

The Brazilian Framework on Asset Recovery: ITS Strengths and Weaknesses

Marcelo Zenkner¹ & Américo Bedê Jr.²

"As long as we live in a world where a philosophy of sovereignty from the 17th century is reinforced by a judicial model of the 18th century, defended by a concept of combatting crime from the 19th century that is still trying to come to terms with the technology of the 20th century, the 21st century will belong to transnational criminals." ROBINSON, Jeffrey. *The Globalization of Crime*. Rio de Janeiro: Ediouro, 2001

1. Introductory Notes

Combating organized crime is not a task for amateurs. The agents of the State, no-matter how well-meaning they are, need both agile and effective instruments that provide for the respecting of human rights, so as to act in combating an activity that already claims thousands of lives daily. Increasingly, there is a concern in the sense that the solution for this type of crime should not be left in the hands of a single hero: it is fundamentally essential to the existence of institutions to be sufficiently empowered with instruments having the capacity to cope with these well equipped criminal organizations. One of the most effective strategies — and offering less risk of loss to human life — is exactly the blocking (or freezing) and the recovering of assets obtained by the constituents of these organizations. That is because, the State's chances of eliminating these criminal cells greatly increases if the financial capacity of these organizations is effectively extinguished. It is obvious that, at the same time, this equivalent like strategy still lends itself to the idea that the State can recover the billions of dollars or euros that were improperly removed from the economy of the country.

In this sense, it is increasingly important to demonstrate, not only international cooperation and the combined joint activities of the various and diverse organs in control for the prevention and suppression of all illicitness occurring in the international transfers of assets, especially by tax havens³, but also to study Brazilian legislation concerning the blocking(freezing) of goods and the recovery of assets, as well as to conduct a brief analysis of both the positive and negative points of the Brazilian legislation involved in these areas.

2. The current legislation on the management and destination of seized and confiscated assets

Only at the end of the decade of the 1990s did Brazil establish the crime of money laundering. The law as it originated was much criticized, not just for possessing a definitive list of antecedent crimes, but also for generating doubts about the possibility of the application of the "Willful Blindness Doctrine". In any case, Federal Law No. 9613, 1998, had the virtue of acting in three different areas, as highlighted by Badaro and Botinni⁴:

¹Master in Fundamental Constitutional Rights and Guarantees from FDV-Faculdade de Direito de Vitória (Brazil) and Doctorate from Nova University of Lisbon (Portugal). Professor of Civil Procedural Law at FDV. Prosecutor of Espírito Santo State (licensed). Secretary of State for Comptroll and Transparency – Espírito Santo State (Brazil).

²Doctor and Master in Fundamental Constitutional Rights and Guarantees from FDV-Faculdade de Direito de Vitória (Brazil). Professor of the postgraduate program in Fundamental Rights Strictly Specialized at FDV. Federal Judge of the 2nd Federal Criminal Court (Vitória, Brazil) specializing in fight against organized crime.

³Curious to note that most of these "tax havens" are situated in the archipelagos, as in the stories of the pirates who hid the fruit of the chaff in isolated islands.

⁴BADARO, Gustavo Henrique; Pierpaolo Cruz BOTTINI. *Money Laundering*. São Paulo: Publisher RT, 2012, p. 36.

"Containing dispositive devices related to the administrative control of sensitive sectors where it is most often found to exist the practice of money laundering (administrative aspect), with the appointment of individuals and private entities who and which must collaborate with the surveillance and identification of criminal practices, the rules applicable to them, sanctions and the public bodies responsible for organizing the intelligence area (organization and systemization of data and information on acts and processes of money laundering). Introducing, still, standards dealing with crimes and punishments related to the crime in question (substantive criminal aspect) and, finally, dispositive devices with the rules of criminal procedure, with reference to provisional remedies offering precautionary measures, probative evidence and other legal institutions related to criminal prosecution (criminal procedural aspect)."

A key point of the Brazilian law was the creation of COAF – the Financial Activities Control Council – which, among its several functions, shall receive, examine, and identify suspected occurrences of illicit activities, pursuant to Art. 1 of Law No. 9.613/1998, and also shall decide on any infractions and apply those administrative penalties as provided for in Art. 12 of the same law, as to the persons referred to in Art. 9, for which there is no properly existent watchdog organizational body.

Also featured, within this context, is the National Strategy to Combat Corruption and Money Laundering (ENCCLA), which, over the years, has been developing several projects with some most effective results in combating the crime of money laundering and corruption. As per its Internet Web site⁵, the ENCCLA was established in 2003, at the initiative of the Ministry of Justice, as a means of contributing to the systematic combat of money laundering in the country. Consisting of the articulation of various organs of the three powers of the Republic, the Public Ministries and the civil society, which are all engaged to operate, directly or indirectly, in the prevention and fight against corruption and money laundering, with the objective to identify and propose perfected improvement.

Currently, about 60 agencies and entities are part of the ENCCLA, such as prosecutors, police institutions, the judiciary, the Comptroller General of the Union (CGU), the Federal Auditors of Brazil (TCU), the Internal Revenue Service of Brazil, the Brazilian Securities Commission (CVM), the Financial Activities Control Council (COAF), the National Council of Internal Comptroll (CONACI), the Central Bank of Brazil (BACEN), the Brazilian Intelligence Agency (ABIN), the Attorney General of the Union (AGU), the Brazilian Federation of Banks (FEBRABAN), among others.

The ENCCLA currently works in the following manner:

- Realization of an annual Plenary Meeting, of all participating organs, with the objective to discuss the work accomplished over the past year and to deliberate the actions to be achieved in the subsequent year(s);
- Realization of diverse meetings of the Working Groups, formed by the participating organs or invitees, with the objective to execute the performance of the deliberate actions by the Plenary;
- Realization of bimonthly meetings of the Cabinet of Integrated Management-GGI, which consists of a group of 25 participating organs of the ENCCLA, with the objective to monitor the implementation of the actions, as well as to propose actions and recommendations to be discussed at Plenary Meetings.

To strengthen international legal cooperation and the recovery of assets, the Federal Decree No. 4991, of 2004, created the Department of Asset Recovery and International Legal Cooperation (DRCI), linked to the Brazilian Ministry of Justice, with the following tasks (Art. 13):

- a) articulate, integrate, and propose actions of the Government in aspects related to the combat against money laundering, transnational organized crime, assets recovery, and international legal cooperation;
- b) promote the articulation of the organs of the executive, legislative, and judicial branches, including the Department of Justice of the Federal and State Public Ministries, as regards the fight against money laundering and transnational organized crime;
- c) negotiate agreements and coordinate the implementation of international legal cooperation;
- d) exert the function of a central authority for the processing of requests for international legal cooperation;
- e) Instruct, opine, and coordinate the implementation of international legal cooperation, either active or passive, inclusive of Rogatory Letters.

⁵<http://enccla.camara.leg.br/quem-somos>

Here it is worth remembering that, "In questions of international cooperation, when dual incrimination is a requisite, this will be considered to be fulfilled if the conduct constituting the offense relative to which assistance is requested is an offense under the legislation of both the Participating States, independent of whether the laws of the petitioning Participating State include the offense within the same category or term with the same terminology as the defending Participating State." (Art.43 of the Mérida Convention).

Maybe for this reason, that is why, in the year 2012, Brazilian law as to the enforcement of the crime of money laundering was profoundly altered by Federal Law No. 12683, which brought legislation into a contemporary context, making it more simple and effective as to the characterization of this species of crime by eliminating the list of antecedent crimes by classification.

Thus, in its new composition, the Brazilian Money-Laundering Law was passed to provide as follows:

Art.4. The judge, in office, upon application of the Public Prosecuting Attorney of the Department of Justice or upon by representation of the Marshall/Chief of Police, having heard the prosecution in 24 (twenty four) hours, and that there is sufficient evidence of criminal infraction, may enact procedural measures for the assurance of goods, rights, or values of those investigated or charged, or existing in the name of the person interposed, which are the instrument, proceeds or fruit of the crimes as provided for in this law or in antecedent criminal infractions.

§ 1stProceeding early on for an accelerated alienation or transference to preserve the value of the assets whenever they could be or are subject to any degree of deterioration or depreciation or when there is difficulty in maintaining same.

§ 2ndThe judge will determine the total or partial release of the assets, rights, and values upon when the legality of its origin has been proven, maintaining the constriction of assets, rights, and values, necessary and sufficient to redress the damage and the payment of monetary benefits, fines and costs arising from criminal infraction.

§ 3rdAny request for release shall be recognized without the personal attendance of the accused or an intermediary referred to in the head of this article, and the judge shall determine the exercised practice of acts necessary for the preservation of assets, rights, or values, without prejudice to those provisions of §1.

§ 4thAccelerated alienation or transference measures may be imposed over assets, rights, or values for the compensation of damages resulting from the antecedent criminal infraction or as contemplated by this law or for the payment of pecuniary payments, fines, and costs. [...]

Art.7 Effects of a judgment of conviction, in addition to those provided for in the criminal code are as follows:

I. The loss, in favor of the Union and of the States, in cases of jurisdiction of the State courts, all assets, rights and values related, directly or indirectly, to the commission of the crimes as stipulated in this law, including those used to pay bail, except for the right of the aggrieved party or of a bona fide third party;

II. The interdiction in the exercise of a public office or function of any kind and of director, board member, administrative council, or management agency of legal persons as referred to in Art. 9, computed by twice the time of the imposed penal deprivation of liberty (custodial sentence).

§ 1stThe Union and the Member States, within the framework of its jurisdictional capacities, shall regulate the form of the disposal of assets, rights, and values whose loss has been declared, secured, with regard to the jurisdictional capacity of the Federal Court proceedings, for its utilization by federal agencies in charge of preventing, combatting, the prosecuting and the trial of the offenses envisioned by this Law, and the number of judicial proceedings or processes in the jurisdiction of the State Court, the preference of local bodies with the identical function.

§ 2nd The instruments of the crime without economic value whose loss in favor of the Union or the State is decreed will be cancelled or donated away for criminal storage or exhibition or to a public entity, should there exist any interest in their preservation.

To be highlighted from the legal text is a fundamental point: according to Brazilian law, the burden of proof of legality as to the original source of the assets belongs to the accused. Worth noting, that this does not imply the violation of any fundamental right, because the accused has the obligation to explain the origin of their heritage, that not being disproportionate or unjust to demand that (s)he explain to the authorities where these resources came from.

Another important reference is the creation, by the National Council of Justice (CNJ), of a national system of assets seized. The objective is to give a national overview of the issue, permitting the implementation of specific public policy for the allocation of those assets. Just to give you an idea of the amounts seized in Brazil, in 2001 the National Council of Justice recorded the following: From the updated data, of July 2011, the National Council of Justice measured, by the SNBA, that since the deployment of the system, the registration of R\$ 2,337,581,497.51 in assets was effectuated. Of this value, 0.23% was the subject of early alienation or transference, representing R\$ 5,330,351.89, and 1.85%, corresponding to R\$ 43,334,075.60, of which there was confiscation in favor of the Union and the States. In addition, 4.43% of these values, importing R\$ 103,452,804.44, occurring in the restitution of property, and 0.15%, i.e. R\$ 3,404,456.34, left to disappearance. The conclusion that is extracted from these data is that the high percentage, 93.35% of the seized goods, are still awaiting disposal, with a "defined or set" scenario, representing the expressive value of R\$ 2,182,059,809.24 under the responsibility of the judiciary.

Another important measure, non-criminal in nature, involves the rules set out in Federal Law No. 12846, of 2013 (*Brazilian Clean Companies Act-BCCA*). This legislation – a result of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Cooperation and Development (OCDE), of 1997, provides for the strict liability of legal persons whose employees are involved with corrupt practices. This same legislation provides for the application of administrative and judicial sanctions, including a fine which can vary between 0.1% to 20% of the gross revenues of the company in the financial year preceding the illicit practice, full restitution of benefits obtained illegally, confiscation of property, loss of rights or other values that are the fruits of that violation, suspension or partial prohibition of activities, and even compulsory dissolution of the legal entity.

The goal of the new Brazilian law to fight corruption is to force corrupting companies to implement within their corporate structures, an effective system of self-regulatory integrity (compliance), which is able to inhibit or, at least, mitigate the possibility of unlawful acts by its employees who have the capacity to corrupt public officials.

More recently, on October 16, 2015, a new law came into effect – Federal Law No. 13170 – which provides another possibility for the inalienability of assets in the Brazilian system. It offers for the blocking of rights or valuable goods as a result of a resolution of the United Nations (UN). The legal provision is as follows:

Art. 1 of this law provides for the inalienability of assets, valuable goods, and rights to possession or ownership and all other rights, real or personal, owned, directly or indirectly, of individuals or legal entities subject to this kind of sanction for resolutions of the UN Security Council-UNSC.

§ 1st Action contemplated under this law stems from the Act to incorporate into the national legal system, the UNSC resolution.

§ 2nd A declaration of the inalienability of goods, valuables, and rights will lead to the nullification of any acts of disposition, except as to the rights of a third party in good faith.

§ 3rd Resources declared inalienable may be partially released by the payment of personal expenditures necessary for the subsistence of the person concerned and his/her family, under the guarantee of individual rights ensured by the Federal Constitution or for compliance with the provisions as laid down in the UNSC resolutions.

§ 4th The provisions of this law can be used to meet the demands of international legal cooperation coming from other jurisdictions, in accordance with the national legislation in force.

3. The strengths and weaknesses of the asset recovery system

In Brazil, the existence of a national control of the seized assets is, without doubt, one of the strong points of the legal system. The magistrates possess functional independence in Brazil, but, on the other hand, it is very important that the destination of the seized property is unified and guaranteed to serve the public interest. The National Council of Justice (CNJ) is pledged to guaranteeing that this control is transparent and effective. It should be remembered that, in the corrective discipline periodically carried out by the Federal Circuit Courts in the Federal criminal courts, there is a specific item related to the verification of communication to the CNJ by the magistrate about the judicially seized goods, as well as if they were held as an accelerated alienation of those goods; and if they were given their intended destination under the terms of a central guidance.

Another aspect that deserves highlight is the existence of specialized courts in the repression of the crime of money laundering and the suppression of organized crime. This is crucial because from them, the magistrates acquire a degree of specialized expertise capable of establishing a differential in everyday activities, not least because, in this field, general knowledge is absolutely insufficient to achieve success in the response by the State.

In Brazil, the law allows for the forwarding of a request to breach banking confidentiality and to block assets abroad including to subsidize investigations of a non-criminal nature. This is because section 3 of Article 16 of Federal Law No. 8429, of 1992 ("Administrative Misconduct Law"), provides that, "Where appropriate, the request will include the investigation, the examination, and the blocking of assets, bank accounts, and investments held by the accused abroad, in accordance with the law and international treaties". Although there is no parallel to this respect with the laws of other countries, the Brazilian courts have come to confirm this possibility:

ADMINISTRATIVE LAW AND CIVIL PROCEDURE. CIVIL ACTION. ADMINISTRATIVE MISCONDUCT. PRECAUTIONARY MEASURE OF THE INALIENABILITY OF GOODS. [...] PRECEDENTS. UNPROVEN DIPUTES. [...] 2. The jurisprudence of this Court is the for the possibility of the blocking of assets, investments, and bank accounts, except for funds for eating habits, provided for in Art. 649, IV, of the CPC (Civil Procedure Law), so that Article 16, section 2, of Law 8.429/1992 authorizes equal measures for bank accounts and investments held by the accused abroad, in accordance with the law and international treaties. In this sense: REsp 1.313.787/RS, Rel. Min. Mauro Campbell Marques, Second Term, DJe 8/14/2012; REsp 535.967/RS, Rel. Min. Eliana Calmon, Second Term, DJe 6/04/2009; REsp 880.427/MG, Rel. Min. Luiz Fux, First Term, DJe 12/04/2008; REsp 929.483/BA, Rel. Min. Luiz Fux, First Term, DJe 12/17/2008. [...] (Superior Court of Justice, in AgRg, rel. AREsp 436.929/RS Rel. Minister BENEDITO GONÇALVES, 1st Term, adjudicated in 10/21/2014, DJe 10/31/2014).

Among the weaknesses, without reservation, of what stands out is about the possibility of the characterization of the crime of money laundering when there is direct intent present. It is fundamental that the legislation expressly foresees and provides for the possibility of conviction for general intent, which, nevertheless, does not occur in Brazil (the explanatory memorandum to the new Law on Money-Laundering expressly acknowledges general intent, but the doctrine insists in affirming that the mere prediction in the explanatory memorandum has no binding effect and the text is, at the least, dubious).

In the famous case involving the assault on the Central Bank in Fortaleza, the capital city of the State of Ceara, established a precedent that makes it enormously difficult to apply the new law. In the case in question, eleven Mitsubishi brand Pajero motor vehicles were purchased, all of them paid for in cash. It is obvious that the possible hypothesis cannot escape any perception of good faith, because no one buys so many vehicles at once and pays for them in such a manner⁶. Nonetheless, the Federal Circuit Court did not understand and characterized the unlawful criminal tort as follows:

CRIMINAL LAW AND CRIMINAL PROCEDURE LAW. COMPOUND GRAND LARCENY OF THE VAULT OF THE CENTRAL BANK IN FORTALEZA. IMPUTATION OF THE RELATED CRIMES OF CRIMINAL CONSPIRACY, FALSE IDENTITY, USE OF FALSE DOCUMENTS, **MONEY LAUNDERING** AND THE POSSESSION OF A WEAPON IN A PROHIBITED OR RESTRICTED USE (...). In the case of the automobiles, the group that executed the planned configured torts, was a true criminal organization, having undertaken efforts, with substantial financial resources, intelligence, skills, and an organization of superior quality, in a highly daring and risky criminal enterprise. The group had a well-defined hierarchy with clear separation of functions, a keen sense of organization, sophistication in operational procedures and instruments used, access to privileged sources of information with current or past links to the State apparatus (at least the employees or outsourced former employees) and **a well-defined scheme for the subsequent laundering of the obtained capital from the antecedent criminal enterprise**. Meeting all of the qualifications necessary for the configuration of a criminal organization, although still incipient. [...]

⁶Each vehicle was evaluated at that time, for approximately 60 thousand dollars, which adds up to a payment of 660 thousand dollars in cash.

Imputation of the crime of money laundering in the face of the sales, by an established store in Fortaleza, of eleven vehicles, upon a payment in cash: the transposition of the American doctrine of Willful Blindness, along the lines of the appealed judgment, on the brink, effectively, of objective criminal liability; there are no concrete elements in the appealed judgment demonstrating that these defendants were aware that the monetary values that they received were of an illicit origin, linked or not to one of the crimes described in Law No. 9,613/98. Subsection II of §2 of Art. 1 of this law requires express scienter and not just, general intent. The absence of any indication or even reference to any activity framed within Subsection II of §2. There are sufficient elements, given the type of negotiating usually held with used vehicles, to indicate that there was some general intent as to the conduct of Art. 1, §1, Subsection II, of the same law; in fact, maybe, it could be attributed to the businessmen, a lack of greater diligence in negotiation (grievous fault), but not, intent, because usually negotiations in this area are informally conducted and based upon trust built on contacts between the parties.⁷

Another way to approach the problem of intent is highlighted by Callegari and Rollemberg, which is also referred to as the so-called issue of The Ostrich Instruction:

Also called the Ostrich Instruction, which when literally translated means the "instruction of the ostrich", referring to the act of an animal hiding its head when in a situation of danger. The theory has its origins in the English courts, principally in the case of *Regina v. Sleep*, in which the jury condemned the defendant with being in possession of marine products that were marked with a symbol that made it clear they were the property of the government. The jury found that the accused had no knowledge of the branding mark, but had the "reasonable means" available to obtain that knowledge. But while the decision was reformed, such judgment gave initiation to the use of this theory in the courts of the *Common Law* system. (IRA P. ROBBINS. *The Ostrich Instruction: Deliberate Ignorance of Criminal Mens Rea*, 81 J. CRIM. L. & Criminology, no. 191, p. 196, 1990)⁸.

For these reasons, it is imperative that the Brazilian Courts overcome the interpretation that rejects the possibility of using the "Willful Blindness Doctrine". This bottleneck is responsible for the impunity of criminals who effectively launder money and hamper the fight against organized crime.

Finally, it deserves reference to mention, the mistaken interpretation of the courts about the scope of certain rights. An example is the binding judicial precedent No. 24 of the Brazilian Federal Supreme Court (STF), which requires the completion of an administrative jurisdictional lawsuit to be initiated as a criminal prosecution for the crime of income tax evasion. Such a precedent does not have expressed support in any text on the law, provoking administrative appeals, absolutely procrastinatory, and disregarding of the legal rule that involves the independence between the penal and administrative spheres.

4. Proposals for reform of the current legislation to make the assignment procedures more effective

There exist several measures that can be proposed to facilitate a more effective asset recovery in Brazil. A general clause on the validity of the evidence obtained in this theme, since observing that the legislation of the country where the money is found is very important.

Underway in Brazil, at present, is the so-called "Car Wash Operation", in which the defense of several of the defendants claims merely formal issues in an attempt to nullify the robust evidence already obtained. Claimed specifically is that international cooperation has been established directly between the Office of the Federal Prosecutor and that of Switzerland, when, according to the defense of those accused, the repatriation of money and the collection of evidence should necessarily go through the Department of Justice. In cases involving thousands of dollars and people with high influential power, and where, unfortunately, several banks are participants or are directly interested, do not cooperate, sometimes even making it more difficult to collect evidence, an overly extensive interpretation of the concept of "illegal evidence" can destroy all claims of the State in achieving some success in combating organized crime.

⁷ Federal Court-5, ACR nº 5520 CE 0014586-40.2005.4.05.8100, Rel. Rogério Fialho Moreira, j. 09/09/2008, DJ 22/10/2008, p. 207, nº 205, 2008.

⁸ <http://www.conjur.com.br/2015-fev-26/lavagem-dinheiro-teoria-cegueira-deliberada>

It is clear that the effective combat of criminal organizations never occurs with "parity of arms", since, while the criminal kills, tortures, and intimidates, the State has the duty to act within the law and to respect fundamental rights. Therefore, for this reason, a general clause on the validity of proof would be important. This would avoid that mere formal issues could be grounds for loss of probative set or for the impossibility of the recovery of assets. We should, then, at least, be subject to the notion of "dual typicality", which means that the evidence would be considered valid if it were obtained by lawful means, either under the laws of Brazil or under the laws of the place where they were produced or of the place where the goods were seized.

Another great problem in Brazilian justice is the statute of limitation periods. Based on the old principle that "no one can benefit from his/her own turpitude", it would be interesting for the legal provision of the rule to effectively be the limitation period would have to be counted differently, if the defense creates obstacles with the prosecution's regular going forward of the proceedings. This would be a very important measure, that is, the Brazilian doctrine interprets in a broad manner the guarantee of an ample defense, which, in some cases, legitimizes procedural abuses that are committed with the sole and exclusive purpose of provoking the prescription.

Finally, it would also be welcomed, a legislative amendment setting out the probative force of the absence of alternative explanation by the accused. Remaining silent is a fundamental right, but is not absolute. There are hypotheses in which the prosecution presents a minimum of proof, which is completely inconsistent with the accused's refusal to respond to the questions that are raised.

If the prosecution demonstrates, by documentary evidence, that flowing through the account of the accused were charged thousands of dollars and there is no plausible explanation furnished for the fact, remaining simply quiet, the absence of an alternative explanation should corroborate the accusatory version. In this line of reasoning, Deltan Dallagnol⁹ points out that:

"[...] The European Court of Human Rights, itself, considers that the fundamental right to silence is not absolute, allowing the use of the silence of the defendant as a way of corroboration of the evidence of the prosecution in specific situations that cry out for an explanation. The paradigm case, on this subject, is *John Murray v. The United Kingdom*. Moreover, it is noted that the valuation of the absence of an explanation, when the evidence clamors for an explanation by the defendant, is similar to the assessment of evidence, against the defendant, the false version or improbable one that he/she presented".

It can be concluded with a quotation from the Federal Prosecutor Janice Ascari, who stated as follows:

"Financial delinquency is much more pernicious than physical violence. The courts seem even not to perceive the dimension of the damage that a subject who diverts millions in public funds or commits financial frauds can cause to society. Our courts seem not to know that a single such crime can reach hundreds or thousands of citizens.

When our courts do have this perception and apply the law with rigor and promptitude to the crimes against the Public Treasury, the financial system, and the taxation order, we will have taken a major step forward towards decency".

⁹ DALLAGNOL, Deltan. *The Logics of Evidence in the Process*. Porto Alegre: Publisher Livraria do Advogado 2015, p. 299.