

# CONSECRATION OF THE DIGNITY OF HUMAN PERSON'S PRINCIPLE THROUGH THE EMERGENCY PROTECTIVE MEASURES IN THE MARIA DA PENHA LAW

AS MEDIDAS PROTETIVAS DE URGÊNCIA PREVISTAS  
NA LEI MARIA DA PENHA COMO CONSAGRAÇÃO DO  
PRINCÍPIO DA DIGNIDADE DA PESSOA HUMANA

*Andrea Flores*

andreaflores.adv@gmail.com

*Maria Paula de Azevedo Nunes da Cunha Bueno*

mpaula.adv@gmail.com

**Sumário.** 1 Introduction. 2 The dignity of the human person and its legal-philosophical foundations. 2.1 The evolution of the concept of human person. 2.2 Legal-philosophical foundations of the dignity of the human person. 3 Domestic violence against women as a violation of human rights. 3.1 Human dignity and human rights. 3.2 Human rights and domestic violence against women. 4 Emergency protective measures as a consecration of the human person's dignity principle. 5 Conclusions. 6 References

## RESUMO:

O presente estudo versa sobre as medidas protetivas de urgência como consagração do princípio da dignidade da pessoa humana. Tem, como objetivo principal, a análise desse princípio, como sendo base para a aplicação das referidas medidas previstas na Lei Maria da Penha. A partir de uma pesquisa emanada de um método dedutivo, eminentemente bibliográfica e documental, e de um paradigma pós-positivista com enfoque em valores, percebe-se a riqueza da discussão existente acerca da matéria. Destarte, por estar a **violência contra a mulher** ligada a um estereótipo muito antigo da mulher como sendo subjugada, e por ter sido, no século XX, reconhecida como violação aos direitos humanos, tal prática vem sendo bastante discutida na comunidade internacional e, recentemente, de forma mais enfática, no Brasil, assim como a dignidade da pessoa humana, que assume várias faces e valorações a cada geração de direitos humanos, o que está intrinsecamente ligado à evolução dos direitos da mulher e, conseqüentemente, à necessidade de protegê-las da

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violência de gênero. Com a pesquisa, pode-se apreender que a dignidade da pessoa humana só pode ser efetivada por meio de políticas como as Medidas Protetivas de Urgência, que, de fato, garantem a segurança da mulher em situação de risco.

**Palavras-chave:**

Direitos Humanos; dignidade; violência doméstica; lei Maria da Penha; medidas protetivas de urgência.

**ABSTRACT:**

The present study approaches the consecration of the dignity of human person's principle through the emergency protective measures. Its main aim is to examine this principle, as being the basis for the application of the measures provided in the Maria da Penha Law. Starting with a research emanating from a deductive method, eminently bibliographic and documentary, and from a post-positivist paradigm focused on values, the richness of the existing discussion on the matter is clear. Thus, because violence against women is linked to a very old concept of women's stereotype, as being subjugated, and because it was recognized in the twentieth century as a violation of human rights, this issue has been widely discussed in the international community and, recently, in a more emphatic way, in Brazil, as well as the dignity of the human person, which embodies several components and values for each generation of human rights, which is intrinsically linked to the evolution of women's rights and, consequently, it is necessary to protect them from the gender-based aggression. From the research, it can be learned that the dignity of the human being can only be realized through policies such as Urgent Protective Measures, which, in fact, guarantee the safety of woman at risk.

**Keywords:**

Human Rights; dignity; domestic violence; Maria da Penha law; urgent protective measures.

## 1. INTRODUCTION

This study approaches the consecration of the dignity of human person's principle through the emergency protective measures in the Maria da Penha law and its main aim is to examine this principle as being the basis for the application of those measures, through a deductive research, eminently bibliographic and documentary and a post-positivist paradigm focused on values.

This research is justified by the epidemic dimension of domestic violence, as well as by the importance of the dignity of the human person for the understanding of the evolution of human rights, which is intrinsically linked to the advancement of women's rights.

In order to clarify the theme, the conceptualization of the principle of human dignity will be explained, focusing on the evolution of this principle/value, as well as its legal-philosophical foundations.

Secondly, the connection between human dignity and human rights and the characterization of domestic violence against women as a violation of human rights will be shown.

Finally, urgent protective measures will be analyzed as a consecration of the principle of human dignity and as a way to effectively protect women in domestic violence situation.

## **2. THE DIGNITY OF THE HUMAN PERSON AND ITS LEGAL-PHILOSOPHICAL FOUNDATIONS**

### **2.1. The evolution of the concept of human person**

Much has been said about human person's dignity. One might think that the expression human person is redundant, but it is certain that it is used to emphasize an achievement of post-World War II society, which saw dignity as a value and a universal principle, due to an inherent attribute of each individual. (AVANCINI, 2013, pp. 77-78).

Before talking about human person's dignity, it is important to take a look at the different forms already assumed by this expression – human person -, using Fábio Konder Comparato's ideas (2015, p. 31), which also emphasizes the historicity of human rights. The author didactically divides this evolution into five main stages.

According to the author, the first stage is marked by speculations about the identity of Jesus Christ, which had its nature interpreted in two ways: either divine or carnal, which was only resolved at the ecumenical council held in 325 AD, in which it was understood as dual nature – human and divine. In addition, the biblical bases make man a special being, because he was created in the image and likeness of God.

The second stage started in the 6th Century with Boethius, who influenced the medieval thought with his studies. For him, a person was said to be the individual substance of rational nature – substance is the intrinsic characteristic of a being. His ideas were received by Tomas de

Aquino and disseminated by the Renaissance and the Enlightenment, and translated into an understanding of the meaning of dignity as the possibility for the individual to build his own existence freely and autonomously. (COMPARATO, 2015, pp. 31-33).

The third stage was embodied in the philosophy of Immanuel Kant, who considered the person as a being treated as an end in themselves. The author understands that due to his rational will, only the human being lives in conditions of autonomy, as a being capable of acting in accordance to the laws they edit. (COMPARATO, 2015, pp. 33-38).

By the way, explaining the categorical imperative, Kant *apud* Comparato (2015, p. 33) prelects that “the first principle of all ethics is that the human being and, in general, every rational being, exists as an end in themselves, not simply as a way which this or that will can serve their desire”.

The fourth stage, for its turn, results from the understanding that each person is the only one capable of directing their own life according to their personal values, subjecting themselves, voluntarily, to the valuation norms they created. (COMPARATO, 2015, pp. 38-39).

Finally, the fifth stage is based on the philosophy of life and existentialist thinking of the first half of the 20th century. Since the Industrial Revolution, life in society became mechanical and bureaucratic, which is why existentialist philosophy seeks to emphasize the unique and irreproducible character of individual personality. From this singular character of existence, the dignity of the person in the whole individual arises. (COMPARATO, 2015, p. 39).

## **2.2. Legal-philosophical foundations of the dignity of the human person**

It is noticed that the agenda about the value of the human person begins both in classical thought and in theological discussions, which is why biblically, man is considered to be of value, since he was created in God’s image and likeness.

Over time, a paradigm shift took place and this thought became secular and rational, which placed moral freedom as a human characteristic that underlies the dignity of the human person, and no longer human nature itself.

Indeed, it is common sense that from Kant onwards the process of secularization was consolidated, as this philosopher understood dignity as a manifestation of the ethical autonomy of the human person, as it has already been said.

Besides, Kant's whole idea about the matter refers to an ideal very present in speeches in defense of human rights or in claims with the purpose of guaranteeing and preserving rights already acquired, that is, human beings are priceless. (PEREIRA, 2018, p. 9).

After all, as José Aparecido Pereira (2018, p. 9) points out, regarding the value of human beings, “é justamente o fato de não podermos atribuir-lhe nenhum valor análogo às transações pecuniárias, comerciais e mercadológicas que inferimos a sua dignidade.”<sup>1</sup>

However, it is important to emphasize, still in this aspect, as Javier Orlando Aguirre-Pabón (2011, p. 49) asserts, that our current notion of the dignity of the human person is not exactly what Kant talked about in his texts, considering that, for this philosopher, the term dignity was more far-reaching and it was characterized by three tendencies.

First, this philosopher did not sum up dignity to the term “Menschenwürde” (human dignity), but also to the following: “Würde der Pflicht” (dignity of duty), “Würde des Gebots” (dignity of the law), “Würde der Sittlichkeit” (moral dignity), “Würde eines vernünftigen Wesens” (dignity of a rational being) and “Würde der Menschheit” (dignity of humanity). (AGUIRRE-PABÓN, 2011, p. 49).

In addition, the term dignity is, especially as the dignity of a rational being, only relevant in the text *Foundations of Metaphysics and Customs*, because in the critique of practical reason and metaphysics of customs, this term seems to have no role. (AGUIRRE-PABÓN, 2011, p. 50).

And finally, the kantian notion of human dignity, in contrast to our modern notion, is mostly absent from all of Kant's important works on political and legal philosophy. (AGUIRRE-PABÓN, 2011, p. 50).

That is why, for Aguirre-Pabón (2011, p. 50), Kant's notion of dignity is a political and legal notion, belonging to his time, closely linked to the nobility, and not to the human person, as it currently exists. So, as Habermas *apud* Aguirre-Pabón (2011, p. 72) asserts, the concept of human

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1 Free translation by the authors: “it is precisely the fact that we cannot attribute any analogous value to pecuniary, commercial and market transactions that we infer their dignity.”

dignity did not acquire systematic importance in Kant, since reason rests on the moral philosophical explanation of autonomy.

It is important to highlight these nuances in order to stop linking the current concept of human dignity to Kant alone, since, as Jürgen Habermas (2010, p. 17) points out, it was from medieval discussions about the creation of human beings to the image and likeness of God that it was realized that everyone would face a Final Judgment as unique and irreplaceable people, which was translated by philosophy with the understanding that the bases of the dignity of the human person are in the individualization and the unique value of each human being.

Despite the importance of these discussions, it is emphasized that, as explained by Fábio Konder Comparato (2010, p. 44), the reflections of secularized philosophy added to the evolution of the scientific foundations of biology strengthened the historical character of human rights, making an unnecessary clash between the two existing bases, which are, the immutable natural law and the legal positivism, which sees in the State the only possibility for the existence of law.

In other words, a dialogue between the bases is much more viable, with a view to realizing the dignity of the human person, considering that, as Norberto Bobbio (2004, p. 17) asserts, “o problema que temos diante de nós não é filosófico, mas jurídico e, num sentido mais amplo, político.”<sup>2</sup>

And also, that “não se trata de saber quais e quantos são esses direitos, qual é sua natureza e seu fundamento, se são direitos naturais ou históricos, absolutos ou relativos, mas sim qual é o modo mais seguro para garanti-los (...).”<sup>3</sup> (BOBBIO, 2004, p. 17).

Even because, finding an ultimate foundation for human rights, and, consequently, for the dignity of the human person, is not interesting, because no one would be able to cover the wide spectrum of them.

In other words, “(...) não se trata de encontrar um fundamento absoluto – empreendimento sublime, porém desesperado -, mas de buscar, em cada caso concreto, os vários fundamentos possíveis”<sup>4</sup>(BOBBIO, 2004, p. 16), since these plural foundations will have no historical importance

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2 Free translation by the authors: “the problem we have before us is not philosophical, but legal and, in a broader sense, political.”

3 Free translation by the authors: “it is not a matter of knowing what and how many are these rights, what is their nature and their foundation, if they are natural or historical, absolute or relative rights, but what the safest way to guarantee them is (...).”

4 Free translation by the authors: “(...) it is not a question of finding an absolute foundation - a sublime but desperate undertaking - but of seeking, in each specific case, the several possible foundations.”

if their search is not accompanied by the study of the conditions, means and situations in which this or that right can be accomplished. (BOBBIO, 2004, p. 16).

Ingo Sarlet (2003, p. 113) affirms that the dignity of the human person must be understood as an “open axiological category”, since the idea of a fixed concept would harm a series of existing values in a plural society that aims the same respect for dignity.

With this digression about the importance of understanding the fundamentals of the dignity of the human person, even due to the historical condition of human rights, it is necessary to comment on two other aspects - the connection of the dignity of the human person with the human rights and the violence against women.

### **3. DOMESTIC VIOLENCE AGAINST WOMEN AS A VIOLATION OF HUMAN RIGHTS**

#### **3.1. Human dignity and human rights**

Human dignity “deriva do latim *dignitas* que significa virtude, valor, honra, consideração, ou qualidade moral, focalizado na justiça, na igualdade e na solidariedade.” (FACHIN; SOUZA, 2019, p. 315).<sup>5</sup>

Moreover, the notion of human dignity is considered a key concept in the treatment of the discourse of rights, even because, according to Jürgen Habermas, human dignity is the moral source from which all fundamental rights derive their support. (AGUIRRE-PABÓN, 2011, p. 48).

Furthermore, for Habermas, although implicitly or explicitly, there has always been an internal conceptual link between human dignity and human rights, even because human dignity constitutes the portal through which the egalitarian and universalistic substratum of morality is transferred to the scope of law. (HABERMAS, 2010, p. 16). By the way:

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<sup>5</sup> Free translation by the authors: “derives from the Latin *dignitas* which means virtue, value, honor, consideration, or moral quality, focused on justice, equality and solidarity.”

“A ideia de dignidade humana é o eixo conceitual que liga a moralidade do respeito igual a todos com o direito positivo e o processo de legislação democrática, de forma que sua interação possa dar origem a uma ordem política fundada em direitos humanos.”<sup>6</sup> (HABERMAS *apud* AGUIRRE-PABÓN, 2011, p. 73).

Such importance of the dignity of the human person for the understanding of human rights is stamped in the main documents of the international human rights system, such as the Charter of the United Nations, the Universal Declaration of Human Rights and other documents of *jus cogens* (hard Law).

It is noticed that although the discussion about the dignity of the human person started even before talking about human rights, as it has already been boasted, it is accurate to say that the connection between these two institutes took place in a more striking way after the Second World War, as follows:

No entanto, com a evolução das regras que protegem os direitos humanos, observa-se que a conexão entre dignidade e direitos humanos, ou seja, a visão de que a dignidade vem com os direitos, ocorreu apenas com o advent dos principais textos e constituições internacionais após a Segunda Guerra Mundial.<sup>7</sup>(MEZZARROBA; SILVEIRA, 2018, p. 277).

Even because there is no society without rights: *ubi societas ibi jus* (Cintra et al., 2009). For this reason, “a afirmação de ideias, isto é, a padronização de condutas e direitos, é um meio importante para evitar o desrespeito à dignidade humana e desencadear mudanças sociais.”<sup>8</sup> (FERNANDES; SIQUEIRA, 2017, p.12).

In addition to this matter, it is worth saying that, like human rights, human dignity is implemented according to the emergence of its dimensions. By the way:

A dignidade da pessoa humana será concretizada pelo valor preponderante em um dado período histórico, por exemplo, liberdade, igualdade e solidariedade. Assim, na Declara-

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6 Original text: “La idea de la dignidad humana es el eje conceptual que conecta la moral del respeto igualitario de toda persona con el derecho positivo y el proceso de legislación democrático, de tal forma que su interacción puede dar origen a un orden político fundado en los derechos humanos.”

Free translation by the authors: “The idea of human dignity is the conceptual axis that connects the moral of equal respect of every person with positive law and the process of democratic legislation, so that their interaction can give rise to a political order founded on human rights.”

7 Original text: “However, with the evolution of the rules protecting human rights, it is observed that the connection between dignity and human rights, namely the vision that dignity comes with rights, just took place with the advent of major international texts and constitutions after the Second World War.”

8 Original text: “the affirmation of ideas, that is, the standardization of conduct and rights is an important means to avoid disrespect for human dignity and trigger social changes.”



ção Universal dos Direitos Humanos de 1948, um importante instrumento dos direitos humanos universais e principal disseminador de valores pelo mundo, a dignidade do ser humano substituiu o pilar de todos os direitos nela consagrados.<sup>9</sup> (MEZZARROBA; SILVEIRA, 2018, p. 278).

Likewise, in Brazil the principle of human dignity also governs the State from the current Constitution. In addition to its recognition as a principle and value, it is stamped in Article 1, item III, of the Constitution of the Republic from 1988, and it is understood as an essential core of the Federative Republic of Brazil, translating into the recognition of the individual's value as a limit and foundation of the political organization of society, as a validity foundation that harmonizes and inspires the current constitutional order as a whole, informing the basis of the republican and democratic order. (CANOTILHO, 1998, p. 219).

That is “em 1988, a Constituição Federal reconheceu a igualdade de direitos e deveres entre homens e mulheres, reafirmando os valores sociais e humanizadores, especialmente a dignidade humana, a solidariedade social e a igualdade substancial.” (FACHIN; SOUZA, 2019, 327).<sup>10</sup>

Thus, the recognition of the dignity of the person by our constitutional order brought to Brazil an alignment with the international human rights agenda, which throughout history has recognized violence against women as one of the ways of its violation, as it will be seen below.

### **3.2. Human Rights and domestic violence against women**

Looking at the digression made in the previous topic about the connection of human rights with the dignity of the human person and their affirmation in the international and Brazilian scope, it is emphasized that, due to the ideas of Norberto Bobbio (2004, p. 9), human rights are not born all at once and not once and for all. Hence, from there it comes the complexity of the study, its advances and changes, which accompany the social, economic and political achievements made internationally, regionally and internally in the Brazilian States.

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9 Original text: “The dignity of the human person will be made concrete by the preponderant value in a given historical time, for example, freedom, equality and solidarity. Thus, on the Universal Declaration of Human Rights of 1948, an important instrument of universal human rights and main spreader of values over the world, the human being dignity took the place of pillar to all the rights in it enshrined.”

10 Free translation by the authors: “in 1988, the Federal Constitution recognized equal rights and duties between men and women, reaffirming social and humanizing values, especially human dignity, social solidarity and substantial equality.”

In turn, women's rights also come from a pluralist feminist movement, marked by different moments of struggles and achievements. By the way:

Enquanto um construído histórico, os direitos humanos das mulheres não traduzem uma história linear, não compõem uma marcha triunfal, nem tampouco uma causa perdida. Mas refletem, a todo tempo, a história de um combate, mediante processos que abrem e consolidam espaços de luta pela dignidade humana, como invoca, em sua complexidade e dinâmica, o movimento feminista, em sua trajetória plural.” (PIMENTEL; PIOVESAN, 2011, p. 101).<sup>11</sup>

Indeed, the struggle of women has always been very plural, since, at each time, we sought to achieve a certain right - always with gender equality as a backdrop. The recognition of domestic violence as a violation of human rights is part of this movement, in search of material equality.

In other words, while pursuing equality, it was necessary to raise domestic violence against women to the status of violation of human rights, as it was not enough that the female revolution have marked the previous century, since the advancement of women in several areas and sectors failed to end the cruel sequel to discrimination that they are still victims of. (DIAS; REINHEIMER, 2011, p. 195).

And this fight for equal rights was waged by women, generating feminist content, which Carmen Hein de Campos (2011, p. 1) calls feminist theory of law. The first feminist criticism was the modern dichotomies, which placed women as inferior to men, identifying the right only with the male pole. (OLSEN, 1995, p. 473).

As a demonstration of the effects of modern thinking, the first 1789 Declaration of Human and Citizen Rights can be cited, which only refers to a single gender as a subject of rights, namely man - a neutral term, but which indicates exclusion of women, which generated, in response, the Declaration of the Rights of Women and Female Citizens, in 1791.

Indeed, the historical process of accomplishment by women of civil, political, economic, social and cultural rights gained greater emphasis in the 20th century, with the organized action of social movements that contributed to the application of citizenship and the incorporation of women as subjects of rights.

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<sup>11</sup> Free translation by the authors: “As a historical construct, women’s human rights do not represent a linear history, they do not make up a triumphal march, nor a lost cause. But they reflect, at all times, the history of combat, through a processes that open and consolidate spaces for the struggle for human dignity, as the feminist movement invokes, in its complexity and dynamics, in its plural trajectory.”

The welcoming of these new actors - like women - redefined the dimensions of rights beyond formal freedom and equality, highlighting rights in the field of health, education, among others, marking the indivisibility of the rights inherent to the human person. (BARSTED, 2011, p. 13). These new rights are those of solidarity, or of the third generation, according to Karel Vazak.

It is also important to reinforce that the search for women's rights started in the American community even before it was done at the UN level. In 1928 the 6th American International Conference took place, in which the Inter-American Commission of Women was created. In 1933, at the 7th Conference, the Inter-American Convention on the Nationality of Women was launched.

In 1938, at the 8th Conference, Lima Declaration on the Rights of Women emerged and, at the 9th Conference, five years later, the International Convention on the Granting of Civil Rights to Women. In parallel, there was the Universal Declaration of Human Rights, within the scope of the UN.

After several achievements, in 1979, the Convention on the Elimination of All Forms of Discrimination against Women was launched at the international level (internalized in Brazil through Decree Law No. 93/1983); and in 1993, at the Second World Conference on Human Rights of the UN, gender violence was recognized for the first time as a violation of human rights.

In other words, for the first time it was recognized, at an international level, that violence against women is a way of disrespecting the dignity and equality of human beings, because it conveys the idea that women are inferior to men. (CERQUEIRA; FERNANDES, 2017, p. 13).

A year later, the Inter-American Convention to Prevent, Punish and Eradicate Violence Against Women was held, which was internalized in Brazil by Decree 1973/1996.

In the face of all these advances and before Maria da Penha's situation of total injustice - which gives name to Brazilian law and who was a woman victim of serious domestic violence practiced by her partner, who left practically unharmed - Brazilian feminism has shown that it has distanced itself of the dichotomy of modern thinking and that, in fact, approached the search for gender equality, which is why it achieved, through successful feminist advocacy, the promulgation of the Maria da Penha Law, in the face of Brazil's condemnation by the Inter-American Court of Human Rights.

It should also be highlighted that the Maria da Penha Law recognizes and reinforces the character of the violation of human rights that domestic violence against women has, showing that the country is aligned with international guidelines, according to its 6<sup>th</sup> article:

“A violência doméstica e familiar contra a mulher constitui uma das formas de violação dos direitos humanos.”<sup>12</sup> (BRASIL, 2006).

It is also important to emphasize that what motivated their inclusion in the legal text transcribed above was the purpose of affirming the importance in the fight to end this type of violence, even because this law is not only for women who have been victims of any type of violence, but also for family, state and society, which together must seek equality among people and dignity for all. (BIANCHINI, 2018, p. 17).

In summary, it was at the United Nations Conference on Human Rights in Vienna, in 1993, that it was declared for the first time that women’s rights are human rights. Shortly thereafter, the Inter-American Convention to Prevent and Eradicate Violence Against Women - Belém do Pará Convention treated violence against women the same way. That is why, among the countless advances represented by the Maria da Penha Law, the most significant probably was the definitive establishment of gender discrimination and violence as a form of insulting human rights. (BIANCHINI, 2018, p. 17).

#### **4. EMERGENCY PROTECTIVE MEASURES AS A CONSECRATION OF THE HUMAN PERSON’S DIGNITY PRINCIPLE**

Based on a perfunctory analysis of the texts by Norberto Bobbio and Fábio Konder Comparato, the enforcement of human rights matters much more than their conceptualization or finding an ultimate foundation for them.

According to this, in order to protect the human right to domestic non-violence against women, urgent protective measures were set forth in the Maria da Penha Law, as a way of making this ideal effective. Especially because, in most cases, violence comes from home and if it were

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<sup>12</sup> violations.” (BRASIL, 2006).

Free translation by the authors: “Domestic and family violence against women is one of the ways of human rights

not for urgent protective measures women would have to return to that environment after an eventual report to the police, which would be dangerous and inconceivable, for example.

In fact, Rosane M. Reis Lavigne and Cecilia Perlingeiro (2011, p. 293) point out that such measures represent the greatest success of the Maria da Penha Law, with their effectiveness and innovation praised in the doctrine even by authors who offer criticisms about women's achievement, even because the current legal order makes it clear the State's duty to safeguard the freedom of action of women and their children and family members involved in the situation of risk in summary cognition.

The urgent protective measures are set forth in article 9<sup>th</sup> and 18 in the Maria da Penha Law, and because they are emergency measures, the victim may request them through the police authority - usually when registering the victim police report - or the Public Prosecutor's Office, which, in both cases, will forward the request to the judge, who must decide about the request within 48 hours.

An exception to this rule is found in the new law 13.827/2019, which has set forth exceptional possibilities in which, aiming at the immediate protection of women, the Police Chief or police officer may enact emergency protective measures in favor of women, which will probably be applied in cities where there are no specialized courts for domestic violence, that is, in the countryside.

In another aspect, it should be noted that articles 18 to 21 of the Law explain the procedures to be carried out to guarantee protection against risk to the integrity of the woman and her family, but it does not establish a specific rite, which is why there are controversies regarding the nature and form of processing. The doctrinal discussion about the legal nature was well summarized by Thiago Pierobom de Ávila (2019, s.p.):

Há enorme celeuma doutrinária sobre a natureza jurídica das medidas protetivas de urgência. Um segmento defende se tratar de medida de natureza cível (PIRES, 2011:155; CUNHA; PINTO, 2014:156; DIDIER JR.; OLIVEIRA, 2016; OLIVEIRA et al, 2016:105; PASINATO et al, 2016: 246; e, aparentemente, FERNANDES, 2015:142). Há quem a classifique como medidas cautelares inominadas assemelhadas aos writs constitucionais (LIMA, 2011:329; DIAS, 2012:148), ou tutela de amparo sui generis com natureza acautelatória especial (CAMPOS; CORRÊA, 2007:384). Há ainda a posição de se tratar de medidas híbridas (DINIZ, 2014:9; COPEVID, Enunciado 4). Cavalcanti (2010:223) cinde as

medidas protetivas em criminais (art. 22, incisos I, II e III, da LMP) e cíveis (incisos IV e V) e Souza (2013:151 e 176) aparentemente segue essa linha. Normalmente, os criminalistas tendem a reconduzir as medidas protetivas de urgência à lógica das medidas cautelares criminais, ainda que o façam genericamente, sem discutir sua efetiva natureza jurídica (DELMANTO, 2008:163; FEITOZA, 2008:779; BELLOQUE, 2011:309; CRUZ, 2011:181). Bianchini (2011:241) afirma genericamente que “as medidas protetivas da Lei Maria da Penha possuem natureza jurídica distinta das medidas cautelares do CPP”, já que visam garantir os direitos previstos na LMP. Há precedentes conflitantes do STJ sobre o tema, dois entendendo pela natureza cível e autônoma das medidas protetivas (BRASIL, 2014b; BRASIL, 2016) e outro afirmando se tratar de uma cautelar criminal (BRASIL, 2017).<sup>13</sup>

We understand, in this regard, that the protective measures provided for in the Maria da Penha Law, in articles 22 to 24 and 9, have a civil and autonomous character, even if they will have a reflex in the criminal field, even because, the provision of the urgent protective measures can also be considered as recognition of a civil obligation not arising from the practice of an illegal act (DIDIER JR .; OLIVEIRA, 2016).

Thinking this way will ultimately influence several other factors, such as the possibility of imprisonment for failure to comply with a protective measure, or the need for a Police Inquiry to determine it, among others, which ends up generating greater protection for women in situation of domestic violence. By the way:

Transformar essas medidas protetivas cíveis em cautelares criminais significaria expropriar a mulher do seu direito fundamental à proteção, tutelável autonomamente na esfera cível. A solução da controvérsia há de ser feita à luz do princípio da máxima efetividade dos direitos fundamentais, guiada pelo vetor hermenêutico do art. 4º da LMP, que determina a consideração dos fins sociais da lei, que é a adequada proteção à mulher em situação de violência doméstica. (ÁVILA, 2019, s.p.).<sup>14</sup>

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13 Free translation by the authors: “There is a huge doctrinal stir about the legal nature of emergency protective measures. One segment argues that it is a civil action (PIRES, 2011: 155; CUNHA; PINTO, 2014: 156; DIDIER JR.; OLIVEIRA, 2016; OLIVEIRA et al, 2016: 105; PASINATO et al, 2016: 246; and apparently FERNANDES, 2015: 142). There are those who classify it as innominate precautionary measures similar to constitutional writs (LIMA, 2011: 329; DIAS, 2012: 148), or *sui generis* guardianship with a special precautionary nature (CAMPOS; CORRÊA, 2007: 384). There is also the position of dealing with hybrid measures (DINIZ, 2014: 9; COPEVID, Statement 4). Cavalcanti (2010: 223) surrounds protective measures in criminal (art. 22, items I, II and III, of the LMP) and civil (items IV and V) and Souza (2013: 151 and 176) apparently follows this line. Usually, criminalists tend to redirect urgent protective measures to the logic of criminal precautionary measures, even if they do so generically, without discussing their effective legal nature (DELMANTO, 2008: 163; FEITOZA, 2008: 779; BELLOQUE, 2011: 309; CRUZ, 2011: 181). Bianchini (2011: 241) generically affirms that “the protective measures of the Maria da Penha Law have a different legal nature from the precautionary measures of the CPP”, since they aim to guarantee the rights set forth in the LMP. There are conflicting precedents of the STJ on the subject, two understanding the civil and autonomous nature of protective measures (BRASIL, 2014b; BRASIL, 2016) and another claiming that it is a criminal injunction (BRASIL, 2017).”

14 Free translation by the authors: “Transforming these civil protective measures into criminal injunctions would mean expropriating women from their fundamental right to protection, which can be autonomously protected in the civil sphere. The solution of the controversy must be made in the light of the principle of maximum effectiveness of fundamental rights, guided by the hermeneutic vector of art. 4 of the LMP, which determines the consideration of the social purposes of the law, which is adequate protection for women in situations of domestic violence.” (ÁVILA, 2019, s.p.).

Even because the simplified rite and the speed of processing is more appropriate, with a standard accessible to all victims, so they, their legal representatives or relatives can request it. (LAVIGNE; PERLINGERO, 2011, p. 294). If it were not like that, the emergency protective measures would be a beautiful institute, but dead and without any effectiveness.

In the USA, it is worthwhile to exemplify, all states have civil protective orders since the 1990s, whose content is absolutely identical to the emergency protective measures that forbids approach and contact (see BUZAWA *et al*, 2017, p. 224).

Furthermore, under a general view of the Maria da Penha Law, it is clear that it was created not only to deal with the criminal question, of repression, but also, more importantly, it was created to guarantee protection and prevention of crimes. The first article of the mentioned law shows its spirit:

Esta Lei cria mecanismos para coibir e prevenir a violência doméstica e familiar contra a mulher, nos termos do § 8º do art. 226 da Constituição Federal, da Convenção sobre a Eliminação de Todas as Formas de Violência contra a Mulher, da Convenção Interamericana para Prevenir, Punir e Erradicar a Violência contra a Mulher e de outros tratados internacionais ratificados pela República Federativa do Brasil; dispõe sobre a criação dos Juizados de Violência Doméstica e Familiar contra a Mulher; e estabelece medidas de assistência e proteção às mulheres em situação de violência doméstica e familiar. (BRASIL, 2006).<sup>15</sup>

Under this point of view, it is clear that the role of the Maria da Penha Law in the legal system is to expand legal and state mechanisms to protect women, which, since 2014, has been highlighted by the Superior Court of Justice, which has since then made it clear that the attempt to prevent domestic violence against women can be pursued with judicial measures of a non-criminal nature, since the state criminal response is only triggered after the criminal offense is committed concretely, sometimes with irreversible consequences.

Therefore, having the urgent protective measures as civil nature, they can be applied in civil proceedings, without the need for criminal proceedings, or even a police investigation.

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15 Free translation by the authors: “This Law creates mechanisms to restrain and prevent domestic and family violence against women, under the terms of § 8 of art. 226 of the Federal Constitution, the Convention on the Elimination of All Ways 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.”

Because of this reality, in Brazil, at the Forum of Judges of Domestic Violence, as to the hybridity of domestic violence courts - an issue that will not be discussed in this article, but on which we opine for the full application by all courts, according to what The Maria da Penha Law initially envisaged, even more comprehensively than the one proposed by Law 13,894 / 2019 – the statement 3 was edited, asserting that the civil character of courts would be restricted to Emergency Protective Measures. (FONAVID, 2014).

At another point, it should be noted that there are other measures, outside the Maria da Penha Law, that will continue to be considered as criminal injunctions, such as periodic court appearances, the prohibition of being absent from the county or country, night home retreat, suspension of the exercise of public function or economic or financial activity, provisional hospitalization and electronic monitoring, all set forth in art. 319, items I, IV, V, VI, VII and IX of the Criminal Procedure Code, as well as the decree of preventive detention in case of non-compliance with emergency protective measures, as provided for in article 20 of the Maria da Penha Law and article 313, III of the CPP. (ÁVILA, 2019, s.p.).

Once this doctrinal-jurisprudential digression has been made, it should be noted that the emergency protective measures set forth in the Law (BRASIL, 2006, no page) can be organized, didactically, as follows: measures directed at the aggressor (art. 22), directed at the victim (art. 23) and assistance measures (art. 9). The legal role is only exemplary and there is no minimum and maximum number of protective measures to be applied to a given case.

Those addressed to the aggressor and provided by the law are: suspension or restriction of possession of weapons; removal from home or place where the relationship was held; prohibition of certain behaviors, such as approaching or contacting the victim, family members and witnesses and attending certain places in order to preserve the victim's physical and psychological integrity; restriction or suspension of visits to minor dependents; and, finally, provision of maintenance or provisional maintenance.

Those addressed to the victim, in turn, are the referral of the victim and her dependents to an official or community protection program or assistance program, the determination of the return of the victim and her dependents home, after removal of the aggressor; determination of the removal of the victim from home, without prejudice to her assets, custody of children and food;



determination of the separation of bodies and the registration or transfer of the victim's dependents to a basic education institution close to their home, regardless of the existence of a vacancy.

Still, for the patrimonial protection of the assets of the conjugal society or those of women's private property, it will be possible to determine, in a preliminary character, the restitution of assets, the temporary prohibition for the execution of acts and contracts of purchase, sale, lease of common property, etc. The suspension of powers of attorney conferred by the victim to the aggressor and the provision of provisional security, through judicial deposit, for losses and damages resulting from the practice of domestic violence.

And finally, with assistance, there are the measures set forth in article 9 of the Maria da Penha Law, which must, in accordance with the legal provision, be provided in an articulated manner, in accordance with the principles and guidelines provided for in the Organic Law Social Assistance, in the Unified Health System, in the Unified Public Security System, among other rules and public protection policies, and, emergency, when appropriate.

Thus, it is noted that the dignity of the human person is observed when it comes to emergency protective measures, since women find, in law and in the State, support to denounce and lead a life without gender violence, all of that, certainly, if the measures are monitored and enforced, and also if the criminal action takes its normal course and the psychological and social assistance to the victim is satisfactory.

## 5. CONCLUSIONS

It is important to study emergency protective measures, from the perspective of human dignity and human rights, because, despite the different nuances that surround them, the research ends up presenting itself more completely.

As a result, in a period in which an attempt was being made to change all accepted thinking, at the time, in most countries, which was the modern dichotomy, which placed women as worse than men, the feminist struggle began to gain space, in order to achieve material equality, the Maria da Penha Law being the result of much effort by the brave fighters at the international and national levels.

In other words, in order to give effect to the intention of protecting women, the Maria da Penha Law was provided for the possibility of enacting emergency protective measures in favor of the victim and her family.

Even so, despite all the efforts that have been made to protect women from gender-based violence within their coexistence, it is important to note that a large number do not even denounce or require measures and, the “tip of the iceberg” that reports ends up not being satisfactorily attended to in some opportunities.

That is why the fight against domestic violence against women has yet to be strengthened by the international community, through the elaboration of conventions and the creation of inspection bodies, and, in Brazil, which is a country with a high rate of domestic violence, it has started to be more vigorously combated in the last decade, through the internalization of international documents and the creation of the Maria da Penha Law.

However, fighting against it must increase and can't stop, until there is a paradigm shift regarding gender equality, which can only happen with the efforts of the international community and Brazil's efforts, to face and suppress this practice with effective public policies.

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*Andrea Flores*

*andreaflores.adv@gmail.com*

Universidade Federal de Mato Grosso  
do Sul

Currículo Lattes: <http://lattes.cnpq.br/1075600690855372>

ORCID iD: <https://orcid.org/0000-0002-5141-7653>

*Maria Paula de Azevedo Nunes da*

*Cunha Bueno*

*mpaula.adv@gmail.com*

Universidade Federal de Mato Grosso  
do Sul.

Currículo Lattes: [http://lattes.cnpq.  
br/1444669887715178](http://lattes.cnpq.br/1444669887715178)

Orcid iD: [https://orcid.org/0000-  
0002-6912-5931](https://orcid.org/0000-0002-6912-5931)