International Annals of Criminology (2021), **59**, 23–37
doi:10.1017/cri.2021.3

ARTICLE

Money Laundering and Deprivation of Illegally Obtained Assets in Brazil: An Overview of the Current National Legislation

Emília Merlini Giuliani*

Rua Ramiro Barcelos, 1561, apt. 306, zip code 90035-006, Porto Alegre, RS, Brazil
*Corresponding Author: Emília Merlini Giuliani, Rua Ramiro Barcelos, 1561, apt. 306, zip code 90035-006, Porto Alegre, RS, Brazil. E-mail: emiliamg@gmail.com

(Submitted 1 December 2020; revised 8 February 2021; accepted 21 February 2021; first published online 05 April 2021)

Abstract
The present paper aims to provide a comprehensive yet critical overview of current Brazilian legislation on money-laundering prevention and control. Given that stripping criminals of their illegal profits has for a long time been considered one of the most important measures in the fight against international and organized crime, a part of this paper explores the legal mechanisms that allow for this to take place as a consequence of crime and, especially, in connection with money laundering in the context of the Brazilian criminal justice system.

Keywords money laundering; prevention; repression; asset recovery; confiscation

INTRODUCTION

One simple adage connects the two main subjects of this paper: "Crime does not pay." As it turns out, however, crime does pay. It can pay a lot. So much so that the profits of crime are, in many cases, considered to be not only the very goal of the criminal activity itself, but the thing that enables it to go on and thrive, the means that finance it and allow it to reach levels of organization and revenue comparable to that of entire governments or countries (Caeiro 2017:369–70). The adage is therefore not accurate. Instead, what it means is: Crime *should not* pay (Lucchesi 2017:415; van Duyne, Harvey, and Gelemerova 2018:178).[1]

Criminal prosecution embodies, in many respects, the downside of committing a crime. Conviction, being the goal of prosecution, is supposed to take away the benefits (in a general sense) and thus also the motivation to engage in criminal activity (Caeiro 2017:369–71). The imposing and serving of a sentence should, or so it was

[1]As Alldridge (2016:4) points out, the "idea that a person should not benefit from his/her crime is a *principle* of English Law."

once thought, be enough to erase, for the criminal, any positive outcome of her criminal enterprise. However, that is not how the story went (Naylor 1999:11).[2] first, because the risks of being caught for violating criminal law, instead of discouraging the criminal from committing a crime, can also be viewed as an incentive to find ways not to get caught (Gelemerova 2011:40), and second, because *financial* gains of criminal activities have not always been taken away from the criminal due to conviction (Alldridge 2001:283). Thus, the person convicted can theoretically still reap the economic fruits of her wrongdoings while in prison or after serving her time (Alldridge 2008:441; Lucchesi 2017:422). So, in the end, the overall message remains: Crime can pay if done the right way.

These observations are at the root of our two main subjects, namely the criminalization of money laundering, on the one hand, and the confiscation or asset recovery, on the other.[3] We intend to dive into some of the most relevant aspects of how these two topics are currently regulated in Brazil. However, before we get into that, we will elaborate a little bit on why it is so important that we dedicate our time and efforts to familiarizing ourselves with other countries' legal systems and local contexts, notably in the area of money laundering regulation and asset-focused intervention in cross-border crime.

INTERNATIONAL SOLUTIONS FOR INTERNATIONAL PROBLEMS: ON THE NEED FOR A BETTER UNDERSTANDING OF NATIONAL LEGAL SYSTEMS AS A CONDITION FOR DEVELOPING ADEQUATE SOLUTIONS

There is no need to explain the processes that led to introducing anti-money laundering measures and strengthening the "proceeds-of-crime" approach in criminal law over the last half-century (Naylor 2001:128). They are well known and have been described in depth in specialized literature.[4] However, it is important to keep in mind that they are part of a significant shift in investigation and law enforcement strategies worldwide from the 1970s onwards.[5] For one, money laundering did not

[2]According to Naylor (1999:11), eliminating gains is an effective weapon against crime for four main reasons. "First, since profit is the motive, eliminating criminal gains acts as a powerful deterrent. Second, taking away ill-gotten income prevents criminals from being able to infiltrate and corrupt the legitimate economy. Third, removing the money also takes away the capital essential to commit future crimes. To these three could be added the fundamental moral principle that no one should be permitted to profit from the commission of a crime. Together they provide a compelling rationalization for the proceeds-of-the-crime approach. But appearances can be deceiving."

[3]As pointed out in an FATF's *Best practices paper on confiscation (Recommendations 4 and 38) and a framework for ongoing work on asset recovery*, it is important to define and differentiate these two terms. According to the document, *asset recovery* designates "the return or repatriation of the illicit proceeds, where those proceeds are located in foreign countries (Financial Action Task Force (FATF) 2020). *Confiscation*, on the other hand, as defined in the glossary of the FATF Recommendations, means "the permanent deprivation of funds or other assets by order of a competent authority or a court. Confiscation or forfeiture takes place through a judicial or administrative procedure that transfers the ownership of specified funds or other assets to the State" (Financial Action Task Force (FATF) 2020).

[4]See, among others, the works by Blanco Cordero (2015:65–8), Fernandes Godinho (2001:49–55), Durrieu (2013:98–103) and Gelemerova (2011), in particular chapters 3 and 4, in which the authors elaborate in great details those aspects.

[5]As Gelemerova (2011:2) keenly points out, "Although 40 years ago money laundering was not a penal issue, it is now internationally considered one of the major crimes of the 21st century."

https://doi.org/10.1017/cri.2021.3 Published online by Cambridge University Press

even exist as an autonomous offense in most countries until well into the 1980s and 1990s (Giuliani 2020; Pieth 1998).

It was during that period, as well as over the following decades, that the "follow the money" and "hit them where it hurts" criminal law policy trend (van Duyne et al. 2018:258) took hold at the international level (Naylor 2001; van Duyne and Levi 2005). This, in turn, led to it being quickly propagated to the majority of countries all around the globe – to such an extent that it is difficult, nowadays, to think of places where the laundering of illegal gains has not been outlawed to some degree (Giuliani 2020:112–13).[6] This "criminalization wave" regarding money laundering practices, set in motion towards the end of the 1980s, was largely a result of the extremely powerful political mobilization, at the supranational level, of key countries and organizations – notably the U.S. and the then newly created Financial Action Task Force (FATF) (Gelemerova 2011). In the beginning, the narrative adopted by those actors was geared exclusively towards the "war on drugs" (van Duyne et al. 2018:231).[7] It stressed how important it was to double down on the profits of international drug trafficking, both through preventative measures, such as those to be followed by banks and other financial institutions, and through the repression of any tactics employed by drug traffickers to hide and disguise their illegally obtained assets (Stessens 2003:3; van Duyne et al. 2018:143–4).

This scenario marked an interesting bifurcation in the approach to the subject at hand: while the path of prevention led to the establishment of an increasing number of measures and rules to be followed mainly by the private sector (Badaró and Bottini 2019) – given that said rules are mostly situated in the administrative sphere (Oliveira 2019:26) –, the repression measures led to the criminalization of money laundering and the strengthening of international cooperation to recover assets relating to criminal activities (Alldridge 2016). Furthermore, though the goals of making money laundering a criminal offense in all countries across the globe and of designing effective instruments to deprive criminals of their illegal gains may have been at the intended "finishing line" of this repression road, over the years, they have been shown to be quite a tricky destination to reach, as they kept being constantly moved farther and farther away from the initially set endpoint. This has to do with the fact that the definition of what constitutes money laundering (and therefore what has to be criminalized, as well as what assets can be subsequently seized) has been continuously expanded throughout the years (Durrieu 2013:171). That way, the offense that was once only linked to the proceeds of drug trafficking kept being tied to more and more sources of dirty money. Thus, a growing number of conducts had to be included in the circle of punishable offenses in each country (van Duyne et al. 2018:191).[8]

[6]Also, according to van Duyne, Harvey, and Gelemerova (2018:233), "[t]he AML [anti-money laundering] framework has girdled the earth and found its way into the national legislation of some 190 countries."

[7]Besides – as van Duyne and Levi (2005:143–52) remind us – in the beginning, fear of the immense financial power believed to be deriving from drug trafficking played a significant role in the decision to outlaw money laundering all over the world.

[8]Alldridge (2016:15–31) criticizes the "narrative on quantity" that surrounds the development and growth of the anti-money laundering industry, arguing that while it is nigh impossible to establish a reliable estimate of how much money is laundered, "[w]hatever the numbers are, they will be larger if more predicate offences (in particular tax evasion) are included, and if the other conditions for criminal

https://doi.org/10.1017/cri.2021.3 Published online by Cambridge University Press

One needs not emphasize how this constant change in the perception of money laundering and its wrongfulness has made an impact on its regulation in the international sphere and, consequently, at the national one as well (van Duyne et al. 2018:109). As it is easy to imagine, implementing all those changes in so many different national contexts has not been a simple task, especially considering the need for it to be as consistent and uniform as possible. In addition to transposing new directives, treaties and recommendations to their language without losing sight of the spirit and purpose of the rules to be integrated, each country has to evaluate their compatibility with the national legal system as a whole. It is usually also necessary to rearrange public expenditures within the national budget in cases where new measures have to be put in place due to these new provisions and pass the necessary laws to enforce them within their territory.[9]

In this process, a couple of obstacles may appear: In some countries, as is the case with Brazil, for instance, other offenses already cover some of the conducts to be included as money laundering, which gives rise to possible incompatibilities or overlaps in the legislation.[10] In other countries, as the heated debate around the penalization of self-laundering in Germany has shown (Schröder and Bergmann 2013), some conducts' punishability may conflict with constitutional principles. These are just two examples of the sorts of barriers that may lead to the absence of true harmonization of anti-money laundering laws. Such problems often arise from a lack of understanding of how the legal systems in different countries are configured, how these systems work in practice, and the repercussions that some of the modifications suggested (or imposed) through international instruments may have in each of them.

As we all know, money laundering has a marked international dimension, and so do the policies and regulations designed to prevent and repress it. Asset recovery, an integral part of the proceeds-of-crime approach to combating transnational organized crime, requires international cooperation and enough similarity and uniformity between national legislations regarding the statutory definitions of the criminal offense – otherwise, seizing assets located abroad is not possible (van Duyne et al. 2018:111). The criminalization of money laundering and the crafting of the necessary framework to implement effective anti-money laundering systems have been, without a doubt, a product of countries joining forces to tackle shared criminal policy problems (Giuliani 2020:155). However, despite considerable approximation levels between most legal systems regarding money laundering regulation, an optimal degree of harmonization has not yet been reached.

liability are more easily satisfied." Thus, this narrative represents, in a way, a feedback loop: it is stated that huge amounts of money are laundered but not confiscated, which in turn justifies giving more power and resources to the authorities to fight money laundering; yet the more crimes are made into predicate offenses, the greater this sum will be.

[9]It is worth mentioning that evaluating the impacts of such measures and laws is a hard if not impossible task, as demonstrated by van Duyne *et al.* (2018:193–6) and Harvey (2014). On the costs of anti-money laundering measures, see Harvey (2004, 2008).

[10]Notably after the extinction of the list of predicate crimes (Welter 2013:199–203).

https://doi.org/10.1017/cri.2021.3 Published online by Cambridge University Press

ANTI-MONEY LAUNDERING REGULATION IN BRAZIL: AN OVERVIEW OF THE SUBSTANTIVE CRIMINAL LAW CURRENTLY IN PLACE

Money laundering was criminalized as an autonomous offense in Brazil in 1998, with Law 9.613. In the course of the past 22 years since it came into force, the Brazilian Money Laundering Law (BMLL) has been subjected to successive modifications, most of them aiming at adapting national legislation to the latest international standards on the matter as well as at legally internalizing commitments entered by the Brazilian government before the international community (Badaró and Bottini 2019:23). In its original version, the crime of money laundering, as described in Brazilian legislation, encompassed conducts exclusively relating to the illegal proceeds of drug trafficking, terrorism, trafficking of arms and ammunition, crimes against public administration (such as corruption), crimes against the national financial system (such as those described in Law 7.492/86), and crimes committed in the context of a criminal organization. The legislator initially justified this restrictive list of predicate offenses, reasoning that the practices associated with and legally described as money laundering were only considered deserving of criminal reproach when deriving from very serious criminal activity.[11]

Now, many aspects regarding the evolution of anti-money laundering legislation in Brazil are probably not known in depth outside national borders, so a bit of contextualization is due here – especially since, in my opinion, they did end up having an impact on the current configuration of the national systems (legal and otherwise) tasked with preventing and combating money laundering. Therefore, I believe a short detour seems reasonable, to allow for a better understanding of our legal framework regarding the legal treatment of the crime of money laundering.

So, let us go back to when the BMLL first came into force in 1998. Nearly 10 years earlier, Brazil had officially signed the Vienna Convention of 1988 and thus committed to criminalizing money laundering concerning the proceeds of drug trafficking.[12] Over that same decade, the Brazilian government also had, on many official occasions, publicly declared to the international community the intention to make money laundering related to specific crimes a criminal offense within its territory (Giuliani 2020:161). From the perspective of international law and policy, the BMLL represents Brazil's following through those commitments. But not only that. From a criminal policy point of view, it also represented the addressing of a problem that the Brazilian legislator had already noticed for a while and for which the criminal law legislation of the time did not provide an adequate answer. Therefore, the BMLL was enacted to fill the very specific gap perceived in the legislation of hiding and disguising assets illegally obtained through *some offenses*, known for their potential to generate large sums of money (Cervini, Oliveira, and Gomes 1998:313). At least initially, this was an important demarcation element of the legislative motivation behind the law.

Nonetheless, over the years, the BMLL has undergone significant changes, the purpose of which can easily be identified as the broadening of the scope of sanctions and measures against practices of money laundering and other serious offenses. In

[11]These reasons are in the explanatory memorandum that accompanied the bill – Exposição de Motivos no 692/MJ (Legis Compliance 1996).

[12]See art. 3 ("Offences and sanctions") of the Vienna Convention (United Nations 1988).

https://doi.org/10.1017/cri.2021.3 Published online by Cambridge University Press

its most recent reform, the BMLL was altered in key points to allow for a wider spectrum of conduct to be characterized as punishable (Badaró and Bottini 2019). Since this last major change, the law no longer provides a material limit on what crimes constitute a predicate money laundering offense. Thus, as of 2012, basically *any criminal offense*, however minor,[13] can theoretically lead to a subsequent money laundering crime, so long as it generates some financial profit. In other words, there are currently absolutely no legal parameters, no thresholds as to the severity of a predicate offense or the actual dimension of money being laundered that could serve as an interpretative guide in concrete laundering cases.

To that, one must add the not-so-detailed legal description of the criminal conduct of money laundering in Brazilian legislation.[14] All of this leads to an extremely wide field of application of the law. From a criminal law policy perspective, it is not hard to see why this may not be the best[15] strategy to combat and repress money laundering. As it is well known, money laundering investigations are usually costly, time-consuming and require a considerable amount of human hours (van Duyne et al. 2018:193). From a financial point of view, one can assume that not every crime committed will be successfully elucidated and prosecuted, if not for reasons inherent to those crimes' particular circumstances, for the finite resources that law enforcement has at its disposal (Gelemerova 2011:255). If almost any amount of money derived from virtually any illegal source can be the object of money laundering conduct (in a criminal law sense), logic dictates that law enforcement authorities, given their limited resources,[16] will end up having to choose which cases to investigate (van Duyne et al. 2018:230). One may safely posit that, as has been observed in other countries in cases of possible fraud offenses (Gelemerova 2011:72), the authorities will have to choose between dedicating their time and efforts to going after "easier" or more complex cases, which, in turn, may lead to decisions that are not necessarily in tune with the public's best interests.[17]

It is important to highlight that, in the documents that accompanied the bill that later became the BMLL, it was stated that *hiding or concealing financial gains from criminal offenses other than those listed in the law did not constitute money laundering* in a criminal law sense. Instead, they were meant to fall under the broader category of after-the-fact offenses, also called ancillary offenses,[18] which were already sufficiently covered by the existing penal clauses in Brazil. Examples of those ancillary offenses are handling illicitly obtained goods (art. 180 Brazilian Criminal Code (BCC)) and different forms of accessory-after-the-fact offenses (art. 348 and 349 BCC). The Brazilian legislator explicitly stated that without an interpretation criterion like that of a set list of predicate money laundering offenses, the bill would be proposing some "mass criminalization," indistinctly covering endless conducts financially connected to any number of crimes. According to the bill's authors, that

[13]Any crime is said to be included, even misdemeanors (D'Avila and Giuliani 2016:764).
[14]A factor not exclusive of Brazil (van Duyne *et al.* 2018:112).
[15]"Best" in the sense of "yielding the intended results".
[16]Especially in less developed countries.
[17]Of course, determining what those interests are is also a valid question.
[18]An expression coined by Abrams (1989).

https://doi.org/10.1017/cri.2021.3 Published online by Cambridge University Press

would essentially lead to the (unjust) punishing, as a money launderer, for instance, of a thief who used the stolen object to purchase a wristwatch.[19]

Although the reasoning given in the explanatory memorandum has its flaws (the one mentioned above is superficial at best), it does make clear the intentions with which the BMLL was imbued. The reasons given by the legislator when drafting a bill and for later enacting it as a law are not binding in a legal sense, but they can be – as often they are – used as a means for interpreting and successfully implementing its legal provisions (Alexy 2016:84–5; Badaró and Bottini 2019:96). However, in the case of the BMLL, these very intentions were later on contradicted without much consideration of the law's spirit and structure and without the necessary reflection on the actual impact those changes would have on its systematic consistency. In 2012 the list of predicate offenses was removed from the BMLL, leaving it with no legal parameters as to what crimes are capable of originating assets susceptible to being laundered. This, along with the vagueness of the legal description of the punishable conduct, led to an extreme widening of the scope of applying the corresponding criminal provisions (D'Avila and Giuliani 2016). Now it is not only hard to determine what exactly can be subsumed under the law as an offense of money laundering, but also, and most importantly, what *cannot be subsumed*.

It is not difficult to see how expanding the applicability of the scope of the criminal law provisions beyond any reasonable material limits can be damaging, rather than beneficial, to the "efficiency" of the fight against money laundering.[20] It is counterproductive in practice. Suppose a legal provision can be applied to almost any conduct relating to illegally obtained money in a wide array of contexts, then in this sea of punishable behaviors, authorities may end up missing the ones that actually should be investigated and prosecuted. Of course, this is merely speculation, as no research has been carried out specifically on this matter.

Aside from that, there are also concerns of a more substantial nature that speak against such a wide scope of criminally punishable money laundering offenses that we cannot explore more in depth here for reasons of space. However, it is worth noting that the sentence for money laundering in Brazil can range from 3 to 10 years of imprisonment, plus a fine. In comparison, this is more than what a person would get for abandoning a newborn baby, thereby causing her death (art. 134 BCC), or for kidnapping a person for over 15 days or in such a manner that it leads to grave physical consequences for the victim (art. 148 §1 III and §2 BCC). This abstract range of custodial sentence is comparable to that applicable to crimes of corruption (art. 317 and art. 333 BCC), and its maximum is equivalent to that of rape (art. 213 BCC).

Thus, it is evident that money laundering is a very serious offense in Brazil, at least from a legal viewpoint. The fact that the legal description of the crime of money laundering in Brazil does not include any objective or material criteria to differentiate between a serious money laundering offense and a less serious one for purposes of sentencing also gives rise to a problem of proportionality and even of predictability – something that could be circumvented either by limiting the spectrum of

[19]Item 24 of the explanatory memorandum (see footnote no. 2).

[20]The word "efficiency" is used here in the widespread sense that punishing *more* means punishing *more efficiently*, which is not necessarily true.

https://doi.org/10.1017/cri.2021.3 Published online by Cambridge University Press

predicate offenses according to their seriousness or by better circumscribing the elements of punishable money laundering conducts, in order to help separate them from less relevant ones.[21]

Moreover, concerning the fines applicable in a conviction case, they are calculated according to the daily-fine system (art. 49 BCC) and should reflect the seriousness of the offense and be adjusted to the convicted person's financial conditions (Prado 2017:1027). The stipulated amount is then deposited on a fund for penitentiary administration (Nucci 2019:433).

COMPENSATION, CONFISCATION AND ASSET RECOVERY: AN OVERVIEW OF THE BRAZILIAN LEGISLATION

Aside from being sanctioned criminally, being convicted of a crime entails other consequences for the convicted person. Art. 91 BCC lists some of the automatic effects that are imposed as a result of sentencing. According to this legal provision, a criminal conviction for *any crime* will, among other things, always lead to the *confiscation* of (i) all instruments used for carrying out the criminal enterprise, so long as they constitute objects whose possession, in a broad sense, is also illegal (*instrumenta sceleris*) and of (ii) the profits or any other financial benefits gained from the criminal conduct (*producta sceleris*).[22] In other words: as a consequence of conviction, the person convicted, besides being made responsible for indemnifying or compensating the damages brought on by the crime (art. 91 I BCC), loses, in favor of the State, both the instruments used in the crime and any profit or financial gains that have resulted from that crime (art. 91 II BCC).

In 2012 this provision was altered, and two paragraphs were added to it, basically determining that, if the proceeds of a crime are not to be found or happen to be located in another jurisdiction outside of Brazil, assets of equivalent value to the sums due may be confiscated from the convicted person's legally amassed property.[23] The new rules are applicable both after the conviction and before or during the trial as a protective measure for forfeiture (Prado 2017:1063–4).

As pointed out above, these provisions are enforceable to *all crimes* described in our national criminal law legislation, meaning they are "*generic*" consequences of a criminal conviction. In addition to those, the BMLL describes other, more specific effects of a conviction for money laundering. According to art. 7 of the BMLL, *all assets related, directly or indirectly, to money laundering offenses, including those that have been used to post bail, are subject to confiscation* as a consequence of criminal conviction (Barros 2013:245–51). What this means is not only are the proceeds of money laundering subject to confiscation as a direct consequence of art. 91 II BCC,

[21]Concerning the legal description of the crime of money laundering in Brazil, see Giuliani (2020).

[22]Examples are weapons and ammunition whose possession and use require a special kind of permit that the defendant does not have; machinery exclusively designed to counterfeit money, and illegal drugs (especially regulated in Law 11.343/2006) (Lucchesi 2017:415; Prado 2017:1063–4).

[23]The law does not refer explicitly to the legality of the source of those assets. Nevertheless, this is the only interpretation possible, since if the convicted person's assets are derived from criminal activity, they would have already been subject to confiscation, given that they would match the hypothesis already provided for in art. 91 II BCC. As Teixeira and Gonçalves (2019) point out, this type of confiscation is strictly subsidiary. It can only be imposed *if and when* the illegally obtained assets cannot be, themselves, seized.

https://doi.org/10.1017/cri.2021.3 Published online by Cambridge University Press

but also the *object* of money laundering – that is, the money or assets obtained through predicate offenses that *are being or have been laundered* – is to be confiscated as a result of a money laundering conviction (Badaró and Bottini 2019:233–5).

This provision was altered in 2012 to clarify that the assets do not have to be *directly* related to the offense. Overall, the provision can be seen as reasonable given that money laundering itself is a crime whose very existence depends on the perpetration of another crime and of this other crime having generated financial profits that subsequently can be laundered. Although not dependent on a corresponding conviction for the predicate offense, a conviction for money laundering depends on it being proved a source of the assets. Thus, if in the course of due process it is proved that the assets derive from criminal activity and bear a relation to the charges at hand, it makes sense that they be susceptible to confiscation as well. The proceedings that stipulate how this confiscation or forfeiture will occur are mainly regulated in the Brazilian Criminal Procedure Code (BCPC).[24]

More recently, the newly enacted Law 13.964/19 added another provision to the BCC, which, in effect, corresponds to a form of "extended confiscation" similar to that found in some European countries.[25] According to this new clause (art. 91-A BCC), in the case of a conviction for a crime to which the law stipulates a maximum sentence of more than six years of imprisonment, all assets belonging to the convicted person which are not compatible with her demonstrated legal income are also subject to seizing (Lopes Jr. 2020:781–2). Here, the confiscation takes place due to a legal presumption of illicit enrichment, in situations in which the difference between what the defendant has and what she should have, according to her legal earnings, cannot be explained. Considering that money laundering has a maximum sentencing limit of 10 years, this is relevant to this article's subject. This new legal provision has, however, sparked debate among criminal law academics, given that, in essence, it seems to invert the burden of proof, now that the prosecution does not have to prove that the assets come from an illegal source in order to subject them to confiscation (Bottini 2020; Fabretti and Smanio 2020:35).

Finally, there is the question of *asset recovery*, which involves the repatriation of property located abroad outside of Brazilian jurisdiction. This form of securing and confiscating assets is arguably more complicated to execute in practice, as it presupposes the existence of some form of international cooperation agreement between the countries involved (Brazilian Department for Asset Recovery and International Cooperation 2019:12). Since the coordination of information between national and international authorities can comprise, in this context, several more complex tasks, in 2004, a special department within the Brazilian Ministry of Justice was created specifically to deal with issues related to international cooperation and asset recovery.[26] Besides, the BMLL has a special provision that stipulates the conditions for executing, in Brazilian territory, foreign requests for seizing or securing assets that are located within its borders.

[24]Specifically in art. 125 to 144-A BCPC (Paludo 2013:683–5).

[25]For example, in Portugal (Caeiro 2017), Spain and Germany (Teixeira and Gonçalves 2019).

[26]According to Essado (2014:141), the Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional (DRCI) was instituted by Decreto 4.991/2004 (although it is currently regulated by Decreto 6.061/2007).

https://doi.org/10.1017/cri.2021.3 Published online by Cambridge University Press

Especially in the context of *criminal* cases, when the assets subject to confiscation happen to be located in a foreign country, recovering them is considerably more difficult than if they were located in the national territory. One of the reasons why it usually takes so long for the authorities in one country to seize, let us say, money that is deposited in a bank account in another jurisdiction has to do with the fact that each country has its own specific rules for asset confiscation, and sometimes the petition does not fulfill all conditions necessary in the requested state (Medeiros 2012). Besides, criminal proceedings can last a very long time, notably when dealing with cross-border unlawful activities or more complex money laundering and corruption schemes. In those situations, preliminary investigations may also take a longer time to conclude. For this reason, assets located abroad that have been effectively identified as the product of criminal activity will likely be subject only to freezing and will remain outside Brazilian jurisdiction until *res judicata* is achieved (Giacomet Jr. 2019).[27]

Considering this scenario, an efficient exchange of information between authorities and institutions from different countries, the collecting and sharing of evidence situated in foreign jurisdictions and the enforcing of preventative measures abroad to secure illicitly obtained capital are essential steps for making the actual confiscation and repatriation of assets possible (Brun et al. 2011:23–6). Through the creation of the Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional (DRCI; Brazilian Department for Asset Recovery and International Cooperation), Brazil has visibly improved the coordination of investigative efforts between its authorities and foreign ones,[28] thanks to Brazil having a central agency dedicated to helping process international cooperation requests (Giacomet Jr. 2019).[29] However, processing these requests still tends to take a long time, whether in Brazil or other jurisdictions. It is only logical that the more the legal systems and pertinent laws in the countries involved differ from one another, the longer it will take to process any request – particularly in the area of criminal law, since the requested country has to make sure the measures requested are in accordance with its applicable legislation (Brun et al. 2011). For this reason, achieving greater degrees of legal harmonization is of utmost importance.

CONCLUSIONS

Over the last five decades, the world has witnessed a shift in strategy in the fight against transnational and organized crime. Gradually, countries worldwide, prompted by the international community, adopted a more financial-focused strategy, turning their attention to striking at what came to be known as the "Achilles' heel" of criminal

[27]This is well illustrated in the graphs the DCRI put together for statistical analysis purposes, which show that while between the years of 2000 and 2020, a total of US$ 1,770,595,025.41 had been frozen abroad, over that same period only a fraction of that, US$ 291,775,592.17 had been repatriated to Brazil (Brazilian Department for Asset Recovery and International Cooperation 2020).

[28]According to the statistics mentioned in n. 27 above, over 90% of all asset recovery in Brazil over the last 20 years has occurred in the last five years, which shows a remarkable improvement in international cooperation and asset recovery.

[29]See a more detailed description of the department's attributions at the DRCI website (Ministério da Justiça e Segurança Pública 2019).

https://doi.org/10.1017/cri.2021.3 Published online by Cambridge University Press

organizations: their money. The idea behind this "proceeds-of-crime" approach is to make sure that criminals are held accountable for what they have done and are stripped of all gains they might have accumulated due to their criminal activities. In other words: to make it so that crime does not pay. So, measures had to be put in place to ensure just that. However, implementing this is far from a simple task.

It requires a great degree of legal harmonization across many countries, given that international organized crime, by definition, knows no borders. One way this has been expressed was through the criminalization of money laundering. Another was through the strengthening of international cooperation in criminal matters. Like many other nations, Brazil has taken active steps to align its legislation to international standards, most notably in the field of money laundering. However, transposing supranational treaties to domestic law does not automatically translate them into practice. Besides, internalizing supranational provisions is a complicated process whose results may considerably differ from country to country. The constant changes in perception and regulation of money laundering both at an international and national level have also led to an inconsistency of legal provisions that affect its interpretation and application in concrete cases. On this front, we believe Brazil has a lot to rethink and reform.[30] The desire to adjust its legal framework according to supranational money laundering guidelines has arguably led to more problems than solutions as it seems virtually impossible at the moment to exclude conducts from the law's scope of application. In effect, the BMLL has been amended so often that it has become even more vague than it already was, making its enforcement harder and less predictable.

In contrast, Brazilian criminal law provides for many consequences of financial nature that ensue for the convicted person, and not only in cases relating to money laundering or organized crime. As pointed out above, these consequences range from the obligation to compensate the victim for the damages brought on by their crime to the confiscation of property incompatible with the convicted person's legal earnings. This seems to bring the country's legislation in line with supranational standards on the issue – which, incidentally, does not mean it is not subject to criticism. Nevertheless, recovering assets located abroad continues to pose a challenge to implementing all those measures. On the other hand, it should be emphasized that Brazil has made visible efforts in the last decade to improve international cooperation in criminal matters, thus narrowing the gap between the letter of the law and the application of its content.

Acknowledgements. This paper is a modified and expanded version of a talk given by the author in the 11th session of the International Forum on Crime and Criminal Law in the Global Era (IFCCLGE) on December 13, 2020. I would like to thank Prof. Dr. Emilio Viano for his suggestions and criticism, which undoubtedly contributed to the improvement of the manuscript.

References

Abrams, Norman. 1989. "The New Ancillary Offenses." *Criminal Law Forum* 1:1–39.

Alexy, Robert. [1995] 2016. *Recht, Vernunft, Diskurs: Studien zur Rechtsphilosophie*, 2nd ed. Frankfurt am Main: Suhrkamp.

[30]Fortunately, an expert commission is currently working on such a reform (Consultor Jurídico (ConJur) 2020).

https://doi.org/10.1017/cri.2021.3 Published online by Cambridge University Press

Alldridge, Peter. 2001. "The Moral Limits of the Crime of Money Laundering." *Buffalo Criminal Law Review* 5:279–319.

Alldridge, Peter. 2008. "Money Laundering and Globalisation." *Journal of Law and Society* 35(4):437–63.

Alldridge, Peter. 2016. *What Went Wrong with Money Laundering?* London: Palgrave Macmillan.

Badaró, Gustavo Henrique and Pierpaolo Cruz Bottini. 2019. *Lavagem de dinheiro: Aspectos penais e processuais penais*, 4th ed. São Paulo: Revista dos Tribunais.

Barros, Marco Antonio de. 2013. *Lavagem de capitais e obrigações civis correlatas*, 4th ed. São Paulo: Revista dos Tribunais.

Blanco Cordero, Isidoro. 2015. *El delito de blanqueo de capitales*, 4th ed. Pamplona: Thomson Reuters Aranzadi.

Bottini, Pierpaolo Cruz. 2020. "Direito penal, processo penal e colaboração premiada na lei 'anticrime'." *Conjur*, January 6, 2020. Retrieved November 27, 2020 (https://www.conjur.com.br/2020-jan-06/direito-defesa-direito-penal-processo-penal-delacao-lei-anticrime).

Brazilian Department for Asset Recovery and International Cooperation (DRCI). 2019. *Manual de Cooperação Jurídica Internacional: Matéria Penal e Recuperação de Ativos*, 4th ed. Retrieved January 29, 2021 (https://www.justica.gov.br/sua-protecao/lavagem-de-dinheiro/institucional-2/publicacoes/arquivos/manual-penal-online-final.pdf).

Brazilian Department for Asset Recovery and International Cooperation (DRCI). 2020. "Indicadores DRCI/SENAJUS." Retrieved January 29, 2021 (https://www.justica.gov.br/sua-protecao/cooperacao-internacional/estatisticas/indicadores/indicadores-cooperacao-juridica-internacional-drci-2020-1.pdf).

Brun, Jean-Pierre, Larissa Gray, Clive Scott, and Kevin M. Stephenson. 2011. *Asset Recovery Handbook: A Guide for Practitioners*. Washington, DC: The World Bank and UNODC.

Caeiro, Pedro. 2017. "Sentido e função do instituto da perda de vantagens relacionadas com o crime no confronto com outros meios de prevenção da criminalidade reditícia (em especial, os procedimentos de confisco *in rem* e a criminalização do enriquecimento 'ilícito')." Pp. 363–414 in *Crime e Política: corrupção, financiamento irregular de partidos políticos, caixa dois eleitoral e enriquecimento ilícito*, edited by Alaor Leite and Adriano Teixeira. Rio de Janeiro: FGV.

Cervini, Raúl, William Terra de Oliveira, and Luiz Flávio Gomes. 1998. *Lei de lavagem de capitais*. São Paulo: Revista dos Tribunais.

Consultor Jurídico (ConJur). 2020. "Câmara cria comissão de juristas para reforma da lei da lavagem de dinheiro." *ConJur*, September 10, 2020. Retrieved January 26, 2021 (https://www.conjur.com.br/2020-set-10/camara-institui-comissao-reformar-lei-lavagem-dinheiro).

D'Avila, Fabio Roberto and Emília Merlini Giuliani. 2016. "Novos e velhos problemas da lavagem de dinheiro." Pp. 756–76 in *Perspectivas das ciências criminais: Coletânea em homenagem aos 55 anos de atuação profissional do Prof. Dr. René Ariel Dotti*, edited by Paulo César Busato, Priscilla Placha Sá, and Gustavo Britta Scandelari. Rio de Janeiro: vGZ.

Durrieu, Roberto. 2013. *Rethinking Money Laundering and Financing of Terrorism in International Law: Towards a New Global Legal Order*. Leiden and Boston: Martinus Nijhoff Publishers.

Essado, Tiago Cintra. 2014. "A perda de bens e o novo paradigma para o processo penal brasileiro." PhD dissertation, Law Department, USP, São Paulo, SP.

Fabretti, Humberto Barrionuevo and Gianpaolo Poggio Smanio. 2020. *Comentários ao pacote anticrime*. São Paulo: Atlas.

Fernandes Godinho, Jorge Alexandre. 2001. *Do crime de "branqueamento" de capitais: Introdução e tipicidade*. Coimbra: Almedina.

Financial Action Task Force (FATF). 2020. "Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery." Retrieved November 30, 2020 (https://www.fatf-gafi.org/publications/fatfrecommendations/documents/bestpracticesonconfiscationrecommendations4and38andaframeworkforongoingworkonassetrecovery.html).

Gelemerova, Liliya Y. 2011. "The Anti-Money Laundering System in the Context of Globalisation: A Panopticon Built on Quicksand?" PhD dissertation, Tilburg University. Nijmegen: Wolf Legal Publishers.

Giacomet Jr., Isalino Antonio. 2019. "Desempenho da cooperação jurídica internacional nos cinco anos de 'lava jato'." *ConJur*, March 24, 2019. Retrieved January 29, 2021 (https://www.conjur.com.br/2019-mar-24/isalino-giacomet-cooperacao-juridica-internacional-lava-jato).

https://doi.org/10.1017/cri.2021.3 Published online by Cambridge University Press

Giuliani, Emília Merlini. 2020. *Strafbarkeit der Geldwäsche in Brasilien und in Deutschland: Die strafrechtliche Behandlung des Phänomens auf internationaler und auf nationaler Ebene*. Hamburg: Verlag Dr. Kovač.

Harvey, Jackie. 2004. "Compliance and Reporting Issues Arising for Financial Institutions from Money Laundering Regulations: A Preliminary Cost–Benefit Study." *Journal of Money Laundering Control* 7(4):333–46.

Harvey, Jackie. 2008. "Just How Effective is Money Laundering Legislation?" *Security Journal* 21(3):189–211.

Harvey, Jackie. 2014. "Asset Recovery: Substantive or Symbolic?" Pp. 183–202 in *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets*, edited by Colin King and Clive Walker. Farnham, Surrey: Ashgate Publishing.

Legis Compliance. 1996. "Exposição De Motivos Lei Nº 9.613, EM 18.121996. EM no 692/MJ." Retrieved February 18, 2021 (https://cutt.ly/Wk6cYsE).

Lopes Jr., Aury. 2020. *Direito processual penal*, 17th ed. São Paulo: Saraiva.

Lucchesi, Guilherme Brenner. 2017. "Confisco alargado: análise das medidas para a recuperação de bens de origem ilícita na experiência comparada americana." Pp. 415–34 in *Crime e Política: corrupção, financiamento irregular de partidos políticos, caixa dois eleitoral e enriquecimento ilícito*, edited by Alaor Leite and Adriano Teixeira. Rio de Janeiro: FGV.

Medeiros, Ana Rosa de Brito. 2012. "A cooperação penal internacional e a recuperação de ativos no exterior: avanços e desafios ao Estado brasileiro à luz do combate internacional à lavagem de dinheiro." Master's thesis, Federal University of Paraíba. Retrieved January 29, 2021 (https://repositorio.ufpb.br/jspui/bitstream/tede/4372/1/arquivototal.pdf).

Ministério da Justiça e Segurança Pública. 2019. "Institucional." Retrieved January 27, 2021 (https://www.justica.gov.br/sua-protecao/lavagem-de-dinheiro/institucional-2).

Naylor, R. T. 1999. "Wash-Out: A Critique of Follow-The-Money Methods in Crime Control Policy." *Crime, Law & Social Change* 32:1–57.

Naylor, R. T. 2001. "License to Loot? A Critique of Follow-the-Money Methods in Crime Control Policy." *Social Justice* 28(3):121–52.

Nucci, Guilherme de Souza. 2019. *Código Penal Comentado*, 19th ed. Rio de Janeiro: Forense.

Oliveira, Ana Carolina Carlos de. 2019. *Lavagem de dinheiro: Responsabilidade pela omissão de informações*. São Paulo: Tirant Lo Blanch.

Paludo, Januário. 2013. "Recuperação de bens." Pp. 681–709 in *Lavagem de dinheiro: Prevenção e controle penal*, edited by Carla Veríssimo de Carli. Porto Alegre: Verbo Jurídico.

Pieth, Mark. 1998. "The Prevention of Money Laundering: A Comparative Analysis." *European Journal of Crime, Criminal Law and Criminal Justice* 6(2):159–68.

Prado, Luiz Regis. 2017. *Tratado de Direito Penal Brasileiro: Vol. 1 – Parte Geral*, 2nd ed. São Paulo: Revista dos Tribunais.

Schröder, Christian and Marcus Bergmann. 2013. *Warum die Selbstgeldwäsche straffrei bleiben muss: Why Self-Money Laundering Must Remain Exempt From Punishment*. Berlin: Berliner Wissenschafts-Verlag.

Stessens, Guy. 2003. *Money Laundering: A New International Law Enforcement Model*. Cambridge: Cambridge University Press.

Teixeira, Adriano and Felipe Gonçalves. 2019. "Constrição patrimonial no Direito Penal brasileiro: Sentido e limites do 'confisco por equivalência' e do 'sequestro subsidiário'." *JOTA*, November 20, 2019. Retrieved December 2, 2020 (https://www.jota.info/opiniao-e-analise/colunas/penal-em-foco/constricao-patrimonial-no-direito-penal-brasileiro-20112019).

United Nations. 1988. "United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988." Retrieved December 6, 2020 (https://www.unodc.org/pdf/convention_1988_en.pdf).

Van Duyne, Petrus C., Jackie H. Harvey, and Liliya Y. Gelemerova. 2018. *The Critical Handbook of Money Laundering: Policy, Analysis and Myth*. London: Palgrave MacMillan.

Van Duyne, Petrus C. and Michael Levi. 2005. *Drugs and Money: Managing the Drug Trade and Crime-Money in Europe*. Abingdon, Oxfordshire: Routledge.

Welter, Antônio Carlos. 2013. "Dos crimes: Dogmática básica." Pp. 187–213 in *Lavagem de dinheiro: Prevenção e controle penal*, edited by Carla Veríssimo de Carli. Porto Alegre: Verbo Jurídico.

https://doi.org/10.1017/cri.2021.3 Published online by Cambridge University Press

TRANSLATED ABSTRACTS

Abstracto
El presente articulo tiene como objetivo proporcionar una visión general completa pero crítica de la legislación brasileña actual sobre prevención y control del lavado de dinero. Dado que despojar a los delincuentes de sus ganancias ilícitas ha sido considerado durante mucho tiempo una de las medidas más importantes en la lucha contra el crimen internacional y organizado, una parte de este trabajo explora los mecanismos legales que permiten que esto ocurra como consecuencia de delito y, especialmente, en relación con el lavado de activos en el contexto del sistema de justicia penal brasileño.

Palabras clave blanqueo de capitales; prevención; represión; recuperación de activos; confiscación

Abstrait
Ce document vise à fournir un aperçu complet mais critique de la législation brésilienne en vigueur sur la prévention et le contrôle du blanchiment d'argent. Étant donné que priver les criminels de leurs revenus illicites a longtemps été considéré comme l'une des mesures les plus importantes dans la lutte contre la criminalité internationale et organisée, une partie de ce travail explore les mécanismes juridiques qui permettent que cela se produise à la suite de la criminalité. en relation avec le blanchiment d'argent dans le contexte du système de justice pénale brésilien.

Mots-clés blanchiment d'argent; la prévention; répression; recouvrement d'avoirs; confiscation

抽象的
本文件旨在对巴西目前有关预防和控制洗钱活动的立法提供全面而重要的概述。长期以来, 剥夺罪犯的非法利润一直被认为是打击国际和有组织犯罪的最重要措施之一, 因此本文的一部分探讨了由于以下原因而发生的法律机制：犯罪, 尤其是与巴西刑事司法系统范围内的洗钱有关。

关键词： 洗钱 ; 预防 ; 抑制 ; 资产追回 ; 没收。

خلاصة
تهدف هذه الورقة إلى تقديم نظرة عامة شاملة ولكن انتقادية للتشريع البرازيلي الحالي بشأن غسل الأموال ومكافحته. بالنظر إلى أن تجريد المجرمين من أرباحهم غير المشروعة كان يعتبر لفترة طويلة أحد أهم التدابير في مكافحة الجريمة الدولية والجريمة المنظمة ، يستكشف جزء من هذه الورقة الآليات القانونية التي تسمح بحدوث ذلك نتيجة الجريمة ، وخاصة فيما يتعلق بغسل الأموال في سياق نظام العدالة الجنائية البرازيلي.

الكلمات الدالة: غسيل أموال؛ الوقاية؛ قمع؛ استرداد الموجودات؛ مصادرة

https://doi.org/10.1017/cri.2021.3 Published online by Cambridge University Press

Emília Merlini Giuliani earned a PhD and an MA in Criminal Sciences (PUCRS, Brazil) and Law (Universität Osnabrück, Germany). Her dissertation, "Strafbarkeit der Geldwäsche in Brasilien und in Deutschland," was published in 2020 by Verlag Dr. Kovač. She is a lawyer in Brazil. She has been a lecturer at the Universidade de Passo Fundo (Brazil) and on several other graduate and undergraduate courses. She is a reviewer for several Brazilian scientific journals and was a guest researcher at Max Plank Institut für ausländisches und internationales Strafrecht, in Freiburg (April 2017).

Cite this article: Giuliani, E.M. 2021. Money Laundering and Deprivation of Illegally Obtained Assets in Brazil: An Overview of the Current National Legislation. *International Annals of Criminology* **59**, 23–37. https://doi.org/10.1017/cri.2021.3