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Recovery of Assets and Property Measures in Criminal Proceedings

Marta Saad

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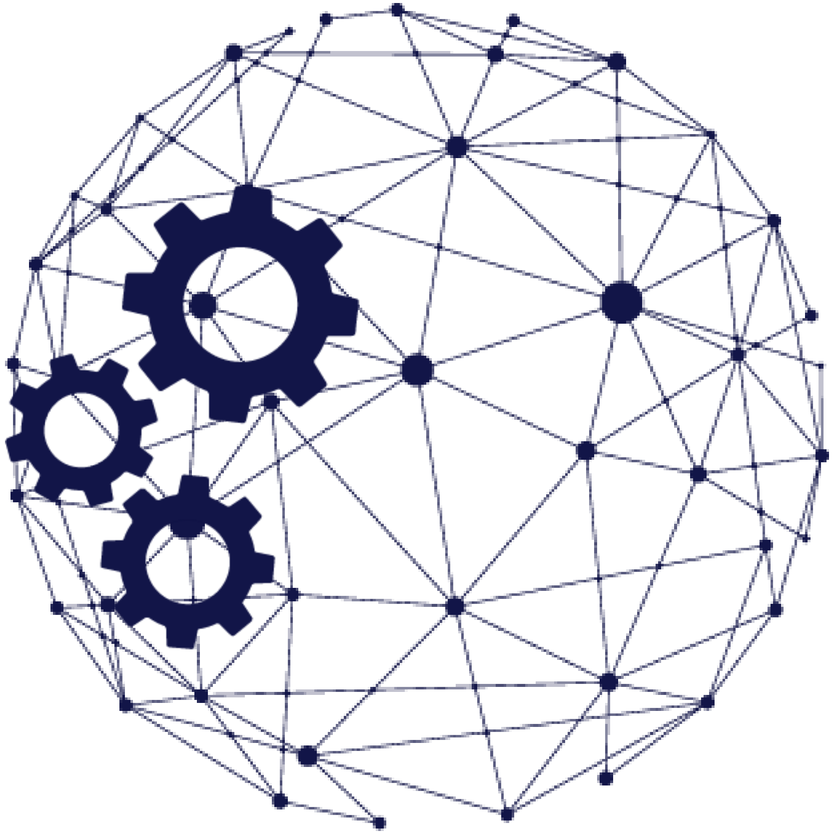
Introduction

I will address the topic of asset recovery and asset measures in the Brazilian criminal procedure.

Asset recovery has been treated as an efficient strategy in criminal policy to fight organized crime.



Concepts

Asset recovery: it is understood as the forfeiture, in favor of the State, of the products and proceeds of illicit activities.

Organizations

DRCI: The Department of Asset Recovery and International Legal Cooperation is a specialized unit of the Brazilian Federal Police responsible for investigating and combating financial crimes, especially those related to money laundering, in addition to coordinating international legal cooperation in criminal matters.

United Nations Office on Drugs and Crime (UNODC): is a UN agency dedicated to combating drug trafficking, transnational crime, corruption and terrorism through prevention, technical assistance and policy development programs.

FATF: The Financial Action Task Force is an intergovernmental organization that sets standards and promotes measures to fight money laundering, terrorist financing and the proliferation of weapons of mass destruction at the global level. Its purpose is to strengthen financial systems and protect the integrity of the international financial system.

Organizations

OECD: The Organization for Economic Cooperation and Development is an international organization composed of 38 countries that seek to promote economic and social policies that aim to improve people's economic and social well-being, as well as foster sustainable growth and economic development on a global scale.

PCC: The First Command of the Capital is a Brazilian criminal group, originating in São Paulo.

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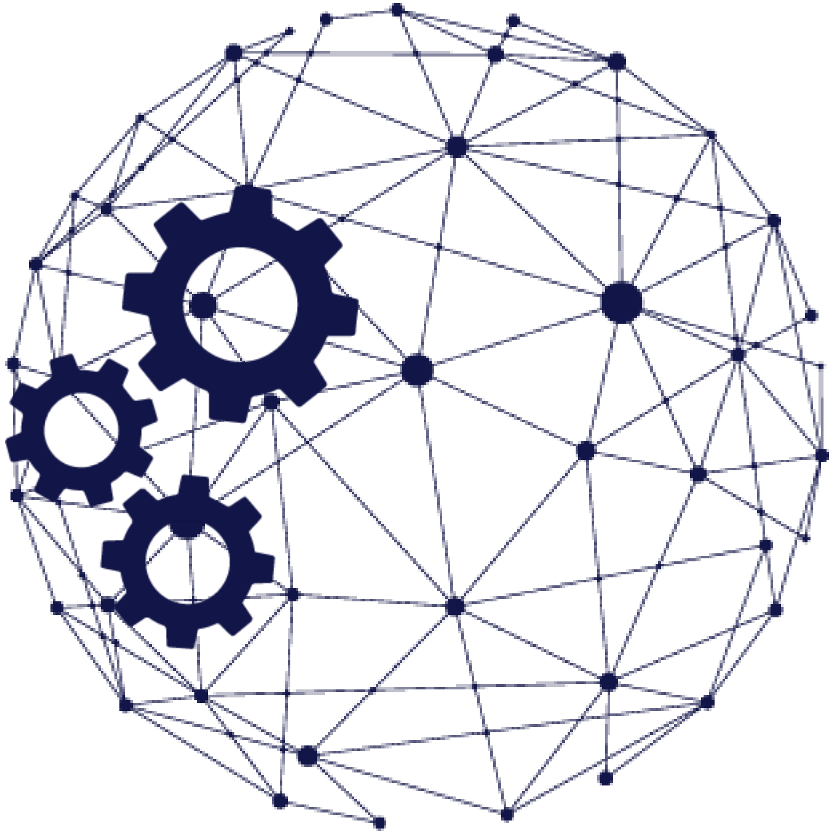
Crime doesn't make up for it; it cannot make up for it. Imprisonment is not enough as a criminal policy strategy: arrested individuals are quickly replaced by others, in the structure of the organization itself, perpetuating the criminal practice.

Therefore, in addition to imprisonment (and not necessarily instead of it), asset measures must be added: identifying and seizing the proceeds of the crime and preventing their use.

Without resources, the criminal group weakens, losing the capacity to pay its members, finance activities, and corrupt public officials.



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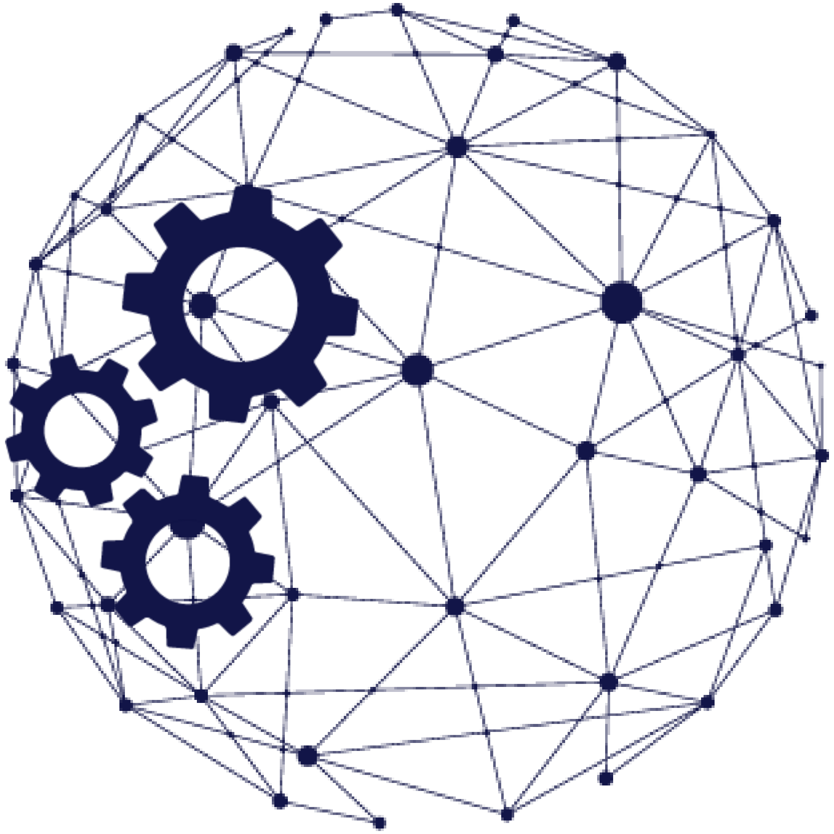
With the idea of seeking the proceeds of crime, since the 1970s many countries have started to criminalize the conduct of concealing assets arising from crimes. **As a result, individuals can be prosecuted and punished not only for the crime committed but also for concealing the profits out of that crime**.



This behavior is known as **money laundering**. The term money laundering was coined by authorities in the United States to describe one of the methods used by the mafia to validate the origin of illicit funds: the commercial operation of automatic laundry machines. The laundromat was running at a loss, but it appeared profitable since the "dirty" money was justified and “washed” as if it were obtained through that licit commercial activity.

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In Brazil, the criminalization of money laundering was definitely late: the crime of money laundering was only set forth in 1998, and the law underwent amendments in 2012.

Measures intended for asset forfeiture followed the well-established model of our Criminal Procedure Code, based on causal connection and the link of the asset with the criminal activity, both with regard to the so-called predicate crime and the money laundering activity itself.

Throughout the process, it should be possible to implement asset measures in order to ensure that, at the end of the process, the assets will be there to be forfeited and confiscated. These are known as precautionary measures, whose regulation has remained mostly unchanged since the 1940s.

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Within the scope of the Executive Branch, it is incumbent upon the **DRCI** (Department of Asset Recovery and International Legal Cooperation), created in 2004, coordinating, integrating, and proposing actions among the Executive and Judicial branches and the Public Prosecutor’s Office to fight corruption, money laundering, and transnational organized crime.

In addition, the **DRCI** serves as the Central Authority for international legal cooperation in criminal and civil matters.

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The challenges faced with asset recovery are not exclusive to the Brazilian model.

Although asset recovery is a fundamental pillar in combating organized crime, money laundering, and terrorism financing, **countries still have limited capacity for investigations in this regard.**

In an attempt to identify and prevent money laundering practices, the Financial Action Task Force **(FATF)**, a specialized intergovernmental group under the **OECD** (Organization for Economic Co-operation and Development), **holds regular meetings of experts and authorities to promote dialogues, exchange experiences, and propose mechanisms for cross-border improvement, as well as the seizure and confiscation of assets of illicit origin**.

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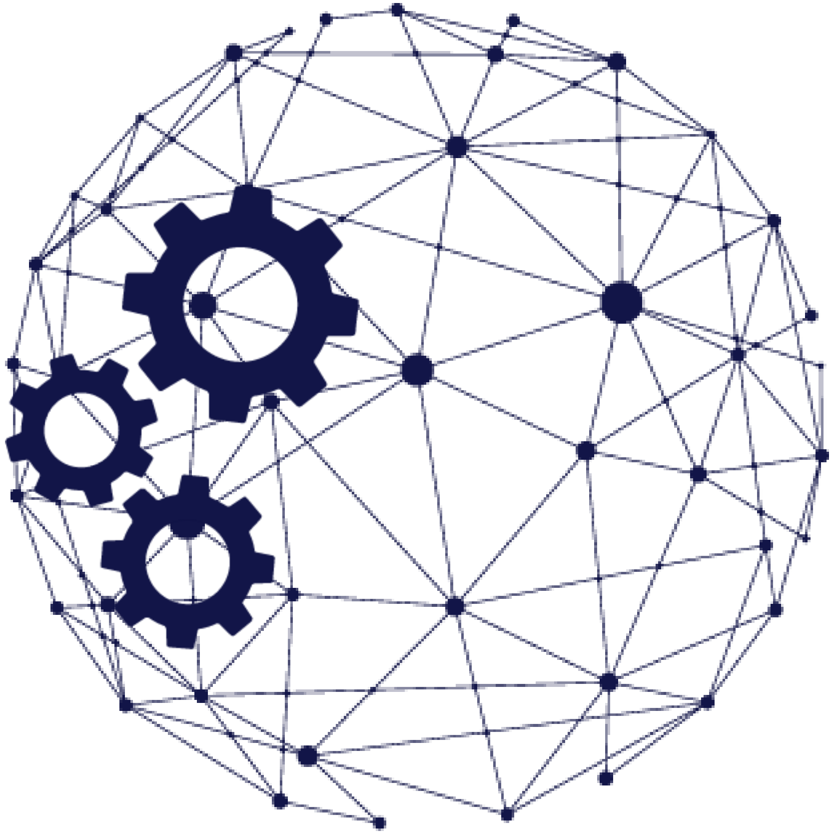
The Criminal Code provides for the **forfeiture of instruments, products, and proceeds of the crime as an effect of a criminal final judgment**. Since 2012, it also includes the **forfeiture of assets by equivalence**, meaning assets of lawful origin when the illicit ones, which are the product or proceeds of the crime, are located outside of Brazil or are difficult to locate.

Since the Anti-Crime Law enactment, it also provides for the so-called **extended confiscation**. In this sense, the Brazilian law followed the international trend of reinforcing the implementation of legal mechanisms that provide the criminal prosecution with means to prove that "crime doesn’t make up for it." Particularly in crimes generating economic profits, there are mechanisms to impose the forfeiture of any and all illicit benefits resulting from criminal activities.



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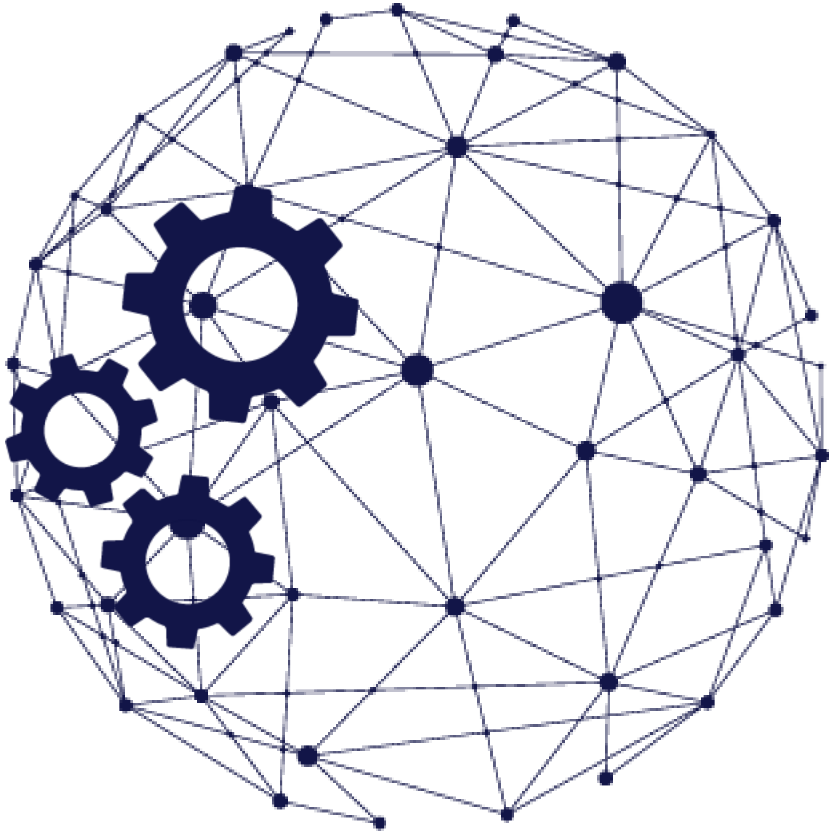
On the international level, extended confiscation was suggested for the countries composing the European Union through Framework Decision No. 202/2005.

Subsequently, in April 2014, the European Council issued Directive No. 42/2014, dealing with the freezing and forfeiture of instruments and proceeds of crime, expanding on previous provisions. This Directive, in addition to extended confiscation, also includes non-conviction-based confiscation and confiscation of assets from third parties, which do not yet have an equivalent in Brazilian law.



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The scattered legislative reforms that took place in 2012 and 2019 did not manage to adapt to the new criminality what already had constraints in the previous legislation, either due to the characteristic unsystematic nature of the punctual reforms or because they continue to refer to the outdated old law.

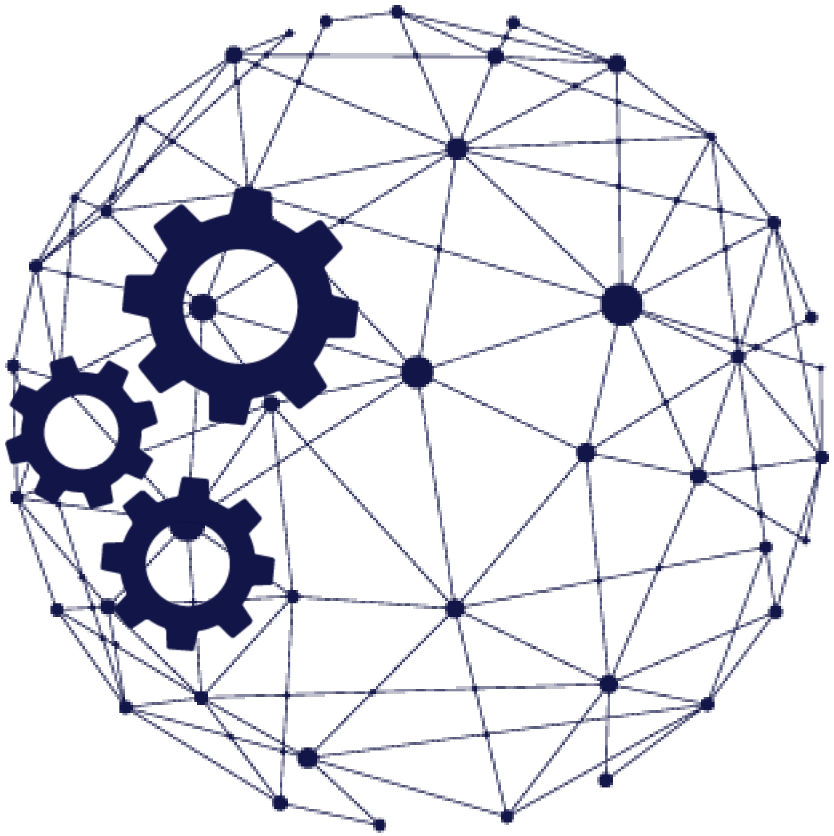
Today, we are living in a model of inadequate action: judges "torture" the normative precepts in pursuit of effectiveness, and the accused, faced with judicial actions often guided by general cautionary powers but lacking specificity, end up without sufficient means of defense due to the lack of clarity regarding the prerequisites and requirements for sentences and adequate means to appeal.

The operational mechanisms for identifying and freezing assets in Brazil are thus insufficiently provided for by law and fail on both sides: both due to the lack of efficiency and the lack of safeguards. They do not act quickly and effectively, nor do they ensure guarantees for the subjects under investigation.

- Need to prioritize more violent and profitable transnational illicit markets.
- Understanding environmental architecture and situational context is essential for control policies.
- Focus on the rationalist perspective to discourage crime and create effective public security policies.
- Latin America's low performance in crime control points to the need for structural changes.

Class Overview

- Asset recovery and fight against organized crime
- Money laundering
- Criminalization of money laundering in Brazil
- Asset recovery in the European Union and Brazil



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