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JUDICIAL PLURALISM AND VIOLENCE AGAINST WOMEN: CASE STUDY

[1]Gabriela Andrade Fernandes and [2,*]Maria da Conceição Fonseca-Silva

[1]PhD in Memory: Language and Society, State University of Southwest Bahia (UESB/BRAZIL)
[2]PhD in Linguistics, National Council for Scientific and Technological Development (CNPq/BAZIL), Research Laboratory in Discourse Analysis (LAPADis/UESB), State University of Southwest Bahia (UESB/BRAZIL)

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ABSTRACT

In this essay, we present research results from studies on the social efficacy of the Maria da Penha Law in the municipality of Vitória da Conquista in the state of Bahia, Brazil, vis-à-vis its applicability by the state apparatus for the protection of women - Specialized Police Stations to Attend to Women (in Portuguese, Delegacia Especializada no Atendimento à Mulher or DEAM) and criminal judicial authorities – in particular, with regard to the antagonistic approach toissues of conflict resolution, which leads to an instrumental inefficacy of the judicial system, when faced with specific collective conflicts. In the analysis that follows, we mobilize the theory of Juridical Pluralism. Based on investigations into the demand for new rights and in light of the monist crisis of the state, especially the instrumental inefficacy of the Judicial Branch as identified in the empirical research into the modus operandi of state agencies for the protection of women, we have verified a degree of inertia of the formal criminal justice system in responding to the procedural demands pertaining to Domestic and Family Violence (in Portuguese, Violencia Doméstica e Familiar, or VDF) against women, and herein lies the main reason for inquiring into the causes for this juridical problem.

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INTRODUCTION

In this essay, we will present part of the results obtained from the research work on the social efficacy of the Maria da Penha Law in the municipality of Vitória da Conquista, in the state of Bahia vis-à-vis its applicability by the state apparatus for the protection of women –Specialized Police Stations to Attend to Women (Delegacia Especializada no Atendimento à Mulher or DEAM) and criminal judicial authorities - in particular, with regard to the antagonistic approach to issues of conflict resolution, as identified in the study, which leads to instrumental inefficacy of the Judicial Branch when faced with specific collective conflicts. The new citizenship construction process highlights the problem of "new rights", which arises from fundamental lacks and needs that are not fulfilled by state authorities. These, in turn, end up generating contradictions, conflicts and struggles, both for the defence of acquired rights, and for the creation of "new rights."

Corresponding author: **Maria da Conceição Fonseca-Silva**
PhD in Linguistics, National Council for Scientific and Technological Development (CNPq/BAZIL), Research Laboratory in Discourse Analysis (LAPADis/UESB), State University of Southwest Bahia (UESB/BRAZIL).

Within this perspective of non-realization of essential needs, a framework for Women's Human Rights (Direitos Humanos das Mulheres or DHM) was established, as a result of claims put forward by social movements through/by way of international juridical recognition of the right for equality for women and, consequently, of the unrestricted access to the same rights (political, economic, educational and social) extended to men. The reinvention of "new rights" is directly related to the "degree of efficacy" of an answer to a condition of lack or deprivation which, within the Brazilian government system, as a general rule, occurs through the adoption of positivist legislation, such as, for example, Law n. 11.340/2006, and its corresponding enforcement by judicial authorities, in such a way as to make the text of the law visible and observable by the social body. However, in order for the individual to enjoy the full exercise of these "new rights", it is not enough to simply obtain formal recognition set forth in the letter of the law. Rather, they need to be experienced and observed in daily life in a spontaneous way, based on society's respect for these rights and, in its absence, through the compulsory observance enforced by state institutions responsible for the administration of justice and order.

Theoretical foundation: According to Wolkmer (2001), the Brazilian state is currently facing an "acute paradigmatic crisis", as a result of a monist tradition influenced by Kelsenian legal thought and rooted in bourgeois-liberal values that "transforms Law and justice into exclusive state manifestations." This situation prevents the Judicial Branch in Brazil from solving new and contradictory collective conflicts that have arisen since the end of the 20th century in a creative and effective way. The distinct forms of monist crisis in which the state apparatus in Brazil is immersed has an impact on the actual administration of justice on several levels, rendering it ineffective and inoperative. This is because the national judicial culture founded upon a system of dogmatic rationality and logical-formal procedures "is incapable of following the rhythm of social transformations and the everyday life specificity of the new collective conflicts" (Wolkmer, 2001). As a result of the crisis of legitimation of the traditional modes of representation of collective interests, the process of construction of a new citizenship requires the constitution of active political agents and collective subjects that demand the satisfaction of fundamental human needs (Wolkmer, 2001), such as the struggle of social movements for the right for equality for women, for example. According to Wolkmer (2001), the realization of these new rights occurs in two stages: firstly, through social and judicial recognition of new rights; secondly, through the struggle to make effective the rights that have already been established and certified by the official legislation. In light of the expansion of citizenship and of the need inherent to it for implementation of reforming policies in the democratic state, the Judicial Branch is urged to decide on sociopolitical conflicts, either by recognizing or by denying social claims and demands. Nonetheless, the lack of operationality, the bureaucratic ritualization and the slowness of the judicial apparatus jeopardize the ability to quickly and effectively deal with urgent social issues, as state Faria and Lima Lopes (1994).

MATERIALS AND METHODS

Based on, the methodology employed involved bibliographic and documental investigation. The bibliographic investigation focused on primary sources from the legal field and from the interdisciplinary field of memory studies. The documental research stemmed from judicial procedures related to cases of domestic and family violence against women being prosecuted before three criminal courts of the district of Vitória da Conquista in Bahia between the years 2007 and 2014. The *corpus* was composed of seven lawsuits where there was production and presentation of evidence and where the prosecution of the domestic and family violence lawsuits within the aforementioned period. To perform an analysis of the narratives we followed a comparative method, wherein we confronted the victim testimonies obtained in the police and procedural stage with rulings on the merits. This methodology enabled us to identify two distinct situations with different results vis-à-vis the hearing of the victim of domestic and family violence and the treatment meted out by the Judicial Branch in each case.

RESULTS AND DISCUSSION

During the empirical investigation, we accounted for 1065 domestic violence criminal proceedings instituted between 2007 and 2014 in the three criminal courts of Vitória da Conquista. By correlating the total number of criminal lawsuits with the number of sentences passed in the same period, we found seven merits rulings, which amounts to less than 1% of police investigations instituted. Among the latter, four were adverse judgements and three resulted in judgements of acquittal. Between the years 2007 and 2012, no records of legal production were found. The seven merits rulings identified occurred after deliberation by the State Appellate Court for the establishment of the Specialized Court, after judgment had been rendered in 2013 and 2014, on the eve of the inauguration of the Specialized Court. The empirical research revealed a lack of effectiveness of the state apparatus of Vitória da Conquista in protecting women who suffer domestic and family violence. Not only does the formal criminal justice system, a guardian of socially relevant facts and values, refuseto look at gender inequality issues, it evades and circumvents the issue. For Falcão (1984), the disputes of collective nature have not received effective attention from interpreters of the legal dogmatics of the state. In this sense, the Judicial Branch becomes a place "where non-decisions are obtained" (Falcão, 1984). The consequences of judicial negligence[1], observed between 2007 and 2012, was the impunity of the aggressor and the repetition of the act of aggression against the victim, where this is the second institutional violence on account of violation of Article 3 (g) of the Inter-American Convention for Prevention, Punishment and Eradication of Violence Against Women, which states that all women have "*the right to simple and prompt recourse to a competent court or tribunal for protection against acts that violate her fundamental rights."*

As a result of the instrumental ineffectiveness of the Judicial Branch of Vitória da Conquista as regards the outcome of criminal proceedings involving domestic and family violence against women, we have attempted to identify where the possible cause(s) of the problem lie. For this purpose, by delving into the records of the seven sentenced cases we sought to analyse the way in which the formal criminal justice system conducted the hearing of the victim and how it manifested itself in relation to distinct claims as they were put forward. We identified two distinct situations relating to the hearing of the victim and the treatment given by the local judicial authorities to the vis-à-vis the declared purpose of women faced with a domestic and family violence situation. The first circumstance alludes to violence inflicted by the ex-partner who did not accept the break-up of their relationship and therefore continued to stalk the woman, behaving aggressively and assaulting her when she refused his request to back together. This situation, identified in four of the seven cases tried by the criminal courts, resulted in the conviction and sentencing of the defendant (supposed aggressor).

Mrs. […] reports that her ex-partner Mr. […] kicked in the backdoor to her house, […] and attacked her by clutching her neck, and then grabbed the victim's mobile phone and left, announcing he would kill her. […] the victim informs that the plaintiff refuses to accept the end of the relationship, she informs that they were together in a relationship for two and a half years and that they had a child together. (Case n. 07). Our emphasis.

[1] The inaction of the judicial branch of Vitória da Conquista lead to the prescription of more than sixty criminal lawsuits. According to Capez (2012, p. 572) prescription is the "the state's loss of the right-power-duty to punish due to non-enactment or non-realization of the punitive intention (interest in imposing the sentence) [...] after a fixed period of time."

Let us turn to the declarations made by Mrs. […], during the trial: 01:05 minutes: she and the accused were in a relationship for two and a half years, they had a child together and are currently separated. 01:35 minutes: [she states] that the defendant insists on getting back together with her, but she does not wish to do so. 02:00 minutes: that in the day when the fact occurred, the defendant wanted to come into her house, but she would not open the door, so the defendant kicked in the backdoor and approached the victim, clutching her neck, next grabbing her mobile phone and threatening her with death(Case n. 21). Our emphasis.

The comparison between the police investigation/inquiry and the eighth victim at the evidentiary stage indicates the author's firm conviction vis-à-vis the unfolding of the events at issue. This situation is in line with the viewpoint of Ricoeur (2007) as to the reliability of the testimony, the inaugural element of a memory that was buried or locked away and depends, first and foremost, on the witness's ability to confirm her first narrative, dispelling any suspicions that falls on him. We also verified in the legal prosecution of these investigations and lawsuits, that there were no obstacles in the path of prosecution: victim, witnesses, expert evidences and other proofs were suitably provided. Tough not expressly declared, the integrity and coherence of the narrative and the adoption of all legal measures and procedures demonstrate that the victim clearly intended to see her aggressor prosecuted and tried for the crimes committed.

A second circumstance relates to the complaints of domestic violence registered at Specialized Police Stations in which the victim is unwilling to pursue the charges against the aggressor or revokes the complaint, does not appear at the trial to confirm the first testimony, or else, *when she does show up, she presents a conflicting and contradictory declaration*, which indicates indirectly the victim's intention of not proceeding with the law suit (discontinuance), because she does not wish to see the aggressor tried and convicted, due to an emotional bond that still exists – be it parent-child, marital or kinship relations –between the victim and the accused, as can be observed in the following statement:

In court, though, after recounting an almost infinite number of times that she had been battered or attacked in some way by the defendant, in a confusing testimony that sounded more like she was blowing off steam and giving vent to her feelings, when inquired by the Public Defendant the victim denied that on the date stated in the complaint the accused had threatened to kill her, or her children. Quite the contrary, after denying the facts relating to the offense as they were stated when she registered her complaint at the police station, she then stated in court that the defendant had promised to burn down her house […]. It is comprehensible that the Court may have been inclined to establish the highest degree of relevancy to the victim's statement about the crimes committed in her own home, seeing that [this type of crime] is normally carried out without the presence of witnesses. However, for this purpose the victim's declarations must be endowed with coherence, clarity and completeness (Case n. 01, p. 87). Our emphasis. The analysis of the above-mentioned circumstances, which ultimately led to opposing results – criminal conviction in the first case and acquittal in the second – points to a problematic relation between facts and norms. According to Ferraz (1994, p. 46), in its task of responding to society's needs and concerns over particular conflicts, the legal science, and, in addition, the judicial activity itself, does not contemplate the many possible variables – be them social, anthropological, historical, ethnological, psychological or economic – that permeate and inform the conflict, thus proposing the extrapolation of the traditionally recognized sources of the Law (laws, precedents, caselaws, judicial decisions), in the sense of a multidisciplinary approach to the concrete case, making use of secondary sources such as Sociology and History.

CONCLUSION

The results indicated that the criminal justice system is not prepared to solve complex social issues, such as issues concerning gender inequality. It chooses to deal with the conflictual issue procedurally, acquitting the defendant of the crime on the basis of the lack of credibility of the victim's testimony, without further inquiry into the underlying causes of the domestic and family violence suffered by the victim. It rules on the issue and passes judgement, but does not actually attack the real problems surrounding the case. Our findings confirm that the legal system adopts a formalist and dogmatic approach, guided by a "pseudo-neutrality", revealing an urgency in bringing about a solid transformation in the entire jurisdictional instance as to solving conflicts involving new rights such as women's human rights.

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