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Forensic Research & Criminology International Journal

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The person arrested as a subject of rights custody hearing

Summary

The custody hearing is the act of presenting the arrested citizen, within up to 24 hours, before the judicial authority to verify the regularity of the arrest and the physical condition of the person arrested. This research sought to understand whether this legal procedural instrument has fulfilled the purpose for which it was implemented, which is to guarantee rights, or whether it has reinforced unequal social structures, with the increased stigmatization of certain groups based on skin color or social class. Thus, the aim was to identify the possible criteria used by the Judiciary for granting measures other than imprisonment in the custody hearing, considering the statistics that most people in prison are black and poor. The importance of this research is justified by the relevance of the custody hearing as an instrument for the defense of the fundamental human rights of the arrested subject. The methodology consisted of a qualitative bibliographic and documentary research. The intention was to expand the database on the subject, working as a promoter of the theme, ensuring the inmate the character of a person with rights. Finally, we conclude that the institute of the custody hearing presents itself, in fact, as a mechanism to stimulate unequal social structures that already exist, frustrating its main purpose.

Keywords: arrest, custody hearing, social stigma, imprisonment, human rights violation

Volume 11 Issue 3 - 2023

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Received: June 04, 2023 | **Published:** June 19, 2023

Abbreviations: ICCPR, international covenant on civil and political rights; CNJ, national council of justice

Introduction

In the national scenario and in the context of the Institutions of the Justice System, an intense debate has taken place among professionals and scholars from the legal and judicial area about the custody hearing, which has been conceived in a perspective of various alternatives to the persistent problems of prison overcrowding, torture of detainees and cruelty on the part of State agents, especially at the time of arrest. The custody hearing is a procedural act in which the person arrested in flagrante delicto has the right to be heard by a judge to assess the need to maintain the arrest. It is necessary to point out that there is not a defendant, but a person in custody who needs to be brought before a judge within 24 hours (twenty-four hours). The initial function of the hearing is to investigate and prevent possible acts of torture and cruel, inhuman and degrading treatment that may be committed by state agents after the arrest of the person in custody. It is a kind of preliminary hearing that precedes the criminal process, so there is no discussion on the merits, since there is no accusation or even a criminal action filed.

Data from the 14th Brazilian Yearbook of Public Safety indicate that, historically, the prison population in the country follows a profile: they are young men, black and with low education (FBSP, 2020). This research aimed to answer the following question: what are the possible criteria used by the magistrate to grant measures other than imprisonment in the custody hearing, considering the statistics that most people in prison are black, poor and with low education?[1] Specifically: to demonstrate the functions of the custody hearing in the preservation of fundamental rights of the person arrested, and how this procedural act can contribute to the reduction of cases of mistreatment and torture of people in custody. The origin of the custody hearing and its relationship with international treaties signed and internalized by the Federative Republic of Brazil were sought. The second section was dedicated to the methodology, which consisted of qualitative bibliographic research in periodicals, journals and from scientific constructs developed in the last five years, and documentary research. Initially, a bibliographic and documental survey was carried out on the

theme, analyzing the categories delimited here and their relations in the national and international context.

The third section identified social stigmas. Thus, this research considered Goffman's (2004) teachings on stigmatization, according to which society establishes the means to categorize people and the total of attributes considered common and natural for members of each of these categories. In the fourth section, the historical aspects of the custody hearing were listed, and then the criteria used by judges when granting precautionary measures other than prison for the detainee, considering his economic power, skin color and level of education. The fourth section of this text attempted to identify the history and peculiarities of the custody hearing and the criteria used by judges when granting precautionary measures other than prison for the detainee, considering his economic power, skin color and level of education. Then, we sought to list the functions of the custody hearing, going through its origins based on the United Nations International Covenant on Civil and Political Rights - ICCPR, the 1988 Federal Constitution - CF/88, Law No. 13,964 of December 24, 2019 - Anti-crime Law and Resolution 213/15 of the National Council of Justice - CNJ.

Finally, as a result, it was noticed that the custody hearing did not achieve its original objectives, such as humanization of the prisoner, protection of rights, reduction of the prison population and even less physical violence against the detainee. The custody hearing also aims, besides verifying the legality and the need for maintenance, to curb prison overcrowding and consequently reduce spending for the maintenance of the prisoner in Brazilian prisons, in order to enable the redirection of public resources saved for other essential sectors of society.

Methodological approach

The present research was based on bibliographic and documental research, analyzing CNJ resolutions, decrees, the Anti-crime Law and its relations in the national and international context. Thus, the study justified its consistency by obtaining data and materials available in books and scientific articles, published in the main national and international repositories. As a theoretical foundation, the research was based on the discussions of authors such as: Goffman (2004),[2–5] among others, respecting the epistemological cut, and that have as main objective to assist in the analysis of research or information manipulations.[6]

For,[7] bibliographical research is characterized as an ordering of the empirical reality, being an exercise of theoretical and practical criticism. The following descriptors were used in the research in search tools: "Custody hearing"; "Determinants of the decision"; "Social stigma"; "Prison" and "Human Rights Violation". Examples of tools that use this form of information processing are Altavista (http://www.altavista.com), ResearchIndex (www.researchindex.com), Yahoo (http://www.yahoo.com), Lycos (http://www.lycos.com), Google Scholar (https://scholar.google.com.br) and Cadê (http://www.cade.com.br). The aim was to understand the state of the art in the main scientific databases on law and public policy: Scielo, Bases made available by the CAPES periodicals portal, RT Online, CONPEDI, LexML; GlobaLex and VLex.

According to[7] the investigation of social relations involves beliefs and values, therefore, in social research, all participating subjects, whether investigator or investigated, influence the construction of knowledge. For the author: [...] the object of study of the social sciences is historical. This means that each human society exists and is built in a certain space and is organized in a particular way, different from others. In turn, all those that live in the same historical period have some common traits, given the fact that we live in a world marked by the influx of communications. Likewise, societies live the present marked by their past and it is with such determinations that they build their future, in a constant dialectic between what is given and what will be the result of their protagonism.[7]

In this case, the present work met the requirements of the complexity of a social research, since it was able to contemplate some new social demands, with regard to the nuances of the custody hearing (it has to explain why). The documentary research sought to analyze articles, laws and resolutions on custody hearing. After the survey, through the study and analysis method, the information collected was examined and set against the current system of criminal procedure in Brazil. Decisions of the STJ, STF, CNJ resolutions, and the Anti-crime Law were analyzed. Scientific research means a search for knowledge, based on procedures capable of giving reliability to the results, in this sense (PRODANOV and FREITAS, 2013).

Social stigmatization: characteristics, concepts and applicability in judicial decisions

It is important to emphasize that this research recognizes, from the beginning, that the Criminal System is directed, in general, to the management of exclusion, guided by prejudices of color, gender, *class* (racism, sexism, misogyny, transphobia etc.), in short, intolerant to the difference. Based on this premise, even judicial decisions are susceptible to social stigmatization, including by judges, who should act with impartiality and without prejudice .[8] The characteristics, behaviors, clothing, and habits that define a social group, and that are generally not the same as those practiced and adopted by the imposed culture, are called social stigmas. Social stigma is defined as a mark or sign that designates its bearer as disqualified or less valued, or according to Erving Goffman's (2004) definition: "the situation of the individual who is unfit for full social acceptance"(GOFFMAN, 2004, p.4). In sociology, stigma is related to the classification of one group by another, that is, it is related to the social identity of subjects and social groups.

The etymological analysis of the word *stigma* defines it as that which is considered unworthy, with a bad reputation, difficult to accept. In ancient Greece, the word defined body marks made on slaves or prisoners of war. The term stigma was created by the ancient Greeks, in order to refer to the bodily signs made by cutting or using fire that showed something extraordinary or bad about the moral status of those who presented them (GOFFMAN, 2004). In ancient times, stigma was understood as a mark on the body of those who were sick and no longer fit for social coexistence. Here we highlight the mentally ill and people with disabilities, especially the physically handicapped and the deaf.[9] Within this conception, a person marked by these signs was considered ritually polluted and should be avoided, especially in public places.[10]

According to Goffman (2004), when we are in front of the other, we are led to categorize him according to the variables we have in our repertoire of categories. Thus, this classification is taken according to the representations built in each context, and society ends up creating stereotypes for each social type of individual and expects from him a type of response consistent with this socially created image. In this perspective Goffman (2004) describes the types of stigmas. Three distinctly different kinds of stigma can be mentioned. First, there are the abominations of the body - the various physical deformities. Second, the faults of individual character, perceived as weak-willed, tyrannical or unnatural passions, false and rigid beliefs, dishonesty, these being inferred from known accounts of, for example, mental

disorder, imprisonment, addiction, alcoholism, homosexuality, unemployment, suicide attempts, and radical political behavior. Finally, there are the tribal stigmas of race, nation, and religion, which can be transmitted through lineage and infect all members of a family equally. (GOFFMAN, 2004, p. 14)

It is necessary to point out that judgments with a less elaborate ideological base or half-truths, as well as prejudiced postures, can culminate in a mutilated, inverted, and deformed reflection of reality. Law is an applied social science that seeks to organize social relations between citizens, groups, companies, and the public power, *in* accordance with the legal norms in force in a given country, with the main objective of resolving conflicts and guaranteeing rights *in a* fair and *in thesi*, impartial manner. It seems, therefore, more appropriate to think of a judicial decision, far from prejudices and partialities, to become efficient. Furthermore, article 25 of the Magistrature's Code of Ethics, signals that it is the magistrate's duty, especially when making decisions, to act cautiously, paying attention to the consequences that may be caused,[8] as well asserted by Siqueira and Santos:[3] There is an urgent need not only to emphasize the importance of values when applying the law, but also to interpret it by always examining the consequences - good or bad - that the decisions linked to the exegesis may generate in the social environment.[3]

The magistrate is in this model a prominent figure, because it is the one who is responsible for saying the right of the parties in a particular relationship or dispute, acts on behalf of the state, is the state agent responsible for the jurisdiction. From the etymological point of view, jurisdiction comes from *juris dictio*, meaning the power to judge, to say the law by applying the law to the concrete case.[11] In view of this,[2] emphasize that: It is up to the judges and courts today, when applying the CPP, more than seeking constitutional conformity, to also observe the conventionality of the law applied, that is, if it is in conformity with the American Convention on Human Rights. The Constitution is no longer the only reference for the control of ordinary laws. The theme is of the greatest practical and theoretical relevance, not least because any violation of the ACHR justifies the filing of an Extraordinary Appeal with the STF.[2]

Moreover, it has that as a rule, the expression judicial acts is used as an indicator of jurisdictional acts of the magistrate, related to the specific exercise of the judge's function. On the other hand, judicial acts is an expression normally reserved for administrative acts performed in the judiciary, either by the judge or by the auxiliary services of justice.[12] The magistrate performs decision-making acts. As a rule, we should conceive such state agent as being impartial and/or distant from the actions of social stigmatization. However,[5] emphasizes that procedural agents with decision-making power may possess a degree of alienation that contributes to decisions with intolerant and unconstitutional practices, and that the agent may not be aware of his unconstitutional, intolerant, and possibly stigmatizing discourse, even if such decisions followed human deliberative patterns and were based on system algorithms and/or machines, according to the author: The predictive model, when establishing decision patterns, makes use of data and information produced by humans. The consequence is that the patterns identified are not the fault of the algorithm, but of the (human) data that served as the training basis. If the data is racist and sexist, the model produced by the algorithm will be too. At the same time techniques can help, among them "textual analysis," which is why mitigating the effects of biases can be supported by machines. What can be said is that human decisions will continue to be made by sexist, racist, and prejudiced biases explicitly or implicitly, because prejudiced subjectivity operates silently.[5]

Teresa Arruda Alvim (2021) recognizes that in periods of stability and without high complexity the law imposes social archetypes, which are reduced to a rigid normative standard. The author also recognizes that the current moment in which we live is one of intense mobility and social complexity, consubstantiating an absolutely exceptional situation, which is the Covid-19 pandemic, textually states: In recent times, mainly due to the Covid-19 pandemic that has shaken the world, consequentialist arguments have very often served as a basis for judicial decisions in Brazil. These arguments are the result of the judge's evaluation of the impacts that his decision may have on society. Consequentialist arguments can, therefore, determine the very content of the decision.[13] Thus, the best way to avoid stigma processes is to understand and know the group that is being stigmatized, relating the negative characteristics imposed on them to the social, cultural, political, and economic forces that surround them. In this line of thought, the present research intended to subsidize the role of the magistrate to recognize himself inserted in a stigmatizing social environment, and that through science and development of techniques to avoid giving continuity to these processes of exclusion of poor, black and socially vulnerable people. It is opportune to say that we often reproduce *prejudices* unconsciously or not, and in face of this reality it is necessary to practice educational actions that make it possible to reflect on and become aware of our attitudes. Therefore, it is necessary for us to know the types of coercion that are imposed on us, including judges. Generally, we reproduce patterns learned in the social environment in which we are inserted, without realizing how much we are impregnated by them. Often, through our educational and cultural process, we exercise roles that have been assigned to us, without any choice. The main consequence of this type of relationship is the denial of rights and opportunities to the stigmatized group. One can think of the situation of blacks, poor people and immigrants as an example of stigma. When they are categorized as such, they are automatically perceived as undesirable, criminals, lazy, and, in general, as a threat.

Goffman (2004) defends the hypothesis that stigma arises when there are discrepancies between the virtual social identity and the so-called real social identity, so that particular attributes disqualify the judge from other people in a given historical and cultural context, not providing him with full social acceptance. The inaccurate perception of reality by the magistrate is structured on a set of abstract ideas, values, and representations of a certain society, in a certain historical and social moment of a people. The stigmatized person is not even socially accepted, due to the mark that is imposed on them, differentiating them from other individuals.

The custody hearing

The custody hearing is an innovation that, since 2015, has been incorporated into the Brazilian criminal process through an initiative of the National Council of Justice (CNJ). In this context, custody hearings need special attention, since they deal with two institutional goals (reducing provisional incarceration and combating police violence) that are often represented as an incentive to impunity and a privilege granted to criminals.[14] The custody hearing was institutionalized in Brazil because it does not allow aggression against any person in custody. Similarly, it was observed through the studies of[2] that recognize the need for immediate presentation of the person arrested in flagrante delicto to the judge through the custody hearing, because "*it is a requirement imposed by the inter-American human rights system and that integrates the Senate Bill PLS No. 554/2011"* [2]

This hearing consists of the presentation of the person arrested in flagrante delicto within 24 hours in front of the judge, the prosecutor

and the technical defense. Its main objective is to investigate the need to maintain the arrest, its legality, reports of abuse and/or torture, reduction of the prison population (especially provisional detainees) and police violence, because through it "it *promotes a meeting of the judge with the prisoner, overcoming, thus, the border of the role established in art. 306, § 1, of the CPP, which is satisfied with the mere sending of the act of arrest in flagrante delicto for the magistrate*.[2]

It has long been discussed why black and poor people are the majority in Brazilian penitentiaries. About 63.7% of the Brazilian prison population is made up of blacks.[15] Racial segregation in Brazil has historical roots, there is a policy of imprisonment of blacks, data confirms that the levels of economic and social vulnerability are higher in the black population. "Why is that? Why are they poor? Why are most poor people black? Incarceration has color."[16]

The vulnerability of the black population and the growth of the prison population show that prisons are reasserting themselves as a place for black people. There is, therefore, social inequality in the Brazilian prison system.[1] In 2019, blacks represented 66.7% of the prison population, while the non-black population (considered white, yellow, and indigenous, according to the classification adopted by IBGE) represented 33.3%. This means that for every non-black person arrested in Brazil in 2019, two blacks were arrested. And a little more than double when compared to whites.

Although the greater incarceration of black people is not exactly news, when we analyze the historical series of data on the race/color of prisoners in Brazil, it is clear that, each year, this group represents a larger fraction of the total number of people imprisoned. If, in 2005, blacks represented 58.4% of the total number of prisoners, while whites were 39.8%, in 2019, this proportion reached 66.7% black and 32.3% white. The variation rate in this period shows the growth of 377.7% in the prison population identified by race/color black, a value much higher than the variation for white prisoners, which was 239.5%.[1] Thus, it can be seen that Brazil's colonial history and the foundations of structural racism reproduce political and social entanglements of vulnerability and precariousness of black and poor people. This favors the emergence of social stigmas, biased decisions, and demonstrates that incarceration in Brazil does indeed have a color.

From the international prevision to the introduction of the custody hearing in the Brazilian legal system

The implementation of custody hearings is provided for in international human rights pacts and treaties internalized by Brazil, such as the International Covenant on Civil and Political Rights - ICCPR and the American Convention on Human Rights - ACHR. Moreover, the implementation of custody hearings was confirmed by the Federal Supreme Court - STF when it judged, in 2015, the Direct Action of Unconstitutionality - ADI 5240 and the Argument of Noncompliance with Fundamental Precept - ADPF 347. The ICCPR of the United Nations in item 3, article 9, which came into force in the Brazilian territory after the publication of Decree No. 592, dated July 6, 1992, which also guided Resolution 213/15, of the CNJ, and this tells us that (...) anyone arrested or imprisoned for a criminal offence shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. Pre-trial detention of persons awaiting trial shall not be the general rule, but release may be conditioned by guarantees to ensure the attendance of the person in question at the hearing, at all acts of the proceedings, and, if necessary, for the execution of the sentence.[17,18]

One cannot forget that the ICCPR also emphasizes that the signatory states recognize the right of everyone to a custody hearing.[19] In the same vein, we pinpointed item 6 of Article 7 of the Pact of San José da Costa Rica, promulgated by Decree No. 678 of November 6, 1992, which ensures that "everyone deprived of his liberty is entitled to take proceedings before a competent judge or court, so that it may decide without delay on the legality of his arrest or detention and order his release if the arrest or detention is illegal.[19]

Custody hearings began to be implemented in the country in February 2015, initially in São Paulo. It is worth noting, however, that the criminal court of São Luís, in the state of Maranhão, was already conducting this procedure a few months earlier. The measure met the requirement of the American Convention on Human Rights, whose Article 7 states that *every person arrested or detained must be brought before a judge without delay. Brazil ratified the agreement in 1992, but this determination was ignored for years*.[20] Thus with the holding of custody hearings in São Luís (MA) and the implementation in São Paulo by the CNJ was in compliance with the American Convention on Human Rights (Pact of San Jose da Costa Rica), of which Brazil is a signatory. It is known that given the cases of beatings of prisoners in flagrante delicto, in frontal disrespect to the human being, the custody hearing was legitimized, to be held in the short time, up to 24 hours, with exception to those held not in person. Therefore, in normal times, the custody hearing cannot be held by videoconference, the Superior Court of Justice - STJ has settled the understanding in the sense of the incompatibility of the custody hearing with the videoconference system.

However, through Normative Act - 0009672-61.2020.2.00.0000 the CNJ , recognized the possibility of custody hearings by videoconference due to the exceptional health situation caused by the Covid-19, in which Min. Luiz Fux, of the STF, pondered that not holding custody hearings during the pandemic period constitutes a step backwards, in violation of international treaties . Add to this the fact that the National Council of Justice approved Resolution 357 of 26/11/2020, currently revoked due to the end of the pandemic period, which authorized the holding of custody hearings by videoconference.[21] One cannot omit that, in favor of this perspective of virtual hearings, there is a current, with predominance in the judiciary, that this procedure in the virtual sphere becomes the norm. However, the custody hearing must be held in person, since the Federal Constitution enshrines the due process of law (art. 5, item LIV), which presupposes that the procedural acts must be guided strictly by the form that the law gives them, including the designation of the place where they will take place. Therefore, allowing a custody hearing to be held virtually goes against the solid understanding of the STF that some procedural acts must take place in *a* physical way, as well as being a real step backwards, since *it is "much easier to produce suffering without any guilt when we are in a virtual dimension (because, if it is virtual, it is not real...)*"[2]

Procedures, peculiarities and the use of artificial intelligence

One of the peculiarities of the custody hearing is the reduction in the number of provisional detainees in the Brazilian prison system. However,[4] states that the hearings have served more to fulfill the ritual imposed on operators than to verify the real need to maintain the arrest and/or the physical integrity of the detainee. One example is the fact that some judges and prosecutors do not lend credibility to the facts presented by the prisoners, but to the police version of the facts. It can be inferred that the stereotype that every person arrested will lie to get released, to the detriment of the other maxim that public

agents responsible for the arrest will lend legality to all their acts. Another obstacle to the effectiveness of the objectives of custody hearings is the recurrent use of technical-legal language that hinders the compression of prisoners about what is discussed in the hearing, in addition to the standardization of decisions, observed by the author, with little consideration to the particularities of each case.[4]

It is necessary to point out the existence of a multidisciplinary team that assists in the decision of the judicial authority to identify the immediate needs of the person arrested, such as contact with family, documentation, work and income. Based on this information, a report is prepared to help the magistrate analyze whether or not to maintain the person in flagrante delicto, and also to indicate referrals for identified situations of vulnerability. This facilitates the judge's decision, since this is a preliminary hearing and not an evidentiary hearing, so that some questions and analyses, such as work and income, have already been carried out by the multidisciplinary team.

In fact, for a simple reason, a short period of time was chosen so that the magistrate can observe whether or not there was aggression against the detainee. The health condition of the detainee will also be observed, as well as whether there is a need for continuous medication, without which the detainee would be doomed to die. It should also be noted that, in addition to the observance of the physical integrity of the person in custody, the magistrate should observe whether he was guaranteed the observance of constitutional and infra-constitutional rights during the arrest by public officials, as well as the celerity of acts, since the person is in prison.[5] defends that Information Science allied to Law Science can use artificial intelligence to speed up the decisions of magistrates "*but for that it will be necessary to combine the cognitive power of the machine with decision makers, aware that biases and heuristics operate automatically and implicitly in their judgments"*.[5] The author also adds that one can *"build decision support mechanisms mitigating the effect of biased factors, besides enabling them* to *be in evidence, as is the case of MCDA-C* ".[5]

The Multicriteria Constructivist Decision Support Methodology (MCDA-C) was the intervention instrument chosen to develop the model given that it is capable of identifying the elements to be evaluated, measure these elements, integrate these individual evaluations and generate improvement actions for those elements that present a performance that falls short of that expected. In order to fulfill its proposed objective, the MCDA-C uses decision support activities, which are subdivided into three phases: Structuring; Evaluation and Elaboration of Recommendations.[22] In this same line of reasoning[23] assert that: MCDA-C constitutes a decision making support tool within a multicriteria context, the premises of which may be summarized as follows: (i) consensus in relation to the fact that, in decision making problems, there are multiple criteria; (ii) consensus in relation to the fact that, in substitution of the notion of best solution, the search for a solution that best fits the needs of the decision maker and the decision making context as a whole is proposed. (....) To fulfill its function, the MCDA-C methodology makes use of three different but correlated phases: (i) structuring of the decision context; (ii) construction of an alternatives/actions assessment model; and, (iii) formulation of recommendations aiming at improvement actions.[23]

One cannot neglect to mention that the so-called ghost hearing exists. A term used by actors in the justice system to designate the custody hearing held in the absence of the person arrested in flagrante delicto, who, on this occasion, was in the hospital or for some other reason did not attend. In the ghost hearing, the rite is normally followed by judges, prosecutors and public defenders, but without the presence of the person arrested.

The phantom hearing constitutes an antithetical judicial act, perhaps illegal, for real affront to the procedural and constitutional rules regarding the matter. Admitting the realization of the judicial act by videoconference, as previously discussed, seems reasonable in pandemic times, but a hearing without the main person involved/interested, constitutes an act of affront to human rights and the democratic rule of law, under the terms of CF/88.

Another point worth mentioning, which has been demanded for years, is that the Brazilian State must apply the provisions of the American Convention on Human Rights and enable custody hearings to be held throughout the country in person, avoiding even ghost hearings. Now that the custody hearings are already a reality in several places, it is necessary that the Justice Institutions, through members of the Judiciary, Public Prosecutor's Office, Public Defender's Offices and the Brazilian Bar Association act more effectively so that this important mechanism fulfills its objectives, focusing on combating and preventing torture and other cruel, inhuman and degrading treatment, such as illegal detention. It is worth pointing out that the magistrate must remain alert to the *signs of torture*, which range from physical aspects observed by the multidisciplinary team, such as recent injuries, difficulty in locomotion and torn or bloodstained clothes; and also the very testimony of the people who indicated they had suffered violence of any kind at the time of their arrest.[20]

We must emphasize that in addition to physical violence, we must pay attention to symbolic violence, which corrodes democratic structures and violates constitutional precepts, many of which are dear to Brazilian society. Symbolic violence can occur through the propagation of ideas that belong to the dominant layers (which, usually in capitalist society, are those with greater economic capital) to the minority layers, so that the social order is maintained.[24] Corroborating, above all, with the structural racism and cultural racism in Brazil.

For,[24] human beings possess four types of capital, they are: 1) the economic capital, the financial income; 2) the social capital, their networks of friendship and conviviality; 3) the cultural, the one that is constituted by education, diplomas and involvement with art; 4) the symbolic capital, which is linked to honor, prestige and recognition.[25] It is through the latter capital that certain power differences are socially defined. It is through symbolic capital that institutions and individuals can try to persuade others with their ideas. In this context[24] considers: as symbolic violence any coercion that is only established through the adherence that the dominated agrees to the dominant (therefore to domination) when, in order to think and think itself or to think its relation to him, it has only instruments of knowledge that have in common with the dominant and that makes this relation seem natural.[24]

It is noted, then, that symbolic violence occurs precisely because of the lack of equivalence of this capital between people or institutions. The concept was defined by Bourdieu (1997) as a violence that is committed with complicity between those who suffer and those who practice it, without those involved often being aware of what they are suffering or exercising, becoming permanent in the judicial environment, which ends up developing strategies of self(rre) production in a natural way. It becomes an institutionalized attack on human rights, democracy, and constitutional corollaries, such as the ample defense and the presumption of innocence, perpetrated by judges, based on their biased decisions, prejudices, and/or social stigmas. Thus, the hostile environment towards the detainee, the social stigmatization and the posture of the members of the Justice system institutions in the custody hearings suggest that the underreporting of cases of torture and mistreatment is higher than those reported, and it

can be inferred that the silence of the detainee is constituted by fear of reprisals and/or the presence of the police officers who made the arrest, in the hearing room, among other factors.[26–36]

Concluding remarks

It is essential to understand that torture and mistreatment permeate the Brazilian Criminal Justice system and that custody hearings are a non-negotiable opportunity to combat this culture of violence and structural racism. The institutions of the Justice System, such as the Police, the Public Prosecutor's Office, the Public Defender's Office, and especially the Judiciary, must, therefore, adopt an active stance in the face of nefarious practices that compromise the legal security of the country, the democratic rule of law and democratic achievements, post-CRF/88. Only after breaking with the archaic structure of *stigmatizing* hearings, which is in line with constitutional states of exception, will we be able to break with the structures that still prevent the eradication of torture and other cruel, inhuman and degrading treatment in Brazil.

Thus, the custody hearing held within 24 hours, even if in hybrid form and by videoconference, constituted a breakthrough by complying with the American Convention on Human Rights (ACHR), the International Covenant on Civil and Political Rights (ICCPR), CNJ Resolutions, and STF Decisions, which are constitutionally compliant with CF/88. It has been noticed that the process of stigmatization is complex, covering all relational spheres and, in this dynamic, from the structural stigma to the internalization of rejection, the damage to the daily life of black and poor people is clear, including the State's obligation to provide jurisdiction. Furthermore, the existence of social and economic parameters to define who has appropriate behavior or not, to have their freedom guaranteed in the custody hearing allows dominant groups to act with the intention of **excluding and inferiorizing** other groups, including the use of violent acts, **which go beyond physical, verbal, and psychological pain**.

It is necessary that minorities considered maladjusted be observed critically, since the differences are often linked to socioeconomic, political, color, race, and ethnic realities may constitute skillful tools for confronting Brazilian structural racism, reaffirming possible, proposed, and desired paths in confronting stigmatization in the custody hearing. It is known that social stigma was created by society itself, in order to standardize behaviors, habits, and even physical appearance, to keep the environment comfortable for the individuals named as *normal*. On the other hand, any situation that deviates from the standard considered correct by these same people is criticized, marginalized, ridiculed, in short, stigmatized. Stigma, therefore, synthesizes the prejudices and the various forms of discrimination by humanity, which deserves to be fought. It is an outstanding feature of the current democratic culture the projection of the role of the magistrate to act fairly and impartially in the custody hearing, in almost all aspects of social life. It is necessary to turn our eyes to *consequentialism* and, whenever possible, the magistrate should use the assistance of the MCDA-C in order to make fair decisions and in accordance with norms.

The magistrate, when deciding a certain claim, without observance of ethical and moral limits, has his decision embodied in a symbolic violence (BOURDIEU, 1997), since it is a practice that segregates, restricts, denies recognition and appreciation of the human being and, above all, denies rights. It is a harmful violence, because your skin tone, your address, your living conditions are the conditions that determine whether you are ~~capable~~ or not ~~of~~ being a subject of rights. It is expected that the Magistrature will understand that violence is not punctual, situational, and private, and that it cannot be tolerated, much less justified as a personal matter between the state agent and the detained citizen. It is necessary to question and control the actions of public agents who act on behalf of the State, breaking the relationship of leniency that is based on the presumption of the veracity of the facts and acts practiced by the State and its agents.

Acknowledgements

None.

Conflicts of interest

The authors declare there is no conflict of interest.

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Citation: Feitosa MJL, Sousa dos JC, de Aguiar AML, et al. The person arrested as a subject of rights custody hearing. *Forensic Res Criminol Int J.* 2023;11(3):74–80. DOI: 10.15406/frcij.2023.11.00372