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Critical reflections on punitivism and the control policies defined by Brazilian federal law number 11,340 of 2006 (the "Maria da Penha" law)

Abstract

Feminist movements, aiming for "empowerment", demanded greater criminal penalties, which resulted in the creation of the Maria da Penha Law – Law No. 11,340/2006. The increase in abstractly foreseen penalties legitimizes the objective of the legal system, but this rule is inappropriate for domestic and family problems, manifesting penal symbolism. The criminal justice model, despite repressing violence, has not been effective given the complexity of this phenomenon and the peculiarities of the victims in question. Along this path, this work intends, under the aegis of Critical Criminology, to understand the aspirations raised by feminist movements from Law No. 9,099/95 to the punitive increase resulting from Law No. 11,340/2006, as well as to identify the symbolic mechanisms of criminal policy to combat domestic violence, through the analysis of data collected in the Brazilian Public Security Yearbooks of 2022 and 2023. The results will clarify the social, economic and cultural changes associated with late modernity of reduced effectiveness of social control and growth in the rate of crime, in addition to demonstrating the changes felt due to the punitive tendency of the Maria da Penha Law. It is clear that the great challenge is not in creating legislation and justifying women's rights, but rather in finding ways to protect and prevent them from multiple forms of violence.

Keywords: maria da Penha law, criminology, control policiy, punitivism

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Introduction

The present article is aims to, in addition to the observation of punitive expansionism, seeks to find alternatives to the forms of conflict resolution presented by the Maria da Penha Law[1] (Brazilian Federal Law 11,340 of 2006) since its creation to the present day. Based on the theoretical framework of Critical Criminology and its findings, whose studies demonstrate the delegitimization of the criminal justice system, given the contradiction between its declared and undeclared functions, and the problem of selectivity, the following hypothesis can be developed: if the greater tightening of the procedure provided for in specific legislation to combat domestic and family violence, as a result of the criminal policy of expanding punitive power, is merely symbolic, it is possible, then, that the criminal system does not achieve the objectives of pacification of declared domestic conflicts by the legislator. It is therefore necessary to discuss and deepen the symbolic state violence and on the objectives declared by the norm and those achieved with its application in the domestic and family sphere. There is, then, an expansion of the state's criminal reach, corresponding to a popular demand for greater punishment and social protection, masking the inefficiency of the judicial system in guaranteeing public order. Finally, the punitive system acts in its most traditional form also in the context of domestic violence, reproducing violence and pain, selecting those who can be marginalized and expanding control mechanisms.

This research, therefore, has been aimed to understand, under the aegis of Critical Criminology, the aspirations raised by feminist movements since Brazilian Federal Law No. 9,099 of 1995 to the punitive increase arising with Federal Law No. 11,340 of 2006, as well as identifying the symbolic mechanisms of criminal policy to combat domestic violence, through the analysis of data collected in the Brazilian Public Security Yearbooks of 2022 and 2023. This paper was thus divided into three sections. The first of them deals with criminal policies and the mechanisms for controlling and legitimizing punitive power in the legal sphere. It highlights the development of criminal policy based on punitive populism and the increase in incarceration and selectivity of the penal system. The second section provides a historical analysis of the legal and criminal forms of dealing with the problem of domestic and family violence against women in Brazil – from the Special Criminal Courts, created by Federal Law No. 9,099 of 1995, until the advent of Federal Law No. 11,340/ 2006, popularly known as the "Maria da Penha" Law, named after the victim of domestic abuse whose story, after nearly being killed by her now ex-husband, ignited the population to pressure lawmakers in Brazil to produce a norm to protect future victim and establish strict criminal rules for their attackers.

In this context, the documentary and bibliographic study aims to provide the researcher with a theoretical foundation to infer her results, as well as to assist in the abstraction of information and data collected in the field research that will be presented in the third chapter. In order to test the hypothesis of this article, data collection was developed in the Brazilian Public Security Yearbooks of 2022 and 2023. Therefore, in the third section, the methods and tactics through which data from this data were collected and interpreted were highlighted and outlined. This theoretical and empirical study, which presents a qualitative analysis, allowed, from the framework of critical criminology, the understanding of the real function of the criminal policy of the Maria da Penha Law in combating domestic and family violence against women. One cannot lose sight of the historical selectivity and violence perpetrated by state mechanisms of punitive control, which seduce with the possibility of taking on the defense of the most important social interests, but do not deliver what they promise.

Criminal policies in modern Brazilian society and reflection on the penal system

According to the National Penitentiary Department (DEPEN), based on information collected in June 2022, the number of people deprived of their liberty in Brazil exceeded the nine hundred and nineteen thousand mark. Currently, there are around 350 prisoners for every hundred thousand inhabitants in the country, in sub-human and devastating conditions. In these circumstances, expansionist Criminal Law policies emerged, guided by efficient and superficial ideologies, inserted in the "Law and Order" movement, which implied legislative and institutional reforms for the incisive and repressive fight against crime. In the course of these reforms, the suppression and relativization of civil liberties and procedural guarantees indispensable to a democratic state of law, such as the principles of due legal process and the presumption of innocence, began to be accepted in the name of maintaining security and effectiveness of the punitive intervention.[2]

Enemies are selected and victims are purified, instigating emotions in society ranging from fear and insecurity to feelings such as anger and revenge, which contribute to the growth of social expectations of repression and intolerance. According to D'Elia Filho,[3] the right combined with the good use of force, understood as legitimate violence, is what now includes the police State within the Rule of Law. For the "zero tolerance" actions to be successful, the constant and vigilant action of a very ostentatious police force was necessary. Therefore, incivilities, violence, torture and even police executions, in this context, became frequent and, often, tolerated.[4] Vera Batista demonstrates that neoliberal policies brought the penal system to the epicenter of political action: the singularity of neoliberalism was to combine the penal system with new technologies of control, surveillance, and the constitution of poor neighborhoods into concentration camps. Every day the option is made to incarcerate those who are not involved in consumption. The resocializing myth is rhetorically manipulated and remains in neoliberal political discourses as a way of maintaining the prison. Therefore, there is a need to break with the logic of retribution, guilt, punishment, revenge, as a way of putting an end to a social problem.[5]

In this direction, the problem that can be seen from the analysis of the current trend in criminal policy is the centralization of the response to the crisis of legitimation experienced by the institutions of contemporary society through the use of punishment, as if there were no other valid means of social control. Therefore, the failed policy of criminalizing more and more conduct continues, increasing the penalties for existing ones and increasingly subjecting the individual to prison sentences, which is re-emerging as the penalty par excellence, which is clear from the unprecedented growth of the prison population.

Another trend in this criminal policy is the construction of preventive Criminal Law with the characteristic of anticipating criminal protection, which leads to the constant creation of dangerous crimes and the configuration of new universal legal assets. This trend finds strength in Brazilian criminal legislative practice, which is very close to the model defended by the speeches of repressive movements which, under the slogan "law and order" and "zero tolerance" are based on the criminalization and resurgence of the penal system, suppressing individual rights and guarantees. The promulgation of stricter criminal laws and social control interventions by formal, more forceful bodies is legitimized, without there being any disagreement. The result that is achieved from the symbiosis between symbolism and punitivism/penal efficiency is the execution of a model of maximum Criminal Law, in total disagreement with the model of minimum criminal intervention designed by the Federal Constitution of Brazil.

Criminal policy therefore seeks to respond to the risks of contemporary society, through the expansion of criminal intervention to the detriment of other instruments of social control. Within this context of penal expansionism and arbitrariness, contemporary penal policies attest to an instrumental logic and an expressive mode of action, which seek to translate public sentiment, operating in two different registers, a punitive register that uses symbols of punishment and suffering to deliver its message and an instrumental record more suited to the objectives of public protection and risk management, added to the characteristics typical of a hierarchical and unequal society, marked by an inquisitorial, arbitrary and selective culture in matters of penal control.[6]

From special criminal courts to courts of domestic and family violence against women: a study of methods of resolution of domestic conflicts

Under the decriminalizing sign of the principle of minimum intervention, the use of prison as an ultima ratio and the search for alternative sentences to it, in 1995, Brazilian Federal Law number 9,099 was enacted, which implemented the Special State Courts in Brazil. With regard to the sphere of criminal justice, the main scope of the new legislation is to promote the "unburdening" of the system and increase the population's access to justice, through the application of the principles of morality, celerity, procedural economy, informality and simplification of the process. These objectives apply to all crimes and criminal misdemeanors for which the Penal Code and the Criminal Misdemeanors Law provide for a maximum penalty of up to two years of imprisonment or detention, in accordance with article 61 of Law 9,099 of 1995, called "less offensive potential". Thus, the aforementioned law was being described as a consequence of a movement for self-reform of the Judiciary and which was based on minimum Criminal Law, the basis of which is to provide small state interventions and great guarantees.

The theory of minimum criminal law represents a proposal for an alternative criminal policy from the perspective of critical criminology. It is, above all, a program to contain punitive violence through law based on the most rigorous affirmation of the legal guarantees inherent to the Rule of Law and the human rights of all citizens, in particular victims, prosecuted and sentenced by the criminal justice system criminal justice. Its program consists of a broad and rigorous decriminalization policy and, in a final perspective, overcoming the current criminal justice system and replacing it with more adequate, differentiated and fair forms of defending human rights in the face of violence.[7]

Contrary to expectations, this law did not significantly reduce cases in criminal courts. The courts introduced a multitude of infractions to the judiciary that previously, as demonstrated by Luciano Oliveira in his work entitled "His Excellency the Commissioner", were within the police sphere, which led to a reduction in the arbitrariness and selectivity exercised in police stations. According to Koerner,[8] the selectivity of the system, previously exercised by the police, is now placed in the hands of the victim/complainant. This communicates the occurrence, resulting in a detailed statement, which will only be followed up with the representation of the victim. In this context of apparent increase in cases of domestic violence against women, alleged inability of Special Courts to judge cases of domestic violence against women and consequent dissatisfaction on the part of the population, Federal Law number 11,340 of 2006 emerged. From the perspective of women's emancipation and respective empowerment, the feminist movements' request was a new piece of legislation – Law No. 11,340/2006 – as a balance, which aims to protect women

in situations in which they may be weakened by violence. It is up to ordinary law to treat unequals unequally in certain exceptional and specific situations.[9]

The Maria da Penha Law was born in order to meet this feminist demand, and despite numerous criticisms that were launched, it removed the judgment of crimes perpetrated with domestic and family violence against women from the scope of JECRIM. The empowerment strategies, via criminal hardening to its ultimate consequences, defended by feminist movements, would supposedly repay the evil to men and prevent domestic violence against women. However, these results are not achieved in the Brazilian reality. In this context, therefore, the aim is to understand the reality of the performance of this criminal justice system in the context of domestic and family violence against women, through critical criminological studies that prohibit the orthodox perspective obsessed with the atomization of crime and the criminal and guide the researcher in a trajectory in which the important thing is to look and interpret the subject in their context, realizing that their acts are not isolated, but always inserted in the networks of interactions that produce their subjectivity. Punitivism and its expansionism is overwhelming; it is essential, therefore, that instruments are proposed to reduce the harmful effects generated daily by the prison system. According to Zaffaroni,[10] the strategy is clear: save lives, reduce inequality, avoid suffering.

Investigating the reality of the Maria da Penha law: recrudescence as a reflection of a symbolic criminal law

In a general sense, the method is "the order that must be imposed on the different processes necessary to achieve a given end"[11] or the "orderly, repeatable and self-correcting investigation procedure that guarantees the obtaining of valid results,"[12] whose importance lies in disciplining research in order to exclude whim and chance, determining the means of investigation and the order of research. The method seeks evidence of the analyzed object. On the other hand, to know the nature of things, it is necessary to analyze, carry out an operation to decompose the whole into smaller parts, to discern what is essential and what is accidental, and then proceed to synthesis as a means of verifying the results, thus establishing relationships.

Psychological violence as a criminal type was classified in 2021 and resulted in the registration of 24,382 police reports, with a rate of 35.6 women per group of 100 thousand, according to the 2022 Public Security Yearbook. According to the Brazilian Ministry of Women's website, from January to October 2023, the Women's Call Center - Call 180 answered an average of 1,525 telephone calls per day. There were 461,994 consultations, 74,584 of which referred to reports of violence against women. In 2022, in the same period, there were 73,685. Among the main types of complaints are psychological violence (72,993); followed by physical violence (55,524); property violence (12,744), sexual violence (6,669); false imprisonment (2,338); moral violence (2,156) and human trafficking (41) Another recently typified crime is stalking, a practice also known as stalking, which resulted in 56,560 cases of female victims in 2022, a rate of 54.5 per 100,000, according to the 2023 Public Security Yearbook. And, finally, the quantitative analysis of the crime of non-compliance with urgent protective measures. According to the 2022 Public Security Yearbook, there was no considerable impact in terms of reducing the occurrences of non-compliance with urgent protective measures after the criminal classification of the conduct of non-compliance, as no change was found in the number of police records of the crime in the 2018, 2019 and 2020, there was even a small increase in cases in 2019.

In 2021, the Brazilian National Human Rights Ombudsman (ONDH) registered 67,779 reports of domestic violence against women, of which 8,033 concerned violence perpetrated in breach of urgent protective measures. That is, of all reports of domestic violence received by the ONDH (67,779) in 2021, almost 12% (8,033) referred to attacks carried out without complying with urgent protective measures. It should be noted, therefore, that in these cases, the woman had already been a victim of violence, had at least one MPU (emergency protective measure) in her favor It appears, therefore, that these legislative advances are still not sufficient to guarantee the necessary effectiveness of urgent protective measures, meaning that women's fundamental rights are still under insufficient protection by the State.

It can be seen, therefore, that changes in incriminating criminal types arose in accordance with the current political tendency to resort to the criminal system (creating new crimes or increasing the penalty for pre-existing crimes) to solve a social problem, even though research cannot demonstrate the relationship between the increase in criminal severity and the decrease in certain crimes.[13] These collected data confirm the observation already brought up throughout the work, that is, women cannot seek their emancipation through the legitimization of punitive discourse and its symbolic load. According to Campos and Carvalho,[14] "the objective, therefore, becomes the instrumentalization of harm reduction discourses that protect both the victim and the defendant from the violence of the criminal process." From this perspective, it is envisaged that the law will be retrained as a strategic means of a humanist policy concerned with reducing the suffering of people involved in criminalized conflict.[15–31]

Conclusion

Brazil, especially since the 90s of the last century, has been deeply influenced by trends that herald the resurgence of Criminal Law. In this direction, the problem that can be seen from the analysis of the current trend in criminal policy is the centralization of the response to the crisis of legitimation experienced by the institutions of contemporary society through the use of punishment, as if there were no other valid means of social control and efficient. Therefore, the failed policy of criminalizing more and more conduct continues, increasing penalties beyond those already existing and increasingly subjecting the individual to prison sentences, which reemerges as the penalty par excellence, which is clear from the growth without precedents of the prison population. Bringing this theme to the reality of domestic and family violence against women, at an opportune moment, Law 11,340, of August 7, 2006, came into force, with the aim of creating mechanisms to curb domestic and family violence against women. It introduced into the Brazilian legal system a difference in treatment between genders, even when the same crime was committed. From the bibliographical research and data collection carried out, it was demonstrated that punitive expansionism does not guarantee protection for women victims of domestic violence, as it does not tend to contain the escalation and progression of crimes committed. There was an increase in numbers in relation to crimes of psychological violence, stalking and non-compliance with protective measures according to the Brazilian Public Security Yearbooks of 2022 and 2023.

The provision of a stricter procedure by the Maria da Penha Law did not alter the situation of domestic violence in any way, as women continue to be attacked; the figures grow in light of the increase in criminal norms and the system's operability, contrary to what was expected with the creation of these laws, further weakening the assaulted woman. What we intend to say is that the expansion in the

management of the punitive system to ensure female emancipation is not an ideal tool. It is healthier, therefore, to associate it with public policies that prioritize the social and psychological aspects of the people involved in the conflict. The Maria da Penha Law goes further, seeking to combat the inequalities suffered by women through a multidisciplinary approach, which covers a wide range of sciences and related areas. This is a strategy that is growing, in search of balance, since the expansion of criminal law, in itself, is not healthy.

This research used the discourse of critical criminology, more specifically feminist criminology, as a theoretical framework. In view of the growing tendency of feminist movements to seek support in the criminal system to defend women's rights, criminology has developed a theoretical basis to guide the political-criminal options of these women. It is based on the assumption that this system is not capable of guaranteeing rights, since it acts symbolically, creating the illusory sensation of legal security. The creation of the criminal type is a legislative advance and consistent with the Democratic Rule of Law and the adequacy of domestic legislation to the Convention on the elimination of all forms of discrimination against women, despite our positioning ourselves in the sense of not believing in the creation of criminal types, for the purpose of solving major social problems. It is appropriate to note that the concern of the legislator and the operators of the Law and Judiciary, in addition to the creation and implementation of legislation, must move towards providing due reception to women who are victims of physical, psychological, financial, moral violence, among others, avoiding revictimization. In this context, it is urgent to expand discussions regarding the best ways to resolve domestic conflicts beyond the criminal system and compatible with the needs and expectations of victims. Tackling domestic violence will not happen through the painful and damaging intervention of the criminal system. In addition to not resolving conflicts, it produces symbolism, injustice and selectivity inherent to its operation.

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Conflicts of interest

The author declares there is no conflict of interest.

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