



**Recommendations for the improvement  
of custody hearings**

# Women Without Prison

Facing the (in)visibility of  
women subjected to criminal  
justice

# ACKNOWLEDGMENTS

We thank the professionals and institutions that collaborated to carry out this research, allowing access to people, places and documents and to the construction of critical reflections.

To the Board of ITTC, that conducted the works of support and development of the teams, as well as presented the necessary criticisms for the maturing of the research and the final text.

To the representatives of the Oak Foundation and the Brazilian Fund for Human Rights who support, believe and acknowledge the Institution's competence and commitment in these 20 years of defending women's rights.

To the statistical consultant, partner of many ITTC's works, for ensuring the cohesion and reliability of the data organization from the beginning to the end of the research.

## **In particular**

*To the invited guests who participated in the critical debate, since the reading of the preliminary report of the research.*

To the retired judge of the Court of Justice of the State of São Paulo, Kenarik Boujikian.

To the researcher Rafael Godoi, who also worked as a research consultant and who signs the preface of the report.

To the ITTC consultant, Bruna Louzada Bumachar, for the rich contributions throughout the writing of the work.

To the Amparar (Association of Friends and Relatives of Prisoners), for their collaboration with the recommendations made in the report.

To the professionals working in custody hearings

To employees of the notary offices of the Criminal Forum "Ministro Mário Guimarães" and the Forum of Osasco

To the members of the Public Defender's Office, the Magistracy and the Public Prosecutor's Office who granted interviews to the research team

To the board of the Forum of Osasco and to the corregedoria of the Department of Police Inquiries and Judiciary Police of the Capital (DIPO), that authorized the conducting of the research

To the partners and the working partners, especially from all the teams of the Institute Land, Work and Citizenship (ITTC), with whom were exchanged essential reflections to the accomplishment of the research and the report.

To all those in contact with the criminal justice system, who we support and defend in our daily work.

*The objective of the Justice Without Walls Program is to produce information and to promote public debate in favor of reducing female imprisonment in Brazil by monitoring the criminal justice system and the legislative movements that impact on rights inside the prison and by producing knowledge. The Program works in network together with civil society organizations to mobilize actors from the Executive, Legislative and Judiciary Powers, seeking to expand civil society participation in public policies and reducing abusive and repressive state intervention on socially vulnerable groups and struggling social movements that fight for social transformations.*

## (IN)VISIBILITY OF WOMEN SUBJECTED TO CRIMINAL JUSTICE

The research accompanied 213 women in custody hearings in the metropolitan region of São Paulo between 2017 and 2018, and aimed to demonstrate how the criminal justice system values, arrests or grants freedom to certain women.

Thus, in addition to the profile of the women subjected to the criminal justice system, the research portrays the profile and / or mechanics of processing of the women at the custody hearing, understood as a first filter of the Judiciary Power.

The custody hearings were instituted by the National Justice Council (CNJ) in 2015, through Resolution 213/15. They are an important instrument since they are the first meeting of the person with the judicial authority after her/his arrest in the act.

It establishes that personal contact with the magistrate must take place within 24 hours after the arrest in the act, respecting the deadline stipulated in the American Convention on Human Rights (Pact of San José of Costa Rica) and in the International Covenant on Civil and Political Rights. Once the person served is presented, one should:

1. verify if the flagrant is legal;
2. report any abuse occurred at the moment of arrest and
3. establish the need to maintain the pretrial detention.

The data brought by the research allow the appraisal of two moments of the criminalization processes: the first one, as from the filtering of police action through the execution of arrests in the act; and the second one, which begins in the contact with the Judiciary Power.

At first, the numbers regarding the criminal offences by which women are brought to custody hearings suggest that the policing in the metropolitan region of São Paulo is marked by an ostentatious defense of patrimony. Crimes against property (larseny, theft, robbery, damage, fraud and receiving) accounted for 59.15% of the arrests in the act recorded during the time of the research, being that robbery accounts for 39.44% of the cases.

When these data are crossed with racial and socio economic characteristics of the women, we see that in this fase racial selectivity is more striking: 56.81% of the arrests in the act were of black women, and 72, 5% of the women who claimed to have suffered violence at the time of the arrest were also black. Thus, black women, in addition to being preferential targets of arrests in the act, are more susceptible to violence at the time they occur.

The second moment indicates greater weight in regard to the criminalization of crimes related to drugs. The pretrial detention was decreed in 69.74% of the cases accompanied in the research. This high rate, as well as the high number of requests by the Public Prosecutor of this type of arrest (76.32%), points to the conclusion that the “war on drugs” seems to be made even more pronounced in the courts than in the streets.

This conclusion is reinforced when the arguments used to deny the concession of different measures to jail are those that use the relationship between motherhood and drug trafficking to give more weight to the seriousness of the fact. Or, then, they are based on a still present notion of trafficking as a heinous crime.

## Maternity

The judgment of the Collective Habeas Corpus 143641/SP in February of 2018 represented an important inflection point in the fieldwork, changing the dynamics, discourses and decision-making processes during the custody hearings. The decision of the Federal Supreme Court in this case was to replace pretrial detention with the house arrest of all pregnant women, women who have recently given birth and mothers of children up to 12 years of age or with disabilities that fall within the Legal Framework of Early Childhood (Law No. 13257 / 2016).

Although the house arrest is still a form of restriction of freedom, the guarantee of this right still caused discomfort among actors and reluctance to apply this measure. Maternity, in this sense, that should serve to the possibility of being used for desincarcerating measures, is often used and applied within the punitive logic by institutional actors.

Even so, the Collective HC proved to be a framework capable of broadening the spaces of

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discussion on gender issues and on the vulnerabilities faced by the women subjected to the criminal justice system. Echoing especially in the number of requests for house arrest carried out by the defense after the decision of the Supreme Court, where there was an increase of 75%.

The research also showed that subjective parameters linked to the personal conditions of the women are taken into account to increase the severity of certain crimes, while their realities are disregarded or silenced when they seek to portray their versions of the event or of their lives. This lack of listening is also evident when examining, for example, the various precautionary measures imposed on the women to remain in provisional release, and the possibility of complying with the measures was not asked of them during the custody hearings.

## Violence

With regard to the violence suffered by women at the time of the arrest in the act, it is necessary to emphasize the persistence of enormous barriers to their identification, investigation and forwarding. 18.77% of the women reported having suffered some type of violence and 70% of these reports did not have any kind of forwarding. Three kinds of violence were identified: the psychological/verbal, the physical and the body cavity searches. However, the research concluded that these violence are not yet taken into account in decision-making processes, either to determine the necessary verification routes or to recognize the illegality of the arrest in the act.

## Discourses of those who “make” the criminal justice system

The analysis of the speeches of actors members of the different professional categories during the hearings and the collection of their impressions in interviews conducted for the research allowed the visualization of the conjugation between personal positions and institutional configurations that determine their actions on the decision processes.

Obstacles such as the deficits in the Public Defender’s Office, institutional guidelines of the Public Prosecutor’s Office for the pretrial detention of trafficking crimes and the work of the Magistracy and its lack of sensitivity or knowledge regarding the reality of women, are some identified factors that contribute to the high statistics of the criminalization of women, mostly black, performing works that are not socioeconomically valued, imprisoned for property or drug-related crimes.

The detachment between the contexts and the realities of the women in contact with criminal justice and the institutional actors also demonstrates how the different positions in power relations influence the decision-making processes that lead to the current criminal policy of mass incarceration.

## Custody hearings: our conquest

For ITTC, the custody hearings continue to represent an important achievement, especially regarding the investigation of police abuses and illegal detentions. It is also the time to provide alternatives to imprisonment, as can be seen from the considerable numbers of provisional freedoms granted to women in custody, even if they are cumulated with precautionary measures.

Its implementation, although fragile in several aspects, symbolized a milestone in the legal process, in the sense of guaranteeing access to rights and the approach of the criminal justice system to the reality of the prisoners. The understanding of its functioning, as well as the revelation of its logic, is fundamental for the elaboration of strategies that aim at its improvement.

Finally, the report provides recommendations aimed at enhancing the custody hearings so that they can increasingly become a mechanism for promoting the reduction of incarceration and the guarantee of rights.

The recommendations are intended for both the actors responsible for conducting the custody hearings, interviewed by the research team, as well as for other instances capable of impacting its functioning, such as the Court of Justice, the police, the National Council of Justice, among others.

# SITUATIONS AND RECOMMENDATIONS

## Regarding the condition of the jail

Anyone arrested in the act and subjected to criminal investigation has the right to have her/his physical integrity preserved, to the presumption of innocence, to information about her/his rights and of access to defense.

Until the custody hearing, many women are at risk of situations of violence and mistreatment, in addition to the lack of information about the procedures. There are reports of lack of food and cold in the jails during the period of 24 hours that they need to wait until the hearing.

**Targets: bodies responsible for conducting the custody hearings (whether or not it is the Court of Justice).**

- 1 Ensuring unrestricted access to all civil and independent oversight bodies, such as community councils, institutions such as the Prison Pastoral and the Mechanisms for Preventing and Combating Torture, to the jails of the places where the people in custody are waiting for the custody hearing.
- 2 Allocating female police officers to conduct the women in custody to the custody hearings and remain present in the room when necessary.

**Target: Public Defenders and attorneys.**

- 3 Asking, during the first contact just before the custody hearing, specifically about the conditions of the place where the awaiting the hearing takes place, about feeding, temperature, and treatment received.
- 4 Requesting a reserved room for conducting the interview with the woman in custody in a separate and private place, without the presence of police force.

**Target: members of the Magistracy, Public Prosecutor and Public Defender.**

- 5 Monitoring routinely the structures of the jails of the places where the people in custody await for the custody hearings, observing the conditions of the feeding and of the temperature that may represent mistreatment, with attention to gender issues.

## Regarding the treatment of family members

Relatives of persons arrested in the act and taken to the custody hearings have the right to be informed about the flagrant arrest of their family members, being able to establish communication with the public defenders prior to and after the custody hearing, and provide subsidies to the defense, among them: documents that may assist in the guarantee of provisional release, such as birth certificate of children, labour card, among others.

Most family members are women who wait in long lines, unprotected from sun or rain, to accompany the custody hearings of their family members. They also have not obtained the guarantee of access to the spaces of the forum where the hearings are held.

**Target: bodies responsible for conducting the custody hearings (whether or not it is the Court of Justice).**

- 6 Informing the family members and close persons of the person in custody about the arrest in the act and the forwarding to the forum, allowing the presence of these, if they wish, at the place of the hearings and other forensic facilities.

### **Target: Public Defenders and attorneys.**

- 7 Establishing personal contact with family members and close persons that are in the forum to follow the custody hearing; make reports about the person in custody, necessary forwarding etc.

### **Regarding the conduction of the custody hearing**

The way of conducting the custody hearings by institutional actors should ensure that those in custody are informed of their rights. The conduct of the hearing must respect basic guarantees, observing if there are violations such as disrespect to the social name, and the indiscriminate use of handcuffs, without plausible justification and corresponding to each specific case. In addition, it is also necessary for the person in custody to have full understanding of the procedure, the decision that was made in the case, the next procedural steps and the effects that this will have on her/his life.

### **Target: members of the Magistracy, Public Prosecutor and Public Defender.**

- 8 Using simple language and, where possible, non-technical language during the hearing process, with the aim of providing the person in custody with better understanding.
- 9 Respecting the criteria of self-determination for use of the social name and, in case of a pretrial detention order, and for the choosing between the female or male prison unit.
- 10 Using translators in the case of people that don't speak Portuguese, as well as notify the Consulate or Embassy of the nationality of the person in custody, informing them of the custody hearing and its outcome.
- 11 Asking questions that take into account the social conditions and vulnerability indicators for possible referrals to social, medical or psychological services, provided that the person in custody is consulted; in such cases, it is essential that referrals are not conditions of compliance with precautionary measures..
- 12 Not using handcuffs while holding audiences. Its exceptional use must take into account the concrete case and upon explicit justification proportional to the need.

### **Target: National Justice Council - CNJ.**

- 13 Establishing parameters for conducting and investigating the custody hearings of LGBT women and LGBT people in general, through the drafting of a protocol to CNJ Resolution 213. Such parameters should include criteria for the conversion of pre-trial detention to house arrest, as well as the identification of forms of gender-based violence.

### **Regarding the investigation of torture and ill-treatment**

The custody hearing is the fundamental moment to investigate possible abuses, violence, torture or ill-treatment at the time of the arrest in the act. However, the naturalization of police violence, as well as the different forms of gender violence, such as psychological / verbal violence and the body cavity searches, lead to underreporting, lack of forwarding and legitimation of these practices.

### **Target: bodies responsible for conducting the custody hearings (whether or not it is the Court of Justice).**

- 14 Establishing an independent and well-equipped investigation service linked to the courts and not to the civil and military police, composed of a multidisciplinary team with health, psychology and social assistance professionals.
- 15 Even for the existing investigation service in the current molds, medical examiners must have the necessary training and resources to diagnose all forms of torture, ill-treatment and other human rights violations based on gender discrimination, such as psychological / verbal violence and body cavity searches.

### **Target: members of the Magistracy, Public Prosecutor and Public Defender.**

- 16** Investigating possible violence or abuses committed in the act of arrest against women, taking into account broad and objective criteria, from the reports of the custodians, such as:
- > for psychological / verbal violence: questioning about threats of aggression and various name-calling, such as sexual and gender identity related, as well as other forms of threats and abuses that would at least constitute illegal practices by the state agents;
  - > for body cavity searches: also consider as vexatious the intimate personal search carried out by agents of the Military Police and of the Metropolitan Civil Guard, feminine and masculine, during the police approach;
  - > for physical violence: the facial recognition of possible aggressors, the existence of physical marks and the confirmation of the facts by police agents should not be necessary conditions for forwarding to investigating reports of violence.

### **Target: members of the Magistracy.**

- 17** Considering unlawful the imprisonment carried out by means of violence of any kind and relaxing it immediately, without the subsequent conversion into pretrial detention.

### **Target: members of the Public Prosecution's Office.**

- 18** Ensuring the establishment of meticulous and effective investigations on all the cases of suspected torture or ill-treatment.

### **Target: Public Defenders and attorneys.**

- 19** Questioning, during the contact with the women in custody just before the custody hearing, about possible violence or abuses committed in the act of flagrante against women.
- 20** The defense must have a permanent presence in the police station and monitor the procedures for drafting the arrest warrant. The State Public Defender's Office and the Federal Public Defender's Office must structure themselves in order to meet this demand and to curb abuses and illegalities at that moment.

### **Target: members of the Military Police, Metropolitan City Guard and Department of Penitentiary Administration.**

- 21** The identification of the agents at the time of the police approach and during the custody procedure for the hearings should be mandatory and visible, even if they are not wearing uniforms during the service.

## **Regarding the access to and the transparency of data about custody hearings**

The official data about the female penitentiary system are scarce. The production, updating, transparency and access to data and information regarding the penitentiary system, and, in this specific case, regarding the pretrial detention of women, is fundamental for the formulation and improvement of public policies.

### **Target: bodies responsible for conducting the custody hearings (whether or not it is the Court of Justice); Department of Penitentiary Administration (SAP); National Penitentiary Department (DEPEN); National Justice Council (CNJ).**

- 22** Providing up-to-date data about custody hearing on the websites of the courts of law and federal regional courts, including: a) number of hearings held periodically; b) gender of the people in custody; c) rates on the conversions of arrests in the act into pretrial detentions per month and per year; d) rates on the concession of provisional liberties per month and per year; e) rates on the conversion of pretrial detentions into house arrests per month and per year; f) rates on the relaxation of the flagrant per month and per year; g) types of crimes for which people have been charged; h) number of forwarding cases of violence and to which destination, among others.

## Regarding the training of institutional actors involved in custody hearings

The custody hearings involve a number of important procedures to determine the ascertainment of a) the lawfulness of the arrest in the act; b) abuse, violence, torture or ill-treatment; and c) the need of maintain a pretrial detention. Therefore, it is necessary that all of the actors involved in this procedure, from public servants, police officers, prosecutors, public defenders and judges, have training specifically designed to investigate such issues. These are not to be confused with the judgment on merit, and should include the attention to the rights of women in contact with criminal justice, in accordance with national laws and international norms in this regard.

**Target: members of the Military Police, Metropolitan City Guard and Department of Penitentiary Administration.**

- 23** Incorporating into the training programs of the members of the police forces instructions regarding the purpose of the hearings and the guarantee of rights, especially for women, such as the Bangkok Rules, the Istanbul Protocol and the Early Childhood Legal Framework, as well as the Resolution nº 213 of the National Justice Council - CNJ.

**Target: members of the Magistracy, Public Prosecutor and Public Defender.**

- 24** Carrying out periodic training for members already active in custody hearings, as well as for magistrates recently admitted to the career at the Magistracy School of São Paulo - EPM and at the School of Magistrates of the Federal Justice - EMAG, integrating, for example, this report, and other researches and studies on female incarceration.

## Regarding the parameters used by the institutional actors in the decision-making processes of custody hearings

In order for the custody hearing procedure to configure a concrete possibility for women to actually integrate the decision-making process, decisions need not to be based exclusively on the records of the arrests in the act. Conducting the custody hearing by all actors in the justice system should prioritize listening and considering the women's narratives whenever they wish to speak.

Each of the actors, within their different legal competences, has the duty to guarantee the application of the Bangkok Rules, which point to the need to prioritize the freedom for women selected by the penal system. This should particularly consider the vulnerabilities that lead to an increased susceptibility of women to ostentatious policing and to arrests in the act.

**Target: members of the Magistracy, Public Prosecutor and Public Defender.**

### Pretrial detention

- 25** The abstract seriousness of the crime should not be decisive for the maintenance of a pretrial detention, especially regarding crimes that do not involve violence or serious threat, such as drug trafficking.
- 26** The criminal recidivism, the criminal records and / or the mere prior passage through custody hearings should not be a preponderant factor for the maintenance of a pretrial detention, under the risk of violating the presumption of innocence and of double criminalizing.

### Concession of provisional freedoms

- 27** The existence of criminal records or the abstract seriousness of the offense should not be an obstacle to the application and the granting of provisional freedom. The affective and material impact on the family, especially the children and mothers of the women arrested, should be considered as another element that demonstrates the need to prioritize alternatives to pretrial detention of women.

## Establishment of precautionary measures

- 28** From a dialogue with the person represented, the defense must evaluate which legal alternatives are compatible with the life of the woman served. Judges as well as the Public Prosecutor's Officials should also take into account the personal situations of women so that alternatives to pretrial detention that are effectively enforceable may be prioritized, articulating its application to forwarding to available public services.

## Relaxation of the flagrant

- 29** Finding of vexatious forms of intimate personal search for the realization of the prison should be considered illicit evidence and a determining cause for relaxing the flagrant.
- 30** Relaxing the flagrant should not be accompanied by a pretrial detention in the same decision, because this practice legitimizes the holding of illegal arrests in the act.
- 31** Excludables of illegality as legitimate defense and state of necessity, as well as excluding of typicality, like the principle of insignificance, must also be taken into account in order to ascertain the possibility of relaxation of the flagrant.

## Concession of house arrest

- 32** It should not be a necessary condition to prove maternity at the time of the hearing, given the difficulty of access to documents in a short period of time. The word of the woman should be sufficient for this right to be guaranteed.
- 33** Very exceptional situations must respect objective criteria. The abstract seriousness of the crime, especially that of trafficking, can not be considered a very exceptional situation or a parameter to deny the conversion of pretrial detention to house arrest.
- 34** The fact that the flagrant was carried out in a prison unit does not prevent the conversion of pretrial detention to house arrest.
- 35** The fact that the accused is a repeat offender or present a criminal record, by itself, does not prevent the conversion of pretrial detention to house arrest.
- 36** The establishment of criteria for the fulfillment of the house arrest must be based on reasonableness, taking into account the social condition of the woman, her position in the family structure and the basic activities for the maintenance of the family bond, and the flexibility of the displacement restrictions, such as for the performance of work activities, whether registered or not, the health care of women and their families, the study activities of women and their families, and other activities necessary to support the household and the well-being of the family.
- 37** The determination of the house arrest should only be given as an alternative to pre-trial detention, and should be requested by the defense and determined by the judges only in justified need of maintaining the pretrial detention. Provisional release must be prioritized by all actors.

## Forwarding to social services

- 38** The social services integrated with the Judiciary should be informed as alternatives to all women taken to custody hearings, so that they can access them if they so desire. Demands linked to the need for shelter and income, for example, should be identified during the hearing and sent to integrated social services. However, it is essential that the forwarding be disconnected from compliance with the precautionary measure which should be presented in an informative manner and as a possibility for women at the custody hearing, regardless of the type of decision applied in each case.



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Support

**Fundo Brasil de Direitos Humanos**

**Oak Foundation**

Board 2017–2019

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Year

**2019**

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