

Criminal Law and the Laws that Ensure the Implementation of Custody Hearings in Brazil: A Literature Review

O Direito Penal e as Leis que asseguram a implementação das Audiências de Custódia no Brasil: revisão de literatura

El Derecho Penal y las Leyes que Garantizan la Implementación de las Audiencias de Custodia en Brasil: una revisión de la literatura

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Abstract:

This study analyzed the importance of Custody Hearings within the Brazilian legal framework. It is well known that our prison system faces numerous difficulties. Among them are situations where individuals arrested in flagrante delicto could await trial in freedom, but end up occupying prison spaces that are largely already at capacity or overcrowded. Furthermore, this leads to the violation of the fundamental rights of individuals who could otherwise await trial in freedom. It was in the face of these realities that the concept of the "Custody Hearing" emerged, a controversial and much-discussed topic in the legal field. Custody Hearings have a social function of curbing the trivialization of pretrial detention and ensuring that human rights treaties and pacts are effectively implemented. Therefore, the main objective of this study was to analyze the implementation of Custody Hearings as a right of the defendant, through the actions of judges and the position of the Supreme Federal Court (STF) justices, in addition to addressing their legal aspects and their function as a guarantee of the defendant's defense. The methodology used was a literature review based on published scientific articles on the subject, international human rights treaties, doctrines and respective jurisdictions involving criminal law, and the laws that ensure the implementation of Custody Hearings in Brazil. It was concluded that Custody Hearings are positive in preventing abuses against the defendant, reducing unnecessary detentions in already overcrowded prison systems, and humanizing and improving the quality of the legal process.

Keywords:

Custody Hearing; Human Rights; Jurisdiction; Prison.

Resumo:

Este estudo analisou a importância das Audiências de Custódia no âmbito jurídico brasileiro. É notório, que nosso sistema penitenciário enfrenta inúmeras dificuldades. Dentre elas, estão as prisões em que o preso em flagrante delito, pode aguardar seu julgamento em liberdade, mas, contudo, acaba ocupando vagas na prisão que em grande parte já está no limite de lotação ou superlotada, e ainda ocorre a violação dos direitos fundamentais do indivíduo que, poderia aguardar em liberdade seu julgamento. Foi diante destas realidades que surgiu o conceito da "Audiência de Custódia", um tema polêmico e muito discutido no meio jurídico. As Audiências de Custódia têm uma função social de coibir a banalização das prisões cautelares e assegurar que os tratados e pactos de Direitos Humanos sejam cumpridos de maneira eficaz. Diante do exposto, o principal objetivo deste estudo foi analisar a implementação das Audiências de Custódia, enquanto direito do réu, por meio da atuação dos juízes e da posição dos ministros do STF, além de abordar seus aspectos legais e sua função enquanto garantia de defesa do réu. A metodologia utilizada foi revisão bibliográfica fundamentada por artigos científicos publicados sobre o tema, tratados internacionais de Direitos Humanos, doutrinas e jurisdições respectivas que envolvem o direito penal, e as leis que asseguram a implementação das Audiências de Custódia no Brasil. Concluiu-se que as Audiências de Custódia são positivas na prevenção de

abusos contra o réu, na redução de prisões desnecessárias em sistemas prisionais já lotados, humanizando e qualificando o processo jurídico.

Palavras-chave:

Audiência de Custódia; Direitos Humanos; Jurisdição; Prisão.

Resumen:

Este estudio analizó la importancia de las Audiencias de Custodia en el ámbito jurídico brasileño. Es notorio que nuestro sistema penitenciario enfrenta numerosas dificultades. Entre ellas se encuentran los casos en que una persona detenida en flagrante delito podría esperar su juicio en libertad, pero termina ocupando plazas en establecimientos penitenciarios que ya se encuentran al límite de su capacidad o superpoblados. Además, se produce la vulneración de los derechos fundamentales del individuo que podría esperar el juicio en libertad. Fue frente a estas realidades que surgió el concepto de la “Audiencia de Custodia”, un tema polémico y ampliamente debatido en el ámbito jurídico. Las Audiencias de Custodia tienen una función social de impedir la banalización de las prisiones cautelares y garantizar que los tratados y pactos de Derechos Humanos sean cumplidos de manera efectiva. Ante lo expuesto, el principal objetivo de este estudio fue analizar la implementación de las Audiencias de Custodia como un derecho del acusado, a través de la actuación de los jueces y de la posición de los ministros del STF, además de abordar sus aspectos legales y su función como garantía de defensa del acusado. La metodología utilizada consistió en una revisión bibliográfica fundamentada en artículos científicos publicados sobre el tema, tratados internacionales de Derechos Humanos, doctrinas y jurisdicciones relacionadas con el derecho penal, así como las leyes que garantizan la implementación de las Audiencias de Custodia en Brasil. Se concluyó que las Audiencias de Custodia son positivas para prevenir abusos contra el acusado, reducir las detenciones innecesarias en sistemas penitenciarios ya saturados y humanizar y cualificar el proceso jurídico.

Palabras clave:

Audiencia de Custodia; Derechos Humanos; Jurisdicción; Prisión.

INTRODUCTION

Brazilian criminal justice , therefore as your procedural legislation criminals it happened put countless changes us lately , searching adapt the Brazilian Code of Criminal Procedure to conventions and treaties international initiatives . One of the initiatives what they deserve emphasis in this context These are the Custody Hearings .

In the year 2015, his implementation he was carried out put in the middle of a project what involved the Supreme Federal Court (STJ), the The debates in each Brazilian state are conducted by the Courts of Justice (TJ), the National Council of Justice (CNJ), and the Institute of the Right to Defense (IDDD). around the theme since So , they won. many strength in the middle legal and academic , already which is an instrument directly related to the preservation of the defendant 's rights . In the year

2019, by Pursuant to Law No. 13.964, of December 24 , the Custody Hearing became mandatory . in our criminal procedural law .

Among the In the years 2025/2026 there were new changes put quite of Law 15.272/2025 and new draft laws (PL 226/2024) that changed criteria for imprisonment preventive measures and holding of the Hearing , consolidating practices regarding the dangerousness and the need for a lawyer 's presence or defender .

Such measures they were sockets through to the The following legal bases are established : Federal Constitution: Article 5, item LXV (release from illegal imprisonment); International: Pact of San José, Costa Rica (Decree 678/1992); Code of Criminal Procedure (CPP): Article 310 (conversion/release) and Article 3-B (judge of guarantees); finally, the Virtual Hearing, which was regulated by CNJ Resolution No. 329/2020 and 357/2020, allowing the use of videoconferencing. All these measures aim to inhibit mistreatment and the practice of the "culture of automatic imprisonment".

THE choice of the aforementioned theme of that work was done due to trivialization of prisons precautionary measures observed in the scenario Brazilian . In a country as the Brazil in that the reality of the system prison life is dramatic , according to Teixeira (2015, p.22), “ prisons precautionary measures they are constantly used as urgent measures to address the opinion public , with the illusion of justice Immediate . The discourse prevails . what only it will be punished that one what you are prisoner preventively , giving the false impression that there is inefficiency of justice if the agent to stay " Released ." In this sense , the Custody Hearing presents several benefits to society such as preservation of rights of the detainee one time that , the presence of one judge in Audience avoid abuses police and arrests arbitrary , reduction of prison sentences provisional unnecessary promoting the effectiveness of the treaties international of Human Rights and not overloading yet plus the system prison . The Custody Hearing still provides opportunities the adequate assessment of the legality of the arrest Caught in the act, access the lawyer , and about Everything , transparency and social control of the penal system . Therefore , the The choice of theme aims to broaden the discussion. validating your effectiveness when conducted in a manner efficient and ethical to fulfill your social function .

In light of the above , the main objective of that study he was to check the implementation of Custody Hearings , while defendant 's right , by through the actions of judges and the position of ministers of the Supreme Federal Court, in addition to addressing your aspects legal and their function while guarantee of citizen defense . In

addition to knowing the Importance of the Custody Hearing for the criminal process ; explain How does the Custody Hearing contribute to treaty compliance ? international human rights ; investigate you pros and cons that involve the topic of Custody Hearings within the scope legal Brazilian

METHODOLOGY

THE methodology adopted to development of present work combines multiple research methods for a analysis broad topic proposed . It will be therefore accomplished vast revision bibliographic on the theme , including books , articles publications relevant what they address the The institution of the Custody Hearing and its implications .

Simultaneously , it will be carried out one detailed documentary review of science criminological , well as well as the resolutions and recommendations of the National Council of Justice, for the development of discussions relevant to the theme .

The following stands out : research and review jurisprudence shows itself to be of considerable importance . importance for explanation and defense this work , based put doctrines and jurisdictions respective what This involves Criminal Law , and the laws that they assure the Implementation of Custody Hearings in Brazil .

The realization of fundamental rights in the national legal system.

Fundamental rights are a significant achievement for society in preserving rights common to all human beings, without distinction. They are also essential for safeguarding their dignity. De Oliveira (2004) emphasizes that:

The importance of fundamental rights also stems from another circumstance. Besides being tautologically fundamental, the evolution of humanity has demanded a new conception of the effectiveness of fundamental rights. From the purely abstract and metaphysical sense of the Declaration of the Rights of Man of 1789, starting with the Universal Declaration of Human Rights of 1948, there has been an evolution towards a new universality of fundamental rights, placing them at a higher level of juridicality, concreteness, positivity, and effectiveness (Oliveira 2008, p. 121).

Therefore, life in society is dynamic, and changes affect different social sectors, including legal ones that permeate the duties and rights of social actors. Thus, achieving the evolution of Human Rights in a conception of universality was a significant leap.

Flávia Piovesan (2008, p.4) comments that:

The 1948 Declaration introduced the contemporary conception of human rights, marked by the universality and indivisibility of these rights. Universality because it calls for the universal extension of human rights, under the belief that the condition of being a person is the sole requirement for the entitlement to rights, considering the human being as an essentially moral being, endowed with existential uniqueness and dignity, the latter as an intrinsic value of the human condition. Indivisibility because the guarantee of civil and political rights is a condition for the observance of social, economic, and cultural rights, and vice versa. When one of them is violated, the others are also violated. Human rights thus form an indivisible, interdependent, and interrelated unity, capable of combining the catalog of civil and political rights with the catalog of social, economic, and cultural rights.

In this way, man becomes the holder of universal fundamental rights, with the strengthening of human rights and a break from a past in which grave atrocities against human life were witnessed, without any preservation of rights or opportunity for defense, as exemplified by the Holocaust, which occurred in the Second World War.

These rights were formalized in law and became a reality through international treaties that aimed to establish guidelines allowing for the empowerment of individuals in relation to the State.

Regarding international treaties, it is worth highlighting, according to De Almeida Martins (2014), that:

International human rights treaties, in their current model, emerged as a legacy of the 1948 Universal Declaration of Human Rights. This Universal Declaration, in turn, arose after World War II as a way to consolidate and truly recognize human rights, even to the detriment of the old concept of absolute state sovereignty, since, until then, only states were recognized as subjects of international law. Thus, international treaties for the protection of human rights began to be used generically and globally, so that these acquired rights would not be subject to the whims of each state's sovereignty. These treaties came to be endowed with mechanisms for safeguarding internationally protected human rights, including the relativization of state sovereignty itself, as interventions at the national level were permitted in the interest of protecting human rights. (De Almeida Martins 2014, p.10).

It is also worth mentioning the important convention held in Vienna in 1969, which was highly significant with regard to international treaties.

According to Chiappini (2011, p.15):

The International Convention on the Law of Treaties was signed in Vienna, Austria, in 1969, with the aim of resolving disputes regarding the application of international treaties and establishing parameters for the signing, accession, formulation, denunciation, and other international obligations. Its importance is undeniable, since the convention sought to codify customary international law and establish new rules based primarily on general principles of law, jurisprudence, and doctrine .

In 1986, a new convention was held in Vienna and a new treaty was drafted to complement the 1969 treaty, altering the possibility that treaties were not exclusively the domain of states. And as Chiappini (2011, p. 15) explains, despite its relevance, the aforementioned convention was only ratified in Brazil in 2009, after several years of processing in the National Congress.

Regarding the application of treaties, Fávoro and Valadão (2008, p. 2,696) reiterate that:

There are two principles that guide the application of treaties: *pacta sunt servanda* and good faith. Thus, after the effective establishment of a treaty, the parties must respect and comply with it in good faith. Failure to comply with the obligations contained in treaties constitutes an illegality under International Law, even generating international responsibility for the State that violates it. However, there are instances in which non-compliance is permitted and, consequently, exemption from international responsibilities, such as force majeure and self-defense.

Based on these principles, fundamental rights have been consolidated and established in Brazilian jurisdiction. Moreira (2015, p. 21) comments on the relevance of this event:

The recognition of international human rights treaties as a source of domestic law and the constitutional treatment granted to them by the 1988 Constitution makes the application of these instruments by the Brazilian jurisdiction absolutely necessary. Therefore, in order to demonstrate the undeniable duty of the judicial branch to apply international treaties concerning human rights, it is necessary to develop an initial study of how these rights are protected by International Law, followed by an analysis of the State's obligation to protect human rights, the constitutional principles governing international relations, with emphasis on the prevalence of human rights, and finally, to present an overview of the international commitments undertaken by the Brazilian State regarding the protection of human rights, focusing on its procedural aspects and liability for violations.

It is also worth mentioning the 1988 Constitution, which, as Neto (2012, p. 81) points out, was established in a democratic political regime in our country and represented an advance in the legislative consolidation of fundamental rights and guarantees. Through it, human rights gained unprecedented importance within the Federal Government.

The formative principles of Custody Hearings

When discussing Custody Hearings, we must not only analyze the significant influence of international treaties, but also examine the principles that form their basis and their objectives in society. To do this, we will refer to criminal law and the general theory of crime, which will allow us to delve deeper into the subject.

According to Damásio Jesus (2010, p.45):

Law arises as a regulator of social relations, born from a human need aimed at ensuring survival within a community. These norms, which comprise the legal order and are imposed on everyone, provide the necessary security for good relations among the members of a society. Therefore, acts that go against what has been previously agreed upon and regulated by all result in a legal offense, in this context a criminal offense, that is, an action that affects a relevant legal good that the law has chosen to protect.

Given this function of Law, to be a guideline for the limits that must be respected and the duties that need to be fulfilled for life in society, we can highlight some principles that justify and endorse the implementation of Custody Hearings in Brazil.

Principle of presumption of innocence

According to Gustavo Henrique Righi Ivahy Badarô (2003, p.284) states that this principle is recognized as a basic component of a criminal procedural model that seeks to respect the dignity and essential rights of the human person. The presumption of innocence ensures every person a prior state of innocence, which can only be overturned if there is full proof of the commission of the crime.

Regarding the principle of presumption of innocence, Fernando Brandini Barbagalo (2015, p.10) comments that:

The presumption of innocence is a guarantee conceived from the principle of the dignity of the human person and developed from due process of law, enshrined in major international instruments and in the constitutions of practically the entire world. Following its enshrining in the 1988 Constitution (Article 5, LVII), an interpretative process began in the courts, primarily in the Supreme Federal Court – "the Guardian of the Constitution" – to determine the influence of this now constitutional norm. Initially, the possibility of ordering imprisonment before the "final judgment of the criminal conviction" was questioned, since, until that moment, "no one can be considered guilty." Regarding this aspect, the provision for imprisonment before the final judgment in the Constitution (Article 5, LXI) was weighed, thus authorizing this pre-trial detention, provided it is necessary for the proper conduct of the criminal proceedings. Subsequently, the possibility of the immediate execution of the criminal conviction before the final judgment was questioned, fundamentally in relation to the provisions of the then-current Article... Article 594 of the Code of Criminal Procedure stipulated that imprisonment was a consequence of conviction, except in the

case of a defendant who was a first-time offender with a clean record. The very notion of good and bad antecedents related to ongoing investigations and criminal proceedings has been challenged by the principle of presumption of innocence, a matter recently summarized by the Superior Court of Justice (Summary 444).

Lopes Júnior (2019, p.137) explains that the principle of presumption of innocence has three important specifications:

It is a fundamental principle around which the entire liberal criminal process is built, essentially establishing guarantees for the accused against punitive state action;
It is a postulate that is directly related to the treatment of the accused during criminal proceedings, according to which one should start from the idea that he is innocent and, therefore, measures that restrict his rights during the process should be reduced to the maximum extent possible (including, of course, the pre-trial phase);
Finally, the presumption of innocence is a rule directly related to the judgment of fact made in a criminal sentence. Its application in the evidentiary realm is linked to the requirement that the burden of proof of guilt rests with the prosecution, imposing the acquittal of the accused if guilt is not sufficiently demonstrated.

Thus, the presumption of innocence offers the individual the possibility that the illegal acts in which they are involved will be investigated coherently in the light of justice, so that no mistakes or injustices occur against innocent people. Only after the facts have been proven will an arrest take place.

In *dubio pro reo*

The principle of *in dubio pro reo* favors the defendant in the sense that, as long as there is doubt about any aspect of the crime committed, the defendant should be favored until everything is properly investigated, ascertained, and proven. Therefore, the presumption of innocence and the principle of *in dubio pro reo* are closely related.

Tonini (2002, p.69) emphasizes that *in dubio pro reo* is linked to the issue of the production of evidence and the distribution of the burden of proof, on the one hand, and that, on the other hand, one of the most important consequences of the presumption of innocence is revealed in the fact that the defendant does not need to prove his innocence in order to be acquitted, concluding, consequently, that both principles act on the same field, in this case that of evidence.

According to Lopes Junior (2019, p. 138) , " the presumption of innocence and the *in dubio pro reo* principle cannot be disregarded at any stage of the jury trial procedure." This action prevents injustices and illegalities from being committed.

Principle of minimal intervention

We can also cite the principle of minimum intervention as a legal component that fosters the need for Custody Hearings in terms of their relevance.

The principle of minimum intervention advocates the idea that criminal law should interfere as little as possible and in a very careful manner in social life, only intervening when other areas of law are unable to do so.

Thus, according to Urbano Félix Pugliese do Bomfim (2009, p. 27), this principle began, legally, with the Declaration of the Rights of Man and of the Citizen in 1789, which was the "death certificate of the Ancien Régime." Article eight restricted the State's power to punish. At that historical moment, indicating a necessary punishment gave rise to the understanding that the State also needs to act only when strictly necessary, therefore within pre-determined limits.

CONCEPT OF CUSTODY HEARING

The purpose of a Custody Hearing is, first and foremost, to serve as a basis for the humanization of the criminal process, in line with international human rights treaties, in which the detainee must be brought quickly and personally before a judicial authority to analyze their situation before possible incarceration.

"Custody hearings serve to avoid the unnecessary incarceration of people who, even though they have committed crimes, should not remain imprisoned during the process" (Lewandowski 2015, p.1).

"The Custody Hearing emerged with the objective of reducing the number of unnecessary arrests, allowing those arrested in flagrante delicto the right to await trial in freedom. It is, therefore, an essential procedural instrument for the protection of the fundamental rights of the individual (Cordeiro; De Almeida Coutinho 2018, p.77)."

Leal (2017, p.123) reflects that:

Custody Hearings are a procedural criminal instrument recently implemented in our legal system, despite their provision in international treaties and conventions to which Brazil freely adhered more than twenty years ago. Given that they were instituted in a serious context of crisis, it is necessary to investigate the real possibility of Custody Hearings being an instrument for transforming procedures related to imprisonment and, above all, sufficient to significantly reduce the incarceration of pretrial detainees in the country.

Based on the author's statement, it is observed that analyzing the impact of Custody Hearings on the Brazilian legal landscape is very important to verify their applicability within the legal system, and their benefits for society, in the preservation of fundamental rights, and the reduction of pretrial detentions.

"The Custody Hearing is of paramount importance to the legal system, since this instrument brings a certain control of legality to the state's legal machinery, preventing the Judiciary from maintaining an illegal detention, guaranteeing freedom for those who have the right to freedom" (Júnior; Martins 2019, p.4).

Andrade (2015, p.1) agrees that:

There is no denying that the Custody Hearing was virtually unknown in our country, at least until 2011, when Senate Bill No. 554 was introduced. And, once again, as happened with the reform of the Code of Criminal Procedure also carried out in 2011, we were all caught by surprise, highlighting the fragility of our institution in monitoring legislative issues of interest to those who have the constitutional duty to represent society in criminal matters. This law amends § 1 of Article 306 of Decree-Law No. 3,689, of October 3, 1941 (Code of Criminal Procedure), to establish a twenty-four-hour deadline for presenting the detainee to the judicial authority after their arrest in flagrante delicto.

Biz and Perlin (2017) state that, in a formal way, another more recent resolution supports the Custody Hearing:

The Custody Hearing originated on December 15, 2015, when the National Council of Justice (CNJ) issued Resolution No. 213. In this sense, there is no specific legislation for this type of hearing; however, the legal basis guiding it is the American Convention on Human Rights of 1969, which aims to protect human rights by prohibiting torture, as well as the Federal Constitution of 1988, which reveals the need to respect the physical and moral integrity of the prisoner, ensuring that no prisoner is subjected to psychological or physical torture with the aim of obtaining a confession of a crime, and stipulating that it is fundamental to guarantee the punishment of anyone who assaults the human body. Therefore, the San José da Costa Rica Pact also guides the Hearing, which provides for the presentation of the prisoner to the judicial authority within a very short period of time. Since there is no specific legislation regarding the deadline for presentation in this Hearing, Article 306, paragraph one of the Code of Criminal Procedure is applied, using the time frame for arrest in flagrante delicto, that is, 24 (twenty-four) hours to present the prisoner to the authority (Biz; Perlin 2017, p.1).

More specifically, a Custody Hearing is a pre-trial judicial act that ensures that a person arrested in the act of committing a crime has the right to be presented to the competent judicial authority within a maximum period of 24 hours, so that the authority can, in a reasoned manner, assess the legality and necessity of maintaining or not maintaining the detention.

Guilherme Nucci (2016, p. 566) defines it as, (...) “the hearing held, after the arrest in flagrante delicto of the agent, within a maximum period of 24 hours, so that the judge, personally, assesses its legality and promotes the appropriate measures (maintain the arrest, release the agent from flagrante delicto or grant provisional release).

This judicial mechanism allows the magistrate to have prior contact with the detainee, instead of only with the arrest report, as stipulated by the Code of Criminal Procedure. The analysis will examine not only the legality of the arrest, but also the possible measures adopted under Article 310 of the Code of Criminal Procedure, which, due to Minister Sérgio Moro's anti-crime package, underwent the following amendment through Law 13.964 of December 2019, which incorporated the provision for a custody hearing into the Code of Criminal Procedure, thus constitutionalizing it, as provided for in the aforementioned article:

Art. 310. After receiving the arrest report, within a maximum period of 24 (twenty-four) hours after the arrest, the judge must hold a Custody Hearing with the presence of the accused, his appointed lawyer or a member of the Public Defender's Office and a member of the Public Prosecutor's Office, and, at this Hearing, the judge must, with due justification (Brazil, 2019).

In this way, Custody Hearings promote the possibility for the magistrate, face-to-face with the detainee, to more cautiously assess the circumstances of the arrest. Therefore, Custody Hearings serve, especially, to avoid the unnecessary incarceration of people who, even if they have committed the crime, should not remain imprisoned during the process. (Lewandowski , 2015).

A person undergoing a Custody Hearing retains all fundamental rights, including the right to remain silent (without this being interpreted against them) and the right to be assisted by a retained or public lawyer.

Therefore, this mechanism serves as an instrument for "humanizing the process," ensuring that the entire procedural system works to safeguard fundamental rights, internationally protected rights, and the dignity of the human person.

The implementation of Custody Hearings in Brazil

The current Federal Constitution and Code of Criminal Procedure do not expressly provide for a Custody Hearing, limiting themselves to guaranteeing at least the notification of the arrest to the judge, without addressing the physical presentation of the detainee. However, this provision has existed for a long time with the ratification of international treaties, treaties that have not been respected.

It is important to emphasize that International Treaties concerning human rights, after being ratified by the country, enter our legal system with supralegal normative status, that is, above all internal legislation and below only the Federal Constitution. They also have full and immediate effectiveness under the terms of Article 5, § 1, of the 1988 Federal Constitution, "The rules defining fundamental rights and guarantees have immediate application" and must be complied with in accordance with the principle *of pacta sunt servanda*.

Decree No. 592, of July 6, 1992, incorporated the International Covenant on Civil and Political Rights, establishing in its Article 9, paragraph 3 that:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other authority authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. Pretrial detention of persons awaiting trial shall not be the general rule, but release may be subject to guarantees to ensure the person's appearance at the hearing, at all stages of the proceedings and, if necessary, for the execution of the sentence. (Decree No. 592 of 1992, Article 9, paragraph 3).

The American Convention on Human Rights (ACHR), incorporated by Decree No. 678, stipulates in its Article 7, paragraph 5 that:

Every person detained or held in custody shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. Release may be subject to guarantees to assure appearance for trial" (ACHR No. 678, 1992, Article 7, paragraph 5).

Even with the normative provisions of international treaties ratified by the domestic legal system, segments of the police entities, the Public Prosecutor's Office, and the judiciary itself oppose their application, understanding that it constitutes a legal innovation not foreseen in the Code of Criminal Procedure.

However, in the judgment of Extraordinary Appeal No. 466.343/SP, when delivering his vote, Minister Gilmar Mendes stated that the Constitution is not the only benchmark for controlling ordinary laws, and the following passage from his vote deserves highlighting:

The pressing need to ensure the effective protection of human rights at both the domestic and international levels makes a change in position regarding the role of international human rights treaties in the national legal order imperative. It is necessary to adopt a jurisdictional stance more suited to emerging realities in supranational spheres, primarily focused on the protection of human beings (Extraordinary Appeal No. 466.343/SP, 2009).

As Cançado Trindade emphasizes (2013, p.515), “The contemporary constitutional tendency to give special treatment to human rights treaties is, therefore, symptomatic of a scale of values in which the human being comes to occupy a central position”

Therefore, given the unequivocal special nature of international treaties that deal with the protection of human rights, it is not difficult to understand that their incorporation into the legal system, through the ratification procedure provided for in the Constitution, has the power to paralyze the legal effectiveness of any and all sub-constitutional normative provisions that conflict with them.

This means that any sub-constitutional norm that contradicts international treaties signed by the Brazilian legal system will be ineffective.

In the same vein, Ada Pellegrini Grinover, Antônio Magalhães Gomes Filho, and Antônio Scarance Fernandes, commenting on Article 8 of the American Convention on Human Rights, state that:

All the procedural criminal guarantees of the American Convention are now integrated into the Brazilian constitutional system, having the same hierarchical level as the norms enshrined in the Constitution. This means that the constitutional guarantees and those of the American Convention are integrated and complementary; and, if one is broader than the other, the one that best ensures fundamental rights will prevail (Grinover; Fernandes; Gomes Filho 2009, p.71).

Therefore, we can conclude that international norms that provide for the physical presentation of the prisoner to the magistrate do not conflict with domestic law; on the contrary, they are complementary, and the internal regulation of the Custody Hearing is relevant, fulfilling internationally established commitments.

Regulatory Provision

Regarding its normative provision, the implementation of Custody Hearings is foreseen in international human rights pacts and treaties incorporated into Brazilian law, such as the International Covenant on Civil and Political Rights and the Inter-American Convention on Human Rights. Furthermore, the holding of Custody Hearings was confirmed by the Supreme Federal Court when it ruled on ADI 5240 and ADPF 347 in 2015 (CNJ , 2015).

Regarding ADI 5240, we have the following summary: DIRECT ACTION OF UNCONSTITUTIONALITY. JOINT PROVISION 03/2015 OF THE COURT OF JUSTICE OF SÃO PAULO. CUSTODY HEARING:

1. The American Convention on Human Rights, which states in its Article 7, item 5, that "every person arrested, detained or held must be brought promptly before a judge," given its supralegal status that international human rights treaties have in the Brazilian legal system, legitimizes the so-called "Custody Hearing," whose name is suggested as "Presentation Hearing." 2. The conventional right to present the prisoner to a judge consequently triggers the legal procedure of habeas corpus, in which the judge will assess the legality of the arrest, in the presence of the prisoner presented to him, a procedure established by the Code of Criminal Procedure, in its articles 647 and following. 3. The habeas corpus ad subjiciendum, in its remote origin, consisted of the judge's determination to present the prisoner for verification of the legality of his arrest, which is still present in criminal procedural law (Article 656 of the CPP). 4. The normative act under the scrutiny of abstract constitutional review contemplates, in its articles 1, 3, 5, 6 and 7, rules strictly regulating the legal procedure of habeas corpus instituted before the Judge of first instance, in no way exceeding or contradicting the current procedural law, thus there is no conflict with the law, which makes the filing of a direct action of unconstitutionality inadmissible for its challenge, since the status of the CPP does not generate constitutional violation, as it is infra-constitutional legislation. 5. The administrative provisions of the challenged act (articles 2, 4, 8, 9, 10 and 11), concerning the organization of the functioning of the jurisdictional units of the Court of Justice, fall within the limits of its self-management (article 96, item I, subparagraph a, of the CRFB). Directly based on the Federal Constitution, admitting, *ad argumentandum*, challenge through a direct action of unconstitutionality, given that the claim is materially unfeasible. 6. *In this case*, the part of the challenged act that deals with the clerical routines and administrative measures related to the Custody Hearing does not in any way offend the reserve of law or constitutional norm. 7. Articles 5, item II, and 22, item I, of the Federal Constitution were not violated, insofar as there is federal legislation in the strict sense legitimizing the Presentation Hearing. 8. The American Convention on Human Rights and the Code of Criminal Procedure, despite having general and *erga omnes* effectiveness, affect the sphere of action of Police Delegates, refuting the allegation of violation of the fundamental clause of separation of powers. 9. The National Association of Police Delegates – ADEPOL, a national class entity that brings together the entire category of Police Delegates (civil and federal), has standing to bring a direct action of unconstitutionality (article 103, item IX, of the CRFB). Precedents. 10. The thematic relevance between the objectives of the plaintiff association and the object of the direct action of unconstitutionality is unequivocal, since the holding of custody hearings has repercussions on the activity of Police Delegates, who are responsible for presenting the prisoner in court. 11. Direct action of unconstitutionality PARTIALLY ADMITTED and, in that part, JUDGED UNFOUNDED, indicating the adoption of the aforementioned practice of the presentation hearing by all courts in the country. (STF 2015, On line).

ADI 347, on the other hand, occurred under the following terms: DETAINEE – PHYSICAL AND MORAL INTEGRITY – PENITENTIARY SYSTEM – ALLEGATION OF NON-COMPLIANCE WITH FUNDAMENTAL PRECEPT – ADEQUACY. The allegation of non-compliance with a fundamental precept is admissible considering the degrading situation of penitentiaries in Brazil. NATIONAL PENITENTIARY SYSTEM – PRISON OVERCROWDING – INHUMAN CONDITIONS OF CUSTODY – MASSIVE VIOLATION OF FUNDAMENTAL RIGHTS – STRUCTURAL FAILURES – UNCONSTITUTIONAL STATE OF AFFAIRS – CONFIGURATION. Given the current situation of massive and persistent violation of fundamental rights, resulting from structural failures and the collapse of public policies, and whose modification depends on comprehensive measures of a normative, administrative, and budgetary



nature, the national penitentiary system should be characterized as an “unconstitutional state of affairs.” NATIONAL PENITENTIARY FUND – FUNDS – CONTINGENCY. In view of the precarious situation of the penitentiaries, the public interest directs the release of funds from the National Penitentiary Fund. CUSTODY HEARING – MANDATORY OBSERVANCE. Judges and courts are obliged, in accordance with articles 9.3 of the International Covenant on Civil and Political Rights and 7.5 of the American Convention on Human Rights, to hold Custody Hearings within ninety days, enabling the prisoner to appear before the judicial authority within a maximum period of 24 hours from the moment of arrest (Brazil, 2015).

All these measures substantiated the Custody Hearings in Brazil, establishing the necessary criteria for their implementation, supporting their effective execution in a cohesive manner and with backing in existing constitutional laws.

Regulation by CNJ Resolution No. 213

International Human Rights Treaties are self-executing, not requiring normative supplementation to produce their effects; however, the need for legislative intervention regarding the application of Custody Hearings is evident, in order to define the correct application of the institution and provide greater legal certainty, avoiding diverse interpretations regarding its procedure.

Since 2011, Bill 544, authored by Senator Antônio Carlos Valadares, has been under consideration in the Federal Senate. It proposes an amendment to Article 306 of the Code of Criminal Procedure, which would read as follows:

"Article 306. The arrest of any person and the place where they are held shall be immediately communicated to the competent judge, the Public Prosecutor's Office, and the family of the arrested person or the person indicated by them. § 1 Within 24 (twenty-four) hours after the arrest, the arrest report shall be forwarded to the competent judge and, if the arrested person does not provide the name of their lawyer, a complete copy shall be sent to the Public Defender's Office. (Wording given by Law No. 12,403, of 2011). (Brazil 2011)"

This established an explicit provision that, within a maximum of 24 hours of being caught in the act, the detainee must be presented to the competent judicial authority, safeguarding their physical and psychological integrity and enabling effective judicial review of the legality of arrests. However, to this day, this law has not come into effect in the Brazilian legal system.

Given the legislative delays regarding the bill, which remains pending a vote in the Chamber of Deputies, and in light of Brazil's non-compliance with the provisions established

by its ratification of International Treaties, the National Council of Justice, together with the Public Prosecutor's Office of São Paulo and the Court of Justice of the State of São Paulo, through provision no. 03/15 of January 2015, regulated the procedural mechanism of the Custody Hearing.

The delay in implementing the AC led to this procedure, which expedited the start of activities through the Court of Justice of the State of São Paulo. Joint Provision No. 03/2015: Provides for the presentation of a person arrested in flagrante delicto, up to 24 hours after their arrest, to participate in a Custody Hearing:

Considering, therefore, the need to implement, in complete synergy with recent measures from the National Council of Justice and the Ministry of Justice, a tool for more effective judicial control of the need to maintain pre-trial detention;

WHEREAS Brazil, in 1992, ratified the American Convention on Human Rights (Pact of San Jose, Costa Rica), which, in its Article 7, item 5, states: "Every person detained or held must be brought promptly before a judge or other authority authorized by law to exercise judicial functions";

Considering Bill No. 554/2001 from the Federal Senate, which amends Article 306, paragraph 1 of the Code of Criminal Procedure, to incorporate into our ordinary legislation the mandatory presentation of the arrested person, within 24 hours, to the judge who, in a Custody Hearing, will decide whether to maintain the arrest in flagrante delicto, convert it into preventive detention, release them, or replace it with a precautionary measure;

Considering, finally, the decision in case file no. 2014/00153634 DICOGE 2.1;
RESOLVE:

Article 1. In compliance with the provisions of Article 7, item 5, of the American Convention on Human Rights (Pact of San Jose, Costa Rica), it is hereby determined that any person arrested in flagrante delicto must be presented, within 24 hours of their arrest, to participate in a Custody Hearing. Article 2. The implementation of the Custody Hearing in the State of São Paulo will be gradual and will follow the schedule for assigning police districts to the competent courts.

Sole paragraph. The General Inspectorate of Justice will regulate, by provision, the implementation of the Custody Hearing in the State of São Paulo and the schedule for assigning police districts to the competent courts. (Brazil, 1988).

Finally, the regulation by CNJ Resolution No. 213 was an important milestone for the beginning of Custody Hearings in Brazilian judicial practice, leading to the prompt presentation of the detainee to a judge for an initial analysis of their detention or of alternative measures that should be adopted according to each circumstance.

Custody Hearings: Benefits and Contradictions in the Legal Field

The benefits and contradictions that emerge from the discussion surrounding AC are linked to some fundamental factors, the first of which is the relevant constitutional framework. Lopes Junior argues that:



Essentially, the Custody Hearing humanizes the act of arrest, allows for better control of the legality of the arrest in flagrante delicto and, above all, creates better conditions for the judge to assess the situation and the need for pretrial detention (including temporary or preventive detention). It also prevents the detainee from only being heard by the judge many months (sometimes years) after being arrested (insofar as the judicial interrogation is the last act of the procedure). (...) It is a feasible and perfectly achievable practice. The same on-call judge who today receives – at any time – the records of the arrest in flagrante delicto and needs to analyze them, will hold a quick and simple hearing with the detainee (Lopes Junior, 2019, p. 744).

As we know, the 1988 Federal Constitution elevates the supreme principle of human dignity in its purpose, this being the priority of the Democratic Rule of Law.

In this sense, Teixeira (2015) emphasizes that:

Thus, even if an individual commits a reprehensible act, liable to state repression, this measure does not authorize the curtailment of their dignity. From this principle, several others have derived, such as due process of law, the presumption of innocence, strict legality, the right to a full defense, the adversarial system, and, implicitly, the principle of proportionality, all arising to guarantee the dignity of the human person (Teixeira 2015, p.12).

Thus, based on the principle of presumption of innocence provided for in Article 5, paragraphs LVII and LXI of the Brazilian Federal Constitution (1988), the accused is free from presumed guilt until a final and unappealable criminal judgment is reached. This is reaffirmed by Pacelli (2013, p. 498): "Any and all imprisonment must be based on the necessity or indispensability of the measure, to be assessed in a reasoned decision by the judge and the court, according to a specific and relevant purpose."

We can also cite the principle of proportionality as another legal element that carries within it similar objectives, present in the concepts of Custody Hearings in preserving the subject's right through the preservation of their dignity.

According to Dobriansky (2009, p.26), " The principle of proportionality is very important, perhaps the most important within the realm of criminal law, as it aims to guarantee the Democratic Rule of Law, so that there is no elimination of a fundamental right when in conflict with another, respecting its initial core."

The same author further reiterates that, "The first intrinsic requirement of the principle of proportionality is that of adequacy or suitability, also called the principle of relevance, aptitude or conformity. By this requirement, an attack on an individual's right will not be permitted if the means used are not suitable for achieving the intended result (Dobriansky 2009, p.32).

According to Domingos (2000, p. 200), the principle of proportionality was initially used to preserve individual liberty in the face of interference from the Executive Branch. Subsequently, it was incorporated into administrative law as a general principle of police power, and finally, taken in its broad sense, it was elevated to a constitutional principle.

The same author explains regarding the principle of proportionality that:

The path of proportionality in its three senses: adequacy, necessity, and strictness. Thus, in the analysis of a specific case, where one principle will prevail over another, a relationship of adequacy must first be established between the measure to be adopted and the end sought. Next, this intended end must impose the least possible burden on the citizen, the least disadvantage (necessity). Finally, in the strict sense, an assessment is made as to whether the means used are proportional to the end sought, weighing the advantages and disadvantages of the scope intended by the Public Authority (Domingos 2000, p. 200).

In accordance with the principle of proportionality, the issue of adequacy aligns with the procedure adopted in the Custody Hearing, since this procedure advocates for a thorough case analysis to ensure that the penal measure is applied coherently with the law by the judicial authority. It is also determined that, as per article 306, paragraph one of the Code of Criminal Procedure, the deadline for presenting the subject to the judicial authority must be met within 24 hours of the arrest. This is the point to be highlighted, as this procedure aims to expedite the process.

The questioning of opposition to the Custody Hearing then stems precisely from these elements already existing in the law, which culminate in the same result. This is what Choukr (2016, pp. 14-15) questions: “The most astonishing thing in this whole scenario is that there are two norms in force in Brazilian law on the same matter, and at no time has there been so much legal repudiation of either of them. The Custody Hearing, since, at the very least, one could employ analogy as an integration of the system, whether by Article 4 of the Law of Introduction to the Norms of Brazilian Law, not to mention, outright, Article 3 of the Code of Criminal Procedure itself. These two norms, together or even separately, are capable of satisfying both those aligned with a conception of internationalization of law and the full enjoyment of human rights based on international commitments, and the more conservative who tend to seek support for their positions in constructions more attached to traditional legal knowledge.”

Another point that deserves to be highlighted is pretrial detention in our country. According to Margraf and Svistun (2016):

Pretrial detention, which should be the exception, ends up becoming the rule due to the use of generic justifications available to judicial authorities. This is because, in

most cases, the evidence that establishes the basis for the *right to punish* is circumstantial, originating from the testimony of the police officers who made the arrest and produced without cross-examination. It is observed that in Brazil, 59.2% of cases were initiated by an investigation stemming from an arrest in flagrante delicto. Furthermore, pretrial detention is often maintained due to a lack of active public defenders, as the offenses are frequently of lesser severity, such as simple theft or drug trafficking, but in very small quantities (Margraf ; Svistun, 2016, p. 4).

The trivialization of pretrial detention is a recurring argument in defense of the effectiveness of custody hearings, based on data such as those presented by the author. In a country like Brazil, where the reality of the prison system is dramatic, it is a serious concern. According to Teixeira (2015, p. 22), "Pretrial detentions are constantly used as emergency measures to appease public opinion, with the illusion of immediate justice. The prevailing discourse is that only those who are preventively detained will be punished, giving the false impression that justice is inefficient if the accused is released."

Therefore, the implementation of hearings for the penal system is justified by the serious problem of prisoners awaiting trial in Brazil. Many of them are occupying spaces in the prison system while awaiting trial.

Data from the National Secretariat of Penal Policies (SENAPPEN), of the Ministry of Justice and Public Security, revealed the results of a survey of penitentiary information for the first half of 2025. The results showed that Brazil has 941,752 people serving sentences, with 705,872 in physical cells and 235,880 under house arrest, with or without electronic monitoring. The survey gathered data on the prison population, infrastructure, education, electronic monitoring, work, and the profile of people deprived of liberty, including type of crime, marital status, nationality, color or race, and administrative information on staff, vacancies, registered visits, and maternity in the units (Brazil, 2025).

The high number of arrests related to Custody Hearings, according to the National Council of Justice (CNJ), since their implementation in Brazil in 2015, has resulted in an impressive more than 2 million of these judicial sessions. CNJ statistics also indicate that, historically, approximately 59% to 60% of cases result in preventive detention, while 40% to 41% result in provisional release (with or without precautionary measures) (Brazil, 2025). This high rate demonstrates the immediacy that Custody Hearings promote in the Brazilian judiciary, which on the one hand avoids delays in criminal decisions and on the other hand is strongly criticized. One of the aspects discussed is the role of the police chief in relation to this measure. Since the police chief is the qualified authority for the initial analysis of a crime, it is not their responsibility to verify the legality of the arrest. Is it really necessary to involve a judge if this other, more accessible and qualified professional is available to perform such an action?

Conversely, there is a common belief surrounding the decreeing of any pretrial detention without a prior trial; such action is seen as an offense against the common sense of justice, constituting an act of state force and arbitrariness. In this case, pretrial detention is considered a product of the inquisitorial conception of the process, and becomes an instrument that places the accused in a position of inferiority in relation to the prosecution (Ferrajoli, 2002, p. 446).

According to Renato Brasileiro (2020, p. 309), this idea finds support in the second paragraph of article 310 of the criminal procedure code, which has dubious constitutionality, considering the denial of provisional release in the cases mentioned in the article. It reads as follows:

Article 310. After receiving the arrest report, within a maximum period of 24 (twenty-four) hours after the arrest, the judge must hold a Custody Hearing with the presence of the accused, their appointed lawyer or a member of the Public Defender's Office, and a member of the Public Prosecutor's Office, and, at this Hearing, the judge must, with due justification:

[...]

§ 2 If the judge finds that the offender is a repeat offender, or is a member of an armed criminal organization or militia, or is carrying a restricted firearm, provisional release must be denied, with or without precautionary measures .

Renato Brasileiro explains that the magistrate, supported by article 310, has three reasoned decisions at the Custody Hearing: 1) The release from prison, when there is some illegality in the procedure of the arrest in flagrante delicto; 2) The conversion of the flagrante delicto into preventive detention, when the fundamental requirements and assumptions for the precautionary segregation of the individual are present; and 3) The granting of provisional release, when the requirements for precautionary segregation are not proven (Brasileiro, 2020, p. 310).

And it is precisely at this point that the legal discussion surrounding the Custody Hearing takes on greater proportions, since the conduct used is interpreted by part of the legal class as unconstitutional, considering that a different position would institutionalize, in the national legal system, the so-called mandatory imprisonment, since with the absence of the necessary requirements for the conversion of the flagrant arrest into preventive detention, the accused would still have his freedom suppressed, in view of conduct practiced in the past, such as the case of recidivism (Facchi Júnior, 2020).

Furthermore, the Federal Constitution states that no one shall be considered guilty until a final and unappealable criminal conviction is issued, enshrining the presumption of innocence, one of the fundamental principles of the Rule of Law as a procedural guarantee in criminal law, aimed at protecting personal liberty (Moraes, 2003, p. 102).



The Brazilian Forum on Public Security (FBSP) supports Custody Hearings, considering them an essential tool to combat police violence, torture, and avoid unnecessary pretrial detentions. The institution states that the procedure strengthens constitutional guarantees and the Pact of San José, Costa Rica (American Convention on Human Rights), which, at the national level... The legal framework ensures the right to the presumption of innocence, the right to a fair trial, the right to a full defense, and the right to remain silent (prohibition of self-incrimination); it prohibits imprisonment for debt, which in Brazil resulted in the prohibition of imprisonment for defaulting custodians (according to Binding Precedent 25 of the Supreme Federal Court), and guarantees rights such as the right to life, personal integrity, freedom of expression, and freedom of movement (Azevedo *et al.*, 2015).

This topic has undergone recent changes with the enactment of Law No. 15,358/ 2026 , also known as the Anti-Faction Law , which amended the Code of Criminal Procedure, stipulating that Custody Hearings should preferably be conducted via videoconference . This change has generated debate and criticism from human rights organizations, which fear that the virtual modality will compromise the identification of potential cases of torture or ill-treatment at the time of arrest (Brazil, 2026). Because it is a recent law, it is necessary to monitor its implementation in the penal system so that academic studies can be conducted and its benefits and application difficulties can be observed.

It is therefore noticeable that many biases arise in matters related to Custody Hearings, whether in a favorable way through their benefits, or through the contradictions in which they are embedded, even under consistent arguments. The issue that emerges from these circumstances is that the Brazilian justice system needs to strengthen its actions more and more and produce real results in the practical life of society, unclogging the system. If the Custody Hearing optimizes and provides greater security for the law to be fully complied with regarding the fundamental rights of the individual, this is a positive implementation for the judiciary, since statistical data do not show a functional system with regard to provisional detentions and the time for completion and/or definition of processes and penalties.

FINAL CONSIDERATIONS

This study presented the importance of preserving the fundamental rights of the defendant from the perspective of international treaties, the federal constitution, and other legislation that addresses this objective.

Initially, we recognized the importance of international treaties on fundamental rights that guide all purposes of human dignity present in other laws and doctrines of law. In addition to these, we also endorsed the importance of Custody Hearings with some formative principles that encompass their objectives, such as the principle of presumption of innocence, in *dubio pro reo* , and the principle of minimum intervention. Finally, we conceptualized Custody Hearings from a perspective of humanizing the criminal process, validating the legal references used to support them.

Although contradictions exist, the benefits of Custody Hearings have been recognized, given the numerous weaknesses in the Brazilian judicial system. Focusing on its implementation , we conclude that, prior to its implementation, norms, rules, and all the necessary legal instruments already existed to protect the dignity and fundamental rights of individuals. However, this did not occur fully in many cases, and therefore the Custody Hearing emerges as a new impetus for the courts to review their conduct and provide improvements to the system.

The benefits of Custody Hearings prevent new pretrial detainees from taking the place of convicted prisoners, allowing them to await trial in freedom, which is pertinent in light of legal doctrine. It must be understood that these hearings require effort, commitment, and organization, and take time to become effectively regular throughout the country; however, as they are strengthened, they will represent an initiative in favor of fundamental rights and Brazilian justice, providing a more qualified and timely response in criminal proceedings.

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