

LEGAL DOCTRINE AND THE GENDER ISSUE IN BRAZIL¹

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I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. THE ISSUE OF GENDER AND THE BRAZILIAN STATE

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

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

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

We concluded that studies of public policy should include an

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

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

evaluation of this other branch of government legally vested with the authority to judge, exonerate, or convict those accused of violence. In this way, we sought to understand the "policy" of the judicial branch on subjects related to violence against women in order to raise the profile of institutions of public authority and increase their sensitivity to the issue of women as citizens.

We began by establishing that studies of government institutions in Brazil have amply analyzed the legislative and executive branches, focusing on the way in which these branches have operated throughout Brazilian history. Studies by various experts contain information profiling these institutions and their members and emphasize the idea that the policies and leadership of the Brazilian government are essentially confined to these two branches of government. Moreover, the re-democratization of the 1980s meant that these areas of government became the target of public opinion, media scrutiny, and academic study.

The judicial branch, however, did not attain the same degree of visibility and, to date, has been studied very little. Seen as a neutral, apolitical area by classical political theory, the judiciary must be analyzed in more depth. Both its positive aspects as well as those areas that were closed to the democratization process must be explored.

We believe, therefore, that we must evaluate the judicial system's actions regarding crimes against women beginning with an understanding of its overall structure, with the goal of deepening the debate about gender violence, and by raising the profile of this branch of government. The emphasis on the judicial system also makes it possible to identify the prototypes of femininity and masculinity created by this institution. It may also contribute to reflection on how receptive the judiciary, compared to other branches of government, has been to the demands of the women's movement and the democratization process.

Our study enabled us to understand the organization of the judiciary, the characteristics of its members, and how it treats "domestic crimes," while keeping in mind its evolution and socialization process. Through bibliographic expositions and analysis, we examined the way legal doctrine treats "honor," "adultery," "family," and other issues that surface in legal proceedings and in the discourse of members of the judiciary. An analysis of legal cases and the jurisprudence created around the "domestic crimes" made it possible to evaluate how the socialization of judges associated

with a certain social class creates a real habitus,⁸ accentuated by a strong corporate identity that permeates the institution. The decisions issued by these judges reflect culturally-constructed prototypes of gender roles.

III. LEGAL DOCTRINE AND THE ISSUE OF GENDER IN BRAZIL

The judiciary is a vast and complicated system that includes agents from different social strata who constitute the producers and reproducers of a certain vision of justice which illuminates and reinforces cultural values and social hierarchies. From this standpoint, we saw the difficulty of analyzing this branch of government outside the historical/cultural context of which it is both a part and the product. It is impossible, therefore, to evaluate specific decisions theoretically imbued with technical, "neutral" concepts, without placing them in their broader socio-cultural framework. It is obvious that this branch is absorbed with a political logic that is reflected in its decisions.

Historically, the judicial system created a type of jurisprudence⁹ around crimes committed against women. This is found in criminal codes starting with the colonial period, as well as in legal bibliography used to train future professionals in the field.

Using a bibliography that described the actions of the judiciary and schematized the socialization of judges, lawyers, and advocates, it was possible to observe that this branch of government extends far beyond the confines of its legal structure. Socialization mechanisms, corporatism, and the absence of external controls enable this branch of government to be significantly less vulnerable to social pressures and changes than the executive and legislative branches. Clinging tenaciously to legal doctrine, a necessary guide to individual guarantees and the rule of law, members of this branch of government were not disposed to rethinking their parameters of judgment in various cases. Examples of this are cases involving domestic violence against women; these cases which reveal a persistent vision that is extremely conservative and inappropriate in terms of the changed role of women in society, in general, and in the home, in particular.

8. Cf. Pierre Bourdieu, *Condição de Classe e Posição de Classe*, in *HIERARQUIA EM CLASSES* (1974).

9. Technically and legally in Brazil, jurisprudence is a term that denotes the entirety of court decisions on questions of law. In Superior Courts, these decisions are called "*sumulas*" and inform future trials. In our work, we use the term in its technical sense to describe a "legal culture" which, although not translated into jurisprudence, functions as a recurring trend in legal decisions.

We were not at all surprised to find that in present day laws, legal doctrine and judicial decisions follow the same logic found in nineteenth century texts. The content of past and current criminal codes allowed us to observe what has and has not changed with respect to the issue of gender in legal discourse and in the practical application of legal decisions. If, according to the most conservative legal discourse, the family is considered the natural foundation of all societies, then judicial decisions that still constitute the basis for regulating established social roles within the family merit serious reflection. From this perspective, which wavers between a macro- and micro-social approach (state and family), we endeavored to highlight certain concepts and categories that Brazilian law and legal doctrine use to guide their decisions on gender issues.

Our initial hypothesis in approaching this complex matter was based on the idea that the principles underlying the concept known as "legitimate defense of honor" —long over-used in Brazil to absolve men who have murdered their wives or girlfriends— reflects a historical-penal approach that recognized and legitimized a different moral code for men and women involved in crimes committed in the domestic sphere. A discussion of the different roles and moral behaviors of both sexes was present in all murder and attempted murder cases that we reviewed in the course of our investigation.

In nearly all law school courses, particularly those in the area of criminal law, legal culture is informed by a notion of the historical evolution of law usually drawn from texts dating back to our colonial period demonstrating its commitment to tradition. We decided, therefore, to retrace the same route in an effort to understand how sexual asymmetries were reflected in the concepts of honor, the definition of the crime of adultery, which only punished women and is present in our Criminal Code to this day, and the formulation of the concept of "legitimate defense of honor."

This retracing process was extremely revealing. It showed how legal theories from the colonial period influence the views of today's legal experts and the general public, who comprise the juries in the court system,¹⁰ even though the current Criminal Code, published in 1940, was intended to break with the legal culture of past centuries. The most convincing evidence of this enduring effect is the fact that the theory of "legitimate defense of honor" derives from the legal

10. In Brazil, cases of deliberate crimes against life, meaning when the perpetrator intended to commit the crime, are heard by jury trials. According to the 1988 Brazilian Constitution, a jury of the people is supreme and, therefore, no higher court can alter the content of its decision. The most that higher courts can do, if they consider a decision by a jury of the people to be illegal, is demand a new trial.

concept of adultery.

From the Philippine Code [*Código Filipino*],¹¹ the official document of the Portuguese Realm which meted out justice in colonial Brazil from the seventeenth to the nineteenth centuries, until the first Criminal Code of Brazilian independence, enacted in 1840, the crime of adultery appears as a serious infraction punishable only when committed by a woman. The law explicitly refers to women as the perpetrators of the crime of adultery.¹²

In the colonial period, it was legitimate to kill a woman considered to be an adulteress. In order for this to be legal, it was only necessary that witnesses confirm the marriage between the murderer and the victim. This permitted the husband to exercise his property rights over the life and death of his wife just as he exercised it over his slaves and controlled his real property, household possessions, and livestock.

The Criminal Code of the Empire of Independent Brazil, promulgated in 1840, included adultery in the section "Regarding Crimes Against the Security of Civil and Domestic Status" [*De los Crimenes en Contra de la Seguridad del Estado Civil y Domestico*], article 250, and disallowed murder as a legitimate "solution" to it. From that time on, the crime of adultery became punishable by a prison term of one to three years, with an identical sentence for a husband adulterer. Nonetheless, in order to convict a man of this crime, it was necessary to prove that he was supporting the other woman, thus implying a stable and long term relationship. This was not required in order to incriminate a woman in the same circumstances.

The first Criminal Code of the Republican period, published in 1890, retains the differentiation between men and women stipulated in the 1840 code. It also introduces article 279 in the chapter on adultery and marital infidelity, defining the punishment for married women. However, even though this legal document penalizes men who murder adulterous women, the code conceptualizes the legitimate defense theory so broadly that it ends up legitimizing the ongoing murders of women considered to be unfaithful. The Republican Code affirmed the defense of any threatened legal right as legitimate and included honor as a legally-protected right. It did not establish, however, a proportional relationship between the

11. Cf. J. H. PIERANGELLI, CÓDIGOS PENAIS NO BRAZIL: EVOLUÇÃO HISTÓRICA 40 (1980).

12. Volume V of the Regulations of the Realm of the Philippine Code [*Ordenaciones del Reino del Código Filipino*], for example, asserts that the husband can legitimately murder his wife, as well as the man with whom she is with, if she is found to be committing adultery. It advised, however, that the latter could not be murdered if he were "a nobleman, *desembargador* [privy counselor in Portugal], or a person of quality."

injured good and the force of the measures taken to defend it. In this sense, the honor of a betrayed man could be considered a more precious good than the life of the adulterous woman.

This code also introduced as a justifiable action,¹³ the fact that the perpetrator of the crime was "deprived of reason." This defense incorporated medical advances from the mental health field and laid the basis for "forensic psychiatry." Extremely prestigious in Europe, this new definition introduced a number of modifications to the criminal laws of many countries. It associated criminal acts with pathological states that temporarily could deprive an individual of reason, leading that individual to commit crimes even though, in the past, he or she had not committed any infractions. The use of mental state as a defense expanded to encompass other crimes in addition to those linked to marital relations. This helped mask the fact that, for many years, it was applied with a preconceived and sexist attitude.¹⁴

Differences in the treatment of men and women in the area of crime only disappeared in the Criminal Code of 1940, the second promulgated by the Republic. Despite modifications to the general clauses introduced in 1984, the code still retains the original text in all of the special clauses. The chapter on "Crimes Against the Family" and more specifically, "Crimes Against Marriage," assumed a general tone which equated female and male adultery and which drastically reduced the punishment to a jail term of between two weeks and six months.

Nonetheless, while legal discourse changed significantly by rendering male and female adultery equally illegal and reducing sentences, the same was not true of gender-based differences in social morality. The concept of crimes of passion acquired notoriety in the 1930s, and became the subject of specific legal reflection as revealed in several publications by renowned criminologists of the period.¹⁵ A

13. Justifiable act [*exclusión de ilicitud*] is a legal category that determines the circumstances in which certain acts, described in the Criminal Code, are not considered crimes. In the Brazilian Criminal Code currently in force, there are three cases that fit this description: a) situation of extreme necessity [*estado de necesidad*]; b) legitimate defense [*legítima defensa*]; c) strict compliance with a legal obligation [*el estricto cumplimiento del deber legal*]. Curiously, the combination that allowed for the emergence of "legal artificialism," as some criminal law experts call the "theory of legitimate defense of honor," includes some aspects of the notion of "situation of extreme necessity," meaning that if there is no other way to defend the offended right, the agent has no other choice but to place his or her right over and above that of anyone else.

14. See JACQUES DONZELOT, *A POLÍCIA DAS FAMÍLIAS* (1980); RUTH HARRIS, *ASSASSINATO E LOUCURA: MEDICINA, LEYES Y SOCIEDAD EN EL FIN DE SIÈCLE* (1993).

15. See ROBERTO LYRA, *O AMOR E A RESPONSABILIDADE CRIMINAL*, (1932); *O SUICÍDIO FRUSTRO. A RESPONSABILIDADE DOS CRIMINOSOS PASSIONAIS*, (1935); EVARISTO DE MORAIS, *CRIMINALIDADE PASSIONAL: O HOMICÍDIO E O HOMICÍDIO-SUICÍDIO POR AMOR* (1933). It is worthwhile to point out that during the entire period of the dictatorship of the 1930s there was

review of these works led us to a study on the meaning of the legal right to "honor," as seen in Brazilian criminal law discourse in this century, and the perception of how distinct social values evolved in terms of the conduct expected of men and women.

In Brazil, the combined effects of forensic psychiatry and a tradition of inequality between the sexes created a particular type of legal doctrine. The existence of the crime of adultery, the importance attributed to male honor, and the need to control the legitimacy of children, so important to the hygienist vision¹⁶ strongly espoused at the time, combined with the scientific recognition of altered emotional states, converged to define the theory of "legitimate defense of honor" as a legal justification accepted by doctrine and by juries of the people to exonerate men who murdered their wives.

Although formally separated since the colonial period, the legal concepts of marriage, fidelity, and adultery were always associated with the man's right to honor when it came to justifying crimes in which the victim was a woman and the murderer was her husband or male partner. Legal doctrine, moreover, is silent on the issue of female honor. In the area of crimes against the family, adultery penalizes the woman and allows "a good man" to protect himself legally by arguing that he is trying to safeguard his honor and that of his family. The man is afforded respect for an individual right, while the woman's role is to honor and safeguard a collective and institutional right, the family, and a sacrament, marriage.¹⁷

These ideas led us to seek out the intellectual framework that resulted in defined social roles for men and women in the Western Judeo-Christian culture that we inherited. These different social roles and the development of a line of reasoning that attributed to women a vile, diabolical, insidious, and man-corrupting nature are still manifest in criminal proceedings that exonerate the accused by defiling the public image of the victim.¹⁸ This illustrates a perverse

a flurry of legislation in the name of protection of the family. Cf. Leila L. Barsted and Branca Moreira Alves, *Novas Padrões e Velhas Instituições: Feminismo e Família no Brasil*, in *FAMÍLIA Y VALORES* 205-33 (1987).

16. See, e.g., Donzelot (1980); Machado (1979).

17. Some years earlier, the Civil Code of 1916, still in effect, defined "lack of purity" of the daughter as a reason for disinheritance, based on an assumption of inappropriate behavior of a "young lady of family," while the same understanding was not used to disinherit a male child. In this same vein, article 219, subparagraph IV of the same Code, considers the importance of female virginity when it provides that the "loss of virginity of the woman unbeknownst to her husband" is cause to annul the marriage.

18. See JEAN DELUMEAU, *HISTÓRIA DO MEDO NO OCIDENTE (1300-1800)* or MALLEUS MALEFICARUM: O MARTELO DAS FEITICEIRAS (1991) (providing an important summary of this intellectual framework). It is worth pointing out the way in which some of these same bestial

contradiction that condemns the dead woman and "sanctions" the death penalty for crimes of adultery, usually committed by men against their wives or companions.

In all of the cases that we analyzed, the accused and his defense call attention to what is considered the inappropriate conduct of the victim who: "arrived home late," "wore revealing clothing," "talked to other men," "exercised or dieted," "had taken up smoking," "traveled to work," "listened to romantic music," "had begun to drive," "talked with the neighbor," or "wanted to return to school or work." The woman had begun to exercise her individual rights, become less dependent on her husband, and less constricted by family and marital obligations. These were some of the "signs" that caused husbands to begin to distrust their wives' motives and fidelity and often led them to spy on their wives or attack them verbally or even physically.

The issue to be emphasized here is that, for a long time, and even to this day, such arguments served to exonerate men who murder their wives.¹⁹ Used as a justifiable homicide argument in "domestic murder" cases, the principle of "legitimate defense of honor" became an important line of reasoning for criminologists and was responsible for a substantial number of acquittals. Juries accepted this argument, engendering a body of "jurisprudence" that, until 1991, guided the position of most Brazilian courts in this type of case.²⁰

It is worth examining the tortuous and sexist path by which the concept of "legitimate defense of honor" developed. When the second Criminal Code of the Republic was drafted in 1940, the general clauses identified only three situations in which a crime had been committed, yet it was not considered a criminal offense.

For some contemporary criminologists, the deletion of the concept "deprived of reason" as a justifiable offense from the former Code made the Criminal Code more stringent and, paradoxically, contributed to the development of the concept of "legitimate defense of honor." The medical aspects of a possible momentary "loss of

and savage characteristics are also cited as characteristic of the black population.

19. One recent example is the trial of a physician who was convicted in Rio de Janeiro at the end of 1993. The justification he used to explain his distrust was the fact that his ex-wife liked to dance, had enrolled in a dance academy, was fond of parties, and exercised. The defendant's case was based on the principle of "legitimate defense of honor."

20. We refer to the case reported in *Criminal Injustice: Violence Against Women in Brazil*, AMERICAS WATCH, 1992, in which a man in Paraná, in southern Brazil, was acquitted after stabbing his adulterous wife to death. The Superior Court of Justice overturned the decision and, by law, held a new trial for the accused. Nonetheless, on August 29, 1991, the accused was again acquitted based on the same argument used by the defense in the first trial: "the legitimate defense of honor."

reason" contained no inherent moral connotations, nor did they depend on an inventory of the victim's past conduct as is the case with the concept of the "legitimate defense of honor."

In the Criminal Code, in effect since 1940, the legitimate defense argument is contemplated in cases in which there is imminent and unwarranted aggression placing at risk personal or other rights that must be safeguarded. This argument is supported by the work of legal scholar Nelson Hungria, which is required reading in law schools throughout the country. According to the author:

The term right ... is broad and includes any and all legally-protected rights or interests whether or not they are inherent to the person (life, physical integrity, honor, modesty, personal liberty, domestic tranquility, patrimony, written ideas, parental authority, etc.) Here, moreover, certain rights are not singled out to the exclusion of others. Not even the humblest of rights may be exposed to unjust attack. All rights are inviolable and none, therefore, can be excluded from the area of legitimate defense. Any conclusion to the contrary would be illogical.²¹

It should be pointed out that, despite these words, Nelson Hungria vigorously combated the use of the "legitimate defense of honor" argument to justify the murder of women. He understood that the defense of a legal right must be offset by a balance between what is unjust and what is a measured response.

In order to eliminate the criminal nature of domestic murders, a certain "adaptation" or juxtaposition of legitimate defense and the defense of the legal right to "honor" occurred to develop the precept of "legitimate defense of honor." In legal rhetoric, the combination would be absolutely correct in the context of the quote from legal expert Nelson Hungria.

This approach to the matter may acquire even stronger powers of persuasion when accompanied by moral arguments such as:

... a man needs a good reputation, which is an indispensable basis or premise, if you will, for his position and social standing. Honest men only keep company with those who enjoy a good reputation. If one acquires notoriety, his acquaintances and friends keep their distance and people of quality no longer tolerate him. He would lose the trust and prestige with which societies protect honest men. Without a good reputation, moreover, it is impossible to reach or successfully carry out positions of distinction, influence, or responsibility since notorious men are not worthy of consideration. The vigilant consciousness of the benefits that the individual, in the

21. 4 ENCICLOPÉDIA SARAIVA DE DIREITO 395 (1977).

social context, derives from the favorable esteem and opinion of others is what perfects and exalts personal dignity (subjective honor).²²

These observations, extracted from a text considered modern and widely used by attorneys, law students, judges, and other actors in the legal world, seem to reproduce the logic of the Philippine regulations, which penalized the husband who remained indifferent to the real or presumed adultery of his wife. In these circumstances, the husband lost honor, the respect of his friends, relatives, and neighbors, would no longer be accepted by reputable people, and ran the risk of having to parade in the streets wearing a "pair of horns." In the curious combination of subjective honor, known as personal dignity, and objective honor, an external perception of our attributes, limits and tensions can be observed between the establishment of an order that is supposedly neutral and technical and the socio-cultural values that are present in any reflection in the area of the sciences and humanities. This clash, which seemingly pits law against subjectivity, allows us to evaluate differences and social hierarchies exemplified by values that produce, reproduce, replicate or alter modes of social organization, thereby revealing collective behaviors and opinions.

When a jury acquits a man who has killed his wife or companion in order to defend his honor, this decision confronts us with a society that holds the woman accountable and responsible for the social and professional standing of her companion or husband. She is also responsible for preserving the unity and respectability of the family. The husband, conversely, has no such commitment to the reputation of his wife or family when his behavior belies the "vows" of fidelity made during the marriage ceremony. She is responsible for whether or not her husband keeps "good company." The man is the "head of the household," but it is the woman who is charged with protecting the moral equilibrium of the family system at the risk of compromising its function and stability. What we wish to emphasize here is the way in which this moral reasoning affects legal reasoning which is developed mainly by men, lawmakers, advocates, public defenders, judges, juries, and framers of legal doctrine,²³ despite the fact that the 1988 Federal Constitution of Brazil recognizes the equality of men and women.

22. Cf. Nelson Hungria e Fragoso Helenno, 6 COMENTÁRIOS AO CÓDIGO PENAL 39 (1980).

23. For an evaluation of the difficulties of expanding the space for women in this area of work, which was exclusively male until recently, see Renato Lessa e Leila Linhares Barsted (1990).

This discussion of some of the possible legal arguments to justify "crimes of passion" was meant to highlight the subjective, interpretive, and cultural facets of the law and demonstrate how such crimes continue to be accepted today. It must be pointed out, however, that despite the hegemonics, the trends referred to above are now being espoused by criminologists, legal experts, and some sectors of the judiciary itself. This is mostly due to pressure exerted by feminists groups since the mid 1970s. A 1991 statement of the Superior Court is a concrete example of a new doctrinal posture: "Homicide cannot be portrayed as a normal and legitimate response to adultery, because in this type of crime what is being defended is not honor, but rather the arrogance, vaunting, and pride of a man who considers a woman to be his property."²⁴

Nonetheless, we reiterate the difficulties posed by a judicial system still resistant to social change, which should motivate Brazilian society to challenge principles and concepts based on prejudices. When we highlight the legal bibliography that was, and continues to be, used to train our attorneys and legal professionals, we encounter the conservative arguments mentioned here. We can observe the difficulty of changing quickly or even examining this "training-action" cycle. This is true because it is deeply influenced by a false notion of neutrality that obscures the substantive inequalities found in social life.²⁵ The relationship and/or distance between jurisprudence, doctrine, and the behavior of the judicial system and social change must continue to be studied with the goal of deepening and broadening the debate over gender relations as they are culturally implanted in legal discourse.

24. Decision of the Superior Court of Justice, March 11, 1991.

25. The 1988 Brazilian Constitution decisively introduced the issue of equality between men and women. The Civil and Criminal Codes should be reformed beginning in 1998 and here it is important that the gender perspective be one of the focuses of this change.

