

Violence against Women, Gender Equality and the Brazilian Constitution

- Draft Paper -

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1. Introduction:

An evaluation of the twenty-year experience since transition from authoritarian rule in Brazil is ambivalent. Despite many undeniable achievements, the new democratic institutions set up in the country by the 1988 Federal Constitution, have not been able so far to produce the egalitarian effects implied in the very idea of democracy. Regarding the protection of human rights, in general, and women's rights, in particular, the 1988 Constitution represents an evident achievement when compared to the previous Brazilian constitutions.

However, despite recent progress towards gender equality, there remains in the country a large disparity between women and men's capacity to enjoy constitutional freedoms. As an example, although women's participation in the market force has increased recently, they are still highly underrepresented in decision-making positions in both private and public sectors.² Women's average earnings are about 69.3% of men's earnings for the same jobs.³ Women's vulnerability increases the data is disaggregated taking into account other variables such as race, social class and the geographic localization within the country.⁴

In this context, an investigation into the causes of inequality and discrimination becomes of paramount importance as a matter of justice. Due to Brazilian peculiar political and economic history, the dominant thinking tends to reduce the causes of all forms of inequality and discrimination in the country to a problem of concentration of wealth and class stratification. However, different civil society organizations and social movements have struggled for at least the past 30 years against this dominant view and have claimed that there is something distinct to discrimination based on gender that cannot be reduced to a class problem.

This paper aims at examining gender issues in Brazil against the backdrop of the process of democratization in the country as well as the transnational strategies used by the feminist movement in Brazil to have their voices heard domestically. More specifically, I intend to consider the implication of the Law against Domestic Violence and Violence Within the Family (law 11.340), the so-called Maria da Penha Law, enacted in 2006, to the legal order and to the processes of democratization and social inclusion in Brazil. This statute was enacted, to a great

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² Ministry of Labor and Employment (*Ministério do Trabalho e Emprego*, hereinafter MTE). Annual Report on Social Information (*Relação Anual das Informações Sociais*, hereinafter RAIS), 2000 and 2001.

³ Brazilian Institute of Geography and Statistics (*Instituto Brasileiro de Geografia e Estatística*, hereinafter IBGE). Annual Report 2004. This discrepancy is higher between rural women and men.

⁴ Rural women, for instance, represent only 12.6 of those benefited by land reform plans, while men are 86% beneficiaries of adjudicated land, according to the National Land Reform Institute (*Instituto Nacional de Colonização e Reforma Agrária*, hereinafter INCRA).

extent, as a response by the Brazilian Government to recommendations made by the Inter-American Commission of Human Rights (IACHR) in a case on domestic violence against Brazil (the *Maria da Penha Case*).

In fact, violence against women is a serious problem in Brazil, but before Maria da Penha Law, there was no specific statute or any other kind of regulation dealing with the issue of violence against women in the country. According to Fundação Perseu Abramo, every 15 seconds a woman is beaten by a man in the country, 16% of Brazilian women have suffered some kind of physical violence and 8% have already been threatened with firearms. In 53% to 70% of the registered cases, the offender is the husband or partner. Maria da Penha became the personification of domestic violence in the country after she was made paralytic by her husband and her case was taken to the IACHR due to an unjustifiable delay of the Brazilian Judiciary in deciding the case.

Contrary to those who argue its unconstitutionality on grounds that it violates the non-discrimination and the gender equality principles, present in Article 5, I, of the 1988 Constitution,⁵ to the extent that it creates a special protection to women, my argument is that this piece of legislation not only embodies a better understanding of gender equality, but it also gives the best meaning available to the special protection clause, present in article 226, paragraph 8 of the 1988 Constitution.⁶ In fact, the very absence of a specific regulation constitutes a Constitutional violation, given that Brazil ratified both the CEDAW and its Protocol, as well as the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (hereinafter, the Belem do Pará Convention) and that, according to a recent decision by the STF, these treaties have a *quasi-constitutional* nature, or a *supra-legal* status, using the Brazilian Constitutional Court's (*Supremo Tribunal Federal*, hereinafter STF) terminology.⁷

These treaties establish that violence against women is a form of discrimination and, thus, should be eradicated. The U.N. Committee on Elimination of Discrimination Against

⁵ Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

I. men and women have equal rights and duties under the terms of this Constitution;

⁶ Article 226. The family, which is the foundation of society, shall enjoy special protection from the State.

Paragraph 8 - The State shall ensure assistance to the family in the person of each of its members, creating mechanisms to suppress violence within the family.

⁷ Article 5, paragraph 2 of the Constitution reads: « The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party . » There was a long discussion on what status these treaties acquire in the domestic legal order after they have been ratified, considering that non-human rights treaties have been long established to be on an infra-constitutional level and, therefore, can be changed by any other domestic statute. Constitutional amendment 45, of 2004 (*Emenda Constitucional 45*, hereinafter EC 45/04), provides that if a human right treaty is internally approved by a qualified quorum in Congress, it acquires a constitutional nature. Nonetheless, the amendment is not clear on the nature of human rights treaties that were approved in Congress but did not reach this qualified quorum. In December 3rd, 2008, in a very innovative decision, the STF held that human rights treaties which have not been approved via a qualified quorum, as well as those approved before this rule was introduced by EC 45/04, have a 'supra-legal' status and, therefore, cannot be changed by domestic law, though they cannot change the constitution either. However, I agree with those who claim that this distinction between a supra-legal and a constitutional nature of human rights treaties lacks any practical meaning.

Women, in its General Recommendation n.19, paragraph 11, notes that “the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.” The preamble of the Belem do Pará Convention says “that violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men” and that “the elimination of violence against women is essential for their individual and social development and their full and equal participation in all walks of life.”

I also contend that the Maria da Penha Law is legitimate based on a interpretation of the gender equality and non-discrimination principles informed by Nancy Fraser’s principle of parity of participation. Firstly, the statute restaures some sense of gender parity because it was enacted after a very intense debate, with the participation of key actors in the Brazilian feminist movement. Secondly, it promotes parity because it addresses the problem of violence based on gender, which undeniably prevents women from participating as peers in every aspect of the social life. Violence based on gender is a byproduct of women’s oppression and it also perpetuates the discrimination cycle.

In the next section, I briefly introduce Nancy Fraser’s principle, which is related to the idea of non-discrimination. Then, I argue that violence against women is a form of discrimination. Finally, I present the discussion currently in Brazil about the Maria da Penha Law, its innovations to the legal order and the discussions revolving around the principles of non-discrimination and gender equality.

2. Parity of Participation, Discrimination and Domestic Violence

The discussion about the nature of discrimination against women and also the relationship between gender and other forms of unequal treatment, such as the one originated from class structure is a fundamental one. What is the best conceptual apparatus to understand inequality? Is social class the defining criterion of inequality and discrimination? Is social status (and not class) a more appropriate concept to measure inequality? Are there forms of discrimination which are made invisible by class stratification? Are claims of justice based on class stratification and claims of justice based on status reconcilable?

The answers to these questions have direct implications in the kind of law and public policies one would demand from the state: tax policies, affirmative action policies and etc. In this paper, however, I will not address these important questions and rely on Nancy Fraser’s principle of parity of participation as the most adequate principle to discuss matters of justice in stratified societies (i.e. those whose “basic institutions generate unequal social groups in structural relations of subordination and domination”).⁸ According to her, parity of participation makes it possible to reconcile the two dimensions of justice in contemporary societies: the demands for identity recognition and the demands for wealth redistribution.⁹ Fraser asserts that both dimensions — status and class — are constitutive of modern pluralist

⁸ Nancy Fraser, *Rethinking the Public Sphere*, 122.

⁹ The first set of demands is of a Hegelian ancestry, presupposes the notion of “status” as a measure of exclusion, and understands the recognition of the differences among the various identities as vital for the correct formation of one’s subjectivity. The second set has a Kantian and Marxian origin, and sees unequal social class structure as the source of injustice; social equality is their most fundamental value.

societies. One dimension cannot be reduced to the other, although they are not incommensurable. These two types of justice claims, according to her, lie in the realm of morality (as opposed to that of ethics); they both result in treating certain groups or individuals as less than peers in society.¹⁰

This principle seems very appropriate to understand the feminist movement because it integrates questions related to social stratification and fragmentation – so evident in Brazil – to questions regarding patriarchic societies. In fact, social inequality associated to patriarchy has a disproportionate impact in women's lives. In a closer look, we will see that every women's groups demand has a recognition as well as a redistribution component to it. In terms of recognition, the elimination of domestic violence, for instance, implies acknowledging the fact that violence against women has peculiarities that can only be grasped if we understand patriarchic structures and women's inferiority within it. In terms of redistribution, it also implies acknowledging the fact that, because of the subordinated role attributed to women in society, she will not be able to escape from a situation of violence unless there are some redistributive remedies allowing for at least her economic autonomy from the aggressor. In addition to the repressive measures against the offender, it implies educational measures to change cultural patterns, health care measures, child care services and many other measures which lie somewhere between the recognition and the redistribution dimensions.

The intricate relationship between recognition and redistribution is also highlighted by the Committee on the Elimination of Discrimination Against Women in its General Recommendation n.19. In paragraphs 15 and 16, it states that poverty and unemployment increase the opportunities for trafficking in women and force many women into prostitution. These practices make women even more vulnerable and put them at special risk of violence.

In Fraser's account, another crucial aspect of the participation parity is that it is to be applied dialogically. To treat women as peers means that they should be seen as agents of their own emancipation and, in this sense, norms and policies which promote participation parity among individuals are justified. Fraser conceives participation parity as a principle of a "democratic justice," one which, according to her, avoids the "authoritarian" alternative of a philosopher-king, as well as the "populist" option of letting the unrecognized groups, or the unjustified groups, alone determine if and how they have been treated as less than peers.¹¹

Maria da Penha Law meets these criteria. On the one hand, violence against women is a direct result of women's subordination at the same time that it impairs the enjoyment by women of human rights, aggravating inequality. Thus, policies for the eradication of violence against women are fundamental measures towards parity of participation. On the other hand, the statute can be considered the most democratic piece of legislation we had since the Constitution itself, due to the great participation in its drafting and in its enactment of women organizations, of experts and of authorities from different governmental bodies of different levels of the federation.

3. Maria da Penha Law and the 1988 Federal Constitution: a protection or a violation of the non-discrimination and gender-equality principles?

¹⁰ Nancy Fraser and AXEL HONNETH. REDISTRIBUTION OR RECOGNITION: A PHILOSOPHICAL EXCHANGE (Verso 2003).

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Although the issue of violence against women is of crucial importance to the effectiveness of human right, as established by the CEDAW and the Belem do Pará Convention, there are no specific provisions about this issue in 1988 Federal Constitution . The only relevant provisions are art. 5 (non-discrimination principle), art.5.1 (gender equality), art 5 paragraph 2 (human rights treaties should be added to the constitutional rights), and art 226.8 (special protection to family members)¹².

Before 2006, incidents of domestic violence in Brasil were considered to be a misdemeanor, regulated by the Law 9.099/95, which requires the victim's consent for the criminal persecution, convicts defendants to a maximum of two-year detention time, and allows for alternative penalties which are usually the donation of a certain amount of food supplies to charity. When applied to violence against women cases, this statute proved to be very ineffective. While in most cases of violence against men, the offender is an unknown person, in the most situations of violence against women the victim is forced to live very closely to the offender, and usually depends economically on him. Considering that the offender, even if convicted, would stay in jail for a very short time, many women who are victims of violence would prefer to withdraw their complaints or not go to the police at all.

Despite the political mobilization around the drafting of the Maria da Penha law and the celebration of its enactment as a great progress in the country, after it entered into force the statute has been frequently challenged by lawyers and judges. One of these challenges relates to the discussion on the excessive criminalization of social relations. From a critical criminology point of view, the statute is criticized for having severed the penalties imposed to the accused, by increasing detention time and prohibiting alternative penalties. Although this is an important controversy, I will not address it here and, instead, I will focus on two arguments against the statute based on the non-discrimination principle. The first argument is that a special protection to women against violence violates the non-discrimination principle and, therefore, the statute is unconstitutional and void.¹³ The second argument is that special protection to women against violence violates the non-discrimination principle and, therefore, the statute should also be applied by analogy to men who are victims of domestic violence.¹⁴ Most cases are still pending before lower courts, few of them have reached State Appellate Courts, but none has reached the STF yet.¹⁵

I believe ,the Maria da Pena Law is constitutional when interpreted in conjunction with the relevant international instruments and with the Federal Constitution, art. 226, paragraph 8 - "The State shall ensure assistance to the family in the person of each of its members, creating mechanisms to suppress violence within the family." If we recall the principle of participation parity to interpret the meaning of equality in complex societies, the fact that there are different individuals treated differently does not correspond automatically to an injustice. If

¹² See footnotes 5, 6 and 7.

¹³ See *Recurso em Sentido Estrito* -2007.023422-4/0000-00 (TJ/MS), See *ação ordinária* 222.942-8/06 (Sete Lagoas/MG).

¹⁴ See Negative Conflict of Jurisdiction nº 1.0000.07.458416-0/000 (TJ/MG), *ação ordinária* 1074/2008 (Juizado Especial Criminal Unificado de Cuiabá/ MT), Restraining Order nº 017.09.001138- 0 (Dionísio Cerqueira/ SC).

¹⁵ It should be noted that in Brazil the principle of stare decisis does not apply, unless in very exceptional situations, and cases are only binding upon the parties. Different chambers of the same State Court may hold different understandings of the same legal issue and lower courts may also diverge.

fact, participatory parity requires that the special situation an individual or a group occupy in society be taken into account when designing public policies.

The argument that the protection granted by Maria da Penha Law should be extended by analogy to men who are victims of domestic violence, however, requires a closer look. If all the requirements established by law are there, and taking into account the principle of gender equality, it seems unreasonable, at least on the surface, to deny to men the legal protection otherwise granted to women who are specially vulnerable to violence due to her family or domestic relation to the offender.

However, feminists reply that such analogy is not perfect. The fact that the alleged victim is a man is very relevant in patriarchic societies. Men and women are not in comparable situations, given that only women carry the inferiority stigma and, therefore, face a greater challenge when trying to leave a violent environment. Men who are victims of violence are not left in a legal vacuum, they are protected by other criminal statutes which, however, have not been effective to protect women.

In fact, because the challenge is so great, women need a safe and receptive environment and a specially trained staff to have the courage to make a complaint. Due to these reasons, Maria da Penha Law created new courtrooms, which are equipped with multidisciplinary teams and where women can find counselling, childcare services, and social workers, in addition to law enforcement and judicial authorities. The understanding of the peculiarities of this type of violence and of the need of this special services is very new and still deficient in most parts of Brazil. The application of Maria da Penha Law to men who are victims of domestic violence may be detrimental to the goal of building such safe and receptive environment to women.

Moreover, to allow the Maria da Penha Law to be extended to men may jeopardize the symbolic weight it carries as a victory over patriarchic structures of women subordination and overlook the fact that violence against women is not just any other type of violence, but a form of discrimination against women .