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Domestic Violence in Brazil Social Problems and Legislative Interventions¹

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Abstract: Recent statistical data confirms that domestic violence is a structural problem of exceptional gravity. We analyze the frequent legislative changes in Brazil since 2000 as a result of social pressure for protection of abused women. Only the Law 11.340 of 2006 was well received by lawyers, judges and the public opinion. We present the innovations and peculiarities of this statute and the allegations on unconstitutionality. We discuss cases of judicial review of this law and reject the arguments of unconstitutionality. That notwithstanding, we argue that penalization decisions is the wrong way from a criminological point of view because they do not take into consideration the desires and needs of the victims.

Keywords: Brazil; Domestic violence against women; Judicial review; Legislation on domestic violence.

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1 Introduction

Violence by family members and current or former companions is a structural problem and one of exceptional gravity in Brazil. The victims are mostly women. Some statistics:

- Sociological institute research found that between 1980 and 2010, 92,000 women in Brazil were murdered. While 14% of men are murdered in the home environment, the percentage for women rises to 42%. This lets us assume that most women were murdered by relatives. Brazil is in seventh place among 84 countries in homicides for women (4.4 per 100,000). Among the 51,000 hospital visits by female victims of physical violence in 2011, the perpetrators were parents of the victim in 22% of cases, and in the case of (current or former) partners, the figure was 15%. For victims between the ages of 30 and 49 years, the figure for aggression by (current or former) partners exceeds 30%.⁴
- The state agency that serves battered women in recent years registered that 60% of the victims are abused daily at home and in 70% of cases, the perpetrator is the victim's companion.⁵
- The national statistics institute IBGE found that in 2009, women were victims of violence at home in 43% of cases versus 12% for men. The attacker was the current or former partner in 26% of cases for women and 2% for men.⁶

In regards to reactions in Brazil, a political framework informs the initiatives of feminist groups, from the 1970s, which campaigned to fight against impunity for “crimes of passion”, where the victim was a woman.⁷ Acting on specific cases, the campaigns had a dual purpose. First, to impose a change of perspective, explaining that the so-called “murder of passion” was not due to the love of a man for a woman, according to the patriarchal view of society adopted by the criminal justice system.⁸ The feminist campaigns adopted impactful strategies such as the slogan “who loves does NOT kill”, in contrast to the patriarchal discourse.

The second goal was to demand equality in the application of criminal law, leading to the conviction of men who had killed their companions. The organizations made themselves present at trials and held demonstrations denouncing acquittals or a defendant's release pending trial.

⁴ <http://mapadaviolencia.org.br/pdf2012/MapaViolencia2012_atual_mulheres.pdf>.

⁵ Newspaper **Folha de S.Paulo**, São Paulo, 8 Aug. 2012.

⁶ <<http://www.dieese.org.br/anu/anuarioMulheresBrasileiras2011.pdf>>.

⁷ BLAY, 2003, p. 88-91.

In the state of São Paulo in 1980, an organization named SOS-Woman appeared, formed by women from feminist organizations, with the goal of offering legal and psychological assistance to victims of domestic violence.⁹ In 1983, the *State Council for the Condition of Women* was formed, charged with developing policy measures to effect gender equality. In 1985, the Government of the State of São Paulo created the first Women's Police Station ("Delegacia da Mulher"). This is a police station where the victims are exclusively attended to by women employees, who are specially trained for this service; shelters for victims of domestic violence were also opened.¹⁰

The experience of creating the Women's Police Station was positive and currently such police stations exist in all Brazilian states; however shelters for victims of violence are scarce.

2 Treatment of domestic violence in Brazilian legislation

2.1 The flaws of Law 9.099 (1995)

Federal Law 9.099 of 1995 instituted differential treatment for less serious offenses, considering those with imprisonment of *not more than two years*. The statute aimed to provide better and faster responses to social conflicts involving crimes, avoiding the penalty of imprisonment for minor offenses.¹¹

Among the swifter procedures were highlighted:

- the possibility of reconciliation between victim and aggressor (plea bargain – *transação penal* – arts. 2 and 76);
- the conditional suspension of lawsuits (art. 89).

Finally, the law imposed the creation of specialized small claims courts (*Juizados especiais criminais*), in which the judge should act primarily as a conciliator.

Most cases of domestic violence attended by the Women's Police Stations refers to crimes of "minor bodily injury" (*lesão corporal leve*) and "threats" (*ameaça*), both punishable

⁸ BLAY, 2003, p. 93, 96. For an analysis of the arguments employed in cases of femicide, cf. CORRÊA, 1983; ARDAILLON; DEBERT, 1987.

⁹ IZUMINO, 1998, p. 33-34.

¹⁰ IZUMINO, 1998, p. 34-37; BLAY, 2003, p. 91-92; DEBERT; GREGORI; PISCITELLI, 2006; GREGORI, 1993; SOARES, 1999; SANTOS, 2010, p. 153-159.

¹¹ For an analysis of law 9.099: WUNDERLICH; CARVALHO, 2005; PRADO, 2005; AMORIN, 2002; GRINOVER, 2005; KARAM, 2004; DOTTE, 2003.

with sentences of up to two years, which led to the application of Law 9.099 for cases of domestic violence.

Studies show that in cases of domestic violence in Brazil occurs often an interruption in the lawsuit in the preliminary phase, after the registration of the term at the police station and before heard by a judge.¹² But even in cases that get to a judge, Law 9.099 would allow for a plea bargain (*transação penal*).

The lack of preparation of law enforcement officials with regards to “small claims” was felt in the problematic area of gender. We are not aware of methodologically controlled research on the topic, but it is known that the solutions given by the judges were trite. It was common for the small claims judge to resolve conflict by forcing the victim to accept the payment of small fee and to also give outlandish solutions such as inviting the victim to dinner or instituting mandatory delivery of flowers. There were even cases in which the judge forced the defendant to buy materials needed for the functioning of the court.¹³ Through study of some decisions it can be stated that the solution offered by the system was the “re-privatization” of the conflict, confirming the patriarchal idea that domestic violence is only about the parties involved.¹⁴ This was criticized for making light of the conflict and disrespecting the needs of women.¹⁵

At the same time, there was a significant increase in reports of domestic violence at the Women’s Police Stations since Law 9.099 went into effect.¹⁶ As the law permits a waiver process by the victim, it is possible that this “flexibility” stimulated demand for the Women’s Police Station as a form of reaction and/or mediation, facilitated by moving away from the repressive sequence “offense – process – prison.” It was argued that the significant increase in complaints may be indicative of a process of empowerment, of women leaving a state of passivity and starting to take a more active role by reporting. However, the high number of those giving up show that the women did not want (or do not have the social power) to continue the proceedings.¹⁷

¹² VEGNERS, 2005.

¹³ IZUMINO, 2002, p. 20; CAMPOS; CARVALHO, 2006.

¹⁴ IZUMINO, 2002, p. 20.

¹⁵ WUNDERLICH, 2005, p. 40-41; DINIZ; SILVEIRA; LIZ, 2006; RODRIGUES; CORTES, 2006; HERMANN, 2000; VEGNERS, 2005; IZUMINO, 2002; IZUMINO 2005.

¹⁶ IZUMINO, 2002.

¹⁷ VEGNERS, 2005, p. 32-45.

2.2 The occasional interventions of Federal Laws 10.455 (2002) and 10.778 (2003)

In 2002, Law 10.455 sought to adapt the swift process of Law 9.099 for the problem of domestic violence. The new art. 69 of the Criminal Code specified that in cases of domestic violence, the court may determine, as a precautionary measure, the removal of the offender from the home of the victim. This change was not accompanied by a legal definition of domestic violence. Part of the judiciary did not apply the rule, alleging violation of the criminal principle *nullum crimen sine lege certa*, provided for in art. 5, XXXIX of the Federal Constitution of 1988: “there is no crime without a previous law that *defines* it.”

In 2003, Federal Law 10.778 requires that professionals in public and private health services report cases of violence against women appearing at their places of service, and lodged a legal definition of the term. The 1st § of Art. 1 defines violence against women, regardless of place of occurrence and the relationship of the perpetrator to the victim. Gender alone of the victim has been a decisive factor:

For the purposes of this Law, violence shall be understood as violence against women by any action or conduct, based on gender, which causes death, injury or physical, sexual or psychological suffering or damage to women, in both public and private spaces.

The 2nd § of Art. 1 specifies that violence against women includes physical, sexual and psychological violence occurring within the family or domestic unit or within any other interpersonal relationship, in which the offender lives or has lived with the woman, including, among others acts, rape (*estupro*), “violation” (at that time, there existed no criminal law punishing the “violation” in Brazil), maltreatment (*maus-tratos*) and sexual abuse (*abuso sexual*). The Law mentions the international treaties and conventions ratified by Brazil in terms of punishment and eradication of violence against women and provides that they should be observed for the purpose of defining violence against women.

The law adopts a broad concept of violence against women due to gender.¹⁸ This is due to the influence of international statutes. Examining the *Inter-American Convention on the prevention, punishment and eradication of violence against women*, adopted in 1994 and ratified by Brazil in 1995, we find that the definition of Law 10.778 is virtually identical to that employed in the arts. 1 and 2(a-b) of the Convention.

¹⁸ VEGNERS, 2005, p. 8.

2.3 The errors of Law 10.886 (2004)

The situation changed with Law 10.886 of 2004, which introduced the 9th and 10th § to art. 129 of the Brazilian Penal Code, repealing the art. 1 §1 of Law 10.778. As the vast majority of reports of domestic violence involving bodily injury under the terms of art. 129 of the Brazilian Penal Code, the legislator wished to relate domestic violence to this crime with the introduction of specific paragraphs.

The 9th § of art. 129 classifies the crime as domestic violence if the injury is practiced “against ascendant, descendant, brother, spouse or partner, or who lives or has lived, or even prevailing on the agent, in domestic relations, cohabitation or hospitality.” The penalty is imprisonment from 6 to 12 months.¹⁹

This concept is open to criticism. First, for the lack of reference to *gender*, and the extremely broad definition (mentioning as offenders persons who have “special bond” with the victim). Art. 129 §9 means that, for the Brazilian legislator, the husband who assaults his wife commits the same offense as a woman who assaults the girlfriend of her cousin who is staying in his house (relation of hospitality as “special bond”)!

Secondly, the formulation of art. 129, §9 indicates that there has been a *regression* in the perspective of criminal policy: the legislator did not want to make domestic violence an issue of gender relations and, therefore, he eliminates the gender roles from the legal definition of the relationship.

Thirdly, the increased penalty provided by art. 129 §9 is less significant. The penalty imposed by the *caput* of art. 129 for minor bodily injury is imprisonment from 3 to 12 months and the §9 determines a sentence from 6 to 12 months. This allows for sustain that the goal of the framers was to give a message of disapproval for violence between people who live or lived together, even on a symbolic level.

Finally, the absence of extra-penal measures indicates that the legislator is reiterating its confidence in penal repression, known to be of little help in cases of domestic violence.

¹⁹ Art. 129 §10, also introduced by Federal Law 10.886 of 2004, imposes increased penalty in “serious bodily injury” in circumstances of domestic violence.

2.4 The small progresses of Law 11.340 (2006)

In 2006, Federal Law 11.340 was approved, known as the “Maria da Penha” Law,²⁰ which has as its political framework a serious case of domestic violence. Ms. Maria da Penha Fernandes suffered repeated assaults and attempted murders by her husband and she became paraplegic.²¹ The case was examined by the Inter-American Commission on Human Rights which forced Brazil to take remedial measures and legislative reform.²²

This is the first Brazilian law that provides a special legal treatment to domestic violence.²³ We can distinguish two parts. In his penal area, the law significantly changes the treatment for domestic violence against women, especially those whose maximum sentence is less than two years, as is the case with minor bodily injury and threats, crimes hitherto submitted to the small claim courts (chapter 2.1).

The more extensive and, in our opinion important part of Law 11.340 has a no-penal character. The statute mentions various forms of no-penal social control, outlining mechanisms for prevention and reparation of domestic violence (arts. 8-10): participation of non-governmental organizations, conducting research and statistical studies; prevention campaigns; training of public officials on issues of gender, race and ethnicity; implementation of educational programs in school curricula. The Law encourages also the creation of centers of multidisciplinary and comprehensive care for women (art. 35). Finally, he determines (art. 45) the offender’s presence in rehabilitation and gender reeducation programs.

Among the 46 provisions of the “Maria da Penha” statute, only 4 are of penal character. Even so, the law does not abandon the punitive model, establishing a prison sentence as a response to gender conflict raised by domestic violence.²⁴ The Law increases the maximum penalty applied (from 1 to 3 years), but at the same time decreases the minimum (from 6 to 3 months).²⁵ In parallel, it imposes strict conditions for the woman who waives the complaint. The victim may only renounce in “a hearing specially designated for such purpose, prior to receipt of the complaint by the judge; the hearing of the public prosecutor is obligatory” (art. 16). We will return to the topic by analyzing the judicial interpretation of this provision (Chapter 3.3).

²⁰ <http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/111340.htm>.

²¹ Contextualisation of the Law 11.340, in Santos, 2010, p. 162-167.

²² Inter-american Commission on Human Rights, Report 54/2001, Case 12.051, Maria da Penha Maia Fernandes v. Brasil (<<http://www.cidh.oas.org/women/Brazil12.051.htm>>).

²³ For an analysis of Federal Law 11.340, see MELLO, 2009.

²⁴ BATISTA, 2009, p. xxi.

²⁵ The Brazilian penal judge typically assigns the minimal penalty. This means that under Law 11.340 no greater penalties will be applied.

With regard to the concept of domestic violence, Law 11.340 resumes the perspective on gender, which was ignored, as we observed, by the previous Law 10.886. Art. 5 of Law 11.340 states: “domestic and family violence against a woman includes any action or omission based on gender which causes: death; injury; physical, sexual, or psychological suffering; moral or patrimonial damages.” This is true, according to the same article, both within the household and in the context of any intimate relationship, in which the offender lives or has lived with the victim.

3 Problems of constitutionality of Law 11.340 (2006)

After Law 11.340 of 2006 came into force, some Courts alleged unconstitutionality. We will present these criticisms.²⁶

3.1 Validity of the previous legislation on domestic violence?

Given the social inadequacy of responses given by the small claims Courts (*Juizados Especiais Criminais*) to domestic violence conflicts, art. 41 of Law 11.340 prohibited plea bargain (*transação penal*) under Law 9.099 in disputes involving domestic violence. Applying fines as the only penalty for cases of domestic violence was also prohibited (art. 17 of Law 11.340).

Lawyers criticized the non-application of the despenalizing Law 9.099 in cases of domestic violence. The main argument was that alternative sanctions sought better social solutions and the problem was deficiencies of implementation, in particular the fact that the social and psychological aspects of gender problem was ignored by judges, leading them to opt for inappropriate solutions to conflict (trite penalties, forced agreements).

At the meeting of the Small Claim Courts of first and second instance (*Juizados Especiais Criminais e Turmas Recursais*) of the State of Rio de Janeiro in 2006, the magistrates signed an understanding about the unconstitutionality of art. 41 of Law 11.340, highlighting the need to implement the despenalizing norms of Law 9.099.²⁷

²⁶ Cf. MACHADO et al., 2012, p. 72-78.

²⁷ Topics n. 82, 83, 84, 88 and 89, Aviso 43 of 4-9-2006. In: Consolidação dos Enunciados Jurídicos e Administrativos Criminais em vigor resultantes das Discussões dos Encontros de Juízes de Juizados Especiais

This can be plausible from the criminological point of view, as an argument in favor of reduction of penal intervention. But from a legal standpoint it is not convincing. According Brazilian Law, the newer statute repeals the previous if it is expressly stated in the statute itself.²⁸ In this respect, the prohibition of applying Law 9.099 (of 1995) in domestic violence cases is valid, as the new law 11.340 (of 2006) expressly revokes the previous one in art. 41: “For the crimes practiced with domestic and family violence against women, regardless of provided penalty, does not apply to Law 9.099, of September 26, 1995”.

Neither is convincing the argument that the Federal Constitution in its art. 98, I established competence of the small claim courts (with decriminalized measures) for “minor offenses”. “Minor offenses” is a concept of low normative density, leaving to the legislator its implementation, as occurs with other similar concepts in Brazilian penal law (for instance, “grave”, “heinous”, “imprescriptible” crimes). The fact that the legislator, following the international trend, had considered the problem of domestic violence to be grave lies in its discretionary powers and has strong social and political justifications.

In Summary. The fact that the “Maria da Penha” Law provides for more severe treatment for the abuser is a questionable criminal policy option. But this does not affect its constitutionality.

3.2 Violation of the principle of equality?

Some courts cited the unconstitutionality of Law 11.340, invoking the principle of equality. The Court of Appeals of Mato Grosso do Sul decided that the statute was unconstitutional because it does not include men under the protection established, therefore creating prohibited discrimination based on gender. It was stated also that it violates the principle of proportionality, because the penalties are more severe than necessary in the case of domestic violence. The Court of Appeals of Minas Gerais also considered contrary to the principle of equality the fact that the victim can only be a woman.²⁹

criminais e Turmas Recursais do Estado do Rio de Janeiro. **Revista de Direito do Tribunal de Justiça do Estado do Rio de Janeiro**, n. 69, 2006, p. 359.

²⁸ This is provided for in Art. 9 of the Complementary Law (*Lei Complementar*) 95, of 1998, modified by the Complementary Law 107.

²⁹ Court of Appeals of Mato Grosso do Sul, Appeal in strict sense (*Recurso em sentido estrito*) 2007.023422-4, judgement on 26-9-2007 (<http://www.tj.ms.gov.br/cposg5/sg/show.do?processo.foro=900&processo.codigo=P00009MDG0000>). Court of Appeals of Minas Gerais, Criminal appeal 1.0672.07.244893-5, judgement on 7-8-2007 (http://www.tjmg.jus.br/juridico/sf/proc_massiva2.jsp).

The proportionality of sentences and equality are concerned when it is alleged that there has been given unjustifiably more severe treatment to the defendant for bodily injury through use of domestic violence, as Law 11.340 does not authorize the judge to grant suspension of proceedings and other despenalizing measures according the Law 9.099, applicable in other cases of personal injury.

This opinion was followed by few Courts and questioned by others.³⁰ To the allegations for unconstitutionality the following responses can be given:

- Law 11.340 does not indicate men as perpetrators of crimes related to domestic violence. It includes any agent that causes abuse within family relationships. It happens that the global statistics (and Brazilian ones) indicate that men are the majority of authors of this type of violence. Therefore, there is no violation of the equality between men and women that only requires not using the criterion of gender when it is not relevant, generating discriminatory treatment based on the Federal Constitution (art. 5, I).
- Law 11.340 does not violate the general principle of equality (art. 5 *caput* of the Federal Constitution), treating differently persons accused or convicted of crimes of bodily injury. The legislator considered that domestic violence with injury is far more reprehensible than the physical assault of a stranger. This consideration has broad sociological and factual basis. It is justified by the systematization of domestic violence and its serious consequences for the social and emotional development of women. The treatment of a specific problem can lead the legislature to ponder the need to create special mechanisms to ensure the interests of the weaker party. Equality requires treating equals equally, but the situation of those who attack their companion is not equal to the situation in which, for example, after a disagreement at a party, someone happens to attack an unknown person.
- The same response should be given to the non-tutelage for males through Law 11.340. The legislator took measures to curb the widespread practice of assaulting systematically the fundamental rights of women, within their power of determining public policy. Being obvious that this deals with a specific problem of women as a socially vulnerable group facing male violence, the legislation is justified.
- The argument of disproportionality of penalties is not convincing. Compared to other crimes against bodily integrity, those related to domestic violence show no great discrepancy in penalties according to the Brazilian Penal Code. Serious bodily harm (art.

For a detailed analysis, cf. MALOSSO, 2007, p. 146-152; MACHADO et al., 2012, p. 64-72.

129, § 2) is punishable by imprisonment of up to 8 years and the penalty increases in cases of domestic violence up to 10 years and 8 months. It is thought that simple murder is punishable with imprisonment up to 20 years (art. 121) and the “danger of contagion of venereal disease” (art. 131) is punishable with up to 4 years.

3.3 Nature of the criminal action (ação penal) for crimes of bodily harm

As we said, Law 11.340 provides that a woman may only waive her complaint under special conditions that are not anticipated in crimes of similar gravity. In case of domestic violence the waiver must be made “in a hearing specially designated for such purpose, prior to receipt of the complaint by the judge; the hearing of the public prosecutor is obligatory” (art. 16). On 6-28-2007, the Appeals Court of the Federal District held that “*in the pursuit of achieving the purposes proposed by law 11.340/2006 the public interest translated into the curbing of domestic violence prevails.*” And it opted to impede the victim from exercising the right to waive.³¹

Additionally, it was argued that the Law 11.340 does not sufficiently protect women in allowing criminal action conditioned to the representation of the victim (*ação penal pública condicionada*) in arts. 12, item I, 16 and 41. It was felt that this would give insufficient protection to the woman who in many cases is afraid to denounce her aggressor. The Federal prosecutors office filed a direct action of unconstitutionality (*ação direta de inconstitucionalidade*) with the argument that the criminal persecution should be independent of the victims behavior and the action conditioned to the representation of the victim promotes impunity.

We can, in an inverse manner, consider that it is the right of the woman to decide the best form of resolving conflict that affects her life, without compulsory intervention of the State, in clear patriarchal posture.

Both theses are not legally convincing. There is no constitutional rule that prevents the penal criminal action from being conditioned on the victim’s behalf. By making this choice, the legislator has exercised discretionary power. The contrary position can only be sustained

³⁰ Cf. the decisions cited in MACHADO et al., 2012, p. 66-71; cf. also the Complaint before the Supreme Court in the “Declarative action of constitutionality” (*Ação declaratória de constitucionalidade*) n. 19 (http://www.sbdp.org.br/arquivos/material/377_PI%20ADC19.pdf, p. 4-12).

³¹ <

with consequentialist arguments (impunity, high number women giving up) that are not convincing, because nothing indicates that the Federal Constitution desired to protect a woman against her will, nor is there evidence that a conviction improves the conditions of the women's lives.

3.4 Limits of judicial review in Brazil and the response of the Federal Supreme Court

It would be possible to conduct a thorough judicial review and question the appropriateness and necessity of criminal penalties, in particular using statistical data and interviews with those involved, victims, offenders and law enforcement officers. Such an examination would discover many instances of disproportionality between the severity of crimes and the penalties, as well a trend in recent years to increase the sanctions for various offenses, especially when involving violence.

This raised the curious concern of the courts with the disproportionality of the Domestic Violence Act, but not with dozens of other devices and “efficientist”-emergency laws. The option to challenge a law that seeks to protect women's interests and not the dozens of others that do not relate to women concerns seems to be associated with the patriarchal attitudes in Brazilian judiciary, whose decisions discriminating women.³²

Regardless of this reflection, in the Brazilian judicial review it applies the rule that allegations of disproportionality should not obstruct the freedom of decision (discretionary powers) of the legislators when there are no clear criteria to measure the seriousness of offenses and the appropriateness of penalties. A strict judicial review results in the subjectivity of each judge's opinion about what is appropriate and proportionate, sufficient or insufficient.³³

It is necessary to respect the discretionary options of the legislator where the Constitution did not establish duties of legislative action or abstention. Otherwise, the judge becomes unduly “activist”. In Law 11.340 we have examples of such discretion of the legislator that does not hinder constitutional decisions:

- The nature of the criminal action (conditional or independent of the initiative of the victim);
- The inclusion (or not) of vulnerable males in the role of victims of domestic violence;

³² SADADELL, 2013, p. 228-234.

³³ DIMOULIS; MARTINS, 2012.

- The inclusion (or not) of domestic violence crimes in the category of “minor offenses”.

In these cases, from the time the legislator has made a decision, there is no room for judicial review.

To put an end to the jurisprudential divergences, the President of the Republic has filed in 2007 a declaratory action of constitutionality (*ação declaratória de constitucionalidade*) of the Law 11.340 before the Federal Supreme Court and requesting to suspend the effects of decisions by other courts that consider parts of the law as unconstitutional. An injunction denied the suspension of these decisions. The Supreme Court ruled in February 2012, unanimously confirming the constitutionality of articles 1, 33 and 41 of the statute.³⁴

On the same day, the Supreme Court judged the direct action of unconstitutionality (*ação direta de inconstitucionalidade*) n. 4.424. The Action questioned articles 12, paragraph I, and 16 of the Law n. 11.340 which, as we have seen, established the conditioned nature of the criminal action. With one dissenting vote, considered that, in the light of the Federal Constitution, these articles establish that the criminal action is independent of the initiative of the victim in respect to crimes of bodily injury.³⁵ This is actually a declaration of unconstitutionality of the conditioned criminal action under the guise of “interpretation according to the Constitution”. As we said, this positioning of the Federal Supreme Court has no constitutional justification. But in any case, this is a modification of Law 11.430 which does not affect its meaning and structure.

4 Conclusion. Social problems, criminal law and possible alternatives

The first conclusion of this paper concerns the frequent legislative changes in Brazil since 2000 on the subject of domestic violence. Social pressure for protection of abused women was echoed in Congress, but the suggested solutions had no effect, fueling criticism and motivating new changes. The statutes adopted various definitions of violence against women and/or domestic violence and introduced several models of solution. Only the Law 11.340 of 2006 was well received by lawyers, judges and the public opinion.³⁶ It did not

³⁴ Declarative action of constitutionality (*Ação declaratória de constitucionalidade*) n. 19 de 2007, rapporteur Justice MA Mello, judged on 9-2-2012. Decision not published until 15-9-2013.

³⁵ Direct action of unconstitutionality (*Ação direta de inconstitucionalidade*) n. 4.424 de 2007, rapporteur Justice MA Mello, judged on 9-2-2012. Decision not published until 15-9-2013.

³⁶ MELLO, 2009.

suffer changes seven years after its entry into force and it was practically convalidated in all his respects by the Federal Supreme Court.

Judicial statistics recorded a remarkable increase in complaints under the enforcement of this law. From 2006 to 2011 almost 700,000 cases were opened, almost double the previous years.³⁷ And the President of the Republic, Mrs. Dilma Rousseff, stated in August 2012 that Law 11.340 made Brazil a more just and egalitarian country.³⁸

The “Maria da Penha” law may have facilitated access to justice, but we do not know the statistics on the number of convictions (which should be very small). Nor are there statistics indicating improvement in living conditions and safety of women or non-recurrence of the accused and convicted. With no evidence of such positive outcomes, there is no reason to celebrate the results of the Law.

For a global analysis, it is necessary to take into consideration the desires and the needs of the victims³⁹ which, as we said, were crucial for determination of issues of domestic violence. There are at least three reasons⁴⁰ for why women victims of violence would want to continue living with the abuser:

- fear of not being able to provide for the needs of the children;
- depression and passivity due to the ongoing experience of violence;
- fear of suffering further damage and risking death if they leave the violent partner.

In some cases, emotional bonds with the aggressor are also relevant. The inclusion of women in patriarchal culture requires recognizing that the man should be the provider and exercise authority, and from this stems a certain duty of submission of women. Of course, this patriarchal view does not justify, in our days, physical violence, and this explains the intense legislative activity in recent years in the field of domestic violence.

None of these factors is taken into account by the criminal intervention. Even if the woman decides to break off the relationship, the criminal sanction to the abuser does not overcome the stage of vengeance, not helping the woman in her new life project and not providing greater safety. A woman who decides to separate prefers to surpassing the conflict in the least violent way possible and avoiding hearings that can stir up potential the violent ex-partner.

³⁷ <http://www.agenciapatriciagalvao.org.br/images/stories/PDF/noticias2012/viol/cnj25042012_procedimentosinstauradospelalmpenhacresceram.pdf>.

³⁸ Newspaper **O Estado de S. Paulo**, São Paulo, 7 Aug. 2012.

³⁹ MAHONEY, 1994.

⁴⁰ MAHONEY, 1994, p. 73.

Although we analyze such desires as a result of the patriarchal culture, which makes victims accept the ideologies of their attackers, we cannot ignore that the request made by the woman who is victim is very simple: in general she wants her partner to stop being violent and she does not want him to be punished, knowing that punishment is unlikely to change his behavior.

Feminist studies consider domestic violence as a means *systematically* employed to control women through intimidation and punishment, even if, within common sense, the prevailing idea is that domestic violence is a phenomenon of isolated deviation that can be attributed to the “pathologies” of man or couple.⁴¹ Educational processes, without entirely dispensing with penalties, develop strategies that move away from the sequence order-disobedience-penalty. This allows changing cultural patterns of conduct through processes of reflection, awareness and self-knowledge, which do not necessarily sanction them for any mistakes. Education does not offer immediate answers, but it is the only path capable of producing satisfactory and long-lasting solutions.

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⁴¹ EDWARDS, 1994, p. 26; MAHONEY, 1994, p. 60-65; FINEMAN; MYKITIUK, 1994, p. 11-35.

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