fights that end up in sending them to sweep the sidewalk.¹⁶

The final text of the Law expressly mentions that domestic violence cases would no longer be judged by the *Small Criminal Claims Courts* and would not follow the determinations of the special procedure, among the alternatives paths mentioned above. This determination (established in the Article 41) was the most controversial one during the passing of the Law and is until today also one of the most controversial issues in the enforcement of the Maria da Penha Law. Some judges questioned the constitutionality or applicability of provisions included in the Law – in particular the above mentioned article 41 relating to the repeal of the alternatives – and these discussions have reverberated widely within the public sphere.

¹⁵ Congresswoman Jandyra Feghaly, responsible for presenting the new Law in the Parliament.

¹⁶ Ministry Nilcéa Freire in charge of the Secretariat of Women Affairs during passage of the Law.

At this point, it is important to clarify why the unconstitutionality claim can become an instrument that creates obstacles to putting the Law into effect. As said before, in Brazil the judicial review model allows any judge or court, by means of diffuse constitutional control, to make a judgment of unconstitutionality to nullify the effect of a law. According to this model, every judicial authority can perform this diffuse constitutional control, as it allows arguments about the constitutionality of a provision in relation to a particular case. Here, the effects of the decision are limited to that case.

The other mechanism of constitutional review is called “concentrated control” and is done by the Federal Supreme Court in abstract terms, that is, not addressing a specific case, but bringing the abstract norm itself into discussion. The decision permanently removes the issue from diffuse constitutional control, declaring a particular legal provision to be unconstitutional, or declaring that its constitutionality is conditional on a particular interpretation, standardizing the interpretation of the law so that it complies with particular provision(s) of the Constitution¹⁷. The effects of the decision apply to all cases brought to the Judiciary for that moment on.

This double control model makes the Brazilian judiciary systematically implicated in debates on the constitutionality of laws, which may result widespread instance of first instance judges and appellate courts not enforcing a piece of legislation approved by Parliament on account of unconstitutionality.

In light of these specific characteristics of the Brazilian judicial review system of constitutional control we researched both the Appeal Courts (the non-concentrated constitutionality claims) and the two Supreme Court decisions, exercising the concentrated control of constitutionality, which in principle, would put an end to the discussions about the Constitutionality of Maria da Penha Law when they declared it constitutional.

¹⁷ For the purposes of this study, among the different ways to promote a concentrated control of constitutionality, the Direct Action for the Declaration of Unconstitutionality (ADI) and the Declaratory Judgment Action of Constitutionality (ADC) stand out. The ADI aims to declare, in the abstract, the unconstitutionality of a federal or state law or normative act, while the ADC aims to declare, in the abstract, the constitutionality of a federal or state law or normative act (Art. 102, I, of the Brazilian Constitution). ADI is also used to confer upon the federal or state law or normative act a specific interpretation “according to the Constitution,” a hermeneutical mechanism used by judges in Brazil through which the rule in question is given an interpretation consistent with constitutional provisions. Use of this resource is limited. In the case of the ADI and the ADC, those with the power to propose the action are: a) the President of the Republic, b) the Senate Board, c) the Board of the House of Representatives, d) the State Senate Board or the Board of the House of Representatives of the Federal District, e) the Governor of the State and the Federal District, f) the Attorney General, g) the Federal Council of the Brazilian Bar Association, h) a political party represented in Congress, and i) a trade-union confederation or national professional association.

Regarding the Appellate Courts, we have collected and analyzed all the penal rulings regarding this statute (from 2006 to 2009) handed down by nine State Appeal Courts in Brazil. We examined 1822 decisions altogether and the results bring some important data forward in evaluating how Courts are reacting to the new legal instrument. It is important to mention that the non-concentrated control can also be made by judges in the first instance of the Judiciary and these are not covered by this research. Also, if none of the participants of the case appeals, the decision will not go up to the Appeal Court, where we concentrated our data collection efforts. This means that we are not able to present all the cases of non-application of the Law, only the ones that reached the Appeal Courts we chose to research.

3 Results of the empirical research on the State Appellate Courts

This research analyzed the decisions regarding the enforcement of the Maria da Penha Law, from 2006 to 2009, selected from the digital collections available online of the following State Appellate Courts: Acre, Bahia, Mato Grosso do Sul, Paraíba, Pernambuco, Rio de Janeiro, Roraima, Rio Grande do Sul and São Paulo.¹⁸ These decisions have been analyzed regarding many different aspects of the Law, one of which is its constitutionality. In the future, we hope that an analysis of the decisions will provide a general map of the application of the Maria da Penha Law in the different regions of Brazil.

Using these decisions, we will present a general picture of the resistance to the Maria da Penha Law on account of its constitutionality. Among the decisions that were analyzed, 272 address the constitutionality of the Maria da Penha Law (approximately 15%). The data below focuses solely on how the judges of the Appellate Courts of the different Brazilian states addressed and decided on the constitutionality of the Maria da Penha Law.

Although it is not a low occurrence, we could see that in the majority of cases in which the constitutionality of the Law was challenged the arguments were more frequently dismissed by the State Appellate Courts. In just six cases the Appellate Court felt that a provision was unconstitutional. In 14 rulings, an unconstitutionality claim was made and the State Appellate

¹⁸ The selection of judicial decisions via digital collection has some limitations, the main one being the uncertainty about the availability of all the decisions regarding the terms sought. Although one cannot draw conclusions about the universe of cases actually tried, these are the cases that the state appellate courts have made available to the public.

Courts did not accept the unconstitutionality claim but ordered an “interpretation in accordance with the Constitution” invalidating only one of its articles.

We also observed 17 rulings in which the judges declared their personal stance on the unconstitutionality of the norm but ended up deciding for the constitutionality of the Law. In 15 of these cases, the judges acted this way out of a submission to the hierarchy of the courts (even though sometimes they were not technically attached to the superior court’s position). In one case, the judge defended the unconstitutionality of the Law but decided to enforce it on the grounds that such an interpretation will be more beneficial to the defendant. The positions in which the Law is considered unconstitutional are not only a minority but also only defended by a few judges, located in specific states, as we will see following.

Apart from the outcome of the trials, it was important to survey the arguments used to discuss the constitutionality of the Law, as it gives a scenario of the reactions towards the law in the Judiciary. In observing the unconstitutionally claims we found that there were mainly two themes being addressed: i) the questioning of the law in its entirety, for giving special treatment to women; ii) the questioning of the law, as it prohibits the application of the alternatives paths to criminal procedure established in the Law 9.099.

In terms of the positions adopted by the justices on these issues, we could see the following nuances: a) positions in favor or against the constitutionality of the Law, on the grounds of the items relevant to each of the issues raised above (and often involving more than one of them); b) positions that do not question the Law entirely but consider it constitutional, with the exception of a few provisions. In this case, the judge supports an interpretation of the Law in accordance with the Constitution (normally excluding only the articles deemed as problematic); c) positions of justices who argue that it is unconstitutional but submit to the hierarchy of the courts (and therefore apply the Law, but register their personal disagreement towards it); d) positions of justices who assume that the law is constitutional but ultimately do not offer any grounds for their position (they simply apply the Maria da Penha Law, without issuing an opinion on the issue of constitutionality or taking it for granted, violating thus the principle that any judicial decision should be justified). The arguments for or against the Constitutionality of the Law or some of its provisions will be systematized and displayed bellow. We will also address the position of the justices who apply an interpretation according to the Constitution, as it occurred in the cases in which the exclusion of the Law 9.099 was being questioned.

We cannot assert that the arguments used to defend such positions have been exhausted, but the following study covers most of them. Of interest, many of the arguments raised by this research have been reproduced in the cases regarding the constitutionality of the Maria da Penha Law brought to the Federal Supreme Court, as we will discuss in the next item.

3.1 Questioning of the Law in its entirety, for giving special treatment to women

The argument most frequently raised against the constitutionality of the Maria da Penha Law in the cases we analyzed consists of the idea that giving special treatment for female victims of domestic violence is unconstitutional as it violates the principle of gender equality provided for in the Brazilian Constitution, which establishes that “men and women have equal rights and duties.”

This position is seldom echoed by the justices, who, in most cases, justify the special treatment promoted by Maria da Penha Law based on the fact that historically women have been the predominate victims of domestic violence, as well as on the large number of women still being assaulted.

In this sense, it is common for justices to make reference to the existence of statistics and surveys which “show that the woman is the main victim of domestic violence,” which would justify “special protection by Criminal Law” in order to minimize inequalities. As stated by justice Laís Rogéria Alves Barbosa, “the rules of experience have shown that, remarkably, the number of women who suffer injuries of every kind inflicted on them by their partners is significant and growing, especially among the neediest in society.”¹⁹

An argument has therefore been developed in the sense that the formal equality guaranteed by the Constitution is not sufficient, and that it should be ensured in the actual legal practice, through legislation providing for concrete measures. It thus justifies the constitutionality of the Law precisely to the extent that it would promote material equality between men and women.

Some judges even claim that we are standing before a situation of “affirmative action in favor of women victims of domestic violence who urgently needed appropriate protection

¹⁹ Decision: Brazil, Rio Grande do Sul State Appellate Court, 2009. Criminal Appeal 70029413929, justice rapporteur Laís Rogéria.

instruments, with the intention to curb such violence and restore the material equality between the sexes.”²⁰

A variation of this argument can be seen in the decisions that do not use the term material equality directly but which claim that Maria da Penha Law is constitutional due to Brazilian reality and history, in which thousands of women were and are victims of domestic violence.

Many decisions also raise the argument that the Maria da Penha Law is constitutional because the state would have the power to “establish laws to protect groups of vulnerable individuals on the basis of gender.”²¹ The protection of the elderly and of children and adolescents, besides discrimination based on race, color, ethnicity or religion, are cited as constitutional examples of the “legislating power of the state to create laws establishing special treatment for minority groups of citizens.”²² According to justice Elba Aparecida, the State, in protecting women, would be addressing her “gender condition” and assisting the family by creating mechanisms to prevent violence in its relationships, as provided for in the Constitution.

The protection of the family is a recurrent argument to sustain the constitutionality of the Maria da Penha Law. The Law would put into effect the aims of the Constitution itself, to the extent it would bring the protection of the family and of each individual within the family into reality, once “the practice of domestic violence entails, as a rule, harmful consequences for the entire family institution,” representing also direct violation of human dignity, provision also contained in the Constitution.²³

Still other decisions make explicit references to the international treaties to which Brazil is a party, stating, for instance, that “ultimately, the Law was created to comply with the International Convention underwritten by the Union itself.”²⁴ The Law thus does and should incorporate into domestic laws the international norms issued in favor of women to prevent and punish violence against women.

²⁰ Brazil, Rio de Janeiro State Appellate Court, 2010. Criminal Appeal 200905003254, justice rapporteur Siro Darlan de Oliveira.

²¹ Brazil, Rio Grande do Sul State Appellate Court, 2009. Criminal Appeal 70030827380, justice rapporteur Elba Aparecida Nicolli Bastos.

²² Brazil, Rio Grande do Sul State Appellate Court, 2009. Habeas Corpus 70031748676, justice rapporteur Elba Aparecida Nicolli Bastos.

²³ Brazil, Mato Grosso do Sul State Appellate Court, 2009. Criminal Appeal 2009.025378-7, justice Dorival Moreira dos Santos.

²⁴ Brazil, Rio Grande do Sul State Appellate Court, 2010. Criminal Appeal 70028874113, decision of justice Jaime Piterman of the Rio Grande do Sul Appellate Court.

If the majority of arguments claim that the legislator may enact laws that establish distinctions seeking to ensure material equality between men and women, there are disagreements regarding this claim. The following decision is an example of the opposite position:

“First, the constitutional text is permeated with bans on discrimination, including that of gender, which is expressed as one of the objectives of the Federative Republic of Brazil, namely, to promote the good of all, irrespective of origin, race, gender, color, age and any other type of discrimination. Moreover, one of the basic rights and guarantees that the Constitution establishes is that legislators are prohibited from establishing differences between men and women, since article 5, item I, provides that men and women have equal rights and obligations under the Constitution. Common law therefore should not go against constitutional principles even if filled with good intentions. Such discrimination is misplaced, because men can also be victims of domestic violence. In fact, this understanding is fully consistent with reality, since psychological violence also qualifies as a crime, a fact that receives widespread attention in the media.” “According to studies conducted by sociologists at USP, affirmative action actually encourages discrimination.”²⁵

Although numerically insignificant, the influences and debates that decisions such as these can cause, both by influencing other decisions and by moving the debate into the public sphere, are not measurable or predictable. Moreover, the decision whose passage was quoted above is emblematic because it raised arguments that emerged in the early discussion when the law was enacted.

It should be noted that the group of judges including above justice, the Second Criminal Session of the Mato Grosso do Sul State Appellate Court, raised an unconstitutionality claim that was tried by the whole Appellate Court in January 2009. The claim intended the recognition of the unconstitutionality of Maria da Penha, alleging that “this law is ineffective, a disseminator of injustice, antisocial, reactionary and a disguise for social revenge.” The Full Court's decision, however, affirmed the constitutionality of the Law. It argued that it was created in light of a factual situation of inequality and of the perception that there has been an alarming increase in violent situations, a scenario in which victims “could not find a specific remedy able to effectively protect them and restrain the particular crimes.”²⁶ As we will see, this decision settled

²⁵ SOARES; BRAGA; COSTA. O dilema racial brasileiro: de Roger Bastide a Florestan Fernandes ou da explicação teórica à proposição política, p. 51. (Brazil, State of Mato Grosso do Sul Appellate Court, 2007. Appeal Stricto Sensu 2007.023422-4, justice rapporteur Romero Osme Dias Lopes). Although it seems that the very “studies conducted by sociologists at USP” do not point to the conclusion reached by the Justice. In fact, the quoted article does not say anything about the consequences of affirmative action.

²⁶ Mato Grosso do Sul State Appellate Court, Appeal Stricto Sensu 2007.023422-4/0002.

the application of the Law in that State Appeal Court, although many justices continued to express their personal position against the Law.

3.2 Questioning of the Maria da Penha Law, as it prohibits the application of alternative paths for criminal procedure (Law 9.099/1995)

Another main issue raised in these cases refers to the constitutionality of Article 41 of the Maria da Penha Law, which prohibits the enforcement of Law 9.099 in cases of domestic violence against women. That article would supposedly cause “injury to the constitutional principles of egalitarianism and equality between people of different genders and between spouses, and would be an affront to the principles of reasonableness and proportionality.” The Constitution, in prescribing that “all are equal before the law, without distinction of any kind” would have prevented “normative distinctions” to be established in the laws under the Constitution. According to a justice from the Appeal Court of Rio de Janeiro:

It is not just about prohibiting discrimination. People also need to be protected against it. What legal argument is capable of explaining why, if a light bodily offense is committed against a child or an elderly person and classified as a *less offensive potential* offense, the offender can legitimately use the various “depenalizing” measures under Law 9.099/95, whereas this possibility is denied if the same crime is committed against a woman? Would a woman always and necessarily appear to be at a disadvantage, in order to justify such a discrepancy of treatment compared to those who also received differentiated protection from the legislator?²⁷

As one can see, this argument includes the formalist anti-discrimination traits of the previous argument regarding the prohibition of gender distinction, but it brings something new: a criticism of the position of women according to the Law.

Most decisions, however, consider Article 41 and the impossibility of applying the alternatives measures of Law 9.099 to be constitutional. In order to justify that there is no violation of the principle of proportionality due to the prohibition expressed in Article 41 there is constant reference to the intention of the legislature to effectively rule out the “depenalizing” measures in cases of domestic violence against women. They intended to change the context of

²⁷ Brazil, Rio de Janeiro State Appellate Court, 2009. Criminal Appeals 6208/2008 and 3144/2009, Adilson Vieira Macabu.

violence committed within the family by proposing “changes that could effectively contribute to terminate, or at least drastically reduce it.”²⁸

There is here a reference to the previous scenario of ineffectiveness of the alternative measures in face of the seriousness of the crime. Thus, it is understood that the Maria da Penha Law, in prohibiting the application of the alternative measures of Law 9.099, aimed to punish more severely the crime of domestic violence against women. Some judges even argue that such a prohibition is essential to the effective protection of women, stating that if the contrary view prevailed, the Maria da Penha Law would become ineffective, precisely because its differential lies in its prohibiting the “depenalizing” measures.

In terms of prohibiting the application of Law 9.099, some judges developed a somewhat intermediate position: they do not view the Maria da Penha Law as unconstitutional on a whole, but they create an exception to the enforcement of Article 41. They consider that the Law 9.099 could be partially applicable to domestic violence cases.

In this sense justice Carlos Eduardo Contar states that the constitutionality of the Maria da Penha Law lies in the acknowledgement that some mechanisms of Law 9.099 would not be sufficient to protect victims of domestic violence, so that only these provisions should not be applied and not Law 9.099 as a whole:

Actually, Law 11.340/06 can only prohibit the application of Law 9.099/95 regarding the benefits that are substantially detrimental to the protection given to victims of domestic violence. It is not enough if the benefits are simply a part of Law 9.099/95; rather, it is essential that the “depenalizing” or beneficial measure display a violating nature towards the Constitution – in other words, equality in protecting the family – in order for it not to be applicable to an actual case. (...) However, the procedural measure known as diversion program in no way goes against the protection of the person subjected to domestic violence, because it has a different instrumental aspect, as it is consistent in its fulfillment of certain requirements and its compliance with certain conditions, without which the prosecution can proceed.²⁹

Under these arguments, the Court of Appeals thus applies the Maria da Penha Law together with some institutes of Law 9.099 according to the so-called “interpretation according to the Constitution.” This position was adopted by the justices of the Mato Grosso do Sul State

²⁸ Brazil, Mato Grosso do Sul State Appellate Court, 2010. Criminal Appeal 20100178957, justice rapporteur Manoel Mendes Carli.

²⁹ Brazil, Mato Grosso do Sul State Appellate Court, 2009. Criminal Appeal 2008.022719-8, justice rapporteur Carlos Eduardo Contar.

Appellate Court, even after the Full Court decision we mentioned above declaring that the Law was constitutional. It was made possible because it is not exactly a claim of unconstitutionality.

3.3 Positions of submission to the hierarchy of the judiciary; and decisions without any justification

In some decisions, the justices ended up not deciding the issue of the constitutionality of the Law, claiming submission to the hierarchy of the Courts, even though they are only bound to the higher trial courts when the Federal Supreme Court decides by means of concentrated control (the trials before the Supreme Court that are going to be discussed later were ruled only after these ones) or when there is a Full Court decision (as the one we mentioned above). This seems to be the nature of the cases in which the judges raise the following arguments: i) that the Federal Supreme Court has already decided the Law's constitutionality, ii) that the Law has not been ruled unconstitutional by the Federal Supreme Court or iii) that it has been tried by the respective Full Court.

Some justices explicitly agree with arguments about the unconstitutionality of the Maria da Penha Law but end up deciding on the constitutionality of the Law,³⁰ as this position would be in line with the majority position adopted by courts. However, in several of these cases, the judges are keen to explicitly express their personal position against the Law and its alleged inconsistency with the constitutional text.

At the Mato Grosso do Sul State Appellate Court, justice Romero Osme Dias Lopes on five occasions stressed that he considers the Law to be unconstitutional, but his position would be irrelevant given that the State Appellate Court fully recognized the constitutionality of the Law. Notably, the justice, who had already decided on the unconstitutionality of the Law as explained in section 3.1, was forced to change his opinion after the dismissal of the Unconstitutionality Claim at the January 2009 trial before the Full Court.

Even so, the justice makes a point of replicating the previous trial in which the Law was ruled to be unconstitutional, for “disrespecting one of the objectives of the Federative Republic of Brazil (Article 3, Item IV) and harming the principles of equality and proportionality.”

³⁰ It is important to know that in Brazil, even in collective decisions as in the Appeal Courts and Superior Courts, all justices express individual opinions in the session.

He goes on to criticize the criminal sphere as a solution to the problem. According to his decision, with the exception of cases where there is sexual violence or serious injury, “the female victim of domestic violence does not want her partner or husband to be arrested, much less convicted as a criminal.” So the solution would not lie in criminal law “but in the creation of public policies committed to restoring the mutual respect that must prevail within the family.” In his opinion, convicting the aggressor “only worsens the family relationship,” so that the woman's will is that the State intervene to “appease the family problem” and cause the attacks to cease, but without jailing the offending partner.

Furthermore, justice Manuel José Martinez Lucas of the Rio Grande do Sul State Appellate Court also justified his decision in favor of the constitutionality of the Law solely because, “strangely,” he says, this is the position of the overwhelming majority. For him, this is a provision that goes against the “essential right to equality between men and women” when one considers that the “constitutional item itself provides that only the Constitution can regulate this equality and only when the Constitution allows can men and women be treated unequally.”³¹ He states that he finds himself “forced” to change his position once he recognizes that he is “virtually alone” and he justifies his change “as a matter of judicial policy and to avoid an innocuous discussion.” He also raised the argument that the Law must be applied by the judges and Appellate Courts of the country if the Federal Supreme Court, the “guardian of the Constitution,” did not declare it to be unconstitutional.

These positions are few but emphatic. In terms of measuring the resistance of the judiciary, the results show that there is not widespread resistance to the application of legal provisions of the Maria da Penha Law in the Appeal Courts. The focus of resistance was concentrated in some Courts and in particular judges.

The attention in the public sphere regarding this judicial resistance probably is most likely a reaction to the position primarily located in trials in first instance and thus could not be addressed by our research in the Appeal Courts. Situations of non-enforcement of the law (or parts of the law) frequently narrated can appear and end in the first instances when no one was interested in appealing. Since the victim is taken out of the criminal procedure, it is most likely to happen when the prosecutor, defendant and judge come to an agreement about the decision. In

³¹ Brazil, Rio Grande do Sul State Appellate Court, 2009. Criminal Appeal 70029189206, judge rapporteur Manuel José Martinez Lucas.

any case, the fact that these positions are not reflected in the Appeal Courts means that there have not been a formation of a jurisprudential tendency against the Law.

Nevertheless, for many reasons – among them dissident opinions and ongoing resistance in first instance trials – we can consider the discussion still open in the judiciary. In this scenario the study of arguments exposed in the rulings are important not only to give a broad idea of the paths the judicial discourse against and in favor of the Law have been articulated, but also how it can be reopened.

Furthermore, the different reasons of the debate are interesting because they show themselves with many nuances and ambivalences and in a certain way they also show how ideas regarding gender equality face imperfect reception in the judiciary.

As we saw, most of the trials concluded about the constitutionality of the law, but the arguments showed important variations. Regarding the claim questioning the break of the equality principle, we saw that the arguments regarding the material equality and the historical and factual situation of women were of great importance. Some judges constructed the argument in a different way, framing the issue within the “gender condition” and the need of protection of minorities. Many decisions however validated the law not because of the situation of the women, but because of the protection of the family. In practical terms, all the reasons led to the confirmation of the Law, but there is a risk to the feminist debate to subsume the problem of domestic violence as a matter of protecting the family. Put in these terms, a public policy to fight domestic violence against women becomes distant itself from questioning the basis of domestic violence in patriarchy.

On the other hand, not all the positions questioning the Law could be taken as anti-feminist. As we saw, some of the positions that questioned the repeal of the alternative criminal measures were worried about discovering better solutions to break the cycle of violence. Others were worried about locking women in the role of fragile agent that has to be protected and which has no autonomy to make decisions about their own lives. These arguments show that the debate over the resistance to the law cannot be explained in a simplistic way pro-/anti-woman frame and that the efforts to enforce the Law should not prevent a deeper reflection about the solutions designed by the Law.

After this presentation of the main arguments discussed in the State Appellate Courts, we will analyze the trials before the Federal Supreme Court that happened in 2012. In principle, these decisions would end the discussions about the constitutionality of Maria da Penha Law.

4 The Maria da Penha Law in the Federal Supreme Court

As mentioned earlier, since its enactment in 2006, the Maria da Penha Law has been the subject of discussions in the Federal Supreme Court on several different occasions. *Habeas Corpus* 106212 (BRAZIL, 2011), tried by the Federal Supreme Court in March of 2011, already addressed the constitutionality of Article 41 of the Maria da Penha Law. The Federal Supreme Court unanimously considered constitutional Article 41 of the Maria da Penha Law.

The issue, however, was examined in an incidental manner and did not have general effect, meaning it could be used as an influential precedent but would have no direct enforcement. The uncertainty regarding the application of the law was so strong that President Lula, supported by the Special Secretariat for Women, decided to start two actions of concentrated control of constitutionality in the Supreme Court to get a formal declaration of its constitutionality and settle the conflicts involving the application of the Law. In December 2007, the Presidency submitted Declaratory Judgment Action of Constitutionality 19 (BRAZIL, ADC 19, 2007b), and in 2010 the Attorney General's Office filed Direct Action for the Declaration of Unconstitutionality 4424 (BRAZIL, ADI 4424, 2010e).

In discussing the suitability of the action, the plaintiff described the negative scenario surrounding the application of the Law, pointing to decisions by the above mentioned State Appellate Courts of Mato Grosso do Sul (TJMS), Rio de Janeiro (TJRJ) and Minas Gerais (TJMG). Decisions reaffirming the constitutionality of the Law were also presented, thus highlighting the evident legal controversy that gave rise to the ADC.

ADC 19 intensely mobilized the public, and rapporteur Minister Marco Aurelio Mello allowed for three *amici curiae*³² of different civil society organizations,³³ which were mobilized

³² Amicus curiae is an institution that allows the representation of the opinions of civil society organizations in cases of concentrated control of constitutionality. It allows those who are not actually part of the case to participate in the case. Requirements for admission include: the relevance of the matter and the representativeness of the applicant (Article 7, Paragraph 2. Law 9.868/99). Per the understanding of the Federal Supreme Court, the institute aims to ensure greater legitimacy to the decision and to allow for a more democratic debate.

to reaffirm the constitutionality of the Law and its key role in fighting violence against women, and in making Brazilian law conform to international provisions.

Still within this context of doubt as to the application of the Law, and before the Supreme Court's final decision regarding the ADC, the Attorney General's Office of the Republic filed another action in 2010, ADI 4424, again demanding that the Federal Supreme Court express its position on the interpretation of the Maria da Penha Law.

This action petitioned for "Articles 12, I, 16 and 41 of Law 11.340/2006 to be interpreted according to the Constitution." The key articles to be declared constitutional in the ADC and in the ADI requests were not the exact same ones, suggesting that new controversies came to light in the application of the Law. The ADI's main point was to get declared that the enforcement of Law 9.099 and any of its provisions in relation to crimes committed under the Maria da Penha Law should be prohibited, especially the proposition regarding the need of the victim consent as a prerequisite to prosecute crimes of bodily injury.

ADC 19 was filed approximately three years before ADI 4424, and both were tried simultaneously by the Federal Supreme Court in February of 2012. Both actions were upheld, *i.e.* ruling the Maria da Penha Law constitutional: ADC 19 by unanimous vote and ADI 4424 by majority vote (with Chief Justice Cezar Peluso dissenting).

Justice Marco Aurélio de Mello was the rapporteur and voted in favor of the law in both actions. The first set of arguments analyzed by justice Marco Aurélio concerned the constitutionality of Article 1 of the Maria da Penha Law. Marco Aurelio posits that one cannot consider the Maria da Penha Law in isolation of the Constitution and international treaties, which allow for positive discrimination intended to meet the peculiarities of disadvantaged groups and to compensate for inequalities arising from long held cultural biases. In his view, there was no merit to claims of unconstitutionality regarding this Article because, in order to curb domestic violence, a differentiation based on the gender of the victim is not a disproportionate or illegitimate measure, as women are vulnerable when it comes to violence occurring within the family. According to him, attacks on women are significantly more numerous than those suffered by men, and when the latter happens, it is not based on cultural and social values and the usual

³³ Amicus curiae briefs were received from the Federal Council of the Brazilian Bar Association (OAB), CLADEM/Brazil (the Latin American and Caribbean Committee for the Defense of Women's Rights), along with the following organizations: THEMIS (Legal Advice and Gender Studies), Ipê (Institute for the Promotion of Equality), Instituto Antígona, and IBDFAM (Brazilian Institute of Family Rights).

difference in physical strength between people of opposite sexes. The justice also takes into account the fact that the Maria da Penha Law is in line with international treaties to which Brazil is a signatory.

In this sense, Marco Aurelio states that the Maria da Penha Law was enacted taking into consideration the invisibility of victims who suffered from violence in their own homes. The law would mitigate the situation of social and cultural discrimination in the country and would be required for as long as this situation persisted. He also points out that other normative acts were passed in order to protect those groups in need, such as the “Estatuto da Criança e do Adolescente (the Statute of Children and Adolescents – ECA) and the “Estatuto do Idoso” (the Statute of the Elderly).

As for ADI 4424, Marco Aurélio believes that a discussion pertaining to this action should take data from real life into account. He states that in the vast majority of cases, the victim withdraws the previously made complaint against the aggressor, quoting a statistic that indicates that complaint withdrawals occur in up to 90% of the cases. He further argues that withdrawing a complaint does not constitute an expression of the free will of the victim but rather an expression of her hope that the abuser will evolve and no longer assault her. However, according to him, in most cases the assaults actually escalate, since the mechanisms that could keep the offender from repeating this type of behavior have been removed.

Marco Aurelio argues that establishing that such actions be unconditional would not cause the State to infringe upon the will and autonomy of women, as this would not be a form of guardianship but rather of protection. Moreover, to have the woman who filed the complaint decide on when to initiate prosecution would mean to disregard the fear, the psychological and economic pressure, and the threats and the lack of power equality due to historical and cultural conditions. This, according to the opinion of the justice, contributes to further reducing the protection of the victim and to the perpetuation of the situation of violence, discrimination and assault on human dignity.

Marco Aurélio thus voted for ADI 4424 to be upheld and was of the opinion that the non-application of Law 9.099/95 to crimes to which the Maria da Penha Law applies is constitutional.

In terms of ADC 19, the other justices were of the same opinion as the rapporteur and contributed brief observations that were very much in line with Marco Aurélio’s arguments. One of the arguments used repeatedly is that of material equality, formulated as treating unequals

unequally. Several justices (including Rosa Weber, Carmen Lúcia, Ricardo Lewandowski and Ayres Britto) contend that the Maria da Penha Law is characterized as an affirmative action or policy on behalf of women, justified due to the existence of social inequality. Also meaningful is the fact that some justices defended the constitutionality of the Maria da Penha Law or any of its provisions by referencing the protection of the family provided for in the Constitution (justices Fux and Lewandowski). Reference to international treaties and conferences were also made.

Justice Carmen Lúcia held a position that openly put in question in a more broadly way the role of women in Brazilian society. She reiterated the need to seriously address the problem of domestic violence and noted that the very existence of the action under trial meant that the struggle for the equalization and dignity of women was far from over. She argued that historically, physical violence within the family has annihilated generation after generation of women, and the need for a law such as the Maria da Penha Law was a reminder of the continuing struggle for equality. She ended her opinion with the consideration that women became unequal in society through historical social processes and therefore have to be treated differently. In her view, “an average white Western man will never be able to write or think about equality as if he were one of us – because prejudice is expressed through how one is looked at.”

The justice states that even though female justices in the STF are said to not suffer any prejudice, such is not the case: although they do not suffer as much prejudice as other women, there are still those who think that the Supreme Court is no place for a woman. Women, including herself, despite holding an official title, are looked at differently, and are seen as usurpers of man's place. Nowadays discrimination is not as obvious, but that does not mean it does not exist. She contends that the fact that there are women who still suffer from violence concerns all women and is not an individual matter. In this regard, she differs from justice Fux, who stated that women who suffer domestic violence are not the same as those who “lead an ordinary life.”

Justice Cezar Peluso presented another an interesting variation. He defended the constitutionality of the Maria da Penha Law; i.e., he voted to uphold ADC 19, as he concluded that “the Maria da Penha Law, in fact, represented a normative strategy of the Brazilian legal system to apply, in actuality, the principle of equality rather than to violate it.” However, he was the only justice to vote against ADI 4424. The justice clarified that his stance should not be understood “merely as an opposition to the majority, but rather as an alert to the legislator.”

Peluso explicitly refuted the argument brought forth by justice Lewandowski regarding a possible flaw in the will of the offended woman at the time of filing a complaint, arguing that this cannot be taken as a standard. He emphasizes the importance of “the exercise of the substantial core of human dignity which is to be responsible for one’s own destiny.” According to the justice, many women do not report offenders by choice. Thus, the concept of having to file a complaint would have been provided for in the assumption that “human beings are characterized precisely by being the subject of their own history and by their ability to trace their own paths.”

The justice states that the legislator should consider some of the risks that could arise after the Supreme Court’s decision to consolidate the argument regarding the unconditional nature of the action: the first is the possibility that women would feel intimidated, as they would not be able to influence the course of the criminal action or halt it; the second risk is the possibility that the offender is sentenced, leading to unpredictable consequences within the family in cases where a peaceful coexistence between a woman and her partner is reached.

Justice Peluso also took into account the fact that an unconditioned public action could trigger further violence on the part of the offender. In the justice’s opinion, public knowledge of the criminal action would not curb the violence; rather, it could increase the likelihood of its occurrence, since the attacker would now be subject to a situation that escapes the possibility of intervention; i.e., that is independent of any change of behavior towards the victim. In the justice’s view, the judiciary cannot bear the risk of this decision, which would result in a loss of the “perception of the family situation.” He points out that the legislator sought to reconcile values: the protection of women and the need to maintain the family situation in which they are involved – one that takes into account not only the condition of the woman or her partner but also that of the children and other relatives.

With the dissenting opinion of the justice Peluso, the Federal Supreme Court formally declared, by majority vote, the constitutionality of the Maria da Penha Law. The dissenting opinion expresses an ambivalent discourse regarding women. From one hand, he states the importance of recognizing women’s autonomy and the risks of reifying them in the role of a victim. But from the other hand, he also affirms the importance of protecting of the family.

In analyzing this decision, it was interesting to note that a number of arguments, described in this paper, which were used by judges in the Appellate Courts of several Brazilian states were

also used by the justices of the Federal Supreme Court, especially those who advocated for the constitutionality of the Maria da Penha Law.

5 Conclusion

After the assessment it is possible to affirm that three main questions have substantially contributed to the uncertainty and controversy concerning the Maria da Penha Law: (i) its framing regarding the protection of *women* and not domestic violence in general terms, which is deemed unconstitutional by some judges that claim equal protection for men; (ii) the controversies regarding the more severe punishment (and the impossibility of applying alternative measures) to behavior related to domestic violence against women; and (iii) the impossibility of judicial composition between author and victims and the lack of discretion of female victims of domestic violence to decide about the continuation of the criminal case.

In diagnosing the application of the Maria da Penha Law, we can argue that there was no widespread resistance in the Appellate Courts to the implementation of the Maria da Penha Law due to its alleged unconstitutionality, nor the formation of a strong trend within the courts supporting this thesis.

We noticed that on the whole resistance to applying the Law is tied most directly to the question of “depenalizing measures” provided for in Law 9.099. This means that in most cases where the State Appellate Court somehow resists the application of the Law, the discussion is focused on the adequacy of a greater punishment for the offender and not on the existence itself of special mechanisms to protect women. Furthermore, these positions are issued only by some courts in few Brazilian states.

Although the decision in favor of the constitutionality of the Maria da Penha Law has prevailed, it is worth mentioning that in every Appellate Court there was at least one justice who defended the unconstitutionality of this law.

However, as mentioned before, the fact that this research does not cover the trial courts in first instance, the very existence of positions contrary to the Maria da Penha Law and the possibility that these decisions may increasingly influence other courts do not allow us to overlook or minimize this discussion. These facts lead us to conclude that one cannot assume that

the debate over its constitutionality was over in our courts before the trial of ADC 19 and ADI 4424 by the Federal Supreme Court. In declaring the constitutionality of the Maria da Penha Law and some specific provisions (such as Article 41), the recent Federal Supreme Court decision (February 2012) confronted and neutralized the interpretative disputes regarding the constitutionality of the Law. However, this does not imply the elimination of controversies surrounding the Maria da Penha Law in Brazilian courts. This dogmatic legal debate has not been concluded. There is a need to monitor which disputes will arise as this debate is redefined after the Federal Supreme Court decision.

It is important to mention for example what is currently taking place in the Trial Courts, where domestic violence cases are reportedly being still tried via Small Criminal Claims Courts. This may very well be occurring without any of the parties, dissatisfied with the outcome, taking the case to the Appellate Court.

Furthermore, it should be emphasized that this study focused on the resistance to applying the Maria da Penha Law only with regard to the discussion of its constitutionality. Other disputes – also relevant to the delimitation of the scope of the law, such as, for example, the conditions for the enforcement of protective measures – and other dogmatic discussions – for example, should the Law be applied to same sex couples — should be considered in the evaluation of the implementation of the Maria da Penha Law in Brazilian courts.

In addition, most of the innovations brought about by the law involved the creation of new institutions (for example, the specialized police stations and court rooms), which is happening at a very slow pace. Maria Berenice Dias, in an article published a year after the enactment of the Law (DIAS, 2008), states: “Nobody is doing anything. The courts, with the shabby excuse that they lack resources, haven’t established special courts for this purpose. In most states there isn’t even a single one. When these exist, it’s just one, in the capital. Because of this, the situation is much, much worse than before.”

The conflicts regarding the application and implementation of the law also expose another crucial question regarding the relationship between social movement and the law. The creation of a statute on gender violence was an old demand of the Brazilian feminist movement – articulated nationally and internationally. The enactment of the law was of course considered a victory of this national and international mobilization, but the current challenges regarding its enforcement come now from the level of its application and its institutionalization in the national context. The

case clearly exposes the insufficiency of legal strategies involving only legislative reform and the urgency of considering and addressing the process of application the law by judiciary and the creation and equipping of structures in the administrative level.

It also tells us something about the relationship between the international and national public sphere. It is noticeable that the international mobilization is pretty much focused on determining changes in national legislation, and thus introducing international standards of protection in the national order. If this is an important step, the Maria da Penha Law case clearly shows that it is equally important to go deeper in dealing with the specific dynamics of the national contexts and institutions.

We hope that this research can shed some light to the institutional dynamics that influences the enforcement of laws. In this sense, it can be worthless to spend all the resources and energy in fighting for one specific statute if we do not have institutions to apply it.

References

Bibliography

DIAS, Maria Berenice. Um ano sem festa. **Folha de S.Paulo**, São Paulo, Sep. 22, 2007. Caderno principal, Tendências e Debates, p. A3.

FREIRE, Nilcéa. Lei Maria da Penha, já. **Folha de S.Paulo**, São Paulo, Aug. 7, 2008. Caderno principal, Tendências e Debates, p. A3.

GENRO, Tarso. Erradicar a violência contra a mulher, já. **Folha de S.Paulo**, São Paulo, Mar. 9, 2008. Caderno principal, Tendências e Debates, p. A3.

PARA especialistas, Brasil falha na aplicação de leis de proteção à mulher. **O Estado de S. Paulo** (online), Jul. 9, 2010. Available at: <www.estadao.com.br/noticias/nacional,para-especialistas-brasil-falha-na-aplicacao-de-leis-de-protecao-a-mulher,579003,0.htm>. Last visited: Oct. 24, 2011.

MIRAGLIA, Paula. Incapaz de prevenir, incapaz de proteger. **Último Segundo** (online), Apr. 24, 2011. Available at: <ultimosegundo.ig.com.br/colunistas/paulamiraglia/incapaz+de+prevenir+incapaz+de+proteger/c1300098763543.html>. Last visited: May 18, 2011.

RODRIGUEZ, José R. Zonas de autarquia nas decisões jurisdicionais: Estado de Direito, indeterminação e democracia. In: VILHENA, Oscar Vieira; DIMOULIS, Dimitri (Orgs.). **O Estado de direito e os desafios do desenvolvimento**. São Paulo: Saraiva, 2011.

_____. The Persistence of Formalism: Towards a Situated Critique beyond the Classic Separation of Powers. **The Law and Development Review**, v. 3, n. 2, article 3, 2010.

RODRIGUEZ, José R.; NOBRE, Marcos (Coords.). **Processo legislativo e controle de constitucionalidade**. Brasília: Ministério da Justiça SAL, 2010. (Projeto Pensando o Direito).

RODRIGUEZ, José R.; NOBRE, Marcos (Coords.). **Igualdade de direitos entre mulheres e homens**, Brasília: Ministério da Justiça SAL, 2009. (Projeto Pensando o Direito).

Judicial Decisions

BRASIL. Supremo Tribunal Federal. *Habeas Corpus* 106212. Available at: <<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=1231117>>. Last visited: Nov. 2, 2011.

BRASIL. Supremo Tribunal Federal. Ação Declaratória de Constitucionalidade 19 (em tramitação). Complaint available at: <<http://www.stf.jus.br/portal/peticaoInicial/verPeticaoInicial.asp?base=ADCN&s1=19&processo=19>>. Last visited: Sep. 4, 2010.

BRASIL. Supremo Tribunal Federal. Ação Direta de Inconstitucionalidade 4424 (em tramitação). Complaint available at: <<http://www.stf.jus.br/portal/peticaoInicial/verPeticaoInicial.asp?base=ADIN&s1=maria%20da%20penha&processo=4424>>. Last visited: Nov. 2, 2011.

BRASIL. Tribunal de Justiça do Estado do Mato Grosso do Sul. 2007. Recurso em Sentido Estrito 2007.023422-4/0002, desembargador relator Romero Osme Dias Lopes.

BRASIL. Tribunal de Justiça do Estado do Mato Grosso do Sul. 2009. Apelação Criminal 2009.025378-7, desembargador relator Dorival Moreira dos Santos.

BRASIL. Tribunal de Justiça do Estado do Mato Grosso do Sul. 2009. Arguição de Inconstitucionalidade em Recurso em Sentido Estrito 2007.023422-4/0002, Órgão Especial do Tribunal de Justiça.

BRASIL. Tribunal de Justiça do Estado do Mato Grosso do Sul. 2009. Apelação Criminal 2008.022719-8, desembargador relator Carlos Eduardo Contar.

BRASIL. Tribunal de Justiça do Estado do Mato Grosso do Sul. 2010. Apelação Criminal 20100178957, desembargador relator Manoel Mendes Carli.

BRASIL. Tribunal de Justiça do Estado do Rio de Janeiro. 2009. Apelação Criminal 6208/2008, desembargador relator Adilson Vieira Macabu.

BRASIL. Tribunal de Justiça do Estado do Rio de Janeiro. 2009. Apelação 3144/2009, desembargador relator Adilson Vieira Macabu.

BRASIL. Tribunal de Justiça do Estado do Rio de Janeiro. 2010. Apelação Criminal 200905003254, desembargador relator Siro Darlan de Oliveira.

BRASIL. Tribunal de Justiça do Rio Grande do Sul. 2009. Habeas Corpus 70031748676, desembargadora relatora Elba Aparecida Nicolli Bastos

BRASIL. Tribunal de Justiça do Estado do Rio Grande do Sul. 2009. Apelação Criminal 70029410172, desembargado relator Marcel Esquivel Hoppe.

BRASIL. Tribunal de Justiça do Estado do Rio Grande do Sul. 2009. Apelação Criminal 70029189206, desembargador relator Manuel José Martinez Lucas.

BRASIL. Tribunal de Justiça do Estado do Rio Grande do Sul. 2010. Apelação Criminal 70036402121, desembargador relator Marco Antônio Ribeiro de Oliveira.

BRASIL. Tribunal de Justiça do Rio Grande do Sul. 2009. Apelação Criminal 70029413929, desembargadora relatora Lais Rogéria Alves Barbosa.

BRASIL. Tribunal de Justiça do Rio Grande do Sul. 2009. Apelação Criminal 70030827380, desembargadora relatora Elba Aparecida Nicolli Bastos.

BRASIL. Tribunal de Justiça do Rio Grande do Sul. 2010. Apelação Criminal 70028874113, desembargador relator Jaime Piterman.