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**SERIE MUJER Y DESARROLLO**

**VIOLENCE WITHIN COUPLES**

**Legal treatment. Review of progress and results**

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**WOMEN AND DEVELOPMENT UNIT**



**ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN**



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## **ABSTRACT**

The subject of violence against women is a new one, but it deals with an age-old practice which was long connived at and propitiated by the legal system and ignored by society, as it was regarded as lying strictly within the private domain.

International action by the women's movement has been vital in bringing the issue to the forefront, and violence against women is now seen as a breach of their human rights, with all the public connotations that this entails and the opportunity it provides to use the mechanisms that exist within individual countries and internationally for the protection of human rights.

The purpose of the present report is to examine the issue of violence within couples, as one of the forms that violence against women takes. The subject is approached from a legal standpoint, consideration being given on the one hand to the international and regional legal framework, which clearly identifies violence against women as a breach of human rights requiring a response from the State, and on the other hand to the emergence since 1989, and especially in the last three years, of a number of special laws on family or domestic violence that aim to support the victim and punish the aggressor. This partly explains the exclusion from this document of other forms of violence against women that occur outside of the family sphere, such as rape (except when this takes place within a couple), which takes on particularly large proportions in armed conflicts; sexual harassment; and discrimination of all kinds against women.

From the analysis carried out, it can be concluded that special laws are an important instrument for combating violence of this kind, and that they need to be improved so that better results can be achieved in reducing cases of violence and assisting victims, but that in the final analysis the problem can only be rooted out when the discrimination that still persists in the legal system is eliminated.





## I. INTRODUCTION

### **From private to public. Violence as a breach of human rights**

Violence against women, which manifests itself in many different ways,<sup>1</sup> is now recognized as a serious impediment to women's ability to exercise their right of full participation in society, and consequently represents an obstacle to development.<sup>2</sup> It may be said to be the most dramatic manifestation of inequality; the difference between this type of violence and the other forms of aggression that are found in societies as a result of the domination exercised by certain sectors or groups over others is that in the case of violence against women, it is the very fact of their being women that gives rise to the risk or vulnerability.

The legal, economic and social dependency of women has historically placed them in a subordinate position and made them especially vulnerable to male aggression. Legal dependency is already found in Roman Law, in the form of paternal power and marital power; the first gave the fathers of families —men— powers over the person and property of their male and female children; the second, absolute power over their wives. During the Middle Ages, religions tolerated, and even encouraged, physical aggression against women. The witch hunts of Europe and North America were used to punish women for deviating from the norm. In the 18th and 19th centuries, family laws recognized the rights of men to commit abuses, in that physical violence against wives was regarded as a "punitive reprimand". In Napoleonic legislation, women, like minors, were regarded as legally incompetent. Although modern society regards violence in all its forms as something negative, discrimination against women persists in the legal systems of the countries.<sup>3</sup> Not only does this undoubtedly abet aggression against women, but it is a violence in itself.

In short, the problem is not a new one, but one that for a long time was little known about or was not regarded as a problem, since it derives from forms of conduct that in the past were accepted, and furthermore were regarded as belonging strictly to the sphere of private life. There can be no question but that the separation established between the public and private spheres has weakened the defence of women's rights. Even today, women in the family are represented in society through families headed by men, and this is so much the case that the issue of women heads of households, which has emerged in recent years, requires particular attention from the State, as legal, economic and social structures are based on the idea of households being headed by men.

Again, until very recently the family was regarded as a social unit beyond the reach of the supervisory powers of the State.<sup>4</sup>

The efforts made by the women's movement since the mid-1950s have brought the issue to international prominence. In the middle of this century, during the 1960s, feminist movements triggered a tide of family law reform in Europe, the guiding principle being equality: equality between children, equality between father and mother and equality between spouses. In the 1980s, Latin American and Caribbean legislation, with

its Roman and Napoleonic roots, began to be amended in the light of these same principles, which were further reinforced by the approval in 1979 of the Convention on the Elimination of All Forms of Discrimination against Women. Prior to these changes<sup>5</sup> masculine authority was enshrined in law, and the competence of women was recognized only in limited spheres. Some legislation even gave the husband the right of control and punishment, thereby openly permitting and propitiating violence against women.

Before the Convention, discussions in the Commission on the Status of Women and other international forums did not treat the issue of violence against women as one of human rights requiring a response from governments; on the contrary, the problem was considered in terms of domestic violence and violence affecting certain categories of women such as refugees and migrant workers. A section of the international community regarded violence against women as a private matter between individuals and not a public issue of human rights demanding action by governments and the international community.

The Convention approved in 1979, which marks a milestone in the development of protection for women's rights, did not address the issue clearly; it referred to it only obliquely by requiring States Parties to take appropriate measures to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women" (art. 5). Nonetheless this Convention, by requiring Governments to eliminate discrimination not only in the public sphere but in the private sphere as well, was one of the starting points for a series of international resolutions that removed the issue from the private sphere once and for all.

By the end of 1990, one of the most significant achievements of the women's movement was to have begun to move on from the view firmly established in society that violence against women was a private matter and to consider that all forms of violence against women, including domestic abuse, were a matter of public and international concern. This new approach has a crucial role in efforts to eradicate gender violence, and may be the most important contribution that the women's movement has made to the issue of human rights (United Nations, 1995).

The issue of violence against women was brought up explicitly for the first time in 1980, at the World Conference of the United Nations Decade for Women, held in Copenhagen. One of the 48 resolutions that came out of this was entitled "Battered women and violence in the family". This resolution sets forth the need to recognize that battering of family members is "a problem of serious social consequences that perpetuates itself from one generation to the next". It also notes that "...Long-held attitudes that diminish the value of women have resulted in virtual immunity from prosecution of persons who commit acts of violence against members of their families and against women in the care of institutions".

In 1982, the Economic and Social Council, meeting in Geneva, passed a resolution to the effect that battering of women and children, violence in the family and rape are an offence to the dignity of human beings. In 1983, the International Seminar on Violence in the Family organized by the United Nations and the alliance of NGOs for Crime Prevention and Penal Justice drew attention to the need to investigate the social and economic origins of family violence and its relationship to violence in society as a whole. In the same year, a worldwide survey carried out by the United Nations on the situation of women and the administration of criminal justice systems (1970-1982)

revealed how serious domestic violence was and how inadequate the criminal justice system for dealing with it.

In 1985, for the first time, the Nairobi World Conference that marked the end of the United Nations Decade for Women treated violence against women in the family as an issue that was of relevance to peace, pointing out that blows, mutilation, burning, sexual abuse and rape are a major obstacle to peace; it established the elimination of violence in the family as a priority and stated the need for "governments to try to create public awareness about violence against women as a social phenomenon", but it did not classify violence against women as a violation of human rights within the terms of the Convention.

It was in 1986 that the Economic and Social Council declared violence in the family to be a severe violation of women's rights, and in 1991 the Commission on the Status of Women recommended that a group of experts be convened to decide what international instrument was needed to deal with the problem.

In 1992 the Committee for the Elimination of Discrimination against Women adopted a general recommendation in which it was affirmed that, under the terms of the Convention, violence against women is certainly a form of gender discrimination that Governments are obliged to eliminate. It was specified that for such violence to be treated as gender discrimination it must be committed against women because they are women, or must affect them in a disproportionate way (United Nations, 1995). This includes acts that produce physical, mental or sexual suffering or harm, the threat of such acts, coercion or other deprivations of liberty. The Committee also considered that States were accountable for private acts of violence if they failed to prevent breaches of rights, or to investigate and punish acts of violence.

In August 1992, a working group of the Commission on the Status of Women submitted a draft Declaration on violence against women that was approved by the General Assembly in December 1993. It was recognized that violence against women is an obstacle to equality, development and peace and that the opportunities for women to attain legal, social, economic and political equality are constantly being limited by violence. Violence against women is defined as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life" (art. 1); and examples of acts considered to constitute gender violence<sup>6</sup> are listed.

A new stage in the commitment to combat violence began in March 1994 when the Commission on Human Rights agreed to approve a draft resolution to integrate the rights of women into the human rights mechanisms of the United Nations, and decided to appoint a Special Rapporteur to gather information and recommend national, regional and international measures to eliminate violence against women and its causes. This step had been proposed at the World Conference on Human Rights, held in 1993, which treated violence against women as a human rights issue.<sup>7</sup> In November 1994 the Special Rapporteur recommended that an optional Protocol to the Convention be drawn up to give victims of violence the right to petition individually, once they have exhausted all local means of redress. This proposal was approved in 1995.

In 1995, the General Assembly urged the States Parties to strengthen penal, civil, labour and administrative penalties in their domestic legislation to punish violence against women in the home, the workplace, the community and society as a whole; it also declared all forms of sexual violence and sexual trafficking to be a violation of the human rights of women and female children.<sup>8</sup>

In his International Women's Day message in March 1995, the Secretary General said that the time had come for the States to give the Declaration on the elimination of violence against women a binding legal form.

The strategic objectives of the Platform for Action adopted at the fourth World Conference on Women held in Beijing include studying the causes of violence against women and seeking methods to devise prevention strategies.

The legal measures proposed to meet these objectives encompass ongoing review and analysis of laws to ensure that they are effective, with emphasis on prevention, the prosecution of those responsible, victim protection, reparation and the rehabilitation of offenders. To this end, it is suggested that penal, civil, labour and administrative penalties be introduced to punish and compensate for harm caused in the home, the workplace, the community or society at large; in particular, it is suggested that punishments be introduced for members of police forces or other agents of the State who commit acts of violence against women while on duty. It is also proposed that patterns of social and cultural conduct be modified and that prejudices and customary and other practices be eliminated, when these are based on the idea of the inferiority or superiority of one of the sexes.

## II. INTERNATIONAL LEGAL FRAMEWORK

### A. UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on 10 December 1948. As an instrument that interprets the Charter of the United Nations, it constitutes the first binding legal statute on the subject of human rights (Binstock, 1997, II-C). It covers the subject of violence against women when it states that "all human beings are born free and equal in dignity and rights..." and that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex..."; and among the rights listed are included the right to "life, liberty and security of person..." and the right not to be subjected to "cruel, inhuman or degrading treatment" (arts. 1, 2, 3 and 5). The Declaration asserts that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law" (art. 8).<sup>9</sup>

### B. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

This Convention may be regarded, particularly in this area, as a development of the Universal Declaration of Human Right as relating to women, and it was necessary because of the traditional predominance of men over women, which was enshrined in laws and cultural and religious traditions. **The Convention**, although it deals only tangentially with the subject of violence against women, as a **binding legal statute** (Binstock, 1997, II-B), is a **sufficient basis for requiring States to take legislative and administrative measures to prevent, investigate and punish violence and provide for reparation for the harm caused.**

### C. DECLARATION ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN

In December 1993 the General Assembly of the United Nations adopted this Declaration, whose purpose is to reinforce and complement the process of applying the Convention and, above all, to give international prominence to the concern felt about violence against women. Thus, after defining what violence against women is (see above) it calls upon States Parties to punish and indemnify the harm suffered by women who are subjected to violence and to ensure that these women have access to the mechanisms of justice and are made aware of their rights and the procedures for enforcing them. It is likewise suggested that the States include appropriate measures in

national plans of action, take legal, political, administrative and cultural measures to prevent violence against women, and allocate budget funding for this purpose. In particular, it calls upon the States to ensure that re-victimization of women does not occur because of laws that are insensitive to gender considerations.<sup>10</sup> It should be mentioned that the Declaration includes a call for officials responsible for the prevention, investigation and punishment of violence against women to be given training to sensitize them to women's needs.

Special reference was made to the role that has been and can be played in this area by women's movements and non-governmental organizations, and the States were called upon to facilitate coordination of the work carried out locally, nationally and regionally. Likewise, stress was laid on the need for measures in the area of education to modify patterns of conduct, prejudices, customary practices and all other practices based on the idea of the superiority or inferiority of either of the sexes and on stereotyped roles for men and women.

The Declaration calls upon the specialist bodies of the United Nations to contribute to achieving these objectives in their respective fields of competence.

It concludes by giving priority to national legislation or any international convention that is more conducive to the elimination of violence. This provision is striking as it appears to suggest that the Declaration is binding on States that do not have legislation that is more "conducive" to the elimination of violence against women.<sup>11</sup>

### ***Optional protocol***

The World Conference on Human Rights held in Vienna in 1993 recommended the establishment of a procedure for reporting violations of the Convention on the Elimination of all Forms of Discrimination against Women,<sup>12</sup> and this was subsequently reaffirmed in the Beijing Declaration and Platform for Action. To implement this recommendation, the United Nations Commission on the Status of Women urged Governments to support the drawing up of a draft optional protocol to the Convention, and the matter was placed in the hands of an open-ended working group with a mandate to deliberate and note views.<sup>13</sup>

**The Protocol is optional and facultative because it is not an annex to the Convention but a new instrument that has to be ratified by the States. We understand, however, that once it is ratified it will be legally binding, since it can be regarded as a text that complements and interprets a Convention that is the main binding international legal human rights instrument for women.**<sup>14</sup>

The optional Protocol envisages a procedure for individual, group and intergovernmental complaints to be heard before the Committee for the Elimination of Discrimination against Women (CEDAW); the main objective of this Committee, which began to meet in 1982, is to consider reports from Governments on the measures adopted to give effect to the Convention and to prepare reports on the factors and difficulties involved in this process (art. 18). The original mandate of CEDAW excluded investigation of individual cases of human rights violations and the **draft optional Protocol, in consequence, extends the mandate of CEDAW.** The procedure envisaged requires the complainant, be this an individual or an organization, to show that their rights as guaranteed by the Convention have been prejudiced,<sup>15</sup> the Committee may investigate the facts, taking into account all relevant information even if obtained from sources other than the complaint, and assess to what extent the State has failed to comply with the provisions of the Convention; should it judge that a violation or

omission has occurred, the Committee may recommend specific measures to the State to remedy the situation complained of, and this may be done even before the final ruling if necessary for irreparable harm to be avoided (art. 5). The Protocol also provides the means for victims to be compensated. Within six months from receipt of the ruling, the State must send written explanations of the measures taken (art. 8).<sup>16</sup>

The Protocol will also be a monitoring instrument that CEDAW can use to supplement the periodic reports submitted by governments, and as such will strengthen observance of women's human rights, as States will seek to avoid international oversight.<sup>17</sup> Again, the Protocol will help ensure that women's human rights are integrated into the human rights mechanisms of the United Nations through the development of a specific doctrine and jurisprudence.<sup>18</sup>

At the meeting of the Commission on the Status of Women held in March 1996, it was recommended that CEDAW participate in the Protocol Working Group, and at the meeting last March it was decided that a proposal for non-governmental organizations to be authorized to submit complaints of non-compliance with the Convention would be put forward at the 1998 meeting. This proposal is of great value because of the work that non-governmental organizations (NGOs) have done and are still doing directly with victims of aggression. In art. 15 the Protocol stipulates that CEDAW should develop its own procedures for carrying out the functions conferred by the Protocol.





### **III. VIOLENCE AGAINST WOMEN AND THE REGION**

#### **A. INTRODUCTION**

In the Region, innumerable governmental and non-governmental forums were held to prepare for the 1993 World Conference on Human Rights. In 1992, the first Working Meeting of Regional Human Rights Organizations with Programmes for Women demanded that gender violence be treated as a violation of human rights and that human rights be redefined to change the male-centred approach that they embodied. At the satellite preparatory Conference "La nuestra" in the same year, the following were defined as acts that violated human rights: "any direct or indirect action or omission by the State or private individuals, in the public or private sphere, inflicted on women during their lives that has the intention or result of causing physical, sexual, psychological or emotional suffering or damaging their human dignity or integrity, denying us our right to self-determination in any area of our lives, and resulting in a lessening of our personal security...". In January 1993 the San José Declaration on Human Rights, adopted by the Latin American and Caribbean Regional Conference of the World Conference on Human Rights, reiterated that the State needs to prioritize actions aimed at recognition of the rights of women, participation by them on equal terms in public decision-making, the eradication of any form of discrimination be it overt or covert, and especially the elimination of gender violence.

In parallel with this, in July 1990 the Inter-American Commission of Women (IACW) held the First Inter-American Consultation on Women and Violence, and in 1994 the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women was approved in Belém do Pará, as the result of a Jurists' Congress in 1991 and national consultations carried out by IACW.

This Convention recognizes that gender violence perpetrated by agents of the State or private individuals constitutes a serious violation of human rights, and States therefore have the responsibility of punishing, preventing and eradicating it.

Again, the ECLAC member countries' Regional Programme of Action for the Women of Latin America and the Caribbean, 1995-2001 includes the subject of violence against women in one of its eight strategic areas, within the subject of human rights.<sup>19</sup>

The countries of the Region have responded to the issue of violence against women by passing special laws, dealing in particular with family or domestic violence, and provisions for sexual harassment, and by introducing reforms into penal statutes to categorize attacks on women as a crime. Those countries that have approved Equality Plans have also included the subject explicitly as a priority one.

The regional and national legal instruments referred to are analysed below.

## B. THE INTER-AMERICAN CONVENTION ON THE PREVENTION, PUNISHMENT AND ERADICATION OF VIOLENCE AGAINST WOMEN

This was approved in 1994 and has so far been ratified by 26 States. It should be noted that it expressly rejects the notion of violence against women being a private matter, and condemns both violence inflicted by private individuals and institutions and official violence. Within the Region it is the most solid instrument against gender violence, in that it provides for regional protection mechanisms comparable to the American Convention on Human Rights. It requires ratifying States, in their national reports, to state what measures have been taken to prevent and eradicate violence and to assist victims.

It includes measures similar to those contained in the American Convention on Human Rights, giving any individual, group or recognized non-governmental entity the right to lodge petitions containing denunciations or complaints of violations by a State Party of the obligations incumbent upon it under this Convention (arts. 12 and 17). Complaints or denunciations must be put before the Inter-American Commission on Human Rights, and the procedure to be followed is the one established in the Inter-American Convention on Human Rights (art. 46 and 47).

The preconditions for denunciations to be admitted are that the remedies of domestic law must have been exhausted first,<sup>20</sup> that they be submitted within six months following notification of the final ruling, and that no other proceedings of an international nature be pending. These requirements do not apply when there is no domestic legislation or due process for protecting the right that has been violated, when the victim has not been granted access to the resources of the domestic legal system or has been prevented from exhausting them, or when there is undue delay by the domestic legal system in issuing a ruling. When the purpose of a denunciation is to draw attention to general conditions as regards the violation of women's human rights, it may be anonymous; in response, the Commission may send out experts to investigate the problems, and these may publish special reports. A second type of denunciation is for individual cases of family violence and, in accordance with arts. 48 to 51 of the American Convention on Human Rights, the State that has been denounced may reply to the petition and the Commission may recommend measures to be implemented by the State to remedy the violation. **The binding force of this decision is that of the moral pressure applied to force the State to accept its responsibilities, but if the violation continues the General Assembly of the Organization of American States (OAS) may respond to the Commission's report.**

The mechanisms of this Convention do not apply directly to perpetrators: the Convention only recalls the State to its responsibilities when it fails to suitably prevent or punish violence, but the State is obliged to punish the perpetrators in its courts. The list of the State's responsibilities given in art. 7 is so comprehensive that it can serve as a basis for denouncing any violation of the right to be free from gender violence. Even failure to apply progressive compliance measures could be denounced under a broad interpretation of the article referred to.

This Convention gives States Parties and the Inter-American Commission of Women (IACW) the right to apply to the Inter-American Court of Human Rights for advisory opinions on its interpretation.<sup>21</sup> This means that the Court has the power to declare what constitutes a breach of this Convention and what States have to do, and this power may prove to be of great practical use because it means that the IACW can request advisory opinions on laws and practices that perpetuate the impunity of gender

violence; it can ask for an interpretation of the obligation of States to implement specific measures progressively (art. 8), and it can also participate in cases sent to the Court by the Inter-American Commission on Human Rights.<sup>22</sup> In short, this Convention gives the IACW a vital role in the struggle to eliminate violence against women.

The Inter-American Convention defines violence against women 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 private sphere" (art. 1). It covers violence that takes place within the family or domestic unit or in any other inter-personal relationship, including cases where the perpetrator shares or has shared the same home as the woman, and includes among other things "rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place... that is perpetrated or condoned by the State or its agents regardless of where it occurs".

Chapter II, which deals with the rights protected, is a very decisive one in that, after declaring that "every woman has the right to be free from violence in both the public and private spheres" it refers to the human rights and freedoms enshrined in regional and international instruments on human rights, and lists examples.<sup>23</sup> If we examine the rights listed, we find they are the same ones as are included in the Universal Declaration of Human Rights, the Declaration on the elimination of violence against women and the American Convention on Human Rights.

**Strictly speaking, this means that from a legal point of view violence against women is a violation of their human rights under the Universal Declaration of Human Rights internationally, and under the American Convention on Human Rights regionally, as these instruments enshrine the fundamental rights of human beings and expressly prohibit differentiation by sex. The new international and regional instruments dealing specifically with the human rights of women have however been necessary to contribute towards the elimination of the situations of violence that continue to affect women.**

A very useful contribution to the eradication of violence is chapter III setting out the duties of States, as it will enable some kind of oversight to be exercised within the Region, and this will undoubtedly create pressure for measures to be adopted if the mechanisms provided for in the Convention are made use of. In the legal area, in fact, it obliges States to include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women; to adopt legal measures so that perpetrators can be prevented from harassing, intimidating, threatening or harming women they have committed violence against; to amend or repeal existing laws and regulations or modify legal or customary practices which sustain violence against women and toleration of this; to establish the legal and administrative mechanisms needed to ensure that victims have effective access to restitution, reparations or other just and effective remedies; and to adopt such legislative or other measures as may be necessary to give effect to the Inter-American Convention.

There is recognition that, in general, discrimination against women is a form of violence as well an incentive to physical violence, in the form of a requirement for the States to comply with a number of progressive obligations such as promoting awareness of women's human rights and developing formal and informal educational programmes designed to modify social and cultural patterns of conduct and to counteract prejudices, customs and all other practices which are based on the idea of the inferiority of superiority of either of the sexes or on stereotyped roles for men and women.

The States are also required to promote the education and training of all those involved in the administration of justice, police and other law enforcement officers as

well as other personnel responsible for implementing policies for the prevention, punishment and eradication of violence against women, and to provide appropriate specialized services for women who have been subjected to violence. There is also an obligation, which must be regarded as a priority, to "encourage the communications media to develop appropriate guidelines in order to contribute to the eradication of violence against women in all its forms, and to enhance respect for the dignity of women" (art. 8, g). The responsibility of the State is reinforced in the form of an obligation to "ensure research and the gathering of statistics and other relevant information relating to the causes, consequences and frequency of violence against women, in order to assess the effectiveness of measures to prevent, punish and eradicate violence against women and to formulate and implement the necessary changes; and to foster international cooperation for the exchange of ideas and experiences..." (art. 8, h-i).

At its Assembly in November 1994, the IACW approved a resolution on "Promotion of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Convention of Belém do Pará" and the "IACW strategic plan of action". Both documents propose strategies in the areas of education, information and publicization; legal reforms to bring domestic legislation into line with international agreements and treaties and to secure approval for special laws to prevent violence against women, punish perpetrators and establish victim protection measures; and support services, such as comprehensive legal services and services to care for victims and treat perpetrators. The final strategy proposal is for statistics to be produced and research conducted on the nature, magnitude and key risk factors of violence; and for public servants in the judiciary, police, health service and education, and in general all personnel who in some way or another provide services to women, to receive training and be sensitized to the issue by means of large-scale awareness campaigns.

### **C. THE REGIONAL PROGRAMME OF ACTION FOR THE WOMEN OF LATIN AMERICA AND THE CARIBBEAN, 1995-2001**

As was noted earlier, this Programme includes the issue within the strategic area of human rights, peace and violence, the strategic thrust of which is to ensure "the universal, inalienable, indivisible and integral nature of all the human rights of women...".

The salient features of the Diagnosis included in the Programme are the consideration given to the structural origin of violence against women, the continuing existence of discriminatory laws that reinforce the inequality of women in society and the family, the obsolescence of legislation, poor administration of and difficulty of access to justice, and non-compliance with international conventions intended to eliminate discrimination and inequality.

The Programme proposes three strategic objectives: to consolidate full respect for the human rights of women "within a context where priority is given to the elimination of violence..."; "to promote action to make visible and eliminate all types and forms of violence against women"; and to sensitize the mass media to the culture of violence, with the aim of changing the image of women, which is the product of discrimination.

Strategic actions are proposed to attain these objects. In the legislative area, these may be summed up as the creation and strengthening of mechanisms to ensure compliance with international conventions and regional and national plans of action, in

the form of bodies responsible for carrying out monitoring and reporting transgressions; the promulgation of laws and/or the inclusion of provisions that treat violence as a public order problem and ensure that women can exercise their human rights, and thereby prevent, eradicate and punish violence against them; and support for the preparation of the optional Protocol to the Convention.

There are also proposals for actions with legislative backing to extend awareness of the human rights of women to every area of national life, promote the culture of peace by means of training activities aimed at the mass media, and incorporate human rights with a gender perspective into educational programmes at every level.

In another strategic area (II), "Economic and social development with a gender perspective", the Programme also urges the States to sign, ratify and implement the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.<sup>24</sup>

The binding force of the Regional Programme of Action derives from the fact that it is the result of an agreement, and it undoubtedly provides a direction and an incentive for action, since it is a framework for follow-up activities in the Region.<sup>25</sup>

#### **D. DOMESTIC LEGAL SITUATION OF THE COUNTRIES IN THE REGION**

##### **a) *General outlook***

The subject of violence against women is now dealt with by a number of statutes in the countries of the region: Penal Codes, Procedural Codes and Special Laws on Domestic and Family Violence and Sexual Harassment.

The move to legislate began in 1989 when Puerto Rico passed Law 54 on Preventing and Intervening in Domestic Violence. In 1990, Costa Rica approved the Law to Promote the Social Equality of Women, Chapter 4 of which deals with family violence; in the same year that country set up a watchdog body, the Defensoría General de Derechos Humanos or General Commission for Human Rights, with various specialist Commissions, one of them being the Commission for Women. During its first two years this Commission dealt with denunciations of family and sexual violence and sexual harassment. (In 1993 the Commission became part of the ombudsman's office, the Defensor de los Habitantes, with powers to defend the rights of women when actions or omissions are committed by the public authorities). In the same year a Women's Office was created in the Ministry of the Interior to provide free assistance in cases of physical, psychological and sexual violence against women, receive and process complaints, provide legal, psychological and medical assistance and arrange for admission to hostels. In the following years, the Bahamas passed its Law against Sexual Offences and Domestic Violence (1991), Barbados its Law against Domestic Violence (1992) and Peru its Law 26260 (1993). Since 1994, when the Belém do Pará Convention was approved, laws against family violence have been passed in Argentina,<sup>26</sup> Chile, Panama, Uruguay, Ecuador, Bolivia, Costa Rica, Mexico, Colombia, the Dominican Republic and Peru.<sup>27</sup>

In Venezuela there is a projected Reform to the Civil Code which proposes penalization of domestic abuse within couples, decriminalization of adultery and the abolition of extenuating circumstances relating to honour. A 1992 Bill against domestic and sexual violence, providing for civil and criminal penalties, is also in progress.<sup>28</sup> In 1993 a new type of magistrate was created, the Juez de Paz or Justice of the Peace,

with functions that include responsibility for resolving family conflicts, including violence and abuse within the family.

In Paraguay there is a "National Plan for the Prevention and Punishment of Violence against Women" run by an Inter-institutional Commission coordinated with the Department of Women's Affairs, which in turn is attached to the Office of the President of the Republic.

**All the laws promulgated are in accordance with the principles of the Declaration on the elimination of violence against women and the Inter-American Convention. They likewise reiterate the principles established in Nairobi.<sup>29</sup> They represent great progress because they give prominence to the issue in society and are instruments in the struggle against violence, for the protection not only of women but of entire families. Almost all of them refer to family or domestic violence.<sup>30</sup>**

Including the problem of violence against women in a law on violence within the family is, on the one hand, a good strategy for securing approval of a special law, since despite the progress made in the area of women's equality violence directed solely against women is still not sufficiently recognized, while on the other hand the problem of the abuse of children and the elderly has similarities with the abuse of women in terms of the sphere in which it generally occurs and the affective relationship that underlies it, which is an argument for a single law being formulated to cover violence within families. Nonetheless, as is indicated below, we believe that when this issue is addressed the problem of violence against women needs to be kept separate, as it has very specific characteristics based on discrimination.

**All the laws passed follow a strategy of justice for victims and dissuasion and punishment for perpetrators. As regards their contents, some of them include State policies, and all of them define violence, set up channels for denunciation, and establish more or less expeditious procedures, measures to protect victims and sanctions against perpetrators.**

### 1. State policies and plans

Some of the laws against family violence include a declaration concerning the policies and measures that are to be implemented by the State to eradicate and prevent family violence. Others assign responsibility for devising policies, plans and programmes to a State body: **the effect of these provisions is to place the State under real obligations, and they provide a basis for determining and enforcing the responsibility of the State.**

By way of example, the Bolivian Law referred to, in defining its scope, states that it "establishes the policy of the State against family violence" (art. 1). It confirms that "Eradicating family violence is a national strategy" and it includes a range of measures to be implemented by the State, which is enjoined to promote the **incorporation** into teaching processes of "attitudes and values of respect... working for access to and use and enjoyment of citizen rights without discrimination by sex..."; to foster a process of "modification of the social and cultural patterns of conduct of men and women, including the design of educational programmes... to counteract prejudices, customs and practices of every kind that are based on the supposed inferiority or superiority of either of the sexes..."; to give greater currency to "the rights of and protection for women... avoiding discrimination or acts of violence that are detrimental or damaging to their health"; to train medical staff in the care and treatment of victims; to coordinate joint actions between medical services and integrated legal services; to train those involved in the administration of justice, the police and other officials

responsible for applying this law; to mount awareness campaigns through the mass media to strengthen opposition to family violence, publicize the rights of women and disseminate the conviction that family violence is an attack on human rights; to publicize the Convention, the Inter-American Convention and this law both among the general public and among political decision-makers; and to include this law in the National Education System and as course material in armed forces institutions and the National Police Academy (chapter 1).

The Colombian Law includes a section (V) on family protection policy, which gives the Colombian Institute for Social Welfare the responsibility of designing policies, plans and programmes to prevent and eradicate family violence. The Institute is ordered to set up a family violence database, for which all the authorities responsible for receiving and processing complaints will update the necessary information every six months so that research can be carried out to help prevent and eradicate this problem. The Law contains a final article which is very important, as it authorizes the central Government to allocate the funding necessary to carry this out.

The Mexican Law includes a social policy measure, the creation of a Council for Preventing and Attending to Violence in Mexico City, whose functions include designing a general programme to prevent and attend to family violence and producing a quarterly assessment of achievements and progress.

Likewise, the Puerto Rican Law includes a number of preventive measures to be taken by the Women's Affairs Commission, the aim of which is to strengthen public policy on domestic violence (educational and research functions), authorize collaboration and coordination between the Commission and the agencies of the justice system, and establish programmes to help victims recover and rehabilitate offenders.

The Ecuadorian Law requires the National Women's Department of the Ministry of Social Welfare to produce policies, coordinate activities and draw up plans and programmes to prevent and eradicate violence against women and families. It also establishes hostels, refuges and rehabilitation centres for offenders and families and other educational measures relating to training, research and information, together with funding provisions for this.

The Venezuelan Bill provides for the establishment and defines the functions<sup>31</sup> of a National Commission for Preventing and Attending to Domestic and Sexual Violence, attached to the Ministry of Justice, which is required to "formulate and coordinate execution of the policies and programmes to prevent and attend to domestic and sexual violence which are to be implemented in different offices of the Executive".<sup>32</sup>

Those countries that have Equality Plans have also incorporated the subject of violence into these as a matter of priority concern.

In its Equality Plan 1996-1998, Costa Rica has included action to support reform of the Civil Proceedings Code with a view to incorporating legal mechanisms to protect people's rights to life, security of the person and liberty, and reform of the section of the Penal Code that relates to sexual offences, so that the legal goods protected are no longer "honour" and "virtue" but security of the person and the right to personal freedom, without distinction as to sex.

The Mexican National Women's Plan provides for review and updating of codes, laws and regulations so that sexual offences can be defined more clearly, sexual harassment defined, and violence against women in all its manifestations be prevented and punished more severely when it occurs.

The Equal Opportunities for Women Plan in Chile proposes to work towards the eradication of family violence, develop prevention mechanisms, improve information

services, raise the standard of victim support services and give suitable training to those who look after or have contact with victims.

Likewise, the Paraguayan Plan<sup>33</sup> that was recently approved sets out very precise details of actions to prevent and punish the different forms of violence and to give appropriate support to women who are subjected to it. Like the Chilean plan, it specifies which body is responsible for each of the actions proposed.

**All the policy declarations and proposals of the equality plans referred to reiterate what has been established in international and regional Declarations and Conventions and are in accordance with the objectives and actions proposed in the Regional Programme of Action 1995-2001.**<sup>34</sup>

## 2. Defining violence

The laws of the different countries define violence as physical or psychological aggression or abuse by one of the members of the victim's family.<sup>35</sup>

The Laws of Puerto Rico and Ecuador are notable in that they define domestic and family violence, respectively, as physical, psychological or sexual abuse of women, but only the Puerto Rican law speaks of violence within couples.<sup>36</sup>

Some laws specify the different manifestations of sexual aggression, including marital rape (imposing unwanted sexual conduct).<sup>37</sup>

The first law in the region to define marital rape was that of Puerto Rico; this is one of the most important achievements of the law as it breaks with the age-old idea that women are the property of their husbands and that marriage implies lifelong consent to sexual relations.

A noteworthy feature of many of the laws<sup>38</sup> is the precise description they give of what is meant by the different forms of aggression.<sup>39</sup>

What needs to be emphasized is the way these laws transform the concept of the family. The common denominator is the wide range of relationships covered by the definition of family violence and the spheres where this is deemed to take place. Not only is a de facto union regarded in all cases as producing the bond required for violence to be regarded as domestic or occurring within the family,<sup>40</sup> but other people forming part of the domestic unit on a permanent basis are also included.<sup>41</sup> Some laws do not even require a "de facto union", it being enough for the perpetrator and the victim to have had a child together. Some laws also regard violence committed against former cohabitants as being family violence.<sup>42</sup> **This reveals a surer understanding of what actually happens in society; the aim is to protect people from violence in the context of current relationships as a couple, regardless of their legal status.**

## 3. Legal goods protected

The physical and mental health and security of family members; the right to dignity, life, security and peace, harmony within the family, equal rights and respect for privacy and the good name of individuals are the legal goods protected by the different laws against family violence.

Accordingly, the Argentinean Law is designed to protect the physical and/or mental health of any of the members of a family, and contains express provision for the accused and his family to receive free medical and psychological treatment.



The Chilean Law is also designed to protect "physical and mental health", but the Equality Plan focuses on development with equity and equal opportunities for women.<sup>43</sup>

The laws of Bolivia and Mexico protect the person. The Bolivian Law speaks of the physical, psychological, moral and sexual security of every member of the family (art. 2). The same is true of the Ecuadorian Law, but it refers expressly to women, and not just to members of the family. The Mexican Law only mentions the physical and mental security of members of the de jure or de facto family group.

The Puerto Rican Law includes a public policy declaration about the problem of violence within couples, which is recognized as a serious and complex social problem that limits the right of those who confront it to dignity, life, security and peace.<sup>44</sup>

The Colombian Law is designed to secure the harmony and unity of families, equality of rights and opportunities between men and women and respect for people's privacy and good name in the handling and resolution of family conflicts.

#### 4. Procedures

In general, special laws against family violence provide for prompt procedures with very short delays, the aim being to provide immediate protection. Characteristic of these procedures is the process of reporting an offence. By way of example, complaints may be made directly, without the assistance of a lawyer being required, before a magistrate, the police or the Public Ministry, where there is one. Some laws stipulate that any magistrate is competent. Except in the case of sexual violence, not only the victim but any person who has knowledge of the facts is entitled to lay a complaint. Complaints may be made verbally or in writing, and to make the process even easier some laws require Courts to provide forms and assistance in completing them, which means that women themselves can set the wheels of justice in motion without having to depend on anyone else. A number of laws make it obligatory for public servants who learn of acts of violence to lay a complaint. Almost all the laws provide for a conciliation or arbitration hearing.<sup>45</sup> Arbitration has been greatly criticized on the basis that it defeats the object of a special law on violence within the family, which is to give the community a clear message that violence will not be tolerated or condoned.

When acts of violence are classified as criminal offences, the laws tend to assign jurisdiction to the criminal courts<sup>46</sup> under the procedures followed by these. Some of the laws require whoever receives the complaint to refer the matter to these courts.

**Procedures are of vital importance, as they determine whether special laws will achieve their objectives or not. Victim protection depends to a great extent on ease of access to justice and the timely application of measures to prevent renewed violence.**

To illustrate the approach taken as regards procedures for acts of violence within couples and families, the salient features of the provisions of the special laws passed in certain countries in the region are summarized below.

The Argentinean Law stipulates that the complaint must be made verbally or in writing before a magistrate competent to deal with family matters. If the complainant is a minor or incompetent, he or she may apprise the Public Ministry of the facts directly or make the complaint before the judge through a representative. Public or private welfare, social or educational services, health care professionals and public servants who may learn of a case in the course of their work are obliged to make the complaint. The judge may order an expert appraisal to determine what harm has been caused and whether the family is in danger, and is entitled to order precautionary measures; within

48 hours from when the precautionary measures are taken he must convene the parties and the Public Ministry to an arbitration hearing at which the family will be urged to attend educational or therapeutic programmes.

Under the Bolivian Law, the complaint may be submitted verbally or in writing with or without the assistance of a lawyer to the competent magistrate, the Public Minister or the police. The competent magistrate is the Family Examining Magistrate or, where there is none, the Examining Magistrate. When the violence constitutes an offence as defined in the Penal Code, only a criminal judge is competent (arts. 21, 14 and 15). **Indigenous and rural community authorities are competent provided they do not act in a manner that is contrary to the Constitution or to the spirit of the law** (art. 16). The complaint may be made by the victim, the victim's relatives or any person who has knowledge of the facts. In the case of sexual violence, only victims can make complaints unless they are under 18 or are of age but incompetent. Workers at public and private health establishments who receive or attend to victims are obliged to lay a complaint.

In cases where the complaint is made to the police, they must refer the information to the competent magistrate within 24 hours, and when it is made to the Public Ministry the parties will be convened to a conciliation hearing within 24 hours, after which, if conciliation cannot be effected, the case will be referred to the competent magistrate. A magistrate receiving a complaint will schedule a conciliation hearing to take place within 48 hours; if the person entitled to take action does not appear, they will be deemed to have withdrawn the complaint. At this hearing the judge will receive evidence, hear the parties and issue a ruling. If circumstances require it, the judge may call for a psychological assessment of the accused and the family, in which case the report must be submitted within 7 working days, after which the judge will issue his ruling, with or without reports. It is specifically stipulated that proceedings for family violence cases are strictly confidential (art. 41).

Under the Chilean Law, complaints are to be made before the competent judge who is the duty magistrate in civil matters for the place where the affected person lives, or before the Carabineros or Investigative Police. If the matter reported constitutes a criminal offence, the civil court must refer the proceedings to the competent criminal court. If the Carabineros or police receive the complaint, they must bring it to the attention of the competent judge. The complaint may be laid by the person affected or by anyone else who has direct knowledge of the circumstances, without a lawyer being required. The court will summon the parties within eight working days to a hearing at which all the evidence must be presented, and the judge will seek to effect a conciliation. If this effort is successful, the proceedings are at an end. If not, the court will request evidence which must be submitted immediately, and the hearing will continue past normal hours, if necessary, until it is concluded. Once the evidence has been taken, the court will summon the parties, and may decree measures within the three days that follow, with time limits for compliance.

In the Colombian Law, it is stipulated that any person in a family who is subjected to some form of assault by another member of that family may apply for an immediate restraining order, without prejudice to the right to bring a criminal charge. The family or municipal magistrate will have jurisdiction or, failing this, the family magistrate of the place where the victim lives. The petition may be made "in writing, orally or by any means that serve to apprise the judge of the facts..." and must be submitted within eight days from the event that is being reported, either by the victim in person, or by any person acting on their behalf, or by the family commissioner when the victim is unable to do it personally (arts. 4 and 9).<sup>47</sup> The petition must contain an

application for the proofs that are considered necessary. If the petition is based on at least circumstantial evidence, the judge will issue a provisional restraining order within four working hours. In cases where the act that is the subject of the complaint constitutes a criminal offence or contravention, the judge will pass on the initial investigation results to the competent authority, but will still apply the protective measures (art. 6). Once the petition has been admitted, the accused will be summoned to a hearing within five to ten days; before the hearing the accused may submit depositions, request examinations and propose formulas for reconciliation with the victim. The judge, before and during the hearing, must seek formulas to resolve the conflict "in order to secure the unity and harmony of the family, and in particular to ensure that the assailant mends his behaviour". At the same hearing the judge will carry out the examinations requested and those he considers appropriate. If the assailant does not appear, he will be deemed to have confessed; if the victim does not appear, the case will be deemed to have been dropped. At the end of the hearing the judge will issue a ruling (arts. 11 to 16).

The Ecuadorian Law establishes that any person who is apprised of the facts may lay the application or suit before the family magistrate in writing, whereupon the magistrate may order protective measures and convene a conciliation hearing between two and eight days from when the accused is summoned. If conciliation is not achieved, proceedings will be opened for evidence to be submitted for six days, and the appropriate ruling will be issued.

The Mexican Law establishes that acts of family violence may be reported at police stations by any person who has knowledge of the facts by virtue of their closeness to the victim of the violence.<sup>48</sup> The police station is responsible for summoning those involved so that a conciliatory legal procedure can be carried out, this being prior to any investigation, criminal proceedings or civil trial. Conciliation and amicable settlement or arbitration procedures are the essence of the law. No protective measures even of a provisional kind are provided for. Offences that are formally prosecuted are excluded from these arrangements. Conciliation is to be effected at a single hearing, and if the parties reach some accord the appropriate agreement will be concluded. If this does not happen, the parties may decide, by mutual agreement and in writing, to submit the case to amicable settlement, a procedure that concludes with an agreement which is enforceable and binding for both parties. This procedure is carried out at a hearing where the parties present their evidence and verbal pleas. The law requires any authority that has knowledge of "conduct giving reason to believe that a crime has been committed" as per the Penal Law to notify the appropriate body.

The Puerto Rican Law states that when an act of domestic violence is committed a protection order may be applied for from any judge; the application may be made directly by the victim or through the police, a legal representative or a third person, verbally or in writing. It is worth noting that to facilitate the process the law stipulates that the court clerk must provide forms and assistance in filling them in, thus enabling women themselves to set the legal process in motion without having to depend on anyone else; a restraining order can be issued immediately, and the assailant then summoned to a hearing at which the judge may order a range of protective measures. When the act of violence constitutes a criminal offence, the procedure is as established in the Criminal Proceedings Code.

In the Dominican Republic, the Law is only an amendment to the Penal Code defining family and sexual violence, so the procedure is as provided for criminal trials.

## **5. Victim protection measures**

Victim protection measures are the essence of laws to deal with family violence. In some cases, these may be ordered by the judge as soon as he learns of the complaint and before the alleged assailant is summoned, since the purpose of these measures is to ensure the physical or psychological safety and protection of the victim. They consist essentially in restraining orders preventing the alleged assailant from entering the home and workplace of the victim, and provisional measures concerning any children. They may also include participation by administrative bodies so that these can coordinate public and private services to provide assistance to victims of violence. The laws are particularly precise when it comes to listing these measures.<sup>49</sup> Some of the laws place an obligation on the police to provide certain forms of protection (in Bolivia there are what are called Family Protection Squads which are a component of the National Plan for the Prevention and Eradication of Violence against Women), consisting mainly in providing immediate assistance to the victim as needed and placing the facts on record for the purposes of evidence.<sup>50</sup> It is worthy of note that the Mexican Law, in whose system of administrative justice police stations play a vital role, requires these to provide specialist psychotherapy free of charge to the victims of violence and the perpetrators.<sup>51</sup>

## **6. Punishment of perpetrators**

If the act of violence is not classified as a criminal offence, some laws stipulate a fine or imprisonment as punishment, or a fine convertible into imprisonment, and these penalties may in certain circumstances be doubled, suspended or replaced by others. If the act is classified as a criminal offence, penal law will apply.<sup>52</sup> The laws of Puerto Rico and Colombia stand apart in this respect, as in different ways they provide for measures of a penal nature. Chapter III of the Puerto Rican Law provides for measures of a criminal or punitive nature for the five forms of abuse within a couple<sup>53</sup> that constitute serious offences under the criminal statutes. The penalties vary depending on any attenuating or aggravating circumstances attached to the offence. For the offence of conjugal sexual assault, the Law provides for the same penalties as the Penal Code does for rape. Failure to comply with a restraining order constitutes a less serious offence that entitles the police to make an arrest if they are aware that this exists and have good grounds to believe that it has been disobeyed (art. 2.8).

Section V of the Colombian Law refers to crimes against the harmony and unity of the family and prescribes a one to two year prison term for those who abuse any member of their family physically, mentally or sexually (art. 22). When the abuse causes bodily injuries, the penalty prescribed for the offence concerned is increased by from a third to a half (art. 23). When a person is convicted of a punishable act against a family member, they will be obliged to undergo rehabilitation (art. 26).<sup>54</sup> When the act of violence does not constitute a criminal offence the judge, in the final protection order, may require the perpetrator to undergo rehabilitation treatment in a public or private institution at his own expense, if he already has a record of family violence. In all cases the judge will order the perpetrator to pay for damages caused, including among other things medical, psychological and psychiatric costs. Non-compliance with protection measures is punished by a fine convertible into imprisonment.

Under the Bolivian Law, if the acts of violence included in that Law do not constitute offences under the Penal Code, they will be punished by a fine to be paid

within three days. If the fine is not paid, it will be converted into imprisonment for a period of no more than four days. Penalties may be doubled in the case of repeat offences or if the victim was pregnant, older than 60 or disabled. The penalty may be suspended and replaced, depending on the nature of the act and the character of the perpetrator, by psychological therapy or community service (arts. 7 to 13).

Under the Ecuadorian Law, the punishment is an indemnity which may be replaced by community service.

The Chilean Law provides for alternative penalties: up to 6 months attendance of therapeutic or family guidance programmes, a fine convertible into imprisonment, and prison terms of every degree. The two latter penalties may be commuted to community service. The regulations of Law no. 19,325 referring to penalties appear in the *Diario Oficial* of 5 February 1996. These establish measures for supervising therapeutic family guidance programmes and the characteristics and supervision procedures of community work. Likewise, these regulations require the Registry and Identification Service to keep a Special Register of Convictions for acts of family violence in the central database of its computer system, and prescribe what information is to be recorded there.

The Venezuelan Bill requires measures to be taken to ensure that those held in custody or convicted for acts of violence covered by this Bill work and receive an income that enables them to meet their family and personal obligations. For this purpose, the judge will decide what amount is required to cover the needs of the family, and make the appropriate deductions. In addition, it is stipulated that the sentence will be served in a special section where education and prevention programmes are carried out (art. 28).

#### **b) *Review of laws on family violence as applied in practice***

Since the oldest of these special laws has been in operation for only a little over seven years, and most of the countries that have passed laws on this issue have done so in the last three years, it is too early to take stock of their effectiveness.

Nonetheless, the evaluation reports on some of these laws do provide us with information that enables us to form a view of what these statutes have meant as instruments for combating violence in the family, and violence within couples in particular. That this is possible is due to the great similarity that exists between the countries of the region in terms of the social structures and historical culture from which violence comes, and of the way the rights of women and the organization of the family are regarded.

The Puerto Rican Law, which was the first to be passed, has been evaluated a number of times, from the year it came into effect onwards.<sup>55</sup> The Chilean Law has also been formally evaluated.<sup>56</sup> The Mexican Law, again, has been commented upon in academic works (González and Illán, n/d) as an administrative justice law, since for extreme cases of family violence where there is no prospect of arbitration or when administrative justice can no longer apply, recourse has to be had to civil and penal statutes. This law, which only applies in the Federal District, provides solely for a conciliation procedure and an amicable settlement procedure when the act of violence does not constitute a criminal offence, which means that it is a useful tool, but needs to be supplemented by other civil and penal procedures that do not yet exist.<sup>57</sup>

The evaluations of the Puerto Rican Law have furnished the following information:

- *Increase in complaints*

The evaluations carried out have found that the greatest achievement of the Law has been to increase the number of complaints. The number of cases attended to by the police and the Department of Justice through public prosecutor's offices shows how great the need was for legal remedies to deal with the problem of domestic violence. Since the Law was passed, accusations of domestic violence have increased to around 15,000 a year.

- *Wavering support in key sectors*

One of the greatest difficulties in implementing the law tends to be the attitude taken by the officials responsible for applying it. In Puerto Rico it was demanded that the Law be amended before all its provisions were applied; within the first year the criminal justice system came out as an ally of offenders by seeking ways to avoid "flooding the jails" or the courts (Vicente, 1993, pp. 98 and 99).

The police, meanwhile, declared that domestic violence was a social problem and not a criminal one, which meant that the Law could not resolve it. The Women's Affairs Commission regards this view as amounting to "unwillingness to accept the authority of the Law", and has stated that this Law is a tool to support efforts "to eradicate a problem that humanity has lived with for centuries and that cannot be solved by law" (Isis Internacional, *Boletín*, No. 2, 1993).

Thus, the evaluations carried out find that the response of the agencies composing the system that administers judgement has been "confused and weak". A report from April 1993 goes further in proposing that an Inter-agency Council be set up with the objective of producing and implementing a plan of action to consolidate the implementation of the law. The main recommendation made is that "all members of the legal community contribute by example and leadership to promoting this law" (Isis Internacional, *Boletín*, No. 2, 1993).

- *Ignorance of the law*

The evaluations carried out reveal difficulties in applying the law due to ignorance of it on the part of public servants and attitudes associated with the stereotypes of a patriarchal society. Clear examples have emerged in relation to restraining orders, for which no criminal charges need be established; despite this, officials in the justice system have prevented restraining orders being made when no criminal charges have been established. There are instances of judges failing to implement restraining orders issued by other courts, and other cases where these orders have been issued for short periods, discouraging victims from reapplying for them.

- *Charges dropped by the victim*

It is stated that once victims have set the legal process in motion, they have often chosen not to proceed, and it has consequently been proposed that an arbitration process be established before criminal charges are laid. This complaint, which has some truth to it in that many women do drop charges, is nonetheless unjustified since the system must provide room for the needs of victims of this type to be listened and attended to, as otherwise they will feel impelled to withdraw from the system (Vicente, 1993, p. 98).

- *Lack of support services*

Seven years after being passed, the Law still has complaints levelled at it, and its supporters claim that the greatest difficulties in applying it arise from a shortage of hostels for victims and of rehabilitation programmes for offenders, who furthermore often refuse to accept rehabilitation. Other problems referred to are a lack of specialist staff and funding.

The most important information obtained from studies of the Chilean Law in action is as follows:

- Most of the complaints relate to physical assault, and are only made once these assaults have been continued for seven years or so.
- Most complaints are made to the police and not the courts.
- The mere fact of the complaint being made leads to the violence being discontinued in 47% of cases and dropping in frequency in 25% of cases.
- The procedure is too long, as the deadlines stipulated are not met.<sup>58</sup> Stress is laid on the need to speed up the process and establish mechanisms to provide the courts promptly with the necessary background information so that they can rule on precautionary measures.
- Conciliation hearings do not produce very useful results.<sup>59</sup>
- Charges are dropped in 49.3% of cases, the main reasons being a change in the behaviour of the perpetrator and the exigencies of the proceedings.
- The need for training to be given to legal officials (judges, clerks) and the police is established, and it is argued that there is a need for specialist support staff in the civil courts.

At the end of 1996 the Inter-American Commission of Women (IACW) carried out a review in the region and noted the following as having been achieved during the decade in relation to the issue of violence against women:

- Visibility and debate in society, which is helping to reveal the scale of the problem.

- The clear need in most of the countries for official institutions providing assistance to women victims of violence to be established and/or reinforced.
- Progress in the area of legislation through reform of discriminatory laws and the passing of new laws on domestic violence; greater emphasis on the defence of human rights and, in this context, recognition of violence against women as a violation of human rights, both regionally and internationally.
- The importance taken on by women's movements both nationally and internationally, which makes it easier to deal with the issue more specifically and enables regional strategies to be proposed.

The obstacles still to be overcome, according to this IACW review, are: a lack of resources for national bodies to develop and implement suitable working plans, for victims to receive appropriate and comprehensive support, and for the process of reforming national laws to be completed.<sup>60</sup>



## IV. CONCLUSIONS AND PROPOSALS

### 1. Special laws or reforms to penal and civil codes?

Countries that seek to deal with the subject of violence against women by means of civil and penal statutes do not resolve the problem from a legal point of view, since civil laws only relate to torts and penal laws establish general categories, as is the case with the offences of bodily harm and threatening behaviour. This leaves out of account, on the one hand, the emotional bond which is at the heart of family violence and is the particular reason for distinguishing it from injuries that are inflicted outside of cohabitation relationships: those who commit violent acts in these circumstances are taking advantage of a relationship of moral, economic and/or emotional dependency. On the other hand, criminal proceedings are designed for situations that can be visualized; violence within couples takes place in private, and requires legal proceedings that take account of its specificity. This specificity means there is a need to provide for acts that are not included in penal categories because of their lesser seriousness, but which are the most common in this situation and which, most importantly, are the ones that initiate the cycle of violence and subsequently worsen until they reach the levels envisaged by penal categories.<sup>61</sup> Consequently, if penal law categorizes violence against women within couples, it will also be necessary to provide for special procedures that are less cumbersome in terms of proof and delays, since one of the characteristics of this type of violence is its repeated nature, as the parties involved generally live under the same roof.

The purpose behind special laws goes beyond the categorization of offences; the aim is to take a comprehensive approach to different aspects and needs, to seek to include alternative forms of punishment, civil remedies and educational measures aimed at prevention and awareness training in a single law, and to classify as criminal conduct the greatest possible number of ways in which violence against women can manifest itself: physical, psychological, verbal or sexual violence, or violence against objects or human beings they are fond of.

Consequently, for these special laws to be complete, they need not only to provide for precautionary measures, but to classify infractions of civil and penal laws. This is legally unobjectionable since family violence has very specific characteristics which are different from those evinced by violence that occurs outside of couples or what is recognized as the family sphere.

Nonetheless, there is no doubt that for these concepts to be strengthened and legislation made consistent, not only are laws on violence needed, **but certain provisions of civil and penal statutes need to be reformed.** Thus in the civil sphere, for example, violence within couples should be included as grounds for separation and divorce<sup>62</sup> and violence against the children as grounds for deprivation of paternal authority. In the penal sphere, the legal goods that are protected in the classification of the crimes of rape and sexual abuse should be "personal security" and "freedom" and not "virtue" and

"honour"; and extenuating circumstances based on honour should be reviewed in the light of the new approaches.

## 2. The law as an instrument in the struggle against violence

The evaluations carried out show that there has been an increase in complaints since the laws were passed, which reveals how necessary they were.<sup>63</sup>

Nonetheless, it may be stated that **such laws are only one more instrument in the struggle against violence; but this does not mean they are not important**; on the contrary, efforts to equip all countries with this tool need to be redoubled. Laws on violence are a useful alternative for many women, and furthermore they have transformed the legal debate by making it clear that the problem is a social one and not a personal matter between husbands and wives. Sometimes, even discussing a bill can have an important effect in increasing awareness and mobilizing opinion.

A special law also **provides a framework for continuous evaluation and for improving the response of the State**. It can contribute enormously to eradicating violence against women, if it embraces all the components of the legal system and sets out clearly who is the victim and who the aggressor. Laws need to set out from the reality of gender violence, which is that the aggressors are generally men and the victims mostly women (Facio, 1996, p. 128). The principle that everyone has an equal right to protection before the law implies equality of conditions, and if this does not exist the application of this principle will result in those who suffer from inequality being left unprotected. In conclusion, every provision of the Law should proclaim that its purpose is to prevent and eradicate violence against women within couples; and **although the law by itself will not change cultural norms, without it crimes will continue to go unpunished**.

## 3. Easy access to justice

Procedures are vital if the objectives of special laws are to be met. Consequently, they should be as rapid and uncumbersome as possible. The following aspects are of particular importance:

a) It must be made as easy as possible for acts of violence to be reported. The provision of forms and assistance in filling them in is a very positive measure as it enables women to act directly, without any special knowledge. Enabling complaints to be made to the police and creating private areas within the police and courts are other useful measures.

**Ideally, Women's Offices should be set up to receive complaints.**<sup>64</sup> It also facilitates reporting if complaints can be lodged by any person who has knowledge of the facts and if reporting is made obligatory for public servants who learn of such facts in the course of their duties. This is very important, because the characteristics of the bond existing between victim and assailant often means that the victim does not dare, or does not wish, to make a report.

b) Conciliation or arbitration. Almost all the laws passed contain provision for conciliation or arbitration hearings.<sup>65</sup> Conciliation has come in for criticism, since its sole objective appears to be to maintain the unity of the couple, sidestepping the real problem.<sup>66</sup> One cannot however ignore the importance of this procedure as a rapid and expeditious way of finding a solution to certain concrete aspects of cohabitation that

can end in violence. It should be possible to develop bases of agreement that do not attribute special priority to preventing the couple from separating but that give equal consideration to the physical and mental security of the victim and the maintenance of the couple. One way of achieving this objective is to place arbitration in the hands of staff who are specially trained for this function.<sup>67</sup> Possibly a Women's Office would be the most suitable venue both for lodging complaints and for carrying out this stage of the procedure.

c) Training for court officials (judges, clerks and legal officials in general) and the police is a need that emerges from all the evaluations carried out. **This should include training to sensitize them to the issue and make them aware of the legal provisions that exist.**

d) The protective measures envisaged by all the laws on violence need to be immediate if they are to attain their objective; there is therefore a need for mechanisms that rapidly provide courts with the information they need to authorize them; **this could be achieved by having specialist staff at the disposal of the court. To be effective, such measures should not have a time limit but should remain in force until it has been determined that the legal good being protected is secure.**

e) It needs to be ensured that the process is short and efficient, as the laws on violence that have been passed provide. To achieve this, it is proposed that follow-up work be organized to determine whether conciliation, protective measures and penalties have been complied with, and what effects they have had on the relationship between the victim and the aggressor. **The creation of monitoring bodies answering to the court or to the administrative authority in charge of the issue of family violence could be a solution.**

f) To ensure that violence is punished, it is proposed that non-appearance of the complainant not be treated as withdrawal, and that proceedings be continued; i.e., **once the complaint has been submitted, withdrawal should no longer be an option.**<sup>68</sup> The evaluations that have been carried out on the application of special laws show that women drop proceedings not because the situation has been resolved, but because the process stretches out and in many cases they are not called to testify, while others are poorly advised by the very officials who should be supporting them.<sup>69</sup> Preventing withdrawal is also consistent with society's interest in refusing to tolerate violence.

#### **4. Adequate support structure**

For a law to be efficient and effective, it is vital for supporting institutions to carry out their part of the work successfully. For this, the involvement of universities and academic institutions, under the coordination of the courts, is indispensable, as is coordination between the courts and civil society with its grass-roots organizations, neighbourhood associations, mothers' unions and other self-help groups that are set up in the community. **This coordination can be given legal backing in the provisions of the special law on violence and municipal regulations to promote and organize support networks for the victims of violence.**

## 5. Changing the legal system

The purpose of the laws is to provide for the administration of justice as an instrument of social change, but it should not be lost sight of that this is perceived in a way that reproduces the gender views which permeate society, and which are still discriminatory. It is now accepted that, although discriminatory laws still exist, they are in a minority and the problem that remains is with the effectiveness of provisions that enshrine equality, to the point where in some situations provisions that are not discriminatory are interpreted as though they were.<sup>70</sup> Consequently, the effectiveness with which laws are applied is bound up with the attitudes, ideas and beliefs of the people who make up the legal system.<sup>71</sup>

The legal community should be prepared to accept the obligations and functions ascribed to it by the laws on violence. It is not easy to change the attitudes of defence lawyers, public prosecutors, judges, policemen and other officials in the justice system; there is therefore a need for training and sensitization, as the law cannot by itself change the sexist ideology that prevails in society.<sup>72</sup>

## 6. Policies and plans to eradicate violence

It has been maintained that a special law on violence needs to include clear and precise terms of reference for the public order authority regarding its responsibilities and its obligation to intervene in incidents of domestic violence, and to refer to the obligation of the State to develop programmes of education and services aimed at removing the social causes and reducing the effects of violence against women (Vicente, 1993).

From the point of view of legal structure this is questionable, as it seems more appropriate for these obligations, which in the laws passed are usually set out in very general terms,<sup>73</sup> to be dealt with in the opening considerations or bases of the special law. Nonetheless, whether or not the special law includes policies and obligations for the State,<sup>74</sup> **it is necessary, if violence within couples and the family is to be combated effectively, for concrete plans of action to be implemented to set timetables, and for funding to be allocated to these.**

These plans need to include all kinds of measures: campaigns in the media, publicization of rights and of the authorities that victims can turn to, and sensitization and training at different levels, particularly of public servants who are concerned with the issue because of the positions they hold, etc.

## 7. Violence and education

In the struggle against violence within couples the role of education is crucial, especially in terms of prevention. One legal supporting measure could be to make it legally obligatory for pre-school, primary and secondary education curricula to include content aimed at familiarizing and socializing pupils with the values of equality, respect, tolerance and the peaceful solution of conflicts, and preparing them for a family life in which domestic obligations and rights are shared between men and women. Educating the young has been highlighted as an indispensable part of the effort to eradicate this problem.<sup>75</sup>

Another measure in the area of education would be to include the subject in the professional training curricula of doctors, social workers, lawyers and others training for professions that will bring them into frequent contact with the issue.

### 8. Violence and the media

Today, it is the communications media that have the greatest potential to exercise a direct and rapid influence on behaviour; thus, where the issue of violence is concerned, they are the most effective instrument of prevention in the short term. They have a vital role to play not only in changing the image of women, but in making people aware of what violence against women means and what an impact it has not only on the victim but on society at large, and in publicizing the mechanisms that exist for making complaints and securing protection. This last function, as well as helping to protect victims and ensure that violence does not go unpunished, has a significant dissuasive effect.

Although regulation in this area could be detrimental to freedom of expression and imply censorship, violence within couples is a matter of social interest, and family violence even more so. Consequently, **the State needs to fulfil its obligations by encouraging self-regulation in the media and drawing up regulations that establish guidelines and lay down limits for the transmission of violent messages, in order to block or dilute these.**<sup>76</sup> Again, it is not detrimental to freedom of expression to impose by law **an obligation for normal programming to include messages designed to prevent violence within couples and the family and to reserve slots for the State to disseminate values.**<sup>77</sup>

An interesting approach could be to include specific provisions in the codes of professional ethics applying to journalists.

**To sum up, a democratic society needs to find a balance between freedom of expression and respect for human rights, and it is therefore necessary to emphasize the responsibility of the communications media for striking this balance.**

As regards the contents of media campaigns, we believe that including the problem of violence within couples within the more general theme of family violence is unquestionably a positive strategy, since despite the progress that has been made in the matter of violence against women, it does not arouse the same level of public concern as family violence. Nonetheless, in terms of prevention, and especially when campaigns are mounted in the mass media, **violence against women must be dealt with separately, because when violence within the family is dealt with in a general way women are not always identified as victims. Publicization campaigns must place emphasis on respect within the couple, on the incompatibility between violence and affection, and on providing information about legal mechanisms of protection, information services, procedures and support services such as refuges, therapeutic support and facilities for the rehabilitation of offenders.**

### 9. Social sanctions versus legal sanctions

Although there is a consensus about the importance of passing laws to prevent and punish violence and support the women who are victims of it, we should not overlook alternative popular solutions based in the community. **In addition to legal proceedings to punish offenders, other tactics may sometimes be more effective than individual punishment**<sup>78</sup> **in changing attitudes and reining in violence, such as shaming perpetrators**

in public places like churches or neighbourhood meeting places, or putting up signs that identify the perpetrator, for example. This line of action should be much more thoroughly explored as another way of tackling the issue.

## 10. Equality and violence

The proposals put forward here are aimed at improving laws in order to reduce the incidence of violence, punish aggressors and support victims, but it needs to be reiterated that **only measures which promote equality can root out this problem once and for all**. When it comes to designing solutions, in fact, violence against women cannot be separated from gender equality, since it is the lack of equality that makes women vulnerable to violence. This means that the discrimination which still persists in the legal system constitutes and encourages violence against women, and consequently legal strategies to combat this must aim at promoting equality between men and women (Binstock, 1997, IV).

### Notes

<sup>1</sup> The forms that violence takes are often culturally determined.

<sup>2</sup> See Carrillo (1995). The World Bank has recognized that gender violence is in itself an epidemic and one of the main causes of ill health and death among women (Red de Salud de las Mujeres Latinoamericanas y del Caribe, 1996, p. 116).

At the third European Ministerial Conference on Equality between Men and Women, held in Rome in October 1993, it was agreed that a key component of the policies of the European states is to emphasize the impact that violence against women produces in society as a whole.

<sup>3</sup> Concerning the need for change in the legal system, see Binstock (1997).

<sup>4</sup> Which is contradictory in terms of the proper organization of families through the law.

<sup>5</sup> Unfortunately, these reforms have not spread to all countries in the region.

<sup>6</sup> The following are considered to be gender violence: "a) physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household [...], marital rape [...], non-spousal violence and violence related to exploitation; b) physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; c) physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs" (art. 2).

<sup>7</sup> Regarding the enforceability of human rights before the Courts of Justice, see Binstock (1977, II-B and C).

<sup>8</sup> This was the first time a resolution on female children had been passed. Art. 5 urges States to eliminate all forms of violence against children, and female children in particular.

<sup>9</sup> Regarding the justiciability of human rights, see Nikken (1991, pp. 49 and 55).

<sup>10</sup> This implies revision of national legislation and/or re-evaluation of special legislation in countries where this exists.

<sup>11</sup> Regarding the binding force of the Declaration, see Binstock (1997, II-C).

<sup>12</sup> The Convention does not make provision for any procedure for this; only reports from the States on its application.

<sup>13</sup> Text submitted by the President of the open-ended Working Group responsible for producing a draft optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (E/CN.6/1997/WG/L.1).

<sup>14</sup> Regarding the legal nature of the Convention, see Binstock (1997, II-B).

<sup>15</sup> Notification must be in writing and must not be anonymous.

<sup>16</sup> Isis Internacional, *Boletín*, No. 11, p. 8.

<sup>17</sup> Additional views of governments, intergovernmental organizations and non-governmental organizations on an optional protocol to the Convention: Report of the Secretary General (E/CN.6/1997/5).

<sup>18</sup> *Ibid.*

<sup>19</sup> This Programme was adopted by the sixth Regional Conference on the Integration of Women into the Economic and Social Development of Latin America and the Caribbean, a governmental forum of the member countries of ECLAC created in 1977. Regarding the legal nature of the Regional Programme of Action, see Binstock (1997, III-A).

<sup>20</sup> It has been maintained that although this requirement sometimes means "a tremendous waste of time and resources", it is also an "opportunity to focus attention on the problem within the individual country". See Copelon (1996, p. 117).

<sup>21</sup> Art. 11.

<sup>22</sup> Only the States Parties and the Inter-American Commission on Human Rights are authorized to submit a denunciation on a case for a ruling by the Inter-American Court, which means that it is very important for individuals or groups to lay petitions of denunciation or complaint before this Commission, as it is the body responsible for bringing denunciations before the Court (art. 67 of the Inter-American Convention on Human Rights).

<sup>23</sup> The text of art. 4 states that "...These rights include, *among others*:..."

<sup>24</sup> See ECLAC (1995, area II, strategic objective II.2, strategic action II.2.e. See above, III-B, a.

<sup>25</sup> Regarding the legal nature of this instrument, see Binstock (1997, III-A).

<sup>26</sup> Between 1988 and 1993 22 bills on domestic violence were produced.

<sup>27</sup> - Chile: Law No. 19,325 "Establishing Procedures and Penalties for Acts of Family Violence", of 27 August 1994.

- Argentina: "Protection against Family Violence" Law No. 24,417 of 7 December 1994.

- Panama: Law No. 27 of 16 June 1995.

- Uruguay: Law No. 16707 "Citizen Safety Law" introduces Art. 321 bis, defining domestic violence and providing for punishments, into the Penal Code.

- Ecuador: Law against Violence to Women and the Family, November 1995.

- Bolivia: Law No. 1674 "Law against Family or Domestic Violence" of 15 December 1995.

- Costa Rica: Law Against Domestic Violence, March 1996.

- Mexico: Family Violence Assistance and Prevention Law, 26 April 1996.

- Colombia: Law on Domestic Violence, 16 July 1996.

- Dominican Republic: Law No. 24-97. Defines the offences of Domestic Violence, Sexual Harassment and Incest.

- Peru: Law No. 26763, 1997.

<sup>28</sup> This therefore also includes forms of violence against women that occur outside the home: rape and sexual harassment.

<sup>29</sup> See above I. Introduction.

<sup>30</sup> The only Law that refers to violence within couples alone is the first one to be passed, the Puerto Rican Law on Preventing and Intervening in Domestic Violence. The Ecuadorian Law refers to violence against "Women and the Family".

<sup>31</sup> The functions listed constitute a real formulation of policies to be implemented by the State (art. 5).

<sup>32</sup> Since 1985 Venezuela has had a Programme to Defend the Family against abusive treatment, in conjunction with which three Women's Offices have been set up to provide free legal assistance in cases of violence.

<sup>33</sup> Paraguay, National Equal Opportunities for Women Plan, 1997-2001, Asuncion, May 1997. Since 1994 Paraguay has had a "National plan for the prevention and punishment of violence against women" and the first measure suggested in the equality plan is to implement this more vigorously.

<sup>34</sup> Regarding the binding force of these plans, see Binstock (1997, III-B-2).

<sup>35</sup> The Argentinean Law defines it as physical or mental abuse or injuries inflicted by a member of the victim's family; for the purposes of this law, a family is one originating in marriage or de facto unions (art. 1).

The Bolivian Law defines it as physical, psychological or sexual aggression committed by the spouse or cohabitant, ex-spouses or former cohabitants or persons who have had children with the victim; ascendants, descendants, siblings, civil relatives or kinsmen in direct or collateral line and guardians or custodians (arts. 4 and 5).

The Colombian Law defines it thus: "...any form of physical or mental harm, threat, abuse, assault, offence, torture or outrage caused by the behaviour of another member of the family (arts. 2 and 3). The law includes conjugal sexual violence (art. 25).

The Mexican Law defines family violence as a "recurring, intentional and cyclical act of power or omission intended to dominate, subject, control or assault any member of the family physically, verbally, mentally, emotionally or sexually inside or outside the family home, when the family member has some relationship of kinship by consanguinity, or have or did have it by civil kinship, marriage or cohabitation or maintains a de facto relationship, and that has the effect of causing harm..." (art. 3, III).

The Chilean Law defines family violence as "any abuse that affects the physical or mental health of anyone who, even if of age, bears towards the perpetrator the relationship of ascendant, spouse or cohabitant or, if a minor or disabled, has towards the perpetrator the relationship of descendant, adopted child or ward, or a blood relationship up to the fourth degree inclusive, or is under the care of or dependent upon any of the members of the family group living under the same roof". It is noteworthy that the Law excludes violence arising between siblings who are of age and between parents and children who are of age.

The Law of the Dominican Republic, which amends the Penal Code, defines domestic or family violence as "any pattern of conduct involving the employment of physical force, psychological or verbal violence, intimidation or persecution against one or more members of the family or against any person who has a relationship of cohabitation, against a spouse, ex-spouse, cohabitant or former cohabitant or consensual partner, or against a person with whom the individual has had a son or daughter..." (art. 309-2).

The Venezuelan Bill also includes harm that affects social, work, personal and family relationships and that places the person in conditions of intimidation, persecution, subjugation, subordination or discrimination.

<sup>36</sup> The Puerto Rican Law defines domestic violence as physical, emotional, psychological and sexual violence against an individual by their partner. Such violence may be manifested in the form of attacks, threats, intimidation, persecution, deprivation of freedom, constant or frequent vigilance to inspire fear or dread in the person and/or the imposition of sexual conduct that the person does not desire, among other types of conduct.

The Ecuadorian Law considers family violence to be "any action or omission that consists in physical, psychological or sexual abuse committed by a member of the family against the woman or other members of the family".

<sup>37</sup> The laws of Bolivia, Ecuador and Mexico refer to sexual violence within the family, while those of Colombia and Puerto Rico include marital rape. Paraguay, in its projected Reform of the Penal Code, omits the discriminatory classification of women in rape (married, single, prostitutes and chaste). In the report submitted by the Department of Women's Affairs, it is proposed that it be treated as an aggravating circumstance for rape to take place within marriage or a de facto cohabitation, considering that "...the family cannot harbour violence of this nature...".

The Venezuelan Bill speaks of "any conduct that is detrimental to the person's right to decide freely on the exercise of their sexuality...".

The Law of the Dominican Republic speaks of non-consenting sexual activity within a couple and lists cases in which this may occur, including participation in an unwanted sexual relationship with third persons (art. 332). This situation had already been classified in the Puerto Rican Law and is likewise included in the Ecuadorian Law.

<sup>38</sup> The Chilean Law speaks only of abuse affecting physical or mental health (art. 1).



<sup>39</sup> The Bolivian Law defines physical violence as "forms of conduct that cause internal or external injury or any other abuse that causes harm to the person", psychological violence as "forms of conduct that produce emotional disturbance in victims, impairing their mental and emotional development" and sexual violence as "forms of conduct, threats or intimidation that affect the victim's sexual integrity or sexual self-determination".

The Ecuadorian Law defines physical violence as an act of force that causes physical harm, pain or suffering, psychological violence as actions or omissions, intimidation or threats that cause distress, emotional disturbance, a loss of self-esteem or fear, and sexual violence as any abuse that constitutes an imposition on the exercise of the victim's sexuality.

The Mexican Law prescribes three types of abuse: physical, psychoemotional and sexual (art. 3 letters A, B and C defines them as follows: Physical abuse is "Any repetitive act of deliberate aggression using some part of the body or some object, weapon or substance to restrain, immobilize or cause bodily harm to another, with the intention of subjecting or controlling them...". Psychoemotional abuse is a "pattern of conduct consisting in repetitive acts or omissions which may manifest themselves in the form of: prohibition, compulsion, conditioning, intimidation, threats, demeaning attitudes, when these are unrestrained and give rise in their recipients to impairment, diminution or harm to their structure of conduct, consisting in repeated acts or omissions, and whose form of expression may be to deny sexual and affective needs, induce the partner to carry out sexual practices that are unwanted or cause pain or practice celibacy in order to control, manipulate or dominate the partner, and that cause harm. It also includes offences against freedom and normal psychosexual development, as provided for by penal legislation.

The Puerto Rican Law divides violence into five types, all of which are serious offences in the criminal law system of the country: abuse, aggravated abuse, threatening behaviour, restriction of liberty and marital sexual assault.

Abuse consists in the employment of physical force or psychological violence, intimidation or persecution in order to cause harm or grave emotional harm to the partner, the partner's property or a third person that the partner is fond of. In the form of abuse by psychological violence, it includes intimidating the partner by repeated words or actions that lead the partner to fear physical or emotional harm, to the extent that the person feels obliged to carry out an act that they do not desire. It is also an offence to keep the partner under constant or frequent surveillance in places adjoining or close to the home, residence, school, workplace or vehicle where they are at the time. The Law specifies that such surveillance must be by the abusive partner in person at those places and must be of such a nature as to cause fear or dread in the person being abused.

Psychological violence is defined as conduct constituting a constant pattern of behaviour that is degrading, discrediting or demeaning to personal value, unreasonable limitations on access to and handling of the couple's common possessions, blackmail, constant vigilance, isolation, deprivation of access to sufficient rest or food, threats to deprive the person of the custody of children, or destruction of objects that the person prizes. This conduct must have caused severe emotional harm to the person receiving it. The Law states that severe emotional harm will be deemed to have occurred when, as a result of repeated acts or omissions by their partner, the person manifests one or more of the following characteristics in recurrent form: paralyzing fear, feelings of defencelessness or desperation, feelings of frustration and failure, feelings of insecurity, helplessness, isolation, weakened self-esteem and other similar behaviour.

As this shows, numerous and complex proofs are required to establish the offence of abuse by psychological violence, since it is necessary to show a pattern of behaviour. Nonetheless, recognition that this type of violence within a couple also constitutes a crime provides a fuller definition of abuse and makes it possible to reveal the profoundest structures and ideological constructs that give rise to violence against women.

Aggravated abuse is when the crime of abuse, as described previously, occurs in more serious circumstances. The Law states what these circumstances are: entering the person's dwelling or the place where they are staying; inflicting grievous bodily harm; committing physical

violence with the use of deadly weapons, without the intention of killing or mutilating the person; behaving abusively in front of minors or after a restraining order has been issued.

Threatening behaviour is defined as situations where the perpetrator threatens the partner with bodily harm or damage to prized possessions or another person.

Restriction of liberty is defined by article 3, 4 and consists in using violence or intimidation against the partner to restrict their liberty. It includes restricting the partner's liberty on the pretext that they suffer from a mental defect. In both cases, a crime is only deemed to have been committed when the person affected realizes that this restriction of liberty has occurred.

Marital sexual assault is defined so as to give protection to those who are obliged by their partners to participate in sexual conduct that they do not desire by the use of physical force, intimidation or the threat of grievous and immediate bodily harm. Nullifying or reducing the partner's ability to refuse to engage in sexual conduct through the use of hypnotic methods, narcotics, depressants or stimulants also constitutes marital sexual assault.

The Law of the Dominican Republic includes not only physical and psychological damage, but also damage to property and "torture or cruelty" including the application of substances or methods designed to annul "people's personality or will or to reduce their physical or mental capabilities even when these do not cause physical pain or mental suffering" (arts. 303 and 303-4, number 7).

<sup>40</sup> See the laws cited from Argentina, Bolivia, Colombia, Ecuador, Chile, Mexico, Puerto Rico and the Dominican Republic.

<sup>41</sup> The Colombian Law deems the family to consist of: spouses or permanent companions; the father and mother of the family even if not living in the same home; the ascendants and descendants of the above and adoptive children; and everyone else who forms part of the domestic unit on a permanent basis.

<sup>42</sup> See the Ecuadorian Law. Puerto Rico provides protection for a multiplicity of conjugal-type relationships, with a whole range of intimate relationships between individuals besides marriage falling within the definition of a couple: spouses, former spouses, cohabitants or former cohabitants, people who maintain or have maintained a consensual relationship similar to that of a couple and people who have had a child together (art. 1.3) are all included. The same is true of the laws cited from Bolivia, Ecuador and the Dominican Republic.

<sup>43</sup> Objective 2-3.

<sup>44</sup> Chapter I.

<sup>45</sup> Argentina, Bolivia, Chile, Ecuador, Colombia and the Venezuelan Bill. In Mexico, conciliation is the essence of the Law.

<sup>46</sup> Argentina, Bolivia, Ecuador, Chile, Colombia, Mexico, Puerto Rico.

<sup>47</sup> Criminal proceedings for sexual violence can only take place when the victim brings the charge (art. 25).

<sup>48</sup> Art. 12, I and VIII.

<sup>49</sup> The Argentinean Law stipulates exclusion of the assailant from the family home, prohibiting access to the domicile or workplace or place of study of the victim and provisionally determining alimony, custody and the right of communication with children. It furthermore requires the judge to liaise with the National Juvenile and Family Council for the purpose of coordinating public and private services to "avoid and, if possible, overcome the causes of the maltreatment, abuse and/or violence occurring within the family". The judge may also call upon public and non-governmental bodies specializing in the prevention of violence and the provision of assistance to victims.

The Chilean Law refers to immediate and essentially temporary measures (60 to 180 working days) to ensure the physical or mental security of the person affected and to enable "the family to together live in peace, survive financially and maintain its assets intact"; it also gives a listing by way of example, which is similar to that of the other laws.

The Bolivian Law lists: prohibiting or restricting entry by the accused into the conjugal home and/or victim's workplace; ordering that the victim be enabled to return to the home if ejected from it by violence; authorizing the victim to leave the common home, providing for

immediate handover of the victim's personal effects, arranging for an inventory of common property and ordering the appropriate family assistance and child custody measures.

The Ecuadorian Law contains very similar provisions; the Puerto Rican Law includes ordering the perpetrator to be ejected from the house of the person affected, prohibiting entry into any place where the affected person is present, awarding provisional custody of children and payment of the appropriate alimony, measures concerning the disposal of the affected person's property and common goods and the use of certain moveable property (furniture, car, etc.); indemnification may also be ordered for damages caused by violent conduct, and any other order may be issued as required for the purposes of the Law to be achieved.

The Colombian Law refers to immediate protection measures, which may be permanent if the judge rules to this effect, having determined that violence has been committed: ordering the perpetrator to abstain from the conduct to which the complaint refers or other similar conduct, besides which the judge may order that the perpetrator be ejected from the house shared with the victim and make provisions for custody and alimony for the children and spouse, if there is a legal obligation to do so.

In the Dominican Republic, even when the proceedings are entirely of a criminal nature, there is provision for a restraining order to be issued before investigation and proceedings begin at the Tribunal de Primera Instancia (Law No. 24-97, art. 309-6). The measures are similar to those provided for in the other countries.

<sup>50</sup> This is the case with the Laws of Bolivia, Colombia and Puerto Rico; the last-named requires the police not only to provide guidance, protection, transportation and assistance to those who face domestic violence, but also to prepare a report on each case they attend, even if the offender is not sent for criminal trial. The Laws of Ecuador and Colombia contain like provisions; the latter also requires the police to deal with the physical and psychological after-effects of the violence and give victims advice on the conservation of evidence and information about their rights and the public and private services that are available.

<sup>51</sup> Mexico, Family Violence Assistance and Prevention Law, Art. 12, V.

<sup>52</sup> This is the case with Argentina, Bolivia, Chile, Ecuador and Mexico. In the Dominican Republic only the Penal Code applies, as the Law consists in an amendment to this; there are however fixed penalties for violence within couples.

<sup>53</sup> See above, C-b, 2.

<sup>54</sup> The Venezuelan Bill likewise establishes that those convicted of acts of violence specified in this Bill or the Penal Code will be obliged to participate in such education and prevention programmes as the professionals and specialists involved in the proceedings consider advisable (art. 25). The Dominican Law also has an accessory requirement for attendance at therapeutic or family guidance programmes for a period of no less than six months (art. 309-5).

<sup>55</sup> In June 1991 the Commission for Women's Affairs presented the "Primer informe de progreso sobre la implantación en Puerto Rico de la Ley" (Vicente, 1993).

<sup>56</sup> Estudio sobre la aplicación de la Ley 19.325 y la formulación de propuestas para mejorar su eficiencia y eficacia (Consultores Asociados, 1997).

<sup>57</sup> There are projects for reform in both the civil and penal areas. In the civil area, there is a proposal to recognize the different types of union, incorporating people's right to physical and emotional security; family violence as automatic grounds for divorce; and empowering the family judge to try family violence cases and rule on provisional measures relating to the right of the perpetrator to remain in the couple's home and other precautionary measures.

In the penal area, it is proposed that a criminal category be produced to define family violence and provide for greater penalties than those established for crimes of violence committed by a person who has no relationship of kin or cohabitation with the person affected. As regards reparation for the harm caused, it is proposed that the perpetrator be liable to pay medical expenses resulting from the offence, including psychotherapy treatment for the victim and family members who require it in the opinion of a health professional.

<sup>58</sup> Complainants put the duration of the process at 65 days.

<sup>59</sup> In 63% of cases the result is of no use and in 51.8% the result is not the desired one.

<sup>60</sup> IACW, November 1996 session.

<sup>61</sup> It is for this reason that the Expert Group Meeting on Violence against Women introduced the concept of "victimization" (United Nations, 1992) in order to obtain a clearer view of the type of protection that victims really need. The concept of a victim, according to the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in 1985, refers to people "who individually or collectively have suffered harm, including bodily or mental injuries, emotional suffering, financial loss or substantial detriment to their basic rights, as a consequence of actions and omissions that violate the penal legislation in force in member States, including legislation proscribing the abuse of power". It is on the basis of "abuse of power" that women suffering any kind of violence are considered to be victims. See above, I.

<sup>62</sup> Violence within couples that is demonstrated through the procedure prescribed by a special law on violence should be regarded as grounds for separation and divorce without further evidence being required. In countries where divorce does not exist (Chile) a special law on family violence has only very limited effects. In this situation there is clearly something of a logical contradiction in attempting to maintain the bond of matrimony despite violence within the couple.

<sup>63</sup> See III-c-c.

<sup>64</sup> Women's Offices have proved highly successful in detecting cases of violence and defending women victims. See Red de Salud de las Mujeres Latinoamericanas y del Caribe (1996, p. 58).

<sup>65</sup> This is the essence of the Mexican Law.

<sup>66</sup> It has been maintained that arbitration prevents the clear message of the law, i.e. that violence will not be tolerated, from getting through. See Vicente (1993).

<sup>67</sup> As provided by the Venezuelan Bill.

<sup>68</sup> *Ibid.*

<sup>69</sup> See above, III, C, c.

<sup>70</sup> This is what has been called "indirect discrimination". For this reason, it has been maintained that legislative strategies are not enough on their own, and furthermore that "they need to be used with great caution, since the system of law is highly patriarchal" (Facio, 1996, p. 125).

<sup>71</sup> Regarding legislative progress and the legal system, see Binstock (1997, I and IV, 3).

<sup>72</sup> See above, III, C, c.

<sup>73</sup> See above, III, C, b, 1.

<sup>74</sup> In the past, it was considered that under a strict interpretation of human rights statutes the State was responsible only for its own actions and those of its agents, while the conduct and actions of private individuals was a matter for criminal justice. The position put forward now is that States are expected to take action to prevent, investigate and punish those who commit acts of violence against women. This new approach has a crucial role in efforts to eradicate gender violence, and may be the most important contribution that the women's movement has made to the issue of human rights (E/CN.4/1995/42). In this regard, see Rico (1996, p. 15) and Binstock (1997, III-B, 6).

<sup>75</sup> The Ministerial Conference of the Council of Europe has emphasized this strategy.

<sup>76</sup> See Binstock (1997, III-B, 6). The third Ministerial Conference of the Council of Europe expressly recommends "encouraging" self-regulation.

<sup>77</sup> This requirement is found in the Venezuelan Bill (art. 6) which also stipulates that the Ministry of Transport and Communications and the National Commission against Domestic and Sexual Violence will monitor compliance with this obligation.

<sup>78</sup> It has been maintained, on the basis of experiences in certain countries such as the United States where there are laws to protect women against domestic violence and where judges and the police have been specially trained, that the incidence of violence has hardly been affected. See Copelon (1996, p. 119).

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