THE EFFECTIVE COLLECTION AND UTILIZATION OF EVIDENCE IN CRIMINAL CASES: CURRENT SITUATION AND CHALLENGES IN BRAZIL

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I. INTRODUCTION

The Brazilian Constitution of 1988[1] grants express rights to defendants, especially in the case of arrest. This is due to its publication after a dictatorship period (1964-1984), when several cases of abuses and torture of detainees occurred. Paradoxically, the State use of violence against civilians in the 60s, 70s and 80s led later to the recognition of numerous fundamental guarantees. In fact, the dictatorial experience still influences the Brazilian case law.

The 1941 Code of Criminal Procedure is the basic law regulating the criminal procedure in Brazil. Published during a previous dictatorship period (1937-1945), the Code was originally inspired by the fascist Italian Code of Criminal Procedure (1930)[2] and has been amended by several laws and constitutions.

The 1988 Constitution and the 1941 Code of Criminal Procedure discipline the collection and utilization of evidence in criminal cases, being complemented by other thematic and sparse rules. It is important to mention that on August 2, 2013 the new Organized Crime Act (Federal Statute n. 12.850/2013) was enacted. This law, besides providing the definition and punishment of organized crime, regulates the special techniques of investigation to prevent and to investigate such crimes.

II. COLLECTION AND UTILIZATION OF EVIDENCE IN CRIMINAL CASES

A. Effective Investigation Methods for Acquiring Statements

1. Interrogation of Suspects

In Brazil, the right to remain silent is a constitutional guarantee: "the arrested person shall be informed of their rights, among which the right to remain silent" (1988 Constitution, Article 5.LXIII). Therefore the interrogation of a suspect or a defendant is not preceded by any oath. Moreover, there is no punishment even in the case of a proven lie. Despite the reference to the "arrested person", it is unanimously accepted that any suspect or defendant, whether or not arrested, has the right to remain silent. The Code of Criminal Procedure adds that silence may not be valued in prejudice of the defence; in other words, presumptions against suspects who refuse to testify are explicitly prohibited (Article 186). In synthesis, there are virtually no legal limits to the right to remain silent. In fact, if the suspect or defendant prefers, they are allowed not to show up for questioning, according to the majority of Brazilian judges. There is an exception created by the new Organized Crime Act (Federal Statute n. 12.850/2013), which says that the defendant who makes an agreement with the prosecutor must waive his right to be silent and has to tell the truth.

In general the suspects are initially interrogated by the Police and, in practice, are usually not warned of their right to remain silent at that time. Their statements, however, must be confirmed before the judge, after the warning (that is truly made by some judges, whereas others limit themselves

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[1] Câmara dos Deputados, 〈http://bd.camara.gov.br/bd/bitstream/handle/bdcamara/1344/constituicao_ingles_3ed.pdf?sequence=7〉 accessed 29 June 2013 (English version).

[2] Presidência da República, 〈http://www.planalto.gov.br/ccivil_03/decreto-lei/del3689.htm〉 accessed 29 June 2013. At the same website, there is a complete database of Brazilian rules.

to issue the warning on paper, but do not really care to do it). If the confession before the Police is not confirmed in the judicial phase, it will be given little or no value; if the judge forgets to alert the defendant about their right to remain silent, an eventual confession will be void. In any case, there is no need of a warning at the moment of detention, but only at the beginning of the hearing.

While the assistance of a lawyer is mandatory during judicial interrogation, it depends upon the suspect's choice in the case of interrogation by the Police. Unfortunately, those who cannot afford paying will be given no assistance during the investigation by the Police and poor assistance during the judicial process.

Enhanced techniques to obtain confessions, such as torture or the administration of truth serum, are not officially accepted in Brazil. According to the Article 5.III of the Brazilian Constitution, "no one shall be submitted to torture or to inhuman or degrading treatment". However, torture by the Police is sometimes reported by suspects.

2. Interrogation of Victims and Key Witness

Everyone may be a witness in Brazil. Since 2008, victims and witnesses are cross-examined by both the public prosecution and the defence, and then the judge may formulate complementary questions.[3] Although called "cross-examination system", it is not allowed in Brazil to the party who called the witness to make an examination in chief, after the other party cross examination. Before 2008, there was a different sequence and method. The judge would interrogate the victim or the witness, and afterwards the public prosecution and the defence were allowed to direct questions to the judge, who would reformulate and redirect the questions to the victim or the witness. Except for judicial mediation, the old procedure is still adopted during the interrogation of the defendant.

As in the interrogation of a suspect or a defendant, the enquiring of a victim is not preceded by any oath, and they are not punished merely because of lying. On the other hand, witnesses testify under oath commit perjury if they do not tell everything they know about the investigated facts. There are, however, some exceptions to the obligation to testify, such as professional confidentiality.

Attending the hearing is mandatory for both victim and witness. If either of them does not attend the hearing, the judge may conduct them to the court *manu militari*. The difference, as above mentioned, is that the witness will be criminally punished merely by lying or remaining silent, while the victim will not.

In general, a witness or a victim must testify in the presence of the defendant. But to prevent intimidation, it is possible to use the video-conference system. If the required equipment isn't available, the court may allow the hearing in the absence of the defendant. But the defence lawyer must always be present.

B. Methods to Facilitate Testifying at Trial by Protecting Witnesses, Victims and Suspects

If the witness or victim is at risk due to their collaboration in a criminal investigation or procedure, it is possible to admit them in a protective programme (there is one federal programme and there are many State protective programmes). The protective programmes were officially implemented in 1999 and are organized by the civil society in cooperation with the government. As many witnesses are in need of protection because of threats made by police officers' groups, the collaboration of civil society has been reinforced and is important to guarantee that the system operates well. The increase in civil society's responsibilities may be considered a good practice. The State, however, coordinates and finances the programmes of protection.

Federal Statute n. 9.807/1999 regulates and organizes the system of victims and witnesses' protection. Some protective measures that may be adopted are (Article 7): (i) security in the habitual residence of the witness or victim; (ii) new residence or temporary accommodation in a location compatible with the protection; (iii) preservation of identity, image and personal data; (iv) monthly stipendium to provide a livelihood to the individual and family, if the protected person is unable to perform regular

[3] It is not allowed, in general, for witnesses to give their mere opinion, and the parties cannot ask leading questions.

work or lacks any source of income; (v) temporary suspension of functional activities, without loss of wages or benefits when the protected person is a public or military official; (vi) social, medical and psychological care. In exceptional cases the person under protection may change their full name and assume a new civil identity. Up to now, such change has happened in five cases.

But the system of protection does not have sufficient resources. In 2003 the budget of the Brazilian system was about four million dollars. The accommodations and facilities offered to the witnesses and victims are precarious. In consequence, the usual witness in the case of a federal offence, who is either rich or middle class, does not accept being admitted to the programme of protection.

There is also a leniency programme in Brazil. The Witnesses and Victims Protection Act (Federal Statute n. 9.807/1999) grants some benefits to the cooperative defendants, such as remission. Additional thematic rules also provide for leniency agreements, especially the Organized Crime Control Act and the Money Laundering Control Act.

Until the New Organized Crime Act, there was no regulation of the procedure in these cases, which was appointed as a flaw in the legislation. However, this new law now regulates the agreement between the defendant and the prosecutor, when that one gives important information to the investigation or prosecution of the crimes or information about the other offenders. The new Act, accepting a practice that was developed in the case law, made a broad regulation of this new technique, especially regulating the procedure of the agreement.

The new law imposes a written assignment between the parts and gives to the informant a range of benefits, like judicial pardon, diminution of the penalty, suspension of prosecution, and others. The judge will not be part of the agreement and will just supervise the legality of the agreement. If the informer is not the leader of the organization and gives, first hand, an effective contribution, the Prosecutor can dismiss the charges against him. According to the new law, the informant must wave his right to be in silent and has the duty to tell the truth. It will be a difficult task to carry out this duty with the idea that the informant cannot be persecuted if he doesn't tell the truth.

In any case, the judge cannot convict anyone based just on the word of an informant, and it is necessary to confirm the defendant's information with other elements (the corroboration rule). The prosecutor must have sufficient additional information to convince the judge, and the defendants cannot be found guilty solely on the basis of an informant's declaration.

C. The Utilization of Special Investigation Techniques

The utilization of special investigation techniques is not yet so common in Brazil. This was due to the absence of a systematic regulation on the matter. The special investigation techniques' regulation was sparse and interspersed in various federal statutes, such as the Organized Crime Control Act and the Drug Control Act. However, the New Organized Crime Act was enacted, aiming to change this scenario. As an exception, wiretapping is regulated by the Wiretapping Act and its practice is frequent.

1. Electronic Surveillance

Wiretapping is the most usual special investigation technique involving electronic surveillance. It is regulated by the Federal Statute n. 9.296/1996 and the Constitution, that states: "the secrecy of correspondence and of telegraphic communication, data and telephonic communication is inviolable, except, in the latter case, by court order, in the cases and in the manner prescribed by law for the purposes of criminal investigation or criminal procedural finding of facts" (Article 5.XII). Therefore a court order is a constitutional requisite. The Federal Statute n. 9.296/1996 (Wiretapping Act) adds three other requisites: (i) the investigated crime should be punished with reclusion — wiretapping is not allowed in the case of misdemeanors and offences punished with detention; (ii) there must be no other way to collect the evidence; (iii) there must be a reasonable indication of authorship or participation in a criminal offence (probable cause). The wiretapping can last for 15 days at maximum, but the judge may authorize a prorogation if necessary. The Federal Statute n. 9.296/1996 (Wiretapping Act) also applies to electronic communications (e-mail wiretapping).

The new Organized Crime Act (Federal Statute n. 12.850/2013) authorizes the registration of

environmental electromagnetic signals, both optical and acoustic (bugging), in the investigation concerning an organized criminal group.

The use of GPS is not regulated in Brazil and there is a debate about whether a judicial authorization (court order) would be required in this case.

2. Undercover Operations

The old Organized Crime Act and the Drug Control Act (Federal Statute n. 11.343/2008, article 53.I) authorized the utilization of "undercover agents, but there was not enough regulation of the matter. However, the new Organized Crime Act wants to change that.

The new Organized Crime Control Act regulates the "undercover agent" broadly. It depends, in all cases, on the judge's decision and it's authorized just for police officers. In other words, it's not possible for an informant to act as an undercover agent. The requirement to begin an undercover investigation should expose the necessity of the measure, tasks which the agent will do and, when possible, the names of the people who are investigated and the places where the infiltration will occur.

The undercover agent, as a drastic and dangerous measure, should be used just if the other measures to obtain evidence are insufficient. The infiltration can last for six months, but can be extended if necessary. At the end of each six months, the agent should make a detailed report and inform the judge and the Prosecutor. However, at any time, the prosecutor can demand more information about the measure. Regarding the limits of the undercover agent, if he commits a crime, he cannot be punished if another conduct isn't expected. Otherwise he can be punished if he acts beyond reasonable limits.

After the charge, the reports made by the undercover agent should be available to the defence lawyer, but preserving the agent's identification. The agent has the right to change his name, according to Law 9807/99, and his image and voice should be preserved during the trial, although the agent has to testify in court. Besides that, the agent cannot be photographed or filmed by the media without his consent.

3. Controlled Delivery

The former Organized Crime Control Act (Article 2.II) and the Drug Control Act (Federal Statute n. 11.343/2008, Article 53.II) allowed the realization of controlled delivery, which is a technique of frequent use in the investigation of drug trafficking. The Drug Control Act demands a court order, whereas the former Organized Crime Control Act was silent about it

The new Organized Crime Control Act regulates "controlled delivery". According to the new law, it's possible to retard the administrative or police intervention to obtain more evidence of the crime. It's requested that the offender must be supervised from the beginning until the end of the proceeding, to avoid escaping. The judge should be advised and, if necessary, he should authorize the limits of the "controlled delivery" and, then, communicate with the Prosecutor. In a case involving two countries, "controlled delivered" with the cooperation of both authorities is allowed if the itinerary of the person is known.

The new law is unclear on which cases will or will not require a court order and, certainly, this issue will be a point of discussion in the case law. It is also unclear what the police should do in case of emergency, when it is not possible to communicate with the judge.

4. Personal Data

The new Organized Crime law grants access to Police and Prosecutors to the data containing personal information, like address, filiation and personal qualification, kept by the Electoral Justice, banks, internet providers, telephone companies and others, without the necessity of a judicial order. Furthermore, the transportation enterprises should grant to the Police and Prosecutors the information of reservations and travels registration for the last five years. Finally, the telephone records should also be granted to the Police and the Prosecutor, and the telephone companies should preserve these records for at least five years.

Access to bank records requires a judicial warrant. Regarding this matter, it is important to mention — and can be described as a good practice in Brazil — the system developed by the Federal Prosecutors Office called the Bank Movements System (SIMBA), which aims to obtain the bank data in a standardized format. In other words, the model establishes a standard model for receiving data and analysing large volumes of financial records. In this new process, all the banks send the data via a secure system and in a standardized electronic format to the Research and Analysis Branch of the Public Prosecutors' Office, after the judicial decision was granted. When the information is received, within generally two months, the programme already has issued five types of reports that help the Prosecutor to analyse the information. The programme was granted to all investigation agencies and is now used in most of the cases of bank secrecy in Brazil.

III. CONCLUSION

Besides the points already mentioned, there are some underlying problems with regard to the investigation practice in Brazil. The Brazilian system is still very inefficient in collecting evidence, especially in white collar criminal cases. About 8% of the crimes committed are effectively punished. The panorama is worse in complex crimes. According to The Financial Action Task Force Mutual Evaluation of Brazil (June 25, 2010), after more than 10 years of the criminalization of money laundering, Brazil had significantly enhanced its ability to prosecute this crime, but there were only 11 final condemnations.[4] In other words, money laundering generally remains unpunished. Among other reasons, this is because the Police still rely on traditional techniques to investigate, even in complex and white collar crimes.

Until recently, there was no comprehensive legal regulation about the special investigation techniques. The New Organized Crime Act is aimed to change the panorama. This new law provides some new special techniques to investigate organized crime that can help to obtain evidence and allow the State to punish these offenders properly and efficiently. However, the enforcement of this new law will depend especially on the case law interpretation, trying to bring efficiency without disregarding the interests of the suspect/defendant.

Also, the police officers are not well trained and do not count on sufficient resources and devices to make use of the especial techniques. Some possible measures to foster an efficient system of collecting evidence, especially in complex crimes, are: (i) use properly and efficiently all the new investigation techniques; (ii) to provide training and equipment to the law enforcement agents; (iii) to allow the prosecutors to propose *nolo contendere* agreements to the suspect or defendant, even in the case of serious crimes.

Brazil needs to assure better protection for witnesses and victims, and more precisely: (i) to provide appropriate financing and organizational structure to the Witness Protection Program; (ii) to facilitate the change of their civil identity; (iii) to allow the international relocation of the protected witness or victim.

Finally, it is important to find a balance: nowadays there is an excessive judicial tolerance in the interpretation and application of the law in order to make up for the cruelty and deficiency of the criminal system in practice, *inter alia*. This posture propitiates impunity. Disregarding the public interest is not a legitimate way to deal with the frequent violation of fundamental guarantees of suspects, defendants and convicted people.

[4]GAFI. *Mutual Evaluation Report Anti-Money Laundering and Combating the Financing of Terrorism. Federative Republic of Brazil*, 2010, p. 35. ⟨http://www.fatf-gafi.org/dataoecd/13/50/45800700.pdf⟩.