



CADHu

Contact information:

CADHu: Eloísa Machado (elo.machado@gmail.com), Bruna Angotti (angotti.bruna@gmail.com),
Nathalie Fragoso (nathalie.fragoso@gmail.com)

Instituto de Defesa do Direito de Defesa: Marina Dias, Executive Director
(marina.dias@iddd.org.br); Nathalie Fragoso, Lawyer (nathalie.fragoso@iddd.org.br); Amanda Oi,
General Coordinator (amanda@iddd.org.br)

The Coletivo de Advocacia em Direitos Humanos- CADHu¹ and the Instituto de Defesa do Direito de Defesa²- IDDD hereby submit information on women deprived of liberty in Brazil, in response to the call for submissions of the Working Group on discrimination against women.

This document addresses the main causes for deprivation of liberty of women in Brazil; general information regarding the female incarcerated population; the human rights violations experienced by women in the prison system; the last developments in law and practice on the issue - which result from the mobilization of civil society actors; and, finally, the main challenges within the country. Given the expertise of the organizations, the document focuses on the justice system, answering the questions posed in the Working Group's *questionnaire*.

¹ Collective of Lawyers for Human Rights

² Institute for Defense of the Right to Defense



CADHu

1. OVERVIEW: INCARCERATION OF WOMEN IN BRAZIL	3
2. CHALLENGING THE SYSTEMATIC PRE-TRIAL DETENTION OF WOMEN IN BRAZIL	5
3. ACCESS TO INFORMATION	9
4. INEFFECTIVENESS OF GUARANTEES AND JUDICIAL RESISTANCE	10
5. RECOMMENDATIONS	11



1. OVERVIEW: INCARCERATION OF WOMEN IN BRAZIL

According to the most recent data gathered by the Ministry of Justice³, in June 2016, there were 42,355 women imprisoned in Brazil; in the first half of that year, 18,274 women entered the prison system, which has an average occupancy rate of 197.4%. The database also records the existence of 563 pregnant women, 357 lactating women and 1803 children, living in the prison due to the deprivation of liberty of their mothers.

Women, predominantly young, black, mothers and responsible for the provision of family support, were sent to jail, in their overwhelming majority, because of their, typically subaltern and vulnerable, involvement in drug trafficking (62% of the incarcerated women). The women arrested for drug trafficking are predominantly involved in peripheral, subsidiary and vulnerable activities. The typical circumstances of detention endorses this assessment: according to the survey⁴ on the *in flagrante* arrests conducted by the Núcleo de Estudos da Violência of the University of São Paulo - USP, in the years 2010 and 2011, in 77% of the cases the women involved in trafficking were approached and arrested by the military police and in 11% of the cases, by the prison staff during the invasive body search before visitations. In almost all of the cases in the aforementioned survey, the arrests were converted into pre-trial detention and only 14% of the women waited for trial in freedom. The pre-trial detention of women in Brazil, with its dire consequences, is not exceptional: pre-trial detainees account for 45%⁵ of the female prison population.

The women who are criminalized have low schooling, come from economically disadvantaged social strata and, before prison, performed work activities in the informal market. The involvement of women in drug use and trafficking reflects their shortfall in economic opportunity and political status. When they engage in illegal activities, they are relegated to the same vulnerable positions that paved the way for this involvement. When they are charged and prosecuted, they face a judicial system that

³ Available under the link: http://depen.gov.br/DEPEN/depen/sisdepen/infopen-mulheres/infopenmulheres_arte_07-03-18.pdf

⁴ Prisão Provisória e Lei de Drogas (NEV-USP), 2011; JESUS, Maria Gorete; CARVALHO, Denise. Mulheres e o tráfico de drogas: um retrato das ocorrências de flagrante na cidade de São Paulo. Revista LEVS, Marília, 2012, p. 188-203.

⁵ Available under the link: http://depen.gov.br/DEPEN/depen/sisdepen/infopen-mulheres/infopenmulheres_arte_07-03-18.pdf



CADHu

discredits their testimonies and apply penalties or precautionary measures that neglect their particular conditions as women.

In a context marked by significant increase in female incarceration due to drug related crimes, to the extent that this is the cause for the confinement of 62% of the women deprived of liberty,⁶ it must be recognized that harsh criminal laws on trafficking, the high penalties and the fact that it is considered a heinous crime in Brazil and also the selective enforcement of public safety policies impact women disproportionately. Adding to this, the precariousness of prison facilities, their inadequacy to women's needs⁷ and to the exercise of their reproductive rights compose a discriminatory criminal policy because of its disproportionate impact on women. Especially disproportionate, in fact, on black women, who make up 62% of the national female prison population and more than 90% in states like Maranhão, Acre, Piauí and Tocantins.

With respect to pregnant women, the synthesis of the conditions to which they are subjected makes every pregnancy experienced in jail in risky one. In addition to the failure to provide a comfortable environment, adequate nutrition and other conditioning factors for a healthy gestational development, they experience the deprivation of regular prenatal care, of access to laboratorial exams, to services that would allow the monitoring of the fetal development, the identification, treatment and prevention of disease transmission. According to official information, there are only 28 gynecologists throughout the national prison system.⁸ It is worth noting that these deprivations are experienced in an infectious environment, which facilitates the spread of diseases and, despite the limited diagnostic capacity, is known to have a much higher incidence of HIV, tuberculosis and other diseases than among the general population.

Negligence, lack of infrastructure and personnel for the assistance of pregnant women in labor characterize the next chapter of the maternity in prison. The staff shortage prevents teams from responding to the emergencies; the pregnant women experience subjection, loneliness and alienation of the decisions related to childbirth. As an epitome of perversity, there are still births that occur in prisons and cases of women subjected to the use of handcuffs during labor - already prohibited by the

⁶ Available under the link: http://depen.gov.br/DEPEN/depen/sisdepen/infopen-mulheres/infopenmulheres_arte_07-03-18.pdf

⁷ https://carceropolis.org.br/dados/materno_infantil/

⁸ <https://carceropolis.org.br/dados/#materno-infantil>



CADHu

law 13.434/2017⁹, recently approved due to the mobilization of the civil society organizations of the Criminal Justice Network.

There is also no structure or personnel to attend to the puerperium. The minimum period of six months, established as a guarantee of conviviality between mothers and children and breastfeeding, is often disrespected or converted into maximum time. If there is the possibility of staying with the children, the mothers are subjected to a regime of isolation and discipline. For children, approximately 1803 of them according to official data, most of them in early childhood, this implies deprivation of liberty and subjection to insalubrity, insecurity; difficulties to access health services; deprivation of community life and lack of proper environmental conditions for their development. When their time with their mothers is over, an abrupt separation is imposed. Next, the families are called for taking care of the children. If the attempts to contact family are unsuccessful, the children are institutionalized and, often, the outcome is the destitution of the family power and the permanent rupture of the maternal-filial bond.¹⁰

Furthermore, as one of the perpetuating factors of this situation, there is a lack of access to justice. In addition to economic obstacles, the effective access to justice is also modulated by social and cultural factors. In Brazil, even with the establishment of a public institution for the defense and systematic promotion of the interests of poor people, its insufficient reach is still evident. There is insufficient contact with lawyers or public defenders and the women often do not have the opportunity to defend themselves in the judicial proceedings about guardianship and family power. In Brazil, the women face criminal justice with mistrust.

2. CHALLENGING THE SYSTEMATIC PRE-TRIAL DETENTION OF WOMEN IN BRAZIL

In Brazil, according to the Federal Constitution, the imprisonment before the final conviction must be exceptional. The law requires that the judiciary authority considers and applies, preferably, non-custodial measures. Even in cases where the pre-trial detention is applicable, since the Law

⁹ Available under the link: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2017/Lei/L13434.htm

¹⁰ BRAGA, Ana Gabriela Mendes; ANGOTTI, Bruna. Dar à luz na sombra: condições atuais e futuras de exercício de maternidade nas prisões. 2014.



CADHu

13.257/2016 was approved, there is the possibility of replacing jail by house arrest, for pregnant women and mothers. However, the exceptionality of pre-trial detention has not yet imposed itself in the criminal justice system.

When imposed upon women, the pre-trial detention - to be served in the above-mentioned detention centers - besides the deprivation of liberty, deprives women of their right to exercise their sexual and reproductive rights in a safe, healthy way and free of discrimination, coercion, violence. The deprivation of liberty in such degrading conditions, because it creates and increases the risk to their lives and the lives of their children, is, in itself, not permitted by law.

Therefore, in 2017 CADHu filed a collective *Habeas Corpus* - a type of class action - requesting the revocation of the pre-trial detention orders on behalf of all women who were pregnant and/or were mothers of children up to 12 years of age. The IDDD acted as *amicus curiae* in the case. On February 20, 2018, the 2nd Panel of the Supreme Court (STF) granted the collective *habeas corpus* 143.641¹¹ (HC), in favor of all women submitted to pre-trial detention in the national prison system, who are pregnant or are mothers of children under 12 years of age and of the children themselves. The order was extended to adolescents who were serving socio-educational measures as well as mothers of children with disabilities. Women accused of violent crimes or crimes against their children or still in extremely exceptional situations, which should be duly justified by the judges who deny the benefit, were excepted.¹²

It was the first time that the Supreme Court accepted a collective *habeas corpus*. The Ministers of the Second Panel (Ricardo Lewandowski, Dias Toffoli, Gilmar Mendes, Celso de Mello and Edson Fachin) unanimously understood that collective violations of human rights demand collective response. In situations where human rights violations are collectivized, the remedy - *habeas corpus* - must also be collective. By arguing that a community, although not individually nominated, may be the beneficiary of a *Habeas Corpus*, the court has opened the precedent so that other endangered collectivities can claim judicial protection.

¹¹ Available under the link: <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5183497>

¹² Available under the link:

http://www2.stf.jus.br/portalStfInternacional/cms/destaquesClipping.php?sigla=portalStfDestaque_en_us&idConteudo=370322; <https://www.hrw.org/news/2018/02/23/pregnant-women-will-no-longer-await-trial-brazilian-jails>.



CADHu

The Second Panel also acknowledged that there is an abuse of pre-trial detention and a judicial resistance to apply the aforementioned law 13.257/2016, the Early Childhood Act, which has promoted changes to allow pregnant women or mothers of children up to 12 to serve house arrest instead of pre-trial detention, in case the latter is applicable. According to the Second Panel of Supreme Court, the legislation must be applied equally to all women, guaranteeing the rights not only for mothers, but also for children, who need to live and grow in a free and healthy environment.

The reporting justice's opinion made it clear that the Supreme Court is not only aware of the violations perpetrated in national prison system, in this case specifically against women, but also made a commitment to guide the judiciary system in the compliance with the laws that regulate the matter. The judges' failure to comply with them, especially in relation to the pre-trial detention of pregnant women and mothers of children up to 12 years of age, was the subject of the ruling granted by the Habeas Corpus filed by CADHu.

After approximately six months of the decision, we still face the judicial resistance to accept the exceptionality of the pre-trial detention and to comply with the Early Childhood Act, which was the main reason to file the Habeas Corpus 143.641. In São Paulo, according to information provided by the Penitentiary Administration Office in August 2018, 1.229 women left jail due to the order of *habeas corpus*. There are, however, 1.325 women still imprisoned who would be eligible for the replacement of pre-trial detention by house arrest. The State Court also stated that there is no control over the arrests determined after the decision of HC 143.641, given the diffuse nature of the assessment of these cases in the custody hearings.

In Rio de Janeiro, according to the Penitentiary Administration Office, there are 1.926 women under detention, of whom 217 would be eligible for home arrest. Although the data on the percentage of mothers and pregnant women appear to be undersized, it is crucial to note that only 56 were released due to the *Habeas Corpus* 143.641. The State Court, in turn, informed that then the Penitentiary Administration Office had not informed the Court of the people who could benefit from *Habeas Corpus* 143.641.

In Pernambuco, the State Department of Human Rights informed that there were 111 women inmates who would be eligible for to the replacement and that only 47 had been released since February. According to National Penitentiary Department - DEPEN, on May 2, 2018, there were 19,223 women



CADHu

under pre-trial detention in Brazil, of which 10.693 were eligible for house arrest, according to the criteria formulated by the Supreme Court. The office also reported the substitution in only 426 cases.

Within the Mães Livres¹³ Taskforce, since November 2017, IDDD, in addition to requesting the release or substitution of pre-trial detention for house arrest on behalf of women deprived of liberty in a specific detention center in São Paulo, has monitored the adherence to the terms of the decision reached in the Habeas Corpus 143.641. IDDD has been collecting data and systematizing information about the performance of the São Paulo justice system in the fulfillment of the decision. In the evaluation of the specific decisions, it was noticed that, although varied, the judicial authorities have been denying the substitution in a regular and still impregnated of gender biases way.

The judges have been accumulating arguments to extend the category "extremely exceptional situation", provided for in the decision as a possibility of prison maintenance, and to deconstruct the scope of the order. They have been imposing upon arrested women the burden of proof on the existence of children, guardianship, the (in)availability of people for the care of their children and even their "indispensability", stripping their testimony of credibility. They have been presenting inadmissible reasons, under the terms of the Brazilian criminal procedural law and the decision reached in Habeas Corpus 143.641, as the abstract gravity of the offense charged. They have been questioning the aptitude of criminalized women to motherhood, especially the women charged with drug-related crimes, when purpose of the mentioned law is exactly to support the motherhood of women in this specific situation of vulnerability. Finally, they insist on the need to prove the inadequacy of the specific prison environment, when the calamity is systematic and the human rights violations are widespread.

In Brazil, drug offenses cannot be subsumed under the category of exceptionality: women - predominantly young, black, mothers and responsible for the provision of family support - are sent to jail in their expressive majority for their involvement, typically subaltern and vulnerable, in drug trafficking - 62% of the incarcerated women. This is the picture of the female incarceration in Brazil: the women are predominantly involved in peripheral, subsidiary and vulnerable activities and their involvement reflects their shortfall in economic opportunity and political status.

¹³ Free mothers.



CADHu

Thus, it is possible to conclude that the Judiciary resists changing its decision-making pattern, even after the approval of a law and a decision of the Supreme Court.

3.ACCESS TO INFORMATION

One of the main challenges to the Supreme Court in hearing the Habeas Corpus 143641 was the lack of updated data on the women in pre-trial detention in Brazil. The reporting Justice, Minister Ricardo Lewandowski, requested a list of these women to the National Penitentiary Department. At the time, it was proved impossible, due to the lack of up-to-date and quality data about the national prison population, especially pre-trial detainees¹⁴. With regard to pregnant women and women with children, the registry was even more flawed and there was no systematic information at that time.

This is in itself worrying. This is a collectivity of people selected and constituted by the Brazilian State and its authorities; after all, for every woman in custody, there is an arrest warrant issued by a judicial authority. The naming of the members of this group is a responsibility of the State and the concealment of these data ends up burdening women and shielding the authorities, especially in a context of deficient access to justice.

Despite the failure to produce official data on the prison system - either by the lack of cooperation of some states in passing them in time to the National Penitentiary System or by not investing in a constantly fed database, the National Penitentiary Department has been now trying to present data and enable the implementation of the *Habeas Corpus*'s decision.

In addition, the recent launch of the National Prison Monitoring Database (BNMP 2.0), a unified information system on people in the Brazilian prison system, has been widely reported to have current and comprehensive information about people deprived of liberty. This database is under the control of the National Council of Justice. The system, as reported, would allow monitoring by the judicial authorities and was designed precisely to enable responses in collective cases. The system puts the National Council of Justice in conditions to exercise control over the new arrests and could enable a proficient dialogue in order to consolidate the parameters established in *habeas corpus* 143.641.

¹⁴ <https://diplomatie.org.br/quem-sabe-quantos-presos-tem-no-brasil/>



CADHu

The Database, however, has not yet been employed for the announced purposes. The data is not accessible to civil society, which continues to litigate in the dark on behalf of incarcerated women.

4. INEFFECTIVENESS OF GUARANTEES AND JUDICIAL RESISTANCE

Thus, in the scope of mentioned issues, but also in general, the persistent challenge is to guarantee the effectiveness of the laws and decisions already reached and promote the desincarceration of women in Brazil, that is, to remove Brazilian women from the dungeons, in which they were placed, and avoid the high social costs of female incarceration. Another challenge is the resistance of the justice system to comply with the legislation. At this point, CADHu and IDDD have recently filed a request before the Supreme Court, to address the problem of judicial discretion on this issue.

In conclusion, the prison question at its intersection with gender relations, that is, the female prison issue, reveals systematic human rights violations. The female incarceration is marked by penalties and precautionary measures that greatly outweigh the deprivation of liberty. They reach the health and often the lives of imprisoned women and their sons and daughters. In this context, the imprisonment, especially the pre-trial detention of women constitutes inhuman, cruel and degrading treatment and finds in the human rights treaties and in the Constitution a clear obstacle to their perpetuation. Its effectiveness, however, has found in part of the Brazilian judicial authorities an obstacle too.



CADHu

5. RECOMMENDATIONS

1. The State should enable a monitoring system applied to all detention facilities, also allowing the monitoring by ombudspersons, national human rights mechanisms and monitoring bodies. Furthermore, it is important that transparency and accountability, concerning the prison system is ensured.
2. The State should review its policies on visiting, in order to promote the contact of the women in prison with their children and relatives and avoid the rupture of family ties. For that matter, the State shall prohibit the invasive body searches.
3. Women deprived of liberty should be granted effective access to legal counsel.
4. Many women in prison are primary carers for children or others, whose welfare is adversely affected by their imprisonment. It is also axiomatic that babies should not be born in prison. Then, desincarceration should be a priority in Brazil and non-custodial measures, applied in compliance with safeguards, should be prioritized.
5. Insofar as women deprived of their liberty are concerned, any ante and post-natal care provided in custody should be equivalent to that available in the outside community. It is also essential that the health care provided to persons deprived of their liberty be of a standard equivalent to that enjoyed outside prison. The principle of equivalence of care shall be respected and this requires that healthcare is to be provided by practitioners and nurses who have specific training in women's health issues and that a woman's right to bodily integrity should be respected in places of detention as in the outside community.