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The ineffectiveness of custody hearings in protecting people with psychiatric disorders

A inefetividade da audiência de custódia na proteção de pessoas com transtornos psiquiátricos

La ineficacia de la audiencia de custodia en la protección de personas con trastornos psiquiátricos

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Abstract

This research addresses the complex intersection between the criminal justice system and mental health in Brazil, focusing on custody hearings and their effectiveness in protecting people with psychiatric disorders.

The objective of this research is to analyze the ineffectiveness of custody hearings in protecting people with psychiatric disorders in the context of the Brazilian criminal justice system.

The specific objectives are: To identify the main challenges in implementing custody hearings for people with psychiatric disorders. To analyze the interconnection between the justice system and the mental health network in guaranteeing the rights of this population. To determine to what extent the Judiciary's Anti-Asylum Policy (CNJ Resolution No. 487/2023) has contributed to overcoming the asylum logic and promoting adequate care.

The social relevance of this research lies in the urgent need to discuss the effectiveness of a fundamental procedural instrument such as the custody hearing in protecting a vulnerable population: people with psychiatric disorders.

Ensuring human rights and promoting dignified treatment for these individuals are legal and ethical precepts that require constant evaluation and improvement of legal practices. This research may lead to the identification of gaps in the application of existing regulations, the proposal of improvements in the procedures for identifying and referring people with psychiatric disorders, and the strengthening of inter-institutional coordination between the justice system and the mental health network.

By analyzing the stage of development of knowledge related to the topic, this research seeks to support discussions and actions that may suggest modifications within the scope of the proposed reality, aiming at greater effectiveness of the custody hearing and overcoming the asylum logic. This discussion becomes pressing given the growing concern about deinstitutionalization and the guarantee of human rights for this population, as recommended by legislation and international treaties.

Keywords: Custody hearing. Mental health. Human rights. Anti-asylum policy. Criminal justice system.

Resumo

A presente pesquisa aborda a complexa intersecção entre o sistema de justiça criminal e a saúde mental no Brasil, com foco na audiência de custódia e sua efetividade na proteção de pessoas com transtornos psiquiátricos.

O objetivo desta pesquisa é analisar a inefetividade da audiência de custódia na proteção de pessoas com transtornos psiquiátricos no contexto do sistema de justiça criminal brasileiro.

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Os objetivos específicos são: Identificar os principais desafios na implementação da audiência de custódia para pessoas com transtornos psiquiátricos. Analisar a articulação entre o sistema de justiça e a rede de saúde mental na garantia dos direitos dessa população. Verificar em que medida a Política Antimanicomial do Poder Judiciário (Resolução CNJ nº 487/2023) tem contribuído para a superação da lógica manicomial e a promoção de um cuidado adequado.
A relevância social desta pesquisa reside na urgência de se discutir a efetividade de um instrumento processual fundamental como a audiência de custódia na proteção de uma população vulnerável: pessoas com transtornos psiquiátricos.
A garantia dos direitos humanos e a promoção de um tratamento digno para esses indivíduos são preceitos legais e éticos que demandam constante avaliação e aprimoramento das práticas jurídicas. Esta pesquisa pode trazer a identificação de lacunas na aplicação das normativas existentes, a proposição de melhorias nos procedimentos de identificação e encaminhamento de pessoas com transtornos psiquiátricos, e o fortalecimento da articulação interinstitucional entre o sistema de justiça e a rede de saúde mental.
Ao analisar o estágio de desenvolvimento dos conhecimentos referentes ao tema, esta pesquisa busca subsidiar discussões e ações que possam sugerir modificações no âmbito da realidade proposta, visando a uma maior efetividade da audiência de custódia e a superação da lógica manicomial.
A discussão se torna premente diante da crescente preocupação com a desinstitucionalização e a garantia de direitos humanos para essa população, conforme preconizado pela legislação e tratados internacionais.

Palavras-chave: Audiência de custódia. Saúde mental. Direitos humanos. Política antimanicomial. Sistema de justiça criminal.

Resumen
La presente investigación aborda la compleja intersección entre el sistema de justicia penal y la salud mental en Brasil, centrándose en la audiencia de custodia y su eficacia en la protección de personas con trastornos psiquiátricos.
El objetivo de esta investigación es analizar la ineficacia de la audiencia de custodia en la protección de personas con trastornos psiquiátricos en el contexto del sistema de justicia penal brasileño.
Los objetivos específicos son: identificar los principales desafíos de la implementación de la audiencia de custodia para personas con trastornos psiquiátricos; analizar la articulación entre el sistema de justicia y la red de salud mental para garantizar los derechos de esta población; y verificar en qué medida la Política Antimanicomial del Poder Judicial (Resolución CNJ n.º 487/2023) ha contribuido a superar la lógica manicomial y promover una atención adecuada.
La relevancia social de esta investigación radica en la urgencia de debatir la eficacia de un instrumento procesal fundamental, como la audiencia de custodia, en la protección de una población vulnerable: las personas con trastornos psiquiátricos.
La garantía de los derechos humanos y la promoción de un trato digno para estas personas son preceptos jurídicos y éticos que exigen una evaluación y una mejora constantes de las prácticas jurídicas. Esta investigación puede contribuir a identificar lagunas en la aplicación de las normas existentes, proponer mejoras en los procedimientos de identificación y derivación de personas con trastornos psiquiátricos y fortalecer la articulación interinstitucional entre el sistema de justicia y la red de salud mental.
Al analizar el estado de desarrollo del conocimiento sobre el tema, esta investigación busca respaldar debates y acciones que puedan sugerir modificaciones en la realidad estudiada, con el fin de aumentar la eficacia de la audiencia de custodia y superar la lógica manicomial.

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Este debate se vuelve apremiante ante la creciente preocupación por la desinstitucionalización y la garantía de los derechos humanos de esta población, conforme a lo establecido en la legislación y los tratados internacionales.

Palabras clave: Audiencia de custodia. Salud mental. Derechos humanos. Política antimanicomial. Sistema de justicia penal.

Dedication

I devote this work first to God, to my beloved children, to my mother, you and the pastor, Adila Sant'Anna, Regina Lucia and Leonardo Sant'Anna for all dedication and understanding throughout the course and for the incentive to carry out this work.

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First of all, I thank the Father Oxala for the life that was given to me, for the health that allowed me to follow and for the strength that sustained me when fatigue seemed greater than will. It was the faith that kept me standing in the early hours of study and in the moments when I doubted that I would arrive here. To Him, the Creator of everything that exists, all my gratitude.

To my spiritual guides, who never let me walk alone, I thank you for the constant companion at every stage of this journey: for the firmness that they borrowed me when my legs weakened, for the clarity in the confused thoughts and for the patience that they expected me when I left away. If I got here, it was because that current went with me.

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every page of this work possible. Thank you for believing that education would be the best gift you could give me.

To my grandmother, who is all of me, I thank you for being a shelter and prayer. There is no word to realize what it represents: it is my root, my safe port and the voice that reminds me, every day, of how much I am still able. This work was also born of your prayers. sincere thanks. To get here was not easy, but I came because, even in the days when I felt alone, I never was.

Knowing yourself is the greatest thing to know.

By Galileo Galilei

1. Introduction

This research addresses the complex intersection between the criminal justice system and mental health in Brazil, with a focus on custody hearing and its effectiveness in protecting people with psychiatric disorders. The objective is to analyze in what extent this procedural instrument, designed to capture illegal and unnecessary prisons, has been able to guarantee the rights and adequate attention to individuals in a situation of mental vulnerability. With the desire to change reality, solve a problem, change a situation, I will build, from the ideas, a proposal for action in the following way:

- Announcing the basic idea.
- Limit the focus of research.
- Placing the subject within the general context of your work area.
- Describe the motivations that led to the choice of the subject.
- Defining the object of analysis: What will be studied?

  Describe the problem of study, from the object of analysis.

2. Objectives

The general purpose of this research is to analyze the inefficiency of custody hearing in protecting people with psychiatric disorders in the context of the Brazilian criminal justice system. The specific objectives are: Identify the main challenges in the implementation of custody hearing for people with psychiatric disorders. Analyze the joint between the justice system and the mental health network in guaranteeing the rights of this population. Verify to what extent the Anti-Asylum-based Policy of the Judicial Power (Resolução CNJ nº 487/2023) has contributed to the overcoming of asylum-based logic and the promotion of adequate care.

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The social relevance of this research lies in the urgency of discussing the effectiveness of a fundamental process instrument such as custody hearing in the protection of a vulnerable population: people with psychiatric disorders. The guarantee of human rights and the promotion of decent treatment for these individuals are legal and ethical provisions that require constant assessment and improvement of legal practices. The contributions that this research may bring include the identification of lacunes in the application of existing regulations, the proposal of improvements in the procedures of identification and directing people with psychiatric disorders, and the strengthening of the interinstitutional joint between the justice system and the mental health network. By analyzing the stage of development of the knowledge related to the topic, this research seeks to support discussions and actions that may suggest modifications within the proposed reality, aiming at increased effectiveness of the custody hearing and the overcoming of asylum-based logic.

3. Specific objectives

3.1 Mental health and the criminal justice system

The relationship between mental health and criminal justice system requires an interdisciplinary approach. Criminal law sets criteria to verify liability for the illegal fact, while psychiatry, psychology and public health policies analyze mental suffering, mental disorders, social factors and the possibilities of care. These fields are related, but do not confuse. Having a psychiatric diagnosis does not mean, by itself, being dangerous, incapable or prone to crime.

In Brazil, the analysis of the issue should consider the Criminal Code, the Criminal Procedure Code, the Federal Constitution, the Law No. 10.216/2001, the Convention on the Rights of Persons with Disabilities and the Anti-Asylum-based Policy of the Judicial Power. The contemporary challenge consists in compatibilizing the protection of society with dignity, autonomy, the appropriate legal process and the right to the health of the person with mental disorder.

The concepts of mental health and psychiatric disorder

The World Health Organization understands mental health as a state of mental well-being that allows a person to face the stresses of life, develop their capabilities, learn, work and contribute to the community. Mental health should not be understood as a fixed state or as simple absence of disease. It develops in a continuous influence by individual, family,

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economic, social and environmental factors. Therefore, poverty, violence, discrimination, social isolation and lack of access to services can deeply affect mental health.

The mental disorder, in turn, is characterized by a clinically significant change in cognitive, emotional regulation or behavior. In general, this change is associated with relevant suffering or damage to the personal, family, social, educational or professional functioning. The expression "mental health condition" is wider and may cover mental disorders, psychosocial disabilities and other states that cause suffering or functional limitation.

This distinction is important for law. The medical diagnosis identifies a clinical condition, but does not answer the legal question on imputability alone. Criminal liability requires an individualized analysis of the person's state at the time of action or omission. Therefore, it is not enough to prove that the accused has schizophrenia, bipolar disorder, depression, intellectual disability or any other condition. It is necessary to examine whether, in the specific case, that condition has removed or reduced its ability to understand the illegal nature of the fact or to determine itself according to that understanding.

It is also necessary to avoid the automatic association between mental disorder and violence. Stigmatizing generalization may produce serious consequences, such as discrimination, family distraction, difficulty accessing work and imprisonment or unnecessary hospitalization. The legal response should consider the person in his singularity, with his history, his bonds, his territory and his care needs.

In the legal context, therefore, the question should not be simply "what is the diagnosis?", but "what was the person's psychic condition at the time of the fact and what concrete effects this condition produced on his ability to understand and self-determinate?" This change of focus prevents the diagnosis from being used as a permanent label or as a sufficient basis to restrict freedom.

The evolution of legal treatment of persons with mental disorders

For a long time, an asylum model has dominated in Brazil and other countries. The person considered "mostly" was removed from the community and subjected to closed institutions. The logic was predominantly custodial: protecting society through isolation, often unpredictable, with low participation of the person in treatment and with little external supervision. In this model, hospitalization could become a permanent social exclusion.

The Brazilian Psychiatric Reform was influenced by Franco Basaglia's disinstitutionalization experiences in Italy. In Brazil, complaints about the degrading conditions

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of psychiatric hospitals gained force in the late 1970s. In 1979, the Workers' Movement for Mental Health was established and in 1987 the anti-asylum movement was consolidated. In 1989, the draft was submitted which would later result in Law No. 10.216/2001, known as the Law of Psychiatric Reform or Law Paulo Delgado.

In the criminal field, the 1940 Criminal Code already provides security measures, historically linked to the idea of dangerousness and the need for social defense. The 1984 Criminal Reform, promoted by Law No. 7.209/1984, reorganized the discipline of imputability and security measures, giving rise to the current edition of Articles 26 and Articles 96 to 99 of the Criminal Code. Although the legal model still retains references to hospitalization and the cessation of dangerousness, its application must be interpreted in accordance with the 1988 Constitution and with the subsequent mental health protection legislation.

The Federal Constitution established the dignity of the human person as the foundation of the Republic and recognized the prevalence of human rights. It also banned perpetual penalty, cruel or degrading treatment and guaranteed the physical and moral integrity of the prisoners. These constitutional commands prevent the security measure from being used as a deprivation of freedom without limits, without therapeutic purposes and without judicial control.

The Law No. 10.216/2001 represented a decisive change. Instead of the centrality of the psychiatric hospital, the law passed to privileging community services, treatment by the less invasive means and social reintegration. The Convention on the Rights of Persons with Disabilities, incorporated into Brazilian Law by Decree No. 6.949/2009, strengthened equality, autonomy, access to justice and freedom of persons with disabilities, including persons with psychosocial disabilities.

More recently, the CNJ Resolution No. 487/2023 established the Anti-Asylum-based Policy of the Judicial Power. The norm established guidelines for the application of the Convention on the Rights of Persons with Disabilities and of Law No. 10.216/2001 in criminal proceedings and in the implementation of security measures. The CNJ Resolution No. 572/2024 amended deadlines for the review of measures, the preparation of therapeutic plans and the closure of custody establishments, allowing exceptional extension by reasoning and action plan.

The legal evolution, therefore, has not literally eliminated all the provisions of the Criminal Code on security measures. What happened was a change in how to interpret and execute them. The deprivation of freedom has ceased to be understood as an automatic response to the existence of mental disorder and has become an exceptional measurement, linked to

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clinical reasons, for the strictly necessary time and in articulation with the Network of Psychosocial Care.

The relationship between mental health, crime and criminal responsibility

The relationship between mental health and crime is neither automatic nor deterministic. Criminal behavior is a complex phenomenon, which can involve economic, social, family, cultural, situations and individual factors. A mental disorder may be present in a person's history without having any causal relationship with the fact investigated. Similarly, a person can experience psychic suffering after the practice of crime without that suffering existing at the time of action.

Criminal responsibility depends on the analysis of guilt. In the case of a person with mental disorder, the central point is to verify if at the time of the fact, he had the ability to understand the illicitity of behavior and to act according to that understanding. This analysis is temporary and concrete. A person may be compensated at the time of the trial, but having presented a serious crisis at the time of the fact. It can also happen the opposite: a person may develop a mental illness after the infringement, a situation that produces its own processal effects.

The Criminal Procedure Code provides for judicial mental health assessment proceedings when there is doubt about the accused's mental integrity. The judge may determine the official examination or the request of the processual and family subjects indicated in law. The examination is medical-legal, the process can be suspended and healers should be appointed when expert assessment is determined. The incident is processed in separate case records and the process may continue or remain suspended according to the time and nature of the mental change.

Expert assessment is essential, but does not replace the judicial decision. Experts evaluate the clinical condition and its possible effects on understanding and self-determination. The judge, on the basis of the proof produced and the contradiction, performs the legal qualification of the situation. Therefore, not every diagnosis generates lack of criminal responsibility and no expert report should be interpreted separately, without considering the context of the fact, the witness reports, the clinical history and the dynamics of the crisis.

When it is recognized that the person practiced the typical and illegal fact, but was person found not criminally responsible, the decision is usually called acquittal accompanied by a security measure. It is absolute because it does not impose punishment, but it can apply

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security measures. This solution requires care so that the measure does not become, in practice, a more serious or longer penalty than that would be applied to a person charged.

The justice system must also recognize that contact with prison, institutional violence, lack of treatment and isolation can aggravate psychic suffering. The United Nations notes that stigmatization, institutionalization, involuntary hospitalization and inappropriate use of conspiracy may produce human rights violations. For this reason, mental health should be considered from the police approach and custody hearing to the implementation of the measure and Community reintegration.

Lack of criminal responsibility under Article 26 of the Criminal Code

Article 26 of the Criminal Code adopts, as a rule, the biopsychological criterion. To recognize lack of criminal responsibility, it is necessary to verify the presence of a condition stipulated in law and at the same time the total incapacity to understand the illegal nature of the fact or to determine itself according to that understanding. The analysis has three main dimensions.

The first is the causal or biological dimension. The Code mentions mental illness or incomplete or delayed mental development. The legal terminology is old and should be interpreted in accordance with the contemporary language of mental health and with the rights of persons with disabilities. The relevant point is not the label, but the psychic condition effectively demonstrated in the case.

The second is the time dimension. Inability must exist at the time of action or omission. It is not enough to prove that the person has had a disorder in some period of his life. It is necessary to establish the relationship between the mental state existing at the time of fact and the concrete ability of understanding or self-determination.

The third is the psychological dimension. The agent must be entirely unable to understand the illicitity of the fact or to conduct his behavior according to that understanding. Inability can reach the cognitive dimension, related to understanding, or the volitive dimension, related to control of behavior.

The single paragraph of Article 26 concerns diminished criminal responsibility. In that case, the person was not fully able to understand the illegal nature of the fact or to determine himself according to that understanding. The result is the possibility of reducing the penalty from one to two-thirds. If there is a need for special healing, Article 98 allows to replace the

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imprisonment with hospitalization or outpatient treatment, in accordance with the rules of Article 97.

Diminished criminal responsibility should not be confused with lack of criminal responsibility total. In the first, it remains some degree of criminal capacity, although reduced. In the second, the capacity is entirely committed in accordance with Article 26. The difference has relevant consequences for the judgment and the type of legal-criminal response.

Lack of criminal responsibility should also not be confused by mental disorder with lack of criminal responsibility aged for under eighteen years or with the rules on intoxication. These are different legal grounds. Similarly, emotions, passion and common difficulties of life do not automatically eliminate imputability.

In any case, the recognition of lack of criminal responsibility does not allow degradant treatment. The measure may be intended for care, should be proportionate to the case, respect the contradiction and should be revised periodically. The goal is not to punish the person for his clinical condition, but to organize a response compatible with the protection of health and the rights of others.

Security measures under Articles 96 to 99 of the Criminal Code

Article 96 of the Criminal Code provides for two types of security measures: hospitalization in custody hospital and psychiatric treatment or in other suitable establishment and the subject of outpatient treatment. Article 97 provides that person found not criminally responsible will be interned, allowing outpatient treatment when the fact planned as a crime is punishable with arrest. The same disposal shall establish a minimum period of one to three years, expert assessment at the end of the minimum period and annual or anticipated repeat when determined by the judge.

The hospitalization, according to the traditional model of the Code, corresponds to the most intense modality of freedom restriction. The outpatient treatment, on the other hand, allows the person to stay in the social environment, with follow-up by the health network. Article 97 also provides for disinternation or conditional release and admits, in legal writing, hospitalization during outpatient treatment when necessary for healing purposes.

Article 98 concerns person with diminished criminal responsibility. If there is a need for specialized healing, the imprisonment may be replaced by hospitalization or outpatient treatment for a minimum period of one to three years, in accordance with the rules of Article

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97. Article 99 states that the internate must be collected to a hospital with medical characteristics and subjected to treatment.

Although the Criminal Code still uses the term "unlimited time" and refers to the cessation of dangerousness, this forecast cannot be interpreted as permission for a perpetual freedom restriction. The Superior Court of Justice has established, in precedential statement 527, that the duration of the security measure should not exceed the maximum limit of the abstractly committed penalty for the offence committed. The understanding is based, among other aspects, on the isolation, proportionality and constitutional separation of perpetual penalties.

The legal discipline should also be read in conjunction with Law No. 10.216/2001 and CNJ Resolution No. 487/2023. The resolution determines that the method of treatment is chosen from biopsy-social assessment and considers possible care in an open environment. The outpatient treatment should be priorized with respect to hospitalization, accompanied by the Psychosocial Care Network, the elaboration of a unique therapeutic project and periodic judicial evaluation. The lack of family support, by itself, should not justify hospitalization or prevent disinternation.

Hospitalization, in this perspective, is only justified for clinical reasons, after multi-professional assessment, for the period strictly necessary for the stabilization of the framework and when extra-hospital resources are insufficient. The resolution also addresses hospitalization in asylum-like institutions, including the former custody and psychiatric hospitals and congenital establishments. Health care cannot acquire punitive character, and the potential need for hospitalization during treatment should not automatically cause the conversion of outpatient treatment to the measure of hospitalization.

There is therefore a tension between the literality of some provisions of the Criminal Code and the subsequent regulatory set. The legally appropriate solution is to make interpretation in accordance with the Constitution, Law No. 10.216/2001, the Convention on the Rights of Persons with Disabilities and the standards of the CNJ. The security measure remains a legal-criminal consequence, but its implementation must be therapeutic, individualized, proportional, revisible and social inclusion-oriented.

The influence of Brazilian psychiatric reform

The psychiatric reform has changed the treatment paradigm. The asylum-based model understood the crisis primarily as a problem of order and danger, responding with isolation.

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The psychosocial model understands the person as a subject of rights and seeks to build care in the territory, preserving family and community bonds whenever possible.

This change does not mean the absence of response to crisis situations. This means that the response should be carried out by a health network capable of receiving, stabilizing, monitoring and rehabilitating. The Ministry of Health points the Psychosocial Care Centers, Residential Therapeutic Services, General Hospitals, Accommodation Units and Multi-Professional Teams as components of a psychosocial care network.

In the criminal justice system, the psychiatric reform produces at least four consequences. First, hospitalization is no longer the standard response. Second, the treatment should be built by a multi-professional team and, where possible, with the participation of the person himself. Thirdly, the Judiciary must work in connection with health and social assistance, and not treat the security measure as a exclusively prison issue. Fourth, the departure of the institution should be planned, with residence, documentation, income, treatment, bonds and follow-up in the territory.

The CNJ Resolution No. 487/2023 concrete this influence in the judicial sphere. It adopts dignity, autonomy, non-discrimination, the right legal process, the prohibition of torture and anti-asylum policy as principles. It also determines the permanent articulation between the Judiciary, the Psychosocial Care Network and social assistance policies.

Disinstitutionalization cannot be reduced to the simple physical closure of hospitals. If the person is transferred to a prison unit without treatment, abandoned in a street situation or returned to the family without support, there will be only displacement of the violation. Disinstitutionalization requires continuity of care, person participation, individualized planning and shared responsibility among public services.

The Reform also requires recognition that social vulnerability is not synonymous with dangerousness. Lack of housing, income or family support may increase the need for social protection, but it should not be used as an autonomous basis to extend a security measure. Free treatment will only be effective if it is accompanied by specific public policies.

Law No. 10.216/2001 and the protection of the rights of persons with mental disorders

Law No. 10.216/2001 ensures the rights and protection of persons with mental disorders without discrimination by race, color, sex, sexual orientation, religion, political opinion, nationality, age, economic condition, severity or time of development of the disorder. This

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clause is especially important in the criminal system, in which the person is already subject to an intense state power relationship.

The rights provided by the law include access to best treatment according to the needs of the person, treatment with humanity and respect, protection against abuse and exploitation, secret information, access to information about disease and treatment, use of less invasive means and preference by community mental health services. The purpose of treatment should be the health benefit and reintegration in the family, work and community.

Hospitalization can only be indicated when the extra-hospital resources are shown to be insufficient. Even when necessary, it should provide comprehensive assistance, including medical, psychological, social, occupational and recreational services. The law prohibits hospitalization in institutions with asylum characteristics, i.e., places without adequate therapeutic resources or which do not guarantee the rights of the person.

The Law No. 10.216/2001 differentiates hospitalization voluntary, involuntary and compulsory. Voluntary hospitalization occurs with consent; involuntary occurs without consent, at the request of a third party; and compulsory is determined by court. All psychiatric hospitalization depends on circumstantiated medical expert report. In the case of hospitalization involuntary, there is notification to the Prosecutor's Office within a legal period. The hospitalization compulsory, although determined by the judge, is not ceasing to be subject to the requirements of necessity, adequacy, therapeutic purpose and respect for fundamental rights.

The law also sets out a specific high-planned policy and psychosocial rehabilitation assisted for people hospitalized for a long period or in a situation of severe institutional dependence. This rule prevents that prolonged hospitalization is justified only by the absence of family network or by the lack of community services.

In the criminal sphere, Law No. 10.216/2001 should not be seen as a rule foreign to the Criminal Code. It establishes the protection parameters that guide the implementation of security measures. Thus, the reference of the Code to a custody hospital or the appropriate establishment does not allow any locations of confinement. The establishment must possess effective health conditions, staff, therapeutic project, external control and respect for dignity.

The importance of human rights in the treatment of this population

Human rights function as a limit to punitive power and as a quality criterion for mental health policies. The Federal Constitution protects the dignity of the human person, equality,

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freedom, physical and moral integrity, the right legal process, the contradictory and the broad defence. It also prohibits perpetual penalties and unhuman or degrading treatments. These rights reach the person with mental disorder subject to investigation, proceedings, precautions or security measures.

The Convention on the Rights of Persons with Disabilities provides that persons with disabilities must enjoy all human rights in equal conditions. Its principles include respect for dignity, individual autonomy, non-discrimination, participation and social inclusion and respect for differences. The Convention also acknowledges legal capacity, requires access to justice with procedural adjustments and establishes that the existence of a disability cannot, by itself, justify the deprivation of freedom.

This protection does not eliminate the possibility of restriction of freedom in situations provided for by law. However, it requires that the restriction is not arbitrary, that it has a legal basis, legitimate purpose, concrete need, proportional duration and periodic review. The person must have access to defence, information, communication, health care, participation in decisions and complaint and supervision mechanisms.

The human rights perspective also changes the performance of professionals. Police, prosecutors, defenders, judges, experts, prison agents and health professionals need to be trained to recognize crises, avoid violent approaches and guide the person to the appropriate network. Access to justice must be effective, which may require accessible language, support for communication, the presence of a trusted person and adaptations in the process.

The protection should also take into account the discriminations that may be associated with mental disorder. The CNJ Resolution No. 487/2023 highlights the need to pay attention to black people, LGBTQIA+, women, mothers, parents or caregivers, elderly people, migrants, people in street situation, indigenous peoples, traditional communities and persons with disabilities. A apparently neutral policy can produce unfair results if ignored these inequalities.

The UN points out that the human rights approach requires person-centered care, community services, fighting stigma, reducing coercion, social inclusion and responsibility mechanisms. Treatment should not be limited to prescription of medications or reduction of symptoms. It should consider housing, income, education, work, bonds, culture, security and social participation.

In this sense, human rights are not an obstacle to public security. They qualify the state response. A person who receives adequate care, keeps connections and is accompanied by the network has better conditions to reconstruct his life than someone who is subjected to indefinite

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isolation, without individualized treatment and without outlook. The protection of society and the protection of the person with mental disorder should be understood as objectives compatible with the legality, proportionality and human dignity.

3.2 Custody hearings in the Brazilian legal system

The custody hearing constitutes a procedural guarantee intended to submit the imprisonment to immediate judicial control. Its core is the presentation of the person imprisoned to the judicial authority, with the participation of the Prosecutor's Office and the Defence, to verify the legality of prison, the need for maintenance of custody, the possibility of implementing various precautions and the occurrence of torture or abuse. Therefore, it is not an anticipation of the trial or an act aimed at the formation of evidence on the authenticity of the crime.

Concept

The custody hearing is a public and oral processual act in which the prisoner is presented, without delay, to the Judicial Authority. The judge must hear her about the circumstances of the arrest and about the treatment received, ensuring the presence of a retained counsel or public defender and the Prosecutor's Office. The CNJ Resolution No. 213/2015 provides that any person detained in flagrant must be submitted within 24 hours for the control of the legality of the prison.

The presentation of the court cannot be replaced by the simple sending of the prison arrest record in flagrant. The reason for the hearing is to allow judicial contact with the custodied person and not just a documentary conference. This contact allows to assess aspects that normally do not appear in the arrest record, such as signs of violence, need for medical care, pregnancy, existence of children or dependents, mental disorders, chemical dependency and concrete conditions for compliance with precautions.

The audience is also not confused with the interview. The judicial authority should not ask questions intended to prove the merit of the imputation or obtain confession. The object of the act is the imprisonment and protection of the fundamental rights of the custodied person, and not the complete reconstruction of the criminal fact. The CNJ Resolution No. 213/2015, with the draft given by Resolution No. 562/2024, sees the judge's proof initiative regarding the imputation.

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There is an important regulatory update. Since the entry into force of Law No. 15.358/2026, the text of the Criminal Procedure Code has been provided for, as a legal rule, the conduct of the custody audition by video conference in real time, within 24 hours. The same law admits presence in exceptional situations, by reasoned decision. This discipline is contrary to CNJ Resolution No. 562/2024, which maintains the audience as a preferential model and the video conference as an exceptional one. The divergence is relevant for academic research because it involves the compatibility between the new legal rule, the administrative regulation of the CNJ and the constitutional and international requirements of effective judicial presentation.

Purpose

The first goal is to control the legality of the prison. The judge verifies whether the claims of the flagrant were present, whether the legal formalities were observed and whether there was a violation of rights. The illegality is found, the consequence is the relaxation of prison, in accordance with the Constitution and article 310, paragraph I, of the Criminal Procedure Code.

The second purpose is to monitor the need and proportionality of caution. The imprisonment in flagrant should not automatically become a pretrial detention. The judge shall examine whether the requirements of Article 312 of the Criminal Procedure Code are present and whether the various caution measures provided for in Article 319 are inadequate or insufficient. If there is no concrete justification for the imprisonment, you may grant temporary freedom, with or without trust and with or without other guardians.

The third purpose is to prevent and strengthen torture, abuse and other forms of violence practiced during the approach, imprisonment or stay in police and prison units. The judicial presence close to the time of imprisonment allows you to ask the custodied person directly about the treatment received, verify injuries and determine body examination of crime or other measures. This purpose is directly related to the constitutional prohibition of torture and unhuman or degrading treatment, as well as the right of prisoners to physical and moral integrity.

The fourth objective is to individualize the cautious decision. The hearing allows the judge to know legal relevant personal circumstances, without turning social vulnerabilities into an automatic basis for arresting or releasing. Information about health, pregnancy, children,

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housing, work, study and chemical dependence can guide a more appropriate decision and voluntary guidance to the social protection network.

Finally, the custody hearing aims to qualify the entrance door to the prison system and reduce illegal or unnecessary prisons. This does not mean that your result should always be freedom. Maintenance of the pretrial detention may be legitimate when there is individualized justification and proof that alternative cautionaries are not enough. The hearing is, above all, a mandatory judicial filter, not an automatic release mechanism.

Legal foundations

Federal Constitution

The Constitution of 1988 originally did not use the term "audience of custody", but established a set of guarantees that founded the institution. These include the dignity of the human person, the prohibition of torture and unhuman or degrading treatment, the appropriate legal process, the contradiction, the broad defense and the presumption of innocence.

Article 5, paragraph LXI, stipulates that no one will be imprisoned except for a flagrant crime or by written and justified order of the competent judicial authority, subject to the military possibilities provided for in the Constitution. The LXII paragraph requires the immediate notification of the prison to the competent judge and to the family or person indicated. The LXIII paragraph guarantees the prisoner the right to remain silent, to receive family assistance and to have a lawyer. The LXV and LXVI incisions determine, respectively, the relaxation of illegal imprisonment and the non- maintenance of imprisonment when the law admits provisional freedom.

These devices demonstrate that the custody hearing is not an administrative concession. It concrete constitutional guarantees related to freedom, physical integrity, defense and judicial control of prison.

International human rights treaties

The American Convention on Human Rights, promulgated in Brazil by Decree No. 678/1992, provides in Article 7.5 that any detained person must be conducted, without delay, to the presence of a judge or other authority authorized to perform judicial functions. The same article ensures the right to obtain a quick decision on the legality of imprisonment and to be released when the detention is illegal.

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The International Covenant on Civil and Political Rights, promulgated by Decree No. 592/1992, contains a similar guarantee in Article 9.3. The provisions establish that the person detained for a criminal offence must be conducted without delay to the presence of a judge and that pretrial detention should not be the general rule. Article 9.4 also ensures the judicial control of the legality of the deprivation of freedom.

These international standards give rise to the requirement of personal and timely presentation. They also emphasize that imprisonment before the trial is cautious, exceptional and subject to judicial control, and not a penalty anticipation.

Code of Criminal Procedure and legislation below the constitutional level

The Law No. 13.964/2019, known as Anticrime Package, expressly incorporated the custody hearing into the Criminal Procedure Code. Article 310 has established that, after receiving the imprisonment in flagrant and within a maximum period of 24 hours, the judge shall conduct the hearing with the presence of the prisoner, the defense and the Prosecutor's Office. In the end, he must fundamentally decide between relieving illegal imprisonment, turning the flagrant into a preventive or granting temporary freedom.

Article 287 of the Criminal Procedure Code provides for the immediate submission to the judge who issued the order when it is an unbelievable infringement and there is no display of the order at the time of imprisonment. In addition, Article 3b, § 1 provides for the sending to the judge of the guarantees, within 24 hours, of the person imprisoned in flagrant or by provisional imprisonment.

The Code also provides for consequences for the non-compliance of the deadline. The authority responsible for the unjustified failure to carry out the hearing may respond in administrative, civil and criminal spheres. After 24 hours exceeding the legal deadline, the imprisonment becomes illegal and must be relaxed, without preventing the pretrial detention to be immediately decreed when your requirements are present.

Case law and CNJ regulations

Before the forecast expressed in the Criminal Procedure Code, the Supreme Federal Court recognized the validity of the rules of the Court of Justice of São Paulo on custody hearing in the ADI judgment 5.240. In ADPF 347, the Court determined the adoption of custody hearings as a measure related to the Brazilian prison system crisis.

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The CNJ Resolution No. 213/2015 regulated the procedure nationally. It disciplines the presentation within 24 hours, the interview reserved with the defense, the presence of the Prosecutor's Office, the absence of police officers responsible for the imprisonment or investigation and the questions about legality, treatment received, health and vulnerabilities.

The CNJ Resolution No. 562/2024 updated the regulations to integrate the custody hearing with the implementation of the guarantees by the judge. The standard preserved the preference for the face-to-face form and established strict requirements for the video conference, such as face-to-face crime body examination, privacy, absence of responsible police team, defense presence in the prisoner's room, appropriate cameras and surveillance of the rooms.

The Law No. 15.358/2026 amended this scenario by modifying Articles 3b and 310 of the Criminal Procedure Code. The new text determines the conduct by video conference in real time as a legal rule and reserves the form for exceptional occasions. The constitutionality of this amendment was discussed in direct acts of inconstitutionality and in the STF public hearing, in which critiques related to privacy, torture and the effectiveness of judicial contact were submitted.

Procedure

1. Arrest and notification. Once an arrest has taken place, the formal requirements for the record of arrest in flagrante delicto must be observed, together with immediate notification of the judge and the family or another designated person, and information about the arrested person's rights. The documents necessary to assess the legality of the arrest must accompany the person's presentation, including the record of arrest in flagrante delicto and the written statement of the grounds for detention, where applicable.
2. Presentation within the statutory period. The arrested person must be brought to a hearing within 24 hours. Under the current wording of the Code of Criminal Procedure, the hearing must take place by live videoconference, with the accused person, the defense and the Prosecution Service present. In-person hearings are exceptional under Law No. 15.358/2026. CNJ Resolution No. 562/2024, however, still describes in-person presentation as the preferred administrative rule and requires concrete justification for videoconferencing.

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3. Confidential interview and participants. Before the hearing, the arrested person must speak privately with a lawyer or public defender, without police officers present. The Prosecution Service participates in the hearing, and the defense must be present even when the arrested person has not retained a lawyer. Officers responsible for the arrest or the investigation may not attend, since their presence may intimidate the detainee and compromise the reporting of violence.
4. Questions concerning custody. The judge must explain the purpose of the hearing and inform the person of the right to remain silent. The judge must then ask about information on rights, access to a lawyer, medical attention, contact with family members, food, water, the circumstances of the police approach and arrest, the treatment received, possible torture or ill-treatment, and whether a forensic examination was carried out. The judge must also ascertain personal information relevant to the decision on pretrial measures and to any referral for assistance.

This questioning must not be used as an interrogation on the merits of the case. Questions intended to obtain a confession or establish who committed the offense and whether it occurred exceed the purpose of the hearing and may violate the right to remain silent and the privilege against self-incrimination. Investigation of the facts must follow its own procedures, respecting the rules governing evidence and defense rights.

5. Submissions by the parties and decision. After the person has been heard, the Prosecution Service and the defense make requests consistent with the nature of the hearing. The judge must issue a reasoned decision. The alternatives are to quash an unlawful arrest; convert an arrest in flagrante delicto into pretrial detention where the statutory requirements are met and other measures are insufficient; or grant provisional release, with or without bail and with or without precautionary measures.
6. Registration and subsequent action. The hearing, the arrested person, the arrest record and the outcome must be registered in the National Database of Penal Measures and Prisons, in accordance with CNJ regulations. Where violence is alleged or there are indications of it, steps must be taken to ensure examination, documentation, investigation and protection. If precautionary measures are imposed, they must be feasible and monitored by structures able to guide the person subject to them.

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Practical limitations

The existence of the custody hearing does not guarantee, by itself, the effectiveness of the rights it intends to protect. The first limitation is structural. The fulfilment of the 24-hour period depends on the coordination between police, transportation, prison units, judicial, prosecutor's office, lawyer and expert assessment services. Distances between municipalities, plantations, lack of servers, lack of proper rooms and difficulty moving can delay the act. The CNJ Resolution no. 562/2024 itself determines that the courts organize presenting flows and articulate the transport of the custodied persons, which reveals the administrative dimension of the problem.

The second limitation is the inequality in the quality of defence and decision. A short-time hearing, with overloaded advocate, incomplete access to documents or only formal-reserved interview may comply with the appearance of the procedure without ensuring effective defense. The audience requires institutional preparation and training of the actors, especially to recognize signs of torture, social vulnerabilities, mental disorders, language barriers and situations involving women, black people, indigenous people, foreigners and people in a street situation.

The third limitation concerns the video conference. Remote communication can reduce costs and facilitate compliance in remote regions, but it can also harm privacy, judicial perception of physical and emotional signs and the spontaneity of the report. There is a risk that the prisoner remains in an environment controlled by state agents or without conditions to freely speak with the defense. Therefore, the CNJ Resolution No. 562/2024 requires face-to-face crime body examination, cameras that allow to visualize the environment, private room and presence of the defendant next to the guard.

This debate became more intense with the Law No. 15.358/2026, which transformed the video conference into a legal rule. During a public hearing at the STF, entities associated with criminal lawyer and torture prevention argued that the virtual form could weaken the control of misconduct and access to justice. Since the constitutional controversy is still in debate, the discipline of the video conference is one of the main current issues for the research on custody hearing.

The fourth limitation is the persistence of violence and selectivity of the criminal system. Data released by the CNJ in 2025, referring to more than 2 million audiences conducted since 2015, indicated maintenance of pretrial detention in 59% of cases, granted freedom in 41% and recorded reports of torture or abuse in 7% of audiences. These data do not make a

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conclusion alone that the hearing has caused a certain result, but show that pretrial detention remains frequent and that protection against violence remains necessary.

The same data reveals information and standardization limits. In the cut of 357,4 thousand auditions registered in BNMP 3.0 from August 2024, 46% were carried out personally, and more than half of the records do not contain information about race, civil status or schooling. The absence of data makes it difficult to identify inequalities, compare federation units and assess whether decisions are being taken uniformly. The percentage of presence, in addition, belongs to the period prior to the legislative change of 2026 and should not be automatically planned for the subsequent scenario.

Another limitation is the nature of the act. The hearing decides on the initial custody, but does not resolve the criminal proceedings, does not replace the investigation and does not prevent pretrial detention from being decreed when concrete grounds arise. It is also not enough to grant temporary freedom if there is no service network, structure for monitoring and material conditions for compliance with the obligations. Without complementary public policies, the precautionary measure may be applied in a merely formal way or discontinued for social reasons that have not been adequately considered.

3.3 Persons with psychiatric disorders at custody hearings

Vulnerability, crisis identification, professional involvement and gaps in diagnosis and protocols

The presence of persons with psychiatric disorders or in mental suffering at the custody hearing puts into contact two institutions with distinct purposes: the justice system, responsible for controlling the legality of the prison and the need to maintain it, and the health network, responsible for evaluating and taking care of the clinical needs. The challenge is to prevent psychic suffering from being invisibilized, treated as simple disobedience or automatically converted into a sign of danger. The hearing should function as a guarantee of rights and gateway to care, not as a psychiatric consultation or as an instrument to anticipate guilt. The CNJ Resolution No. 213/2015, in its updated edition, and the CNJ Resolution No. 487/2023 establish obligations of identification, direction and management of crisis in this context.

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Vulnerability: mental health, deprivation of liberty and inequalities

The vulnerability of the custodied person is not just a diagnosis. It results from overposition between mental suffering, deprivation of freedom, communication barriers, stigma and, in many cases, housing precariety, fragilized social bonds or difficulty accessing continuous treatment. The situation may worsen when the person belongs to historically discriminated groups, such as black people, women, LGBTQIA+ people, indigenous people, migrants, elderly people or in a street situation. The CNJ Resolution 487/2023 indicates that the decision on precautions considers social vulnerabilities and intersectional factors.

This reading should avoid two mistakes. The first is to assume that any psychiatric disorder makes the person unable to understand the audience or participate in it. The second is the assumption that an atypical presentation, poverty, street situation or use of substances proves, by itself, a diagnosis or a condition of danger. The Brazilian Law of Inclusion adopts a relationship understanding of disability, linked to the interaction between long-term obstacles and social barriers, and ensures access to justice in equal opportunities. The Convention on the Rights of Persons with Disabilities also preserves autonomy, legal capacity and procedural adaptations.

In practice, the audience can be a moment of special exhibition. The person may be scared, disoriented, without continuous use of medications, under the effect of substances or in abstinence, without access to an interpreter or without conditions to explain his health history. The lack of a support network or clinical documentation may make it difficult to understand what is happening, but it does not eliminate the institutional duty of listening to it and evaluating its needs. The CNJ Resolution No. 562/2024 emphasized the importance of verifying, with the support of the Service for Care to the Custodied, indications of mental disorder or psychosocial disability. It also provides for the court interview to consider history of health, mental disorders, continuous use of medications, excessive alcohol and other drugs and housing, work and study situation.

Identifying a crisis is not making a diagnosis

It is essential to distinguish three situations: have a psychiatric diagnosis in advance, present indications that recommend health assessment and be in an acute crisis that compromises the participation in the audience. They may coexist, but they are not equivalent. A person with a diagnosis can be stable and suitable to participate, with the necessary support.

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Another, without any known diagnosis, may present a crisis that requires immediate care. Therefore, the absence of expert report or prepared should not be a condition for recognizing suffering or activating the health network. The CNJ Resolution No. 487/2023 speaks of "indications" for voluntary reference to the Network of Psychosocial Care (RAPS) and establishes a own procedure for the crisis that unable participation in the act.

The initial identification should not be confused with clinical assessment or expert assessment on imputability. It is up to the qualified team to observe the needs of communication and participation, to receive reports on health and treatment history, and to record signs that require specialized assessment. The diagnosis, the definition of therapeutic behavior and the indication of possible hospitalization belong to the sphere of health professionals. The decision on the legality of imprisonment, customs and procedural measures belongs to the judicial authority, with the participation of the defence and the Prosecutor's Office. Resolution 487 itself separates crisis management in the hearing from any subsequent imputability and provides respect for the secret of personal and medical information.

When the person is in crisis and can't participate, the rule provided by the CNJ is to try first to manage the crisis with qualified team and RAPS action. This management includes listening, understanding of the situation, attempt to build possible consensus and restore dialogue, in addition to emergency guidance when necessary. If the attempts are not sufficient, health care and formal registration of the failure to conduct the hearing should be provided with the request for clinical information useful to the court decision. The standard provides deadlines for the sending of medical reports and information from the health secretaries. Therefore, it is not required that the person "proves" in advance that he has a disorder to receive attention; what is assessed is the concrete need for care and, separately, his possibility of participation at that time.

3.4 The role of professionals and coordination between justice and health care

The judicial authority should conduct the hearing in respect of fundamental rights, verify signs of mental suffering with the support of the specialized team and hear the Prosecutor's Office and the defence. If there are conditions for participation, it may determine voluntary reference to the RAPS and should consider health and social reality when deciding on precautions. These measures should not make the treatment difficult, impose incompatible obligations with it or be supported in risk assumptions arising only from a diagnosis. The court

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shall also examine whether the use of algae or other containers was necessary, proportional and non-discriminatory.

The Custodied Care Service (APEC) staff, when available, acts in prior care and social protection. Your work can help identify psychosocial needs, record relevant information and recommend guidelines. This assessment does not replace clinical diagnosis. The Psychosocial Care Network, in turn, responds for the assessment and health care, including the handling of emergencies. The Assessment and Monitoring Teams of Therapeutic Measures (EAP) can support the joint between Justice and Health and, where appropriate, contribute to assessments and to a Single Therapeutic Project (PTS), built with the participation of the person. The CNJ highlights the need for integration between APEC, EAP and RAPS just to prevent the identification of a need from ending in a continuous direction.

Technical defence and Prosecutor's office have complementary guarantee functions: they must ensure that the person understands the procedure, can manifest themselves with the necessary support and have their health conditions considered without the diagnosis being used as a short to justify imprisonment. It is also the institution to observe reports or signs of violence and misconduct, especially when the person has difficulty telling what happened. The Convention on the Rights of Persons with Disabilities and the Brazilian Law of Inclusion strengthen the obligation to train professionals in justice, public security and prison system.

Missing diagnosis, risk of invisibility and risk of stigmatization

The absence of prior diagnosis may result in invisibility. Without a medical document, signs of suffering can be read as provocation, resistance, incoherence or lack of collaboration. The person may stop receiving urgent attention or be directed to the prison system without adequate assessment. However, the answer is not to transform the audience into improvised diagnostic trial. This would create the opposite risk: interpreting ambiguous behavior as a disease, treating the person as incapable and restricting his freedom in the name of a presumed risk.

This dilemma appears in a qualitative study published by Campos and co-authors, based on interviews with five judges who acted or had acted in custody hearings in the Holy Spirit. The authors identified speeches that associated mental suffering with risk and that could support the maintenance of imprisonment, as well as a tendency to psychiatrizing the problem. The study is relevant to understand the stigma and decision-making mechanisms, but its sample is localized and small, and the interviews were conducted in 2018, before CNJ Resolution No.

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487/2023. Therefore, it does not allow to say that the same practice occurs in all comarks or that it fully describes the post-standard scenario.

The central point for the TCC is that diagnosis should not work as a password for access to rights or as a synonymous of dangerousness. The protection must begin with reasonable signs of suffering or crisis, preserving autonomy and resorting to health assessment when indicated. Similarly, the crisis should not be used automatically to convert care into prison, detention or hospitalization. Law No. 10.216/2001 provides that treatment should be done, preferably, in community services and that hospitalization is indicated only when the extra-hospital resources are insufficient.

Protocols: no absolute regulatory vacuum, but an implementation challenge

It is more necessary to talk about local implementation and standardization faults than in total absence of protocols. The CNJ Resolution No. 213/2015, updated by Resolution No. 562/2024, and the Resolution No. 487/2023 contain guidelines on indicator identification, voluntary guidance, crisis management, team functioning and adequacy of surveillance. The Manual of the Anti-Asylum-based Policy of the Judicial Power provides guidelines and fluxograms to articulate the services. There are also local experiments: the Piauí Court, for example, published in 2026 a specific flow for the care of people with mental disorders in the custody hearing.

This does not mean that there is a uniform and effective procedure available everywhere. Implementation depends on pre-care team, affordable health professionals, contacts and flows agreed between Judiciary, RAPS and social assistance, adequate transportation, training, data secret and follow-up after the hearing. In 2024, the CNJ described the integration between APEC and EAP as a process that needed to be strengthened. A review published in 2026 on the implementation of Resolution 487 also points to structural challenges and the risk of incomplete implementation of the policy. These records indicate that a national standard may coexist with inequalities in coverage, resources and local routines.

A consistent local protocol should make it clear who carries out prior care, which situations act assessment or crisis management, such as contacting the RAPS and the SAMU, who document the information, how the secret and will of the person are preserved, how defence and support are guaranteed during the act and how cautionaries are avoided from inviability of care. The protocol should also predict what to do when there is no diagnosis, APEC team or immediate availability of the EAP. These elements are useful parameters for

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analyzing the practice of a region; they should not be presented as a list already uniformly fulfilled in the country.

3.5 The Judiciary's Anti-Asylum Policy and the impact of imprisonment and hearings on mental health

Asylum-based logic and its survival in criminal proceedings

The judiciary is not an accident in the history of Brazilian institutions. It results from the joint between a medical knowledge that was established as an order and a police power that needed to administer those who could not be held responsible or simply released. Castel (1978) shows that the psychiatric order was born from this encounter: alienism did not invent the exclusion of the mad, but reorganized it in a closed space, subjected to a medical authority with competence to tell who was dangerous and what should be done with it. Foucault (1978), by reconstructing the history of madness, moves the focus of the disease to practice: before being a clinical object, madness was a problem of public order, solved by hospitalization.

In Brazil, the hospital of custody and psychiatric treatment inherited this double function and organized it in a hierarchical way: it is treated, but above all it is guarded. Goffman (1974), when describing the total institutions, identifies the mechanism that interests here. The interned person loses the objects that maintain his identity, is subjected to a routine that does not control and passes to be identified by the place he occupies, and not by the name he has. This process is called the mortification of the self. Basaglia (1985), reporting Gorizia's experience, adds that the object of the institution was never the disease, but the social relationship that built around it: the internate is someone whose speech was disqualified before he was heard.

Transmitted to the criminal proceedings, this logic gains its own grammar. person found not criminally responsible, pursuant to Article 26 of the Criminal Code, is not punished with punishment, but subjected to the security measure, whose duration, until the arrival of precedential statement No. 527 of the Superior Court of Justice, in 2015, did not find a clear legal limit. precedential statement went to demand that the time of hospitalization does not exceed the maximum of the abstract punishment committed to the crime, but the previous practice produced confination trajectory that was measured in decades. The data collected by the National Council of Justice and CEBRAP (2024) confirm this longevity: the average time of hospitalization was 55,9 months in Paraná and 54,6 months in Rio Grande do Sul, much above what any therapeutic purpose could justify.

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The Law No. 10.216/2001 represented a decisive shift by affirming that hospitalization is the last resource and by redirecting the assistant model to the psychosocial attention network. The criminal system is out of that. The law treated the hospitalization civil and did not face the security measure, so that the psychiatric reform coexisted, for more than two decades, with a custody circuit that preserved the essence of the asylum logic. The condemnation of Brazil in the case of Ximenes Lopes (CORTE IDH, 2006) and the recognition of the unconstitutional state of things of the penitentiary system in ADPF 347 (STF, 2023) explained the cost of this coexistence, but did not dismantle it.

The quantitative portrait is modest in absolute numbers and eloquent in meaning. SISDEPEN registered 2.314 people in security measure of hospitalization in psychiatric care and treatment facilities in the second half of 2023 (CNJ; CEBRAP, 2024); the Federal Council of Psychology (2025) found 2.053 people in such facilities, and the following cycle of SISDEPEN pointed 1.655 hospitalizations by security measure in the first half of 2025 (CNJ, 2026). The profile of these people is repeatedly the same: young men, black, poor, with drug registration in 54,43% of cases and with provisional imprisonment in 77,55% of them (CNJ; CEBRAP, 2024). The madness the criminal system captures is not the abstract madness; it is the one of those who were already exposed, before the crime, to social vulnerability and to the selectivity of criminal control.

CNJ Resolution No. 487/2023 and the regulatory shift

The CNJ Resolution No. 487/2023 established the Anti-Asylum-based Policy of the Judicial Power and gave the issue a treatment that so far did not exist in the internal regulatory plan. It is presented as an instrument of compliance with Law No. 10.216/2001 and the Convention on the Rights of Persons with Disabilities, incorporated by Decree No. 6.949/2009, and organizes its decisions in five fronts: the progressive ban of custody and psychiatric treatment facilities and the sealing of psychiatric wings in prisons; the requirement of a singular therapeutic project, prepared with the person and not for it; the establishment of assessment and monitoring teams in the courts; the construction of permanent flows with the Psychosocial Care Network; and the periodic review of safety measurement procedures, with defined deadlines, subsequently extended from six to nine months by Resolution No. 572/2024.

The shift that the standard operates is deeper than the sum of these provisions suggests. By requiring expert report of technical team, therapeutic design and flow with the network, the resolution removes from the judge the monopoly of knowledge about the case and obliges him

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to decide with information that he does not produce. By linking the decision to the existence of vacancy and follow-up in the territory, it turns the judgment into an act of caution, and not just into an act of detention. And, by predicting the periodic review, it prevents hospitalization from extending by the administrative inertia that characterized the previous model. The vocabulary of the standard is meaningful: it is not spoken in person found not criminally responsible to be kept, but in a person with mental disorder or psychosocial disability in conflict with the law, the holder of rights and the recipient of a project of life.

Treatment in freedom, in this architecture, ceases to be a concession and becomes the rule of organization of care. The psychosocial care network, organized around the psychosocial care centers, therapeutic residential services and basic care teams, is the place where this rule materializes or fails. The singular therapeutic project is the instrument that translates the case into a plan: who accompanies, with what frequency, in what space, with what purpose and under what responsibility. When this arrangement works, the hospitalization ceases to be a destination and becomes an episode; when it does not work, the network becomes a rhetoric justification for the maintenance of the custody. The difference between the two scenarios is not semantic: it decides whether the person will be treated as a subject of a project or as an object of a vacuum.

The implementation, however, reveals the distance between the stated and the practice. The national monitoring coordinated by the CNJ (2026) indicates an average of 72,4% of implementation among courts, with five of the twenty-seven states in a situation of total prohibition of establishments. The previous reports recorded 1.410 disinstitutionalized people and 2.521 unique therapeutic projects developed (CNJ, 2024b), along with 260 people with extinct measure that were waiting for a vacation in therapeutic residential service. The analysis of 294 security measurement processes showed that only 83 were extinct, which corresponds to 28,2% of the total (CNJ; CEBRAP, 2024). The numbers do not authorize enthusiasm or discretion: they indicate that politics has changed the law and vocabulary of the Judiciary, but that its effectiveness depends on established institutional capacity, and not on the individual disposal of each magistrate.

What imprisonment does to mental health

The international literature on mental health in prison is extensive and convergent at one point: the prevalence of mental disorders among prisoners is substantially higher than the general population. The review of 62 findings conducted by Fazel and Danesh (2002), with

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more than 23 people detained, already indicated this difference; subsequent work expanded the diagnosis and refined the methods, such as the systematic review of Emilian, Al-Juffali and Fazel (2025) and the review of the rainfall of Favril et al. of 2024). There is, however, a methodological rescue that needs to be taken seriously: part of the observed excess comes from selection, i.e., from people who had already experienced psychic suffering before imprisonment and who are more vulnerable to criminalization. by Fazel et al. (2016) draw attention to this distinction between what is imported to prison and what is produced by it.

In Brazil, the available studies support both interpretations. In a survey conducted in the state of São Paulo, Andreoli et al. (2014) found a lifetime prevalence of any mental disorder of 56.1% among male prisoners and 68.9% among female prisoners. In a cross-sectional study in Rio de Janeiro, Constantino, Assis and Pinto (2016) identified stress in 35.8% of men and 57.9% of women, as well as depressive symptoms in proportions that varied according to the instrument and population studied. Among women imprisoned in Rio Grande do Sul, Canazaro and Argimon (2010) describe accumulated distress combining personal history, the disruption of family ties and institutional violence. The convergence of these findings does not establish imprisonment as the sole cause of illness, but does support the conclusion that it is an environment that aggravates it.

The mechanisms of this exacerbation are known. Overloading reduces vital space and sleep; prolonged isolation produces psychic deterioration; the absence of treatment turns suffering into indiscipline, and indiscipline into punishment; institutional violence and the breakdown of belonging bonds remove from the person the support that supports psychic life. The ultimate end is suicide. The SISDEPEN recorded 84 suicides among 999 in prison units in the second half of 2024 (BRASIL, 2025), and Chies (2022), by analyzing judgments of the Rio Grande do Sul, sets the suicide rate in prison population at 22,2 per hundred thousand, against 5,5 per hundred thousand in the general population. The same survey allows to dimension the institutional response: 1.339 psychologists to 670.265 people imprisoned in physical cells. Indicators of Mental Health in the Criminal System

The indicator	**The value**	**Source and Period**
Safety measurement of hospitalization	1.655	SISDEPEN, 1st sem. 2025 (CNJ, 2026)
The average time of hospitalization (PA and RS)	55,9 and 54,6 months	by CNJ; CEBRAP (2024)
Any life-long mental disorder (SP)	56,1% and 68,9%	Andrei and al. by 2014
Stress in prisoners (RJ)	35,8% and 57,9%	by Constantine; Assis; Pinto (2016)

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The indicator	The value	Source and Period
Suicide in prison units	84 out of 999 views	2nd edition, 2024
Suicide rate: general population and prison	5,5 and 22,2 per 100 thousand	The Dogs (2022)

The custody hearing as a rite of passage

The custody hearing was introduced in Brazil by CNJ Resolution No. 213/2015 and finds conventional basis in Article 7.5 of the American Convention on Human Rights, which determines the presentation of the person imprisoned, without delay, to the judicial authority. Their declared purpose is triple: verify the legality of the prison, constate the physical and psychic integrity of the person presented and decide on the need for the caution measure. It is, therefore, the first contact between the judge and the person who has just been arrested, and the only moment of the process in which that person is seen, and not just read in a report.

The empirical research on the functioning of the rite, however, leaves the normative expectation. The study of the Brazilian Public Security Forum (2017) describes audiences marked by repeated guidelines, standardized decisions and an institutional culture that treats imprisonment as a rule and freedom as an exception. The IDDD (2019), following audiences in different courts, documented the fragility of technical defense, the shortness of the acts and the difficulty of the person submitted to understand what is happening. Toledo (2021), in ethnographic research, shows that the visual and physical contact between the judge and the custodian is short and loaded with moral judgments, and that the decision tends to form before the speech of the interested party itself. Küller and Dias (2019) note that the prisoner, although he is the recipient of the act, occupies a marginal position on the scene, and Lages and Ribeiro (2019) demonstrate that the decision is sensitive to social and racial stereotypes that have no legal translation.

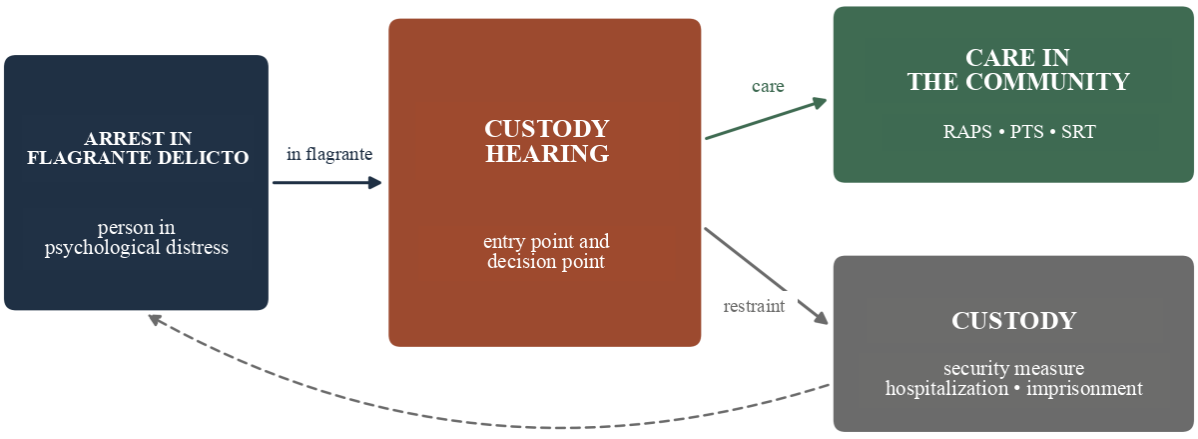
When the person presented is in psychic suffering, these traits are emphasized. The camp and al. (2022), when they analyze custody hearings involving people with mental disorders, they describe a paradox: the rite created to humanize the criminal response reproduces the stigma that it intends to correct. The absence of technical staff at the time of the hearing, the misunderstanding of the act by the person, the use of the provisional hospitalization as a convenience solution and the difficulty to activate the health network convert the care entrance to the custody entrance. The result is a decision that is justified by the protection of

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the person, but which produces, in practice, the same exclusion that the psychiatric reform tried to overcome.

It is at this point that the notion of passing rite shows itself useful as an analytical instrument, and not as a native category of the aforementioned authors. The expression is here used in the interpretative sense, to designate the path by which one leaves a social position and is re-leaded to another, with the acquisition of a new status: that of person in measure of security, of hospitalization, of custody. The approach to Goffman (1974) and the literature on prisonization allows to describe the mechanism, but it is worth not to confuse it with an anthropological classification that the Brazilian studies do not use. What can be affirmed, on the basis of the evidence available, is that the audience works as a point of bifurcation: it is where anti-asylum policy ceases to be text and turns into a decision on someone's life.



CNJ Resolution No. 487/2023 • The Judiciary's Anti-Asylum Policy

The Circuit of Madness in the Criminal System and the Two Outlets of the Guard Audience

Source: own drawing, from CNJ Resolution No. 487/2023 and the revised literature.

The revolving door: the limits of deinstitutionalization

Disinstitutionalization, as it is understood by psychiatric reform, is not confused with the closure of beds. It assumes the construction of a network capable of sustaining life outside the institution: home, work, bond, follow-up and possibility of return in a crisis situation. When

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the institutional design prioritizes the legal dimension and neglected the material dimension, the result is what can be called institutional circulation. The person leaves the manicure because the bed has been prohibited, but does not find a vacancy in therapeutic residential service, does not have an active therapeutic project and does not have income or housing; in a short time, he returns to the circuit, now through the way of prison.

Data from the CNJ (2024b) show that 260 people with extinct security measure expected vacancy in therapeutic residential service, indicating that the gargall moved from the process to the network. The observation is decisive for the argument of this chapter: the anti-asylum policy can be fully fulfilled on the processual plan and yet fail on the life plan. The legal output gate only becomes a real output gate when there is a place to go.

Overcoming asylum-based logic, therefore, does not equate to extinguish establishments, but to dismantle the rationality that organizes them: the primacy of safety over care, the replacement of the person's speech by expert report who speaks for it, the indetermination of the time of hospitalization and the incommunicability between justice and health. Amarante (1995), by reconstructing the trajectory of the Brazilian psychiatric reform, insists that disinstitutionalization is a complex social process, which requires transformation of practices, knowledge and institutional places, and not just the transfer of patients from one building to another. Applied to the criminal system, this warning means that the anti-asylum policy is carried out only when the custody hearing and the implementation of the security measure pass to work with another grammar: the care in freedom as a horizon, and the detention as a reasoned exception.

There is also a gap in knowledge that needs to be explained. There is no study specifically designed to measure the psychic impact of the custody hearing on the person presented. What exists are observational research on the functioning of the rite, prevalence studies on the prison population and ethnographic reports on the contact between judges and custodians. The claim that the audience produces effects on mental health is therefore plausible and supported by indirect evidence, but has not yet been subject to direct empirical verification. Recognizing this limit does not weaken the argument; on the contrary, it precisely defines what the chapter can and what cannot sustain.

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3.6 The ineffectiveness of custody hearings and the distinction between criminal and psychiatric behavior

The custody hearing is the most relevant innovation of the Brazilian criminal proceedings in the last two decades. In a few hours, she condemns the promise of a system that treats prison as an exception to be justified, puts the person imprisoned before a judge and turns the first contact with the State into an opportunity to document institutional violence. Ten years after its dissemination by the National Council of Justice, however, the diagnosis is of profound disproportion between what the norm promises and what the practice provides. This chapter examines this disproportion. The hypothesis is that inefficiency does not arise from the absence of standards — the country has produced, in a decade, a dense and technically sophisticated regulatory set — but from a double gap: between the standard and the material structure available to meet it, and between the standard and the institutional culture of the actors responsible for applying it. The argument develops in five movements: the problems found; the impacts on the custodied person; the violations of rights; the distinction between criminal behavior and psychiatric behavior; and the analysis of decisions, documents and jurisprudence.

The regulatory standard

The obligation to submit the prisoner without delay to a judicial authority arises from Article 9(3) of the International Covenant on Civil and Political Rights and Article 7(5) of the American Convention on Human Rights, incorporated into domestic law since 1992. In the internal plan, the institute was structured into three layers: the precautions measure in the ADPF no. 347, of 2015, which recognized the state of things unconstitutional of the prison system and determined the conduct of audiences within 24 hours; the CNJ resolution no. 213/2015, which fixed the schedule of the act, watched the presence of the police officers and predicted the duty to ask about torture; The law no. 13.964/2019, which gave a new edition to article 310 of the Criminal Procedure Code and created the guarantees judge, declared constitutional in ADI no. 6.298.

Two updates complete the picture. In 2023, the Claim No. 29.303 determined the conduct of hearing in all forms of imprisonment, and not only in the flagrant. In 2024, the CNJ Resolution No. 562 reformed the Resolution No. 213/2015 and reaffirmed the presence as a rule, admitting the video conference only in public calamity, health crisis or manifest impossibility of presentation, with justification in case and specific safeguards: absence of

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police officers in the room, prior and reserved interview with the defense, presence crime body examination and expert report joined before the hearing.

The regulatory draft attributes the act to five functions: control the legality of the prison; control its need; verify the conditions of custody; collect and document reports of torture; and identify vulnerabilities, directing the person to health and protection networks. The force of the institution is to concentrate so many chances of correction in so short time; its fragility, in requiring a combination of conditions — time, structure, present defense, technical team, health network and decision-making disposal — which rarely verifies itself in whole. When one of them is missing, the audience is not just less efficient: it turns into a seal of legitimacy of a prison that has not actually been examined.

Problems identified

Time limits, in-person hearings and virtualization

The first problem is the non-compliance of the deadline and the inversion of the presenciality rule. The Observa Custodia platform survey, published in November 2024, with data of 174 judgments, found that in 60% of them the presentation occurred in up to 24 hours and in 36% in up to 48 hours — that is, in more than one-third of the judgments maped the legal deadline was no longer observed as a rule. The data is serious because the deadline is not formality: it is the interval in which the traces of violence are still documentable.

The second problem is the remaining of the exceptional as ordinary. The IDDD and APT's "Right under custody" survey, which accompanied 1.206 audiences in ten cities in six states between September and December 2024, found that the respect for the rights of the detained was 17,5% higher in presidential audiences and that the judge's conduct was 25,3% more effective in investigating allegations of violence when the judge was in the same environment. However, only 26% of the 2024 audiences were present; 34% took place by video conference and 40% changed the formats. Only 26% of virtual sessions started from a court headquarters; the rest took place in delegations, prisons and chains, and in 37,5% of cases the person appeared surrounded by police officers. Only 26,2 percent counted on a lawyer or advocate on their side. In 2025, virtual auditions still represented 45% of about 690 performed in the country, according to the CNJ.

The second order of problems is the contradiction. Resolution No. 213/2015 ensures prior and reserved care by a lawyer or defendant before submission to the judge; Resolution

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No. 562/2024 extended the guarantee to virtual sessions. In practice, the preliminary interview is often inexistent, especially in remote counties and in plantation regime. As the resolution sees that the judge formulates questions intended to produce evidence about the imputation, the absence of defense reduces the speaking of the custodied person to the qualification and treatment received, without anyone formulating the questions capable of revealing the illegality of the approach. The 2017 Conectas survey, with 331 audiences, already recorded that in 33% of them the court did not question the irregularity of the flagrant, that the Prosecutor's Office did not investigate police violence in 91% of cases and that, in 21 cases, no one asked about torture, even having visible signs.

The third problem is cultural and organizational: the conversion of the audience into a standard item, with decisions made from standardized formulas. Resolution 562/2024 reacted to the phenomenon by claiming that the hearing is one and indivisible act and by vetoing the collective hearing — which in itself reveals the existence of the practice that was intended to be coibed. Ritualism has episthetic consequences: when the decision is written before the optimism, the audience ceases to produce new information and passes to produce confirmation. The decision is not about the case, but about the category of case — trafficking, theft, domestic violence — to which the person was associated by the arrest record of imprisonment. The figures support the reading: 59% of conversion into preventive in the historic CNJ set; 45,2% of provisional imprisonment, 52% of freedom with only cautionaries, 1% of full freedom and 2,7% of relaxation in IDDD research; and 59,7% of preventive in cases of drugs, against 37,5% in the general average.

The fourth problem is material. The hearing presupposes custodial care teams, expert assessment medical-legal available, articulated psychosocial care network and criminal alternatives services. The Custodia Audiences Bulletin No. 1 of the CNJ, records psychosocial guidelines in about 4,7% of the audiences; the Observa Custodia points to the absence of pericial examinations ad cautelam in 35,2% of the Southern and 29,8% of the Southeast. Without expert assessment, the violence suffered is not documented and, therefore, is not overwhelming.

The database is also fragile: 34.4% of SISTAC records lacked race/color information, and approximately 4% had no date; replacement by BNMP 3.0 from August 2024 expanded the fields but interrupted historical series. Underreporting is not neutral: when race/color disappears from the record, the operation of institutional racism disappears with it. Finally, there is legislative regression. Law No. 15.272/2025, published on November 27, 2025, established

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circumstances that 'recommend' converting arrest in flagrante delicto into pretrial detention—repeated offending, violence or serious threat, previous release at a custody hearing, an offense committed while an investigation or criminal proceedings are pending, flight or a risk of flight, and interference with the proceedings—and made examination of these circumstances and the dangerousness criteria in Article 312, paragraph 3, mandatory. Paragraph 4 of Article 312 reaffirms the prohibition on relying on the abstract seriousness of the offense, but the systemic effect is the opposite: by turning open criteria into a checklist, the law provides a framework that tends to produce automatic conversion. The same law inserted Article 310-A, which provides for collecting biological material for genetic profiling, preferably at the hearing itself, raising questions about informational self-determination and the presumption of innocence. Similarly, Bill No. 5.582/2025, in the version approved by the Chamber of Deputies, provided for hearings to be held mandatorily by videoconference; the Senate report of December 2025 changed the wording to 'preferably', reducing but not eliminating the problem.

Impacts on the person in custody

The most immediate impact is time. Each out-of-term hearing and each automatic conversion produce days or months of imprisonment that shouldn't exist. The person does not experience the difference between temporary imprisonment and punishment: he experiences deprivation, with all its effects. Brazil had 644.316 people detained in December 2023, of which 27,2% were provisional, according to SISDEPEN; the audience contributed to reducing this percentage, but did not change the background logic.

The second impact is the destruction of bonds: loss of employment, interruption of studies, family breakdown, debt worsening, impossibility to take care of children. These effects do not come into the autos, but are the substance of harm—and produce what criminology describes as a criminal effect of punishment, aggravated by the fact of inciding on who, legally, is innocent.

The third effect is on the body. The 2025 IDDD survey recorded 19,3% reports of torture, abuse or aggression, with 35,3% in Salvador and 31,4% in Betim; the CNJ recorded 7% reports in a decade, about 153 cases, with a percentage of around 9% in the five years before 2024 and a peak of 11,2% in 2021. These numbers measure the recorded report, not the torture: this depends on the person who feels safe to speak, on the present defense, on the judge asking, on the examination being carried out and on the report being delivered.

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The fourth impact is uneven. Among the black people who denounced violence, 27,9% did not have any judicial guidance for persecution, against 17,8% among white people. Even when women have children under the age of 12 — hypothesis of article 318 of the CPP and of the collective HC number 143.641 — the imprisonment rate practically does not change: 28,9% among mothers and 29,3% among others. The protective framework exists, but it is not translated into decision.

Violations of rights

The first violation is processual. Article 5, LIV and LV of the Constitution ensures the appropriate legal process, the contradictory and the broad defence. In the custody hearing, the contradiction is necessarily comprised, because the object of the act is not the imputation, but the freedom. Compression is legitimate as long as two minimum elements are guaranteed: present technical defence and real possibility of influence on the decision. Without defence— as in 73,8% of cases of virtual audiences without a lawyer next to the custodied person—the contradiction ceases to be comprised and becomes inexistent: it is contradictory of façade.

The second violation is the most serious. Article 5, III and XLIX prohibit torture and ensures prisoners the respect for physical and moral integrity; the Convention against Torture imposes the duty of prevention, investigation and punishment. The hearing was designed as a preventive mechanism just because it is the first time a person can tell the violence to an authority that has not participated in it. When it fails, the violation doubles: the torture is not documented or pressed, and the hearing itself, held in a police environment and with the person surrounded by the agents who arrested it, reproduces the conditions that inhibit the report. The contrast between the frequency of reports and the rarity of answers is eloquent: among the 27 decisions that relaxed prisons in the IDDD investigation, only one mentioned police violence.

The third violation is dogmatic. Article 5, LVII, ensures the presumption of innocence, and Article 312, § 4, CPP sees the preventive based on abstract gravity. The practice, however, works by categories: by converting the flagrant because the crime was committed with violence or serious threat — the first circumstance of Article 310, § 5 — the judge does not examine the danger generated by the freedom of the person; applies a presumption. The presumption of freedom is the opposite of the presumption of innocence.

The fourth violation is social: health, family coexistence and non-discrimination do not disappear with prison. The psychosocial guidelines at 4,7% of the audiences, the absence of expert assessment in significant parcels of the counties and the prison rate of mothers identical

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to women without children show that these rights are treated as secondary. The fifth is technical and makes the rest invisible: Article 93, IX of the Constitution requires reasoning under the penalty of nullity, and Article 315, § 2, of the CPP details the duty to motivate. When the decision repeats formulas — "concrete gravity", "periculosity", "garantiation of public order" — without linking them to facts, the reasoning becomes apparent and simulates compliance with the norm, blocking control.

The distinction between criminal and psychiatric behavior

The distinction is organized around imputability. The typical and illegal fact is the presumption of the infringement; guilt allows to assign it to the agent. Article 26 of the Criminal Code excludes the guilt of those who, due to incomplete or delayed mental illness or development, were entirely incapable of understanding the illegal nature of the fact or of determining themselves according to it; the single paragraph provides for diminished criminal responsibility. person found not criminally responsible is not completed because the fact did not exist, but because it cannot be attributed: the sentence is of acquittal accompanied by a security measure, followed by security measure, with therapeutic purpose and limited time, according to STJ's precedential statement 527 to the maximum of abstractly committed penalty.

The custody hearing is not the headquarters of the judicial mental health assessment proceedings of the Articles 149 to 152 of the CPP: it is not the judge to declare the lack of criminal responsibility or to replace the expert assessment by personal print. You have to identify indications, ensure the management of the crisis, determine the body examination of crime, listen to the parties and guide to the Psychosocial Care Network. This duty is expressed: Resolution No. 213/2015, with the drawing up of Resolution No. 562/2024, determines that the judge assures, with the support of the specialized team, if there are indications of mental disorder or psychosocial disability, by adopting the procedures of Resolution CNJ No. 487/2023, which dedicates its Section I to custody audiences, prevents the management of the crisis, sees hospitalization in asylum institution and removes the cautionary treatment or hospitalization compulsory.

In practice, three errors are repeated. The first is to treat the symptom as a crime: people in crisis are autuated by disobedience, resistance, threat or disturbance of order, and the self-prison tells the fact, not the mental state. The second is to treat the crime as a disease: recognized the disorder, the response moves to the provisional hospitalization and to the custody hospital, which cease to be a therapeutic act and passes to be neutralized. The third is the presumption

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of dangerousness: Law no. 15.272/2025 opened a window to break it by requiring concrete demonstration in article 312, § 3, but by sending these criteria to the hearing, it can convert dangerousness into item of checklist.

The highest tension point is the provisional hospitalization of Articles 319, VII of the CPP, which requires expert report of lack of criminal responsibility or diminished criminal responsibility. The STJ reaffirmed this requirement in the AgRg in the HC number 1.032.243/GO, judged in December 2025, distinguishing diagnosis of mental disorder and lack of criminal responsibility. The requirement is correct, but produces a perverse effect when combined with the morosity of the incident: if hospitalization depends on expert report that does not exist, and if the preventive can be maintained while the expert report is not produced, the person in crisis remains imprisoned not because it is dangerous, but because the system failed to assess it — a pretrial detention by default.

The figures measure the phenomenon: 2.314 people fulfilled security measures in custody and psychiatric facilities in December 2023, according to SISDEPEN; in Pará, 54,55% were interned more than six years ago; in Mato Grosso do Sul, 92,31% had passed by prison units before hospitalization. The criminal system works as the gateway to the mental health system, and this, when it works, works as an extension of it. The result is a double violation: one who could not be punished is punished and one who needed treatment is ceased. The custody hearing is the place where this difference should be preserved; when it fails, it is not just ignored — it is produced.

Decisions, documents and case law

In the Federal Supreme Court, four decisions structure the matter. The ADPF No. 347, judged in October 2023, recognized the state of unconstitutional things of the prison system and determined national and state plans, with a period of six months for preparation and three years for execution, including expressly the conduct of audiences within 24 hours; the national plan, called “Justice”, was approved in 2024 and gathers 141 measures. The complaint on March 29.303, 2023 extended the hearing to all forms of imprisonment. ADI on August 6.298, 2023 declared constitutional the guarantee judge, set a period of twelve months, one-time extended, and admitted the video conference only exceptionally, as long as it suits the verification of the prisoner's integrity. The collective HC No. 143.641 of 2018 determined the replacement of the preventive by home, as a rule, for pregnant women and mothers of children up to twelve years or persons with disabilities.

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In the Superior Court of Justice, the edition 120 of the Jurisprudence in Theses, of 2019, consolidated three theses that empty the institution: the preventive exceeds the claim of excess time in the communication of the flagrant; the conversion exceeds the nullity by the absence of hearing; and the preventive damages the allegations of illegality of the segregation in flagrant, by forming a new title. As Valença and Amorim demonstrate, when treating the preventive as a new title, the Court discovers that the fumus comissi delicti may be found in illegal proof and that the conversion, far from healing the illegality, can perpetrate it. In the National Council of Justice, the documents offer the most comprehensive empirical basis: the Bulletin No. 1, with data by February 2024, records 1,54 million hearing, 59% conversion to preventive, 41% freedom, 0,43% home, 4,7% psychosocial guidelines and about 9% reports of torture in the previous five years; The ten-year panel, February 2025, extends the universe to more than 2 million audiences and confirms the percentages; and the September 2026 survey, with 2,5 million cases between 2019 and 2025, demonstrates that a quarter of the audiences involves the Drug Law, that 97,1% of these cases come as flagrant and that 59,7% result in preventive. These documents include Resolutions No. 562/2024, No. 487/2023 and No. 414/2021 and the CNJ and Cebrap report on persons with mental disorders in conflict with the law.

Independent investigations complete the picture: the IDDD, in "The End of Freedom" (2019), with more than 2,7 thousand sessions monitored, already identified the almost automatic application of custodians; in "Right under Custody" (2025), produced the data on torture, defense and virtualization here used; the Observa Custodia documented the non-compliance of the presence rule in 74% of the 174 judgments maped; the Conectas, in 2017, documented the silence of the actors; And Fernandes, Arruda and Chagas (2025) synthesize the problem in the formula "the lack of maturity or the lack of will". The picture below organizes the convergence.

Problems, evidence, affected rights and effects at custody hearings

The problem	Evidence	The right affected	Effects
Time and presence	36% of judgments in up to 48 hours; 74% disconnect the rule face-to-face; 45% virtual by 2025	Article 5, LIV and LXV, CF; Article 7.5 of CADH	Produced in a coercive environment
Defence and Ritual	26,2% defense in virtual; 59% preventive; 2,7% relaxation	Article 5, LV; Article 93, IX, CF	Facade contradictory; apparent foundation
Structure and data	4,7% of shifts; expert assessment absent in up to 35,2% of the comarks; 34,4% without race/color	Art. 6 and 196, CF; Art. 5th, XXXIII	Non-Documented Violence: Invisible Racism

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The problem	Evidence	The right affected	Effects
Legislative Reflections	Law No. 15.272/2025; PL No. 5.582/2025	Article 5, LVII and LXIII, CF	The almost automatic conversion
Psychiatric Driving	2.314 in security measurement; 92,31% with passage per prison in the MS	Article 5, III and XLIX; Law No. 10.216/2001	Disease Treated as a Crime; Double Violation

Source: elaborated by the author based on CNJ (2024; 2025; 2026), IDDD/APT (2025) and Observa Custodia (2024).

3.7 Proposals for improvement

The path developed so far allows to say that the central problem is not the absence of standards. The Brazilian Law No. 10.216/2001, the Brazilian Law of Inclusion, the Resolution No. 487/2023 of the National Council of Justice and the Portaria GM/MS No. 4.876/2024 make up a regulatory set reasonably consistent with the anti-asylum paradigm and the Convention on the Rights of Persons with Disabilities. What is missing in most cases is the institutional mediation between the norm and the specific case: who evaluates the person, with what information, in what period, with what reference service and under what control. It is in that interval — between the legal text and the judicial decision — that the following proposals are located.

The four proposals are organized according to the function each fulfils in the decision-making flow, and not according to the order of importance. The training forms the judgment that decides; the protocols standard the procedure by which it is decided; the multidisciplinary teams produce the technical information without which the decision is arbitrary; and integration with the Psychosocial Care Network (RAPS) ensures that the decision becomes continued care in the territory. It is therefore complementary layers: the success of one depends on the existence of the other, and the failure of one compromises the result of the other.

It deliberately opted for implementation proposals, not for a broad legislative reform. The reason is double. First, because the current regulatory framework already contains the duties whose inobservation produces the framework described in the previous chapters; what occurs is a gap of effectiveness, not of legality. Second, because implementation arrangements can be adopted by administrative and interinstitutional acts within the jurisdiction of the courts, public ministries, defence departments and health secretaries, without depending on the time and the correlation of forces of the legislative process.

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Professional training: preparing judges to decide with adequate information

The judicial decision on hospitalization, security measure or reference to the mental health network is, as a rule, a decision made on a expert report. The magistrate does not follow the clinical framework, does not participate in the preparation of the therapeutic project and often does not have a training that allows him to distinguish, in the technical document he receives, what is clinical conclusion from what is stereotype about madness. The empirical investigation conducted by the National Council of Justice in partnership with the Brazilian Center for Analysis and Planning on Security Measures identified that, when the manifestations of the psychosocial attention teams differ from the conclusions of the testing of end of dangerousness, prevails, in the judicial decision, the conclusion of the examination (CONSELHO NACIONAL DE JUSTIÇA, 2024). The data is revealing: in question, the Judiciary remains in the document that is familiar to him — the expert report — and not in the report of who accompanies the person.

Resolution 487/2023 provided the qualification as a policy instrument, but did it in optional terms. Article 21 stipulates that the courts will be able to promote, in cooperation with the Schools of Judiciary, courses intended for the permanent qualification and functional updating of magistrates and servants on the subject of mental health. The faculty, accompanied by the absence of minimum time burden, of mandatory content and of evaluation, produces inequal offer among the courts and allows the policy to be implemented without anyone having to study the subject.

The first proposal is, therefore, to convert this faculty into an institutional duty. This implies to include compulsory content on Law No. 10.216/2001, Law No. 13.146/2015, the organization of the RAPS, the singular therapeutic project and crisis management in the initial training and vitality courses of the magistratura, with minimum hourly burden and evaluation, extending the requirement to the training courses of the Prosecutor's Office and the Public Defence. It is not about transforming lawyers into clinics, but to give them conditions to formulate relevant questions, to recognize the limits of expert report and to identify when the decision is being supported by prejudice and not by proof.

The second proposal is of method: the training must be interprofessional. Joint modules gathering magistrates, servants, promoters, advocates, professionals from the Centres of Psychosocial Care (CAPS) and the social care teams, with real cases study and custody audition simulation, produce an effect that the exhibition class does not produce — that of making explicit the assumptions and vocabulary of each field before they face in the process.

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International experience in interprofessional education indicates that joint learning improves communication between services, and is precisely the failure of communication between Justice and Health that empirical research identifies as the core of the problem.

The third priority is the training of the security forces. The police approach of a person in crisis, the use of algae and detention instruments and entrance to prison units are times when the absence of training produces documented violence. Resolution 487/2023 has already established that the judicial authority assesses, during the custody hearing, whether the use of algae and containers meets the proportionality considered the person's mental health condition (Article 6). In order for this assessment to be subject, it is necessary that the detention act itself be practiced by agents able to distinguish psychic crisis from prison resistance.

Finally, the capacity should be measured. The GM/MS portfolio number 4.876/2024 included, among the follow-up indicators of the Assessment and Monitoring Team of Applied Therapeutic Measures to Persons with Mental Disorder in Conflict with the Law (EAP-Desinst), the number of permanent education activities carried out, and attributed to the team itself the support for the training of the professionals of public policies involved (Article 97, VII). Linking the resource review and the planning of the magistrates schools to this indicator, and not only to the time load offered, moves the focus of the activity to its outcome.

The limit of this proposal is to be recorded. Training does not create vague, does not hire a psychiatrist and does not resolve the absence of service in the territory. Its effect is conditional: improves the quality of the decision when there are alternatives to imprisonment and hospitalization asylum. Furthermore, there is a risk to avoid—that that training in mental health produces a legality of care, with the judge replacing the clinic in the definition of treatment. The training should be oriented to flow and rights, not to diagnosis.

Protocols and procedures: reducing discretion while preserving individual assessment

The second proposal follows from a simple conclusion: without written procedure, each vara decides with what it has at hand. Resolution 487/2023 expressly referred to “pre-established flows with the network” (Article 4) and to an Orientation Model drawn up by the National Council of Justice (Article 2, VII, and Article 23, single paragraph), but the formalization of these flows depends on each court and each district. The result is a variation that is not explained by the singularity of the cases, but by the local administrative capacity.

The effects of this absence appear in the previously mentioned research. Provisional hospitalizations have been identified without the legal hypothesis of article 319, VII of the

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Criminal Procedure Code; documents produced by the CAPS that arrive to the court in temporality incompatible with the decision; and low coverage of prison primary care teams, which pushes to the hospital of custody people who should be treated in the prison unit or on the network (CONSELHO NACIONAL DE JUSTIÇA, 2024). The extension of the time limits originally set for disinstitutionalization, promoted by Resolution No. 572/2024, is also an indication that timetables without corresponding flow tend to not be met.

It is proposed, first of all, an interinstitutional joint act — court of justice, state and municipal secretaries of health, prosecutor's office, public defence and management of social assistance — which establishes, by district or region of health, a unique fluxogram. This fluxogram must indicate who identifies the person, who evaluates, to whom the request for information is addressed, in what period the response is due, which service is the focus point and which formal communication channel. Places already in the Resolution itself can be used as a parameter: 24 hours for the medical report and 48 hours for the information of the health secretaries about the person's condition and the follow-up indicated (Article 5, § 2).

Second, a specific protocol for involuntary hospitalization is proposed, with a mandatory documentary checklist. Law No. 10.216/2001 requires a detailed medical report stating the reasons for hospitalization (Article 6), authorization by a doctor registered with the state's Regional Council of Medicine (Article 8), and notification of the State Prosecution Service within seventy-two hours of both admission and discharge (Article 8, paragraph 1). A single form containing these requirements and a field specifying the frequency of review would make verifiable what currently requires reading the entire case file and would reduce the scope for hospitalizations to continue without oversight.

Thirdly, a protocol for the security measure is proposed, structured around the unique therapeutic project. Resolution 487/2023 establishes that hospitalization is an exceptional and momentumly suitable resource within the framework of the therapeutic project, provided that it is prescribed by the RAPS health team:

> Provisional hospitalization or hospitalization security measure shall be imposed in absolute exceptional circumstances, when other caution measures different from the prison are not permissible or sufficient and when understood as a momentumly appropriate therapeutic resource within the framework of the PTS, while necessary for the restoration of the person's health, provided that prescribed by the RAPS health team (CONSELHO NACIONAL DE JUSTIÇA, 2023, art. 13).

In order for that device to be applied, the protocol shall define the minimum content of the therapeutic project, the deadline for its presentation, the periodicity of review — the resolution recommends biopsycho-social assessments every thirty days in the case of

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hospitalization (Article 13, § 3) — and the objective criteria for progress for outpatient treatment, disinternalation and extinction of the measure; the time limit set in precedential statement No. 527 of the Superior Court of Justice, according to which the duration of the security measure cannot exceed the maximum of the abstractly committed punishment.

Fourth, it is proposed the standardization of the pericial queries and the evaluation criteria of expert report. It is not about linking the judge to expert assessment, which would be incompatible with the contradiction, but of demanding that the decision expressly faces the health team conclusions when they differ from the expert examination. A matrix of foundations — naming the elements considered, those which were removed and the reason for the removal — would make visible the difference between a reasoned decision and a formally motivated decision.

Finally, the protocol needs a monitoring tool. Indicators such as the time between the decision and the implementation of the direction, the percentage of cases with the elaborated therapeutic project, the percentage of health team opinions effectively considered in the decision and the average time of hospitalization would allow to evaluate the policy, and not just the cases. Resolution No. 487/2023 already provides for the establishment of an Interinstitutional State Monitoring Committee, which includes the RAPS, the Prosecutor's Office, the Prosecutor's Office and the Professional Councils (Article 20, VI), which is the natural space for receiving semestral reports and reviewing the flows.

The limit here is obvious: the protocol does not create empty. A well-designed flow that displays in an inexistent service only documentes the absence. In addition, there is a risk of bureaucracy, with the production of forms that do not change the decision. Therefore, the proposal only makes sense coupled with the following two, and it should provide an annual review based on the indicators.

Multidisciplinary teams: producing the information that decisions require

The third proposal responds to the most concrete gap identified in the research: the absence, in large part of the comarcas, of team able to evaluate the person and to follow the treatment. The Assessment and Monitoring Team of Applied Therapeutic Measures to Persons with Mental Disorder in Conflit with the Law was established in 2014, within the framework of the National Integral Health Care Policy of Private Freedom Persons in the Prison System, and was reconfigured by the GM/MS Portary No. 4.876/2024, which established it as EAP-Desinst within the framework of the RAPS.

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The current regulatory design is detailed and, to a good extent, appropriate. The portfolio defines the minimum composition of five professionals — psychiatrist or with mental health experience, nurse, psychologist, social assistant and professional with training in humanities, social sciences or health —, minimum weekly load of thirty hours and monitoring parameter of eighty people per team (Article 100). It sets a federal incentive of six hundred and six thousand reals per month, sees the installation of the team in environments with prison, asylum or manicure characteristics (Article 101) and assigns the team functions of diagnostic assessment, support for the preparation of the therapeutic project, articulation with the Unified Health System and the Unified Social Assistance System and monitoring the implementation of the measure (Article 97).

The problem is on the scale. The annex of the portary itself connected, in 2024, five already existing teams, concentrated in four states. For a country with 2.758 people in compliance with security measure, of which 71% in hospitalization regime, according to December 2024 data consolidated by the National Council of Justice and the National Council of Secretaries of Health (CONSELHO NACIONAL DE JUSTIÇA, 2025), the coverage is residual. And the absence of team is not a neutral administrative empty: it moves the decision to the expert report of the end-of-periculosity check, document produced to affirm dangerousness, and not to indicate caution.

The proposal, in this axis, is less regulatory and more budgetary and management. It is up to the states and the Federal District to elaborate an expansion plan with targets per health region, prioritizing the comrades that concentrate custody hospitals, penal execution varas and greater volume of hospitalizations provisional. The authorization depends on the request of the state or district manager to the Ministry of Health, with an action plan approved by the Bipartite Intergestors Commission (Article 102), which means that the decision is political and must be charged as such, including by the Judiciary and the Prosecutor's Office in the exercise of their control functions.

As for the tasks, the proposal is to preserve the distinction between care and expert assessment. EAP-Desinst is a health team, linked to the management of the SUS, and its function is to evaluate, suggest and follow — not testify dangerousness. The end-of-periculosity examination remains the act expert, subject to the contradiction. Confusing the two functions produces two unwanted effects: transforms the care team into assistant of the accusation and removes from the process the information about the treatment effectively offered. The team’s opinion should be contradictory, but it cannot be treated as a discountable piece.

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A fourth front, still little explored in practice, is the extension of the model to the civil process. Unintentional and compulsory hospitalizations are determined in actions that, as a rule, treat without any multidisciplinary technical support, based on a particular laud presented by the family or the clinic concerned. The designation of a multidisciplinary supporting team, with opinion in advance to the decision and periodic review, would approach the civil proceedings to the standard that the Resolution No. 487/2023 already imposes on the criminal proceedings, with direct gain of decision-making quality.

The limits are known: cost, lack of professionals — especially psychiatrists — and risk of institutional capture. A team administratively linked to the court tends to respond to the demand of the case, and not to the health needs of the person, which reinforces the option, already made by Portaria no. 4.876/2024, of placing it in the SUS. The connection to the health system is not technical detail: it is what ensures that the team has access to the preparatory, reference CAPS and therapeutic design, and not only to the case records.

Integration with the Psychosocial Care Network: turning decisions into continued care

The fourth proposal is the condition of the possibility of the previous ones. It does not serve to decide well, with protocol and team, if there is no service that receives the person. The RAPS exists and has a consistent design: the GM/MS port on 3.088/2011 organizes it in components that go from basic attention to hospital care, passing through specialized psychosocial attention, transitional residential services and the strategies of disinstitutionalization and psychosocial rehabilitation. Official figures, however, reveal a broad and uneven system: 2.836 CAPS enabled in 1.910 municipalities, 813 Residential Therapeutic Services and average coverage of 1,33 CAPS per hundred thousand inhabitants, with a variation ranging from 0,97 in the Northern Region to 1,70 in the North East (BRASIL, 2022).

This inequality is decisive for the subject of this work, because Resolution No. 487/2023 determines the closure of custody and psychiatric hospitals and the transfer of care to the network (Articles 16 to 18), without that there is, in all territories, sufficient replacement network. The predictable result is the so-called rotating gate: the person leaves hospitalization without the point of attention that receives it, returns to the emergency service in crisis and reinserts the hospitalization circuit. Integration with the RAPS is therefore not a complementary humanization measure; it is a condition for the viability of the policy itself.

The first proposal of this axis is the formal pactuation of seats for judicial claims. In the Bipartite and Regional Intergestor Committees, mental health beds in general hospitals, CAPS

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III, reception units and therapeutic residential services destined to persons directed by the justice system should be defined with a regulatory rule, response time and priority criterion. The pactured and integrated programming, provided for in Decree No. 7.508/2011, is the appropriate instrument for that. Without this pactuation, every court decision becomes a grandfather's request, which is now addressed please, now is not addressed in any way.

The second proposal is the creation of a unique reference and counter-reference instrument, with a focal point named in each CAPS and a response time, preferably the same of forty-eight hours already scheduled for information from the health secretaries. The empirical research shows that the communication between the Judicial and Service is often given by offices that are lost or come after the decision. A formal channel, with entry and exit record, changes this frame without requiring a new structure.

The third proposal is the use of the unique therapeutic project as a connection document between the case records and the service. The project is not a mandatory processual piece by nature, but the Resolution No. 487/2023 puts it in the center of follow-up (Articles 12 and 13) and health policy defines it as a result of collective interdisciplinary team discussion. Adding it to the autos, with periodic updates and registering the participation of the person and his family, would allow the judge to follow the treatment without depending exclusively on expert reports, and the service to provide accounts without submitting to a logic of proof.

The fourth proposal is the systematic articulation with the disinstitutionalization devices. The departure from the custody hospital shall be planned with the existing instruments — therapeutic residential service, home return program, psychosocial rehabilitation — and with the social assistance, education and work and income network, as provided in the guidelines of the resolution itself, which expressly mentions access to social protection, income and labour (Article 3, VI). Unplanned height is the most efficient way to produce reinternation.

The fifth proposal is territorial. Comrades without CAPS, or with remote CAPS, can be served by matrixing and telesaud, with the support of regional mental health team and primary care team. The technology does not replace the service, but allows the judicial decision to be informed by professional assessment where today there is only the alternative between the particular expert report and the reference to the custody hospital.

Finally, integration should include governance and transparency. The Mental Health and Safety Measurement Panel, launched by the National Council of Justice in partnership with the National Council of Secretaries of Health, consolidated data on people in safety measurement and on the presence and capacity of the RAPS in the territories (CONSELHO

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NACIONAL DE JUSTIÇA, 2025). Food and use of this panel in each state, with an annual report submitted to the Interinstitutional Committee and the health councils, turns intention integration into monitorable practice.

The limit of this axis is the risk that the judicialization of the vague disorganizes the line of the network. A isolated judicial decision, made without dialogue with the regulation, can anticipate the access of those who have a lawyer and postpone the access of those who do not have, repeating the inequality that access to justice should correct. The answer is not to deny the judicial path, but to build permanent channels of interaction that allow the judge to decide knowing what the real capacity of the territory is — and that allow the health management to inform, in time, what can and what cannot be offered.

4 Conclusion

The present research was proposed to analyze the inefficiency of custody hearing in protecting people with psychiatric disorders in Brazil. The analysis revealed a number of challenges, from the lack of preparation of the actors of the justice system to deal with the complexity of mental health to the persistence of a asylum-based logic that prioritizes punishment in detriment of care. However, looking forward to the future, we see a horizon of possibilities and transformations that can reverse this framework and ensure that the custody hearing fulfils its role in protecting the rights and dignity of all, including those suffering psychically.

One of the main promises of change lies in the effective implementation of CNJ Resolution No. 487/2023, which establishes the Anti-Asylum-based Policy of the Judicial Power. The internalization and strict application of this resolution in all instances of the justice system have the potential to promote a real revolution in the treatment of people with psychiatric disorders. In the future, the training of judges, promoters, defenders and police officers is expected to be a reality, allowing early identification of psychic vulnerabilities and adequate guidance to the mental health network. Interinstitutional joint failure can become the backbone of a more human and effective system in which health and justice go side by side.

The technology is also a key ally in this process of transformation. The use of telemedicine tools, for example, may facilitate access to specialized psychiatric assessments during custody auditions, overcoming geographical barriers and the lack of professionals. Furthermore, the development of integrated information systems between the justice system and the mental health network may accelerate the sharing of information and ensure continuity

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of care, preventing individuals in psychic suffering from losing themselves into the system breaks.

However, no change will be complete without a massive investment in research and data collection. It is crucial that in the future we are able to monitor and evaluate continuously the effectiveness of the custody hearing and the Anti-Asylum-based Policy. The production of qualified data will allow to identify good practices, correct directions and constantly improve public policies. The Academy, in partnership with the Judicial Power and civil society organizations, will play a crucial role in producing knowledge and formulating innovative solutions to the challenges that still persist.

Finally, it is imperative that the transformation of the justice system be accompanied by a wider cultural change. The overcoming of asylum-based logic and the stigma that surrounds madness requires a collective effort to deconstruct prejudices and to promote a culture of care and respect for diversity. We believe that in the future, the Brazilian society will be able to see the person with psychiatric disorder not as a threat, but as a subject of rights who deserves welcoming, treating and the opportunity to build a decent and full life.

In short, the future of the custody hearing in the protection of people with psychiatric disorders will depend on a firm and continuous commitment to the implementation of innovative public policies, the intelligent use of technology, the production of knowledge and, above all, a profound cultural transformation. The path is long and challenging, but the hope of a fairer and more human future for all drives us forward.

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