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Leila Linhares Barsted

Jacqueline Hermann

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LEGAL DOCTRINE AND THE GENDER ISSUE IN BRAZIL¹

LEILA LINHARES BARSTED² AND JACQUELINE HERMANN³

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I. INTRODUCTION

This paper highlights several preliminary issues necessary for a critical evaluation of the relationship between gender-based violence, the law, and the Brazilian judicial system. It should be stated from the outset that the phenomenon of violence has presented the judicial system with the challenge of securing its monopoly on conflict arbitration, particularly those conflicts falling within the framework of criminal law.

This monopoly in applying the law is based on a theoretical premise inscribed in legal doctrine and government institutions and synthesized in the utopian view that all social conflicts should be resolved by the judiciary within the strict confines of the law. This premise, which espouses equality among all citizens, dates back to the eighteenth century and constitutes one of the cornerstones of democratic legality.

There is no doubt, however, that despite this utopian ideal, most conflicts involving violent acts never come to the attention of the government, either by way of its police force or the judiciary.

1. This article summarizes Leila Linhares Barsted and Jacqueline Hermann, *O Judiciário e a Violência Contra a Mulher: A Ordem Legal e a (des) Ordem Familiar*, CUADERNO, Sept. 1995. It is based on a study supported by the Ford Foundation.

2. Attorney and expert in Political Science, Director of CEPIA, a nongovernmental organization, and Editor of the *Revista Estudos Feministas* of the Universidade Federal do Rio de Janeiro.

3. Historian, Ph.D. in Social History from the Universidade Federal Fluminense, CEPIA researcher and visiting professor of the History Postgraduate Program of the Universidade Federal do Rio de Janeiro.

Moreover, even when the judiciary is activated, it cannot always respond with the desired speed and efficiency. In other words, the ideal of a society able to balance and harmonize the interests of individuals of different genders, races, and social classes, or the interests of citizens and the state, has a theoretical and rhetorical function rather than a direct, concrete effect observable in the actual dynamics of society.

Another issue has to do with the justice system's uneven handling of conflicts and agents of conflict, which reflects social inequalities as well as the selectivity of the punitive framework. From a historical perspective, we perceive selectivity in terms of the legitimacy of events which should be treated as social conflicts and are instead subjected to legal proceedings by the judiciary. For example, since the drafting of labor laws in Brazil in the 1940s, conflicts between employees and employers have been considered situations that should be referred to the police rather than social conflicts more appropriately handled politically. In the same vein, for a long period of our republican history, certain political conflicts were classified as infractions against public order. In other words, police action traditionally supplanted judicial action.

Moreover, studies in the fields of sociology and anthropology of law⁴ have identified alternatives to both the police and the judiciary for the mediation and resolution of certain social conflicts, particularly those in the area of violence. These alternatives provide that families, churches, social groups, and other private agents arbitrate conflictive situations without state interference. This type of action has positive aspects when it is possible to achieve equitable conciliatory solutions. But it can have negative aspects when one of the parties is obliged to accept agreements from a position of inequality.

Other alternatives to state action have also increased over the past few decades. These include arbitrary actions, abuse of authority by police, and actions by criminal groups popularly known as "death squads" which operate illegally and with extreme violence as a private police force. These groups often include criminals who control drug trafficking and terrorize poor populations. In addition, many of these criminal groups include members who belong to or who formerly belonged to the police force.⁵

4. See F. A. Miranda Rosa (1984); Leila de Barsted; A. L. (1985); A. Bastos (1975); J. Falcão (org.) (1984); Oliveira e Pereira (1988); L. F. Duarte, et al. (1993).

5. See R. Kant de Lima (1994); Paulo Sérgio Pinheiro (1981); S. Adorno (1994) (analyzing and reporting on arbitrary police action in Brazil).

Historically, we observe a fissure in the judiciary's monopoly on conflict resolution in Brazilian society. This fact is connected to another phenomenon observed within the judiciary which is a tendency to evaluate interpersonal conflicts differently according to the characteristics of the victim and the perpetrator.

This hierarchy raises a number of issues. On one hand, it is supported by the logic behind the Brazilian Criminal Code which establishes distinctions between "public crimes" [crímenes de acción pública] and "private crimes" [crímenes de acción privada]. Under Brazilian law, public crimes, offenses liable for criminal prosecution by the state, are offenses against society as a whole regardless of the fact that they were perpetrated against a single individual. Any citizen can report such crimes and that report is all that is required to activate the police and judiciary. Conversely, private crimes can only be reported by the offended individual or his or her legal representative, and, in such cases, the individual can decide whether or not to initiate state action. This distinction results in a hierarchy to the extent that the first category of crimes is implicitly considered more serious than the second, even when this is not the case. For example, petty larceny is a public crime while statutory rape is a private crime.

The Brazilian Criminal Code is divided into crimes against the person, crimes against customs or traditions, crimes against patrimony, crimes against the family, crimes against the administration of justice, and so forth. These divisions indicate the juridical values that the law considers more important to protect, and therefore such infractions are punished with greater or lesser severity.

Conventional wisdom adds other discrepancies to the examples of the legal hierarchy of conflicts found in the Brazilian Criminal Code. These include the fact that crimes committed in public areas are considered more serious than those committed in private areas. Indeed, a special term has been created for the latter case: domestic crimes. Taking into account data from the Brazilian Institute of Geography and Statistics [Instituto Brasileiro de Geografia y Estadística-IBGE], which reveals that the victims of crimes committed in public areas are predominantly men while victims of crimes committed in private areas are usually women, this new hierarchy reinforces gender-based asymmetry. It also relegates violence committed in the domestic realm to a sort of second class conflict, even though the Criminal Code considers a crime committed by someone who shares an intimate relationship with the victim to be an offense worthy of more severe punishment.

The same reasoning can be applied to racial and social differences. Deaths of black and poor people attract less public outcry and press attention than deaths of white and rich people. There is a tendency to accept as "natural" a hierarchy that protects some more than others, or in the converse, that penalizes some more than others, as is clearly the case with blacks and the poor.

A paradox exists with regard to crimes committed in the domestic sphere that must be exposed. On one hand, conventional wisdom nearly always considers these to be "private crimes," less important than robberies, kidnappings, murders, and assaults in the street. It would seem then, that the family deserves less protection than property. Nonetheless, at the trials of men accused of assaulting or murdering their wives and female companions, it is argued that they acted to "defend their honor" or "the family honor." As a result, acquittals and more lenient sentences are requested in order to avoid "further harm to the family."

Therefore, on some occasions the family has less value in the eyes of the law, often becoming a discretionary area outside the legal purview. In other cases, the family acquires an even greater legal value than the legal value placed on life itself. In societies such as ours, with Mediterranean cultural influences, this paradox can be compared to the ideological glorification of motherhood juxtaposed with the extreme hardship faced on a daily basis by women raising children.

With these concerns in mind, our recent study of the judiciary sought to understand how legal doctrine is applied to gender-based violence. It examined how Brazilian legal doctrine and the judicial system handle conflicts arising from gender-based violence and whether or not these conflicts are recognized as situations that should be handled comparably to other types of violence found in the Criminal Code.

It is our view that the judicial system's attitude can be an important factor in the transformation of social values based on the naturalization of violence against women, especially in the domestic sphere. If this is not the case, and it has not been to date, the application of private justice in the domestic sphere will intensify the dangerous trend toward trivializing violence in other areas of social life.

In the latter scenario, the judiciary would forfeit its roles including: calling before it conflicts classified as crimes by the Criminal Code; restoring a state of legality; and instilling confidence in the justice system rather than a general feeling of impunity. It would also waste

the historic opportunity to break down the efficiency of parallel violence as a means of “conflict resolution.” By this, we do not mean to naively endorse the utopian view that the judicial system is capable of dealing with all social conflicts. Rather we believe it is capable of playing a more effective role as an institution essential to the rule of law: retaining its monopoly as arbiter of conflicts arising from violent relationships.

II. THE ISSUE OF GENDER AND THE BRAZILIAN STATE

In an earlier report based on the study conducted and published by CEPIA with support from the Ford Foundation and UNIFEM, we evaluated the laws and government programs dealing with gender violence that developed beginning in the mid-1980s as a result of pressure from the women’s movement. The present study deals with the same period.⁶

The evaluation offered by the first report was aimed primarily at the legislative and executive branches. We questioned the extent to which the existence of laws and public services aimed at combating gender-based violence actually contributed to decreasing the number of incidents of this type of violence. We also questioned the way in which modernity in Brazil is accompanied by a lack of respect for citizens and the degree to which Brazilian society tolerates specific forms of violence, particularly violence against women.

Some of the report’s conclusions pointed out increased government sensitivity in the 1980s. This was demonstrated by the legislative and executive branches’ promulgation of laws and creation of public institutions specifically responsible for combating this type of violence. This “sensitivity” is, of course, relative. Nonetheless, despite their limitations, the Special Commissariats to Attend Women Victims of Violence [*Comisariías Especiales de Atendimento a las Mujeres Víctimas de Violencia*]⁷ have become positive forces that raise awareness of the profile of violence against women. Another conclusion drawn from the earlier report was the perception of low rates of punishment despite laws and social institutions created to prevent violence against women. This phenomenon was attributed to the high degree of social tolerance of this type of violence as well as to actions by the judicial system.

We concluded that studies of public policy should include an

6. See Leila Linhares Barsted, *Violencia Contra a Mulher e Cidadania. Uma Avaliação de Políticas Públicas*, in *CADERNOS*, Dec. 1994.

7. These Commissariats were founded beginning in the mid-1980s based on a proposal from the women’s movement. Today, there are more than 200 units around the country.