PRE-TRIAL DETAINEES IN BRAZIL AND THE CUSTODY HEARING

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Instituto de Defesa do Direito de Defesa

1. Introduction

1.1. The Institute of the Defense of the Right to Defense

The Institute for Defense of the Right to Defense – IDDD is a public interest non-governmental organization (OSCIP), created in July 2000, which is dedicated to strengthening the Right to Defense. The IDDD'S mission is to instill in society and in State institutions the idea that everyone has the right to a quality defense, to the observance of the principle of presumption of innocence, full access to Justice, a fair trial and to serve the sentence with dignity. And all of this regardless of the social class, whether they are guilty or innocent, or of the crime of which they are being accused.

After 15 years have elapsed since its foundation, the Institute's work can be divided into three strategic areas: i) legal work, which includes the IDDD'S projects for free legal assistance and IDDD's strategic litigation; ii) advocacy, especially the work-intensive efforts before the Executive, Legislative and Judiciary to build a Criminal Justice System oriented toward the right to defense; and, iii) campaigns to raise the awareness of the society at large, the area in which we engage in projects with the press, cultural and educational actions, in and out of prison, focused on disseminating the importance of respecting the fundamental rights of citizens, especially the right to defense and the presumption of innocence.

1.2. The reality of Brazilian prisons

It is ubiquitously known that the condition in Brazilian prisons poses one of the most serious challenges to be faced by national authorities, with a devastating impact on the public safety arena. This is true because, other than society most often believes, the mass incarceration policy that has been exercised in the country for decades, has not contributed to the reduction of violence and criminality. It suffices to learn that that, between 2005 and 2013, Brazil saw its population grow 60.9%, but the homicide figures did not shrink; on the contrary, this rate experienced a 23.9% increase[1].

According to recently published data of the National Penitentiary Department[2], Brazil has 607,731 thousand people in detention and correctional facilities, the world's fourth largest prison population, ranking behind only the United States, China and Russia. Proportionally, the country has already reached the average of 300 incarcerated people for every 100 thousand inhabitants[3], and also ranks fourth in the world by this measure, only substituting China for Thailand in the previous ranking.

If the national incarceration rate remains on similar levels to those presented over the last two decades – in the range of 7% a year –estimates suggest that in 2022 Brazil will surpass the mark of one million inmates.

If numbers like these were still not enough to attract national and international attention to the incarceration policy in effect in Brazil, it would be helpful to invariably emphasize in the scope of these statistics that 41% of this prison population is held in custody without trial – and as such represents the group of Brazilian temporary prisoners. In São Paulo, the state responsible for housing approximately one third of the country's prison population (219,053 inmates), 32% of them are awaiting trial in jail, which is a blatant disregard for the national legislation that provides for the exceptional nature of the preventive custody, in light of the constitutional principle of the presumption of innocence.

In an attempt to lower the number of temporary detainees in Brazil, Federal Law No. 12.403 – commonly known as the preventive measures act –, was enacted and came into effect in July 2011. The new legislation was a further effort to clarify to the Judiciary the exceptional nature of the procedural arrest, which can and must be declared only when the combined need/adequacy[4] prerequisite is satisfied.

Also according to Law No. 12.403/2011, even when it is necessary to safeguard the due process of law, the preventive custody must be the measure of last resort, and the magistrate must always try to apply, before the extreme measure, one of the alternative preventive measures defined in the list of article 319 of the Code of Criminal Procedure: (i) periodic appearance in court on the scheduled date and according to the conditions set by the judge, to inform and justify activities, (ii) prohibition of access to or presence in certain locations when, for circumstances related to the fact, the defendant or accused must remain away from these places to prevent the risk of new offenses, (iii) prohibition of contact with a given person when, for circumstances related to the fact, the defendant or accused must stay away from such person, (iv) prohibition to leave the Judicial district when their stay is convenient or necessary for the investigation or

1 In 2005, the number of people incarcerated in Brazil was 361,402 (http://www.justica.gov.br/seus-direitos/politica-penal/transparencia-institucional/estatisticas-prisional/anexos-sistema-prisional/populacao-carceraria-sintetico-2005.pdf); in the year 2013 this number rose to 581,507 (http://www.justica.gov.br/seus-direitos/politica-penal/transparencia-institucional/estatisticas-prisional/anexos-sistema-prisional/populacao-carceraria-sintetico-dez-2013-1.pdf). In relation to the number of murders, in 2005 we had 40,975 (http://www.forumseguranca.org.br/storage/download//anuario_2007.pdf), while in 2013 the number jumped to 50,806 (http://www.forumseguranca.org.br/storage/download//anuario_2014_20150309.pdf)

2 http://www.justica.gov.br/seus-direitos/politica-penal/relatorio-depen-versao-web.pdf

3 There are States of the Federation with even more alarming rates, like São Paulo, which has 497.4 for every 100 thousand inhabitants or Mato Grosso do Sul with 568.9 for every 100 thousand inhabitants.

4 Article 282 of the Code of Criminal Procedure, as amended by law 12.403, states verbatim: "Art. 282. The preventive measures established in this Title shall be applied with due regard for the: I - need to apply the criminal law to the investigation or criminal discovery phases and, in strictly specified cases, to thwart the commission of a criminal offense; II - adequacy of the measure to the severity of the crime, circumstances of the fact and condition of the person indicted or accused."

discovery proceedings, (v) home confinement at night and on days off when the person investigated or accused has established residence and has a permanent job, (vi) suspension of the exercise of a public office or activity of an economic or financial nature when there are sound reasons for suspecting that they might make improper use of the office for the commission of criminal offenses, (vii) temporary commitment of the accused in case of violent crimes or serious threat, when there is expert witness testimony to their incompetence to stand trial or there is risk of repeat offense, (viii) in bailable offenses, in order to ensure their presence in the proceedings to prevent obstruction, or otherwise in case of unjustified resistance to court orders and, finally, (ix) electronic monitoring.

Unfortunately, surveys made by civil society organizations[5] after the enactment of the law demonstrate that the legislative efforts have not yet had an impact on the reasoning of judges, who still consider a pretrial detention order adequate procedural disposition.

Indeed, a study made by Instituto Sou da Paz from April to July 2012 shows that 61.3% of the flagrante delicto arrests were converted into pretrial detention[6].

Statistics like these demonstrates that a specific amendment to the national legislation is not sufficient to change the logic of incarceration of the Brazilian criminal justice system. Much has yet to be done so reverse the continuous trend of the growth curve of the Brazilian prison population – in line of what has been happening in the United States, China and Russia –, and invest in education and resocialization of people who supposedly committed an offense, thereby contributing to the reduction of recidivism rates and, consequently, of the national crime rates.

Among the measures that range from raising magistrates' awareness to the strengthening of the Public Defender's Offices, and going through the financial investments in effective policies of alternatives to prison and improvement of the access to Justice for the population, the IDDD believes that the adoption of custody hearings is a fundamental step to reduce the number of temporary detainees in the country, and for this reason it has been working to promote this cause, with the support of the Open Society Foundations, since mid-2011.

5 There are no official data on this topic.

6 O impacto da Lei das Cautelares nas prisões em flagrante na cidade de São Paulo, available from http://soudapaz.org/upload/pdf/lei_das_cautelares_2014_digital.pdf.

2. Custody hearings

2.1. International and national legal parameters in place

Custody hearings are hearings held right after someone is arrested, so they are brought before a judge, who must evaluate the legality of the arrest and the need to keep that person under investigation in jail during the proceedings, as well as to verify any complaint of abuse and torture during the police action.

According to the American Convention on Human Rights (Pact of San Jose, Costa Rica), ratified by Brazil by decree No. 678 of November 6, 1992, "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings" (art. 7, 5). The International Covenant on Civil and Political Rights, incorporated into the Brazilian legal system by way of Decree No. 592 of July 6, 1992, contains provisions to the same effect: "Anyone arrested or detained on a criminal charge 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" (art. 9º, 3).

Although these international treaties, after being ratified by Brazil, are assigned a statutory, supra legal status, they have never been observed nationwide.

On the contrary, when reviewing the legality of the flagrante delicto arrest and need to convert it into pretrial detention, Brazilian judges follow the route currently defined in the Brazilian Code of Criminal Procedure, whereby "the records of the arrest will be forwarded to the competent judge within 24 (twenty four) hours of the arrest and, if the accused does not appoint a counsel, a full copy is to be made available to the Public Defender's Office" (article 306, Code of Criminal Procedure).

The judicial authority, on receipt of a record of flagrante delicto arrest, will review its legality, after which they must: (i) reverse the illegal arrest, (ii) order their temporary release, regardless of the application of any preventive measure alternative to detention, (iii) order their temporary release with the application of any of the alternative preventive measures, established in article 319 of the Code of Criminal Procedure, or, finally (iv) convert the flagrante delicto arrest into pretrial detention, provided that the requisites specified in article 312 of the above-mentioned law are satisfied.

In this decision-making process, there is no contact of the detainee with the judge, which only happens at the time of the discovery, debate and trial hearing that occurs, on average, four months after the arrest[7]. In other words, in Brazil, any person can be kept incarcerated for over one hundred days without being able to state their version of the facts and without even having contact any with the judge. When the accused is finally brought in person before a judge, any possible sign of abuse and torture will no longer be noticeable.

2.2. Experiences in Latin America

While custody hearings are not held in Brazil, the scenario is fortunately much different in most Latin American countries.

Chile, for example, incorporated into its legal system a provision for "detention control hearing" as early as in the year 2000, when the reform of the Code of Criminal Procedure was conducted. As of that year, Article 131 of that Code was amended and restated to provide that the person detained must be brought before the judicial authority within no later than 24 hours. The adoption of the hearing was gradual, but has been taking place throughout the Chilean national territory since 2006.

In Mexico, the hearing is also designated "detention control hearing", as in Chile; however, the rule provides that a person arrested in flagrante delicto be brought before the judge no later than within 48 hours of the arrest. During this period of 48 hours, the Defender is allowed to have contact with them at any time.. The same procedure is in place in Peru.

In Ecuador, on the other hand, there is the so-called "flagrante delicto hearing", which was introduced into the criminal law in March 2009. The Federal Constitution of Ecuador, in its Article 77, already mandates that the person detained appear before the judge within 24 hours.

In Argentina, the National Procedural Code (Código Processual Penal de La Nación Argentina) establishes, in its article 286, that the detainee must be brought before the judge within 6 hours, while in Colombia, the Code of Criminal Procedure provides that, in cases of flagrante delicto arrests, the detainee needs to be brought before the judge within 36 hours.

As can be seen from the scenario depicted above, Brazil, if not the only one, is one of the very few countries in Latin America that have not yet incorporated the detention hearing into its legal system.

7 http://www.nevusp.org/downloads/down254.pdf; tabela 44.

3. Next steps

3.1. Legislative Branch. Bills of law proceeding. IDDD'S Advocacy

3.1.1. Senate Bill of Federal Law No. 554/2011

The Senate Bill of Law (PLS) No. 554 of 2011 is currently proceeding before the Federal Senate, under the sponsorship of Senator Antônio Carlos Valadares (PSB/SE), aiming to amend article 306 of the Code of Criminal Procedure to include the provision of a custody hearing, i.e., the obligation to bring the person arrested in flagrante delicto before the judge within 24 hours of the arrest.

The original text of the bill submitted on September 6, 2011 amends the wording of §1 of the referenced article, which is intended to become effective as follows:

> "Within twenty four hours of the arrest, at the latest, the detainee must be brought before the competent judge, along with the records of the arrest and all transcripts of testimonies gathered and, if the accused does not appoint a lawyer, a full copy is to be made available to the Public Defender's Office."

As soon as the IDDD – which in 2011, funded by a grant of the Open Society Foundations – OSF, started to work on the matter of custody hearings in Brazil – became aware of Senator Valadares' legislative proposal, it attempted to enhance the text of the bill.

The motivation behind IDDD's efforts was that, in view of its vast experience in criminal litigation, it observed that it would be indispensable that the Law provide for the procedure of this hearing for the detainee's appearance, so as to safeguard the fundamental rights and guarantees of the accused, especially the right to defense.

In this sense, the IDDD has prepared a substitute text proposal for Senate Bill of Law (PLS) No. 554/2011. With the support of Rede Justiça Criminal[8], the IDDD was able to partner with some Senators who would present and support the new text.

In the Federal Senate's Human Rights Commission (CDH/SF), the first commission to vote on the proposal, Senator João Capiberibe (PSB/AP), who introduced the bill of law at the time, submitted for the first time the text suggested by the IDDD and supported by Rede Justiça Criminal, which ultimately passed in the Senate by unanimous vote. According to the substitute proposal approved, Article 306 of the Brazilian Code of Criminal Procedure is amended and restated to read:

> Art. 306.
> § 1 Within twenty four hours at the latest of an arrest in flagrante delicto, a detainee shall be brought before the judge to the heard, for the purpose of the measures established in art. 310, for the verification of observance of their fundamental rights, provided that the judicial authority must take the appropriate measures to preserve his rights and verify any violation thereof.
> § 2 In the custody hearing described in paragraph 1, the Judge shall hear the Ministry of Public Prosecution, which may, if deemed necessary, move for preventive custody or another preventive measure alternative to detention, and shall thereafter hear the detainee, followed by the technical defense, and then make the decision, essentially on the basis of art. 310.
> § 3 The hearing referred in the foregoing paragraph must be drawn up in separate case records, and may not be used as evidence against the deponent, being limited to address exclusively the legality of and need for the detention; the prevention of the of torture or abuse; and the rights ensured to the detainee and to the accused.
> § 4 The detainee's appearance before the court shall be accompanied by the records of the arrest and charge sheet provided to them, against receipt, and signed by the police authority, including the motive of the arrest, the identification of the arresting officer and of witnesses.
> § 5 The custody court hearing shall always take place in the presence of the detainee's counsel or, in the event that no one has been retained or appointed, a Public Defender, and member of the Ministry of Public Prosecution, who will be allowed to inquire the detainee about the matters defined in paragraph 3, as well as submit a brief prior to the court decision described in art. 310 of this Code."

Next, the bill was forwarded to the Federal Senate's Economic Affairs Commission (CAE/SF), where it was sponsored by Senator Randolfe Rodrigues (PSOL/AP). Once again, the substitute text approved by the previous commission was passed by unanimous vote.

Finally, last August 5, the bill of law was passed by the Commission de Constitution and Justice of the Federal Senate (CCJ/SF), to which it was presented by Senator Humberto Costa (PT/PE), in the form of the following substitute text:

8 An association that assembles seven civil society organization of the States of São Paulo and Rio de Janeiro, and works for the construction and strengthening of a just and more efficient criminal justice system that respects the fundamental guarantees of citizens. Rede Justiça Criminal formed by: Associação pela Reforma Prisional (ARP), Conectas Direitos Humanos, Instituto de Defensores dos Direitos Humanos (DDH), Instituto de Defesa do Direito de Defesa (IDDD), Instituto Sou da Paz, Instituto Terra, Trabalho e Cidadania (ITTC), and Justiça Global.

"Art. 1 – Art. 304 of Decree-Law No. 3.689 of October 3, 1941 will hereinafter be in force as amended and restated below:

'Art. 304

§ 4 The detainee has the right to be assisted by a defender, whether public or private, during police interrogation, who may be a public defender appointed by the chief of police responsible for the interrogation.

§ 5 Every detainee shall be submitted to a forensic medical examination as a precautionary measure, conducted by a forensic medical examiner, wherever available, or by a medical doctor appointed by the chief of police, preferably from the public health system.

§ 6 After the records of the arrest are prepared by the chief of police, the proceedings will be conducted as established in art. 306, provided that the detainee shall remain available to the competent judge at a prison facility specified in Law No. 7.210 of July 11, 1984.' (New Wording)

Art. 2 – Art. 306 of Decree-Law No. 3.689 of October 3, 1941 shall hereinafter be in force as amended and restated below:

'Art. 306. The arrest of any person and the facility to which they are committed will be reported immediately, by the chief of police in charge of issuing the records of the arrest, to the competent judge, the Ministry of Public Prosecution and to the Public Defender's Office, when no qualified lawyer has been named in the case records, as well as to the detainee's family or any person as the former may name.

§ 1 Within 24 (twenty four) hours of the arrest at the latest, the chief of police shall forward the records of the arrest to the competent judge and to the Ministry of Public Prosecution and, if the accused does not name an attorney, a full copy is to be made available to the respective Public Defender's Office.

§ 2 Within the same time period, the charge sheet signed by the chief of police and indicating the motive of the arrest, the legal grounds, the identification of the arresting officer and the of the witnesses shall be provided to the detainee, against receipt.

§ 3 Immediately after the issuance of the records of the arrest, in the event that an alleged violation of the detained person's fundamental rights has occurred, the chief of police shall be allowed to order, based on a well-grounded decision, the adoption of the appropriate measures to preserve the integrity of the detainee, in addition to ordering the assessment of the alleged violations, by causing a police inquiry to be initiated immediately, the investigation of the facts, requesting the conduction of expert examinations, which may include complementary forensic examinations, as well as the search for other applicable evidence.

§ 4 Within 24 (twenty four) hours of the issuance of the records of the arrest, at the latest, the detainee shall be brought before the judge to be heard for the purpose of the measures established in art. 310 and for the verification of observance of their fundamental rights, it being provided that the judicial authority shall take the appropriate measures to preserve them and to assess any violation.

§ 5 In the custody hearing described in paragraph four, the judge shall hear the Ministry of Public Prosecution, which may, if deemed necessary, move for preventive custody or another preventive measure alternative to detention, and shall thereafter hear the detainee, followed by the technical defense, and then make the decision, essentially on the basis of art. 310.

§ 6 The hearing referred in the foregoing paragraph must be drawn up in separate case records, and may not be used as evidence against the deponent, being limited to address exclusively the legality of and need for the detention; the prevention of the of torture or abuse; and the rights ensured to the detainee and to the accused.

§ 7 The custody court hearing shall always take place in the presence of the detainee's counsel or, in the event that no one has been retained or appointed, a Public Defender, and a member of the Ministry of Public Prosecution, who will be allowed to inquire the detainee about the matters defined in paragraph 3, as well as submit a brief prior to the court decision described in art. 310 of this Code."

§ 8 In case of properly demonstrated and certified impediment of the judicial authority to inquire a detainee at the time as they are brought before the judge, the custodian authority or the chief of police, through their agents, shall cause the court officer in charge to draft and sign a receipt, which must be entered in the records of the case and whereby the detainee shall be returned, when this fact shall be immediately notified to the Ministry of Public Prosecution, the Public Defender's Office and the

National Justice Council.

§ 9 With a view to guarantee the fundamental rights of the detained person, the custody hearing must be held on the first subsequent business day, provided that the custodian authority shall, under penalty of liability, bring the detainee on the date indicated once again.

§ 10 In cases of crimes under the jurisdiction of the Federal Police, when the municipality where the records of the arrest were drawn up is not the same as that of the Federal Court seat, the custodian authority or the federal chief of police shall instruct their agents to bring the detainee to the Court of Law of the jurisdiction where the records of arrest were issued no later than within twenty four hours, at which time the records of the arrest must be submitted along with all transcripts of the testimonies gathered and, if the accused does not inform the name of his lawyer, a full copy to the Public Defender's Office.' (New Wording)

Art. 3. Art. 322 of Decree-Law No. 3.689 of October 3, 1941 shall hereinafter be in force as amended and restated below:

'Art. 322. The chief of police may grant bail in cases of offenses for which the penalty of incarceration is no longer than 6 (six) years, unless the former ascertains the existence of the prerequisites for preventive arrest.

§ 1 ....

§ 2 In the events of the introductory provisions, the chief of police will be allowed to apply, in a well-grounded decision, the measure set forth in item I of art. 319 of this Code, and give notice thereof to the competent jurisdiction within 24 hours.' (New Wording)

Art. 4 Art. 350 of Decree-Law No. 3.689 of October 3, 1941 shall hereinafter be in force as amended and restated below:

'Art. 350. In cases when bail is permitted, the authority determines the bail amount, having ascertained the detainee is deprived of economic resources, may waive the payment of the amount determined and subject them to the obligations specified in arts. 327 and 328 and to the preventive measure specified in item I of art. 319, all of this Code.' (New Wording)

Art. 5 This Law comes into effect as of the date of its publication."

The amendment submitted by Senator Randolfe Rodrigues, on the IDDD'S request, is still pending voting. This amendment intends to suppress §§ 8 and 9 of article 306, to the extent that the Institute believes that the exceptional event described in this provision will ultimately become the rule, and this would altogether erode the meaning and purpose of the custody hearing. Such amendment must be voted by August 12; next, if no appeal is filed before a plenary session, the bill will be forwarded to the House of Representatives.

3.1.2. House of Representatives Bill of Law No. 7.871/2014

Much more recent is bill of law No. 7.871, of 2014, sponsored by Congressman Jorginho Mello (PR/SC), at the House of Representatives, whose original text provides for the amendment of article 301 of the Code of Criminal Procedure, which, if passed, would be amended and restated to read:

"Any person of the people will be allowed to, whereas the police must, order the arrest of anyone who is caught is flagrante delicto.

Sole paragraph. After the records of the arrest are issued by the police, within twenty- four hours at the latest the detained person must be brought before the competent judge, at which time the records of the arrest must be presented, along with the transcripts of all testimonies gathered, and, if the accused does not name a counsel, a full copy shall also be forwarded to the Public Defender's Office."

Bill of Law PL No. 7.871 of 2014, currently reported by Congressman Marcos Reategui (PSC-AP) to the Public Safety and Anti- Organized Crime Commission of the House of Representatives (CSPCCO/CD), received amendments and legislative proposals attached. The text pending voting, which is very distressing and raises a great concern in the view of IDDD, reads as follows:

"[...]
Art. 310 [...]
§ 1 [...]
§ 2 Within 72 hours, after receiving the records of the arrest, the judge may hold a custody hearing, with the participation of the defense and the Ministry of Public Prosecution, if the accused has not been released by the chief of police, and either with or without the application of a preventive measure alternative to detention (New Wording).
§ 3 The custody hearing shall be restricted to the measures listed in the introductory provisions and may be held by videoconference, pursuant to §2 of art. 185. (New Wording)"

Last May 20, 2015, in light of the intensive efforts conducted by the IDDD and by the entire Rede Justiça Criminal, the Reporting Congressman opted to remove the bill of law from the docket of bills and to hold public hearings. After the public debate – where the IDDD was represented by its ex-President and Councilor Marina Dias – the reporting congressman expressed interest in amending the bill.

3.2. Judiciary. National Justice Council. Custody hearings Pilot Project

The IDDD signed, last April 9, a Technical Cooperation Agreement with the National Justice Council (CNJ) and the Ministry of Justice (MJ), aimed at combining efforts to enable the effective implementation of the "Custody Hearing Project" throughout the country.

The project, conceived by the CNJ and fostered and supported by the IDDD from the outset, consists of creating a multidisciplinary structure in the Courts of Appeal, which will begin to receive, in the scope of a pilot project, individuals arrested in flagrante delicto for a custody hearing, when the judge will assess the legality of and the need for the temporary detention of the accused or, alternatively, the imposition of other preventive measures alternative to detention, in order to adjust Brazilian judicial practices to the above-mentioned international rules, regardless of whether any of the bills of law underway is passed or not.

According to the cooperation agreement signed, as a civil society organization, it will be assigned with the incumbency to conduct the "monitoring, analysis and evaluation of the Project and its execution, in order to adjust the actions implemented to the envisaged objectives and results, as well as to organize the respective database, qualitative analyses of the information gathered, sharing them with all associates and the respective Courts, in order to evaluate the Project's impact and identify its effects on the Brazilian criminal justice system."

The invitation by the CNJ and by the Ministry of Justice (MJ) to the IDDD to participate in such a pioneering undertaking represents the recognition of the Institute as one of the protagonists of the process for institution of custody hearings in Brazil.

The project plans to introduce custody hearings countrywide, especially in the capitals of all States of the Federation.

The first step happened in São Paulo, where the pilot project started in mid-February 2015. Unfortunately, the Court of Appeals of the State of São Paulo barred the participation of the IDDD in the Technical Cooperation Agreement for that state, and this is the reason why it opted to proceed with the monitoring and inspection of the work toward the implementation of custody hearings in the State.

To that effect, and funded by resources from the OSF and another international foundation that preferred not to have its identity disclosed, the IDDD hired a team composed of a lawyer and a field researcher, who monitor various custody hearings every day, and reports thereon in a special survey instrument specifically designed for that purpose[9]. From February until mid-July, 110 hearings have been accompanied by the team. The result of this monitoring work – which is due to last until the end of 2015 – is expected to allow the extraction of relevant data and diagnoses about the functioning of these hearings, in time to support any increments in the public policy, as well as strengthen the efforts before the National Congress.

The Technical Cooperation Agreement signed between the IDDD, the CNJ and the MJ provides for the expansion of the initiative into the other States of the Federation besides São Paulo. Nineteen States have already expressed their interest in receiving pilot projects similar to São Paulo's: Amazonas, Mato Grosso, Tocantins, Piauí, Ceará, Paraíba, Pernambuco, Minas Gerais, Paraná, Rio de Janeiro, Santa Catarina, Rio Grande do Sul, Goiás, Bahia, Roraima, Acre, Rondônia, Maranhão and Espírito Santo.

Last May 22, custody hearings already began to be held in Vitória, in Espírito Santo; subsequently, on June 22, in São Luís, in Maranhão; on July 17, the project was initiated in Belo Horizonte, Minas Gerais, and then in Cuiabá, Mato Grosso, on July 24; finally, on July 30 and 31, Porto Alegre, Rio Grande do Sul, and Curitiba, Paraná, respectively, joined the project, as shown in the following photographic records:

9 Exhibit 01.

Figure 1: First custody hearing held in Vitória, Espírito Santo, in the presence of Minister Ricardo Lewandowski

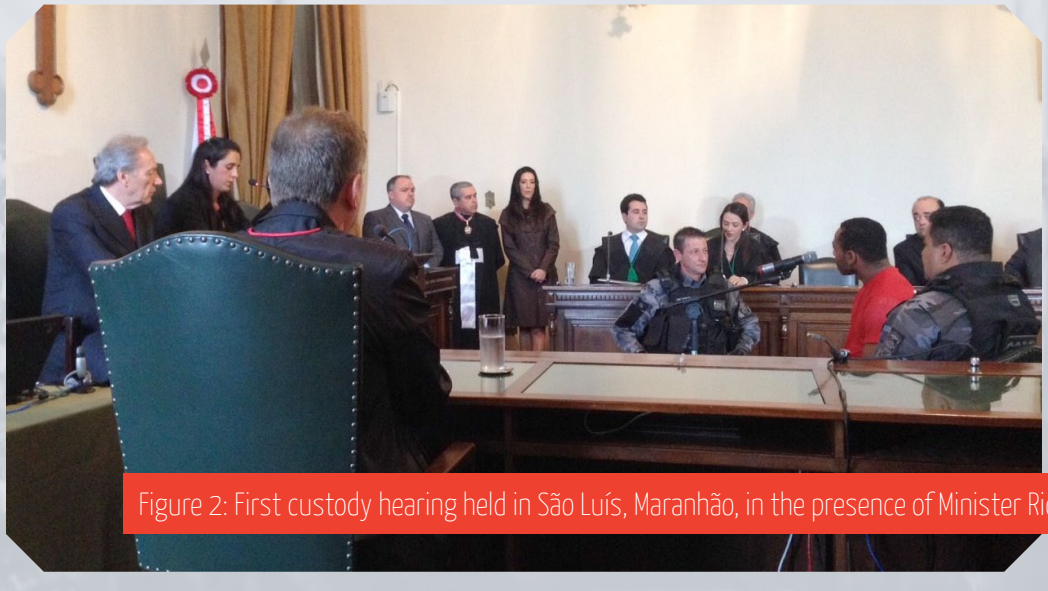


Figure 2: First custody hearing held in São Luís, Maranhão, in the presence of Minister Ricardo Lewandowski

Figure 3: signature of the Technical Cooperation Agreement, in the presence of Minister Ricardo Lewandoski

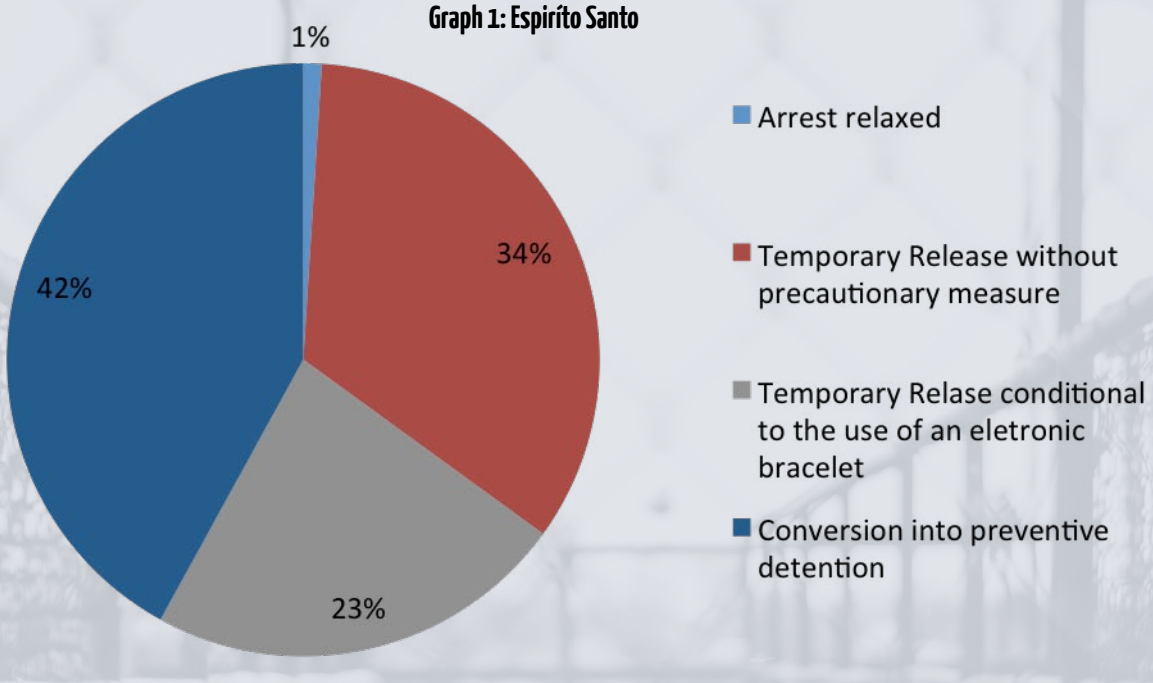
For August, a date is already scheduled for the project to begin in the states of Amazonas, Goiás, Tocantins, Paraíba, Pernambuco, Ceará, Piauí, Santa Catarina, and Bahia. The States of Rio de Janeiro, Roraima, Acre and Rondônia will implement the Project in September. The Federal Courts also joined the pioneering undertaking and, on October 30, the Federal Regional Court of the 4th Circuit will be the first to sign the Cooperation Agreement.

3.2.1. Partial results

Espírito Santo

For now, in addition to the data from São Paulo, there is only partial information from Espírito Santo, where, exclusively for the first weekend, when the custody hearings were held, 59% of those arrested in flagrante delicto were released during the hearing. According to an article published by the specialized press[10], out of the 77 cases of arrest in flagrante delicto, there was one case in which the arrest was abated, 26 cases when unrestricted temporary release was granted, 18 cases when the release was made contingent upon the use of an electronic bracelet and, lastly, 32 cases when the arrest was converted into pretrial detention[11].

Graph 1: Espiríto Santo



São Paulo

In São Paulo, the pilot project has already acquired features of a true public policy. Daily, about one hundred (100) arrests in flagrante delicto[12] are reviewed by six (6) judges[13] . All hearings are attended by a prosecutor and a public defender or lawyer.

Unfortunately, although the Brazilian law ensures the personal and reserved contact of every accused with their defender, there is still no room on the premises of criminal courts of the city of São Paulo for the Public Defender to confer with the prisoners, so that the contact between them (or between prisoners and their private counsel) happens in the corridors of the courthouse, always in the presence of the military police[14].

Dynamics of the hearings

The detainees are brought to the hearing rooms by military police officers and remain handcuffed as long as the hearings last.

Following a procedure similar to that suggested in the bill of law being presently proceeding before the Federal Senate, the hear-

10 http://www.conjur.com.br/2015-mai-25/estreia-audiencias-custodia-es-mantem-41-prisoes

11 Unfortunately, there are no official data and statistics about the percentage of conversion of the arrests in flagrante delicto into pretrial detention from the time before the pilot project, but the results are absolutely impressive.

12 The number of arrests in flagrante delicto that are subject to custody hearings every day has been growing over the last five months, considering that a decision has been made to include gradually the police precincts of the capital in the pilot project. In the beginning of July 2015, all individuals arrested in flagrante delicto in the capital of São Paulo – except for those who were detained on weekends and those arrested for crimes against the life or for the crimes defined in the Women's Protection Act (Maria da Penha) (Law No. 11.340/2006) – already had this hearing, averaging a rate of one hundred (100) cases daily.

13 The judges in charge of pre-trial hearings are the judges of the Department of Police Inquiry and Judiciary Police of São Paulo (DIPO), a department consisting of one (1) Reviewer Juiz and ten (10) Auxiliary Judges, all designated by Court of Appeals of the State of São Paulo. The panel of judges rotates shifts so that, daily, six (6) magistrates are exclusively dedicated to holding the hearings, while the others remain in their offices, working on the conduction of the police inquiries.

14 The IDDD, aware of these circumstances, has already taken some measures in an attempt to reverse this scenario and to enforce the right of every accused to have personal and reserved contact with their defender, having, in particular, sent an official letter to the Court of Appeals of the State of São Paulo to require that an adequate room for this conference be arranged.

ing begins with questions made by the judge, generally aimed to assess the socioeconomic standing of the detainees[15]. Some judges put forward some questions related to the facts described in the police report, but most of them avoid touching the merits, thereby making sure that the act will not be an early interrogation of the accused. Next, the judge hears the prosecutor and the defender, necessarily in this sequence, who, should they wish, are allowed to ask further questions. At the end of this phase, the prosecutor must request the abatement of the arrest in flagrante delicto, the order for temporary release – with or without the imposition of another preventive measure alternative to detention –, or else the conversion of the flagrante delicto arrest into pretrial detention. Next, the defender must request the abatement of the arrest or the order for temporary release to the accused, in each case based on relevant grounds. In the end, the judge will render his decision.

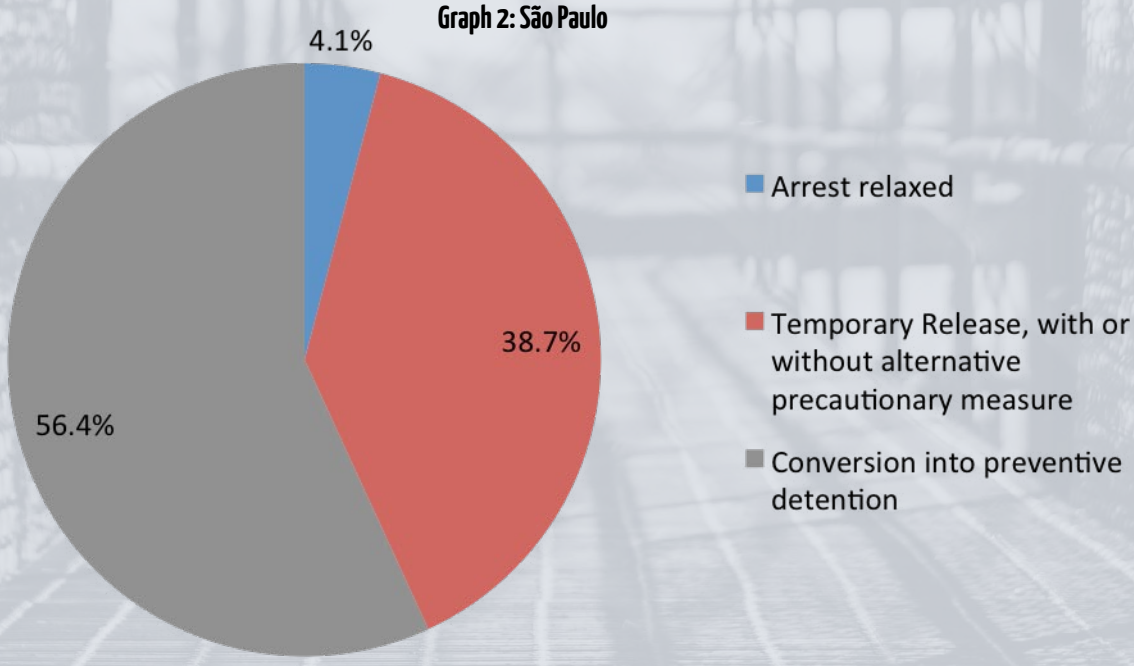
The Center for Alternative Punishments and Social Inclusion (CEAPIS) has been structured on the premises of the courthouse, in order to provide assistance to the detainees to whom preventive measures alternative to detention are ordered. The work is done at CEAPIS by a psychologist and by a social worker, who are in charge of referring them to the services responsible for monitoring preventive measures or to drug and alcohol rehabilitation centers.

During the hearing, when the detainee reports police mistreatment, abuse or torture, the judge must officially notify the Department of Police Inquiries 5 (DIPO 5), so that the applicable investigation is initiated.

Some figures

From time to time, the IDDD receives from the Court of Appeals of the State of São Paulo the quantitative data of the pilot project. From February 25 to July 14, 2015, the Court indicated that 4,878 custody hearings had been held, with a balance of 204 cases (4.2%) of abatement of the arrest, 1,891 cases (38.8%) where temporary release was granted, with or without the application of an alternative preventive measure, and 2,783 cases (57%) in which the arrest in flagrante delicto was converted into pretrial detention. Of the same total of cases (4,878), 442 individuals were committed to the Center for Alternative Punishments and Social Inclusion (CEAPIS). Figure 2 illustrates the scenario of the first months of the pilot project in São Paulo:

Graph 2: São Paulo



Despite the non-existence of official data on the number of releases and conversions into preventive arrests in São Paulo from the time before the inception of the pilot project, data gathered by Instituto Sou da Paz, in 2012 can be used for comparison.

According to the survey conducted by the Institute between the months of April and July 2012, out of a universe of 5,517 flagrante delicto arrests, 61.3% were converted into pretrial detention, a much larger rate than the current 57%.

In addition to the data gathered and provided by the Court of Appeals of the State of São Paulo, relative to the total number of flagrante delicto arrests reached by the São Paulo pilot project, the IDDD has been collecting further data.

15 These initial question usually follow a standard pattern: name, fixed home address and place of work, monthly income, children, family, criminal records and drug addiction.

Out of a total of 110 custody hearings personally monitored by the Institute until May 11, 2015[16], the analysis of the socioeconomic profile of the detainees indicated that in 11 cases (10% of the total hearings observed), there were persons who lived as beggars or participated in a shelter project put in place by the City of São Paulo[17]. These detainees usually appear in court barefoot and can be readily identified as homeless. There were cases, however, in which the detainees' appearance did not indicate this situation, which was only ascertained after questioning by the judge. This is equivalent to saying that there can be more than 11 cases that were not identified as such. Out of this group (11 cases), for five (45.4%) the flagrante delicto arrest was converted into pretrial detention, for one (9%) the temporary release was conditioned to the payment of bail, despite the clear incompatibility between the detainee's economic condition and the bail, and in five cases (45.4%) temporary release was ordered with the imposition of another preventive measure alternative to bail (out of these, only 3 were referred to CEAPIS).

Also, out of the 110 detainees, only 12 (10.9%) declared to be unemployed; the other 98 (89%) declared to be engaged in some type of work. Out of these 98, only eight said they were formally employed, while the other 90 declared they earn a living on jobbing.

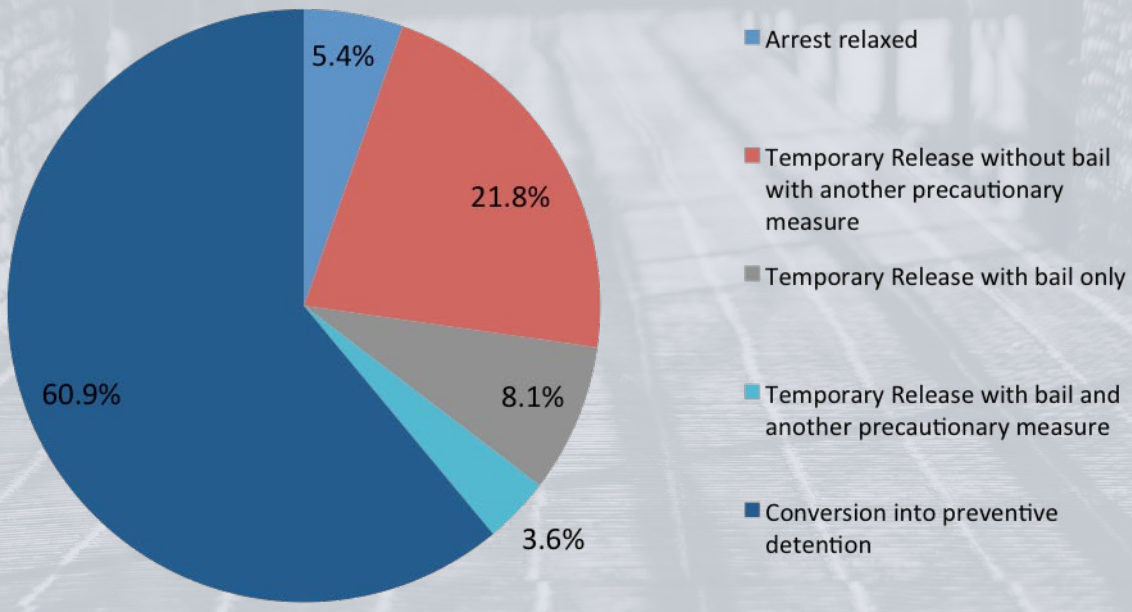
In relation to the age of the persons whose hearings were held, 25.4% of them were in the 18-25 age brackets, 11%, in the 25-30 age brackets, a further 11%, in the 30-40 age brackets, and 9% older than 40 year, but for 47% we did not obtain information about the detainee's age, because such aspect was not addressed during the custody hearing. Now with respect to the detainee's skin color, a profiling was not feasible at this stage of the survey, considering that we have not had access to the classifications made in the Police Reports. For this reason, we inform that this data will be gathered in the future.

Out of the 110 detainees, seven were foreign nationals (from Latin American countries – Peru, Bolivia and Colombia) and all were investigated allegedly for having committed theft. Out of these seven cases, in only a single one the flagrante delicto arrest was converted into pretrial detention, four detainees were released subject to the payment of bail and for two, the temporary release was made contingent to another preventive measure alternative to bail.

It was also observed, for 40% of the total cases analyzed, that the detainee was not asked if he or she had children or dependents. Among those who were asked, only 21% answered they did not have children, while the other 39% declared to have at least one child.

In 67 cases (60.9%), out of the total of 110, the flagrante delicto arrest was converted into pretrial detention; in 24 cases (21.8%), a temporary release was ordered without bail to the detainee, with the imposition of another alternative preventive measure[18]; in 13 cases (11.8%) the temporary release was ordered upon the payment of bail – of which nine (8.1%) cases bail was established as a precautionary measure, and in four cases (3.6%), bail was combined with other alternative measures –; and, finally, in six cases (5.4%) the arrest was abated. Out of this same total of cases analyzed (110), there were 10 persons who were temporarily released and were referred to CEAPIS.

Graph 3 : São Paulo - IDDD's monitoring



16 Considering the extension and the depth of the data survey instrument utilized by the IDDD, as well as in view of time constraints of a single researcher, the sample of the Institute's research represents about 10% of the total hearings held in the period. This sampling has been compiled with the cooperation of a researcher from the Getúlio Vargas Foundation, Professor Maíra Machado.

17 "De Braços Abertos" program, which promotes the social rescue of crack users, which provides remunerated work, food and shelter.

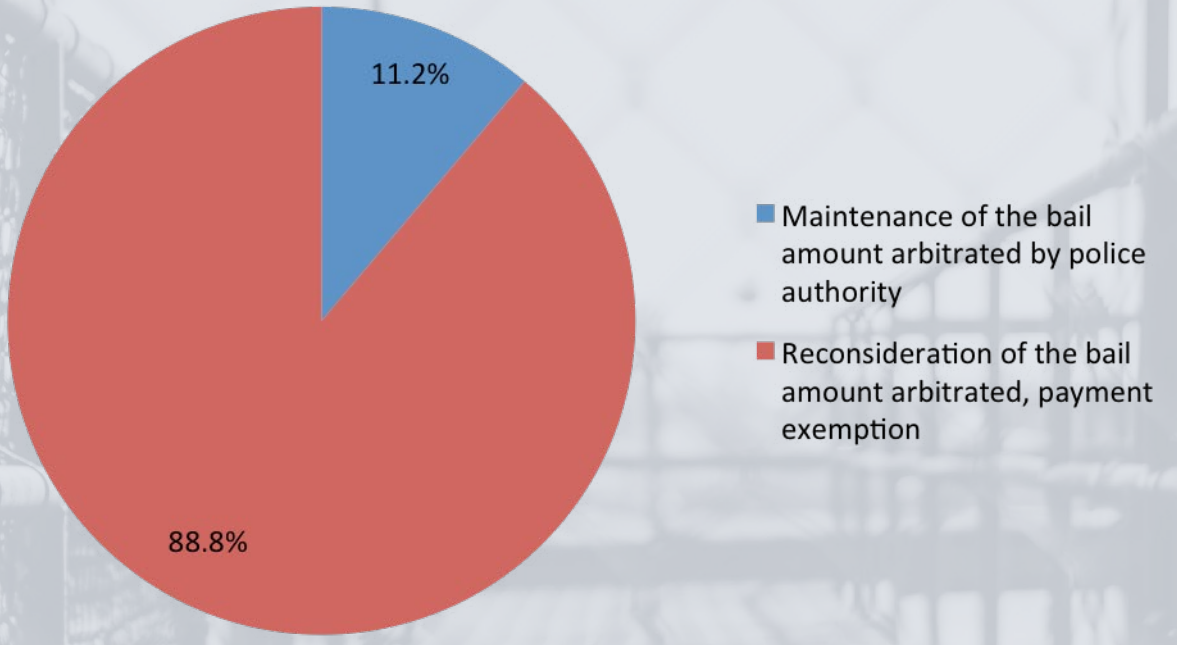
18 Until May 11, in all cases where release was ordered without the determination of bail, there was imposition of another precautionary measure, which we will discuss further.

Out of the 37 cases (33.6% of the total hearings monitored) where temporary release was granted and, next, preventive measures alternative to detention were applied (in this approach based on the number of cases in which the bail amount was determined, and stressing that there may be cases in which more than one precautionary measure was simultaneously applied), the most recurring requirement was the appearance before the court, which came up in 55.8% of these decisions (in other words, 19% of the total hearings observed).

We also identified the recurring application of the measures imposing nighttime confinement and prohibition from attending certain locations, always combined with the obligation to appear in court. Thus, it was noted that in four cases (3.6% of the total hearings held) the three measures were combined, in five cases (4.5%) nighttime confinement and monthly appearance in court were applied, and in two cases (1.8%) the monthly appearance in court was combined with the prohibition to attend certain locations.

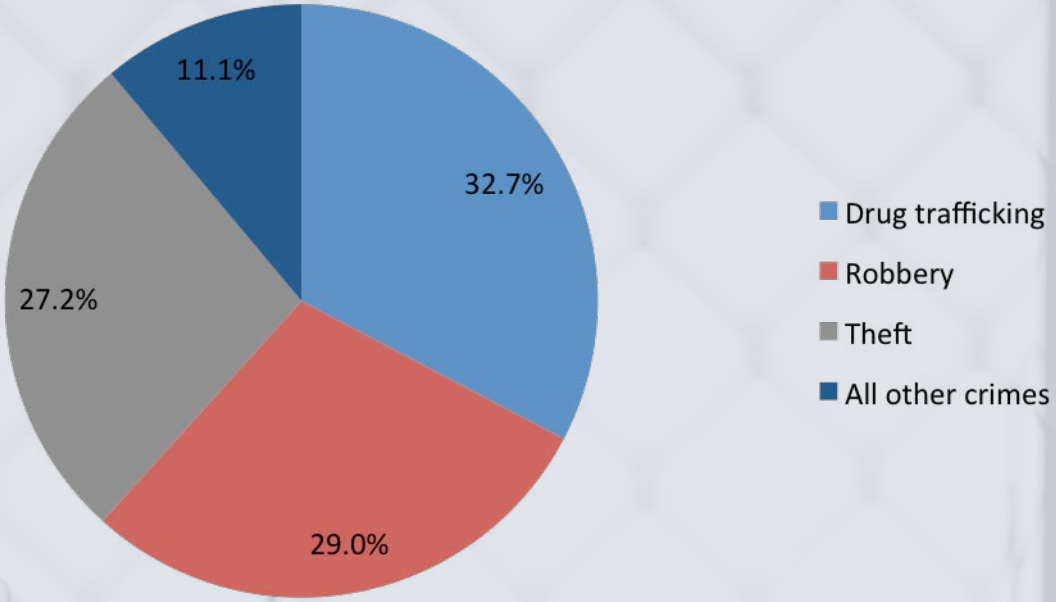
In the analysis of the chief of police work when drafting the records of the arrest, we were able to verify that bail was set by the police authority in nine (8.1%) of the 110 cases observed[19]. For eight of them (88.8%), the amount determined was reviewed during a court hearing for incapacity of payment of the investigated, also to include the exemption of payment and the application of another alternative preventive measure:

Graph 4: Maintenance or modification of the bail amount



19 It is important to note that only in this case of bail determination by the chief of police and its non-payment the detainee had to be present in the custody hearing. If the bail set is paid at the police precinct, the detainee is immediately released and, consequently, there is no custody hearing. Hence, according to the methodology followed in this survey, the IDDD does not have access to the total number of cases in which bail was determined at the Police Precinct.

Graph 5: Types of crime



In the review made by types of crimes, we observed, as demonstrated in figure 5, we noted that 32.7% of the cases monitored by the IDDD referred to drug trafficking, 29% to robbery, 27.2% to theft and another 11.1% referred to all other crimes (receipt of stolen goods, drunk driving, use of forged ID, etc.).

Also, it is interesting to note that a survey conducted in 2011[20]–therefore before Law 12.403 came into effect – demonstrated that the rate of people accused of drug trafficking who were freed pending trial was of 11.3%. Today, the data provided by the Court of Appeals of the State of São Paulo indicate a significant increase of this figure after the custody hearings were introduced, whether because detainees were temporarily released or because there was abatement of flagrante delicto arrest. From February 24 to June 30, 23.5% temporary releases or abatement of the arrests and release were ordered for cases of drug trafficking.

The data already gathered by the IDDD also point out to the relevance of the recidivism in court decisions to review the legality of and need for pre-trialt detention. Indeed, in 74.4% of the cases where there was mention to recidivism, the flagrante delicto arrest was converted into pretrial detention[21]. In relation to criminal records (cases where the detainee is facing other charges, but has not yet been convicted), there was conversion of the arrest into pretrial detention in 63% of the cases where these circumstances were mentioned; for comparison, 43% of the flagrante delicto arrests that involved non-offenders were converted into pretrial detention, in an unequivocal demonstration that criminal records are taken into consideration at the moment of analyzing the need for the extreme measure of temporary detention, thereby detracting from the meaning of the constitutional principle of the presumption of innocence, to the extent that these other cases are still proceeding.

Another argument repeatedly mentioned to justify the conversion of the arrest into pretrial detention is the abstract severity of the crime; considering that it is reflected in the result of 89.6% of the conversions for robbery.

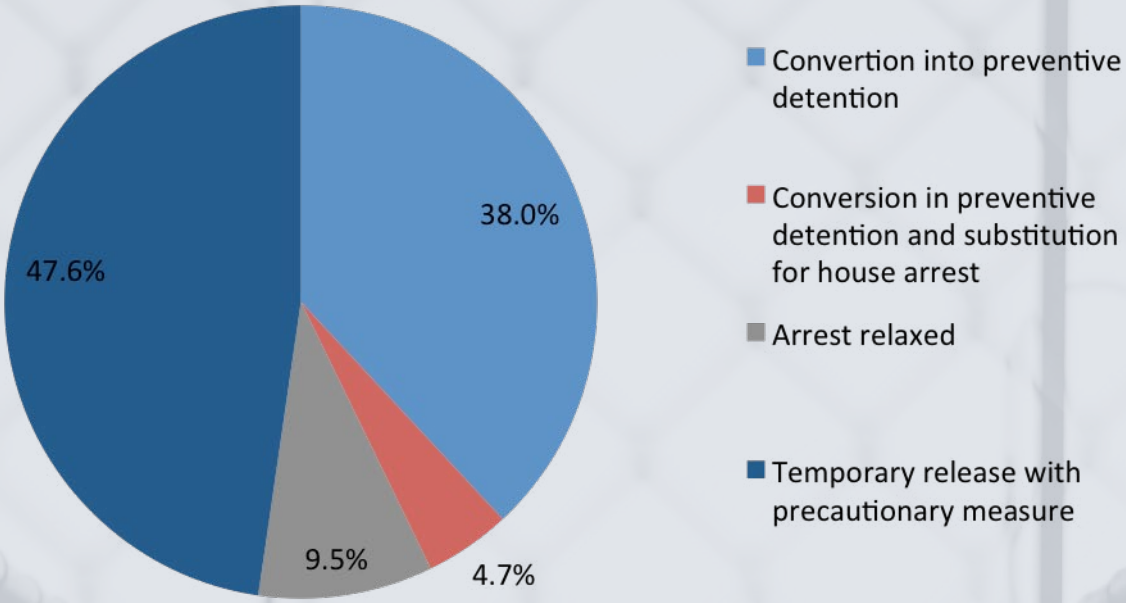
In relation to drug abuse, 36 of the 110 detainees declared to be addicted to some sort of drug, especially crack (24 detainees or 66% of those who declared to be addicted). Also in this regard, it is worthy pointing out that of the 36 cases mentioned above, 14 of them (38.8%) referred to drug trafficking; the other 22 cases (61.1%) referred to property crimes (theft, robbery and reception of stolen goods). At last, it is appropriate to emphasize that, although there were 36 spontaneous declarations of issues related to drug use, only 18 individuals were released and, of these 18, only eight were forwarded to CEAPIS for treatment or psychosocial assistance.

There were 21 cases, among the 110 analyzed, where the custody hearing allowed the identification of some peculiarity related to the personal condition of the detainee (or of some dependent), such as pregnancy, breastfeeding period, psychiatric disorders, chronic illnesses, etc. The judge would have possibly have never received this information had it not been for the personal appearance of the detainee at the hearing. Out of these 21 cases, in eight (38%) the flagrante delicto arrest was converted into pretrial detention, in one (4.7%) the arrest was converted into home confinement (a woman with a newborn child), in two (9.5%) the flagrante delicto arrest was abated and the detainee was discharged and, at last, in 10 cases (47.6%) a temporary release was ordered with the imposition of some preventive measure.

20 Prisão provisória e Lei de Drogas – um estudo sobre os flagrantes de tráfico de drogas na cidade de São Paulo, available from http://www.nevusp.org/downloads/down254.pdf

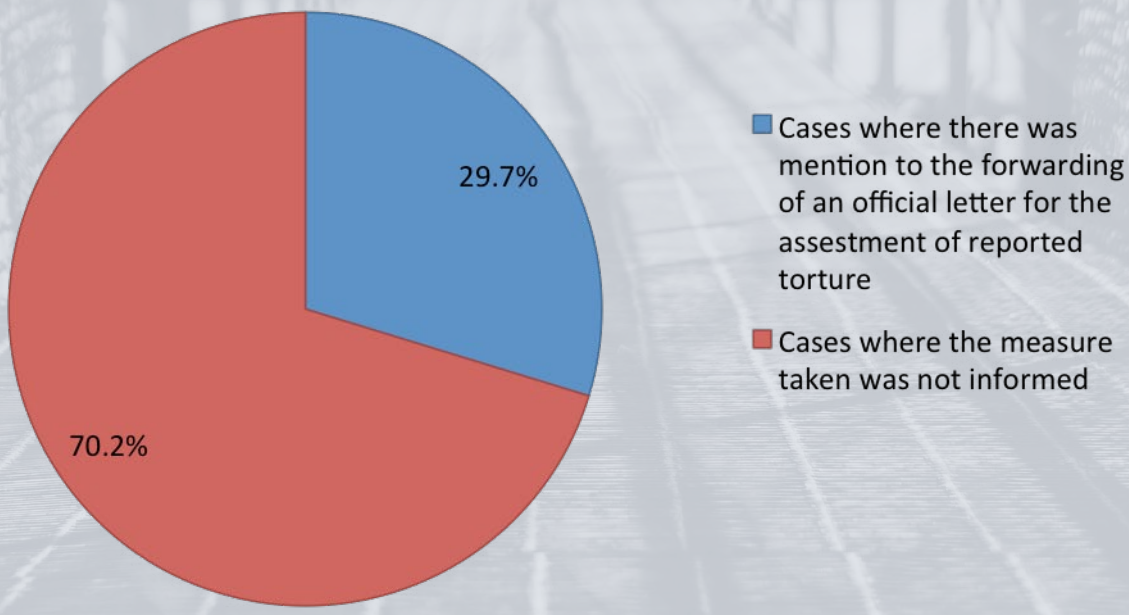
21 Many judges use as grounds for their decision to issue arrest orders based on the past time the detainee has spent at Fundação Casa, the Juvenile Detention System - which is blatantly illegal - which equates a misdemeanor to a criminal offense.

Graph 6: Cases with peculiarities related to personal circumstances



Finally, in terms of torture, it was verified that, of the cases analyzed by the IDDD, 47 persons (42.7%) admitted they had suffered some form of abuse by the police; there are reports of moral and physical injuries, some of them evident in visible bruises. It is appropriate to note that, of the 47 reports, in 22 the aggression suffered by the detainee was prominent and menacing, like a broken nose or arm, black eyes, cuts, etc., but in only eight of these cases did the judge mention sending an official letter to DIPO 5 – responsible for opening a torture investigation –, and in the other 14 cases, no answer was received. In addition to these eight cases, in another six the judge stated he might send an official letter to DIPO 5, as such, totaling 14 (29.7%) of 47 reports of some form of aggression. In the other 33 cases (70.2%), the disposition made was not informed.

Graph 7: Forwarding of torture reports



4. Conclusion

The change in criminal procedure brought by the introduction of custody hearings – which will be endorsed in the future by Federal Law – allows the immediate assessment and investigation of abuse and torture by the police, in addition to facilitating a much more precise analysis by the judge about the legality of and need for the pre-trial detention of the accused.

The personal contact, as a rule, guarantees enhanced awareness of the magistrate, who is then confronted with the socioeconomic reality of a large part of those arrested in flagrante delicto. This personal contact, added to a closer analysis of the case in the presence of the parties, reflects as a larger number of abatement of illegal arrests and orders for conditional release.

As if all of this were not enough, the custody hearing allows the immediate diagnosis and investigation of any reports of torture or abuse by police, which are regretfully part of the daily routine of criminal cases in Brazil.

This is why the IDDD, in addition to supporting and contributing to the pilot project of custody hearings conceived in partnership with the National Justice Council and the Ministry of Justice, expects and works for the passing of Bill of Law No. 554/2011 by the Federal Senate.

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