

Feminist Agendas
—
and Democracy
—
in Latin America

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operation between women's groups and human rights organizations. There is increasing awareness of the need for protocols at the national level to avoid having decisions about abortion and emergency contraception repeatedly taken to the courts, itself a measure of the impact litigation has had in activating public debate. These examples should encourage women's groups to give more thought to legislative advocacy and the benefits of putting pressure on the government to implement its laws and policies, rather than leaving enforcement to the discretion of the executive branch. Feminists and women's groups must be prepared to pursue these opportunities and to improve the understanding of gender issues among human rights militants (Vázquez Sotelo n.d.). Argentine women's groups have been responsive when called on, but they have not taken a proactive approach. They would find the use of litigation strategies an effective complement to the other political strategies they deploy.

Notes ¶

- 1 I would like to thank María Julia Pérez Tort and Denise Fridman for help with research on the cases.
- 2 Among the groups contributing shadow reports in 2002 were CELS, CLADEM, FEIM, and Instituto Social y Político de la Mujer; in 2004 the contributing groups included ADEUEM, ACDH, CELS, FEIM, Feministas en Acción, Instituto Social y Político de la Mujer, and Mujeres en Acción.

Violence against Women in Brazil ¶

INTERNATIONAL LITIGATION AND LOCAL ADVANCES

Flávia Piovesan

Using an international litigation strategy developed by human rights networks to mobilize domestic forces for change, the women's movement in Brazil has succeeded in winning an important victory for women's human rights. This essay looks at the case of Maria da Penha, whose severe injuries combined with the inaction of the Brazilian state alerted the inter-American system to the problem of violence against women in Brazil. The guilty verdict by the Inter-American Commission on Human Rights (IACHR) against the Brazilian government paved the way for a new law that addresses violence against women, providing stronger penalties and establishing a new social infrastructure to treat the victims of domestic violence and educate the public on the seriousness of this crime.

To put the case in context, I show the scope of the problem of violence against women in Brazil, for which the Maria da Penha case provides dramatic evidence. I examine the role of the women's movement in Brazil's transition to democracy, as well as its impact on the rights-oriented Constitution of 1988. The women's movement's efforts to bring the issue of violence against women forward, change the law, and hold their government accountable were strongly reinforced by international litigation and the support of transnational human rights groups. The Maria da Penha case illustrates the success, but also the dilemmas and challenges, that have accompanied the

use of legal strategies to promote women's human rights, and it provides a window through which to view the quality of democracy in Brazil.

The Maria da Penha Case ¶

I Survived to Tell My Story—this is the title of the autobiographical book by Maria da Penha, a victim of two attempted murders by her then husband in her own home in Fortaleza in 1983. The shots fired at her while she slept, the attempt to electrocute her, and the many assaults she suffered throughout her marriage made her a paraplegic at age thirty-eight. Her husband was found guilty by a local court, but fifteen years later he was still enjoying his freedom due to successive procedural appeals against his conviction in a jury trial. The case offered a dramatic example of impunity and the ineffectiveness of the Brazilian judicial system in the face of domestic violence against women. In response, in 1998 the Center for Justice and International Law (CEJIL-Brazil) and the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM-Brasil) filed a petition to the IACHR under the Organization of American States (OAS). In 2001, eighteen years after the crime, the IACHR, in an unprecedented decision, found the Brazilian state guilty of negligence and failure to take action against domestic violence (Piovesan and Pimentel 2002a:A3).

The Maria da Penha case provides insights into a crime that primarily affects women: domestic violence. The case clearly illustrates two hallmarks of this form of violence: the perpetrator of the crime that caused her to suffer from irreversible paraplegia was no stranger, but her own husband; and the physical and psychological scars caused by this violence were aggravated by impunity (IACHR 2001).

Domestic Violence in Brazil and the Convention of Belém do Pará ¶

Studies have shown the epidemic proportions of domestic violence in Brazil. According to a report by Human Rights Watch (1991),¹ of every one hundred women murdered in Brazil, seventy of these deaths occur within the scope of domestic relations. A survey conducted by Brazil's National Human Rights Movement reveals that two-thirds of men accused of killing women are their partners (National Human Rights Movement 1998). In Brazil impunity fur-

ther abets this form of violence (*Jornal da Redesauíde* 1999). It is estimated that in 1990, in the state of Rio de Janeiro, not one of the two thousand cases of aggression against women reported to the police resulted in the punishment of the accused. In the state of Maranhão, of the four thousand reported incidents, perpetrators were punished in only two cases (Americas Watch 2000:171).

Domestic violence occurs not only in the socially less privileged classes and in developing countries like Brazil but in virtually all classes and cultures across the globe. The United Nations (UN) committee on the Elimination of All forms of Discrimination against Women (the CEDAW Committee) finds that "family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes." Further, a lack of economic independence "forces many women to stay in violent relationships" that put "women's health at risk and impair their ability to participate in family life and public life on a basis of equality." According to the UN, domestic violence is the principal cause of injuries in women between fifteen and forty-four years of age (CEDAW Committee 1992).

An important consequence of domestic violence is its impact on women's ability to earn income. According to the Inter-American Development Bank, one in every five women who miss work do so as a result of having suffered physical aggression (*Folha de São Paulo*, 21 July 1998:1, 3). It is estimated that domestic violence costs Latin America 14.6 percent of its gross domestic product (GDP), or some US\$170 billion. In Brazil, the price tag attached to domestic violence is 10.5 percent of the GDP (National Feminist Health and Reproductive Rights Network 1999:paragraphs 54, 55).

In 1994 several countries ratified the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (the Convention of Belém do Pará), the first international human rights treaty to focus on violence against women as a generalized phenomenon that affects all women regardless of race, class, religion, age, or any other condition. It was ratified by Brazil in 1995. The convention asserts that violence against women constitutes a serious violation of women's human rights and impairs or nullifies the exercise of other fundamental rights. It describes violence against women as an offense against human dignity and a manifestation of

the historically unequal power relations between women and men. Violence against women is defined as "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere." In other words, gender-based violence consists of any violent act directed against a woman because she is a woman or any type of violent act that affects women disproportionately.

The Women's Movement in Brazil

The Maria da Penha case provides an example of the relationship between the women's movement and the process of democratization in Brazil. The Brazilian women's movement has not evolved in a vacuum; it has been part of and has responded to larger transnational trends. The connection between the local and global arenas has proven particularly significant for the issue of violence against women. The Maria da Penha case, which strongly conditioned the Brazilian state's response to the issue, shows one impact of the women's movement in Brazil and how its strategy of international litigation secured local advances.

The collapse of Brazil's twenty-one-year military dictatorship, which lasted from 1964 to 1985, unleashed a process of democratization. During the period of authoritarian rule, the regime suppressed the most basic rights and freedoms, engaging in systematic torture, arbitrary detentions, forced disappearances and political and ideological persecution. The armed forces, acting as an institution, seized direct control of all government functions. The year 1985 marked the start of the gradual process of transition to democracy.² Although the transition process began as a result of the political liberalization introduced by the military regime largely in response to its internal problems (Hagopian 1992:245; Martins 1992:82–83), the opposition forces of civil society hastened its collapse. New social actors and movements began to emerge, and their demands and claims further strengthened the process of democratization in Brazil.

In contrast to the abrupt transition that occurred in Argentina in the wake of the military defeat in the Falklands/Malvinas War or to the military's control of the transition process in Chile, democratic transition in Brazil involved a negotiated process of return to civilian control. The return to democracy required the preparation of a new civil code to reshape the political and social charter. A national assembly was elected to develop the framework for

a new constitutional order. The Federal Constitution of October 5, 1988, is a legal landmark in Brazil's democratic transition and its institutionalization of human rights.

The text of the 1988 Constitution reflects a new democratic consensus. After twenty-one years of authoritarian rule, it restored the rule of law, the separation of powers, and the principles of federalism. As the most wide-ranging and detailed document on human rights in the country's constitutional history, it marked an extraordinary advance in the consolidation of fundamental rights and guarantees in Brazil. Among Brazilian constitutions, the 1988 version relied most on the active participation of civil society in its preparation, and it enjoys great popular legitimacy.

From the standpoint of the women's movement, the period prior to 1988, when the Constitution was under debate, proved critical to advancing awareness of women's human rights. As various groups lobbied to have the new constitution reflect their concerns, and after extensive national discussion, women's groups prepared a "Letter from Brazilian Women to the Constitutional Convention" to address their primary claims. As Leila Linhares Barsted observes, the Brazilian feminist movement was a "key player in this process of legislative and social change, denouncing inequalities, proposing public policies, working together with the Legislative Branch, and . . . [interpreting] the law." Furthermore, since the mid-1970s, the Brazilian feminist movement "fought for the equal rights of men and women" and for the ideals of human rights, "defending the elimination of all forms of discrimination, both in the law and in social practices. Indeed, the organized action of the women's movement during the drafting of the Federal Constitution of 1988 was largely responsible for numerous new rights and corresponding obligations of the state." These include "equality in the family, condemnation of domestic violence, equality among sons and daughters, [and the] recognition of reproductive rights," among others (Barsted 2001:35).³

The extension of full citizenship to women in the Constitution of 1988 resulted from "an impressive political process of dialogue between society and the Executive and Legislative Branches." The fact that the Constitution addressed domestic violence "lent weight in the 1990s to the demands on state and municipal levels to create new services, such as shelters and legal aid services," which were provided by many states and municipalities (Barsted 2006:257).

As a result of the skillful maneuvering by the women's movement, a ma-

jority of its claims were incorporated into the constitutional text, including language that assures the equality of men and women both in the public and private spheres and the prohibition of discrimination.⁴ There are also special protections for women in the labor market.⁵ Family-planning decisions are to be made freely by a couple (with the government responsible for providing the educational and scientific resources needed for the exercise of this right). The government has a duty to restrain violence in the family.⁶ In 1997 the issue of women's underrepresentation in Congress was addressed by a gender-quota law (see Marx, Borner, and Caminotti, this volume), and a law passed in 2001 deals with sexual harassment.

The International Context ¶

In Brazil's case, the demands of the women's movement were influenced by international advances, particularly the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Declaration and Program of Action of the 1993 World Conference on Human Rights in Vienna, the Action Plan of the 1994 World Conference on Population and Development in Cairo, and particularly the 1994 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belém do Pará), as well as the Platform for Action of the 1995 World Conference on Women in Beijing. These international instruments enabled the women's movement in Brazil to demand the implementation of these norms. As Jacqueline Pitanguy describes the process: "As the new issues were incorporated into the human rights agenda, the women's movement also stepped up its campaigns directed toward national governments. The Conferences of Cairo (1994) and Beijing (1995), CEDAW and the Conventions like the one agreed to in Belém do Pará were fundamental for the institutionalization of women's citizenship and human rights in Brazil." She concludes that the women's human rights agenda "influenced the political discourse in Brazil and was responsible for the creation of new public policies, particularly in the fields of sexual and reproductive health, labor and welfare rights, political and civil rights, and gender violence" (Pitanguy 2006:29).

After 1988 Brazil adopted a comprehensive set of national rules on the protection of human rights and endorsed a number of international human rights treaties.⁷ Since 1988 the legislature has passed more human rights laws than at any time in its history.⁸ Brazil "not only signed all the documents re-

lating to the recognition and protection of the human rights of women" but also created "a decidedly progressive legislative framework" on the equality of rights between men and women (Barsted 2001:34).

Despite the significant advances made at the constitutional and legislative levels, however, sexism and discrimination against women are still deeply ingrained in Brazilian culture, preventing women from exercising their most fundamental rights with full autonomy and dignity.⁹ Among the most serious violations of women's human rights are discrimination, the denial of sexual and reproductive rights, and violence directed against them. After the adoption of the new Constitution, these issues became the main priorities of the Brazilian feminist agenda. Pitanguy describes the final decades of the twentieth century as "characterized by a process of consolidation of the new language of human rights, which began to take into consideration concerns with female citizenship and gender relations." But the emergence of a global institutional framework of human rights brought "new dimensions" to this agenda, including "topics such as reproduction, violence and sexuality." In Brazil "the debate around a modern concept of humanity, no longer modeled exclusively on the abstract figure of the man, prompted the adoption of public policies and laws in the field of sexual and reproductive health, labor, civil and political rights, and gender violence" (2006:16).

Making Domestic Violence a Public Issue:

The IACHR Decision ¶

The Maria da Penha case broke through the invisibility that shrouds the issue of domestic violence and became the symbol for a much needed campaign against impunity, a critical issue for the rule of law in Brazil. In 2001, the IACHR took an unprecedented step, finding the Brazilian state guilty of negligence and failure to take action against domestic violence, and recommended that Brazil "continue and expand the reform process" to "put an end to the State's tolerance and discriminatory treatment of domestic violence against women in Brazil." The commission noted that the tolerance of domestic violence in Brazil "is a tolerance by the entire system, which only serves to perpetuate the psychological, social and historical roots and factors that sustain and feed violence against women" (IACHR 2001:paragraphs 54, 55).¹⁰

The IACHR decision was based on the finding that Brazil violated the obligations it assumed when it ratified the Convention of Belém do Pará. The

commission stressed that states that have ratified the convention are “obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, then the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups of persons to act freely and with impunity to the detriment of the rights recognized by the Convention” (IACHR 2001:paragraphs 54, 55).

The second obligation that states assume when they ratify the convention is “to ‘ensure’ the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction.” This means that governments must create the necessary structures (laws, as well as monitoring and enforcement agencies) to “legally ensure” the “free and full enjoyment of human rights,” and “prevent, investigate and punish any violation of the rights recognized by the Convention.” Moreover, if possible, they must “attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation” (IACHR 2001:paragraphs 42, 44).

The IACHR further recommended that the government (1) “rapidly and effectively” complete criminal proceedings against the person responsible for the assault; (2) conduct a serious and impartial investigation into the irregularities and unwarranted delays in the criminal proceedings; (3) pay the victim a symbolic compensation for the delay in delivering justice, without prejudice to the civil proceedings against the aggressor; and (4) promote the training of officials of the judiciary in human rights, particularly the rights contained in the Convention of Belém do Pará (IACHR 2001:Recommendations).

The Maria da Penha case marked the first time that a case of domestic violence resulted in a guilty verdict brought against a country within the inter-American system. The petitioning organizations (the Center for Justice and International Law and CLADEM-Brasil) hoped that international litigation would improve the protection of women’s human rights in Brazil. On October 31, 2002, the offender was finally incarcerated in the state of Paraíba (*Folha de São Paulo*: 31 October 2002); the cycle of impunity had ended after nineteen years. The other measures recommended by the commission (such as reparatory measures, prevention campaigns, and programs to train and

raise the awareness of officials of the judiciary, among others) were the subject of a commitment agreement signed between the petitioning organizations and the Brazilian government.¹¹ In November 2003 a law was enacted requiring both public and private health services throughout Brazil to notify the authorities of all cases of violence against women they treat.

Further progress was made when an Inter-ministerial Working Group was established in the Brazilian executive branch in March 2004, with members representing both civil society and government. Its purpose was to draft a law and set up additional instruments to tackle domestic violence against women. The group drew up a legislative proposal that was submitted by the president to the National Congress in late 2004. Those who argued for the law were able to point to the Maria da Penha case and cite the recommendations made by the IACHR. Nearly two years later, in August 2006, Law 11.340 (also known as the “Maria da Penha” law) was adopted, establishing measures for the prevention of domestic violence, as well as for assistance and protection for women suffering from violence.

The “Maria da Penha” Law 𐄂

In contrast to seventeen other countries in Latin America, prior to 2006 Brazil had no specific legislation addressing violence against women; such cases were treated under a law (9099/95) that created Special Criminal Courts. These functioned like small claims courts to handle “criminal infractions of minor offensive potential,” punishable by no more than one year of imprisonment.

By recognizing and punishing violent acts in the private domain, the state no longer supported the strict division between the public and private spheres, in which police had to “cross the private threshold” to arrest and prosecute those committing domestic violence. Returning the perpetrators to the very same domain and requiring only that offenders buy their victims a food basket or pay for half an oven or refrigerator, however, trivialized the crime and reinforced the widespread impression that cases of violence against women are merely “domestic quarrels.” The law thus endorsed the erroneous notion that violence against women was a minor crime, not a serious human rights violation. Research has shown that, by failing to take violence against women seriously, the 1995 law legitimized domestic violence

and reinforced gender hierarchy (Araujo 2005).¹² In some cases the courts had ruled that domestic violence was justified as a reaction to an act of “vengeance or antagonism by the victim” or found the victim at fault in some other way, employing the absurd logic that women can behave in ways that justify male abuse. The application of the law thus undermined the credibility of the Brazilian justice system (fragile in any case), an assessment further reinforced by the fact that only 2 percent of cases of violence against women ended in conviction.

Legally, however, the failure of the Brazilian state to take action in the Maria da Pena case was a breach of the Convention of Belém do Pará that obliged the Brazilian government to implement public policies to prevent, punish, and eradicate violence against women in accordance with international and constitutional standards. Its failure to act warranted the guilty verdict in the Penha case and led to the adoption of the “Maria da Penha” law (Law 11.340) in August 2006.

The new law incorporates seven remarkable innovations. The first changes the legal terminology for addressing violence against women. Violence against women, formerly treated as a *criminal infraction of minor offensive potential*, is now considered a *human rights violation*, and the new law expressly bans applying the earlier law to cases of domestic abuse. In a second innovation, the law incorporates a gender perspective by requiring that the specific conditions under which women suffer domestic and family violence must be taken into consideration. It provides for the creation of Courts for Domestic and Family Violence against Women, with both civil and criminal jurisdiction and specialized police stations that offer a variety of services to abused women. Third, the new law makes provisions for developing a preventive, integrated, and multidisciplinary approach to domestic violence, establishing integrated prevention measures that require coordination among the federal, state, and municipal governments and nongovernment organizations. It integrates the judiciary, the Public Prosecution Service, and the Public Defense Service with the areas of public safety, social assistance, health, education, labor, and housing. The law stresses the importance of running awareness campaigns promoting the prevention of domestic and family violence, as well as of the dissemination of the law and related legislation and the texts of international treaties that protect women’s rights. It urges that issues such as human rights, gender and race equality, ethnicity, and the problem of domestic and family violence against women be included

in school curricula at all levels. It also addresses the need for ongoing training for police officers on gender, race, and ethnicity.

Fifth, in contrast with the trivial sanctions meted out under the old law (9099/95), the new law states that offenders in cases of domestic violence may not be punished merely by being required to make restitution through gifts of food or other pecuniary penalties, nor can they get by with merely paying a fine.¹³ This measure is intended to eliminate the state’s complacency with regard to the crime of domestic violence, following the terms of the convention by broadening the concept of violence against women to include “any act or omission thereof based on gender that causes death, injury, physical, sexual or psychological suffering and moral or pecuniary damages” that occurs within the domestic unit, within the family, or in any intimate relationship.

The sixth innovation is the establishment of a broader definition of “family” and the visibility given the right to free sexual orientation. The new law affirms that sexual orientation is of no relevance in determining how the law applies. It reiterates that all women, regardless of sexual orientation, class, race, ethnicity, income, culture, schooling, age, or religion have the right to live without violence. Finally, the law calls for the creation of databases and provides for the promotion of research and the collection and analysis of relevant data—broken down by gender, race, and ethnicity—on the causes, consequences, and frequency of domestic and family violence against women. It also provides for the organization of this data and a regular evaluation of the results of the adopted measures.

Commenting on the law, Leila Barsted concludes that the history of the issue of domestic violence “reveals the important role of women’s movements in dialogue with the State in its different spheres”: with the executive to ratify treaties, the legislature to pass the necessary laws and regulatory rules, and the various agencies involved in law enforcement and the provision of services to address the consequences of domestic violence, including police stations and shelters. The movement must continue to lobby to ensure that these facilities are adequately funded, including funds for the collection and analysis of data. “There is no doubt,” Barsted adds, “that in the past three decades, the women’s movement has been a major player driving public policies on gender, including those [on] the prevention of violence. Nevertheless, in spite of the breakthroughs achieved, there is still an undeniable persistence of domestic and sexual violence against women in Brazil” (2006:288).

Conclusion ¶

The “Maria da Penha” law was passed in August 2006 and came into force forty-five days later. The groups in the women’s movement remain in close contact with each other to confront resistance from various sectors to the measures included in the new law. Some legal experts have argued that the law is unconstitutional, claiming that “a measure that only affects violence against women is discriminatory,” thereby ignoring the persistence and the epidemic proportions of this gendered pattern of violence. There are judges who contend that the creation of courts with both civil and criminal jurisdiction, as the “Maria da Penha” law demands, is unconstitutional because it is not part of the Brazilian tradition.¹⁴ However, the women’s movement has stood firmly behind the new law, emphasizing the importance of its innovations and stressing the law’s constitutionality—arguing, in fact, that *not* having such a law would be unconstitutional.

The “Maria da Penha” law produced an intense public debate on violence against women. It resulted from a successful strategy by the Brazilian women’s movement to identify an emblematic case of violence against women and submit it to an international court, using the power of international litigation supported by transnational activism. The women’s movement used a range of legal, political, and communication strategies to bring public attention to its message. With the IACHR decision and growing public awareness, women’s groups succeeded in changing the law and shaping public policy. By monitoring the legislative process and actively participating in drafting the law on violence against women, they played a direct role in passing the law, and now they are fighting for its effective implementation.

The Brazilian experience also illustrates how bringing an international legal case can focus public attention on human rights violations against women not taken seriously before. The IACHR decision caused the Brazilian government considerable political and moral embarrassment. Confronted with human rights violations in the court of international public opinion, a government is practically compelled to justify its actions.

James Cavallaro (2002) argues that well-articulated international litigation strategies differentiate merely procedural victories from substantive gains, and the “Maria da Penha” case provides an important example of the latter. Kathryn Sikkink (1993) has shown how the work of transnational NGOs makes the repressive practices of states more visible and public, requiring

a response from those who would otherwise remain silent. In this case, it is clear that international attention made it easier for the Brazilian women’s movement to mobilize the media, engage public opinion, and advance the cause of women’s human rights (Cavallaro 2002:492). When a government recognizes the legitimacy of international interventions on the matter of human rights and when, in response to international pressure, it alters its behavior, the relation between the state, its citizens, and international actors is strengthened (Sikkink 1993:414–15). The extensive involvement of non-government organizations employing coordinated and competent litigation strategies made the international instruments Brazil had signed powerful mechanisms for strengthening human rights protections for women.

The liberating ethic of human rights requires social transformation to ensure that each person can fully exercise his or her potential without violence or discrimination. It is an ethic that views others as deserving of equal consideration and profound respect, and as having the right to develop their human potential freely, autonomously, and fully. Historically, the campaign for human rights has not always followed a linear path upward (Pitanguy 2006). But although it has not been a triumphant march forward, it has certainly not proven a lost cause. The history of human rights is a history of conflict (Lochak 2005:116; Lafer 2006) that opens and consolidates new spaces from where it is possible to continue the struggle for human dignity.

The goal of the women’s movement was to give the Maria da Penha case special integrity and meaning, as well as to inspire hope, creative action, and the capacity to transform the society in which they live. Hannah Arendt (1995, 1998) emphasizes this human potential and believes that, with patience, people can tame the wilderness with the faculties of passion and action. These are lessons that can be learned from the way the women’s movement in Brazil pursued the Maria da Penha case and gained a legal, moral, and practical victory for women.

Notes ¶

- 1 This Human Rights Watch report also reveals that, of more than eight hundred cases of rape reported to police stations in São Paulo from 1985 to 1989, less than a quarter were investigated. The same report also states that the women’s police station in São Luis, in the state of Maranhão, reported that, of the more than four thousand cases of physical and sexual assault brought to their attention,

only three hundred ended up in court and only two resulted in the punishment of the accused.

- 2 Adopting the classification made by Guillermo O'Donnell, who wrote: "It is useful to conceptualize the processes of democratization as actually implying two transitions. The first is the transition from the previous authoritarian regime to the installation of a democratic government. The second transition is from this government to the consolidation of democracy or, in other words, to the effective functioning of a democratic regime" a process that is still in progress (O'Donnell 1992:18)
- 3 She writes further, "this favorable legislative situation was the result of women's long struggle . . . since the Brazilian Republic [was] founded in 1889. The restrictions on women's political rights were only fully withdrawn in the 1934 Federal Constitution; until 1962, a married woman needed her husband's authorization to exercise the most elemental rights, for example, the right to work. Until 1988, married women were still considered their husbands' collaborators, and husbands were responsible for directing the marriage. Until the late 1970s, the law, under the pretense of 'protection,' prevented women's entry into numerous sectors of the labor market" (Barsted 2001:34-35).
- 4 Law 9.029 of April 13, 1995, prohibits employers from requiring women to present pregnancy or sterilization certificates, or any other discriminatory practices, for the purposes of hiring or continuing employment.
- 5 Law 9.799 of May 26, 1999, which includes (in the section on consolidation of labor laws) rules on the access of women to the labor market.
- 6 Law 10.778 of November 24, 2003, requires both public and private health services throughout Brazil to notify the authorities of all cases of violence against women they have treated.
- 7 Foremost among them are: (1) the Inter-American Convention to Prevent and Punish Torture, on July 20, 1989; (2) the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment, on September 28, 1989; (3) the Convention on Children's Rights, on September 24, 1990; (4) the International Covenant on Civil and Political Rights, on January 24, 1992; (5) the International Covenant on Economic, Social, and Cultural Rights, on January 24, 1992; (6) the American Convention on Human Rights, on September 25, 1992; (7) the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, on November 17, 1995; (8) the Protocol to the American Convention regarding the Abolition of the Death Penalty, on August 13, 1996; (9) the Protocol to the American Convention in the Area of Economic, Social, and Cultural Rights (San Salvador Protocol), on August 21, 1996; (10) the Rome Statute, which created the International Criminal Court, on June 20, 2002; (11) the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, on June 28, 2002; and (12) the two Optional Protocols to the Convention on Children's Rights, regarding children's

involvement in armed conflicts, the sale of children, and child prostitution and pornography, on January 24, 2004. In addition to these advances, one might add Brazil's recognition of the jurisdiction of the Inter-American Court of Human Rights in December 1998.

- 8 On this point, the following laws stand out: (1) Law 7.716 of January 5, 1989, which defines crimes arising from discrimination based on race or color and considers racism an "unbailable and imprescriptible" crime (prior to the 1988 Constitution, racism was considered merely a misdemeanor); (2) Law 9.029 of April 13, 1995, which prohibits employers from requiring women to present pregnancy or sterilization certificates, or any other discriminatory practices, for the purposes of hiring or continuing employment; (3) Decree 1.904 of May 13, 1996, which establishes the National Human Rights Program and for the first time endows human rights with the status of government public policy, prescribing government initiatives for the protection and promotion of civil and political rights in Brazil; (4) Law 9.459 of May 13, 1997, which modifies Law 7.716 (that defines crimes arising from discrimination based on race or color), expanding it to include punishments for crimes arising from discrimination based on ethnicity, religion, or nationality; (5) Law 9.504 of September 30, 1997, which establishes election rules, stating that each party or coalition must reserve a minimum of 30 percent and a maximum of 70 percent for the candidacies of each sex; (6) Law 8.069 of July 13, 1990, which provides for the Child and Adolescent Statute, considered one of the most advanced pieces of legislation on the subject, as it establishes full protection for children and adolescents, emphasizing their fundamental rights and the policies needed to protect these rights; and (7) Law 9.455 of April 7, 1997, which defines and punishes the crime of torture as a crime not subject to bail, mercy, or amnesty, and whose perpetrators, accessories, and those who, being in a position to prevent the crime, refrained from doing so, shall be held liable pursuant to Article 5, XLIII, of the Constitution of 1988.
- 9 See the shadow report on the International Covenant on Civil and Political Rights submitted to the Human Rights Committee, Geneva, in October 2005, particularly the section drafted by CLADEM (Latin American and Caribbean Committee for the Defense of Women's Rights). See also Piovesan and Pimental 2002b, 2003.
- 10 Language in this and the following paragraph are taken from the IACHR, -OAS, Report 54/01, case 12.051, *Maria da Penha Fernandes v. Brazil*, 16/04/01, paragraphs 54, 55.
- 11 The annual report of the IACHR in 2003, in the chapter entitled "Status of Compliance with the Recommendations of the IACHR" (www.cidh.org/annualrep/, accessed on February 25, 2005), reveals that the Brazilian state informed the commission on the progress of the ongoing criminal proceedings against the person responsible for the assault and attempted murder to which recommen-

- dation 1 refers. In due course, the commission learned that the prison sentence imposed on the offender had been executed.
- 12 From the point of view of Leila Linhares Barsted: "Ten years after the approval of this law, it has been found that nearly 70% of cases heard in the Special Criminal Courts involve situations of domestic violence against women. Of all these cases, the vast majority end in 'conciliation,' without the Public Prosecution Service or the judge even becoming aware of the case and without the women getting an appropriate response from the State for the violence suffered. Given the all but discriminatory effect of this law, the women's movement has debated some solutions and evaluated the initiatives of lawmakers currently in the National Congress, as well as legislative experiences in other countries that have drafted laws against domestic violence. Drawing on this insight, a consortium of NGOs prepared a draft bill on the topic, modeled on the Convention of Belém do Pará and rejecting the application of Law 9.099/95. This proposal was presented to the Special Department of Policies for Women" (2006:280–81).
 - 13 An article in *O estado de São Paulo* entitled "Nova lei que protege a mulher já tem um preso" (September 23, 2006) refers to a case where a man was detained who beat his wife, who was five months pregnant. According to the female arresting police officer, the offender considered his imprisonment to be "ridiculous," indicating that although laws can be changed, they must be enforced to affect underlying attitudes.
 - 14 A Motion to Reject the Domestic Violence Law, Law 11.340/06, was approved in the Third Conference of Special Criminal Court Judges, in Rio de Janeiro, in September 2006. In the document, the judges criticize the "unsystematic and unscientific form in which various laws, penalties, and criminal procedures have been rewritten in recent sessions of the legislature." They add that "the succession of imperfect laws baffles society and increases the feeling of despair." Likewise, the majority of prosecutors and judges from the Federal District consider the law unconstitutional, particularly the provision that prevents the application of Law 9099/95 to crimes of domestic and family violence against women. On the opposite end of the spectrum, however, note the commendable and extraordinary efforts of the judge Shelma Lombardi de Kato, which led to the installation of Brazil's first Court for Domestic and Family Violence against Women, in Cuiabá, on September 25, 2006.

Gender and Human Rights ໔

LESSONS FROM THE PERUVIAN TRUTH AND RECONCILIATION COMMISSION

Julissa Mantilla Falcón

The main documents of international human rights law, such as the Universal Declaration of Human Rights (1948) or the International Covenant for Civil and Political Rights (1966), refer to the principle of non-discrimination and employ a supposedly neutral language that does not distinguish between men and women. However, in Vienna in 1993 the United Nations Second Conference on Human Rights declared the rights of women and girls as human rights. Since then, international documents and case law have included stronger references to women's human rights and to the need for a gender perspective, although the international community still underestimates the importance of the gender perspective to investigations of human rights violations and the processes of postconflict reconciliation.

This essay reviews the evolution of the incorporation of a gender perspective in international human rights law and looks at the case of the Peruvian Truth and Reconciliation Commission (PTRC) as an example of the impact this perspective has had in a human rights investigation.

The Gender Perspective in International Human Rights Law ໔

The term *gender* is often associated only with women or women-based approaches. In fact, gender should be understood as the "socially constructed roles of women and men that are ascribed to them on the basis of their