

LAW ENFORCEMENT AT ISSUE: CONSTITUTIONALITY OF THE MARIA DA PENHA LAW IN BRAZILIAN COURTS*

Marta Rodriguez de Assis Machado, José Rodrigo Rodriguez,
Flavio Marques Prol, Gabriela Justino da Silva, Marina Zanata
Ganzarolli and Renata do Vale Elias

1 Introduction

Approved by the President of the Republic more than five years ago, the Maria da Penha law is the first Brazilian law providing comprehensive measures to inhibit domestic violence against women. As of September 22, 2006, Law 11340/2006 was named Maria da Penha law after an episode of domestic violence suffered by Mrs. Maria da Penha Maia Fernandes¹ that had wide repercussion in Brazil. The legislation was a result of decades of advocacy by Brazilian feminists for the regulation of Article 226, 8 of the Federal Constitution. This article demands that the State “ensure assistance to the family in the person of each of its members, creating mechanisms to suppress violence within the family” (BRASIL, 1988). The bill has also been influenced by the demands of international treaties that Brazil has signed, such as the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention of Belém do Pará (1994) and the Beijing Women’s Conference (1995). Needless to say, it stands as a milestone for the fight against gender-based violence as a social problem in Brazil.

The Maria da Penha law has established new measures and made significant changes to the way the Brazilian legal system addressed the issue. For instance,

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it has introduced conceptual innovations, such as recognizing different forms of violence — physical, psychological, sexual, property-related and moral —, as well as defining domestic violence against women regardless of the actor's or victim's sexual orientation. It has also introduced emergency protective measures for victims (such as the suspension of weapon possession, removal from home and limitation on the perpetrator's nearness to victims) and the preventive arrest of offenders in case they are found to pose a risk to the victims' physical or mental integrity. The bill has given special attention to the way victims should be treated in police stations specialized in domestic violence cases; has provided that victims should be assisted by multidisciplinary teams and has improved their access to justice by creating rules such as the need for legal assistance at all procedural stages (Article 27 of the Maria da Penha law). Furthermore, it has introduced new mechanisms of assistance to women experiencing domestic violence, as well as conferred them the right to keep their employment when it is deemed necessary that they temporarily leave their workplace. Additionally, it has created Small Claims Courts for Family and Domestic Violence against Women with civil and criminal competence (Articles 14 and 33), given that the judges in these courts are able to examine both crime and family law issues.

Notwithstanding the complexity and reach of these measures, the Maria da Penha law focuses on a more stringent criminal treatment for this type of violence. It precludes the jurisdiction of Special Criminal Courts to try crimes of domestic violence against women (Article 41 of the Maria da Penha law). Lastly, it has expressly prohibited penalties such as the mere provision of food or other financial aid to victims, as well as strictly pecuniary compensating penalties (Article 17 of the Maria da Penha law).

The preclusion of the jurisdiction of the Special Criminal Courts, which were created and regulated by Law 9099/95, was one of the most controversial issues discussed before the law was enacted. It has also been one of the most sensitive issues with regard to its enforcement.

Law 9099/95 has regulated Article 98 of the Federal Constitution, which provides for the Special Criminal Courts' jurisdiction to try petty crimes. Currently, Law 9099/95 establishes that Special Courts can try crimes of minor offensive potential, i.e., those leading to sentences not exceeding two years (Article 61 of Law 9099/95). It establishes a special and faster prosecution, introducing so-called "depenalizing" measures.

According to Law 9.099/1995, before the prosecution begins, the dispute may be settled between the parties, leading to termination of culpability. Otherwise, there may be plea bargain, where the Prosecutor's Office proposes a noncustodial sentence to be enacted immediately, offering, in exchange, to not initiate prosecution (Article 76 of Law 9099/95). In addition to this, the law introduces the possibility that, after the prosecution begins, the procedure can be conditionally reprieved, entailing conditions to be imposed on the defendant, which, if fulfilled timely, should lead to stay of execution.

Law 9099/95 has also introduced a change that is not directly connected to the procedure, but that impacts the issued addressed herein: Article 88 establishes that the prosecution of minor bodily injuries and unintentional injuries depends on

the victim's complaint, which repeals the provision in the Criminal Code that any crime is the object of unconditional public prosecution.

Thus, the provision of Article 41 of the Maria da Penha law implied not only the preclusion of alternatives to punishment and the criminal proceeding established by Law 9099/95 to cases of domestic violence against women, but also included minor injuries again in unqualified public prosecution processes, i.e., as a crime that does not need the victim's consent to be prosecuted.

Since it has become effective, the Maria da Penha law has been controversial among law enforcers. Some judges have questioned its constitutionality or the applicability of its legal provisions — especially those relating to the preclusion of Law 9099/95 and the minor injury prosecution system — and these discussions have led to heated debates in the public sphere.

Given this scenario, in December 2007, the President of the Republic presented the Declaratory Action of Constitutionality 19 (ADC 19) to the Supreme Federal Court (STF) with the purpose of solving judicial controversies and debarring the legal uncertainty over the constitutionality of the Maria da Penha law, especially articles 1, 33 and 41.

Yet due to the overall uncertainty surrounding the enforcement of the Maria da Penha law, in 2010 the Office of the Attorney General filed a Direct Action of Unconstitutionality claiming a Provisional Remedy (BRASIL, *ADI 4424*, 2010e) that would standardize its interpretation. According to the complaint filed with the Supreme Federal Court, the legislation would allow two different interpretations for enforcement: the assumption that the crime of domestic violence gives rise to (i) public prosecution according to the victim's complaint or (ii) unconditional public prosecution.² As we will address in this article, the only interpretation consistent with the Constitution, from the Attorney General's standpoint, is an unconditional public prosecution.

Resistance to the enforcement of the Maria da Penha Law, especially regarding its constitutionality, and the filing of judicial reviews of constitutionality with the Supreme Federal Court,³ have evoked a feeling of mistrust of the law's enforcement by the Judiciary in the public sphere, especially among social movement actors.

Thus, we may advocate that the conflicts that have arisen add even more importance to researching the enforcement of the Maria da Penha law by Brazilian courts.

The argument of unconstitutionality may hinder the application of the Maria da Penha law. In Brazil, the process of judicial review enables any judge or Court, by means of diffuse judicial review, to argue unconstitutionality to prevent the enforcement of a law. According to this model, the Federal Supreme Court (STF) may choose to adopt a system of diffuse judicial review to argue the constitutionality of a legal rule in its application to a particular case. In this case, the effects of the decision are limited to the case concerned, but the court may also challenge the constitutionality at an abstract level (concentrated judicial review).

At an abstract level, the court's decision should apply to all cases. The decision definitively removes legal rules from the legal system, rendering unconstitutional a particular legal rule or making the constitutionality of such rule contingent upon a

particular interpretation, thereby standardizing the interpretation of the law in order to bring it into compliance with a particular provision of the Constitution.⁴ As can be seen, this model makes the Brazilian Judicial Branch extremely susceptible to the debate on constitutionality of laws, which may ultimately result in non-enforcement by judges of appellate courts or courts of appeals of a law approved by the legislative.

Given the traits of the Brazilian judicial review, the objective of this paper is to respond to the concern over the application of the Maria da Penha law based on data from courts of appeal. Below we present a partial assessment of the enforcement of this law in Brazil, concentrating on some Brazilian Courts of Justice to do so.

Given the context underlying our research, we will present results from our database from the enactment of the Maria da Penha law until December 2010 to enrich the discussion on constitutionality in nine Brazilian Courts of Justice.

We will review the arguments and positions assumed by justices of the Courts of Justice, the contents of the Direct Action of Constitutionality 19, Direct Action of Unconstitutionality 4424 and the issues of the resulting hearing in the Supreme Federal Court.

Last, we will consider whether there are precedents contrary to the enforcement of the Maria da Penha law owing to its alleged unconstitutionality before the trial of actions by the Supreme Federal Court. The analysis, grounded on the data gathered, will also ascertain if there is connection between the discussions in Courts of Justice and that in the Supreme Federal Court.

2 Result of the Empirical Research in the Courts of Justice

This study analyzes 1822 judicial decisions regarding the enforcement of the Maria da Penha law accessed in the digital collections from the Courts of Justice of the following locations: Acre, Bahia, Mato Grosso do Sul, Paraíba, Pernambuco, Rio de Janeiro, Roraima, Rio Grande do Sul and São Paulo.⁵ Different aspects involved in the enforcement of the Maria da Penha law were considered in the research's scenario (including the issue of constitutionality) in order to provide an overview of the law's enforcement in different Brazilian regions.

In this paper, these decisions allow us to outline the general picture of the resistance to the Maria da Penha law that questions its constitutionality. Out of the decisions analyzed, 272 discussed the constitutionality of the Maria da Penha law (approximately 15%). The data below concentrate only on how the justices of different Brazilian States' Courts of Justice discuss and render their decisions on constitutionality.

The results allow us to make the following assessment: although it is possible that the argument of unconstitutionality works as a strategy to preclude the enforcement of the Maria da Penha law, the data shows that it has failed to establish precedent in the courts. In fact, empirical data is not enough to indicate generalized resistance in courts, even if there are indications that the Maria da Penha law is questioned either because the debate impacts courts' decisions or influences the public sphere. In other words, if there is resistance to the application of legal provisions of the Maria da Penha law or if it happens to a greater extent in trial courts (which

this research does not find), the said resistance does not affect the discussion on the precedents of the law's constitutionality.

According to our data, the arguments above were dispelled by the courts in the overwhelming majority of cases challenging the constitutionality of Maria da Penha Law. In only six cases did the courts entertain it as an unconstitutional provision. In 14 decisions, the Court did not entertain the argument of unconstitutionality, but ordered an "interpretation according to the Constitution".

Furthermore, there were 17 decisions where the justices stated their personal positions on the issue of constitutionality, but decided in favor of the constitutionality of the Maria da Penha law. In 15 of these cases, the justices stated that the reason for the said decisions was the hierarchy of courts. In one case, the justice has defended the unconstitutionality of the Maria da Penha law, but decided to enforce the law to ensure the best outcome for the defendant. In another case, the justice acting as rapporteur stated that he believed the Maria da Penha law was unconstitutional, but decided to make an "interpretation according to the Constitution." The positions that consider the Maria da Penha law unconstitutional seem to be few and are advocated by justices especially in certain states. By analyzing each State's profile of reasoning over constitutionality per justice, we can deepen our understanding of the issue. However, this task will not be carried out in this text.

Besides the trials' results, we felt it important to heed the Courts' arguments to discuss the constitutionality of the Maria da Penha law. Questions about the law's constitutionality are connected to three subjects: i) the law's questioning as a whole, considering its distinguished treatment of women; ii) the law's questioning as it precludes the enforcement of Law 9099/95; and iii) questioning over the jurisdiction to legislate.

The justices' positions on these subjects may be grouped the following way: a) positions in favor of the constitutionality of the Maria da Penha law founded on elements relevant to each of the issues raised above (often involving more than one), b) positions contrary to the constitutionality of the Maria da Penha law, which are similarly grounded on elements relevant to the said issues (often involving more than one); c) positions advocating an interpretation of the Maria da Penha law according to the Constitution (in general, the Maria da Penha law is constitutional, except for some provisions); d) positions that defend the unconstitutionality of the Maria da Penha law, even if they subsequently recommend its enforcement because of the hierarchy of courts; e) positions of justices defending the constitutionality of the Maria da Penha law who fail to ground their position.

The arguments for or against the constitutionality of Maria da Penha law will be systematized and exposed in the next section. Section 3.2 addresses the position of the justices who enforced an interpretation according to the Constitution. This type of decision happened principally in the cases discussing the validity of precluding Law 9099/95. Lastly, there were decisions where justices only enforce the Maria da Penha law for the party's claims without stating their position on its constitutionality.

Many of the arguments on the constitutionality of the Maria da Penha law (ADC 19 and ADI 4424) raised by this research are stated in the actions undergoing trial in the Supreme Federal Court.

2.1 Questioning of the Maria da Penha law as a whole, considering its distinguished treatment of women

The argument most frequently raised against the constitutionality of the Maria da Penha law in the cases analyzed is that the idea that the differential treatment of women who experienced violence at home is unconstitutional because it violates the principle of gender equality established in Article 5, item I of the Federal Constitution.

This position has little support among justices. They generally justify the differentiation introduced by the Maria da Penha law given the history of men abusing women, which is currently still significant.

It is common for justices to refer to statistics and surveys which “show that women are the main victim of domestic violence” in order to justify “special protection by the Criminal Law” in order to reduce inequalities. As stated by Justice Lais Rogéria Alves Barbosa, “the rules grounded on experience have shown that the number of women suffering all sorts of injuries by their partners is significant and growing, especially in the poorest layers of society.” (BRASIL, *Apelação Criminal 70029413929*, 2009a).

Thus, the reasoning is that, given that domestic violence is a social problem, the Maria da Penha law is constitutional precisely because it promotes substantive equality between men and women. The justices who have maintained this position point out that the formal equality ensured by the Constitution is not enough and that equality should be factual and enforced through laws providing for concrete measures.

They have advocated that women’s weakness and inequality should be analyzed case-by-case. Some justices even claim that the case is “an affirmative action in favor of women experiencing domestic violence who desperately needed appropriate protections in order to inhibit this type of violence and restore the substantive equality between men and women.” (BRASIL, *Apelação Criminal 200905003254*, 2010a).

The frequency of this reasoning varies quite a deal in the courts we analyze. It is recurring in the Court of Justice of São Paulo, where the argument of substantive equality is the basis for around 40% of the decisions discussing the constitutionality of the Maria da Penha law. In turn, the Court of Justice of Mato Grosso do Sul has used the same argument in only about 12% of the decisions discussing it.

A variation of this argument is used in decisions that have not employed the term “substantive equality,” but claim that the Maria da Penha law was constitutional given the Brazilian reality and history, where thousands of women experience domestic violence. This is the reasoning used in approximately 15% of decisions on the constitutionality of the Maria da Penha law in the Court of Justice of Rio Grande do Sul and in less than 5% of the decisions dealing with the issue in the Court of Justice of Mato Grosso do Sul.

In many decisions, the Maria da Penha law is deemed constitutional due to the State’s ability to “establish laws to protect vulnerable individuals on the grounds of gender.” (BRASIL, *Apelação Criminal 70030827380*, 2009b). The protection to the elderly conferred by Law 7716/89, to children and adolescents by the Child and Adolescent Law (ECA — Law 8069/90), and the prohibition of discrimination on the basis of race, color, ethnicity or religion under Law 7716/89, are cited as

constitutional examples of the “State’s power to make laws establishing different treatment to minority groups” (BRASIL, *Habeas Corpus 70031748676*, 2009c). According to Justice Barbosa, when protecting women, the State would be considering their “gender condition”, and assisting families by creating mechanisms to inhibit violence within their relationships, as provided for in Article 226, Paragraph 8 of the Federal Constitution.

Therefore, the Maria da Penha Law is alleged to be constitutional for giving effectiveness to the Constitution itself by making the protection of families concrete, since “the practice of domestic violence typically entails harmful consequences to every family as an entity,” representing a direct violation of human dignity, under the terms of articles 2 and 3, Paragraph 1 of the said law, and particularly under the provision established in Article 1, III of the Federal Constitution. Therefore, the Maria da Penha law would be a way to protect each individual within a family (BRASIL, *Apelação Criminal 2009.025378-7*, 2009d).

This argument is often used in the Court of Justice of Rio Grande do Sul, where it grounds about 20% of the decisions on constitutionality of the Maria da Penha law. In other courts, such as in São Paulo and Mato Grosso do Sul, this argument is not as frequent: it is used in only 5% of cases.

Some decisions refer explicitly to international treaties signed by Brazil, stating, for instance, that “the Maria da Penha law has ultimately been created to fulfill an International Convention signed by the very federal government” and “is founded on historical, empirical and statistical facts which justify that women, because of this differentiation, must have a tool to safeguard the balance of the men-women equation.” (BRASIL, *Apelação Criminal 70028874113*, 2010b). According to this line of reasoning, the Maria da Penha law, as a means of protection, has incorporated into domestic legislation international standards issued in favor of women to prevent and punish violence against them.

The most common argument is that the ordinary legislator may enact laws that establish differentiation, since Article 5 of the Federal Constitution aims to ensure substantive equality between men and women, but not all justices agree on this. For instance, Justice Romero Osme Dias Lopes has rendered decisions stating that statutory law cannot be contrary to the Federal Constitution and that the Constitution precludes several forms of discrimination, including on the basis of gender, and prohibits the legislator from differentiating men and women. This justice claimed that men could also be the victims of domestic violence and, thus, differentiation by gender would be completely inappropriate. Mr. Lopes also mentions theoretical positions implying that affirmative measures are incentives to discrimination (BRASIL, *Recurso em Sentido Estrito 2007.023422-4*, 2007a).

Although numerically insignificant, these decisions may create immeasurable and unpredictable effects by influencing other decisions or rousing debates in the public sphere. Such consequences are not discussed in this paper, but may be the object of future studies. Moreover, the decision referenced above is illustrative as it uses arguments raised in the early enactment of the Maria da Penha law.

The panel of the justice referenced above (the Second Criminal Panel of the Court of Justice of Mato Grosso do Sul) raised the Argument of Unconstitutionality

in Strict Appeal 2007.023422-4/0002, which has undergone trial in the Competent Court of Justice in January 2009. The argument claimed unconstitutionality of the Maria da Penha law, stating, “that the said law is ineffective, disseminating injustice, in addition to being antisocial, outdated and disguised as social revenge” (BRASIL, *Arguição de Inconstitucionalidade em Recurso em Sentido Estrito 2007.023422-4/0002*, 2009g). Nonetheless, the Full Court of Appeals’ decision in the Court of Justice of Mato Grosso do Sul advocated the constitutionality of the Maria da Penha law on the grounds that it is based on constitutional rights and that it has been enacted to deal with empirical inequality, given the alarming increase in violent situations, and “weighing the easiness of perpetration and psychological vulnerability of the victims, who could not previously resort to a specific measure to regulate and effectively inhibit the criminal situation.”

With respect to the formal aspects of these issues, to be discussed below, the decision has held that the Constitution grants the ordinary legislator the power to legally define “crimes of minor offensive potential.” By enacting the Maria da Penha law, the intention of the legislator was to treat more severely women’s offenders in the family environment, precisely because the “decriminalizing” parts of Law 9099/95 have not proven effective to fight crimes of this nature.

2.2 Questioning of the Maria da Penha law for precluding the enforcement of Law 9099/95

The main questioning relating to the Maria da Penha law used in State Appellate Courts references Article 41 of the law, which precludes the enforcement of law 9099/95 in domestic violence against women. This questioning has influenced actions presented to the Supreme Federal Court.

For instance, this is the position of Justice Adilson Vieira Macabu, who has declared Article 41 of the Maria da Penha law unconstitutional in some decisions, since it “violates the constitutional principles of equality and equal protection of people of different genders and spouses, as well as threatens the principles of reasonableness and proportionality.” According to this argument, when the Constitution states that “everyone is equal before the law, without distinction of any nature,” in Article 5, it precludes the establishment of “normative distinctions” in laws below it. According to the justice, this is a protection against discrimination. He avers that it is not reasonable that, if for a crime committed against the elderly, the perpetrator benefits from the decriminalizing measures of Law 9099/95, the same cannot occur when the victim is a woman. The justice then wonders if women are always going to be at an inferior level. (BRASIL, *Apelação Criminal 6208/2008*, 2008, *Apelação Criminal 3144/2009*, 2009e).

However, most of the decisions consider that the said provision is constitutional. The majority of arguments refer to the legislator’s intention to actually refute the “decriminalizing” measures of Law 9099/95 in cases of domestic violence against women, such as a plea bargains and conditional stays of execution.

In order to justify that there is no violation of the proportionality principle because of the preclusion established in Article 41, regardless of the sentence rendered, justices often refer to the legislator’s intent to change the scenario of domestic violence by proposing “changes which can actually contribute to stop or

reduce it drastically” (BRASIL, *Apelação Criminal 20100178957*, 2010c). The Courts of Justice of Rio de Janeiro and São Paulo frequently use this argument in around 25% and 15% of the decisions, respectively, but infrequently used in Rio Grande do Sul and Mato Grosso do Sul (about 5% of the decisions).

An argument about the severity of the crime also seems to ground the decisions purporting the provision’s constitutionality. Thus, dismissing the effect of Law 9099/95, the Maria da Penha law aimed to more severely punish crimes of violence against women committed within the family. Some justices argue that such preclusion is fundamental to effectively protect women, stating that the Maria da Penha law would become ineffective otherwise, precisely because what distinguishes it from other legislation is the preclusion of the “decriminalizing” measures of Law 9099/95.

Some justices have developed a sort of intermediate position about the preclusion of the enforcement of Law 9099/95: they think the Maria da Penha law is constitutional, but consider that some provisions of Law 9099/95 are applicable to cases of domestic violence and create exceptions to Article 41. They understand that the constitutionality of the Maria da Penha law does not entail the preclusion of all provisions of Law 9099/95 in cases of violence against women. Arguments following this position were used in decisions of the Court of Justice of Mato Grosso do Sul, as well as in other courts, such as those in Rio de Janeiro and Rio Grande do Sul.

Justice Carlos Eduardo Count of the Court of Justice of Mato Grosso do Sul avers: “As a matter of fact, what remains to be done is to analyze whether all the procedural mechanisms under Law 9099/95 are substantively contrary to the protection of Article 226, Paragraph 8 of the Constitution” (BRASIL, *Apelação Criminal 2008.022719-8*, 2009f). Afterwards, the justice argued that the constitutionality of the Maria da Penha law lies in the fact that it acknowledges that some provisions of Law 9099/95 are not sufficient to protect victims of domestic violence. Thus, only these provisions should not be enforced, and not Law 9099/95 as a whole. He believes that only measures which substantially violate the protection given to victims of domestic violence should be precluded. He argues that the conditional stay of execution of the process does not violate this protection, as it requires the fulfillment of certain requirements and conditions (BRASIL, *Apelação Criminal 2008.022719-8*, 2009f).

Thus, the Court applies the Maria da Penha law and the provisions of Law 9099/95 through the so-called “interpretation according to the Constitution.” Justices of the Court of Justice of Mato Grosso do Sul adopted this position even after the decision of the Full Court (BRASIL, *Arguição de Inconstitucionalidade em Recurso em Sentido Estrito 2007.023422-4/0002*, 2009g), which affirmed the constitutionality of the Maria da Penha law.

We also found cases where justices claim to have interpreted the law according to the Constitution because, according to them, in order to recognize the unconstitutionality, the process would have to be referred to the respective Full Court, and this would delay the process. This occurs because the Courts of Justice are divided into panels and chambers, which are made up of smaller groups of justices who are responsible for ordinary proceedings. However, Article 97 of the Federal Constitution establishes that only the Full Court, i.e., composed of all justices, could hear arguments for unconstitutionality.

2.3 Questioning the Maria da Penha law and the jurisdiction to define petty crimes

We also found arguments for unconstitutionality which defended that only constitutional legislators could define petty crimes, or “crimes of minor offensive potential”. Justice Adilson Vieira Macabu contends that the Maria da Penha law violates Article 98, I of the Constitution because the jurisdiction of Special Criminal Courts is determined by the nature of the crime and, therefore, it cannot be precluded on the grounds of who the victim was (BRASIL, *Apelação Criminal 6208/2008*, 2008).

Most Courts of Justice do not use this argument, but it is widely used in decisions of the Courts of Justice of Rio de Janeiro, Mato Grosso do Sul and São Paulo. In the vast majority of the decisions, justices have decided that such jurisdiction belongs to the ordinary legislator, contrary to that alleged by the party.

The prevailing understanding is that the Constitution has delegated to the ordinary legislator the authority to define petty crimes, as determined by Article 98, item I. Thus, if the Maria da Penha law expressly precludes the enforcement of Law 9099/95, these violations cannot be considered petty crimes. Laws that are inferior to the Constitution can, therefore, define which criminal offenses are subject to the “decriminalizing” provisions of Law 9099/95.

2.4 Positions of submission to the hierarchy of the Judicial Branch and decisions that do not found their positions

In some decisions, the justices do not state their opinions about the constitutionality of the Maria da Penha law, claiming subjection to the hierarchy of the Courts, although they are bound to sentences issued by higher trial courts only when the Supreme Federal Court has ruled through concentrated judicial review or when there is decision of the respective Full Court. We understand that this is the meaning of the decisions where justices raise the following arguments: i) the fact that the constitutionality has already been tried by the Supreme Federal Court ii) the fact that the Maria da Penha law has not been ruled unconstitutional by the Supreme Federal Court or iii) the fact that it has been tried by the respective Full Court.

The position of some justices who followed these arguments is noteworthy: considering that the Maria da Penha law, although “controversial,” has not been declared unconstitutional by the Supreme Federal Court and the “the guardian of the Constitution” until now (the actions were still pending judgment at that time), its provisions were still in force and should be enforced by justices and courts (BRASIL, *Apelação Criminal 70036402121*, 2010d, *Apelação Criminal 70029410172*, 2009h).

Some justices have agreed with the opinion of trial court judges or else with the defense’s arguments about the unconstitutionality of the Maria da Penha law, but ultimately decided for its constitutionality, since this position keeps with most of the precedents. However, in several cases, justices do express their personal position against the Maria da Penha law and its alleged inconsistency with the constitutional text.

In the Court of Justice of Mato Grosso do Sul, Justice Romero Osme Dias

Lopes stresses five scenarios under which he considers that the law is unconstitutional. However, for him, the debate is irrelevant given the decision of the Supreme Federal Court and the very Court of Justice of Mato Grosso do Sul, which fully recognized the constitutionality of the Maria da Penha law.

This justice, who had already favored the unconstitutionality of the Maria da Penha law as explained in item 3.1, was forced to change his opinion after the Argument of Unconstitutionality issued in January 2009 by the Court of Justice of Mato Grosso do Sul.

Thus, he supported the constitutionality of some articles of the law, including the preclusion in its Article 41, in keeping with the provisions of Article 97 of the Constitution. Nonetheless, the justice reproduced the trial of the 2nd Chamber of the Court of Justice of Mato Grosso do Sul (BRASIL, *Recurso em Sentido Estrito* 2007.023422-4, 2007a), where he appealed for the unconstitutionality of the Maria da Penha law, stating it “disrespected one of the objectives of the Federative Republic of Brazil (Article 3, item IV), violated the principle of equality and the principle of proportionality.”

Except for cases where there is sexual violence or serious injury, this justice believes that “the woman experiencing domestic violence does not want her partner or husband to be arrested, or criminally convicted.” Therefore, the solution is not to rest on Criminal Law, “but in the creation of public policies committed to recover the mutual respect that must prevail within the families.” According to him, the perpetrator’s conviction “only worsens relationships within the family” and women want the State to intervene to “relieve the family’s problem” and stop the assaults without leading to the partner’s arrest.

Similarly, Mr. Carlos Eduardo Contar, of the 2nd Criminal Chamber’s Justice of the Court of Justice of Mato Grosso do Sul, grounds the constitutionality of the Maria da Penha law on the fact that it had been the object of Argument of Unconstitutionality in the same court despite the opinion that it is now unconstitutional.

Thus, the two justices of the 2nd Criminal Chamber of the Court of Justice of Mato Grosso do Sul who openly advocated the unconstitutionality of the Maria da Penha law have eventually enforced it, because they believe that the understanding established in the Argument of Unconstitutionality tried by the Full Court cannot be challenged further.

In the Court of Justice of Rio Grande do Sul, Justice Manuel José Martinez Lucas justifies his decision in favor of the constitutionality of the Maria da Penha law only because, “strangely,” this is the position of the overwhelming majority. According to him, this is the provision which confronts the “fundamental right of equality between men and women” when he considers that the “very constitutional provision determines that only the Constitution may regulate this equality and men and women should be treated unequally only when the Constitution so allows it.” (BRASIL, *Apelação Criminal* 70029189206, 2009i). He has stated that he was “forced” to change his position when he recognized that he was “virtually alone,” and justified the change “owing to the judicial scenario and to avoid a fruitless discussion.” He has also raised the argument that judges and courts in Brazil should apply the Maria da

Penha law because the Supreme Federal Court, “the guardian of the Constitution,” had not declared it unconstitutional.

Among the cases analyzed, we also found decisions where justices, given the issues raised by the party, have enforced the Maria da Penha law, but have not expressed their opinions on the constitutionality. Or, they have taken its constitutionality for granted, even when the party has raised this question, or accepted the Maria da Penha law as constitutional without providing any reasoning for that position.

3 The Maria da Penha law and the Supreme Federal Court

Since its enactment in 2006, the Maria da Penha law has been the subject of debate in the Supreme Federal Court on several occasions. *Habeas Corpus* 106212 (BRASIL, 2011), tried in March 2011 by the Supreme Federal Court, exposed an important divergence relating to the law: the constitutionality of Article 41 of the Maria da Penha law (which precludes the enforcement of Law 9099/95). The Supreme Federal Court’s decision in this trial was unanimous to deny HC 106212, maintaining that Article 41 of the Maria da Penha law was constitutional.

Nevertheless, the matter has been examined as incidental and has not affected the prosecution of concentrated judicial review, which had already been proposed. In December 2007, the President of the Republic proposed the Declaratory Action of Constitutionality 19 (BRASIL, *ADC 19*, 2007b) and, in 2010, the Office of the Attorney General filed the Direct Action of Unconstitutionality 424 (BRASIL, *ADI 4424*, 2010e).

ADC 19 and *ADI 4424* were filed within the span of three years and were tried concomitantly by the Supreme Federal Court in February 2012. Both actions have been considered admissible, *ADC 19* by unanimous vote and *ADI 4424* by a majority vote (against the vote by presiding appellate judge, Cezar Peluso). Although different, the claims are strongly related. Both actions were filed to settle legal disputes and end the legal uncertainty concerning the constitutionality of the Maria da Penha law. *ADC 19* addressed particularly the constitutionality of Articles 1, 33 and 41 and *ADI 4424* claimed that an “interpretation according to the Constitution be given to Articles 12, I, 16 and 41 of Law 11340/2006.” The difference between the claim of *ADC 19* and *ADI 4424* suggests that new controversies aroused from the enforcement of the Maria da Penha law. Accordingly, the claim of *ADI 4424* includes the understanding that there is controversy within the Judiciary about the nature of the action for minor bodily injuries tried under the Maria da Penha law.

3.1 Declaratory Action of Constitutionality 19 (*ADC 19*)

When addressing its admissibility, the plaintiff described a negative scenario of the enforcement of the Maria da Penha law, presenting decisions of different courts questioning its constitutionality in view of an alleged threat: “(i) to the principle of equality (Article 5, I, Constitution); (ii) to the competence of special criminal courts (Article 98, I, Constitution) and (iii) to the competence attributed to the States to establish the local judicial organization (Article 125, Paragraph 1 and Article 96, II, “d”, Constitution).” Decisions made by the Court of Justice of Mato Grosso do Sul,

Rio de Janeiro and Minas Gerais about this issue, as well as others reaffirming the constitutionality of the Maria da Penha law, were presented as evidence of the judicial controversy that ADC 19 required the Supreme Federal Court to settle.

The main arguments used to support the constitutionality of the articles under review were as follows: a) the distinctive treatment of women in the Maria da Penha law is justified by historical reasons, as women stand as a social group which has been discriminated against, and equality cannot be understood exclusively from a formal point of view; b) given the unequal and patriarchal situation of Brazilian society, affirmative actions to protect women are of crucial importance; c) only the Federal Government may legislate; and d) the country is bound by international treaties.

3.2 Direct Action of Unconstitutionality (ADI 4424)

In order to level interpretation of the Maria da Penha law, the plaintiff claimed: i) the preclusion of the enforcement of Law 9099/95 and any of its provisions relating to crimes under the Maria da Penha law; ii) the nature of unconditional public action determined for minor bodily injury crimes under the said law; iii) the application of Articles 12, I, and 16 of the Maria da Penha law (about the need for withdrawal of complaint to be made before court) exclusively to crimes prosecuted on victim's complaint (such as the crime of intimidation, provided for in Article 147 of the Brazilian Criminal Code). Thus, the three objectives of the action refer to the consequences of precluding Law 9099/95 in cases of domestic violence against women, especially in relation to the change the said law establishes for crimes that produce minor physical injuries.

In this action, the prosecution of domestic violence by Law 9099/95 was said to imply impunity for actors, and not to hinder the logic of the cycle of violence that occurs against women. They maintained that making the action conditional to the victim's complaint disregarded the special situation of domestic violence and the problems brought about by the enforcement of Law 9099/95; namely, unsatisfactory settlements, women's discouragement from seeking the Judiciary, and cases treated as mere "domestic disagreements." They believed all of this resulted in impunity, strengthening violence against women. The need for a complaint was treated as an obstacle to the protection of health, life and non-discrimination of women. The action also points to researches showing that, at that time, 70 percent of the cases pending before the special criminal court involved events of domestic violence against women and, as a rule, the outcome was settlement, which discouraged women to file action against actors and strengthens impunity within patriarchal cultures.

To demonstrate the legal controversy about the subject, the claim described the arguments supporting the contrary position, i.e. that bodily injury crimes committed against women in domestic environments should be prosecuted by public action based on a victim's complaint like the other personal injury cases. Such a position is grounded on the following aspects: a need for preserving the family entity and for respecting the victim's wishes, the fact that many couples reconcile after moments of crisis and the possibility of unwanted conviction of the defendant.

Two positions have been outlined in this debate: 1) the action is public and should be unconditional and 2) the action is public and should be conditioned to the victim's claim. The action identifies the latter as the opinion of the majority, especially given a decision made by the Superior Court of Justice in February 2010 in line with that assumption. According to the claim:

The judicial opinions according to which the crime of minor bodily injury should no longer depend on the filing of a complaint by the victim – ‘whose wishes are almost always disguised by the threats and the oppression [exerted by] the perpetrator in order not to be sued’ -, given the preclusion in Article 41 of the Maria da Penha law, and taking into account the historical setting of legislative intervention in domestic violence, have lost.

(BRAZIL, ADI 4424, 2010e).

The plaintiffs also made reference to the role of the complaint made to the Inter-American Commission on Human Rights by Maria da Penha Maia Fernandes. The Commission identified a pattern of discrimination in the tolerance of domestic violence against women in Brazil and recommended legislative reforms. This reasoning is justified largely by international conventions (American Convention on Human Rights and Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, known as the Convention of Belém do Pará, which was the first to recognize violence against women as a general phenomenon), in addition to precedents of the Supreme Federal Court.

The claim states that considering minor bodily injury crime as a conditional public action, as well as enforcing Law 9099/95 for crimes committed under the Maria da Penha law: i) harms human dignity and violates the American Convention on Human Rights, which establishes the respect to physical, mental and moral integrity; ii) violates the principle of equality, and iii) represents an inadequate protection of constitutional rights.

According to the authors, making a criminal action conditional to the victim's complaint ignores the implications of this particular form of violence and perpetuates violence against women due to the lack of adequate criminal response.

The authors also claim that the harmful consequences that women may face after filing a complaint amount to gender inequality. In other words, they violate the principle of equality, giving rise to a situation of impunity, which strengthens violence against women. The claim also follows the position in the report of the Inter-American Commission on Human Rights, which asserts that one of the major shortcomings of laws aimed at combating violence against women is establishing its primordial objective as the preservation of the family, instead of the protection of its members from violence and discrimination. Lastly, it refutes the notion that it is in the individual interest of women, since there has been a constitutional option for defending human rights, including those of women, and cites research indicating that withdrawal of complaints leads courts to shelve 90 percent of criminal cases. Referring to the preclusion to deficient protection of constitutional rights, the action argues that the need for complaint would hinder the protection of health, life and the principle of non-discrimination against women.

3.3 *Trial of Actions in the Supreme Federal Court*

In February 2012, the Supreme Federal Court found ADI 4424 and ADC 19 admissible simultaneously.⁶ Justice Marco Aurélio de Melo was the rapporteur and defended hearing both of the actions.

The first set of arguments Justice Aurélio de Melo analyzed refers to the constitutionality of Article 1 of the Maria da Penha law. According to him, the constitutionality of this article is not a concern since differentiating victims based on their gender in order to inhibit domestic violence is not disproportionate or unlawful, and women are more vulnerable to violence that occurs within the family. Women experience a significantly higher number of assaults than men, according to the justice, and those suffered by men tend not to be a consequence of cultural and social values or of the usual difference in physical strength between men and women. He also considers the Maria da Penha law to be consistent with international treaties signed by Brazil.

The justice points out that, according to the Constitution, fundamental rights cannot be not insufficiently protected. In this vein, Melo avers that the Maria da Penha law was enacted in light of the invisibility of victims of violence in the home. He believes that the rule mitigates social and cultural discrimination in the country and would be necessary as long as the situation continued. He also points out that other laws were enacted to protect weaker parties, such as the Child and Adolescent Law (ECA) and the Elderly Law.

Justice Aurélio de Melo contends that Article 33 of the Maria da Penha law – which determines that cases under this law be tried by ordinary courts until special domestic violence courts are established - is constitutional. According to the justice, this would not violate Articles 96, I, and 125, Paragraph 1 of the Constitution, which confer the authority to establish judicial organization to the states, since Article 14 of the Maria da Penha law would have offers an option, not an obligation, to the states.

In his final point on ADC 19, the justice asserts that Article 22 of the Constitution establishes that the Federal Government needs to regulate procedural law. Thus, the states' assignment to manage their respective judicial organization would not compromise the Federal Government's prerogative to establish rules about processes and, consequently, enact rules that eventually influence local courts.

As for ADI 4424, Justice Aurélio de Melo believes that the debate should take into account empirical data. According to him, in most cases victims withdraw the complaints against the actors of assaults in the hope that violence will not recur. He cites "Violência Doméstica na Lei Maria da Penha" by Estela Cavalcanti, which points out that the rate of withdrawal reaches 90% of cases. Justice Aurélio de Melo argues that the withdrawal of a claim is not an expression of the victim's free will, but rather indicates the hope that the perpetrator will not continue the abuse. Nonetheless, states the justice, in most cases violence worsens, since the constraints that could lead the perpetrator not to become violent are absent.

He advocates that making the action unconditional does not lead to the violation of a women's will and autonomy by the State, since this would not be legal

tutelage but a simple safeguard. Leaving the women in charge of filing a criminal prosecution means to ignore the fear, the psychological and economic pressure, and the threats that they suffer, as well as the asymmetry in power, resulting from historical and cultural conditions. According to the justice, this contributes to decreasing the protection of the victim and prolonging the scenario of violence, discrimination and harm to human dignity.

The justice reaffirms that the Maria da Penha law cannot be considered apart from the Constitution and international treaties, which allow positive discriminations aimed to benefit groups that are more vulnerable and compensate for inequalities based on culturally ingrained prejudice.

Thus, the justice voted for the hearing of ADI 4424, considering that Articles 12, I, 16 and 41 of the Maria da Penha law are in conformity with the Constitution, i.e. that the non-application of Act 9099/95) to the crimes in which the former is applicable is constitutional.

While discussing ADC 19, the other justices followed the opinion of the rapporteur, contributing brief comments similar to his argument. One argument used repeatedly is that of substantive equality, which amounts to treating unequal individuals differently. Several justices (Rosa Weber, Carmen Lúcia, Ricardo Lewandowski, and Ayres Britto) stated that the Maria da Penha law is an affirmative action or policy in favor of women, which is justified by a scenario of social inequality. The fact that some justices defended the constitutionality of the Maria da Penha law or its provisions by referencing constitutional protection of the family (Justices Fux and Lewandowski) is also significant. Reference was also made to international treaties and conferences.

In her opinion, Justice Carmen Lucia affirmed the need to deal with the problem of domestic violence seriously, stressing that the existence of action on trial signals that the fight for equality and dignity for women is far from complete. According to her, “an average white Western man can never write or think of equality and inequality as one of us — because prejudice affects the way he sees.” The justice stated that women, even herself, who holds a distinguished official position, are treated differently because they are seen as usurping the place of men. She asserts that the fact there are still women experiencing violence is a concern for all women, and is not an individual matter. This point was made in disagreement with Justice Fux, who said that women who suffer domestic violence are not be equal to those who “have an ordinary life.”

The justice said that the Maria da Penha law is important to ensure the dynamics of equality and that, although many believe a Supreme Federal Court justice is free from prejudice, this is not true. Even though she may not suffer like other women, there are those who still think that the Supreme Federal Court is no place for women. Currently, discrimination is not conspicuous, but this does not mean that it does not exist. She considers that, historically, physical violence in the home has annihilated generations of women and the Maria da Penha law is a sign that the fight for equality must continue. She concludes her opinion by stating that women have been put in an unequal position by historical social processes and, thus, should receive differential protection.

Justice Cezar Peluso has also defended the constitutionality of the Maria da Penha law, advocating that they hear ADC 19 since, “actually, the Maria da Penha law represented a normative strategy of the Brazilian legal system to, instead of violating, put into practice the principle of equality.”

However, he was the only justice to advocate against hearing ADI 4424. According to him, his position should not be understood as “a mere opposition to the vast majority, but as a warning to the legislator that, in this case, had good reasons for giving conditional character to the criminal action.” According to him, one could not assume that the legislator was unreasonable in his choices when drafting the Maria da Penha law, as he was informed by elements that arose in public hearings, put forth by experts in sociology and humanities, who contributed with data justifying the need for victim’s complaints in the criminal process.

By expressly rejecting the argument used by Justice Lewandowski on the possible existence of a defect of the will of the assaulted woman at the time of a complaint, Justice Peluso said that this is not a rule and emphasized the importance of “exercising the nucleus of human dignity, that is, taking responsibility for one’s own destiny.” According to the justice, many women choose to not report the perpetrators of violence. Thus, the legislator has considered the need for complaint on the assumption that “the human being is characterized precisely for being the subject of its own history, for his ability to decide which way to go.”

Justice Peluso also asserts that a legislator should consider the risks that could arise from the Supreme Federal Court’s decision to make the action unconditional on the victim’s complaint. The first risk would be the possibility of women suffering intimidation, as they would no longer be able to influence the progress of the prosecution or to prevent it. The second risk would be the conviction of the perpetrator, with unpredictable consequences for the family, in cases where peaceful coexistence between a woman and her partner is subsequently established.

The justice maintained that making the action unconditional and public could trigger more violence. The public nature of criminal action would not stand as a deterrent to such violence, according to his opinion. On the contrary, it could increase the likelihood of its occurrence, since the perpetrator knows that he is subject to a condition that is out of his control, i.e., that will not change even if he changes the way he treats the victim. According to the justice, the Judiciary could not take on the risks of this decision, which would imply losing sight of “the family situation.” He points out that the legislator sought to reconcile values: the protection of women and the need for maintaining the family situation in which she is involved, which is not only limited to the condition of the woman or her partner, but also includes children and other relatives.

With the dissenting opinion of Justice Peluso, the Supreme Federal Court officially supported the constitutionality of the Maria da Penha law with a majority vote.

In this decision, many of the arguments used by the justices in the Courts of Justice in several of the Brazilian states studied were repeated in the opinions of this Court’s justices, especially those who have advocated the constitutionality of the Maria da Penha law.

4 Conclusion

The debate about the Maria da Penha law's constitutionality is not reflected in the establishment of precedents contrary to its enforcement in courts of appeal. Out of the 1822 decisions analyzed by this research, only 272 (15%) have discussed this issue. Out of these, in 14 decisions, the justices have enforced the Maria da Penha law partially, according to what they call an interpretation according to the Constitution, and, in only six of them has unconstitutionality been declared.

We realized that the resistance to the enforcement of the Maria da Penha law rests especially on the issue of the enforcement of Law 9099/95 (this is what is in debate in all the 14 cases of interpretation according to the Constitution and in three of the cases of unconstitutionality). This means that, in the cases where the Court somehow resists to the enforcement of Maria Penha Law, the focus of discussion is the stricter criminalization of the actor, and not the existence of different mechanisms of protection to women. Furthermore, only a few justices from some Brazilian states express these positions.

Out of the six unconstitutionality sentences mentioned above, three were rendered by Mr. Adilson Vieira de Macabu of the Court of Justice of Rio de Janeiro, who has advocated that the preclusion of Article 41, preventing the enforcement of Law 9099/95, violates the principle of equality. The other three decisions were rendered by Romero Osme Lopes Dias of the Court of Justice of Mato Grosso do Sul, who resorted to the same argument. However, this justice has ultimately changed his decisions due to the positions of higher courts. We found some decisions that were based on similar grounds, which points to the influence that mechanisms of standardization of precedents exert somehow.

Although decisions in favor of the legislation's constitutionality prevail, there were dissenting opinions that defended the unconstitutionality of the Maria da Penha law in all courts. Therefore, one may say that, even though we have not found generalized resistance to the Maria da Penha law, one may not assume that the debate about its constitutionality had been settled before the Supreme Federal Court tried ADC 19 and ADI 4424. Furthermore, this study only addresses the discussions taking place in the higher courts and does not cover trial courts, about which there are rumors of cases of domestic violence being tried by Special Criminal Courts. This may well be happening, without the dissatisfied party resorting to the courts of appeal.

In terms of the positions and arguments used, there is some specificity regarding states and justices in the Courts of Justice. In other words, some arguments appear only in some courts and do not appear – or appear only incidentally - in others.

It is worth noting that we address only justices of Courts of Justice and, thus, are not able to confirm whether or not this variation is triggered by the claims made before the Court or by the manner that each justice grounds his positions on the constitutionality of the Maria da Penha law. It is probable that these two factors are simultaneously valid.

In any case, it is interesting to observe how some issues are raised in some courts but not in other ones, or how different is the frequency in which they appear. For instance, the most common argument made by the Court of Justice in Rio Grande do Sul to support the constitutionality of the Maria da Penha law considers how this law lawfully promotes substantive equality between men and women. This

argument was used in about 30 percent of the decisions of the Court concerning the constitutionality of the Maria da Penha law. The same occurs in the Court of Justice of São Paulo, which uses the argument of substantive equality in around 40 percent of its decisions on the issue. Other courts grant less importance to this argument. For instance, in the decisions made by the Court of Justice of Mato Grosso do Sul, the argument appears in approximately 18% of the decisions, a lower proportion than the two other Courts. The argument most used by this Court in about 50 percent of its decisions is that the Maria da Penha law may be considered constitutional because its constitutionality has already been affirmed the Full Court.

In the State of Rio de Janeiro, 30 percent of the decisions apply the argument of substantive equality. In these decisions, the reasoning most often offered (in about 45 percent of decisions) is that the competence to define petty crimes belongs with the ordinary legislator. The frequency of this same argument is quite different in other states; for instance, the Court of Justice of São Paulo has resorted to it in only 15 percent of its decisions, the Court of Justice of Mato Grosso do Sul in 10%, and the Court of Justice of Rio Grande do Sul in 10%.

The variation between the arguments commonly used by each Court generally follows this pattern: the argument that contends that the Maria da Penha law is constitutional because it aims to fulfill Article 226, Paragraph 8 of the Constitution is used in approximately 20 percent of the decisions of the Court of Justice of Rio Grande do Sul whereas the Courts of Justice in São Paulo, Rio de Janeiro and Mato Grosso do Sul base constitutionality on this argument in only 5 percent of their decisions.

In 25 percent of the decisions of the Court of Justice of Rio de Janeiro which discuss the constitutionality of the Maria da Penha law, we found they used the argument that the legislator intended to more severely punish the perpetrators of assaults against women, preventing alleged misuse of decriminalizing provisions of Law 9099/95. This would be valid given that this crime poses a serious threat to human rights, and is recurrent in nature.

A similar argument is often used in decisions by the Court of Justice of São Paulo (about 15 percent), while it is not frequently used in the Courts of Justice in Mato Grosso do Sul (7 percent) or Rio Grande do Sul (4 percent).

In the Courts studied, we do not find generalized resistance to the enforcement of the Maria da Penha law in courts of appeal owing to its alleged unconstitutionality. Furthermore, we did not detect the development of a line of precedents supporting this thesis. Nevertheless, as we have said, we do not want to overlook or minimize this discussion, since this research does not include trial courts, the existence of positions contrary to the Maria da Penha law and the possibility that these decisions influence the precedents.

The recent decision by the Supreme Federal Court in February 2012 has confronted and neutralized the interpretative disputes reviewed in this study when it declared the constitutionality of the law and of some of its provisions (such as Article 41).

Nevertheless, this does not imply the complete eradication of controversies over the Maria da Penha law in the Brazilian courts. There is no solution to the doctrinal legal debate and it is important to keep track of disputes that may rise at the new stages of debate following the Supreme Federal Court's decision.

Importantly, this study focused on resistance to the enforcement of the Maria da Penha law connected to the disagreements over its constitutionality. Other disputes that are also relevant to delimit the scope of the application of the law, such as the one regarding the conditions for application of protective measures, are legally substantiated at another stage of doctrinal discussion and should be considered in assessments of the Maria da Penha law in Brazilian courts.

Moreover, study on this issue should be extended in order to improve one's understanding of resistances that may linger in other instances or brought about by other arguments. Our findings only consider the courts of appeal, which represent one aspect connected to the enforcement of the Maria da Penha law. A more comprehensive diagnosis of the problem should be undertaken by considering other issues and examining the filters that are at play that occur before cases reach the courts.

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NOTES

1. The complaint made by Maria da Penha Maia Fernandes to the Inter-American Commission on Human Rights (OAS) states that there was governmental tolerance of domestic violence. Maria da Penha is a Brazilian biopharmaceutical professional who was victim of a double attempted murder by her husband in 1983, and appealed to the commission in 1998 given the irregularities and undue delay of the Brazilian judicial system.

2. As we will discuss below, the Maria da Penha Law, in its Article 41, expressly prevents the application of the Law 9.099/95. Consequently, it also precludes the application of the Article 88 of the Law 9.099/95 to cases of domestic violence against women, which means that minor bodily injuries practiced in this context would not depend on the victim's complaint as the other crimes of this nature do. Article 41 of the Maria da Penha Law, also often subjected to judicial review, as we will describe in more detail later on, has raised doubt about the waiving of the requirement of victim's complaint. This is because Article 16 of the Maria da Penha Law states that if the victim of the crimes established by this law wants to withdraw the complaint, the victim must appear before the judge at a hearing specifically designated for this purpose. Taking into consideration these two mechanisms, they pose the question of what type of legal procedure the crime of intentional minor bodily injury against women is subjected to – either unqualified public prosecution process (noting the prohibition of application of Article 88 of Law 9.099/95 in cases under the Maria da Penha law) or qualified, i.e. requiring the consent of the victim, according to interpretation based on the Article 16 of Maria da Penha law. Another interpretation, however, states that it is not the case of inconsistency of the proceedings established by the Maria da Penha Law, since the victim's complaint under Article 16 would apply to other crimes, other than the minor bodily injuries, such as the crime of intimidation (which also requires victim's complaint).

3. Brazil is a country that has 27 federal units. Each of them has a Court of Justice (TJ) with the jurisdiction to try cases, especially those that appeal decisions of trial courts. The judges working in the Courts of Justice are called justices. The highest level of the Judicial Branch is made up of the

Superior Court of Justice (STJ) and the Supreme Federal Court (STF). The first is mainly responsible for trying, among other things, the appeals coming from the Court of Justice. The Supreme Federal Court is responsible for trying cases involving constitutional issues.

4. For the purposes of this text, some forms that promote the centralized control of constitutionality are the Direct Action of Unconstitutionality (ADI) and the Declaratory Action of Constitutionality (ADC). The objective of ADI is to abstractly declare the unconstitutionality of a federal or state law or normative act, while the ADC aims to abstractly declare the constitutionality of a federal or state law or normative act (Article 102, I, of the Federal Constitution of Brazil). ADI is also used to give the federal or state law or normative act a specific interpretation "according to the Constitution," a hermeneutical mechanism used by justices in Brazil, which interprets the rule in question in a way that is consistent with constitutional provisions. The capacity to bring such actions is limited. In the case of ADI and ADC, the following parties may propose an action: a) the President of the Republic; b) the chair of the Federal Senate; c) the chair of the House of Representatives; d) the chair of the State Legislatures or the chairs of the Federal District Legislative Chamber; e) the State and Federal District Governors; f) the Attorney General; g) the Federal Council of the Brazilian Bar Association; h) the political party represented before the Brazilian Congress; and i) unions and class entities of national nature.

5. The selection of precedents via digital collection has some limitations, and the main one is the uncertainty about the availability of all decisions regarding the terms sought. Although one cannot draw conclusions about the universe of the cases actually tried, we have analysed all the cases made public by the courts.

6. The trial decision by the Supreme Federal Court was not published when this text was finished. The description of the trial in this paper is based on the declaration and public reading of the opinions of the justices during the session, which was broadcasted on TV Justiça and available at: <http://www.youtube.com/playlist?list=PL18BEF1AC0B1D43AA&feature=plcp>. Last accessed: 2 Nov. 2011.

RESUMO

Este estudo teve como objetivo mapear as principais posições sobre a constitucionalidade da Lei Maria da Penha (Lei 11.340/2006) no sistema judiciário brasileiro. A lei, fruto de lutas políticas do movimento feminista brasileiro, tem sido objeto de discussões na esfera pública e de ações que visam consolidar sua constitucionalidade perante o Supremo Tribunal Federal. As posições identificadas foram as seguintes: i) o questionamento da lei *in totum*, por conferir tratamento diferenciado à mulher; ii) o questionamento da lei por vedar a aplicação da Lei 9.099/95; iii) posições que discutem a competência legislativa para definir crimes de menor potencial ofensivo; iv) posições de submissão à hierarquia do Poder Judiciário; e v) posições que assumem a constitucionalidade da lei sem fundamentação. Ao analisar os argumentos utilizados nos Tribunais de Justiça, pretendemos mostrar que a criação do direito não se resume ao momento legislativo, sendo também o Judiciário palco de disputas.

PALAVRAS-CHAVE

Lei Maria da Penha – Constitucionalidade – Judiciário – Esfera pública – Teoria do direito

RESUMEN

Este estudio tuvo como objetivo mapear las principales posiciones sobre la constitucionalidad de la Ley Maria da Penha (Ley 11.340/2006) en el sistema judicial brasileño. La Ley, fruto de las luchas políticas del movimiento feminista brasileño, ha sido objeto de discusiones en la esfera pública y de acciones que buscan consolidar su constitucionalidad frente al Supremo Tribunal Federal (STF). Las posiciones identificadas son las siguientes: i) el cuestionamiento de la ley *in totum*, debido a atribuir un trato diferenciado a la mujer; ii) el cuestionamiento de la ley por impedir la aplicación de la ley 9099/95; iii) posiciones que discuten la competencia legislativa para definir crímenes de menor potencial ofensivo; iv) posiciones de subordinación a la jerarquía del Poder Judicial y v) posiciones que asumen la constitucionalidad de la ley sin ofrecer fundamentación para ello. Al analizar los argumentos utilizados en los Tribunales de Justicia, pretendemos demostrar que la creación del derecho no se resume al momento legislativo y que el Poder Judicial también es un palco de esas disputas.

PALABRAS CLAVE

Ley Maria da Penha – Constitucionalidad – Judicial – Esfera pública – Teoría del derecho