

# **THE EFFECTIVENESS OF CUSTODY HEARING: AN ANALYSIS OF THE BRAZILIAN CASE**

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## **Abstract**

*In Brazilian law, the hearing can be an instrument of protection and promotion of human rights, makes it possible to eliminate the idea of impunity, with which it is seen mainly by lay people, and demonstrating that this institute is not synonymous with freedom or injustice, but a way of ensuring the fundamental laws guaranteed in the Federal Constitution of Brazil of 1988. It seeks to establish here a relationship between the researched theme and Human Rights, seeking to promote analyses on facts that occurred before the legalization of the Custody Hearing in Brazil and the changes that came with the establishment of this institute. It is a study based on forensic literature, international norms and treaties such as the American Convention on Human Rights and Specific Laws dealing with the theme. In this sense, the research also develops by analyzing the different positions and identifies which are the constitutional principles that were commonly violated in view of the non-existence of the Custody Hearing. This research also develops the possibility of the Applicability of Article 37 §6 of the Federal Constitution of Brazil of 1988, as well as developed an investigation of the concept of general repercussion and its consequences, in view of the Supreme Court having presented such an understanding for the question. It is a bibliographic reference based on doctrines, treaties, articles, arranged in physical and digital libraries.*

**Keywords:** *Hearing of Custoday. Human Rights. International Treaties. Constitution.*

## **1. Introduction**

Currently much has been discussed or commented on, in society in general, about custody hearing. However most comments are made without the necessary deepening. By presenting this study, we seek to develop a possible analysis about the Custody Hearing in the Brazilian context. What is this legal instrument really? how is it being carried out? what is your legal rationale? What is the deadline for its realization? It also seeks to analyze the consequences of these hearings for the Brazilian prison system. The custody hearing is a legal instrument that has aroused much controversy, not only in society in general but also in the legal environment. Since it began to be implemented, the custody hearing, had to go a long way with many obstacles until it was consolidated. However, it has been held in all Brazilian states. The overcrowding of Brazilian prisons has been a recurrent problem. A large portion of this amount is provisional prisoners. It is well-off that our legal system is slow, which aggravates this situation. These

hearings do not solve the problem definitively, nor is that the intention. They help to ease the situation, as they prevent people from being imprisoned without conviction. It is verified with this study that, in a way, the hearings promote an adaptation to what is contained in the International Treaties of which Brazil is a signatory.

The main objective of this work is to show that the custody hearing represents an evolution in the Brazilian legal system and undo the belief that it was created only in order to empty the Brazilian prison system.

## **2. CUSTODY HEARING**

Custody Hearing is the procedural act that requires the realization of the first hearing of the prisoner in flagrante, before the judge, within 24 (twenty-four) hours, as a rule. The deadline issue will be reviewed separately in another topic. It is at that hearing that the judicial authority will be able to verify the legality of the arrest and the need to maintain it. Therefore, it is the presentation of the prisoner before a judge. This allows personal contact between the judge and the prisoner. In this way, respect for the fundamental rights of the person custody of the State can be ensured. This mechanism enables the most appropriate and appropriate assessment of the prison. The physical presence of the person caught red-handed is the guarantee of the contradictory still in a timely manner. Timely because it allows the judge, the member of the public prosecutor and the technical defense to know the possible cases of torture and take legal action. In this way, the Custody Hearing Institute prevents the cycle of violence and crime from continuing. Enabling the judge to analyze whether he is facing the arrest of an occasional criminal or someone who is in the criminal field, that is, dangerous to society. At this time the judge may determine the continuity of the prison or the granting of liberty with or without precautionary measures.

According to Luciana Pimenta, 2016, p.39:

Custody Hearing is the procedural instrument that determines that every prisoner in flagrante must be brought to the presence of the judicial authority, within 24 hours, so that it evaluates the legality and need to maintain the prison.

According to Aury Lopes and Caio Paiva, 2014, p. 75: The custody hearing:

It basically consists of the right of (all) imprisoned citizens to be led, without delay, to the presence of a judge so that, on this occasion, any acts of ill-treatment or torture are ceased and also to promote a democratic space of discussion about the legality of the need for imprisonment.

The code of criminal procedure has undergone repeated changes in recent times to adapt criminal prosecution to the standards established by the Federal Constitution of 1988. It has not been easy to make this adjustment, since the Code of Criminal Procedure was born in a time when an authoritarian climate prevailed in Brazil. It was a complicated time in our recent history, in which individual rights and guarantees were in some way not respected in their entire dimension.

Although the most usual nomenclature is a "custody hearing", some find the name "presentation hearing" more appropriate. O Min. Luiz Fux of the Supreme Court, for example, prefers it that way. There are also

those who prefer "warranty hearing". Here I will use the term "custody hearing" because it is the expression for which it became better known. It is the most popular term, although the term "presentation hearing" seems to avoid the idea that the purpose of the audience is to cost someone. The Custody Hearing is far from consensual between the indoctrinators and enforcers of law. There are many who stand against its realization. Society in general also does not see with good eyes the subject dealt with here. This is because a more technical analysis of the facts involving the realization of the Hearing is not made.

Of course, in some situations there may be a sense of impunity, especially for the laity in the field of law. It is noteworthy that there are scholars of law who also do not approve of this realization. However, you must remember, here, of a popular phrase: "One mistake does not justify the other" Thus could not the State curb crime by committing other crimes, such as torture, with the aim, often, of plucking confessions. There is a danger that instead of achieving the main goal, which is justice, if you commit the exact opposite. Not that this occurs in all cases, but we will analyze, at another time, examples of facts that occurred before the implementation of the Custody Hearing in Brazil. The purpose is not to defend impunity; on the contrary, it is to analyze the application of justice and, if justice is done when it is fulfilled by law. If the law endeashes, including prisoners, the need for a right to be exercised in its fullness by anyone who is subject of law.

It is worth noting that the holding of the Custody Hearing is a relatively new fact in Brazil. All European countries have been carrying out this procedure for a long time, in South America, it has also been practiced for a long time, such as in Peru, Colombia, Argentina and several other Latin countries. In these countries, the structure for holding these hearings is called "Guarantees Court". It is a procedure with the objective of civilizing and humanizing the legal process. It distinguishes between individual offenders and high-risk criminals. This prevents prison from becoming a school of crime, since prison should have the opposite goal, that is, the resocialization of the prisoner. It was very common, in the very recent past, to delay between the arrest in flagrante and the hearing of inquiry. So it was called earlier. This often came years before the judge looked at the defendant's face for the first time. This was the case in cases where the law provided for the possibility of provisional freedom or precautionary measures. Prisoners who could not be economically able to become a lawyer were at the mercy of the very course of the process that was walking slowly.

Article 319 of the Code of Criminal Procedure deals with various precautionary measures of imprisonment, especially in the case of minor crimes. Such measures may be applied by the judge by the presence of certain requirements. The applicability of these regulatory precautionary measures in the CPP was compromised without holding custody hearings. In this sense, it is worth remembering that the prisoner submitted to this hearing will not be convicted or acquitted; but only stuck or loose. Therefore, you will have to respond to criminal proceedings before the courts in any case. He will, however, answer for his crime. At the end of the case you can be acquitted or convicted and in the last possibility you will receive the penalty imposed by law.

The egregious that lead prisoners to the hearings have the most varied reasons. From a neighbor's fight to first-degree murders. Among these, of course, there are those less serious to whom penalties can be replaced by fines or restriction of rights, according to the law. If the law imposes less severe penalties, without restriction of freedom, for crimes of lesser offensive potential, then the Custody Hearing prevents

injustices from being committed. Nothing fairer than complying with the law. It would not be fair for a person to be imprisoned for months, and sometimes even years, when the crime committed by him does not imply imprisonment.

It is important to leave recorded here that although the custody hearing is held to present prisoners in flagrante before a judge, Caio Paiva is in favor of carrying out the same in case of preventive and temporary detention. According to him the holding of the hearing in these circumstances would have the purpose of verifying or reassessing the need for imprisonment. It serves to reassess the grounds that led to his arrest. Bardaró also shares this view; as this passage quoted in the book of Caio Paiva, 2015, p. 67, confirms, when it refers to it:

In the case of temporary arrest or pretrial detention, due to prior and reasoned judicial decision, it is not necessary a subsequent analysis of its legality. Nevertheless, the arrested person is entitled, on the basis of Article 7(5) of the American Convention on Human Rights, to be brought before a judge without delay, to hear it, and to reassess the necessity and adequacy of the prison, which may be relaxed, revoked or replaced by an alternative precautionary measure to prison, if the circumstances of the case so indicate appropriate.

Not infrequently the news of a crime scares us and plays with our imagination. If we are human, when we read a prison report in flagrante or a complaint describing, for example, the conduct of Paul K., consistent with having entered a house at dawn, for the purpose of subtracting property and, in its course, have been caught by the resident, elderly lady, who fired two shots, without having died, fleeing, following the crime scene and , then arrested by the police, we would have to fill in the gaps. We would not remember a sweet, respectful, polite face, but rather a subject who brings together the attributes of evil. This human conduct (filling the spaces devoid of information) creates what is called the priming effect, that is, the effect that the network of association of signifiers operates individually without us realizing, based on what we have just realized, even in the absence of information from the case. Hence, the simple reading of the accusatory play or the arrest warrant in flagrante generates, to those involved in criminal proceedings, the anticipation of meaning. Therein lies the first fundamental step towards hosting the custody hearing. It will no longer be the "criminal" we imagine, but the subject of flesh and blood, with a first name, surname, age and face. The human impact provided by the agent, in his first manifestations, may modify the imaginary understanding of those involved in the Criminal Procedure. Decisions, therefore, can be made with more information about the agent, conduct and motivation. Remember that injunctive detention is always procedural, that is, they do not serve to anticipate the penalty, and it should be based on the exceptionality of precautionary restraint, criticism that we have already done before. Hence the state's device for analyzing the reasons for face-to-face injunctive detention is gaining importance. Respect for the rules of the procedural game. This invective has been launched by us for years in texts, as well as many jurists concerned with establishing a minimum standard of procedural standards apt to guarantee substantial due process. (LOPES, MORAIS, 2018, p. 226)

We have seen in this passage above that these renowned jurists justify holding the custody hearing as a way to humanize due process.

The custody hearing is also justified, according to some scholars in the field, in cases of pretrial or temporary detention.

### *2.1 Minor Crimes*

Penalties should vary according to the severity of the crime committed. The Custody Hearing, in a way, makes a selective analysis of cases avoiding unnecessary arrests. It selects cases in which the person could respond to the process in freedom by obeying some precautionary measures. The release in these cases makes people have a misconception about the hearings.

The general idea is of mass incarceration, which is not true. It does not reach the population with the information that the number of prisoners did not vary significantly with the implementation of custody hearings. If it wasn't for the hearing, many innocent inmates would probably spend months in prison until their cases were evaluated. Some say the custody hearing is gradually humanizing criminal proceedings.

Law No. 12,403/2011 amended 32 articles of the Code of Criminal Procedure of 1941. According to the aforementioned law, persons who commit minor crimes, punished with less than four years in prison and who have never been convicted of another offense will only be arrested in the last case. It is worth clarifying that Brazilian legislation considers minor crimes: simple theft, manslaughter in traffic, misappropriation, damage to the public good, smuggling, private imprisonment, coercion of witness during the course of the process, false testimony, among others.

Currently, people who commit minor crimes are only arrested if the judge understands that they can pose risks to society. Not offering risks during the course of the process, there is no reason to wait for a trial in prison. However, when the person has already been convicted in cases of domestic violence, when there is doubt about the identity of the accused, when he has no fixed address making it difficult to locate by the Court his arrest is justified. If you don't agree with the law, that's another situation. It would be a problem of the legislator we have elected for this. At the custody hearing, only the law is up to the court.

According to the law, there are several alternative measures that can replace prison before the accused is tried definitively. It is not a mere incarceration in order to avoid overcrowding. There are legal criteria that the judge will take into account when deciding to release or maintain the prison. It is worth reinforcing that the release does not mean absolution. That's because only at the end of the process will a sentence be given. It should be noted here that if you fail to comply with some of the precautionary measures imposed on him, the individual who is released at the Custody Hearing may be arrested before the end of the proceedings.. This freedom, therefore, is provisional. But if he were imprisoned, incarceration would also be temporary; since there is still no conviction. If he were to be convicted and the sentence is a restriction of rights and not of restriction of freedom, incarceration would also be provisional.

The cold letter of the law does not reach the differences between people. It may also not detail circumstances in which each fact occurs. These peculiarities can be observed by the judge during the hearings.

### 3 FUNDAMENTALS

The Custody Hearing is based mainly on international treaties, but also on national legislation originating from them. We will first analyze the legal basis of the Custody Hearing at the international level, as it was the starting point for the internalization of this institute in the Brazilian legal system.

The Custody Hearing seeks to meet the longings of the American Convention on Human Rights (ACHR) which states that: *"Every person arrested detained or held shall be conducted without delay in the presence of a judge or other authority authorized by law to perform judicial functions (...)"* and the International Covenant on Civil and Political Rights (ICCPR) which also dictates that: *"Any person arrested or imprisoned for criminal offense shall be conducted, without delay, in the presence of a judge or other authority empowered by law to perform judicial functions (...)"* (art.9.3).

Despite some minor differences in the texts of the above-mentioned International Treaties, it can easily be seen that the essence remains the same or, at the very least, similar; this is because they have the same goal as the use of a form of judicial control of prisons in flagrante.

In such a way that it can be affirmed that the custody hearing in Brazil came to establish a synchrony between the Brazilian criminal process and the International Human Rights Treaties.

It is worth remembering that these Treaties have status, according to the Understanding of the Supreme Court, of supralegal norms.

#### 3.1 Pact of St. Joseph of Costa Rica

The American Convention on Human Rights, also called the Pact of San José of Costa Rica, for having been signed in that country in 1969, has as one of its main objectives, to recognize the essential rights of the human person, regardless of his nationality; for the fact that it is based on the attributes of the human person justifies being possessed of the essential rights that must be extended to all human beings as written in Article 1, item 2 of that convention: *"For the purposes of this Convention, a person is every human being"*. It is also important to mention Article 5, item 1 which mentions: *"Everyone has the right to respect his physical, psychic and moral integrity"*

These above-mentioned articles are related to the Custody Hearing Institute, but Article 7, items 5 and 6 of this Convention makes direct reference to the Custody Hearing. See:

Article 7. Right to personal freedom.

[...]

5. Every person detained or detained shall be conducted without delay in the presence of a judge or tried within a reasonable period or to be released, without prejudice to the proceedings. Your freedom may be conditioned to guarantees that ensure your attendance in court.

6. Every person deprived of liberty shall have the right to appeal to a competent judge or court in order for him to decide without delay on the legality of his arrest or detention and to order his release if the arrest or detention is unlawful. In States parties whose laws provide that any person arrested who is threatened with being deprived of his liberty has the right to appeal to a competent judge or court in order for him to decide on the legality of such a threat, such an appeal cannot be restricted or abolished. The appeal may be brought by the person himself or by any other person.



As we have seen, the custody hearing is supported by two important international human rights documents to which Brazil is a signatory. By voluntarily ratifying the aforementioned treaties, Brazil undertakes to comply with the terms contained in these documents. However, it took more than 20 (twenty years) to effect the presentation hearing. That is, in a way Brazil has omitted it all this time; because only a documentary analysis of the situation of the person arrested in flagrante delicto was made, differently from what the international treaties mention.

### *3.2 International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights is one of the three instruments that make up the International Charter of Human Rights. Also part of this are the International Declaration of Human Rights and the International Covenant on Social and Cultural Economic Rights.

However what interests us at the moment is the relationship between this pact and the custody hearing, since it also retains the rights it aims to protect.

The International Covenant on Civil and Political Rights in Article 7 reads:

Article 7 - No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment. In particular, no one will be submitted without your free consent to medical or scientific experiments.

And in Articles 9 and 10:

1-Every individual has the right to personal freedom and security. No one may be subjected to arbitrary arrest or arrest. No one may be deprived of his liberty, except for the reasons laid down by law and in accordance with the procedures laid down therein.

3- Every person arrested or arrested for a criminal offence shall be present, as soon as possible, to a judge or other official authorized by law to perform judicial functions, and shall be entitled to be tried within a reasonable period or to be released. Pre-trial detention should not constitute a general rule, however, freedom must be conditional on guarantees ensuring the act of justice or at any other time of the procedural proceedings, or for the execution of the sentence.

Article 10:

1- Every person deprived of liberty will be treated humanely and with respect due to the dignity inherent to the human being.

As can be seen, the International Covenant on Civil and Political Rights is another international document that supports, substantiates and protects the rights that the custody hearing seeks to implement. It seems a little repetitive, but the goal is to make it clear that the custody hearing is the realization of international anides in dialogue with national objectives, as we will analyze some articles of the Federal Constitution.

### *3.3 Federal Constitution of 1988*

The Federal Constitution of 1988 does not make direct references to custody hearings, because it is a new legal instrument in a certain way in Brazil; however, article 5, which deals with fundamental rights and guarantees, it is possible to identify in item III the protection of rights that meet the objectives of holding

the custody hearing. See: "Article 5: III - no one shall be subjected to torture or inotheror or degrading treatment."

It is clearly verified in the above mentioned article the protection that the Constitution guarantees to Brazilians and foreigners in the national territory. However, what was missing was the instrument to put into practice such rights.

It is also possible to cite the following item of the same article: "XXXV- the law will not exclude from the assessment of the judiciary injury or threat to the right."

In this case, it turns out that the custody hearing came precisely to exercise what was already guaranteed in the Federal Constitution of 1988.

In the xlix item it emittersread: "XLIX- prisoners are assured of respect for physical and moral integrity."

As we see the custody hearing brought no news, only came to curb injustices; because these rights were already protected by the 1988 Constitution.

In the same article cited in the item LXV states: "LXV- illegal imprisonment shall be immediately relaxed by the judicial authority."

It turns out that he already mentioned the immediate release in cases of illegal imprisonment. And to finalize the citations of the Federal Constitution, we will see that it cites the international treaties in the lxxviii item:

*§2- The rights and guarantees expressed in this Constitution do not exclude others arising from the regime and principles adopted by it, or from the international treaties to which the Federative Republic of Brazil is a party.*

It is also possible to mention another excerpt from the Brazilian constitution of 1988 that deals with international treaties.

See also in Article 5, item LXXVIII:

*§3- The international human rights treaties and conventions that are approved, in each house of the National Congress, in two shifts, by three-fifths of the votes of the respective members, shall be equivalent to the constitutional amendments.*

So it is clear that the rights guaranteed in the International Treaties were preserved by the Federal Constitution of 1988 and that they were put into practice from the achievements of custody hearings in Brazil.

### *3.4 CNJ Resolution on Custody Hearing*

The custody hearing was much requested by various sectors of Brazilian society; mainly by human rights protection entities, undoubtedly contributing to the implementation of this institute in the Brazilian legal system. However, the National Council of Justice (CNJ), *launching the Custody Hearing Project*, was indispensable for the judiciary to put the matter in evidence in Brazil. First, the said project was launched only in the State of São Paulo on February 6, 2011, however, in his presentation speech Minister Lewandowski has already announced the intention to expand the project to other states. On April 9 of that



year the CNJ, the Ministry of Justice and the Defense Institute of the Right of Defense (IDDD) signed three agreements aimed at encouraging the implementation of the project throughout the national territory.

It is worth remembering that Maranhão was the first state to regulate the holding of custody hearings in the country in 2014. This was due to serious problems faced in its prison system, which was even broadcast in the national media. The next state to regulate the custody hearing was the State of São Paulo on 01/22/2015. On 04/09/2015 the Court of Justice of the State of Espírito Santo also regulated the holding of the hearings. Then the State of Minas Gerais also joined the CNJ project. And so the states gradually were commencing themselves to the CNJ project and at the same time to international treaties and conventions.

However, it was with Resolution No. 213 of 15/12/2015 that the CNJ, through its president, regulated the holding of custody hearings throughout the country, in which it provides for the presentation of all person arrested to the police authority within 24 hours. This Resolution consists of eleven considerations justifying the hearings, of which two will be cited:

CONSIDERING that imprisonment, according to constitutional provision (CF, art.5º, LXV, LXVI), is an extreme measure that applies only in cases expressed by law and when the hypothesis does not include any of the alternative precautionary measures;

CONSIDERING the diagnosis of prisoners presented by the CNJ and the INFOPEN of the National Penitentiary Department of the Ministry of Justice (DEPEN/MJ), published, respectively, in the years 2014 and 2015, revealing the disproportionate contingent of people provisionally arrested.

In several articles of Resolution No. 213 of 15/12/2015, a special concern is highlighted in curbing acts of torture and ill-treatment, as provided in the international treaties mentioned above.

#### **4. DEADLINE FOR HOLDING CUSTODY HEARING**

The issue of the deadline for holding the custody hearing has been the subject of disagreements since its partial implementation, that is, in some states, until the implementation throughout the national territory.

The first question was about the meaning of the expression "without delay" that appears in the translation American Convention on Human Rights. What does that actually mean? How should this expression be interpreted?

The ACHR uses the expression "without delay" to refer to the temporal aspect between the arrest of the prisoner and his conduct to the judicial authority (Caio Paiva, 43). Although there is, as Bardaró records, some controversy regarding the

translation of the original text of the Convention, as in the English version, which uses the expression promptly ("promptly"), the senses are very close and we will leave, here, from the expression found both in the Spanish version and in the text promulgated in Brazil: "without delay" (Caio Paiva, 43)

Well, that's it. There is a consensus in the jurisprudence of the International Human Rights Courts that the definition of what is meant by without delay should be interpreted according to the special characteristics of each specific case, thus having several precedents both the Inter-American Court and the European Court of Human Rights. However, you can find

some "parameter" in international jurisprudence, which has greatly enhanced the expression "without delay" to attribute to it a meaning consistent with the purposes of the guarantee (Caio Paiva, 45).

At the U.S. regional level, the Inter-American Court has already ruled, for example, that it violates the ACHR (American Convention on Human Rights), the conduct of the prisoner in the presence of judicial authority in the following time lapses after the arrest: almost a week, almost five days, approximately thirty-six days,... On the other hand, the court ruled that in *López Álvarez v. Honduras*, it ruled that the state in demand did not violate the ACHR, and that the case would have been brought before the judicial authority the day after his arrest. Thus, it can be concluded, *for the time being*, that is, until other precedents arise, that the IACHR considers that the expression "without delay" provided for in Art. 7.5 of the Convention is not violated when the prisoner is presented to the judicial authority within one day of the arrest (Caio de Paiva, 45)

As can be seen in the above-mentioned section, there was no fixed or determined deadline to be made the presentation of the prisoner.

In Brazil there were also several divergences regarding this deadline. Other questions that were usually asked in our country: from what time should be begun to count the deadline for holding the hearing? From the moment of the arrest? Right after the conclusion of the investigation? Finally, many doubts existed as to the deadline for the submission of the prisoner before resolution No. 213 of the CNJ.

Let it be clear that, in Brazil, Resolution No. 213 of the CNJ establishes the time of 24 (twenty-four) hours for the presentation of the prisoner to the judicial authority, according to its art.13:

The presentation to the judicial authority within 24 hours also ensured to persons arrested as a result of compliance with injunctions of injunctive or definitive imprisonment, applying, in whatever case, the procedures provided for in this Resolution.

However, several factors have been claimed that may influence the time required for this presentation, such as the structure of the Brazilian judicial police. There are places in Brazil where the operating conditions of police stations are precarious, municipalities where there are no doctors available to perform the necessary tests; there were even suggestions from CONAMP that the deadline in question should be 72 (seventy-two hours). However, I repeat, the deadline stipulated in Resolution No. 213 of the CNJ, which is 24 hours from the time of arrest, is what prevails in Brazil.

## **5 CUSTODY HEARING FROM THE POINT OF VIEW OF DOCTRINE**

Although the custody hearing is a fact that caused disagreements among the indoctrinators, the vast majority consider it as a fundamental guarantee.

As Marcelo Semer warns, 2014, p.116, law (and criminal proceedings, I add) deviates from agency to the extent that it serves as a limit to the exercise of punitive power. Similarly, Caio Paiva points out:

It must not be forgotten that, at least in the Democratic State of Law, the function of criminal sciences, and criminal proceedings in particular, is that of containing power. Criminal proceedings are justified only as an obstacle to oppression. The challenge is to make the criminal sciences

always, and always act as an instrument of democratization of the criminal justice system" (Caio Paiva, 28).

In this regard, the thought of Pope Francis, who, in one of his speeches, after describing what he called "Criminal Systems Out of Control", is revealed, points out that:

In this context, the task of lawyers may be solely to limit and contain such trends. It is a difficult task, in times when many judges and agents of the criminal justice system must carry out their task under pressure from the mass media, some unscrupulous politicians and the drive of revenge that is insinuated into society. Those who have such responsibility are called to do their duty, since not doing so endangers human lives, which need to be cared for with greater intrepidity of what is sometimes sometimes done in the fulfilment of one's own functions" (Caio Paiva, 28).

According to Caio Paiva himself:

Containing or limiting punitive power does not mean commending with impunity, but rather streeming for respect for procedural, constitutional and conventional rules that regulate the activity of the criminal justice system. Such a stance represents a clearly counter-majority activity today."

On this purpose, this is the very valuable warning made by Rui Cunha Martins, 2018, p. 87:

Finally, the process will only be a true operator of change as long as it can assume a facet as unpopular as it is indispensable: being a defraudor of expectations. It is quite true that classically, the process owes the legal certainty that can be expected of its ability to stabilize expectations, whether social, normative, more prosaically, of justice. It doesn't matter. This connection needs to be rethought according to what is now the production mode of expectations. We follow this production too closely, throughout this work, to limit ourselves to fencing the phrase made of the correspondence between process, certainty of the right and social expectations regarding the memo. The truth is that the process today, to be due and legal, has every interest in shutting down its function of the current tables of expectation. This will be one of the greatest glories: to ask him for blood and for him to offer contradictory.

It is important to cite the opinions of the opinion of the function of the process, because it is precisely in this context that the custody hearing fits. It appears with the function of humanizing, limiting punitive power. It is the instrument that makes it possible to prevent excesses and injustices from happening in the process as a whole. So that can actually be a due process.

Still about this, says Alencar and Távora (2013, p. 54):

The recognition of the authorship of a criminal offence presupposes a final judgment (art.5º, inc. LVII of the CF). Before this milestone, we are presumably innocent, and the prosecution has the evidential burden of this demonstration, in addition to which the precautionary restriction of freedom can only occur in exceptional situations of strict necessity. In this context, the rule is freedom and incarceration, before the sentencing order is finalised, it must appear as a measure of strict exception.

The Federal Constitution of 1988 determines that the segregation of freedom, prior to the final judgment of the criminal sentence, will only take place with a decision and written judgment given by the competent court.

Prison is the restraint of freedom, that is, it is the incarceration that comes from a criminal sentence that is finalized, which is regulated by the Penal Code.

In this context, the genuine function of the custody hearing is observed. It is worth remembering that for crimes of lesser offensive potential there are precautionary measures as punishment and that custodial sentences would be disproportionate. And even provisional arrest would make no sense, if even if the accused were to be convicted, the sentence would not be custodial.

Regarding proportionality, Oliveira (2011, p.504) comments that:

Prohibition of excess, but also, in the maximum effectiveness of fundamental rights, effective control of the validity and scope of the rules, authorizing the interpreter to refuse the application of that (standard) containing excessive and out-of-the-line sanctions or prohibitions of the need for regulation [...] it is necessary to allow a weighting judgment in the choice of the most appropriate standard in case of possible tension between them, that is, when more than one rule, legal or constitutional, presents itself as applicable to the same fact.

According to the doctrine of Mauro Fonseca and Rodrigo Alflen, the custody hearing is conceptualized as:

[...] mechanism of control over the criminal prosecution activity carried out by the state, in particular, on the institutions in charge of acts prior to the prosecution of the criminal prosecution ... it would avoid, therefore, the risk of incidence of one of the main problems that occurred in this initial phase of the criminal prosecution, which is the occurrence of ill-treatment and torture to individuals who had been arrested in flagrante [...] by order of state forces diverse from the judiciary. (ANDRADE, 2016, p.16).

Still on the subject, teaches Rogério Schiatti Machado Cruz:

The possibility that the accused himself intervenes, directly and personally, in the performance of the procedural acts, thus constitutes self-defense (...). It should be noted that self-defense is not limited to the participation of the accused in judicial questioning, but must extend to all acts in which the accused participates, (...). In fact, self-defense unfolds in the right of hearing and in the right of presence, that is to say, the accused has the right to be heard and speak during the procedural acts (...).

It is worth noting the concept of custody hearing of Caio Paiva:

The custody hearing consists, therefore, in the conduct of the prisoner, without delay, the presence of a judicial authority that must, from a previous contradictory established between the Public Prosecutor's Office and the Defense, exercise immediate control of the legality and necessity of the arrest, as well as assess issues relating to the person of the citizen led, notably the presence of ill-treatment or torture (PAIVA, 2015, p. 31)

## **6 PRACTICE: HOW THE BRAZILIAN JUDICIARY HAS BEEN APPLYING CUSTODY HEARING**

As we have seen in the international treaties mentioned above, it has been a concern of the international community, since 1966 with the International Covenant on Civil and Political Rights, the effective protection of human rights worldwide. Brazil, despite being a signatory to such Treaties, took decades to actually implement the custody hearing, which is an important instrument for the protection of human rights.

It is necessary to mention that, in Brazil, a portion of the police agencies, the Public Prosecutor's Office and the public prosecutor's office and the justice system in general are against the draft custody hearings. The National Association of State Magistrates (ANAMAGES) stands against and claims that the measure will remove police officers from their functions in the streets and police stations, aggravating public safety problems and further increase the administrative duties of judges.

On February 12, 2015, the Association of Police Delegates of Brazil (ADEPOL/Brazil) filed a Direct Action of Unconstitutionality (ADI 5,240) in the Federal Supreme Court that provided for custody hearings. It is of course that the association was unsuccessful in its work.

In fact, custody hearings were effectively incorporated into the Brazilian judicial system in 2015, thanks to Resolution No. 213/2015 of the National Council of Justice that established guidelines and forecasts about the custody hearing and also to the Senate that approved PSL No. 554/2011 in the first round, which you propose the following menu: " Amends the §1 of Art. 306 of Decree Law No. 3689 of 3 October 1941 (Code of Criminal Procedure), to determine the period of twenty-four hours for the presentation of the prisoner to the judicial authority, it began to be applied throughout the national territory. It is worth remembering that it did not happen throughout Brazil at the same time and also that internal regulation would not be necessary, because Brazil is a signatory to the International Treaties that created and dictated its implementation. The states were gradually adhering to the project, well before Resolution No. 213 mentioned above. Today, custody hearings are in varying degrees of application in each state of the federation.

In a survey conducted by g1, currently, custody hearings arrest more than they release in 2/3 of the Brazilian states. According to the website, in 18 states, hearings result mostly in arrests.

It is worth taking stock of the implementation of the hearings after approximately three years of operation. Even with the strong resistance of the operators of the law, the instrument on the agenda has contributed to the non-recording of the situation of the prison system, which is already precarious. In this way, Brazil dialogues with the international procedures with which it has committed itself.

As expected, not everything came out perfectly from the start. An adaptation period is always required. Therefore, failures occurred. The most serious at the beginning of the implementation occurred in the judicial sphere. For a long time, many magistrates examined the arrest notice in flagrante understanding that it was legal and indispensable to injunctive custody, but did not base it as provided for in the Constitution of the Republic, for all judicial decisions. But over time these problems have been sanated mainly by the criticisms of jurists in various respects.

According to the data, from the year 2017, the National Council of Justice would have held 258,485 custody hearings, of which 115,497 resulted in provisional or non-provisional release, this represents 48.68% of the cases. Thus, most hearings resulted in imprisonment; contrary to the idea of mass incarceration. If in Brazil we had more than 700,000 prisoners this year, we will certainly agree that custody hearings have avoided worsening.

I thought it was important to bring, in this context, some information from the State of Rondônia. Here in our state, the custody hearing was regulated by Joint Provision No. 011/2015/PR-CG. Here in Rondônia, the Custody Hearing Center was created. This is open Monday to Friday from 08:00 to 13:00 and from 15:00 to 18:00 hours, and is presided by a guarantee judge.

The custody hearing has been held in the state since 2015. To be more precise, the first hearing was held in Porto Velho on September 14, 2015, the head of the Court of Justice of Rondônia, including the presence of the CNJ and the Supreme Federal Court at the time, Minister Ricardo Lewandowski.

At the time, it is worth mentioning that the State of Rondônia is the state with the lowest rate of provisional prisoners in the country, with only 16% of the total prisoners.

The National Council of Justice (CNJ) has as one of its objectives the reduction of the prison population of Brazil. This is possible by reducing the contingent of provisional prisoners, i.e. without conviction. Which would reinforce the presumption of innocence.

The average, in the State of Rondônia, conversion of prisons into preventive is 51.01%, in provisional release with injunctive measure is 43.45%, in full provisional freedom is 4.10% and 1.43% in prison relaxation. It is also important to note that in approximately six months of hearings, 172 prisoners claimed that there was violence at the time of the arrest, which makes clear the importance of its realization.

## **7 JURISPRUDENCE**

As a way of complementing the study, some jurisprudence on the fact in question is attached. First ly at the national and later international level.

STF- COMPLAINT Rcl 28834 RS RIO GRANDE DO SUL

Jurisprudence

**Decision:** Regarding the holding of custody **hearings** within the jail, I refer to the Resolution... Felipe Keunecke de Oliveira, inclusive, has designated **custody hearing** for subsequent realization... Second, because from the information provided it is possible to infer that (a) custody hearings **are** daily...

TJ-CE-Conflict of Jurisdiction CJ 00005717020168060000 CE 0000571-70.2016.8.06.0000 (TJ-CE)

Menu

JUDGMENT OF THE 17th CRIMINAL COURT-SINGLE COURT OF **CUSTODY** HEARINGS IN THE FACE OF THE JUDGMENT OF THE 3rd COURT OF DRUG TRAFFICKING OFFENSES. JURISDICTION TO MAKE JUDGMENT OF RETRACTION IN A STRICT SENSE. GRANTING OF PROVISIONAL FREEDOM. DECISION MADE BY THE



JUDGMENT OF THE SINGLE COURT OF **CUSTODY HEARINGS**. ECJ RESOLUTION No. 14/2015. JURISDICTION OF THE COURT RAISED. CONFLICT.

Jurisprudence

1-The present conflict of jurisdiction is consoned, in which body has the jurisdiction to carry out the judgment of retraction of the appeal in strict sense brought against a decision that granted provisional freedom in custody hearing, if the judgment of the 17th Criminal Court – Single Private Court of **Custody**hearing, which delivered the said decision, or the judgment of the 3rd Court of Drug Trafficking Crimes, for which the expedient was distributed after the hearing mentioned. 2. Pursuant to art.96, inc.

STF - COMPLAINT Rcl 34600 RJ RIO DE JANEIRO (STF)

Jurisprudence

**Decision:** CUSTODY **HEARINGS** Act CLAIMED ART. 2nd OF RESOLUTION No. 29/2015 OF THE TJRJ. POSSIBLE ADMINISTRATIVE DISOBEDIENCE TO THE DECISION OF THE SUPREME COURT THAT DETERMINED THE HOLDING OF **CUSTODY HEARINGS** ... In casu, CNJ disciplined the holding of custody **hearing** through Resolution 213/2015, which...

STF - PRECAUTIONARY MEASURE IN COMPLAINT MC Rcl 27206 RJ RIO DE JANEIRO 0005439-10.2017.1.00.0000 (STF)

Jurisprudence

**Decision:** custody within the first instance of local custody, enabling the prisoner to appear before the judicial authority within a maximumperiod... Alluding to Notice No. 80/2015, it points out the absence of custody hearings relatively...

As can be seen in the above-mentioned court examples, there are several favorable or determinable decisions that hold custody hearings, when they were not yet fully regularized within the internal scope of the Brazilian legal system. Numerous examples could be cited here in which illegality in not holding custody hearings is recognised. But we will see cases of international human rights jurisprudence cited by Caio Paiva and Thimotie Aragon Heemann/2015.

#### **White Bear Penitentiary Case**

Judging Body:

Inter-American Court of Human Rights

Trial:

Provisional Measures determined in 2002 and infiscaluntil August 25, 2011.

On 06/06/2002, the Inter-American Commission on Human Rights submitted to the Inter-American Court of Human Rights a request for interim measures in favor of inmates of the José Mário Alves Detention Center, known as "Urso Branco Penitentiary", located in the city of Porto Velho, State of Rondônia, Brazil. The goal was to prevent interns from continuing to die in that prison unit.

After several other Resolutions (in 2002, 2004, 2005, 2008 and 2009) underscoring the duty of the State to better implement compliance with provisional measures to prevent more deaths in the Urso Branco Penitentiary, the Inter-American Court adopted its last resolution on the case on 08/25/2011, at which point, considering (I) that since December 2007 there were no violent deaths or riots in the Urso Branco Penitentiary (II) that the State was properly investigating the allegations of violence or ill-treatment presented by the representatives of the victims and, mainly, (III) that the State of Rondônia signed with the representatives of the victims a "Pact for the Improvement of the Prison System of the State of Rondônia and the lifting of Provisional Measures Granted by the Inter-American Court of Human Rights", repealed the provisional measures because it no longer remains the scenario of gravity, urgency and need to prevent irreparable damage to the integrity and life of inmates of the Urso Branco Penitentiary, which does not release the Brazilian State, however, from its conventional obligations of surveillance and protection.

One can imagine what the environment was like within the prison mentioned above by having a capacity of 360 inmates and hold up to 1300. It counts from 2002 to 2011, exactly 100 deaths from the penitentiary. It is worth informing that, on June 24, 2019, the Urso Branco Penitentiary was completely vacated and that a complete renovation will be made in the building, seeking to meet the minimum dignity for prisoners. Not that this unemployment is the court's determination, but it undoubtedly influenced for this to happen. It is important to note that the Inter-American Court of Human Rights is active in cases of human rights violations, not only in Brazil, but in all countries in which it can intervene. As we will see in the next example:

**Case Mendonza and others vs. Argentina**

Judging body: Inter-American Court of Human Rights

Judgment: 14 May 2013

Between 09/04/2002 to 30/12/2003 the presumed victims, one by lawyer and the other five by the Public Defender General of Argentina, Stella Maris Martinez, filed several petitions with the Inter-American Commission regarding the imposition of the life sentence for minors under 18 years of age who have committed certain crimes. In the face of the similarity between the allegations of fact and law, the committee decided to accumulate these petitions in one expedient, separating only the case of the victim Guillermo Antonio Alvarez, who would be processed in another file.

In 2010, the Commission issued a Background Report, concluded that the State was responsible for the violation of rights recognized in the American Convention on American Human Rights (ACHR) and made several recommendations, including to adopt legislative measures to make the criminal justice system applicable to adolescents compatible with international obligations on the special protection of young people. Argentina, however, even after three extensions of the deadline to inform it of compliance with the recommendations, remained inert, and therefore led the Commission to take the case to the Inter-American Court.

The Court begins by noting that the controversies of this case are not related to the investigation of the criminal liability of victims for the crimes allegedly committed, but rather in the imposition of life imprisonment on those, an aspect on which the Argentine State recognized its international

responsibility for violating the principle of criminal culpability, because life imprisonment would only be provided for imputed adults... Finally, in short, among several other conclusions, of a reparatory nature, of adjustment of the internal legal system etc..., the Court determined that the State refrain from applying the penalty of life imprisonment to victims, as well as to other people for crimes committed when they were minors.

It would be simple to cite numerous cases in which the Inter-American Court of Human Rights intervened to ensure that human rights are respected around the world, but I chose to demonstrate these two cases to illustrate how the Court's intervention was of fundamental importance to prevent such cases from continuing to happen in these countries.

## **Conclusion**

Given everything that has been exposed, it can be concluded that the holding of custody hearings in Brazil is a major step towards the humanization or civilization of the Brazilian prison system. It is a step towards justice in its fullness, for it selects and takes from prison people who did not have the need to be or remain there. However, we must remember that this is a new process and that we are still crawling when we compared ourselves to other countries that have been doing it for decades. It is clear that this is not a mass incarceration with the sole objective of emptying prisons, but rather a mechanism that makes the whole process more fair. It can be seen that the

punishment for some delictive conduct is not always prison. The Brazilian legal system cannot distance itself from its main objective, which should be the reintegration of the individual into society.

The custody hearing allows the correction of possible illegalities and despite and despite the doctrinal and jurisprudential divergences, has proved to be an efficient legal instrument to avoid unnecessary overcrowding in Brazilian prisons and to preserve freedom, even if provisional for those who are entitled to it.

## **References**

- Anne Joyce, Angher. Federal Constitution of 1988. Vade Mecum Academic of Rideel Law. Sao Paulo, 2016.
- Brazil. Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. Available in: <http://www.oas.org/es/cidh/expresion>. Accessed: March 20, 2019.
- \_\_\_\_\_. NATIONAL COUNCIL OF JUSTICE. Custody hearing. Available in <: <http://www.cnj.jus.br/sistema-carcerario-penal/audiencia-de-custodia>>. Accessed: June 20, 2019.
- \_\_\_\_\_. Pact of St. Joseph of Costa Rica. Available at <http://jus.com.br>. Accessed: March 17, 2019.
- Costa, Thiago. Custody Hearing - advance or risk to the accusatory system? Available in: <http://thiagofscosta.jusbrasil.com.br/artigos/161368436/audienciade> custody-custody-advance-or-risk-to-system-accusatory. Accessed: March 20, 2019.
- Darlan, Siro. Custody Hearing, a right to be respected. Available in: <http://www.jb.com.br/sociedade/news/2015>. Accessed: April 15, 2019.
- Paiva, Caio Cezar de Figueiredo, International Human Rights Jurisprudence, Manaus, 2015.