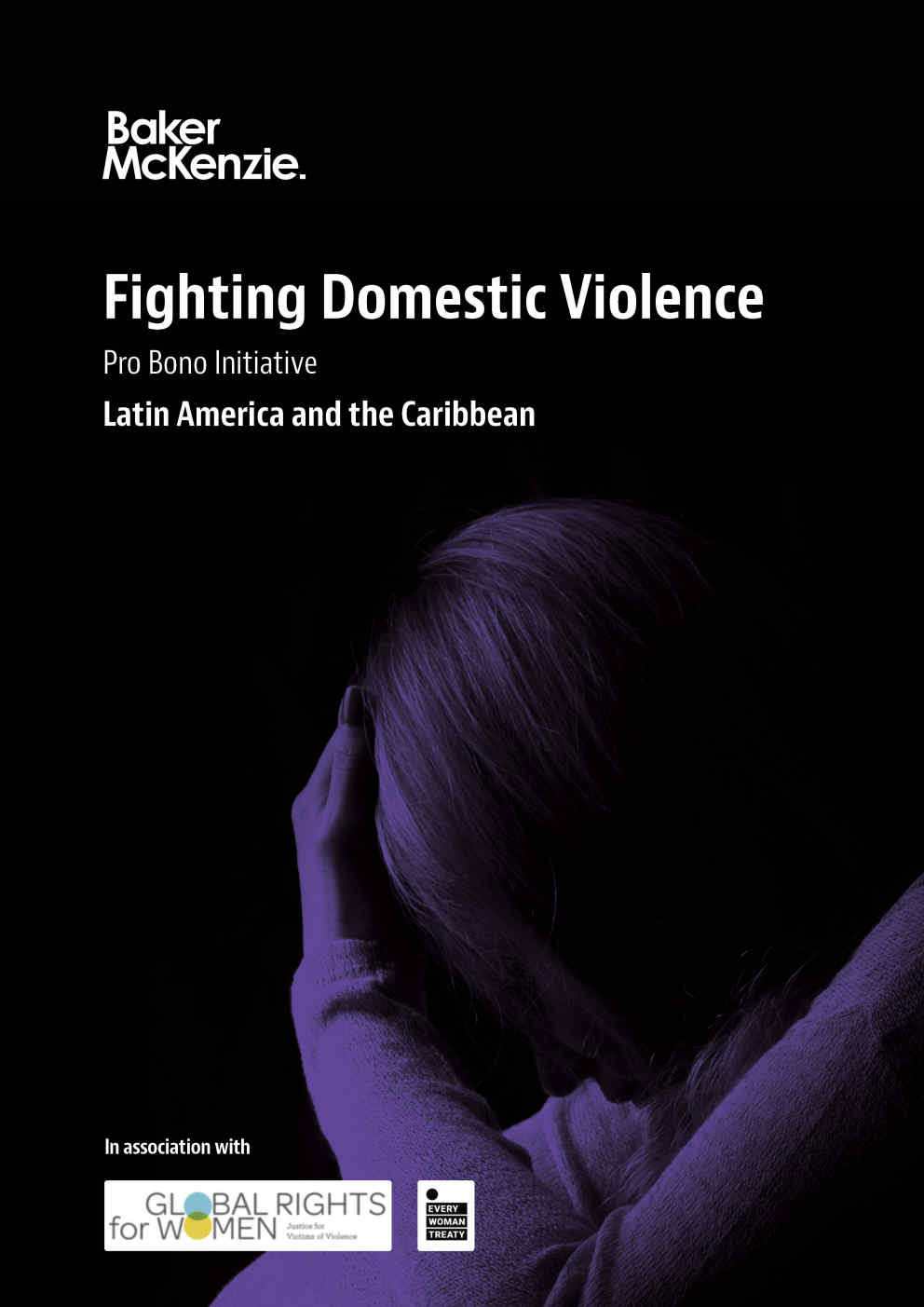
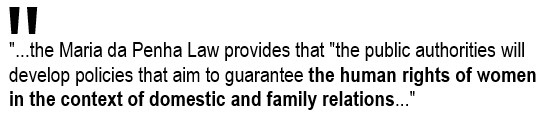
Fighting Domestic Violence - Brazil

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**How to use and navigate this report**

# 1. Legal provisions

## 1.1 What are the relevant statutes and codes?

The relevant legislation on domestic violence in Brazil is divided between international ratified standards/policies and local legislation, as detailed in the below chart.

With respect to local legislation, the ratification of Law No. 11,340/2006 in 2006, regarding domestic and family violence (*Lei Maria da Penha*) ("**Maria da Penha Law**"), constituted a huge step forward against domestic violence in Brazil and is the most comprehensive statute related to this topic:

**International standards**

Decree No. 1,973/1996 Inter-American Convention to prevent, punish and eradicate violence against women.

Aims to prevent, punish and eradicate violence against women and imposes obligations on the signatory states.

Decree No. 5,017/2004. Protocol to prevent, suppress and punish human trafficking, especially of women and children.

Aims to prevent, suppress and punish the transnational organized crime of human trafficking, particularly of women and children.

Decree No. 4,377/2002. Convention for the elimination of all forms of discrimination against women.

Sets forth the international commitment to adopt effective measures to eliminate discrimination against women.

**National laws**

Law No. 11,340/2006/Maria da Penha Law.

Aims to prevent, punish and eradicate domestic violence and grant protection to victims, as follows:

classifies and defines domestic violence as physical, psychological, sexual, patrimonial and moral violence

establishes protective measures for victims of violence in the workplace, either public or private

defines the procedure of attendance of victims of domestic violence in specialized police stations, such as providing the necessary medical services;

establishes the creation of specialized courts and police stations for domestic violence matters

prohibits the punishment for domestic violence to be restricted to fines or other forms of financial payments

establishes protective measures such as removal of the offender from the home and suspension of visits by the offender to their children

establishes the crime of violating protection orders. The penalty is three months to two years of imprisonment.

creates the ability for a victim of domestic violence to leave the workplace for up to six months due to domestic violence issues

establishes that the victim has the option of filing for divorce or dissolving a stable union in the court of domestic and family violence against women

establishes that whoever, by action or omission, causes injury by physical, sexual or psychological violence or moral or patrimonial damage to the woman must reimburse all damages caused, including reimbursement to the Unified Health System (SUS), according to the SUS table, of the costs related to the health services provided for the total treatment of the victim.

Military Criminal Code (Discriminatory regulation) of 1969.

Establishes the crime of kidnapping for sexual gratification: the conduct of kidnapping women, through violence or serious threat, for sexual gratification, in a place where any effective military operations occur. The established penalty is from two to four years of imprisonment.

Federal Law No. 7,210/1984 1984 (including related amendments in 2006, 2009 and 2018).

Establishes rules for women who are held in prison, such as:

Medical assistance must be provided to women, particularly in the prenatal and postpartum period, to include the newborn.

There must be women offender prisons, where only women wardens are allowed.

In cases of violence against women, the judge may consider rehabilitation programs as part of the sentence.

Criminal Procedure Code of 1941 (including related amendments in 2011, 2016, 2017 and 2018).

Establishes procedures for criminal offenses:

In cases of domestic violence, it establishes the possibility of the offender's provisional arrest to guarantee the effectiveness of protective measures ordered in favor of the victim.

In cases of domestic violence, the evidence collection will take priority over other technical exams.

Only women can carry out a strip search of anotherwoman.

It is prohibited to put handcuffs on pregnant women who are receiving medical/hospital treatment in preparation for childbirth or after.

Home confinement is permissible as a substitution for the provisional arrest (before the trial) if the woman is pregnant or has a child up to 12 years old as long as she is not accused of violent crime/crime committed by serious threat or a crime against her children or any person who depends on her

Federal Law No. 13,642/2018.

Establishes that the federal police — in cooperation with others — will investigate cybercrimes that spread misogynistic content, defined as those that propagate hatred or aversion to women.

Criminal Code, Article 121, (introduced by Law No. 13,104/2015).

Sets special punishment for killing women exclusively because of their gender. A crime qualifies if the crime (i) involves domestic or family violence or (ii) disregard or discrimination against a person based on the fact that they are a woman. The established penalty is 12 to 30 years of imprisonment.

Criminal Code, Article 213 (introduced by Law No. 12,015/2009).

Establishes the crime of rape: to coerce someone through violence or serious threat, to practice sexual act or similar. The established penalty is six to 30 years of imprisonment.

Criminal Code, Article 215 (introduced by Law No. 12,015/2009).

Establishes the crime of sexual violation through fraud: the conduct of practicing sexual acts through fraud or any means that hinder the victim's free will. The established penalty is two to six years of imprisonment.

Criminal Code, Article 215- A (introduced by Law No. 13,718/2018).

Establishes the crime of sexual harassment: the conduct of practicing any libidinous act without consent to satisfy his/her own or a third party's lust. The established penalty is one to five years of imprisonment.

Criminal Code, Article 216-A (introduced by Law No. 10,224/2001).

Establishes the crime of sexual harassment: the conduct of harassing someone with the intention of obtaining sexual advantage or favor, based on the agent's hierarchical position or function in labor activities. The established penalty is one to two years of imprisonment.

Criminal Code, Article 216-B (introduced by Law No. 13,772/2018).

Establishes the crime of unauthorized production of sexual intimacy: the conduct of producing, photographing, filming or recording, by any means, nude content or sexual content without the authorization of the participants. The established penalty is six months to one year of imprisonment plus a fine.

Criminal Code, Article 129, §9º and 10 (introduced by Law No. 11,340/2006).

If bodily injury occurs in the context of domestic violence, the penalties will be increased.

Criminal Code, Article 61 introduced by Law No. 11,340/2006).

Establishes that for any crime committed (i) against pregnant women, (ii) under the circumstance of domestic relations, cohabitation or hospitality, and (iii) that involves violence against women as determined by a specific law, the punishment will be more severe.

Federal Law No. 14,022/2020 (Amendment to the Federal Law No. 13,979/2020 — measures to address the public health pandemic related to COVID-19).

Aims to prevent, punish and eradicate domestic violence and grant protection to victims during the public health emergency related to COVID-19. The amendment establishes the following:

continuation of face-to-face victim services

maintenance of the deadlines and analysis of the lawsuits involving domestic violence

customization and improvement of online support and service channels

protective measures will last as long as the federal law 13,979/2020 is in force

protective measures are classified as urgent matters and will not be suspended due to the pandemic crisis

creation of a campaign aiming to prevent domestic violence and provide access to reports channels

Law No. 13,715/2018.

Establishes the loss of "family power" (*poder familiar*) for the offender who commits feminicide (*feminicídio*), which means killing women, homicide or causes serious personal injury against a spouse, daughter or any other descendant.

Article 9, paragraph 2, Law No. 11,340/2009.

Provides that the judge may extend the employment relationship for six months if a victim has to be on leave due to domestic violence. In September 2019, the Brazilian Superior Court of Justice rendered one precedent extending the "sick leave allowance" to the women on the mentioned situation.

## 1.2 What is the controlling case law?

There are several precedents to aid in the fight against domestic violence. Below is the most relevant case law — including the Stare Decisis (*Súmulas Vinculantes*) — issued by the Brazilian Supreme Court of Justice and the Brazilian Superior Court of Justice (the highest appellate court in Brazil for nonconstitutional matters).

**Supreme Court of Justice**

Appeal in Habeas Corpus No. 142,837, Rapporteur Ministry of Justice Marco Aurélio, judged on 20 October 2020.

The Supreme Court of Justice determined that, in regard to crimes against women, the "insignificance principle" (*princípio da insignificância*) is not applicable when the conduct of the author is considered irrelevant or to entail no potential risk (and therefore is not a crime).

Habeas Corpus No. 143,641, Rapporteur Ministry of Justice Ricardo Lewandowski, judged on 20 February 2018.

Considering the overcrowded Brazilian prison system, the Supreme Court decided that no woman who is (i) pregnant; (ii) postpartum or (iii) responsible for children up to 12 years of age or a person with disabilities will be held in custody (before the trial), except in the case of a violent crime, a crime committed by serious threat or a crime against her descendants or other unusual situation determined by the trial judge. If the crime committed qualifies under the above exceptions, the woman should be given in-house confinement.

Action for the Declaration of Constitutionality (ADC) No. 19, Rapporteur Ministry of Justice Marco Aurélio, judged on 9 February 2012.

Here, the Supreme Court upheld ADC No. 19, which provides a uniform judicial interpretation of the provisions contained in the Maria da Penha Law (the constitutionality of Articles 1, 33 and 41 of Law 11.340/2006) and creates mechanisms to curb domestic and family violence against women.

**Superior Court of Justice - *stare decisis***

Stare Decisis No. 600 of the Superior Court of Justice (2017).

The cohabitation between the perpetrator of domestic violence and the victim is not a requirement under the terms of Article 5 of Law No. 11.340/2006.

Stare Decisis No. 589 of the Superior Court of Justice (2017).

The "insignificance principle" (*princípio da insignificância*) is not applicable in crimes against women when the conduct of the author is considered irrelevant or to entail no potential risk and therefore is not a crime.

Stare Decisis No. 588 of the Superior Court of Justice (2017).

In regard to crimes against women, the court is not allowed to convert a penalty involving deprivation of liberty into a penalty of restricting rights.

Stare Decisis No. 536 of the Superior Court of Justice (2015).

In regard to crimes against women, plea-bargaining (a type of negotiation of the penalty) is not allowed.

**Superior Court of Justice - leading cases**

Interlocutory appeal in a Special Appeal No. 1437852/MG, Rapporteur Ministry of Justice Ribeiro Dantas, judged on 18 February 2020.

The Superior Court of Justice found that the violence that occurs within the family unit, as covered by Law No. 11.340/2006, is applicable to cases that involve violence perpetrated by a brother against his sister.

Habeas Corpus No. 542.828/AP, Rapporteur Ministry of Justice Reynaldo Soares da Fonseca, judged on 18 February 2020.

States that Law No. 11.340/06 is meant to not only protect the victim who lives with the aggressor, but also the victim who has lived with the aggressor in the past such as an ex-husband.

Habeas Corpus No. 131.144/SP, Rapporteur Ministry of Justice Reynaldo Soares da Fonseca, judged on 6 October 2020.

In this case, the Superior Court of Justice determined that pre-trial detention of the aggressor was appropriate after he violated the restraining order by threatening the victim with death.

Special appeal No. 1.675.874/MS, Rapporteur Ministry of Justice Rogerio Schietti Cruz, judged on 28 February 2018.

The Superior Court of Justice decided that, in cases of violence perpetrated in the domestic and family environment, requiring minimum indemnification amounts as compensation for nonmaterial damages is appropriate.

## 1.3 What are the specific parts of the court system that address domestic violence?

The provisions related to domestic violence are addressed by criminal law, civil law, labor law and employment law. Although the Maria da Penha Law (Law No. 11,340/2006) has changed mostly criminal provisions, it also regulates labor and civil rights, for instance, it establishes (i) protective measures for victims of violence in the their workplace, either public or private; (ii) mandatory continuation of employment when it is necessary for the victim to leave the workplace, for up to six months, due to domestic violence; (iii) the option of filing for a divorce or dissolving a stable union in the court of domestic and family violence against women; and (iv) that whoever causes injury, physical, sexual or psychological violence and moral or patrimonial damage to the woman is obliged to reimburse all damages caused. Moreover, this Law requires coordination between the federal union, states, municipalities and nongovernmental organizations to promote studies on women conditions, in order to attract attention to the matter to help eradicate violence against women.

The special courts of domestic and family violence against women and the civil and criminal ordinary courts of justice have jurisdiction to hear the domestic violence cases.

## 1.4 What are potential causes of action?

The Maria da Penha Law provides both civil and criminal measures for victims of domestic violence (chapter II of Law No. 11,340/2006). For instance, the law provides the following protective measures in regard to the abuser: (i) the removal of the abuser from the location that the victim lives; (ii) the requirement that the abuser refrain from contacting the victim and her family; (iii) limiting access to public or private places that the victim might be found; (iv) restriction or suspension of visits to children; and (v) attendance of the abuser at recovery and re-education programs.

Moreover, the victim may also be granted protective measures, such as: (i) referral of the victim and her children to an official or community protection or assistance protective program; (ii) writs of prevention of separation from bed and board; (iii) registration of the victim's children in an education institution closest to their home; (iv) restitution for property unduly taken away by the abuser from the victim; and (v) suspension of any powers of attorney granted by the victim to the abuser.

Violation of the measures/orders by the abuser is a crime with a penalty of imprisonment of two months up to three years plus other applicable penalties.

# 2. Introduction: framework guiding domestic violence law

## 2.1 Are there civil and criminal legal remedies for domestic violence victims?

Yes, there are. The Maria da Penha Law and the Brazilian Criminal Code are the main legal provisions for protecting domestic violence against women in Brazil such as:

a)         keeping the abuser away from home

b)         prohibiting the abuser's contact with the victim, family members and witnesses

c)         requiring the abuser to pay the victim a provisional pension

d)         providing health and psychological assistance to the victim

e)         protecting the victim's assets

f)          maintaining the victim's job in the event of the need to leave the workplace

g)         establishing prison sentences that, depending on the case, may reach up to 30 years of imprisonment

This is not an exhaustive list and there are other legal remedies in Brazilian legislation for domestic violence against women. However, the application of these legal remedies due to the economic, social and geographical inequalities in Brazil can be hard. In addition, the Brazilian judiciary has a profound gender inequality issue. This situation negatively affects the practical importance given to fighting domestic violence.

## 2.2 Is domestic violence identified in national law as a human right (noting that at a European level protection from domestic violence has not been explicitly identified as a human right but is indirectly captured by the other provisions)?

Yes, it is. Article 3 of the Brazilian Federal Constitution[1] provides that the fundamental objectives of Brazilian State are (i) to build a free, just and solidary society and (ii) to promote the well-being of all, without prejudice as to origin, race, **sex**, color, age and any other forms of discrimination. Furthermore, the Maria da Penha Law provides that "the public authorities will develop policies that aim to guarantee **the human rights of women in the context of domestic and family relations** in order to protect them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression."[2] Therefore, domestic violence against women is recognized as a violation of human rights in Brazil.

## 2.3 Has your country signed and ratified the Council of Europe's Istanbul Convention (2011) preventing and combating violence against women and domestic violence (CETS No. 210)?

Brazil has not signed or ratified the Council of Europe's Istanbul Convention (2011) preventing and combating violence against women and domestic violence (CETS No. 210) as it was restricted to European countries. However, Brazil has signed and ratified the Inter-American Convention to Prevent, Punish and Eradicate Violence Against Women (Convention of Belém do Pará). This convention was incorporated into national legislation through Federal Decree No. 1,973 in 1996.

## 2.4 If it has ratified the Istanbul Convention, how has this convention been implemented into national law?

N/A

## 2.5 If it has not ratified or signed the Istanbul Convention, is it envisaged that your country will do so?

N/A

## 2.6 If it has ratified the 1979 Convention, how has the recommendations part of General Comment No. 35 been implemented into national law?

Brazil has signed and ratified the full text of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women through the Federal Decree No. 4,377. This federal decree has the force of law at the national level. Furthermore, Maria da Penha Law expressly mentions the 1979 Convention in its first article. [3]

Regarding General Comment No. 35, Brazil has adopted some recommendations (e.g., understanding of violence to include violations of sexual and reproductive health rights). However, there are still no effective mechanisms in Brazilian law for (i) education and promotion of public policies to prevent domestic violence, and (ii) state liability and punishment for acts and omissions committed by its agents or those acting under its authority — in the territory of the State or abroad — and for failing to act with due diligence to prevent domestic violence.

## 2.7 If the 1979 Convention has not been ratified or signed, is it envisaged that your country will do so?

N/A

# 3. Similarities and differences in terminology

## 3.1 Domestic violence

The Maria da Penha Law defines domestic and familial violence as any act or omission based on gender that results in death, bodily harm, physical, psychological or sexual suffering and moral or monetary damages.

The definition requires that the act or omission occur: (i) in the domestic realm, (ii) inside the scope of the family (by blood or affinity), or (ii) in the context of an intimate relationship, regardless of whether the parties involved live together or not. All of the above apply regardless of sexual orientation of the parties involved.

## 3.2 Stalking

There is no specific definition, but stalking can be deemed to characterize suffering under the domestic violence definition of the Maria da Penha Law, for instance, under Article 7, II of the Maria da Penha Law, the crime of psychological violence was defined as any conduct that causes emotional damage and a decrease in self-esteem or that impairs and disrupts full development or that aims to degrade or control your actions, behaviors, beliefs and decisions, through threat, embarrassment, humiliation, manipulation, isolation, constant vigilance, persistent persecution, insult, blackmail, violation of privacy, ridicule, exploitation and limitation of the right to come and go or any other means that cause harm to psychological health and  
self-determination.

## 3.3 Harassment

Sexual harassment is a crime. According to Article 216-A of the Brazilian Criminal Code, it is defined as the conduct of embarrassing someone with the intention of obtaining sexual advantage or favor, based on the agent's hierarchical position or function in labor activities. The established penalty is one to two years of imprisonment. In addition, "sexual bullying" (*importunação* *sexual*) is also classified as a crime and defined as the conduct of practicing any libidinous act without consent to satisfy his/her own or a third party's lust.

## 3.4 Victim

No specific definition, but in order to benefit from the Maria da Penha Law, the victim must be female.

## 3.5 Abuser

No specific definition. The requirement to be deemed an abuser under the Maria da Penha Law relates to their status as a partner/family member of the victim.

## 3.6 Civil protection order

There is no specific definition. The Maria da Penha Law provides for several actions that may be determined by a judge to protect a victim of domestic abuse, which may include distancing requirements, no-contact orders and others that could be equivalent to civil protection orders. Violation of such measures by the abuser is a crime.

## 3.7 Causes of action

The law regarding domestic violence does not create specific causes of action.

## 3.8 Marital rape

Marital rape is not defined. However, the definition of "rape" is broad and case law has expressly confirmed that being married to the victim is not a defense against a rape claim. In fact, committing rape in the context of a familial relationship is an aggravating circumstance that increases the applicable penalty in sentencing. However, the definition of "rape" applies regardless of gender so this increase in penalty is not exclusive to violence against women.

## 3.9 Are there any other important domestic violence terms defined in relevant domestic violence statutes and codes?

Yes. These include the following:

Feminicide

To kill a woman due to her gender, according to Article 121, VI of the Brazilian Criminal Code. A murder can also qualify as feminicide if it involves domestic violence or discrimination against women.

Registration of sexual intimacy

The conduct of producing, photographing, filming or recording, by any means, nude or sexual content without the authorization of the participants. It is defined as a crime under Article 216-B of the Brazilian Criminal Code.

Loss of family power (*poder familiar*), which focuses on duties and rights related to the children

When a man of the family commits, within other intentional crimes, feminicide, homicide or serious personal injury against a spouse, daughter or any other descendants, he will lose his family power, according to Article 1.638, I of the Brazilian Civil Code.

# 4. Protection for domestic violence victims and relief granted

## 4.1 Civil protection orders

## 4.1.1 Are there civil protection orders available to victims of domestic abuse?

Yes. The Brazilian Law, by means of the Maria da Penha Law establishes civil protection orders for domestic violence victims.

## 4.1.2 Who can petition for civil protection orders?

The victim or the public prosecution. Anyone who witnesses domestic abuse can also file a complaint.

## 4.1.3 Are there temporary custody of a child or child support orders?

Yes. In accordance with the Maria da Penha Law, when there is no legal guardian within the extended family that is able to care for the child, the child must be cared for by the foster care system. The legislation prescribes the outlines for child support orders in the case of domestic violence.

## 4.1.4 Is there a provision to order the abuser to move out or stay away from places that the victims frequent?

Yes. The Maria da Penha Law states that in order to protect the victim's physical and mental health, financial well-being and the family, the abuser must have no contact.

## 4.1.5 Are there any other types of emergency, preventive and civil protection orders?

Yes, as provided by the Maria da Penha Law. It is important to emphasize the fact that the protective orders will remain for as long as the victim needs protection.

## 4.1.6 Can these orders be requested by direct or indirect victims or legal representatives in children's cases?

Yes. Brazilian law stipulates that anyone who witnesses domestic abuse, against either women or children, can file a complaint.

## 4.1.7 Are there different types of civil protection orders, e.g., for a short- term period?

Yes. Brazilian law stipulates that 48 hours after the complaint is filed, the judge must enforce the most suitable protective order for that particular case.

## 4.1.8 Are ex parte orders permitted without the aggressor being present?

Yes. Since the main goal of the protective order is to protect the victim immediately, it is permitted for the judge to enforce it before a hearing or the public prosecutor declaration. It is important to emphasize that the judge can even impose pretrial detention on an abuser that violates a protective order.

## 4.1.9 Do emergency orders also extend protection for abuse and intimidation to family members of the victim?

Yes, the main goal of the emergency orders is to protect the victims of abuse and their family members.

## 4.1.10 How long do the orders last?

The Brazilian courts understand that protective orders remain in effect for as long as the abuser is a threat to the victim and their family members.

## 4.1.11 Please provide any data or hyperlinks to government or NGO websites that include information on how often civil protection orders are issued, and any relevant demographics information, e.g., police reports, convictions, etc.

<https://www.tjsc.jus.br/web/violencia-contra-a-mulher/relatorios>

<https://www.tjrs.jus.br/novo/violencia-domestica/estatisticas/>

<http://www.tjrj.jus.br/web/guest/observatorio-judicial-violencia-mulher/vdfm/dados-estatisticos>

## 4.2 Steps for receiving a protective order

## 4.2.1 What documentation is needed to obtain a civil protection order?

After the complaint is filed, a judicial order is needed. Within 48 hours of the complaint being filed, the judge must order a civil protection order.

## 4.2.2 Does the victim need to attend a hearing?

No, the victim does not need to attend the hearing in order to obtain a civil protection order.

## 4.2.3 Can you request remedies?

Yes. The victim can request remedies and restitution.

## 4.2.4 Are there time limits?

Yes. The time limits depend on the nature of the violence and will be applied according to the Brazilian Code of Criminal Procedure.

## 4.2.5 Are there different rules in emergencies?

Yes. For example, an administrative rule (Portaria No. 86/2020) was approved in order to better serve victims of domestic violence during the COVID-19 pandemic.

## 4.3 Judicial discretion

## 4.3.1 What discretion does a judge have in granting a civil protection order or other protective orders?

Since all litigation concerning family and criminal matters run on judicial secrecy, as a general rule, the presiding judge will have discretion. However, there is a draft bill (PL 1.822/2019) in the senate to establish that all litigation regarding domestic violence runs on judicial secrecy.

## 4.3.2 Are there age limits on who can obtain orders?

No. Brazilian laws do not establish age limits.

## 4.4 Restitution and remedies available to victims

## 4.4.1 Can victims obtain reimbursement for costs and restitution paid?

Yes. The victim can file a lawsuit to collect the costs for the amount spent throughout the proceeding. Brazilian courts are also granting claims filed by the Brazilian Social Security Institute ordering the abuser to pay the institutes expenses.

## 4.4.2 Can they recover wages and profits lost?

Yes. The Brazilian courts are unanimous and understand that the victims of domestic violence are entitled to recover financial loss, such as moral and material damages. The damages are considered *in re ipsa*, that is to say it is not necessary for the victim to present evidence of the abuse. However, it is not common for victims to be indemnified for profit lost.

## 4.4.3 Is a separate civil process required?

Yes. However, the government recently approved a bill (Bill of Law No. 1.380/2019 awaiting the senate's approval), in order to simplify the proceedings for moral and material indemnifications for domestic violence victims.

# 5. Prosecutorial considerations

## 5.1 Police procedures

## 5.1.1 When do the police get involved in domestic disputes or legal actions?

As a rule, the police get involved in cases of domestic violence only in the event of complaints from the victims themselves or from third parties who witnessed any act from the aggressor.

## 5.1.2 What circumstances effect law firm involvement?

Usually when the victim wants to file a complaint against the aggressor or once the criminal action has started.

## 5.2 Standard of proof

## 5.2.1 Is proof required by any legal means?

Usually proof is required in cases of domestic violence (such as witness and medical reports, among others). However, there have been decisions by the superior court in Brazil where, to fit aggression against women within the concept of domestic violence established by the Maria da Penha Law (Law 11.340/06), it is enough that the fact occurred as a result of a romantic relationship between the victim and the aggressor.

## 5.2.2 Are there any requirements regarding evidence and documents?

Yes.

## 5.2.3 Is proof "beyond a reasonable doubt" required?

Yes. In the context of domestic and family violence against women it is required that the victim's word should be corroborated by evidence in order to convict the aggressor.

## 5.2.4 Is the standard of proof different for ex parte orders?

No.

## 5.3 Affirmative defenses

## 5.3.1 Are affirmative defenses available to the accused?

Yes. However, the applicability of affirmative defenses will vary from case to case.

## 5.3.3 Are false accusations punishable for the victim?

Yes. According to the Brazilian Criminal Code, false accusations are considered crimes and punishable.

## 5.3.4 How is consent discussed in the law?

The victim's consent generally means the victim's act of consenting to or agreeing to the injury or danger of injury. The consent of the victim may absolve the alleged offender or decrease the offender's penalty.

## 5.3.5 Is self-defense or insanity a defense?

Yes.

## 5.4 Witness status

## 5.4.1 What is a witness's duty to testify honestly and completely?

The witness is usually required to testify and they are obliged to testify honestly and completely.

## 5.4.2 Who may abstain from testifying in certain situations?

 The law does not mention any examples of people who may abstain from testifying.

## 5.4.3 What potential "excuses" can a witness raise to refuse to testify in a domestic violence action?

One example is that witnesses under the age of 14 are not obliged to testify. Also, an ascendant or descendant, a lineal relative, a spouse — even if separated, a sibling or the father, mother or adoptive child of the accused can refuse to testify.

## 5.4.4 What is the impact of domestic violence on witnesses who are children?

Yes. Article 18 of the Statute of the Child and Adolescent (Law 8.069/1990) provides that "it is everyone's duty to ensure the dignity of the child and adolescent, making them safe from any inhuman, violent, terrifying, vexing or embarrassing treatment." In addition, the Code of Criminal Procedure provides that a witness under the age of 14 it is not obliged to testify.

## 5.4.5 Can children be called upon to testify?

Article 208 of the Code of Criminal Procedure also provides that a witness under the age of 14 cannot provide a commitment; therefore, they are also not obliged to testify. Thus, the testimony, even if given, would have a relative value.

## 5.4.6 What is the effect of a child victim on the charges against the offender?

The offender will be charged for crimes committed against children as described in the Statute of the Child and Adolescent.

## 5.5 Penalties and sentencing; penalty enhancements

## 5.5.1 What are the penalties and sentencing laws for first-time domestic violence offenses?

The penalty or sentencing law will vary from case to case for first-time domestic violence offenses. Although the media focuses on maximum penalties, such as prison sentences, in daily life the actual penalty tends to be close to the legal minimum provided for the penalty type. Nowadays, the penalty range is between three months to three years in prison. However, there are two proposed bills discussing the possibility to push the minimum and maximum range up. The Maria da Penha Law forbids the enforcement of a monetary penalty in cases of domestic violence (Article 17, of the above-mentioned law).

## 5.5.2 Are there criminal penalties?

Yes.

## 5.5.3 What is the result of a violation of an existing order for protection?

Failing to comply with a judicial order that grants emergency protective measures can subject the offender to penalties that range from three months to two years in jail.

## 5.5.4 What fines and other penalties are imposed besides incarceration and liberty restriction?

In Brazil, different forms of punishment and rehabilitation are available as alternatives to incarceration. These types of penalties are known as alternative sentences. Payment of a fine and provision of services to the community or public entities are examples of alternatives to incarceration.

## 5.6 Post-release restrictions

## 5.6.1 Does the law notify the victim of the offender's release from custody?

The Maria da Penha Law correctly determines, in Article 21, that the victim must be notified of procedural acts related to the aggressor, especially those pertaining to his admission and his release from prison.

# 6. Special issues

## 6.1 Battered woman syndrome

## 6.1.1 Can lawyers present evidence of battered woman syndrome or other domestic abuse as an affirmative defense to crimes that the battered woman has committed? (Note: Battered Woman Syndrome is accepted by courts in certain jurisdictions to show that battered women can use force to defend themselves and sometimes kill their abusers due to abusive and life-threatening situations.)

Battered woman syndrome is not expressly recognized in the law. The Brazilian Criminal Code provides for attenuating circumstances to be assessed when determining the applicable penalty (but not by the fact finder when assessing guilt). Domestic violence is not expressly provided as one of the attenuating circumstances, but Article 66 contains a general clause that could allow this defense to be used. Note that case law regarding domestic violence usually refers to the alternative scenario, namely, that the penalty can be aggravated for the perpetrator in a domestic violence circumstance. Brazilian criminal law also provides for self-defense claims. In this case, if it is found that the crime has been committed in self-defense, the conduct is no longer unlawful and, therefore, not criminal. However, the requirements for self-defense (e.g., immediate danger and proportional response) apply, so previous (not immediate) domestic violence may not apply.

## 6.2 Domestic violence in the workplace

## 6.2.1 Can courts issue orders to protect employees suffering from domestic violence?

Yes. The Maria da Penha Law provides that the judge may extend the employment relationship for six months if the woman has to be on leave due to domestic violence. In September 2019, the Brazilian Superior Court of Justice rendered a decision extending the "sick leave allowance" for a victim of domestic violence (STJ, Special Appeal No. 1757775/SP, Rapporteur Ministry of Justice Rogerio Schietti Cruz, judged on 20 August 2019).

Similarly, the second regional labor court (Brazilian appellate courts of the federal specialized court system for matters of labor law) ruled that the employer must allow the transfer of the employee to another subsidiary due to domestic violence (2nd TRT, Ordinary Appeal No. 1000554-59.2017.5.02.0318, Rapporteur Judge Ana Cristina Lobo Petinati, judged on 13 April 2018).

## 6.2.2 Can departure be deemed "for good cause" if related to domestic violence?

"Good cause" is not a concept in Brazil. If domestic violence occurs, the procedure would be to request a constructive discharge (i.e., wrongdoing by the employer, which authorizes the termination of the employment agreement). Law No. 105/2015 (the Labor Code for domestics) provides in its sole paragraph of Article 27 the reasons a domestic employee can claim constructive discharge and specifically addresses instances in which domestic violence has occurred.

## 6.2.3 Can family members of domestic violence victims take reasonable leave to help the victim seek treatment or obtain help and services?

Mandatory family leave does not exist in Brazil currently. However, a bill (No. 1876/2015) regulating mandatory family leave is pending analysis and voting in the congress. If the bill passes, the victim could request leave paid for by the Social Security Institute, but this would not extend to family members to support the victims.

## 6.3 Immigration

## 6.3.1 Does the law include provisions that are intended to prevent abusers who are citizens or permanent residents from using immigration laws to perpetrate domestic violence against their spouse?

No.

## 6.3.2 If battered immigrants cooperate with law enforcement in domestic violence, can they obtain immigration remedies?

The law does not address this matter.

## 6.3.3 Does domestic violence law discuss asylum accessibility?

No. The law does not address this matter.

## 6.4 Armed forces

## 6.4.1 Can a victim seek a military protective order if the abuser is in active military?

Yes. In accordance with case No. 0003140-04.2018.9.26.0010, ruled on 7 February 2019, a victim can seek a protection order from the military court against the abuser, but only if both the victim and abuser are in the military.

The court found that both the Brazilian Military Penal Code and Federal Law No. 13.491/2017 provide that the military court has jurisdiction over a case in which the victim and abuser are both in the military.

## 6.5 Child custody and child/spousal support

## 6.5.1 Do judges follow special rules to determine custody or visitation of children in domestic violence cases?

The Maria da Penha Law says little about custody or visitation, only that if a judge determines that the victim and abuser must be kept apart from each other as a protective measure, the protective order will not affect the rights regarding child custody or child-rearing pension (child maintenance). The Brazilian Criminal Code, however, expressly provides that a parent or guardian that commits violent crimes against the other parent(s) or guardian(s), or against the children themselves (homicide, manslaughter, bodily injury and rape expressly included) can lose their parental rights. This provision applies regardless of gender, but in practice has benefitted female victims of domestic violence.

## 6.5.2 Can the judge consider the testimonies of the other spouse and the children when determining custody?

Domestic violence legislation does not provide anything on this matter. Custody is determined on a case-by-case basis and the interests of the child have to be prioritized, so the court will determine whether the other spouse/children should be considered depending on the circumstances.

## 6.6 Housing rights of domestic violence victims

## 6.6.1 Does the law include any barriers to prevent landlords from forcing a tenant to move out because they are victims of domestic violence?

Brazilian's tenancy law does not address eviction due to a tenant being a victim of domestic violence. However, the landlord cannot force the tenant to move out solely because they are victims of domestic violence. We were not able to find any court decision directly related to this point. However, it is important to emphasize that most of the cases involving domestic violence in Brazil proceed with judicial secrecy.

Article 12 of the Brazilian Tenancy Law states that in the event of separation from bed and board, divorce or common-law marriage dissolution, the residential lease will remain in force for the spouse that will continue living in the property. That is to say, the law conveys that in the event of domestic violence and/or protective measures (for instance when the judge rules that the abuser will be removed from the home), the lease agreement will remain in the name of the spouse that will continue living on the property.

## 6.6.2 Does the law allow a tenant to terminate his/her lease early due to domestic violence?

There are no legal determinations or case law legal provisions allowing a tenant to terminate his/her lease agreement early due to domestic violence. However, it is important to emphasize that most of the cases involving domestic violence in Brazil proceed with judicial secrecy.

Brazilian Tenancy Law does state that during the lease agreement term, the landlord cannot reclaim the property or terminate the agreement solely based on the tenants "qualifications" or the fact that the person is a victim of domestic violence.

There is a proposed bill (No. 2510/20) to compel the landlord to report to the appropriate authorities any situation of domestic violence against women that takes place within the boundaries of the residential building.

## 6.6.3 Can an order exclude the abuser from the residence?

Yes. In accordance with the Maria da Penha Law, there are several protective measures that could be applied against the abuser. Item II of the above-mentioned article, for instance, establishes that the abuser must be kept away from the property, residence or locale where the parties cohabitated in cases of domestic violence. Therefore, a judicial order can require that the abuser be removed from his residence, in order to keep him away from the victim and assuring her housing rights.

In addition, the Maria da Penha Law states that if any risk exists to the life or physical well-being of the female victim of domestic violence, the abuser must be immediately removed from the residence by the judicial or police authority.

This protective measure must be applied to all cases in which the abuser's presence in the residence constitutes a risk to the life or physical or mental well-being of the women or/and her children, until the situation is duly assessed by the judge. The victim can also request for distancing measures, without prejudice to her or her children's rights, as allowed by the Maria da Penha Law.

It is generally understood that the effectiveness of this type of protective measure is clear and material, since the physical removal of the abuser from the residence suppresses acts of violence. Also, the judicial order prevents the removal from being classified as 'abandonment of home' (CAVALCANTE, Elaine C. M. *Apontamentos sobre as medidas protetivas de urgência previstas na Lei Maria da Penha*, 2006. Available:

<https://www.tjsp.jus.br/download/EPM/Publicacoes/CadernosJuridicos/38vd%2009.pdf?d=636688301325046003>).

São Paulo State Court of Appeals, Interlocutory Appeal No. 2181604-69.2014.8.26.0000, Rapporteur Judge Alexandre Marcondes, judged on 23 February 2015

Summary: Court decision that ordered the removal of the abuser from the residence in order to protect the victim, on the basis of Federal Law No. 11.340/2006 (Maria da Penha Law).

## 6.6.4 Can abusers be forbidden by court orders to alienate or mortgage the property in his/her name if it is the family domicile?

Yes. Article 24 of the Maria da Penha Law creates protective measures in order to protect the woman's property. Item II from the above-mentioned article states that selling or terminating a lease agreement for common property in cases of domestic violence is prohibited, in order to protect the woman's assets.

Maria Berenice Dias, emphasizes this point by stating that:

The protective measures not only impose that the abuser must hold back, but also withdraw his capacity to perform certain civil rights that presumably relapse on the common property of the couple or particular assets from the victim. Therefore, any act performed by the abuser infringing the court decision must be invalidated. (DIDIER, Fredie Jr. et al. "*Aspectos processuais civis da Lei Maria da Penha*." *Revista Magister de Direito das Famílias e Sucessões*, No. 4, p. 326, June/July, 2008.

Available: <http://tmp.mpce.mp.br/nespeciais/promulher/artigos/Aspectos%20Processuais%20Civis%20da%20Lei%20Maria%20da%20Penha.pdf>).

All the protective measures, once authorized by the judge, must be transmitted to the Notary Office.

# 7. Endnotes

[1]    "Article 3. The fundamental objectives of the Federative Republic of Brazil are:  
I – to build a free, just and solidary society;  
II – to guarantee national development;  
III – to eradicate poverty and substandard living conditions and to reduce social and regional inequalities;  
IV – to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination." (Brazilian Federal Constitution)

[2]    Article 3, §1º of federal law No. 11.340/2006.

[3]    "Article 1. This Law creates mechanisms to restrain and prevent domestic and family violence against women, under the terms of § 8 of Article 226 of the Federal Constitution, the **Convention on the Elimination of All Forms of Violence against Women**, the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women and other international treaties ratified by the Federative Republic of Brazil; provides for the creation of courts for domestic and family violence against women; and establishes assistance and protection measures for women in situations of domestic and family violence." (Federal law No. 11.340/2006).

[4]    The response to the standard of proof question will depend on what laws provide protections for domestic violence victims. In many jurisdictions, there are no standalone "domestic violence" statutes, but generally the criminal code or the civil code will make it an offense to commit domestic violence or abuse a woman. If the jurisdiction has both civil and criminal laws that provide such protections, please specify the standard of proof for each one, e.g., in the United States, preponderance of the evidence is the default for civil cases, but beyond a reasonable doubt is required for criminal cases.

[5]           In certain jurisdictions, employers are prohibited from firing or retaliating against victims of domestic violence, e.g., if the abuser is stalking the victim at work, the victim is missing workdays due to her situation, the abuser shows up at work, etc.

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