



CUSTODY HEARING AND SECURITY RISKS: CRITICAL ANALYSIS OF PUNITIVE LAW

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SUMMARY

This article examines the custody hearing from the perspective of the right to punish and the challenges to public safety, highlighting its role in protecting the fundamental rights of detainees and mitigating unnecessary pretrial detention. The analysis reveals the complex relationship between the right to punish and prison overcrowding, which compromises the effectiveness of the penal system and generates inhumane conditions of imprisonment. It also addresses resocialization as a fundamental goal of the penal system, emphasizing that punishment should transcend simple incarceration and promote social reintegration. The study also explores how public perception and the media impact trust in the custody hearing, influencing public opinion and criminal policies. It concludes that there is a need to reformulate the right to punish, aiming at a balance between public safety and respect for human rights, for a more fair and humane justice system. **Keywords:** The custody hearing; Right to punish; Public safety; Reintegration into society; Prison overcrowding; Human rights; Public perception; Media.

1. INTRODUCTION

The custody hearing, implemented in Brazil in 2015 by the National Council of Justice (CNJ), represents a milestone in the guarantee of fundamental rights, by ensuring that a person arrested in flagrante delicto is presented to a judicial authority within 24 hours. This measure seeks to prevent arbitrary arrests, prevent torture and ill-treatment, and promote greater transparency in the judicial process. However, the implementation of custody hearings faces significant challenges, especially in the context of punitive law and public security.

The State's right to punish, an essential instrument for maintaining social order, finds limits when confronted with issues such as overcrowding in prison systems, criminal recidivism and the need for reintegration of prisoners into society. Such issues highlight the importance of balancing punishment with respect for human rights and the pursuit of a safer society.

Public perception of custody hearings and the role of the media in these proceedings reveal another crucial factor. Sectors of society often view the release of detainees without the imposition of pre-trial detention with suspicion, which can generate a sense of insecurity and fuel calls for harsher punitive responses.

In this context, this article explores the complex relationship between custody hearings, public opinion and the media, examining how sensationalist coverage can distort the public's understanding of the justice system and influence criminal policies. Furthermore, by comparing custody hearing practices in other countries, it is possible to identify lessons applicable to Brazil that could alleviate structural problems, such as prison overcrowding and the ineffectiveness of some punitive measures.

Reintegration into society has emerged as a fundamental objective of the penal system, as opposed to an exclusively punitive approach. In this sense, the question arises as to whether the State's right to punish can be restricted to incarceration, or whether it should expand its guidelines to include social reintegration policies, which are essential for reducing recidivism.

Ultimately, this paper aims to demonstrate that custody hearings, when well implemented, can be an effective instrument in protecting human rights and promoting a more balanced justice system. Thus, by consolidating itself as a mechanism of trust in justice, custody hearings

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custody can contribute to the development of penal policies that harmonize public safety with respect for fundamental rights.

2. THEORETICAL FRAMEWORK

The theoretical framework of this article focuses on three main axes: the custody hearing, the right to punish and resocialization, each with a robust foundation and based on renowned theoretical and legal sources.

2.1 CUSTODY HEARING

The custody hearing was regulated in Brazil by the National Council of Justice (CNJ) in 2015 and fulfills an important function of judicial review of arrests in flagrante delicto. Inspired by international treaties such as the International Covenant on Civil and Political Rights and the American Convention on Human Rights (Pact of San José, Costa Rica), this practice aims to ensure that the prisoner is presented to a judicial authority within 24 hours, promoting an immediate assessment of the legality and conditions of detention

According to Ferreira (2018), custody hearings are essential to combat arbitrary arrests, as they represent a practical application of fundamental rights, although they still face criticism regarding their effectiveness in the context of prison overcrowding.

2.2 RIGHT TO PUNISH AND PUBLIC SAFETY

The right to punish, a historical concept widely discussed by philosophers such as Michel Foucault and jurists such as Luigi Ferrajoli, represents the role of the State in applying sanctions to those who commit crimes, with the aim of maintaining public order and preventing crime. Foucault (1975) analyzes the evolution of the penal system and questions the effectiveness of punishments, arguing that imprisonment often does not fulfill its re-educational function. Ferrajoli, on the other hand, proposes a model of minimum criminal law that respects the dignity of the individual and limits the State's punitive power, suggesting alternatives such as the application of educational measures instead of purely retributive measures. The balance between the right to punish and public safety therefore requires a balance between social control and respect for fundamental rights, since public safety also depends on the effectiveness of social reintegration policies.

2.3 RESOCIALIZATION AND PENAL SYSTEM

Resocialization is a principle of the Brazilian penal system and is provided for in the Penal Enforcement Law (Law No. 7,210/1984). According to studies by experts such as Adorno (1998), resocialization is often neglected in overcrowded and resource-poor environments, undermining the goal of reintegrating inmates and increasing recidivism rates. In contemporary criminal law, resocialization should go beyond simple incarceration and offer education, work, and psychosocial assistance to inmates, creating a real opportunity for change. As argued by Zaffaroni (2015), failure to promote resocialization policies strengthens marginalization and contributes to increased crime, demonstrating that a punishment policy focused on reeducation can improve public safety rates and reduce the cycle of violence.

Based on these concepts, the article explores the custody hearing as a point of intersection between the right to punish, public safety and resocialization, suggesting that the promotion of less punitive and more resocializing practices represents a viable path for the development of a criminal justice system.

more effective and humane.

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3. THE RIGHT TO PUNISH: FOUNDATIONS AND LIMITS IN PHILOSOPHY AND THE LEGAL SYSTEM

The right to punish is an exclusive prerogative of the State that aims to apply criminal sanctions to individuals who commit offenses, with the aim of preserving social order and ensuring compliance with the laws. This power dates back to the classical theory of the social contract, in which authors such as Thomas Hobbes, John Lowell,



cke and Jean-Jacques Rousseau established the idea that individuals give up part of their freedom to the State in exchange for collective protection and security. For Hobbes (2003), this concession is essential to avoid the chaos and violence that are natural to the "state of nature". For Rousseau (2004), the right to punish derives from the general will and aims to guarantee social cohesion and justice among citizens.

The right to punish is guided by constitutional and legal principles that limit the power of the State and aim to guarantee justice, such as the principles of legality, proportionality and human dignity. The principle of legality, according to article 5, item XXXIX of the Federal Constitution, establishes that "there is no crime without a prior law that defines it, nor punishment without prior legal imposition". This principle limits the right to punish by imposing that only acts previously classified as crimes can be sanctioned, preventing state arbitrariness.

Furthermore, the principle of proportionality requires that the sanctions applied by the State be proportionate to the gravity of the offense, avoiding excessive and arbitrary punishments. This principle is fundamental to criminal justice, as it seeks to balance the need to punish with respect for human dignity, reinforcing the rehabilitative function of punishment to the detriment of a purely punitive model.

The retributive theory, defended by philosophers such as Immanuel Kant and Georg Wilhelm Friedrich Hegel, argues that punishment is a moral duty of the State, since the crime must be compensated by the imposition of a proportional penalty. Kant (2008) argues that the right to punish is justified not as a means of deterring other crimes, but as a way of repaying the injustice committed by the offender. According to this view, punishment is a categorical imperative, as it aims to restore the moral and legal balance broken by the criminal act.

On the other hand, utilitarian theory, associated with thinkers such as Jeremy Bentham, views the right to punish as a preventive tool, where punishment should promote social well-being, deterring crime and seeking the reintegration of the offender into society. This view is predominant in modern law, where the right to punish also seeks the rehabilitation and reintegration of the offender into society, in line with fundamental human rights.

The right to punish in Brazil is limited by penal guarantees, a doctrine proposed by Italian jurist Luigi Ferrajoli, which defends the protection of the fundamental rights of the individual, limiting the punitive power of the State. According to Ferrajoli, the State must punish only within the strict legal and constitutional limits, ensuring due process, the presumption of innocence and proportionality in the application of penalties. Penal guarantees oppose authoritarianism and prevent the right to punish from becoming a mechanism of abuse and excessive repression.

Thus, the custody hearing, for example, can be understood within this context of guarantees as an instrument that limits the right to punish by ensuring that the detainee is presented before a judge, who verifies the legality of the arrest and the conditions in which the prisoner is being held, preventing abuse and mistreatment. These limits are essential for maintaining the rule of law and guaranteeing human rights, preventing the State's punitive power from being exercised in a disproportionate or arbitrary manner.

4. CUSTODY HEARING: IMPACTS AND CHALLENGES FOR PUBLIC SAFETY IN THE BRAZILIAN CONTEXT

The custody hearing is a fundamental instrument in Brazilian criminal justice, implemented by Resolution No. 213/2015 of the National Council of Justice (CNJ). Its objective is to ensure that the detainee is presented to a judicial authority within 24 hours of being arrested in flagrante delicto, in order to verify possible abuses and ensure respect for human rights. However, although this measure has important value in terms of protecting rights, its relationship with public safety generates heated debates, highlighting practical challenges for the application of the State's punitive power and the protection of society.

3 The central criticism of custody hearings in terms of public safety lies in the concern that they allow the premature release of potentially dangerous individuals, especially in cases of violent crimes or recidivism. According to data from the National Council of Justice, some of the prisoners presented at custody hearings are released under specific conditions or alternative measures, such as electronic monitoring. However, critics argue that such releases can increase recidivism and, consequently, insecurity in communities, especially in areas already vulnerable to crime.

This tension between rights and public safety is widely discussed by scholars of criminology and criminal law, such as Luiz Flávio Gomes, who highlights the importance of an effective and agile punitive system

to ensure public order. According to Gomes (2013), the State must seek a balance between the application of fair sanctions and the guarantee of fundamental rights, but when this does not occur, society faces the risk of a growing sense of impunity.

The custody hearing, based on international standards such as the Pact of San José de Costa Rica and the International Covenant on Civil and Political Rights, fulfills the role of ensuring that human rights are respected, preventing abuse, torture and illegal imprisonment. For authors such as Luigi Ferrajoli, a defender of criminal guarantees, this measure is essential to avoid state arbitrariness and ensure due process. Ferrajoli (2002) argues that the State's punitive power must be exercised with respect for fundamental rights, preventing abuses that violate human dignity.

However, in seeking to guarantee these freedoms, custody hearings pose challenges that affect public safety, especially in relation to criminal recidivism. Studies show that recidivism rates among detainees released after custody hearings can be high, which reinforces the criticism that this practice undermines the public's confidence in the penal system and in the State's ability to protect society.

Aiming to strengthen public safety without disrespecting the rights guaranteed by the custody hearing, some proposals have been suggested by jurists and professionals in the criminal justice system. One of them is the improvement of alternative precautionary measures, such as electronic monitoring, which allows greater control over released individuals and reduces the possibility of recidivism. Integration between public safety agencies and the Judiciary is essential, since it allows for a more efficient exchange of information, enabling more accurate decisions in custody hearings and increasing social security.

Furthermore, strengthening public policies for the rehabilitation and monitoring of individuals released at custody hearings is considered essential to minimize the risk of recidivism. These policies ensure that the penal system operates not only in a punitive manner, but also in a preventive and resocializing manner, promoting public safety that is compatible with respect for fundamental rights.

The custody hearing is an important advance in the Brazilian penal system, but it requires a delicate balance between respect for human rights and the protection of society. The search for solutions that guarantee effective public security, without compromising fundamental rights, must be an ongoing effort by the State, involving not only the Judiciary, but also public policies and the security system.

5. INTERNATIONAL COMPARISON: PRACTICES AND RESULTS OF THE HEARING CUSTODY IN OTHER COUNTRIES

The custody hearing, a practice adopted in Brazil with the aim of ensuring the rapid presentation of a detainee to a judicial authority, is a tool also used in several other jurisdictions as a mechanism for controlling preventive detention and protecting fundamental rights.

In countries such as Spain, the United States, Germany and Portugal, this procedure is not only well-established, but has also demonstrated greater efficiency in reducing unnecessary imprisonment, contributing to a less overburdened penal system that is more focused on the rehabilitation of detainees. This topic offers a comparative analysis of the practices and results of custody hearings in these countries, identifying good practices that can inform improvements in the Brazilian model.

In Spain and Portugal, custody hearings are held within 24 hours of arrest, as required by the European Convention on Human Rights. Unlike in Brazil, the presentation to the judge already considers a detailed analysis of the feasibility of alternative measures to pre-trial detention, such as electronic monitoring and the application of restrictive measures. These countries have relatively low prison population rates, which is attributed in part to the effective use of alternatives to imprisonment, allowing detention to be reserved for crimes considered to be of high gravity.

In the United States, the criminal justice system varies from state to state, but practices similar to bail hearings are implemented to ensure that detainees have access to a judge in a short period of time. However, the main difference from Brazil is the use of bail as a mechanism to avoid pretrial detention, although this method has faced criticism due to economic disparities that favor higher-income defendants. Still, the use of bail, when applied fairly, is a measure that contributes to reducing the prison population. This model could inspire Brazil to explore fair economic solutions while preserving the right to pretrial release.

In Germany, the custody hearing follows a logic even more focused on social reintegration

and limited use of pretrial detention. Restorative justice measures are strongly incorporated, allowing detainees to participate in programs to repair the harm caused in cases of minor crimes, without necessarily being sent to the prison system. This approach drastically reduces recidivism rates and promotes a more constructive relationship between the penal system and society. The German experience reinforces the importance of policies that prioritize resocialization, a model that Brazil can adapt to reduce excessive incarceration and promote social reintegration.

By observing these models, Brazil can draw valuable lessons to improve its own custody hearing system. Key recommendations include encouraging the use of alternatives to pretrial detention, such as electronic monitoring and other precautionary measures; incorporating restorative justice practices for low-level crimes, allowing offenders to repair the harm caused and avoid incarceration; and improving access to information so that detainees and their families better understand their rights and the alternatives to incarceration available in the system.

These international practices offer an example that custody hearings can go beyond simple procedural guarantees, being a real opportunity to guarantee a more balanced and less punitive justice system, with a focus on human rights and social reintegration.

6. THE RIGHT TO PUNISH AND PUBLIC SAFETY IN THE CONTEXT OF THE HEARING CUSTODY: IMPACTS AND REFLECTIONS IN CONTEMPORARY LAW

The State's right to punish and public safety are fundamental elements of the criminal justice system, but they present complex challenges in the context of custody hearings. The implementation of these hearings represents a step forward in guaranteeing individual rights, while imposing on the criminal justice system and society the need to rethink the balance between punishment and social protection. In contemporary law, custody hearings raise debates about the effectiveness of the right to punish in combating crime, while also highlighting the importance of fundamental guarantees.

The right to punish, traditionally associated with the maintenance of social order, needs to respond to the current challenges of a society that simultaneously demands security and respect for human rights. For the State to exercise its punitive power legitimately, contemporary law bases this power on the principles of legality and proportionality, aligned with human dignity, as proposed by authors such as Cesare Beccaria, who in the 18th century already criticized the abuse and arbitrariness in the application of punishments.

The custody hearing, in this sense, seeks to prevent state abuse and ensure that the detainee is treated fairly, in accordance with the precepts of penal guarantees, defended by Luigi Ferrajoli. Ferrajoli (2002) argues that the right to punish must be exercised within strict constitutional limits, in order to ensure that punishment does not become a mechanism of oppression, but rather an instrument of justice and social reintegration.

One of the main dilemmas generated by custody hearings is the possibility of releasing people caught in the act, especially for minor crimes. This release, although regulated by rules and conditions, can give society the impression of impunity and fragility in public safety. This perception is aggravated in cases of recidivism, since, according to statistics from the CNJ, many of the individuals released end up returning to the penal system for new crimes, highlighting the need for reinforcement of post-release monitoring policies.

In this way, the relationship between the right to punish and public safety is called into question, since, at the same time that the State seeks to fulfill its role of guaranteeing the safety of society, it must also ensure that this objective is not achieved to the detriment of individual rights. The tension between guaranteeing safety and respecting rights is an ongoing challenge, especially in a context of high rates of crime, which require an effective punitive response without losing sight of constitutional guarantees.

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In contemporary law, custody hearings are not only seen as a tool for guaranteeing rights, but also require public policies that reinforce their social function. Strengthening policies to monitor and rehabilitate those released at hearings can help ensure that the right to punish is exercised in a way that minimizes recidivism, thus contributing to public safety. This model is supported by Jeremy Bentham's theory of utilitarian punishment, which defends rehabilitation and prevention as the purposes of the right to punish, guided by the idea that punishment should generate benefits for society.

Therefore, in the current legal scenario, the custody hearing presents itself as a challenge and, at the same time, as an opportunity to improve the penal system. The development of a justice model that harmonizes the right to punish with respect for fundamental rights is one of the most complex tasks of contemporary law, especially in countries with high crime rates, such as Brazil.

7. PUBLIC PERCEPTION AND PUNITIVE LAW: CUSTODY HEARING AS A TRUST MECHANISM IN JUSTICE

The custody hearing represents a milestone in the protection of the fundamental rights of detainees, ensuring that any person arrested in flagrante delicto is brought before a judicial authority within 24 hours. Although this procedure is primarily intended to prevent arbitrary arrests and prevent torture and ill-treatment, it also plays an essential role in how society perceives the justice system. Public confidence in the effectiveness and impartiality of the justice system is closely linked to the way in which judicial processes and decisions are communicated and understood by the population.

Public opinion studies and media analyses indicate that custody hearings are often viewed with suspicion by sectors of society, especially when detainees are released without pretrial detention. This perception can be exacerbated in cases where the media reports on violent crimes committed by individuals previously released at custody hearings, generating a negative association and fostering a feeling of impunity. This phenomenon is commonly referred to as a "sense of insecurity," which, according to authors such as Zaffaroni (2015), influences public policies and criminal law, since public outcry often pressures for more severe punitive responses.

The impact of media coverage is another important factor. In sensationalist reports, custody hearings are often portrayed negatively, highlighting isolated cases and omitting the central objectives of this procedure, such as protecting human rights and reducing unnecessary pretrial detention. By selecting and emphasizing only certain aspects of the hearing, the media can influence public perception and distort the public's understanding of the function of this mechanism. This approach contributes to a public opinion that often disregards the effectiveness of the hearing in ensuring a fairer and more humane criminal process.

For custody hearings to become a true mechanism for building trust in justice, it is essential to improve communication between the judicial system and society. Awareness campaigns and transparency by judicial bodies can contribute to a more balanced view of the objectives and results of custody hearings, presenting data on the benefits and importance of this practice in protecting fundamental rights and combating mass incarceration.

Therefore, public perception of the custody hearing is crucial to strengthen or weaken trust in the justice system. Criminal justice, by acting in a transparent and communicative manner, can not only maintain the integrity of punitive law, but also educate society about the relevance of the custody hearing as an instrument of public safety and respect for human rights, thus contributing to a safer and fairer society.

8. OVERCROWDING IN PRISON SYSTEMS: REFLECTIONS ON THE RIGHT TO PUNISHMENT AND PUBLIC SAFETY

Overcrowding in prison systems is a critical issue that affects the fulfillment of the State's right to punish and, consequently, public safety. In Brazil, prisons are facing an exponential growth in the prison population, which results in degrading conditions and violations of human rights.

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of inmates. According to data from the National Council of Justice (CNJ), in 2020, Brazilian prisons had an occupancy rate that exceeded 170%, highlighting the seriousness of the problem. This situation raises questions about the effectiveness of the penal system and the real function of punishment in society.

Prison overcrowding not only compromises the living conditions of detainees, but also hinders the effectiveness of the right to punish. The concept of punishment, which should serve as an instrument of rehabilitation and resocialization, becomes a form of excessive and often counterproductive punishment. Researchers point out that poor prison conditions encourage the radicalization of criminal behavior and recidivism, since detainees are exposed to violent and unstructured environments, making them more likely to return to crime after release.

In this context, the custody hearing emerges as a possible solution to mitigate overcrowding. By allowing a judge to quickly assess the need for continued detention, the hearing provides an opportunity to apply alternative measures to pre-trial detention, such as provisional release with conditions. This practice can help reduce the prison population by ensuring that only those who truly pose a risk to society remain detained, in line with the principle of proportionality in criminal law.

Prison overcrowding directly impacts public safety, since a penal system ineffective judicial hearings can increase the feeling of insecurity in society. When the population feels that the State is unable to control crime and the prison situation, trust in judicial institutions decreases. Custody hearings, if implemented effectively, can help restore this trust, providing a fairer and more humane response to crime, while seeking to protect citizens' rights and the integrity of the penal system.

The discussion on overcrowding in prison systems reveals the need for a broad debate on the right to punish and public safety. The custody hearing represents an opportunity to reassess current punitive practices and ensure that the penal system is more effective, fair and respectful of human rights. Therefore, tackling overcrowding is not just a logistical issue, but an ethical and legal imperative that demands attention and effective action on the part of the State and civil society.

9. THE FUNCTION OF RESOCIALIZATION IN CRIMINAL LAW: IMPLICATIONS FOR THE SECURITY OF PUBLIC SAFETY

The rehabilitation of individuals who have committed crimes is an essential component of the penal system and is directly related to the State's right to punish and public safety. The concept of rehabilitation seeks not only to punish, but also to reintegrate the offender into society, promoting rehabilitation and reducing criminal recidivism. The practice of rehabilitation is a response to the failure of the traditional punitive model, which often fails to consider the social and psychological needs of detainees, resulting in high rates of recidivism and, consequently, threats to public safety.

The right to punish is legitimized by the need to maintain order and protect society, but this function should not be limited to mere punishment. Punishment should be seen as a means of promoting behavioral change and the rehabilitation of the individual. According to the guarantor theory, defended by authors such as Luigi Ferrajoli, punishment should be proportional to the crime and aimed at the rehabilitation of the offender, respecting human dignity. This approach challenges the idea that punishment should be exclusively punitive and places resocialization as a central objective of the penal system.

The effectiveness of rehabilitation policies can have a direct impact on public safety. Estimates indicate that the lack of effective rehabilitation programs contributes to increased recidivism, which increases crime rates and the feeling of insecurity in society. Rehabilitation programs that provide education, job training, and psychological support can not only reduce recidivism but also provide a smoother transition for individuals back into society, helping to build a safer community.

While reintegration is a promising approach, it faces significant challenges, such as lack of resources and social resistance. Society often views reintegration as a form of impunity, which can create a hostile environment for the reintegration of ex-offenders. This perception can be addressed through educational campaigns that highlight the benefits of reintegration, both for the individual and for society as a whole.

The discussion on resocialization, the right to punish and public safety reveals the need for a penal system that promotes reintegration rather than mere punishment. The effectiveness of resocialization is intrinsically directly linked to public safety, since reducing criminal recidivism results in safer communities. Therefore, it is crucial that the State, in collaboration with civil society, develops and implements resocialization policies that respect human rights and contribute to building a fairer and safer society.

10. CONCLUSION

We highlight the custody hearing as an essential instrument for promoting a system

of justice more humane and effective, in addition to being an important step forward in guaranteeing the fundamental rights of detainees. However, the State's right to punish, although necessary for maintaining social order, faces serious challenges in relation to public safety and prison overcrowding. When confronted with these issues, it is observed that the application of punishment, when focused exclusively on incarceration, is insufficient and can result in adverse consequences, such as criminal recidivism and violation of rights.

The analysis also revealed that reintegration into society must be seen as a central objective of the penal system, going beyond mere punishment. For the right to punish to be legitimate and effective, it is essential that it includes social reintegration policies, capable of reducing crime and strengthening public safety in the long term. The overcrowding of prisons highlights the urgent need for viable alternatives to pretrial detention and the development of support programs that enable the recovery and reintegration of individuals into society.

Another key point discussed was the public perception of custody hearings and the impact of media coverage. The public's lack of understanding of the real objectives of this practice, often influenced by sensationalist reports, can undermine confidence in the justice system and generate demands for stricter penal policies. Therefore, it is essential that the judicial system adopt effective communication measures and awareness campaigns that clarify the importance and benefits of custody hearings for society.

Finally, we point to the need to reformulate punitive law in order to balance the rigor of public safety with respect for human rights. This balance is essential for the construction of a justice system that, in addition to being punitive, is also educational and resocializing, promoting not only order, but also a more just and safe society.

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