

# **Domestic Violence as a Human Rights Issue Beyond (Criminal) Accountability: A Brazilian Case Study**

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## **Abstract**

*The article analyses the domestic implementation of the Maria da Penha Law, a Brazilian federal legal act to combat and prevent domestic and family violence against women. The article first introduces the trajectory of domestic violence from a private matter to a public concern as a human rights violation. Then the article contextualises the Brazilian feminist activism for legal reform and introduces the importance of the 2001 Maria da Penha case in the Inter-American Commission on Human Rights for the enactment of the Maria da Penha Law in 2006. Thereafter, the article presents the Maria da Penha Law's legal provisions and its success in establishing special legal protection for women in situations of domestic violence, as well as it reflects on the Maria da Penha Law's ongoing challenges. A critical analysis of the Brazilian reality demonstrates that offender criminal accountability is the most feasible remedy to domestic violence, whereas the fragmentation and fragility of state measures to protect and assist women in situations of violence perpetuates state neglect of women in the context of gender-based violence. Therefore, the Maria da Penha Law case study demonstrates that legal reform alone is insufficient to tackle domestic violence. Women's effective access to legal protection and integrated and gender-aware public policies is pivotal to eradicating domestic violence against women.*

## **Introduction**

The international human rights framework has developed to understand gender-based violence against women (GBVAW), including domestic violence, as a

human rights violation. Inserting domestic violence into the language of rights raises public importance and awareness of the phenomenon, but it also highlights the problem of human rights ineffectiveness. This article builds on this scholarly debate by discussing the Brazilian special legislation on domestic violence, the Maria da Penha Law (MPL). Aware of the gendered dimensions of domestic violence, the MPL is a federal legal act that creates mechanisms to combat and prevent domestic and family violence against women according to international human rights standards. The 2001 Maria da Penha case at the Inter-American Commission on Human Rights (IACHR) was a milestone for the enactment of the MPL as it held Brazil internationally responsible for human rights violations in the context of violence against women, which in turn strengthened Brazilian feminist engagement for legal reform that resulted in the MPL.

Brazil was chosen as a case study because, even though it has implemented gender-aware legislation on domestic violence, there are still elevated rates of GBVAW.<sup>1</sup> By analysing the MPL as a case study of national legislation on domestic violence, this article seeks to provide insights into the achievements and challenges in the domestic implementation of gender-aware and human rights-based legislation on domestic violence. Through the analysis of the case study, the article also raises globally relevant insights regarding the reality of government interventions on GBVAW that reinforce criminal accountability of offenders rather than promote easily-accessible and effective public services to safeguard women in situations of domestic violence.

The article is structured in three sections. In the first section, the article presents a summary of domestic violence within the international human rights landscape. The second section introduces the Brazilian feminist engagement for legal reform and the importance of the Maria da Penha case in the IACHR for the development of the MPL. Thereafter, the third section analyses the MPL case study, organised into four subsections. The first subsection presents an overall introduction of the

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<sup>1</sup> Inter-American Commission on Human Rights, "Situation of human rights in Brazil: Approved by the Inter-American Commission on Human Rights on February 12, 2021" (Country report BRAZIL, OEA/Ser.L/V/II.Doc.9/21), <https://www.oas.org/en/iachr/reports/pdfs/brasil2021-en.pdf>, [90].

MPL's content and its axes of state intervention in domestic violence against women. Subsections B and C analyse the MPL's effects on state interventions on domestic violence, building on scholarly debates to identify the MPL's achievements and challenges. The final subsection then demonstrates the internationally valid insights of the MPL case study regarding states' commitment to eradicate domestic violence through promoting criminal accountability, but also by protecting survivors and endorsing preventive measures. In conclusion, the article indicates that the MPL is a positive legal development toward eliminating domestic violence as it recognises domestic violence as a human rights violation, but its challenges demonstrate the need to offer state responses for women's rights protection beyond the criminal prosecution of domestic violence offences.

### **The International Human Rights Framework On Domestic Violence**

The first section introduces provisions on domestic violence within international human rights law and aims to reflect on feminist developments in the trajectory of domestic violence from what was previously considered a private affair to an acknowledged human rights violation.

The international human rights framework has developed to understand domestic violence as a human rights violation and recognise the need for states to take positive actions to eliminate it. International human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), contain the right of non-discrimination based on sex and equal rights between men and women.<sup>2</sup> In 1979, the United Nations adopted the Convention on the Elimination of All Forms of Discrimination against

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<sup>2</sup> "Universal Declaration of Human Rights," 10 December 1948, General Assembly Resolution 217-A, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>, articles 2 and 6; "International Covenant on Civil and Political Rights," 16 December 1966, 999 UNTS, at 171, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>, articles 2.1, 3 and 26; "International Covenant on Economic, Social and Cultural Rights," 16 December 1966, 993 UNTS, at 3, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>, articles 2.2 and 3.

Women (CEDAW).<sup>3</sup> While the CEDAW recognises that discrimination against women violates multiple rights, it does not contain any explicit provision relating to violence based on sex or gender. Before the 1990s, the international legal framework did not widely consider domestic violence as a matter of human rights importance. Although women's activism was present throughout the construction of the modern international human rights law framework, "their advocacy centred on the rights to equality and non-discrimination on the basis of sex in a formal sense."<sup>4</sup>

Mainly since the 1990s, feminist legal scholars have raised questions about the human rights framework's inherent male bias, which took men's experiences as the starting point<sup>5</sup> and consequently did not extensively accommodate or address women's experiences.<sup>6</sup> Feminists argued that, due to the public/private dichotomy and the legal protection of the family rather than the individuals within the family, domestic violence was suppressed as a private matter within the family setting.<sup>7</sup> The international feminist movement for women's rights was pivotal for the turn of GBVAW (including domestic violence) from a private to a public matter of violation of human rights.

The repercussions of the women's rights movement were reflected in the CEDAW General Recommendation n. 19 of 1992 (GR 19), which incorporates gender-based violence into CEDAW jurisprudence by making an inherent connection between discrimination and violence.<sup>8</sup> Also, GR 19 overcame the previous

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<sup>3</sup> "Convention on the Elimination of All Forms of Discrimination against Women," 18 December 1979, 1249 UNTS, at 1, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>.

<sup>4</sup> Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge: Cambridge University Press, 2010), 39.

<sup>5</sup> Beth Goldblatt, "Violence against women and social and economic rights: deepening the connections," in *Research Handbook on Feminist Engagement in International Law*, ed. Susan Harris Rimmer and Kate Ogg (New York: Edward Elgar, 2019), 5.

<sup>6</sup> Karen Engle, "International Human Rights and Feminisms: When Discourses Keep Meeting," in *International Law: Modern Feminist Approaches*, eds. Doris Buss and Ambreena Manji (Oxford: Hart Publishing, 2005), 52.

<sup>7</sup> Joan Fitzpatrick, "The Use of International Human Rights Norms to Combat Violence Against Women," in *Human Rights of Women: National and International Perspectives*, ed. Rebecca J. Cook (Pennsylvania: University of Pennsylvania Press, 1994), 534.

<sup>8</sup> UN Committee for the Elimination of All Forms of Discrimination Against Women, Resolution A/47/38, *General recommendation No. 19: Violence against women* (1992), file:///C:/Users/Dell/Downloads/INT\_CEDAW\_GEC\_3731\_E.pdf. See also Bonita

understanding of State responsibility only for public acts by declaring that “[s]tates may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”<sup>9</sup> Thus, the full implementation of CEDAW jurisprudence on GBVAW demands that states act with due diligence as to private acts of gender-based violence, which means taking reasonable steps to safeguard women from violence and to hold perpetrators accountable.<sup>10</sup> If states fail in that obligation, “they may be obliged to provide compensation.”<sup>11</sup>

Furthermore, the CEDAW General Recommendation n. 35 (GR 35) complements and updates the GR 19 and reinforces the obligation of due diligence “for acts or omissions by non-State actors which result in gender-based violence against women.”<sup>12</sup> It is important to highlight that the GR 35 also introduces a more intersectional perspective to states’ obligation to combat GBVAW as it recognises diverse factors other than gender itself that affect and heighten GBVAW, thus acknowledging that GBVAW is interconnected to other structures of social inequality and discrimination that women may also face.<sup>13</sup> Domestic violence and GBVAW are also present in other relevant soft law instruments,<sup>14</sup> such as the Vienna Declaration and Programme of Action, the Declaration on the Elimination

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Meyersfeld, *Domestic Violence and International Law* (London: Bloomsbury Publishing, 2010), 34.

<sup>9</sup> *General recommendation No. 19: Violence against women*, [9].

<sup>10</sup> Lorena Sosa, *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?* (Cambridge: Cambridge University Press, 2017), 55.

<sup>11</sup> Meyersfeld, *Domestic Violence and International Law*, 36.

<sup>12</sup> UN Committee for the Elimination of All Forms of Discrimination Against Women, CEDAW/C/GC/35, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19* (2017), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/231/54/PDF/N1723154.pdf?OpenElement>, [8] and [24.b].

<sup>13</sup> UN Committee for the Elimination of All Forms of Discrimination Against Women, *General recommendation No. 35*, [14].

<sup>14</sup> Although there is no generally agreed definition of “hard law” and “soft law”, in a nutshell and for the purposes of this article, hard law may be understood as legally binding, that is, norms that create enforceable legal obligations, whereas “soft law” is non-binding legal norms. According to Sosa, soft law “appears today as a broad conceptual construction that encompasses non-binding resolutions, recommendations, codes of conduct and standards, and also soft rules included in legally binding treaties.” See Sosa, “Intersectionality,” 45; also Daniel Bradlow and David Hunter, “Introduction: Exploring the Relationship between Hard and Soft International Law and Social Change”, in *Advocating Social Change Through International Law: Exploring the Choice Between Hard and Soft International Law*, ed. Daniel Bradlow and David Hunter (Leiden, Boston: Brill, 2019), 4-5.

of Violence against Women, the establishment of the Special Rapporteur on violence against women, its causes and consequences, and the 1995 Beijing Declaration and Platform for Action.<sup>15</sup>

However, feminist scholarship has questioned the efficacy of GBVAW-related norms at the UN level through soft law instruments, which are not binding to states.<sup>16</sup> In contrast to the international framework, regional human rights systems have regional binding treaties on the matter, thus elevating GBVAW and domestic violence to the standard of hard law. The earliest of the regional treaties on GBVAW is the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará).<sup>17</sup> Also, the African Union adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in 2003, while the Council of Europe adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) in 2011.<sup>18</sup>

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<sup>15</sup> World Conference on Human Rights in Vienna, A/CONF.157/23, *Vienna Declaration and Programme of Action* (1993), <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action>; UN General Assembly, A/RES/48/104, *Declaration on the Elimination of Violence against Women* (1993), [https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.21\\_declaration%20elimination%20vaw.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.21_declaration%20elimination%20vaw.pdf); OHCHR, Resolution n. 1994/45, *Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women* (1994), [https://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-1994-45.doc](https://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-1994-45.doc); Fourth World Conference on Women, A/CONF.177/20, *Beijing Declaration and Platform for Action* (1995), [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.177\\_20.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.177_20.pdf). Endorsed by the UN in: UN General Assembly, A/RES/50/42, *Fourth World Conference on Women* (1996), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N96/761/53/PDF/N9676153.pdf?OpenElement>.

<sup>16</sup> Ronagh McQuigg, "Is it Time for a UN Treaty on Violence against Women?," *The International Journal of Human Rights* 22, no. 3 (2018): 312-313, <https://doi.org/10.1080/13642987.2017.1359552>. See also Meyersfeld, *Domestic Violence and International Law*, 36-37.

<sup>17</sup> "Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women," 9 June 1994, OAS Treaty Series No. 68, <https://www.oas.org/en/mesecvi/docs/belemdopara-english.pdf>

<sup>18</sup> "Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa," 1 July 2003, [https://au.int/sites/default/files/treaties/37077-treaty-charter\\_on\\_rights\\_of\\_women\\_in\\_africa.pdf](https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf); "Convention on Preventing and Combating Violence against Women and Domestic Violence," 2011, CETS 210 11.V.2011, <https://rm.coe.int/168008482e>

As this article focuses on Brazil, it will introduce the Convention of Belém do Pará's provisions on violence against women.<sup>19</sup> The Convention of Belém do Pará recognises violence against women as a breach of women's right "to be free from violence in both the public and private spheres" and other rights embodied in different human rights instruments.<sup>20</sup> Thus, it recognises violence against women practised in the private sphere as a matter of human rights concern. The Convention of Belém do Pará distinguishes between immediate obligations that the states must adopt to prevent, punish and eradicate violence against women (Article 7) and the measures that ought to be adopted progressively to change the gendered norms that legitimate such violence (Article 8).<sup>21</sup> Furthermore, it establishes regional protection mechanisms for women's right to be free from violence, including the possibility of individual denunciations or complaints to the IACHR concerning violations of State Parties' immediate obligations under Article 7.<sup>22</sup> Even though the Convention of Belém do Pará does not specifically mention domestic violence, its definition of violence against women encompasses this form of violence.

In sum, characterising domestic violence as a violation of human rights has been an important feminist development as it raises international political, social and legal awareness of the phenomenon. Adopting a human rights-based approach to domestic violence elevates this form of violence as a breach of human rights, implicating states' obligation to protect survivors and adopt positive measures to combat and prevent this form of violence.<sup>23</sup> Also, it enables holding the state

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<sup>19</sup> The author chose to use the terminology "violence against women" instead of "GBVAW" when introducing the Convention of Belém do Pará as the former was the term employed by the Convention.

<sup>20</sup> "Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women," articles 3 and 4.

<sup>21</sup> Inter-American Convention, articles 7 and 8.

<sup>22</sup> Inter-American Convention, article 12; Chapter IV of the Convention of Belém do Pará elaborates on protection mechanisms for women to be free of violence. Besides the provision of individual complaints to the IACHR, the Convention of Belém do Pará also contains provisions to include the measures adopted to prevent and prohibit violence against women and related information in the State Parties' national reports to the Inter-American Commission of Women, as well as the possibility of requesting advisory opinions to the Inter-American Court of Human Rights regarding the interpretation of the Convention of Belém do Pará. Inter-American Convention, articles 10 and 11.

<sup>23</sup> Dianne Otto, "Women's Rights," in *International Human Rights Law*, eds. Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2022), 330-331.

responsible for not acting with due diligence when dealing with GBVAW cases.<sup>24</sup> The possibility of state responsibility for domestic violence promotes accountability for aggressors and uplifts domestic violence as a matter of public and criminal importance. Hence, domestic violence is no longer marginalised in the private sphere, as if it were a minor intimate problem to be resolved between individuals.<sup>25</sup> Furthermore, according to McQuigg, the discourse of domestic violence as a human rights violation is an effective tool for change as it attributes dignity and rights to survivors of domestic violence, portraying them as people in search of justice, thus pressuring governments to improve protection and public services for survivors and address the offender's wrongdoings.<sup>26</sup> Therefore, the discourse of domestic violence as a human rights violation breaks the public/private dichotomy as it raises domestic violence as a matter of public importance and recognises survivors' need for protection by the state.

Nevertheless, including domestic violence in the realm of human rights law also attracts the (classic) problem of human rights ineffectiveness. The UN does not have an effective method to demand states to comply with their international human rights obligations.<sup>27</sup> The international and regional human rights systems create bodies to monitor, supervise, and even sanction states according to their compliance with international human rights law. Nevertheless, states have broad discretion on how to implement international regimes,<sup>28</sup> including human rights obligations (except for *jus cogens* norms). The UN Special Rapporteur on violence against women, Dubravka Šimonović, identified that the implementation of GBVAW norms at the national level has been fragmented and uncoordinated,

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<sup>24</sup> Rebecca J. Cook, "State Responsibility for Violations of Women's Human Rights," *Harvard Human Rights Journal* 7, (1994): 151.

<sup>25</sup> Shazia Choudhry and Jonathan Herring, "Righting Domestic Violence," *International Journal of Law, Policy and the Family* 20, (2006): 110.

<sup>26</sup> Ronagh McQuigg, "Domestic Violence: Applying a Human Rights Discourse," in *Domestic Violence: Interdisciplinary Perspectives on Protection, Prevention and Intervention*, eds. S. Hilder and V. Bettinson (New York: Springer, 2016), 32.

<sup>27</sup> McQuigg, "Applying a Human Rights Discourse", 31.

<sup>28</sup> José E. Alvarez, "State Sovereignty is Not Withering Away: A Few Lessons for the Future," in *Realizing Utopia: The Future of International Law*, ed. Antonio Cassese (Oxford: Oxford University Press, 2012), 10.



without a “solid legal and institutional framework” to coordinate states’ efforts to combat and prevent GBVAW.<sup>29</sup>

Therefore, domestic political will is imperative for the implementation and enforcement of international human rights norms. This article presents the MPL as a case study of national legislation that incorporates international women’s rights, yet the Brazilian government’s lack of political will to fully implement the MPL’s standards underpins Brazil’s greatest challenges in effectively combating domestic violence.

### **The Importance Of The Maria Da Penha Case And The Brazilian Feminist Movement For The Development Of The Maria Da Penha Law**

As the first section reflected on domestic violence as a human rights concern, the second section aims to demonstrate the importance of international and regional human rights provisions on GBVAW for the development of national gender-aware legislation to combat domestic violence in Brazil.

Brazil has a satisfactory legal architecture safeguarding women’s rights. Brazil has ratified many important international and regional human rights treaties, such as the ICCPR, ICESCR, and the American Convention on Human Rights (American Convention).<sup>30</sup> Furthermore, the 1988 Brazilian Federal Constitution (Federal Constitution) upholds equal rights and obligations between men and women,<sup>31</sup> as well as ensuring legal protection for every individual within the family.<sup>32</sup> As to international treaties focused on women’s rights, Brazil ratified and

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<sup>29</sup> OHCHR, A/HRC/32/42, *Report of the Special Rapporteur on violence against women, its causes and consequences* (2016), <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F32%2F42&Language=E&DeviceType=Desktop&LangRequested=False>, [43].

<sup>30</sup> “Ratification Status for Brazil,” UN Treaty Body Database, OHCHR, accessed 08 April 2023, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=24&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=24&Lang=EN); “Current Status of Signatures and Ratifications of the Inter-American Treaties BRAZIL,” Organization of American States, accessed 08 April 2023, [http://www.oas.org/dil/treaties\\_signatories\\_ratifications\\_member\\_states\\_brazil.htm](http://www.oas.org/dil/treaties_signatories_ratifications_member_states_brazil.htm).

<sup>31</sup> Brazil. Constituição da República Federativa do Brasil de 1988 [Constitution of the Federative Republic of Brazil of 1988], [https://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao.htm](https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm), article 5º I.

<sup>32</sup> Constitution of the Federative Republic of Brazil, article 226 §8º.

implemented CEDAW in 1984, the Convention of Belém do Pará in 1995, and the Optional Protocol to CEDAW in 2002.<sup>33</sup> Finally, in 2006, the MPL entered into force. The MPL is a federal legal act that creates mechanisms to combat and prevent domestic and family violence against women according to the country's obligations held by the Federal Constitution, CEDAW, and the Convention of Belém do Pará.<sup>34</sup>

However, the MPL was not created due to policymakers' goodwill but rather as a result of a long feminist struggle for the recognition and implementation of women's rights. Since the 1980s, considering the Brazilian historical context of progressive return to democracy after the military dictatorship, feminist movements focused their engagements on legislative and public policy reforms for the inclusion of rights for women, grounded on the recognition of non-discrimination based on gender and the right to live free from violence.<sup>35</sup> However, until the 2000s, "the Brazilian legal system was still insensitive to gender perspectives"<sup>36</sup> as there was no special legislation regarding women's rights nor a gender-sensitive policy or framework to eradicate gender-based violence. The Brazilian legal scholarship considers the Maria da Penha case to be the "driving force" for the gender-aware changes in the legislation and public policies that arose from the MPL.<sup>37</sup>

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<sup>33</sup> OHCHR, "Ratification Status for Brazil." See also Organization of American States, "Current Status of Signatures and Ratifications of the Inter-American Treaties BRAZIL."

<sup>34</sup> Brazil. Lei nº 11.340, de 7 de Agosto de 2006 [Law n. 11.340 from 7 August 2006] (Maria da Penha Law), [http://www.planalto.gov.br/ccivil\\_03/\\_ato2004-2006/2006/lei/11340.htm](http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/11340.htm), article 1; To read the Maria da Penha Law in English, see BRAZIL, Special Secretariat for Women's Policies Presidency of the Republic, Maria da Penha Law Law no 11.340 of August 7, 2006, Retrains domestic and family violence against Women (Brasília: 2006) <https://www.institutomariadapenha.org.br/assets/downloads/maria-da-penha-law.pdf>.

<sup>35</sup> Leila Linhares Barsted, "Lei Maria da Penha: uma experiência bem-sucedida de *advocacy* feminista" [The Maria da Penha Law: a successful experience of feminist advocacy], in *Lei Maria da Penha comentada em uma perspectiva jurídico-feminista [The Maria da Penha Law commented from a feminist legal perspective]*, ed. C. Hein de Campos (Rio de Janeiro: Editora Lumen Juris, 2011), 34-35.

<sup>36</sup> Thiago Pierobom de Ávila, "Facing Domestic Violence Against Women in Brazil: Advances and Challenges," *International Journal for Crime, Justice and Social Democracy* 7, no. 1, (2018): 18.

<sup>37</sup> Flávia Piovesan and Sílvia Pimentel, "A Lei Maria da Penha na perspectiva da responsabilidade internacional do Brasil" [The Maria da Penha Law from the perspective of Brazil's international accountability], in *Lei Maria da Penha comentada em uma perspectiva jurídico-feminista [The Maria da Penha Law commented from a feminist legal perspective]*, ed. C Hein de Campos (Rio de Janeiro: Editora Lumen Juris, 2011), 115-116.

Maria da Penha is a Brazilian woman who suffered two violent homicide attempts by her ex-husband, which caused irreparable bodily injuries and psychological trauma.<sup>38</sup> For more than 15 years after the fact, the offender was not properly prosecuted and punished.<sup>39</sup> Due to the risk of the case reaching the statute of limitations, Maria da Penha, alongside two non-governmental organisations (the Center for Justice and International Law and the Latin American and Caribbean Committee for the Defense of Women’s Rights), filed a petition to the IACHR, claiming that Brazil condoned the domestic violence suffered by Maria da Penha.<sup>40</sup> The IACHR held Brazil responsible for violating Maria da Penha’s rights to a fair trial, judicial protection, and equal protection, in breach of its obligation to respect rights (Article 1(1) of the American Convention) and Article 7 of the Convention of Belém do Pará.<sup>41</sup> In the Maria da Penha decision, the IACHR recognised that the human rights violations suffered by Maria da Penha indicated a general pattern of discrimination due to the “[s]tate tolerance of violence against women, in particular as a result of ineffective police and judicial action in Brazil.”<sup>42</sup> The IACHR made recommendations regarding the Brazilian state’s positive obligation to combat and prevent domestic violence against women, including both specific recommendations for the Maria da Penha case as well as broader recommendations toward a (policy) reform process to “put an end to the condoning by the State of domestic violence against women in Brazil and discrimination in the handling thereof.”<sup>43</sup>

The Maria da Penha case was pivotal for the Brazilian feminist movement’s strengthening as it recognised the systematic pattern of GBVAW in Brazil. The Maria da Penha case created a bridge between the violations of women’s rights

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<sup>38</sup> Inter-American Commission on Human Rights, “Case 12.051 Maria da Penha Maia Fernandes v. Brazil,” Annual Report of the Inter-American Commission on Human Rights 2000 Report n° 54/01 (2001), <http://cidh.org/annualrep/2000eng/ChapterIII/Merits/Brazil12.051.htm>.

<sup>39</sup> Inter-American Commission on Human Rights, Case 12.051, [2].

<sup>40</sup> Inter-American Commission on Human Rights, Case 12.051, [1] and [23].

<sup>41</sup> Inter-American Commission on Human Rights, Case 12.051, [60.1].

<sup>42</sup> Inter-American Commission on Human Rights, Case 12.051, [60.3].

<sup>43</sup> Inter-American Commission on Human Rights, Case 12.051, [61.4]. See also [61.1-4] for full IACHR recommendations to Brazil.

in Brazil and the international and regional human rights frameworks.<sup>44</sup> In line with the Brazilian feminists' historical engagement with legislative processes, the feminist movement employed the Maria da Penha case as a resource to raise awareness and put political pressure on the government to create special legislation to combat domestic violence in Brazil, which ultimately led to the enactment of the Federal Law n. 11.340/06, officially named the Maria da Penha Law (*Lei Maria da Penha*).<sup>45</sup>

### ***The Maria Da Penha Law Case Study***

#### *The Maria da Penha Law*

While the two previous chapters reflected on domestic violence as a human rights violation within the international and regional human rights frameworks, subsection A of the third section introduces the MPL's legal provisions and its three axes of intervention to eliminate domestic violence against women. Thereby, the article will further analyse, in the next subsections, the positive developments and challenges to implementing the MPL in the reality of state interventions on domestic violence in Brazil.

As a result of the feminist movement's engagement with the Maria da Penha case, the IACHR decision composed a "key set of guidelines" for the new Brazilian legal approach to domestic violence against women.<sup>46</sup> The first article of the MPL explicitly states that it creates mechanisms to combat and prevent domestic violence according to the CEDAW and the Convention of Belém do Pará.<sup>47</sup> In other words, the international human rights framework on domestic violence informs the MPL's mechanisms.

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<sup>44</sup> Paula Spieler, "The Maria da Penha Case and the Inter-American Commission on Human Rights: Contributions to the Debate on Domestic Violence Against Women in Brazil," *Indiana Journal of Global Legal Studies* 18, no. 1 (2011): 139.

<sup>45</sup> Brazil, Maria da Penha Law, article 1. See also Cecília Macdowell Santos, "Transnational Legal Activism and the State: reflections on cases against Brazil in the Inter-American Commission on Human Rights," *International Journal on Human Rights* 7, no. 4 (2007): 46-47, <https://www.scielo.br/ij/sur/a/53tc4SDrrHtL85tJhzpvkDB/?format=pdf&lang=en>.

<sup>46</sup> Spieler, "The Maria da Penha Case," 134.

<sup>47</sup> Brazil, Maria da Penha Law, article 1.

The MPL adopts a wide and gender-sensitive concept of domestic violence against women as “any act or omission based on gender that causes death; physical injury; physical, sexual and psychological suffering; and moral or financial damage”.<sup>48</sup> Regarding its scope of application, there are three requirements for legal protection under the MPL. First, the MPL comprehends five categories of domestic violence against women: physical, psychological, sexual, financial or moral violence.<sup>49</sup> Second, the case must be grounded on the three legally presumed situations of vulnerability: the domestic unit, which is the physical space considered as a home; the family, either biological or by affection; and the intimate affective relationship, current or past, independently of cohabitation.<sup>50</sup> Third, which is the positive discrimination requirement, the MPL explicitly restricts its legal protection to survivors of domestic violence who identify themselves with the gender “woman”, regardless of sexual orientation.<sup>51</sup>

Furthermore, case law on the MPL has expanded its non-discriminatory dimension. Brazilian jurisprudence has established that the applicability of the MPL does not depend on the offender’s gender identity inasmuch as there exists a relation of vulnerability between the offender and the victim, thus amplifying the MPL’s applicability to non-heterosexual and familiar (that is, non-intimate) relationships.<sup>52</sup> Also, case law has applied the MPL’s legal protections to female

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<sup>48</sup> Brazil, Maria da Penha Law, article 5.

<sup>49</sup> Brazil, Maria da Penha Law, article 7.

<sup>50</sup> Brazil, Maria da Penha Law, article 5 I, II and III. See also Brazil, Superior Tribunal de Justiça, Súmula nº 600 [Precedent no. 600 Superior Court of Justice], <https://www.tjdft.jus.br/consultas/jurisprudencia/deciso-es-em-evidencia/22-11-2017-2013-sumula-600-do-stj#:~:text=S%C3%BAmula%20600%3A%20%22Para%20configura%C3%A7%C3%A3o%20da,coabita%C3%A7%C3%A3o%20entre%20autor%20e%20v%C3%ADtima.%22&text=Todos%20os%20direitos%20reservados.>

<sup>51</sup> Brazil, Maria da Penha Law, articles 4 and 5 sole paragraph. See also Marta Rodriguez de Assis Machado, Flavio Marques Prol, Gabriela Justino da Silva, Ganzarolli and Renata do Vale Elias, José Rodrigo Rodriguez and Marina Zanata, “Law Enforcement at Issue: Constitutionality of the Maria da Penha Law in Brazilian Courts,” *International Journal on Human Rights* 9, no. 16, (2012): 76.

<sup>52</sup> Brazil, Superior Tribunal de Justiça, Conflito de Competência nº 88.027 – MG (2007/01711806-1), <https://www.stj.jus.br/websecstj/cgi/revista/REJ.cgi/ATC?seq=4452837&tipo=0&nreg=&SeqCgrmaSessao=&CodOrgaoJgdr=&dt=&formato=PDF&salvar=false, 3.> See also Valéria Diaz Scarance Fernandes, “Lei Maria da Penha: O Processo Penal no caminho da efetividade,” [*Maria da Penha Law: The Criminal Legal Procedure Towards Effectiveness*] (PhD thesis, Pontifícia Universidade Católica de São Paulo, 2013), 141-142.

domestic workers who suffer violence within the workplace,<sup>53</sup> as well as to transgender women.<sup>54</sup>

Although many of the MPL's articles focus on criminal investigation and prosecution, the MPL is not concerned only with punishing offenders. According to Pasinato, the MPL has three axes of intervention: criminal procedures, protective measures for survivors, and preventive policies.<sup>55,56</sup> The first axis determines specific police investigation and judicial measures to effectively attribute criminal responsibility to aggressors in cases of domestic violence against women.<sup>57</sup>

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- <sup>53</sup> <https://tede2.pucsp.br/bitstream/handle/6177/1/Valeria%20Diez%20Scarance%20FERNANDES.pdf>.  
Brazil, Superior Tribunal de Justiça, Agravo Regimental no Recurso Especial nº 1900478 - GO (2020/0266644-0), [https://scon.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num\\_registro=202002666440&dt\\_publicacao=26/02/2021](https://scon.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num_registro=202002666440&dt_publicacao=26/02/2021). See also Brazil, Tribunal de Justiça do Distrito Federal e dos Territórios, Conflito de Competência nº 1111591 – DF 07101370420188070000, [https://pesquisajuris.tjdft.jus.br/IndexadorAcordaos-web/sistj?visaoid=tjdf.sistj.acordaoeletronico.buscaindexada.apresentacao.VisaoBuscaAcordao&controladorId=tjdf.sistj.acordaoeletronico.buscaindexada.apresentacao.ControladorBuscaAcordao&visaoAnterior=tjdf.sistj.acordaoeletronico.buscaindexada.apresentacao.VisaoBuscaAcordao&nomeDaPagina=resultado&comando=abrirDadosDoAcordao&enderecoDoServlet=sistj&historicoDePaginas=buscaLivre&quantidadeDeRegistros=20&baseSelecionada=BASE\\_ACORDAO\\_TODAS&numeroDaUltimaPagina=1&buscaIndexada=1&mostrarPaginaSelecaoTipoResultado=false&totalHits=1&internet=1&numeroDoDocumento=1111591](https://pesquisajuris.tjdft.jus.br/IndexadorAcordaos-web/sistj?visaoid=tjdf.sistj.acordaoeletronico.buscaindexada.apresentacao.VisaoBuscaAcordao&controladorId=tjdf.sistj.acordaoeletronico.buscaindexada.apresentacao.ControladorBuscaAcordao&visaoAnterior=tjdf.sistj.acordaoeletronico.buscaindexada.apresentacao.VisaoBuscaAcordao&nomeDaPagina=resultado&comando=abrirDadosDoAcordao&enderecoDoServlet=sistj&historicoDePaginas=buscaLivre&quantidadeDeRegistros=20&baseSelecionada=BASE_ACORDAO_TODAS&numeroDaUltimaPagina=1&buscaIndexada=1&mostrarPaginaSelecaoTipoResultado=false&totalHits=1&internet=1&numeroDoDocumento=1111591).
- <sup>54</sup> Brazil, Superior Tribunal de Justiça, Recurso Especial nº 1977124 - SP (2021/0391811-0), [https://scon.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num\\_registro=202103918110&dt\\_publicacao=22/04/2022](https://scon.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num_registro=202103918110&dt_publicacao=22/04/2022). For more case law on the MPL's non-discriminatory dimension, see "Jurisprudência em Teses: Violência Doméstica e Familiar contra Mulher," Superior Tribunal de Justiça, accessed 8 April 2023, [https://www.stj.jus.br/internet\\_docs/jurisprudencia/jurisprudenciaemteses/Jurisprud%C3%Aancia%20em%20teses%2041%20-%20Lei%20Maria%20da%20Penha.pdf](https://www.stj.jus.br/internet_docs/jurisprudencia/jurisprudenciaemteses/Jurisprud%C3%Aancia%20em%20teses%2041%20-%20Lei%20Maria%20da%20Penha.pdf).
- <sup>55</sup> Wânia Pasinato, "Lei Maria da Penha: Novas abordagens sobre velhas propostas. Onde avançamos?" [The Maria da Penha Law: New approaches on old propositions. Where did we move on?]. *Civitas* 10, no. 2 (2010): 220. <https://revistaseletronicas.pucrs.br/ojs/index.php/civitas/article/view/6484>.
- <sup>56</sup> It is relevant to highlight that the MPL's three axes of intervention are a scholarly interpretation that organises and better explains the MPL's legal provisions to prevent and combat domestic violence against women. The three axes of intervention are not mentioned nor used in the legislation, but rather they are a scholarly legal interpretation developed by Pasinato. The author has adopted the MPL's three axes of intervention classification as it is a renowned scholarly legal interpretation within Brazilian academic research. Also, considering that this article aims to be suitable for an international audience, adopting this scholarly legal interpretation better organises and explains the MPL's *voluntas legis* in comparison to restricting this article's analysis to the formal order of the MPL's legal provisions.
- <sup>57</sup> Pasinato, "Lei Maria da Penha", 220. For examples of MPL's specific provisions that reflect this axis, see also Brazil, Maria da Penha Law, articles 16, 20 and 41.

The second axis regards the protective and assistance measures to ensure the safety and rights of women in situations of domestic violence,<sup>58</sup> entailing state intervention through judicial decisions to interrupt the ongoing consequences of violence and protect survivors. It embraces three types of state interventions for domestic violence cases. The first type is urgent protective measures for survivors of domestic violence, which entail judicial intervention to protect women in situations of domestic violence from further vulnerabilities, safeguarding women and their dependents' basic needs of protection of their physical and mental integrity and their properties.<sup>59</sup> The second form of state intervention is urgent protective measures that compel the offenders to stop the acts of aggression immediately and measures that seek their re-education and psychological support.<sup>60</sup> Finally, the second axis also embraces assistance measures for women in situations of vulnerability and their dependents. The assistance measures determine interdisciplinary, integrated and gender-aware public policies to provide support services for survivors of domestic violence throughout the fields of health care, judicial assistance, social services, security, education, and employment protection.<sup>61</sup>

The third intervention axis comprises preventive measures for domestic violence. The MPL's preventive measures demand "interdisciplinary, transversal and integrated policies in the fields of justice, police, social assistance, health, education, employment and housing".<sup>62</sup> Also, the third axis determines multiple

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<sup>58</sup> Pasinato, "Lei Maria da Penha", 220; "Women in situations of domestic violence" is the literal English translation of the expression used throughout the MPL to refer to survivors of domestic violence. The author has decided to maintain this expression in the article as "women in situations of domestic violence" is an alternative term to refer to survivors without falling into the stereotype of women as "victims".

<sup>59</sup> Brazil, Maria da Penha Law, article 23; As examples of urgent protective measures, the judge may determine, according to the circumstances of each case, (i) the survivor's or her dependents' referral to public services, such as enrolment in school or inclusion in official programs of protection and monitoring of domestic violence, (ii) the survivor's removal from the household, or (iii) her return to the household after the aggressor has been removed. Important to note that shortly before the publication of this article, there was a legislative change to the MPL in order to include the possibility for the judge to allow up to 6 months of rent support in favour of women in situations of violence; Brazil. Lei nº 14.674, de 14 de Setembro de 2023 [Law n. 14.674 from 14 September 2023]. [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2023-2026/2023/Lei/L14674.htm#art1](http://www.planalto.gov.br/ccivil_03/_Ato2023-2026/2023/Lei/L14674.htm#art1).

<sup>60</sup> Brazil, Maria da Penha Law, article 22.

<sup>61</sup> Brazil, Maria da Penha Law, article 9.

<sup>62</sup> Ávila, "Facing", 20.

positive state obligations to create integrated public policies to tackle gender stereotypes that legitimise domestic violence in the media, promote scientific studies on domestic violence, and raise awareness through public campaigns.<sup>63</sup>

### *The Maria da Penha Law's achievements*

Considering the brief introduction of the MPL's mechanisms to combat and prevent domestic violence, this part of the article will discuss the MPL's legal advancements for eliminating domestic violence. Before the MPL, many forms of domestic violence, except for explicitly violent ones such as homicide, fell under the scope of Law n. 9.099/95, which established special jurisdiction for penal misdemeanours.<sup>64</sup> According to Roure, approximately 70 per cent of penal misdemeanours under Law n. 9.099/95 "were committed against women in a domestic environment or in intra-family relations. The women in Brazil were principally the victims of this violence in the home, which in large part were assault and crimes of 'light' batteries."<sup>65</sup> Thus, Law n. 9.099/95 considered domestic violence cases to be minor criminal offences, which did not take into account the gendered dimensions of domestic violence, and proposed alternative sanctions for offenders, such as "donation of food baskets to charity or payments of fines."<sup>66</sup> While Law n. 9.099/95 intended to provide alternative sanctions other than punitive criminal responsibility for minor criminal offences, it also reinforced the state's non-prosecution of GBVAW, perpetrators' sense of impunity, and survivors' feelings of lack of legal protection.<sup>67</sup>

The MPL's entry into force is paradigmatic as it explicitly recognises a wide range of rights enunciated in the Federal Constitution as women's rights, whereas no other Brazilian legislation has made such recognition before.<sup>68</sup> Furthermore, it

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<sup>63</sup> Brazil, Maria da Penha Law, article 8.

<sup>64</sup> Brazil. Lei nº 9.099, de 26 de Setembro de 1995 [Law no. 9.099 26 September 1995],

<sup>65</sup> Jodie G. Roure, "Domestic Violence in Brazil: Examining Obstacles and Approaches to Promote Legislative Reform," *Columbia Human Rights Law Review* 41, no. 1 (2009): 79.

<sup>66</sup> Roure, "Domestic Violence in Brazil", 95.

<sup>67</sup> Roure, "Domestic Violence in Brazil", 88.

<sup>68</sup> Brazil, Maria da Penha Law, articles 2 and 3.



established a clear legal understanding that domestic violence is a human rights abuse,<sup>69</sup> thus demanding state intervention in domestic violence cases. By classifying domestic violence as a breach of human rights, the MPL prohibited the application of Law n. 9.099/95 to domestic violence cases,<sup>70</sup> thus promoting criminal accountability. Therefore, the MPL changed the Brazilian paradigm of domestic violence from a minor criminal offence to a recognised human rights violation.<sup>71</sup>

The MPL inserted domestic violence within the language of rights, which triggers the state's positive obligations to prevent and eliminate human rights violations. As the MPL's creation was "primarily due to Brazil's non-observance of the CEDAW and the Convention of Belém do Pará", and considering the Brazilian feminist movements' commitment to legislative reform for the recognition of women's rights, the MPL incorporated legal provisions on domestic violence in accordance with international human rights instruments.<sup>72</sup> The MPL's definition of domestic violence and its scope of application are closely related to Articles 1 and 2(a) of the Convention of Belém do Pará.<sup>73</sup> Consequently, Brazil's legislation does not deal with domestic violence through gender-neutral lenses, but rather it is aware of the gendered dimensions of domestic violence as a human rights violation against women. Furthermore, the MPL's first axis of intervention, which is the specialised police investigations and criminal prosecution procedures for domestic violence, delineates the norms for the Brazilian government to act with due diligence in prosecuting and punishing domestic violence cases.<sup>74</sup> As such, the MPL is compatible with CEDAW's jurisprudence as it creates gender-sensitive norms on how the state should proceed in domestic violence cases, enabling the state's accountability if it fails to act with due diligence.<sup>75</sup> Therefore, the MPL's paradigm shift towards domestic violence as a human rights violation

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<sup>69</sup> Brazil, Maria da Penha Law, article 6.

<sup>70</sup> Brazil, Maria da Penha Law, article 41.

<sup>71</sup> Piovesan and Pimentel, "A Lei Maria da Penha na perspectiva da responsabilidade internacional do Brasil," 113.

<sup>72</sup> Spieler, "The Maria da Penha Case," 138-39.

<sup>73</sup> "Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women," articles 1 and 2(a). See also Brazil, Maria da Penha Law, article 5.

<sup>74</sup> Brazil, Maria da Penha Law, articles 10-17 and 25-28.

<sup>75</sup> UN Committee for the Elimination of All Forms of Discrimination Against Women, *General recommendation No. 19: Violence against women*, article 9.

has brought the Brazilian legal system closer to the provisions of the international human rights framework in view of promoting women's rights and criminal responsibility for private actors.

Additionally, the MPL introduces a gender justice perspective to combat and prevent domestic violence in the Brazilian legal system. According to Zuloaga, a gender justice perspective entails the recognition of the systematic and structural discrimination against women as the root of women's rights violations.<sup>76</sup> In other words, a gender justice perspective demands that redress for human rights violations recognises the structural forms of gender-based oppression that underpin those violations. Building on Zuloaga's understanding of gender justice, it is possible to conclude that the MPL has also turned the Brazilian legal system towards a gender justice approach to domestic violence. The MPL acknowledges that the relationships of domination and hierarchy due to gender inequality are the underlying causes of domestic violence.<sup>77</sup> As such, the MPL's presumed situations of vulnerability demonstrate a developed understanding of the gendered circumstances in which domestic violence is practised. Thus, it perceives domestic violence as a systematic form of GBVAW rather than isolated events.

As a result of its gender justice perspective and its proximity to international human rights instruments, the MPL establishes special legal protection for women in situations of domestic violence.<sup>78</sup> In sum, besides promoting criminal responsibility for offenders, the MPL's special legal protection (i) provides women and their dependents with public services' support to leave the situation of violence and vulnerability,<sup>79</sup> (ii) engages with the aggressors to prevent them from

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<sup>76</sup> Patricia Palacios Zuloaga, "Pushing Past the Tipping Point: Can the Inter-American System Accommodate Abortion Rights?" *Human Rights Law Review* 36, no. 1 (2020): 32.

<sup>77</sup> This affirmation is the result of a legal interpretation of the MPL's provisions, especially articles 1 to 8. Brazil, Maria da Penha Law, articles 1-8. See also Wânia Pasinato, "The Maria da Penha Law: 10 years on," *International Journal on Human Rights* 13, no. 24 (2016): 156, <https://sur.conectas.org/wp-content/uploads/2017/02/14-sur-24-ing-wania-pasinato.pdf>.

<sup>78</sup> This article uses the term "special" not as more important but rather as not ordinary or general. Therefore, the legal protection of the MPL is restricted to its scope of application, as explained in the last subsection.

<sup>79</sup> Brazil, Maria da Penha Law, articles 9 and 23.

committing domestic violence again,<sup>80</sup> and (iii) raises social awareness of the phenomenon of domestic violence.<sup>81</sup> In other words, the MPL does not seek only to prosecute and punish domestic violence cases, as it also comprehends the gendered reasons and consequences of domestic violence and creates mechanisms to address them. Therefore, the MPL creates special legal protection for women in situations of domestic violence as the MPL is aware of women's vulnerability to domestic violence and how the state should intervene to prevent or stop domestic violence and safeguard women's rights.

### *The Challenges In The Implementation Of The Maria Da Penha Law*

The MPL's achievements sparked significant human rights-based legal changes towards the elimination of domestic violence and, consequently, the underlying patriarchal reasoning that legitimises the practice of GBVAW by hiding it as a private matter and promoting impunity for aggressors.<sup>82</sup> Nevertheless, the MPL's full implementation still faces many challenges. Thus, the following subsection identifies and organises the MPL's challenges into two main themes: (i) the fragmentation among public services for women's assistance and (ii) the primacy of criminal prosecution of domestic violence over protective and assistance measures. By doing so, it aims to identify the key challenges for the full implementation of the MPL.

First, according to Brazilian legal scholarship, the fragmentation of public judicial assistance, health care and social services is the leading reason for MPL's ineffectiveness.<sup>83</sup> One of the MPL's most innovative proposals was the creation of an integrated and multidisciplinary approach to public policies to support women in situations of domestic violence. Unfortunately, integration among public services to support survivors of domestic violence is far from reality. There is a reduced number of specialised services available for women, most of them concentrated in metropolitan cities, which may obstruct access to such

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<sup>80</sup> Brazil, Maria da Penha Law, article 22.

<sup>81</sup> Brazil, Maria da Penha Law, article 8.

<sup>82</sup> Pasinato, "The Maria da Penha Law: 10 years on," 156.

<sup>83</sup> Ávila, "Facing," 22.

services.<sup>84</sup> On top of that, the public services that are available suffer from a lack of communication between each other, fragile physical infrastructure, lack of funding, and absence of specialised and trained professionals.<sup>85</sup>

The reality of fragmentation and fragility of specialised public services for women in situations of domestic violence breaches the MPL's provision of an integrated approach to public policies to support women in situations of domestic violence. According to Koller et al., survivors' dissatisfaction with the public services offered for women in situations of violence in Brazil is due to "[f]actors such as the impression that these services are woefully inadequate for users, the lack of an appropriate reception and information about procedures, and the fragmentation of the service network".<sup>86</sup> On the other hand, the decrease in women's demand for specialised public services leads some stakeholders to believe that such services are not necessary.<sup>87</sup> Therefore, a critical analysis of the Brazilian reality of fragmentation and fragility of such specialised public services points to the maintenance of state abandonment of women in situations of GBVAW, as criticised by feminists since the 1990s, since the Brazilian state does not effectively intervene through policy measures in the private dimension of women's lives to protect and support survivors of GBVAW.

Second, considering the fragmentation of public services and Brazil's punitive socio-political tendencies,<sup>88</sup> the protective and assistance measures offered by

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<sup>84</sup> Especially women that already face other forms of vulnerability or discrimination, such as Black, Indigenous, *ribeirinhas* (riverine), *pomeranas* (Pomeranians), *Quilombolas* women, etc. Carmen Hein de Campos, "Desafios na Implementação da Lei Maria da Penha" [Challenges to the Implementation of the Maria da Penha Law], *Revista Direito GV* 11, no. 2 (2015): 395. See also Pasinato, "The Maria da Penha Law: 10 years on," 160.

<sup>85</sup> Stela Nazareth Meneghel, et al., "Repercussões da Lei Maria da Penha no enfrentamento da violência de gênero" [Repercussions of the Maria da Penha Law in tackling gender violence], *Ciências & Saúde Coletiva* 18, no. 3 (2013): 696-697, <https://www.scielo.br/j/csc/a/gZtYwLDYSqtgp7wGTTXHw4z/?format=pdf&lang=pt#:~:text=A%20Lei%20Maria%20da%20Penha%20trouxe%20a%20possibilidade%20de%20instaurar,previa%20a%20Lei%209099%2F5>.

<sup>86</sup> Silvia H. Koller, Priscila Lawrenz, Davi Manzini, Jean von Hohendorff, and Luísa Fernanda Habigzang, "Understanding and Combating Domestic Violence in Brazil," in *Global Responses to Domestic Violence*, eds. Eve S. Buzawa and Carl G. Buzawa (New York: Springer, 2017), 281-282.

<sup>87</sup> Ávila, "Facing," 22. See also Campos, "Desafios na Implementação da Lei Maria da Penha," 395.

<sup>88</sup> Carmen Hein de Campos, and Salo de Carvalho, "Tensões atuais entre a criminologia feminista e a criminologia crítica: a experiência brasileira" [Current Tensions Between

the MPL are subjugated to punitive criminal accountability as the most feasible response to domestic violence.

The MPL created the specialised Courts of Domestic and Family Violence against Women (specialised courts) as the court of competent jurisdiction for criminal prosecution and civil cases that arise from domestic violence against women.<sup>89</sup> In other words, the MPL established a double criminal and civil competent jurisdiction to the specialised courts. Therefore, the specialised courts coordinate MPL's protective and assistance measures, prosecute domestic violence cases, and determine survivor's access to assistance public services.<sup>90</sup> As the integration between public services is imperative to bring effectiveness to the MPL, Pasinato argues that the articulation among the MPL's three axes of intervention depends, to a certain extent, on those specialised courts.<sup>91</sup>

Nevertheless, until 2017, there were only 131 specialised courts throughout Brazil, many of them understaffed and without an appropriate network of multidisciplinary professionals qualified to deal with domestic violence cases.<sup>92</sup> The reduced number of specialised courts is insufficient for coordinating public services to assist and protect women in situations of domestic violence. Together with the lack of appropriate infrastructure and the court's overburdening with domestic violence cases, the specialised courts are not able to offer a quick response to the urgent protective measures,<sup>93</sup> which leaves women without

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Feminist Criminology and Critical Criminology: The Brazilian Experience], in *Lei Maria da Penha comentada em uma perspectiva jurídico-feminista [The Maria da Penha Law commented from a feminist legal perspective]*, ed. C. Hein de Campos (Rio de Janeiro: Editora Lumen Juris, 2011), 155.

<sup>89</sup> Brazil, Maria da Penha Law, article 14.

<sup>90</sup> Brazil, Maria da Penha Law, articles 9 and 14.

<sup>91</sup> Pasinato, "Novas abordagens sobre velhas propostas. Onde avançamos?", 220.

<sup>92</sup> Brazil, Conselho Nacional de Justiça and Instituto de Pesquisa Econômica Avançada, *Sumário Executivo o Poder Judiciário no Enfrentamento à Violência Doméstica e Familiar Contra as Mulheres [Executive Summary: The Judicial Branch in the Combat of Domestic and Family Violence Against Women]*, (Brasília: 2019), <https://www.cnj.jus.br/wp-content/uploads/conteudo/arquivo/2019/08/7918e2dc8e59bde2bba84449e36d3374.pdf>.

<sup>93</sup> Brazil, Senado Federal, *Comissão Parlamentar Mista de Inquérito de Violência contra a Mulher no Brasil: Relatório Final [Parliamentary Committee of Investigation on Violence Against Women in Brazil: Final Report]*, (Brasília: 2013), 53, <https://www12.senado.leg.br/institucional/omv/entenda-a-violencia/pdfs/relatorio-final-da-comissao-parlamentar-mista-de-inquerito-sobre-a-violencia-contra-as-mulheres>.

effective judicial intervention to safeguard them, their dependents, and their rights.

Furthermore, specialised courts work under a restrictive interpretation of their double criminal and civil competent jurisdiction, which in turn favours the criminal justice framework as redress to domestic violence against women. Whereas it is widely established that specialised courts have competent jurisdiction to prosecute and punish domestic violence-related crimes,<sup>94</sup> most specialised courts restrict their civil competent jurisdiction to granting urgent protective measures in order to provide immediate judicial intervention to protect the survivor from further domestic violence.<sup>95</sup> Through this restrictive interpretation, the prolonged and often complex civil and family litigation arising from domestic violence, such as separation of assets and regulation of child visitation, are not encompassed within the specialised courts' civil competent jurisdiction.<sup>96</sup> Instead,

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<sup>94</sup> The intentional crimes against life, including femicide, are an exception to the specialised courts' criminal competent jurisdiction because they fall under the competent jurisdiction of the Jury Tribunal (*Tribunal do Júri*), according to article 5, XXXVIII, d, of the Brazilian Federal Constitution. See also Fausto Rodrigues de Lima, "Dos procedimentos – artigos 13 a 17" [Procedures – Articles 13 to 17], in *Lei Maria da Penha comentada em uma perspectiva jurídico-feminista* [*The Maria da Penha Law commented from a feminist legal perspective*], ed. C. Hein de Campos (Rio de Janeiro: Editora Lumen Juris, 2011), 155.

<sup>95</sup> Wânia Pasinato, "Avanços e obstáculos na implementação da Lei 11.340/06" [Advancements and Obstacles in the Implementation of the Law n. 11.340/06], in *Lei Maria da Penha comentada em uma perspectiva jurídico-feminista* [*The Maria da Penha Law commented from a feminist legal perspective*], ed. C. Hein de Campos (Rio de Janeiro: Editora Lumen Juris, 2011), 135. See also Ávila, "Facing," 19; According to Campos, specialised courts also justify the restriction of their civil competent jurisdiction on the basis of the aforementioned problems of lack of proper infrastructure to deal with this double demand. Campos, "Desafios na Implementação da Lei Maria da Penha," 399; The legal debate on the limitations of specialised courts' competent jurisdiction over civil and family law cases is still ongoing. It presents two main strands. The more restrictive one understands that specialised courts' civil competent jurisdiction is restricted to urgent protective measures, whereas the more encompassing one comprehends that the double competent jurisdiction of specialised courts encompasses criminal, civil and family claims that have domestic violence against women as the cause of action. Although feminist scholarship points out that most judicial courts work under the restrictive interpretation, there is growing jurisprudence that supports the more encompassing interpretation of specialised courts' double competent jurisdiction. See Brazil, Superior Tribunal de Justiça, Recurso Especial nº 1.550.166 - DF (2015/0204694-8), [https://scon.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num\\_registro=201502046948&t\\_publicacao=18/12/2017](https://scon.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num_registro=201502046948&t_publicacao=18/12/2017).

<sup>96</sup> Article 14-A of the MPL determines that the woman survivor of violence may petition for divorce or dissolution of the steady union in the specialised courts; however, it excludes from the specialised courts the competent jurisdiction regarding the separation of assets. Brazil, Maria da Penha Law, article 14-A. See also Brazil, Centro de Inteligência da Justiça do Distrito Federal, *Nota Técnica 7/2021* [Technical Note 7/2021] (Distrito Federal e Territórios: 2021), 8-9,

such problems fall under the competent jurisdiction of Civil Courts or Family Courts, which are not specialised in the gendered dimensions of domestic violence and may not be fully aware of the concrete circumstances of domestic violence suffered by a particular woman and her dependents. Consequently, women survivors of domestic violence may have to migrate between different courts in order to seek judicial redress for non-criminal problems resulting from domestic violence, which imposes further obstacles to women's access to justice.<sup>97</sup>

The realities of (i) women's abandonment due to fragmentation and fragility of specialised public services for women in situations of domestic violence, (ii) a reduced number of specialised courts and insufficient coordination between protective and assistance measures, (iii) delayed judicial decisions for urgent protective measures, and (iv) survivors' migration to non-specialised courts on domestic violence for judicial redress to civil and family law problems amount to a general prioritisation of criminal accountability as the most easily accessible and feasible remedy to domestic violence against women, despite serious problems surrounding criminal justice interventions.<sup>98</sup> However, the MPL's *voluntas legis* determines three harmonic and non-hierarchical axes of intervention in order to redress the gendered relationships of inequality and discrimination that underpin domestic violence. Therefore, the reality of criminal prosecution of aggressors without proper access and enjoyment of protective and assistance measures to survivors constitutes a faulty implementation of the MPL's special legal protection.

Although the MPL has placed elevated importance on preventive, protective and assistance measures to support women in situations of domestic violence, the

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<https://www.tjdft.jus.br/institucional/imprensa/noticias/2021/outubro/cijdf-apresenta-nota-tecnica-sobre-ajuizamento-de-divorcio-nos-juizados-de-violencia-domestica#:~:text=A%20altera%C3%A7%C3%A3o%20normativa%20permite%20que,e%20Familiar%20Contra%20a%20Mulher.>

<sup>97</sup> Campos, "Desafios na Implementação da Lei Maria da Penha," 399.

<sup>98</sup> To name a few, revictimisation of survivors of violence in criminal proceedings, overburdening of courts, and judicial system slowness. Furthermore, according to Ávila, "[d]espite the broad perspective of the MPL, most of the solutions are yet thought of in a solely punitive perspective, disregarding the importance of integrated policies to support victims and to meet their expectations of protection". Ávila, "Facing," 22 and 25.

Brazilian scholar Hein de Campos points out that repressive perspectives have orientated public policies on combating GBVAW in Brazil.<sup>99</sup> The Brazilian state's focus on criminal investigation and prosecution over preventive, protective and assistance measures approximates the Brazilian reality on the fight against domestic violence to a broader trend that Elizabeth Bernstein has identified as "carceral feminism".<sup>100</sup> The latter corresponds to a section of the feminist movement, endorsed by "conservative state agents", that is committed to "the carceral state as the enforcement apparatus for feminist goals".<sup>101</sup> In other words, carceral feminism upholds the punishment of perpetrators as the remedy to GBVAW and gender discrimination. The approximation of Brazilian reality on the combat against domestic violence to the phenomena of carceral feminism points to a neoliberal tendency to remediate GBVAW through criminal justice interventions rather than through redistributive welfare policies that actually engage with the underlying causes of domestic violence,<sup>102</sup> which are mostly located on the MPL's second and third axis.

Therefore, the prioritisation of the MPL's first axis over its second and third axes disrupts the MPL's gender justice perspective. CEDAW jurisprudence and feminist scholarship have been increasingly recognising that gender inequality and discrimination, exacerbated by "cultural, economic, ideological, technological, political, religious, social and environmental factors", comprise the

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<sup>99</sup> Campos, "Desafios na Implementação da Lei Maria da Penha," 402. Likewise, according to information provided to the IACHR for the 2020 annual report on the Maria da Penha case, "the Maria da Penha Law had been legislatively amended 10 times to penalize but not prevent domestic violence." Inter-American Commission on Human Rights, "Follow-Up Factsheet of Report No. 54/01 Case 12.051 Maria Da Penha Maia Fernandes (Brazil)" (Annual Report 2020), para. 30, <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/activities/follow-up/sCasos.asp>.

<sup>100</sup> Elizabeth Bernstein, "The Sexual Politics of the 'New Abolitionism'," *differences: A Journal of Feminist Cultural Studies* 18, no. 3 (2007): 143.

<sup>101</sup> Bernstein, "The Sexual Politics of the 'New Abolitionism'", 130 and 143.

<sup>102</sup> Elizabeth Bernstein, "Carceral politics as gender justice? The 'traffic in women' and neoliberal circuits of crime, sex, and rights," *Theory and Society* 41, no. 3 (2012): 254. See also Ana María Sánchez Rodríguez, "Contesting Neoliberalism: Bringing in Economic and Social Rights to End Violence against Women in Mexico," in *Economic and Social Rights in a Neoliberal World*, ed. Gillian MacNaughton and Diane F. Frey (Cambridge: Cambridge University Press, 2017), 178; and Karen Engle, "A Genealogy of the Criminal Turn in Human Rights," in *Anti-Impunity and the Human Rights Agenda*, eds. Karen Engle, Zinaida Miller and D. M. Davis (Cambridge: Cambridge University Press, 2016), 46.



structural causes of the systematic occurrence of GBVAW.<sup>103</sup> Criminal justice interventions alone — which focus on punishing perpetrators — do not fully address those structural causes.<sup>104</sup> The general priority of state interventions within the MPL's first axis (criminal investigation and prosecution of domestic violence) over the second and third axis (protective, assistance and preventive measures to protect and support survivors) does not redress the gendered relationships of inequality and discrimination that underpin domestic violence, thus contrary to the MPL's *voluntas legis*.

### *The Maria Da Penha Law Case Study And Its International Relevance*

As the subsections above reflected on the MPL's legal provisions, advancements and challenges, the following subsection aims to present internationally valid insights from a critical analysis of the Brazilian case study on domestic violence.

The MPL is a human rights-based legal act on domestic violence that introduced a gender justice perspective into the Brazilian legal and institutional framework to combat GBVAW. Hence, the MPL is considered by Brazilian legal feminist literature as a positive legal development as it proposed a new paradigm for women's rights and legal treatment for GBVAW in Brazil. As previously highlighted in this article, the MPL establishes special legal protection for women in situations of domestic violence, defines domestic violence as a violation of human rights, approximates the Brazilian legal system to international human rights standards, and sets a gender-aware approach to the legal system and public policies on domestic violence. The MPL's embrace of a gender justice perspective and international women's rights instruments signals future social change through legal reform of patriarchal norms that neglected GBVAW in

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<sup>103</sup> *General recommendation no. 35 on gender-based violence against women, updating general recommendation No. 19*, para. 14. See also OHCHR, A/HRC/11/6/Add.6, *Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk - Addendum - Political economy and violence against women* (2009), [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/11/6/Add.6](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/11/6/Add.6), para 2; Jacqui True, *The Political Economy of Violence against Women* (Oxford: Oxford University Press, 2012), 6, <https://academic.oup.com/book/6856>.

<sup>104</sup> Goldblatt, "Violence against women and social and economic rights", 367. See also Engle, "A Genealogy of the Criminal Turn in Human Rights," 44-45; and Rodríguez, "Contesting Neoliberalism," 179.

Brazil. The rise of social awareness of domestic violence due to the popularity of the MPL among Brazilians points out that social changes have already started to happen,<sup>105</sup> but they need to go further.

The MPL case study is of international relevance as it indicates that legal reform alone is insufficient to tackle domestic violence. The Brazilian government's lack of real commitment to adhering to non-criminal aspects of the MPL hinders its full implementation.<sup>106</sup> The MPL still faces many conservative pushbacks to its innovative gender justice perspective and special legal protection.<sup>107</sup> Even though the MPL determines a gender-aware legal and institutional framework on domestic violence against women,<sup>108</sup> the ongoing reality of the primacy of carceral measures to remedy GBVAW points to a disruption of the MPL's values of an integrated approach through criminal accountability of offenders and protection, assistance and preventive measures for survivors in order to tackle the underlying causes of domestic violence as GBVAW.

Therefore, the MPL case study demonstrates the need for states to commit to legal, social and institutional changes, besides pushing for criminal accountability of offenders, in order to redress the *status quo* of gender inequality that fuels GBVAW. Although the MPL introduces a gender justice perspective on domestic violence and women's human rights in Brazil, the existence of the law by itself is not enough to promote true institutional change for the implementation of accessible and effective gender-aware public policies that prevent GBVAW and

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<sup>105</sup> Pasinato, "Avanços e obstáculos na implementação da Lei 11.340/06," 119.

<sup>106</sup> Campos, "Desafios na Implementação da Lei Maria da Penha," 402.

<sup>107</sup> Carmen Hein de Campos and Valdir Florisbal Jung, "Mudanças legislativas na lei Maria da Penha: desafios no contexto atual" [Legislative changes in the "Maria da Penha" Law: challenges in the current context], *Revista da Faculdade de Direito da UFRGS* 44 (2020): 127. <https://doi.org/10.22456/0104-6594.95274>.

<sup>108</sup> The key document that establishes the Brazilian public policies' guidelines on GBVAW is the National Pact to Combat Violence against Women. Although the MPL focuses on domestic violence, the Pact extended the gender-aware standards of the MPL on public policies to combat other forms of GBVAW, such as sexual exploration and trafficking; Brazil, Secretaria de Políticas para as Mulheres Presidência da República, *Pacto Nacional pelo Enfrentamento à Violência contra as Mulheres* [National Pact to Confront Violence against Women] (Brasília: 2011), 11-12, [https://www12.senado.leg.br/institucional/omv/copy\\_of\\_acervo/outras-referencias/copy2\\_of\\_entenda-a-violencia/pdfs/pacto-nacional-pelo-enfrentamento-a-violencia-contra-as-mulheres](https://www12.senado.leg.br/institucional/omv/copy_of_acervo/outras-referencias/copy2_of_entenda-a-violencia/pdfs/pacto-nacional-pelo-enfrentamento-a-violencia-contra-as-mulheres).

assist and empower survivors to overcome situations of violence and vulnerability.

As argued by True, there are three important Ps “in efforts to address violence against women”: prosecution, protection and prevention.<sup>109</sup> As demonstrated by the MPL case study, states’ efforts to eliminate GBVAW should not overfocus on the criminal justice framework and neglect the other “Ps”. Taking into account a domestic context of predominant punitive tendencies in public policies and overburdened and underfinanced courts, criminal law interventions fail to provide timely and enforceable judicial protection for women survivors of violence. The MPL case study indicates that states’ commitment to eliminate GBVAW entails providing women with effective access to special legal protection and integrated public policies for protective, assistance and preventive services in order to promote accountability for perpetrators of domestic violence, protect survivors from further violence, and promote preventive measures that address the underlying causes of GBVAW.

## Conclusion

The international human rights framework has developed to comprehend domestic violence as a form of human rights violation. Adopting the language of human rights to domestic violence is important as it raises awareness of the phenomenon. Furthermore, it requires states to take positive measures to combat and prevent domestic violence against women, including the underlying gender inequality and discrimination that underpins gender-based violence.

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<sup>109</sup> True, *The Political Economy of Violence against Women*, 25; The “three Ps” to address violence against women are a scholarly classification of the state’s human rights obligations to eradicate violence against women. Feminist scholarship presents other forms of classification of such human rights obligations, for example, Rodríguez’s framework of “(1) prevention, (2) protection, (3) rehabilitation and reintegration, and (4) prosecution and punishment”. As classifications serve the purpose of organising thoughts to make a point, the author adopts the “three Ps” classification as it closely relates to the MPL’s three axes of state intervention. Furthermore, as CEDAW jurisprudence does not hold any form of classification specifically, the “three Ps” are also encompassed within CEDAW jurisprudence on recommendations to State parties to eliminate GBVAW. See *General recommendation no. 35 on gender-based violence against women, updating general recommendation No. 19*, [28]; Rodríguez, “Contesting Neoliberalism,” 173-174.

Nevertheless, when dealing with domestic violence as a human rights matter, it also encompasses the general human rights problem of ineffectiveness.

This article analysed the Brazilian legislation on domestic violence against women, the MPL, as a case study of domestic incorporation and implementation of international women's rights and legal provisions on GBVAW. The development of the MPL was not due to the Brazilian state's goodwill but rather as a result of a long feminist struggle domestically and internationally. The MPL promoted legal reform for combating domestic violence in Brazil through its gender justice perspective and proximity to international human rights instruments. On this account, the MPL demands that the Brazilian state pay attention to the gendered circumstances arising from domestic violence due to systematic patterns of gender inequality and GBVAW. Thus, the MPL promotes special legal protection for women in situations of violence as it determines specific and gender-sensitive forms of state intervention in cases of domestic violence.

Nevertheless, the challenges facing the MPL point to the need for social and political changes beyond legal reform. The state's responsibility to eliminate domestic violence entails more than having repressive criminal legislation. Instead, the MPL case study demonstrates that states' commitment to legal, social and institutional changes should promote women's effective access to gender-aware legal protection and integrated public policies for protective, assistance, and preventive measures as pathways towards combatting domestic violence against women. Domestic violence as a matter of human rights should not focus only on the survivors' rights to have the offender properly investigated and punished, whereas it also requires a broader engagement of women's human rights through legal, policy and judicial measures in order to prevent and tackle the structural causes of gender inequality and discrimination underpinning domestic violence as gender-based violence against women.

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