



## "MORAES DAMAGES": THE LAWFARE STRATEGIES OF JUSTICE ALEXANDRE DE MORAES IN THE SUPREME FEDERAL COURT

### *"DANOS MORAES": AS ESTRATÉGIAS DE LAWFARE DO MINISTRO ALEXANDRE DE MORAES NO SUPREMO TRIBUNAL FEDERAL.*

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#### **ABSTRACT:**

This article examines the strategies of Justice Alexandre de Moraes in the Brazilian Supreme Court, focusing on their potential qualification as Lawfare in the context of judicial inquiries conducted by the Justice. This research analyses the nature and impact of Moraes' strategies, assessing potential political motivations, procedural irregularities, and the instrumentalization of legal tools to possibly target political adversaries. By shedding light on specific investigations in the Federal Supreme Court, this research contributes to the study of the instrumentalization of law for political purposes and the consequences for the rule of law. This study aims to foster discussions about the complex interaction between law, politics, and justice in democratic societies.

**Keywords:** Lawfare; Federal Supreme Court; Alexandre de Moraes; Inquiry; Democracy.

#### **RESUMO:**

Este artigo examina as estratégias do ministro Alexandre de Moraes no Supremo Tribunal Federal com foco em sua possível qualificação como *Lawfare* no contexto de inquéritos judiciais conduzidos pelo ministro. Esta pesquisa analisa a natureza e o impacto das estratégias de Moraes avaliando potenciais motivações políticas, irregularidades procedimentais e instrumentalização de ferramentas legais para, possivelmente, atingir adversários políticos. Ao iluminar investigações específicas no Supremo Tribunal Federal brasileiro, esta pesquisa contribui para o estudo da instrumentalização do Direito para fins políticos e as consequências para o Estado de Direito. Este estudo tem como objetivo fomentar discussões sobre a complexa interação entre o direito, a política e a justiça em sociedades democráticas.

**Keywords:** *Lawfare*; Supremo Tribunal Federal; Alexandre de Moraes; Inquérito; Democracia.





## 1 INTRODUCTION

When the former federal deputy Jair Messias Bolsonaro decided to run for the presidency in Brazil, many political analysts expressed concern about the future of Brazilian democracy. Although initially treated with contempt and disbelief, the candidacy was soon taken seriously when the first intention-to-vote polls were released.

Bolsonaro personified an authoritarian and radical discourse<sup>1</sup>. However, while he could be seen as a democratic setback, he was viewed by a large part of the population as a symbol of change from the dominant political party's *status quo*. Bolsonaro was elected by a party with almost no representation, the Social Liberal Party ("PSL"), with a much shorter campaign exposure time than his opponents had and a campaign platform based on social media.

In 2019, Bolsonaro assumed the presidency and began to show the first indications that he would not refrain from attacking the judiciary as his predecessors had done. The president also succeeded in electing some of his most loyal supporters to political positions in the National Congress, including federal deputies Daniel Silveira, Carla Zambelli, Bia Kicis, and others.

The Covid-19 pandemic emerged as the focal point of conflicts between the new government and the judiciary, specifically the Federal Supreme Court. As the number of infected and deceased individuals increased, Bolsonaro adopted an anti-scientific rhetoric, even trivializing the severity of the pandemic. The president resisted to implement measures viewed as illiberal and that could have significantly impacted the country's economy. Consequently, the Federal Supreme Court was compelled to render broad decisions concerning public health initiatives, to the extent that it started to be perceived as partially responsible in the fight against the virus. In response, Bolsonaro intensified his criticism, feeling his powers constrained, as the Federal Supreme Court curtailed the authority of the federal government while strengthening the autonomy of states and municipalities<sup>2</sup>.

<sup>1</sup> See: Lazzari da Silveira, F., & Jobim do Amaral, A. (2023). Bolsonarismo e o fascismo na Era Digital. *Revista Brasileira De Estudos Políticos*, 127(2). <https://doi.org/10.9732/2023.V127.962>

<sup>2</sup> This was the result of the "Ação Direta de Inconstitucionalidade (ADI) 6341", that established that governors and mayors had basically the same powers as the federal government to legislate about public health, and that included measures against Covid-19. See: Machado Sturza, J., & Gonçalves, M. (2022). Saúde e ciência na contemporaneidade: o processo de vacinação compulsória e a tese fixada pelo STF. *Revista Brasileira De Estudos Políticos*, 124. <https://doi.org/10.9732/2022.V124.866>





An impasse was created. The president succeeded in promoting, through speeches, statements, and press releases, the narrative in public opinion that the Supreme Court was interfering in the Executive<sup>3</sup>(Given the government's bad handling of the pandemic, the Justices had no choice but to intervene). In the face of this scenario, a portion of the population that brought the president to power became even more radicalized and began to constantly criticize the Court's decisions. This led to demands for the imprisonment of certain Justices, the closure of the Supreme Court, and even a military coup<sup>4</sup>.

Once under attack, the Brazilian Supreme Court found itself lacking support from the head of the Republic General Prosecutor, Augusto Aras, in prosecuting political figures who promoted an antidemocratic discourse. Aras was perceived as an ally of Bolsonaro.

Consequently, the Court's President, Justice Dias Toffoli, opted to invoke a provision in the court's internal regiment, which carry the force of federal law in Brazil, and initiated an investigation into the attacks targeting the Justices, their families, and the institution's integrity<sup>5</sup>.

The start of this investigation drew criticism from several jurists<sup>6</sup>. The main criticism was that it assigned the role of investigating its alleged attackers to the

<sup>3</sup> "Vou rebater logo mais a nota do Supremo Tribunal Federal de ontem dizendo que não tirou poderes meus. Isso é fake news. Uma decisão que acho que é de março ou de abril, o Supremo decidiu que as medidas restritivas impostas por governadores e prefeitos não poderiam ser modificadas por mim". "Bolsonaro acusa STF de cometer crime e de produzir notícia falsa," IstoÉ Dinheiro. Available at: <https://www.istoedinheiro.com.br/bolsonaro-acusa-stf-de-cometer-crime-e-de-produzir-noticia-falsa/>. Accessed on: June 2, 2023.

In other opportunitie he criticize the measures of the municipalities that were supossily using his powers, Bolsonaro said "Isso [toque de recolher] é estado de defesa, estado de sítio que só uma pessoa pode decretar. "Bolsonaro diz que entrou com ação no STF contra decreto de governadores," Poder360. Available at: <https://www.poder360.com.br/governo/bolsonaro-diz-que-entrou-com-acao-no-stf-contradecreto-de-governadores/>. Accessed on: June 2, 2023,

<sup>4</sup> Passarinho, Nathalia. "STF se prepara para risco de ataques ao prédio e 'todos os cenários possíveis' no 7 de setembro". Available at: <https://www.bbc.com/portuguese/brasil-58430586>, Available at: June 2, 2023. Mendes, Guilherme. "Bolsonaro volta a atacar tse e diz que seu futuro é "preso, morto ou vitorioso". Available at: <https://congressoemfoco.uol.com.br/area/governo/bolsonaro-volta-a-atacar-tse-e-diz-que-seu-futuro-e-presomorto-ou-vitorioso/>. Accessed on: June 2, 2023.

<sup>5</sup> About the role of Constitutional Courts in protect democracy: Hachem, D. W. ., & Pethechust, E. R. B. (2020). Supremacia judicial no constitucionalismo brasileiro: riscos à democracia e as alternativas das teorias dos diálogos constitucionais. *Revista Brasileira De Estudos Políticos*, 121, 203-250. <https://doi.org/10.9732.2020.v121.829>, p. 211.

<sup>6</sup> Piovezan, Cláudia R. de Moraes, ed. Inquérito do Fim do Mundo, o apagar das luzes no Direito Brasileiro. Londrina, PR: Editora E.D.A, 2020.





"victim," namely the court<sup>7</sup>. This approach was seen as contrary to the Brazilian legal system, which follows the so-called accusatory system<sup>8</sup>.

However, the opposition to the government, led by the Workers' Party ("Partido dos Trabalhadores - PT"), supported the Supreme Court's actions. Opposition politicians perceived a positive outcome: through this investigation, the Supreme Court could exert pressure on the president and his supporters to reduce their radicalization.

This initial investigation, launched in March 2019 under Article 43 of the Supreme Court's internal regiment, was called the "Fake News Investigation" (Inquérito 4781/DF). In the same directive, "Portaria GP nº 69, de 14 de março de 2019," which established the investigation, Justice Toffoli also appointed Justice Alexandre de Moraes to oversee it.

As the rapporteur, Alexandre de Moraes made controversial decisions and assumed a prosecutorial role. In this regard, the objective of the study, which assumes the utilization of Lawfare by the magistrate, is to analyze how Moraes employed strategies to undermine his political adversaries rights in both the legal and political spheres, using Brazilian criminal law as a tool.

We believe that the appropriate approach to analyzing the use of Lawfare is not to delve into the internal motivations behind the judge's rulings, sentences, and orders, as they may be perceived as subjective and can lead to debates about the criteria employed. Therefore, the methodology utilized will focus on assessing the alignment or deviation of the judge's decisions with Brazilian criminal procedural law, as well as the political context in which they were rendered.

The theoretical framework of this study will draw upon Cristiano Zanin's work and its connection to the concept of Lawfare and its application in political contexts.

Accordingly, the study is divided into three parts. Firstly, it is necessary to explain the concept of Lawfare, which we consider central to this research. Secondly, we will provide a brief introduction to Brazilian criminal procedure code, enabling the reader to analyze Moraes' conduct within a legal framework. Lastly, in the final part, we will examine if the rapporteur's behavior can be characterized as a case of instrumentalizing the law and violating the rights of his adversaries.

<sup>7</sup> In Brazil there is a norm, artigo 3º da Lei n. 13.964/19 (Pacote Anticrime), that forbid the judge to take initiative in the penal procedure and substitute the acusation institution function of present proves.

<sup>8</sup> Lima, Renato Brasileiro de. Manual de processo penal: volume único. 8th ed. rev., ampl. e atual. Salvador: Ed. JusPodivm, 2020, 44.







## 2 LAWFARE AND ITS TRANSFORMATION

The origin of the term 'lawfare', can be traced back to Charles Dunlap Jr<sup>9</sup>, focused, initially, on the context of wars. After that we can also see the early use of the term in Comaroff's work<sup>10</sup>, with the idea that military authorities of an occupation could utilize the law to exert control over the occupied population in a more subtle manner than through direct violence<sup>11</sup>.

Following these initial military applications, we argue that Lawfare underwent a significant evolution in the judicial discourse across Latin America. The concept began to serve as a political narrative<sup>12</sup>. The context of conflict shifted from conventional warfare to securing political victories within the judicial system. As a new judicial-political concept, the theoretical framework varies among authors, yet several fundamental characteristics remain consistent. These include the normalization of the state of exception, the escalation of "Criminal Law of the Enemy", and the critique of practices such as plea bargaining, all of which contribute to a tension between Lawfare and democracy. Moreover, the direct impact of Lawfare on the stability of liberal democracy underscores its profound implications for the well-being of democratic institutions<sup>13</sup>.

This strategy was widely disseminated against accountability in Latin America in recent years. Popular politicians, usually presidents and/or vice-presidents, attest that they are targets of persecution by their political opponents in the judicial system, as was the case of Cristina Kirchner in Argentina<sup>14</sup> and Luis Inácio Lula da Silva in Brazil. The narrative generally arises from an accusation, or criminal conviction, about these politicians in corruption-related crimes.

<sup>9</sup> Dunlap, Charles J., Jr. "Lawfare: A Decisive Element of 21st-Century Conflicts?" 54 Joint Force Quarterly 34-39 (2009). Available at: [http://scholarship.law.duke.edu/faculty\\_scholarship/3347](http://scholarship.law.duke.edu/faculty_scholarship/3347).

<sup>10</sup> Comaroff, John L. "Symposium Introduction: Colonialism, Culture, and the Law: A Foreword." Law & Social Inquiry 26, no. 2 (2001): 305–14. Accessed July 5, 2023. <http://www.jstor.org/stable/829077>.

<sup>11</sup> Comaroff, John L. "Colonialism, Culture and the Law: A Foreword." Law & Social Inquiry 26 (2001): 305.

<sup>12</sup> See: Vegh Weis, Vanessa. "What does Lawfare mean in Latin America? A new framework for understanding the criminalization of progressive political leaders." Punishment & Society 0, no. 0 (2022). Available at: <https://doi.org/10.1177/14624745221116348> and Zaffaroni, Caamaño, C., and Vegh Weis, V., eds. *Lawfare: The Criminalization of Democratic Politics in the Global South*. 1st ed. Brill, 2023.

<sup>13</sup> Romano, Silvina M. "El lawfare y su trayectoria en América Latina: antecedentes y alcances del concepto." In *El lawfare en América Latina y su impacto en la vigencia de los derechos humanos: I Jornadas Internacionales Desafíos en el campo de los Derechos Humanos*, edited by Silvina M. Romano et al., 25. 1st ed. Ciudad Autónoma de Buenos Aires: Ediciones SAIJ, 2022.

<sup>14</sup> Bielsa R, Peretti P. *Lawfare. Guerra Judicial-Mediática. Desde El Primer Centenario Hasta Cristina Fernández de Kirchner*. Buenos Aires: Planeta, 2019.





In Brazil, the focus of our study, the term "Lawfare" was introduced by the defense of former President Luiz Inácio Lula da Silva. They argued that in the criminal proceedings against Lula, mainly overseen by then-judge Sérgio Moro, government judicial authorities engaged in Lawfare tactics.

Given this context, we pose the question: Could Justice Alexandre de Moraes' actions also be considered Lawfare?

To address this question, the focus of the present study is a limited selection of investigations initiated by the Supreme Court, either assigned to Moraes or initiated by him. By scrutinizing Moraes' actions in these investigations, purportedly aimed at safeguarding democratic institutions, we can assess whether the concept of "Lawfare" is applicable.

As will become apparent, Lawfare is closely associated with the exploitation of legal mechanisms for political ends. Consequently, we suggest assessing the presence of Lawfare in this instance by considering whether Moraes leverages the law to secure triumphs over his political adversaries, thereby impeding their participation in the public sphere. The methodological challenge lies in devising a measurement approach that avoids succumbing to political-ideological criticism.

For instance, we argue that individuals employing Lawfare may selectively cite legal precedents to rationalize their unlawful decisions. In this scenario, it would be necessary to scrutinize each cited precedent to ascertain whether they legitimately support Moraes' actions. However, even this approach could be perceived as subjective. Therefore, as previously stated, we believe that the most effective approach to studying the use of Lawfare is through an analysis of decisions with procedural implications, rather than delving into the merits of a terminative individual rulings. This is what we call "Procedure Lawfare"

Also, we understand that the analysis of possible Lawfare should always be preceded by external contextualization in which the judicial process is embedded<sup>15</sup>. This is an external point of view on the application of the rules that is necessary to understand the political scenario of the lawsuit<sup>16</sup>. Therefore, the processes examined

<sup>15</sup> Gloppen, Siri. "Conceptualizing Abortion Lawfare." *Revista Direito GV* 17, no. 3 (2021): e2143. Available at: <https://doi.org/10.1590/2317-6172202143>. Accessed July 5, 2023

<sup>16</sup> Hart, Herbert L. A. *O conceito de Direito*. 5th ed. Lisbon: Fundação Calouste Gulbenkian, 2007, p. 99.





here will be thoroughly contextualized within the political landscape surrounding Justice Alexandre de Moraes and his objectives.

The reader will be provided with a concise introduction to the Brazilian criminal process, spanning from the initiation of the inquiry to the pronouncement of the sentence. This overview aims to facilitate an understanding of whether and how criminal procedures are being disregarded by Moraes, or if they are respected.

### 3 THE BRAZILIAN CRIMINAL PROCESS<sup>17</sup>

According to Brazilian criminal law, when a crime occurs, there are two scenarios: either the perpetrator is arrested in the act, or if not, the criminal act will be investigated by the appropriate police authority, either the State Civil Police or the Federal Police.

The investigation falls under the jurisdiction of the police chief (known as a "delegado de polícia" in Portuguese), with external oversight from the State or Federal Public Prosecutor's Office. Typically, the responsible will be the policeman in charge of the jurisdiction where the crime occurred or, in certain cases, the officer overseeing a specialized police unit dealing with specific crimes, such as violence against women or cybercrimes.

The investigation assumes an administrative procedural structure and is allocated a case number that corresponds with the judicial system. Following this, a judge from the tribunal where the crime transpired is designated to supervise the investigation. The police authority may request certain measures from this designated judge, such as the interception of the suspect's telephone or bank records.

The judge forwards the requests made by the police authority to the prosecutor's office for evaluation<sup>18</sup>. Usually, the judge decides based on the prosecutor's opinion, although there is no legal obligation to do so. The Public Prosecutor's Office is responsible for oversees police activities from an external perspective.

<sup>17</sup> The explanation is about the most common type of criminal procedure, there is another kind, like a murderer trial, that have differences.

<sup>18</sup> In accordance with article 18, item II, letter "h" of Supplementary Law 75/93





During the investigation and criminal proceedings, one of the measures that the police authority and/or Public Prosecutor can request is a provisional arrest. In Brazil, there are two types of provisional arrests, in addition to the arrest in the act: temporary arrests and preventive arrests. Temporary arrests typically have a maximum duration of five days<sup>19</sup>, and preventive arrests, with a formal time limit of 90 days<sup>20</sup>. Preventive arrests must be based on specific aspects of the case, and temporary arrests serve to ensure the quality of the investigations<sup>21</sup>. Independent of the arrest type, the prisoner always can appeal immediately to a higher court through a *Habeas Corpus*.

Once the investigations are concluded, the police compile a report and forward it to the Public Prosecutor's Office. Armed with this report, the Public Prosecutor proceeds to draft an indictment to commence criminal legal proceedings against the accused. In Portuguese, this document is known as a "denúncia."

The judge who oversaw the investigations may accept or reject the charges<sup>22</sup>. If the indictment is accepted, the criminal proceedings starts. During these proceedings, the evidence gathered in the police investigation undergoes reevaluation and confirmation through examination by the opposing party. Ultimately, by the conclusion of this process, the judge issues a verdict, which may entail a conviction, acquittal, or dismissal of the case. Following the verdict, the involved parties have the option to appeal to a higher court.

Given this brief overview of the Brazilian criminal justice process, we will now turn our attention to a brief examination of the public conduct of Alexandre de Moraes. This assessment aims to discern any potential ideological interest in delegitimizing or neutralizing political adversaries through the manipulation of the law. As we will explore further, it is imperative to contextualize the analysis of Lawfare within the broader political landscape in which legal operators operate. Consequently, we will briefly contextualize Alexandre de Moraes' actions within the context of his trajectory to the

<sup>19</sup> Law 9.960/89.

<sup>20</sup> Article 312 of the Procedural Penal Code.

<sup>21</sup> "O art. 283 do CPP, mesmo após a alteração promovida pelo Pacote Anticrime, é categórico ao estabelecer as hipóteses em que pode haver restrição à liberdade de locomoção no processo penal: a) prisão em flagrante<sup>36</sup> e prisão cautelar (leia-se, temporária e preventiva): são as únicas espécies de prisão cautelar passíveis de decretação no curso da investigação ou do processo; b) prisão penal (*carcer ad poenam*):". Lima, Renato Brasileiro de, Op. Cit., p.53.

<sup>22</sup> This situation was changed by Law 13,964 of 2019, but at the time of writing this article, the law was suspended in its effects by a decision of the Supreme Federal Court.







Supreme Court, his relationship with the Executive power, and his criticisms about the Radical Right.

## 4 ABOUT JUSTICE MORAES

Alexandre de Moraes embarked on his public career as a District Attorney in São Paulo in 1991. He later ascended to become the youngest Secretary of Justice and Defense of Citizenship in the São Paulo State, appointed by then-Governor Geraldo Alckmin (PSDB). Moraes would collaborate with Alckmin once more in subsequent years.

In 2015, Moraes assumed the role of Secretary of Public Security of the São Paulo State, once again selected by Geraldo Alckmin. He held this position until May 2016 when he transitioned to a federal government position. Moraes was appointed by President Michel Temer (PMDB) to serve as the Justice of Justice.

In September 2016, an editorial from the widely circulated *Estadão* newspaper called for his resignation. Moraes was seen by the Left as a conservative and authoritarian figure: In January 2017, federal deputy from the Workers' Party, Wadhi Damous, accused Moraes of being "morally and intellectually unprepared" as well as a "fascist and a liar"<sup>23</sup>. In the same month, Moraes was on the cover of another widely circulated media outlet, *Época*, under the title "The Wrong Man."<sup>24</sup>

As Temer's Justice of Justice, Moraes was eventually nominated to the position as a Justice on the Supreme Court in March 2017. However, the nomination faced substantial criticism by the Left, particularly from the Workers' Party, due to Moraes' perceived authoritarian tendencies and his close ties to President Michel Temer.

During Bolsonaro's administration (2019-2022), Moraes found himself in conflict with the president's radical supporters, and even with Bolsonaro himself. Tensions escalated when Moraes issued an "unorthodox" decision to arrest a Federal

<sup>23</sup> Available at: <https://pt.org.br/damous-alem-de-despreparado-para-o-cargo-moraes-e-mentiroso/>. Accessed on: July 5, 2023.

<sup>24</sup> Rizzo, Alana and Talita Fernandes. "Alexandre de Moraes, o homem errado." *Época*, Available at: <https://epoca.oglobo.globo.com/politica/noticia/2017/01/alexandre-de-moraes-o-homem-errado.html>. Accessed on: July 5, 2023.





Deputy, and supporter of the president, named Daniel Silveira. Silveira had made veiled threats against the Supreme Court Justices.

During this conflict with Moraes, Bolsonaro publicly offended the Justice in front of thousands of supporters and also threatened to defy his judicial orders. However, he later recanted his statements a few days afterwards. Subsequently, Jair Bolsonaro initiated proceedings for the impeachment of the Justice and sought his political accountability, however the motion was rejected by the president of the Senate.

In the 2022 election, Moraes assumed the role of President of the Superior Electoral Court (TSE), a judicial body tasked with administratively and judicially overseeing elections in Brazil. Serving concurrently as a judge of both the Supreme Court and the Superior Electoral Court, Moraes found himself investigating politicians who were running for political office, a task that he, as a judge of the Supreme Electoral Court, was responsible for supervising. Notably, the presidential election was contested between Jair Bolsonaro and Luiz Inácio Lula da Silva. It is worth mentioning that Lula's vice-presidential candidate was Moraes' former boss, Geraldo Alckmin.

At the end of the electoral process, with Bolsonaro's defeat, Luiz Inácio Lula da Silva attended his ceremonial victory as president of the Republic at the TSE headquarters in a ceremony presided over by Alexandre de Moraes. At the beginning of the ceremony, when Lula entered, another judge of the electoral court spoke to Moraes in a celebratory tone about how "A mission given, is a mission accomplished"<sup>25</sup>. After the ceremony, and here is the public demonstration of his preference, Alexandre de Moraes attended, together with Lula<sup>26</sup>, a celebration about the results of the election at the house of a famous lawyer in Brasília.

As observed thus far, Moraes has a political background, had engaged in some political party activities prior to his appointment as a Justice of the Supreme Court. However, with the advent of the Bolsonaro administration, he became embroiled in conflicts with the president's radical supporters.

<sup>25</sup> Alcântara, Manoela. "Missão dada é missão cumprida", diz ministro do TSE a Moraes em diplomação de Lula." *Metrópoles*. Available at: <https://www.metropoles.com/brasil/missao-dada-e-missao-cumprida-diz-ministro-do-tse-a-moraes-em-diplomacao-de-lula>. Accessed on: July 5, 2023.

<sup>26</sup> Araujo, Carla. "Após diplomação, Lula e Moraes vão à festa com samba na casa de Kakay." *UOL Notícias*, December 12, 2022. Available at: <https://noticias.uol.com.br/colunas/carla-araujo/2022/12/12/apos-diplomacao-lula-e-moraes-vao-a-festa-com-samba-na-casa-de-kakay.htm>. Accessed on: July 5, 2023.





Moraes has also publicly stated his aversion to the extreme radical right that Bolsonaro epitomizes. In one occasion in 2022, Moraes explicity said “se pretendeu a criação de uma nova extrema direita que pudesse, de dentro do poder, correr as instituições democráticas. (...) essas pessoas, que criaram esses mecanismo de desinformação, de propagacao do discurso de odio, querem utilizar a liberdade de expressao para aniquilar a liberdade de expressao dos outros<sup>27</sup>”. Also in that year, Moraes said, about the radical-right: “Se pretende não substituir o sistema político (...)O que se pretende é substituir o sistema político. O que se pretende atacar é a própria democracia”<sup>28</sup>.

In this sense, the Justice perceives himself as a sort of democratic guardian tasked with combating the radical right represented by Bolsonaro, but in this this fights we will observe that Moraes employed the law as a weapon, curbing the rights of his adversaries. This is evident in the investigations that the Justice is currently leading.

## 5 THE MORAES INVESTIGATIONS

In 2019, in the context of a several attacks against the Supreme Court, the President of the Court, Dias Toffoli, ordered the initiation of an inquire about the assault. The investigation of "Fake News" mainly focused on "the existence of fraudulent news (fake news), slanderous accusations, threats, and offenses involving *animus calumniandi, diffamandi, and injuriandi*, which affect the honor and security of the Federal Supreme Court, its members and relatives.”<sup>29</sup>.

It's worth noting that the establishment of this investigation came under criticism due to the broad scope of the allegations, deriving from the vague terms used to define its objectives and objects. For instance, one aspect under investigation was the "attack on the dignity and honor" of the Supreme Court. However, what precisely constitutes an "attack on the dignity and honor" of a governmental institution was not

<sup>27</sup> III Encontro Virtual sobre Liberdade de Expressão: Desinformação como Ameaça aos Direitos Humanos e à Democracia." YouTube video, 1:32:45, posted by Conselho Nacional de Justiça, April 15, 2021. Available at: [https://www.youtube.com/watch?v=LulFi0cKJ\\_4](https://www.youtube.com/watch?v=LulFi0cKJ_4). Accessed on: July 5, 2023.

<sup>28</sup> "Democracia foi atacada no Brasil, mas sobreviveu, diz Moraes em Nova York." *Folha de S.Paulo*, November 2022. Available at: <https://www1.folha.uol.com.br/poder/2022/11/democracia-foi-atacada-no-brasil-mas-sobreviveu-diz-moraes-em-nova-york.shtml>. Accessed on: July 5, 2023.

<sup>29</sup> Portaria GP nº 69, of March 14, 2019.





explicitly defined. Furthermore, Brazilian legislation lacks provisions allowing for the defense of the honor of a governmental institution.

It's important to note that in Brazil, government agencies do not possess the legal right to claim compensation for moral damages, either actively or passively. The correct party in the lawsuit will be the State, either the Union (Federal) or the individuals States. Ex.: In cases where Justices offend someone's honor during a trial, Brazilian law stipulates that the Union should be the defendant in the compensation process; or if the local police made some illegal act, the individual State (Rio de Janeiro, São Paulo, etc.) will be responsible.

As a logical consequence of the lack of legal personality of these institutions, it is impossible to attribute any notion of "honor" to them. However, if there is obviously no legal concept of honor applicable to the Federal Supreme Court as an entity, could the investigation instead focus on attacks directed at the honor of individual justices?

As previously discussed, competencies in Brazilian criminal law are determined by several interconnected components: territorial, personal (in cases involving individuals with a prerogative to be tried in a specific court), and the type of crime. Justices of the Supreme Court enjoy a special jurisdictional privilege, meaning that if they commit any crimes, they should be investigated by the Federal Police and prosecuted by the federal prosecution office at its highest level: the "Procurador-Geral da República" - PGR (Attorney General). However, it's important to note that this privilege does not extend to crimes committed against the Justices themselves<sup>30</sup>, so the hypothesis of investigate these crimes in the own Supreme Court because of some prerogative of jurisdiction does not apply.

The other aspect of jurisdiction is the territorial one. Those crimes against the honor of the Justices generally occurred on social media and there is a discussion in Brazilian law about the jurisdiction of crimes committed on the internet. What do the courts understand about jurisdiction in those cases? The correct one is where the offended person became aware of the offenses? The jurisdiction of where the servers of that social media platform are hosted? Or the jurisdiction of where the offender uploaded the offenses? The discussion is important because the article of the

<sup>30</sup> Only if committed by individuals with special prerogatives, like a federal deputy, a senator, the president and other few authorities.







regiment<sup>31</sup> that supported the investigation of the Supreme Court states that the inquire is the responsibility of the court if it occurs "within its headquarters,". In the hypothesis that the crime occurred outside the headquarters of the court, the regiment gives a generic power to the President of the Court to initiate an investigation<sup>32</sup>.

The remaining factor regarding competence is the type of crime committed. The crime being investigated in the initial inquire were attacks on the honor of the Justices and their families. There are three crimes against honor in Brazil: *Injúria*, *Calúnia*, and *Difamação* (These are types of Defamation crime in the US).

Ignoring the fact that the Justices are utilizing their public authority to investigate domestic matters, namely crimes committed against their own families, it's crucial to remember that this does not grant the Court the authority to investigate crimes against its own "honor."

Given the highly contentious argument regarding the legality of this initial investigation, the Attorney General (PGR) held the view that the investigation was unconstitutional and requested the termination of the "Fake News" inquiry. Consequently, once the PGR requested the cessation of the initial investigation, Moraes' procedural obligation would be to immediately terminate inquiry 4781/DF. As emphasized by Renato Brasileiro (2020, p. 202), one of Brazil's most prominent criminal jurists:

Anyway, given the illegal nature of the investigative procedure in question, we can only hope that the Federal Supreme Court will proceed to dismiss Inquiry 4,781, thereby recognizing the illegality of all evidence obtained therein, given its *ab initio* nullity. After all, if there are illicit facts to be investigated, regardless of the authors or victims, even if they are Supreme Court Justices (or their relatives), respect for the constitutional and legal competencies that define the institutions and authorities responsible for investigating them must also be imposed.

And by Lorenzetto(2020, p. 173–203)

The inquiry would also be unconstitutional because it establishes a peculiar jurisdictional regime for the victim's prerogative function. This is because Dias Toffoli had "called" for the (supposed) investigative competence of the STF for all crimes committed against Court justices, even if the potential aggressors did not hold the prerogative of jurisdiction. In this sense, it is worth remembering that the only occasion on which the function of a Supreme Court

<sup>31</sup> Brazil. Supremo Tribunal Federal (STF). *Regimento interno* [recurso eletrônico]. Brasília: STF, Secretaria de Altos Estudos, Pesquisas e Gestão da Informação, 2020, p. 50.

<sup>32</sup> "§ 1 In other cases, the President may proceed under this article or request the opening of an investigation by the competent authority." Brazil, Op. Cit. p. 50





justice attracts the criminal competence of the Court is when the justices themselves commit crimes (Article 102, I, b, Constitution), and never when they are victims.

Not only did Moraes do not ended the "Fake News" inquiry, but he also initiated additional investigations and appointed himself as the rapporteur for these new proceedings. Consequently, the primary offshoots of the "Fake News" investigation are the inquiries into "Anti-democratic Acts" (No. 4828/DF) and "Digital Militias" (No. 4874/DF). In both instances, the investigations are expansive enough to encompass any individual whom the Justice deems to have committed any offense.

The investigation "Anti-Democratic Acts" (nº 4828) was initiated by the request of the PGR to probe the events that transpired on April 19, 2020, when demonstrators congregated in front of Army installations to protest the Supreme Court, even advocating for its closure. However, due to the ineffectiveness of the police authority's tactics, namely the Federal Police appointed by Moraes, the investigations veered off course from their initial aim. Consequently, the PGR requested the shutdown of the investigations, accompanied by criticism of Moraes and his Police Chief:

The criminal investigative process, with due legal process, lacks firm and logically linked probative elements from which the commission of crimes and their authorship may be inferred. (...) There is no room for intuition or a priori convictions moving with a potential bias of confirmation. These are the burdens of a Democratic State of Law, where authorities do not act without firm and concatenated objective elements or merely based on personal certainties<sup>33</sup>.

Despite the PGR's request for the investigation's closure in 2021, it persists to this day due to Moraes' strategy, which we will delve into shortly. Moraes has adopted a tactic of permitting other entities to act as Public Prosecutors, and these entities continue to supply the Justice with new facts and individuals to sustain the inquiry. Typically, these facts and individuals are political adversaries of the Justice and his newfound allies.

The "Digital Militias" investigation (nº 4874/DF) aims to investigate the existence of an organized group that supposedly attacks democracy and the rule of law through social networks and other digital means.

This investigation originated from Justice Moraes' efforts to utilize the evidence gathered during the investigation of "Anti-Democratic Acts," which the PGR perceived

<sup>33</sup> Peça nº 300, p. 4/10. Inq 4.828/DF





as distorting the original objective of that inquiry. Despite facing numerous criticisms from both the legal community and the Public Prosecutor's Office, the primary critique revolved around Moraes' perceived lack of caution in implementing precautionary measures against his political adversaries. This was exemplified in a particular episode, that will be studied, involving Moraes' decision regarding a group of businessmen who emerged in the media, airing grievances against him, and expressing anti-democratic sentiments in a WhatsApp group<sup>34</sup>.

Although there are additional inquiries led by Moraes that could serve as objects of investigation, our focus will be on the strategies employed in the inquiries of "fake news," "anti-democratic acts," and "digital militias." These strategies will be analyzed within the theoretical framework of Lawfare, operating under the assumption that Moraes harbors a political interest in vanquishing his adversaries by exploiting the law and the authority vested in him as a Supreme Court Justice. Such objectives align with Moraes' political trajectory and are consistent with the events that unfolded during Jair Messias Bolsonaro's presidency, which implicated both the president and his most fervent supporters.

But before delving into the Lawfare framework that aligns with Moraes' actions, it's essential to identify the targets of such tactics.

## 6 THE ATTACKED, OR THE VICTIMS

Until January 8, 2023, the main targets were prominent politicians, influential leaders, or extremists, but from that point on, the inquiries focused mainly on ordinary individuals lacking privileged jurisdiction in the Supreme Court (STF). These individuals have made antidemocratic remarks online or participated in the January 8th event<sup>35</sup>.

Predominantly, the targets are right-wing activists associated with former President Bolsonaro. However, there are also liberal figures among them, such as

<sup>34</sup> These businessmen had a WhatsApp group and were discussing about the results of the presidential election, until the messages emerge on the media. Were part of this group a small number of big and rich businessmen.

<sup>35</sup> On January 8<sup>th</sup>, 2023, thousands of Bolsonaro supporters staged an insurgency in Brasília, resulting in millions of dollars in damages to public buildings, hundreds were arrested.





Professor Marcos Cintra, who has questioned the electoral system, but does not align himself with the former president<sup>36</sup>.

The targets range from a homeless person (arrested for 11 months in an STF inquiry but later acquitted) to prominent figures. These include politicians affiliated with former President Bolsonaro, such as federal deputies André Fernandes, Carlos Jordy, and Daniel Silveira, as well as right-wing businessmen like Luciano Hang (owner of the Havan chain), Afrânio Barreira (Coco Bambu group), José Issac Peres (owner of Multiplan)<sup>37</sup>, and even billionaire Elon Musk<sup>38</sup>.

Additionally, social media influencers who support former President Bolsonaro, such as Allan Lopes dos Santos, Bernardo Pires Kuster, and Bárbara Destefani, are also under investigation. Former President Jair Messias Bolsonaro himself is also under investigation in the inquiries.

Given the diversity of inquiries in the STF conducted by Justice De Moraes, and considering the confidentiality of some of them, analysing the profile of all those involved requires a specific study for a comprehensive understanding of the whole. However, it is possible to say that they align themselves with supporters of Far-Right, Right, and Right-Liberal ideologies.

Specifically, regarding those involved in the events of January 8th, Moraes classified them as "terrorists"<sup>39</sup> from the beginning, even indicating to the PGR that this crime could be included in the indictment. However, this suggestion was dismissed by the Attorney General himself.

It is noted, however, that if the Justice is convinced, not only legally but personally, that the individuals involved are terrorists, this can explain the logic of combat, of "lawfare," that De Moraes employs to combat, in a logic of dispute, the investigated parties.

Thus, to fully assess the profile of the individuals under investigation, it is necessary to wait the conclusion of the inquiries, because, as seen, the rapporteur may include anyone he believes to be part of a "criminal association" to "attack the democracy in Brazil". Whether a homeless person or a foreign billionaire.

<sup>36</sup> Coelho, Gabriela. Em depoimento à PF após questionar urnas, Marcos Cintra diz que publicação o "induziu ao erro". Disponível at: <https://www.cnnbrasil.com.br/politica/em-depoimento-a-pf-apos-questionar-urnas-marcos-cintra-diz-que-publicacao-o-induziu-ao-erro/>. accessed on: April 24, 2024.

<sup>37</sup> Pet 10.543/DF

<sup>38</sup> Inq 4957/DF.

<sup>39</sup> Available at: <https://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/Relatorio8dejaneiro1ano.pdf>. accessed on: April 24, 2024.







It's important to emphasize that the rapporteur himself does not align with the ideological spectrum opposite to that of former President Bolsonaro. As observed, Moraes has proximity to the Center-Right spectrum, having been appointed to the STF by former President Michel Temer (PMDB).

Given this scenario, we need to address how Moraes employs the law with the intent of combating his enemies.

## 7 MORAES, LAWFARE AND FUNDAMENTAL RIGHTS

As previously mentioned, the use of the Lawfare concept can present some methodological challenges. In the current study, if we choose to compare Moraes' decisions with the jurisprudence of the Supreme Court, considering the procedural nature of the Brazilian criminal process, the Justice could, as is common, cite random cases to justify his positions. Even if the jurisprudence were completely contrary to Moraes' theories, the Justice could argue that he is modifying and innovating due to the uniqueness of the case.

We believe it's crucial to select a specific aspect of due process that isn't easily influenced by the political stance of the legal operator. In the current case, the political nature of Moraes' decisions isn't solely confined to the argumentation within the rulings but can primarily be observed through the subversion of procedural rules in the lawsuits and inquiries.

Therefore, we will analyze how Justice Moraes has departed from the established Brazilian legal procedural rules in his investigations. However, merely noting abrupt changes in procedural rules doesn't necessarily imply that the legal operator has a political agenda. Thus, we need to adopt criteria that can objectively indicate whether the operator intends to bend procedural rules to undermine his opponents' rights.

We propose that innovation regarding procedural rules must be analyzed considering whether they have caused harm or diminished the rights of individuals. This criterion can be applied in a broader sense because, in Brazil, a legal operator can also bend procedural rules to benefit their allies, which may be perceived as a defense of fundamental rights. However, it is more challenging for a legal operator dealing with adversaries to take actions that benefit them in a new way.





Therefore, Moraes' strategies should be assessed based on whether they strengthen or weaken the fundamental rights of his adversaries. If these strategies ultimately lead to the reinforcement of the democratic system and human rights, there are not "Lawfare".

We will observe that Moraes' procedural innovations were implemented in a manner that made it impossible for the accused to defend themselves and ensured that his orders were executed immediately and without the possibility of filing appeals.

To ensure the theoretical foundation of the research, despite the extensive international literature on the topic, we will focus on the major exponents of the theory within the scope of Brazilian Law: Zanin and Valim (2021). Recently, they addressed the topic in their book "*Lawfare: waging war through*"<sup>40</sup>, in which they affirm that there are various strategies that can be employed by the legal operator in question<sup>41</sup>.

The examination of potential instances of Lawfare necessitates an initial step of external contextualization, which situates the judicial process within its broader political environment<sup>42</sup>. This external perspective provides essential insights into how the rules are being implemented<sup>43</sup>, and that is important because Zanin (2021, p.4) argues that Lawfare depends on the context of the lawsuit: "However, the use of the concept is always problematic, as it is inevitably influenced by the context in which it takes place".

We will apply the same premise to illustrate that Moraes employs a strategy that allows for any opponent, for any reason, at any time, and by any means, to be targeted by the Justice.

In this article, we limit ourselves to three strategies<sup>44</sup> used by the Justice in these investigations that diminish the possibility of defense for the accused and deviate from the procedures established by Brazilian legislation. The first strategy is the imposition of fines in case of non-compliance with the Justice's orders, the second is the replacement of the Public Prosecutor's Office with actors who satisfy the Justice's desires, and the third is the weakening of the defense of the Justice's opponents, in

<sup>40</sup> Martins, Cristiano Zanin, Valeska Teixeira Zanin Martins, and Rafael Valim. *Lawfare: Waging War Through Law*. New York, NY: Routledge, 2021.

<sup>41</sup> Ibidem, p. 6.

<sup>42</sup> Gloppen, Siri. "Conceptualizing Abortion Lawfare." *Revista Direito GV* 17, no. 3 (2021): e2143

<sup>43</sup> Hart, Herbert L. A. *O conceito de Direito*. 5th ed. Lisbon: Fundação Calouste Gulbenkian, 2007, p. 99.

<sup>44</sup> Other strategies, such as censorship and temporary arrests, will be study in a next study. We intend to demonstrate the Justice strategies and tactics in a series of articles.





the person of their lawyers. Through the combination of those three strategies, we will demonstrate that Moraes intentionally utilized legal strategies that give him complete control over the liberty of his opponents.

## 8 THE AUTHORITARIAN STRATEGIES

### 8.1 THE INDUSTRY OF UNPAYABLE FINES

If one wants to prevent the investigated person from continuing to commit crimes or prevented him from interfering with the investigation, there are only two forms established by the legislation: "precautionary measures replacing imprisonment" and preventive and/or temporary imprisonment.

"Precautionary measures replacing imprisonment" emerged to de-incarcerate and prevent that judges only had the option of send people to jail to secure the effectiveness of an ongoing investigation, so in this sense Brazilian legislators create a series of measures so that investigated persons suffered restrictions on their rights that fulfilled the role of preventive detention but without leading them to prison. Examples of these types of measures include: "1) Periodic appearance in court; 2) Prohibition of access to or frequenting certain places; 3) Prohibition of contact with certain individuals; 4) Prohibition of leaving the jurisdiction, necessary for investigation or trial proceedings; 5) Home confinement during nighttime and days off; 6) Suspension of public office or economic activity; 7) Temporary internment; 8) Bail; 9) Electronic monitoring"<sup>45</sup>.

Therefore, it is noted that these are the forms that the legislation expressly states must be followed in the criminal process and police investigation. However, the procedure for imposing fines during an investigation in Brazil is basically accepted by jurisprudence. It is argued that this is the "general power of caution" or the "theory of implied powers"<sup>46</sup>.

The "general power of caution" is related, in Brazilian civil proceedings, to the provision of an urgent decision to guarantee the Party's right, even if the form or limits of this decision are not fully contained in the law. However, this principle is not

<sup>45</sup> Article 319 of the Code of Criminal Procedure.

<sup>46</sup> Recurso Especial nº 1.568.445 - PR (2015/0296413-4).





automatically transposable to the criminal process<sup>47</sup>. When it comes to criminal matters, judges can't just impose restrictions on the accused that aren't specifically allowed by the law, like they can in civil cases. This is because the principle of legality in crimes and punishments means that everything has to be done accordingly with the law and not just when the punishment is handed out, but also throughout the whole process (GOMES, 1991, p.57)<sup>48</sup>.

In this regard, Moraes introduced an innovative approach in his efforts to combat democratic threats. The Justice began utilizing the "general power of caution" to compel suspects or third parties to comply with his legal orders in investigations. This included the imposition of a fine, set at the substantial amount of R\$ 100,000.00 reais for non-compliance.

During the timeframe of the events, from 2019 to 2022, the minimum wage in Brazil was approximately R\$ 1,000.00 reais. Therefore, the fine amount of a hundred thousand times the national minimum wage appears to be excessively high.

The use of this huge fines started at the beginning of the inquire 4781, when the Justice decided against the Brazilian journal *Crusoe*. The online journal did a report about a supposedly involvement of the president of the Supreme Court, Justice Dias Toffoli, in a case of corruption. When Justice Toffoli was informed of the report by the media, he sent a WhatsApp message to Moraes and asked him to investigate the journal and his journalists.

Moraes promptly issued an order to the journal to remove the content from the web, included the journalists in the inquiry, and imposed a fine in case of noncompliance. Despite the journal complying with the order, Moraes still applied the fine.

Later, in 2022, Moraes innovated again, but this time against every Brazilian citizen. The Justice imposed the fine in one of the inquiries that required collaboration from the Telegram application. With the argument that the Telegram was not collaborating with the Supreme Court<sup>49</sup>, the judge gave an order and threat the suspend the app in case of noncompliance. But this time, the judge also involved the rest of the country in the decision.

<sup>47</sup> Alves, Rogério Pacheco. "O poder geral de cautela no processo penal." *Revista do Ministério Público*, no. 15 (2002): 229-254.

<sup>48</sup> Gomes Filho, Antonio Magalhães. *Presunção de inocência e prisão cautelar*. São Paulo: Saraiva, 1991, p. 57

<sup>49</sup> Petição 9.935/DF.







Moraes stated in the decision that if the app was indeed suspended, the fine of R\$ 100,000.00 reais had to be applied to any individual who used the app during the period of its suspension in Brazil<sup>50</sup>.

Later, in 2023, when the Brazilian Congress was discussing a project to regulate social media, Telegram sent a message to its users via the app about the bill project. In the context of Inquiry 4781/DF (Fake News), the Justice understood that the app could not oppose the bill project and issued an order to the company, compelling them to send another message. This new message had to declare that the first one was a "lie" from the company. Failure to comply with the order would result in the suspension of the app, and anyone attempting to use it would face fines once again:

Natural and legal persons who engage in conduct aimed at using technological subterfuge to continue communications through TELEGRAM will be subject to civil and criminal sanctions, in accordance with the law, in addition to a daily fine of R\$ 100,000.00 reais<sup>51</sup>.

With this context, it becomes evident that the justice system does not exercise caution in applying fines that correspond to the defendant's capacity to pay. There is a distortion in the power to impose fines, which has been transformed in a manner that the justice system uses to compel the defendant to immediately comply with its orders, even if it means complying with an unconstitutional order.

The strategy became clear in an interview that the Justice gave to *Piauí*, in which he confessed his unlawful relation with the fines:

"The minister criticized what he called the "ill will" of digital platforms in controlling the content they disseminate. 'When I took over the TSE, court decisions said that big techs had to take down offensive, criminal posts within 48 hours. They laughed: 48 hours is old news on social media. I said [to take them down] in 2 hours, and during elections, in 1 hour. They said it was impossible, **I said it was possible**,' Moraes stated. **'With the push of a button and a fine of a hundred thousand reais per hour, anything is possible.'**" <sup>52</sup> (we highlighted)

## 8.2 SWITCHING THE PROSECUTING BODY

<sup>50</sup> Petição 9.935/DF.

<sup>51</sup> Nunes, Samuel. "Moraes expõe ignorância digital ao bloquear Telegram." *O Bastidor*. Available at: <https://obastidor.com.br/politica/moraes-expoe-ignorancia-digital-ao-bloquear-telegram-2982>.

Accessed on: April 25, 2024.

<sup>52</sup> Available at: <https://piaui.folha.uol.com.br/moraes-diz-que-em-seis-meses-julgara-casos-mais-graves-do-8-de-janeiro/>. Accessed on: April 25, 2024.





## 8.3 WHO IS COMMANDING THE INVESTIGATIONS?

As previously observed, the appointment of Moraes as the rapporteur of the "fake news" investigation was heavily criticized by the Brazilian legal community. It was perceived that Dias Toffoli delegated the role of investigator not through a random selection process, but rather in a discretionary manner.

After the PGR questioned the legality of the investigation 4781/DF in the ADPF 572<sup>53</sup>, the Supreme Court ruled that this type of investigation was constitutional, with a dissenting vote from Justice Marco Aurélio De Mello. The Justice De Mello, the only dissenting vote, stated during the trial session that: "We are facing a stillborn investigation, an investigation of the end of the world, without limits."<sup>54</sup>.

Given that administrative inquiry procedures do not necessitate a lottery between competent authorities, and it is deemed sufficient for the original individual responsible for the investigation to delegate the power to investigate, it was considered that the delegation of the investigation in question was legal.

Despite he was the responsible for the initial investigation, we believe that Moraes had another strategy that twisted the legal procedure that the court ruled as constitutional: While Toffoli's appointment of the rapporteur for the fake news investigations was an act of the presidency of the STF itself, Moraes opened investigations *ex officio* and self-appointed himself as the rapporteur for them, as he did with the "anti-democratic acts" (nº. 4828/DF) and "digital militias." (nº 4874/DF). For him, the new investigations always have some kind of connection to the one that his was originally responsible for.

The strategy to control the inquire do not stop at the opening of new ones, the rapporteur also believe that he has the liberty of appointing the police officers who will conduct the investigations. It's notable that none of the appointed police officers reached a conclusion different from what the Justice stated in the order that initiated the investigations.

These police officers were appointed by Moraes and had a limited possibility of action. At some point, became clear that their investigation was under the will of

<sup>53</sup> Arguição de Descumprimento De Preceito Fundamental 572/Distrito Federal, this lawsuit was filled by the political party "Rede Sustentabilidade".

<sup>54</sup> Coelho, Gabriela. "Marco Aurélio vai contra maioria e vota para arquivar inquérito das fake news." *CNN Brasil*. Available at: <https://www.cnnbrasil.com.br/politica/marco-aurelio-vai-contrmaioria-e-vota-para-arquivar-inquerito-das-fake-news/>. Accessed on: April 25, 2024.





Moraes itself. Denise Dias Rosas Ribeiro, a federal police chief officer chosen by Moraes to lead one of the investigations, began to disagree with Moraes' and PGR decisions<sup>55</sup>. She eventually exceeded the strategy of the Justice and the PGR by requesting a police operation at "Palácio do Planalto", the headquarters of Brazilian presidency, which led to her being removed by Moraes from the inquire she was leading.<sup>56</sup>.

In this sense, Moraes makes use of requests from the police chief that himself appointed to serve his objectives, even though often the PGR has given an opposing opinion to the measures requested by the police<sup>57</sup> (Remember that the judge is not bonded to the prosecutor opinion).

But with constants conflicts with the PGR and a few Police officers, the Justice realized that he could not rely solely on his "supporters" to control the investigations, and since his investigations were aimed at supporters of Bolsonaro and against the president himself, he adopted a new kind of prosecutor/police: Left-wing politicians.

These individuals, who were then in opposition to the Bolsonaro government, started filing petitions directly in the "Alexander inquiries", requesting several measures against government supporters. Moraes found himself imbued with a new actor to legitimize his inquiries. Now, he had political support.

## 8.4 THE REPLACEMENT OF THE GENERAL PROSECUTOR OFFICE (PGR) BY A THIRD PARTY WITHOUT LEGITIMACY

In Brazilian law, it is possible to attribute the so-called *Amicus Curiae*, which are parties outside the lawsuit relation, that have a direct interest in the cause in question. This is usually done by civil entities and class councils that to join a cause they believe is relevant to the future of the country, on the rights of the affected class, or on certain fundamental rights.

<sup>55</sup> Pires, Breno. "Delegada da PF viu risco desnecessário e quis abortar operação contra bolsonaristas." *Estadão*. Available at: <https://www.estadao.com.br/politica/blog-do-fausto-macedo/delegada-da-pf-viu-risco-desnecessario-e-quis-abortar-operacao-contr-bolsonaristas/>. Accessed on: July 5, 2023..

<sup>56</sup> Neves, Rafael, et. al. "Delegada viu atos antidemocráticos e pediu busca e apreensão na Secom da Presidência." *UOL Notícias*. Available at: <https://noticias.uol.com.br/politica/ultimas-noticias/2021/06/16/delegada-atos-antidemocraticos-busca-e-apreensao-secom-presidencia.htm>. Accessed on: July 5, 2023.

<sup>57</sup> Mollica, Fernando. "PGR discordou da operação determinada por Alexandre de Moraes." *CNN Brasil*. Available at: <https://www.cnnbrasil.com.br/politica/pgr-discordou-da-operacao-determinada-por-alexandre-de-moraes>. Accessed on: July 5, 2023.





We also have another kind of external participation called "Accusation Assistant". The accusation assistant is only permitted once the criminal lawsuit began, and the Brazilian legal doctrine believe that this start with once the indictment is accepted by the judge<sup>58</sup>. This is to say that they are not permitted to interfere during the investigations, and even after the request to interfere, the Public Prosecutor can ask to the judge to deny the request.

Regarding this figure, there is a consensus on the limit of their action: they do not enter the investigative process and only entry into the criminal process is limited to certain actors, like the victim and his spouse, ancestor, descendant, or sibling<sup>59</sup>.

In the Moraes' inquires, he adopted a new procedure: When the PGR expressed an indisposition to agree to the Justices ideas for the investigation, he would simply substitute the prosecution for a Left-Wing politician that requested other measure in the investigations by a simple petition. This indisposition was clearly since the beginning of the investigations, when the PGR even requested the end of the Fake News inquire, but Justice Alexandre de Moraes refused to follow the request. We cite the PGR: "In this line of reasoning, the accusatorial criminal system does not allow for the judiciary to conduct criminal investigations, particularly when it excludes the prosecuting authority or imposes secrecy on them during the investigation process"<sup>60</sup>.

The principal example of this was the behavior of senator Randolfe Rodrigues, then leader of the opposition in the Senate, who began submitting petitions directly to the investigations for Moraes to act against certain individuals directly or indirectly linked to President Bolsonaro, or even against the president himself. The PGR was constant against these interventions, saying that this is illegal and a significate a diminish of the constitutional role of the Attorney General.

At the same time, Moraes sought to legitimize this strategy by stating that the Attorney General was, in fact, supervised them, but the PGR publicly denied being consulted on decisions that, legally, it should have been notified beforehand. In one these episodes, the PGR even release a public statement that the institution was not

<sup>58</sup> Lima, Renato Brasileiro. Op. Cit., p. 1345.

<sup>59</sup> "There are two types of assistance in our legal system: technical expert assistant (produced in criminal investigations) and prosecution assistant (in criminal actions). "The procedural or regulatory norms in force do not authorize the entry of a prosecution assistant into the case before the indictment is received" (Ruling of Inquiry 381/DF. Reported by Justice Célio Borja in the Plenary of the Federal Supreme Court. Published in the on November 18, 1988)

<sup>60</sup> In the petition nº 509/2019 – LJ/PGR, Único nº 107339/2019, p.5, in the Inquire 4781.







informed of a Moraes request for opinion, relative about a Federal Police request. This made Moraes release a “counter” public note to respond the supposedly illegality<sup>61</sup>.

Although the politicians could not do the cited procedure, and even though the Public Prosecutor's Office had expressed opposition in all these petitions for the reasons previously exposed (mainly due to this lack of procedural legitimacy to request the measures), Moraes accepted, on more than one occasion, the requests of these outsiders to the process. As we can see in the requests done during 2020-2023:

**Table 1**

Who asked	Request	Inquire	Moraes' Decision
Senator Randolfe Rodrigues	Suspension from office of politician Anderson Torres, involved in the revolt of January 8, 2023 in Brasília.	Inq 4.879/DF	Suspension from office of politician, Ibaneis Rocha, involved in the revolt of January 8, 2023 in Brasília <sup>62</sup> .
Senator Randolfe Rodrigues	Temporary arrest of the Education Justice of Bolsonaro Cabinet, Abraham Weintraub	Inq 4781/DF <sup>63</sup>	No information. Inquire under seal.
Senator Randolfe Rodrigues	Removal of Tércio Arnaud Tomaz, advisor of the president Jair Bolsonaro. The senator asked for the use of the “power of caution”.	Inq. 4781/DF e 4828/DF <sup>64</sup>	No information. Inquire under seal.
Senator Randolfe Rodrigues	Suspension or Removal of the National Secretary of Justice of the Ministry of Justice and Public Security, Vicente Santini.	Inq 4781/DF <sup>65</sup> and Inq 4874	Denied the request, but do not manifest anything about the senator role as a third party in the inquire, despite being informed of this by the PGR <sup>66</sup> .

<sup>61</sup> Supremo Tribunal Federal. "Nota de Esclarecimento Final". Available at: <https://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/NOTAESCLARECIMENTOFINAL2.pdf>.

Accessed on: July 5, 2023.

<sup>62</sup> Anderson Torres was the public safety secretariat of the Federal District, Ibaneis Rocha was the Governor of the Federal District. Despite the fact that Randolfe requested the suspension of a minor player in the Federal District structure, Moraes suspended the governor. There was no specific request of his suspension.

<sup>63</sup> Petição no INQ 4781 - Weintraub x STF. Available at: <https://static.congressoemfoco.uol.com.br/2020/06/peticao-inq-4781-weintraub-x-stf.pdf>. Accessed on: July 5, 2023

<sup>64</sup> Rodrigues, Randolfe. Requests on Inq. 4781/DF e 4828/DF. Available at: <https://static.poder360.com.br/2020/07/randolfe-pedido-stf.pdf>. Accessed on: July 5, 2023

<sup>65</sup> Rodrigues, Randolfe. Request of suspension. "Afastamento" [PDF]. Available at: <https://static.poder360.com.br/2021/12/Randolfe-Allan-Santini-Afastamento-8-dez-2021.pdf>. Accessed on: July 5, 2023

<sup>66</sup> Supremo Tribunal Federal. "INQ 4874 - Randolfe Rodrigues" [PDF]. Available at: <https://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/INQ4874Randolfe.pdf>. Available at: July 5, 2023





Senator Randolfe Rodrigues	That Bolsonaro would stop to lie about Covid vaccines <sup>67</sup>	Inq 4781/DF	No information. Inquire under seal.
Senator Randolfe Rodrigues	Request to investigate the son of Bolsonaro for his travel to Russia <sup>68</sup>	Inq 4874/DF	Request information from the federal government about the travel of Bolsonaro's son to Russia.
Senator Randolfe Rodrigues	Request to prevent administrative changes in the Federal Police <sup>69</sup>	Inq 4.831/DF	Request information from the Federal Police about the changes in the administrative/leadership roles <sup>70</sup>
Senator Randolfe Rodrigues	Request preventive measures against a group of businessmen based of their exposed messages on a Whatsapp group <sup>71</sup>	Inq 4.874/DF	Moraes attended the request <sup>72</sup> and blocked the accounts of the businessmen, among other's measures <sup>73</sup> .

We remember the previously mentioned episode involving the businessmen that was brought to Moraes' attention through a petition filed by left-wing politicians.

Without the knowledge of the PGR, these politicians requested specific precautionary measures against the businessmen, including the blocking of bank accounts and suspension of social media accounts. In response to this request, the PGR leveled the following criticisms against the investigation's proceedings and Moraes' conduct:

II. ON THE LACK OF LEGITIMACY OF THE PETITIONERS The petitioners lack standing ad causam. The governing legislation does not allow, especially during the investigative phase, the intervention of individuals or entities without any connection to the facts under investigation, including as an assistant. If the Senators' argument were to prevail, mutatis mutandis, any ongoing investigation before the Judiciary could be subject to interventions by

<sup>67</sup> "Petição INQ 4781 - Bolsonaro, Desinformação e Vacinação Infantil" [PDF]. Available at: <https://images.jota.info/wp-content/uploads/2022/01/peticao-inq-4781-bolsonaro-desinformacao-vacinacao-infantil.pdf>. Accessed on: July 5, 2023

<sup>68</sup> Supremo Tribunal Federal. "INQ 4874 - Rússia" [PDF]. Available at: <https://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/INQ4874Russia.pdf>. Accessed on: July 5, 2023

<sup>69</sup> Rodrigues, Randolfe. "Migalhas - Pedido Randolfe" [PDF]. Available at: [https://www.migalhas.com.br/arquivos/2022/3/CD994F5DF205F2\\_pedido-randolfe.pdf](https://www.migalhas.com.br/arquivos/2022/3/CD994F5DF205F2_pedido-randolfe.pdf). Accessed on: July 5, 2023

<sup>70</sup> Mendes, Lucas. "Moraes dá 10 dias para PF se manifestar sobre troca de diretores." *Poder360*. Available at: <https://www.poder360.com.br/justica/moraes-da-10-dias-para-pf-se-manifestar-sobre-troca-de-diretores/>. Accessed on: July 5, 2023

<sup>71</sup> Rodrigues, Randolfe. "Pedido - Empresários" [PDF]. Available at: <https://static.poder360.com.br/2022/08/randolfe-pedido-moraes-empresarios.pdf>. Accessed on: July 5, 2023

<sup>72</sup> "Decisão - Pet 10543" [PDF]. Available at: <https://images.jota.info/wp-content/uploads/2022/08/decisacc83o-pet-10543.pdf>. Accessed on: July 5, 2023

<sup>73</sup> "Moraes atendeu a pedido de Randolfe para quebrar sigilo bancário de empresários." *CNN Brasil*. Available at: <https://www.cnnbrasil.com.br/politica/moraes-atendeu-a-pedido-de-randolfe-para-quebrar-sigilo-bancario-de-empresarios/>. Accessed on: July 5, 2023





"interested parties" or local authorities, to directly request investigative measures from the judge, which the Criminal Procedure Code does not authorize, not even to the victim, whose requests for investigative measures are examined and submitted to the judgment of the investigative authority (CPP, art. 14). Therefore, third parties without any connection to the case cannot be recognized as having standing. (...) III. ON THE INVALIDITY OF THE "FISHING EXPEDITION" STRATEGY In reality, this represents an attempt to open a fishing expedition for evidence to be developed by specific political actors in an election year, with the concomitant media exploitation of their actions, and a consequent intention to embark on a new political front in search of legal prominence, replacing the competent authorities.<sup>74</sup>

At this point, it is important to understand the position of the PGR itself, and here we cite one of PGR's statements on the illegality of Senator Randolfe Rodrigues' constant requests in the inquiries:

With these considerations, it is concluded that, with the exception of the injured party, who cannot strictly be considered a "third party" in the legal-procedural relationship, *the governing legislation does not authorize, especially in the investigative phase, the intervention of individuals and entities without any connection to the facts under investigation, including for entry as an assistant or admission as an amicus curiae*<sup>75</sup>

Moraes' situation regarding the nullifying of the Public Prosecutor was so outrageous that the PGR publicly accused the Justice of violating the accusatory system<sup>76</sup>.

Moraes's behaviour can be partly explained by the political stance of the Attorney General, Augusto Aras. Aras was seen as an ally of Bolsonaro, and there was an impression within part of the legal community that Aras provided protection to the president. This analysis requires a study on the relationship between the accusations made against Bolsonaro by civil society and Aras's behaviour, which is not the focus of the present study.

Therefore, it becomes clear that Moraes' objective of adopting a party outside of the investigations to corroborate his intentions to investigate Bolsonaro's supporters or even Bolsonaro himself is a clear example of Lawfare, considering that the public

<sup>74</sup> PETIÇÃO Nº 10.552/DF (ELETRÔNICO). Available at: <https://www.mpf.mp.br/pgr/documentos/PET10552GABLMAN5530682022irregularidadenarepresentailegirtimidadearquivamento.pdf>. Accessed on: July 5, 2023

<sup>75</sup> PETIÇÃO AJCRIM-STF/PGR 42594/2022. Inq 4878, 30. Available at: <https://www.conjur.com.br/dl/manifestacao-inquerito-48781.pdf>. Accessed on: July 5, 2023

<sup>76</sup> Falcão, Márcio; Vivas, Fernanda. "PGR volta a defender arquivamento de investigação contra Bolsonaro e critica Moraes." G1. August 1, 2022. Available at: <https://g1.globo.com/politica/noticia/2022/08/01/pgr-volta-a-defender-arquivamento-de-investigacao-contra-bolsonaro-e-critica-moraes.ghtml>. Accessed on: July 5, 2023





prosecutor, the responsible for the criminal lawsuit, has attested more than once the illegality of the measure.

The substitution of the Public Prosecutor is added to another strategy in the inquires: Besides controlling the accusation and the investigators, Moraes also tries to control the defendant defense, by attacking their lawyers.

## 8.5 THE VIOLATION OF LAWYERS' PREROGATIVES

In Brazil, lawyers have certain legal prerogatives to exercise their work, mostly contained in Federal Law nº 8.906, of July 4, 1994, known as the "Lawyers' Statute". However, it was recurrent practice for government and judicial authorities to violate some of these prerogatives.

The Brazilian Bar Association, began to lobby in the Congress to criminalize violations of lawyers' prerogatives, and this was finally achieved through the promulgation of the "Abuse of Authority Law", nº 13.869 of September 5, 2019.

It became a crime to violate certain prerogatives of lawyers, such as accessing their clients when they were in custody (Article 20), with or without their clients' authorization; accessing ongoing investigation files against their clients, except in diligences about to be executed (Article 32), among others.

In this sense, if the Moraes investigations constantly disrespect the rights of the Public Prosecutor, the conduct could not be different for defense lawyers. Thus, this study also aims to demonstrate that, in this case, the violations of lawyers' prerogatives are inseparable from a possible qualification of Lawfare.

Moraes has one principal tactic to combat lawyers' prerogatives: prohibiting the professionals from accessing the investigations about their clients, or even the clients themselves.

Allegations that the access to the investigations was denied by Justice Alexandre de Moraes began in 2020, with the lawyers of the radical right-wing journalist Allan dos Santos and other right-wing activists that were, at the time, target by Moraes. The critic of the Justice strategy against the lawyers was rising so fast in the media that Moraes had to public express that the lawyers were lying, and they had, in fact, access to the investigations. As said by the Justice cabinet: "Justice's cabinet Alexandre de Moraes informs that, contrary to what was falsely alleged, full knowledge of the records was authorized for those investigated in the investigation that







investigates “fake news”, offenses and threats to members of the STF, the rule of law and democracy”<sup>77</sup>.

The situation got worse when federal deputy Daniel Silveira was included in investigations for attacking the Supreme Court. Silveira’s lawyers public denounced that they do not had access to the investigations, but nothing was done. Other similar allegations began to emerge from lawyers representing individuals who were also being investigated but did not have a similar radical conduct as that of the federal deputy.

The number of defendants whose rights were violated made their lawyers, scattered across the country, to seek their regional Bar. The number of complaints was so great that the Bar association sections in the States of Acre, Distrito Federal, Goiás, Mato Grosso, Mato Grosso do Sul, Minas Gerais, Paraná, Pernambuco, Rio Grande do Sul, and Rondônia sent letters demanding action on the violations of prerogatives to the Federal Council of the Bar Association, the institution's highest body. The president of the Bar Association was obliged to make a petition into Moraes’s investigations demanding that the lawyers could had full access to investigations.

Moraes was forced to respond such criticisms and again claimed that these were lies from the lawyers, stating that access was guaranteed in accordance with the lawyer’s statute<sup>78</sup>.

It should be highlighted the lawyers who reported that they were unable to gain access to the case files:

Table 2

Lawyer name	Inquire
Silvano Willian Antunes	Inq. 4.879
Evaristo Kuhnen	Inq. 4.781
Yuri Batista Novaes G. Ferraz	Inq. 4.879
Adriano Laurentino de Argolo	Inq. 4.781
Paulo Cesar R. de Faria	Inq. 4.879 and 4.828
João Vinicius Manssur	Inq. 4.879 and 4.828
Emerson Tadeu Kuhn Grigollette Junior	Inq. 4.879
Luís Gustavo Mendes	Inq. 4.879
Luciano F.	Inq. 4.879
Rômulo Martins Nagib	Inq. 4.879

<sup>77</sup> Ferrari, Murillo; Spigariol, André. "Advogado de Allan dos Santos diz que não teve acesso a inquérito sobre fake news." *CNN Brasil*. Available at: <https://www.cnnbrasil.com.br/politica/advogado-de-allan-dos-santos-diz-que-nao-teve-acesso-a-inquerito-sobre-fake-news/>. Accessed on: July 5, 2023

<sup>78</sup> OAB - Ordem dos Advogados do Brasil. "Request Inq 4781/DF" [PDF]. Available at: <https://s.oab.org.br/arquivos/2022/12/54a367f4-85f0-49ad-b1c2-873320880838.pdf>. Accessed on: July 5, 2023





Alines Batista Duarte	Inq. 4.781
Yuri Batista Novaes	Inq. 4.781
Jônatan Junes Meireles	Inq. 4.781
Alvaro Bernardi Pes	Inq. 4.879
Marques e Louzich Advogados Associados	Inq. 4.879

79

The judge categorically was not complying with the provisions of Binding Precedent nº 14 of the STF, which says categorically that "it is the right of the defender, in the interest of the represented, to have broad access to the evidence already documented in an investigative procedure carried out by a body with police authority, related to the exercise of the right of defense"<sup>80</sup>. This strategy was created to prevent Moraes' adversaries from having their defense rights fully guaranteed.

It should also be noted that the precedent not only states that there is "access", which would be sufficient to guarantee the lawyer's prerogative to analyze the investigation, but also states that there is "broad access", that is, unconditional access.

The violations committed reached a climax with the case of former deputy Roberto Jefferson.

Jefferson was already under investigation in the Alexandrian investigations and was under house arrest. The former politician, who became influential among the radical right-wing supporters of President Bolsonaro, recorded a video where he made numerous insults to supreme court Justice Carmen Lucia.

Moraes immediately ordered Jefferson's arrest<sup>81</sup>. Jefferson, who had previously advocated for arming the population and for armed resistance against what he saw as the supreme court's arbitrariness, fired numerous shots at the Federal Police car that was carrying out Moraes' arrest order. When Jefferson finally surrendered, a new arrest warrant was issued that contained a provision that we must highlight to demonstrate the point that the strategies reached.

Moraes ordered that Jefferson should be kept incommunicado, even for his lawyers prohibited. His lawyers were prohibited to visit or talk to him<sup>82</sup>. According to

<sup>79</sup> Based on information present in Minister Alexandre de Moraes's response to the OAB's request.

<sup>80</sup> RE 593.727, rel. min. Cezar Peluso, red. p/ o ac. min. Gilmar Mendes, P, j. 14-5-2015, DJE 175 de 8-9-2015, Tema 184.

<sup>81</sup> PET 9844/DF

<sup>82</sup> "Fica o denunciado proibido de conceder entrevista ou receber quaisquer visitas no estabelecimento prisional, salvo mediante prévia autorização judicial por este SUPREMO TRIBUNAL FEDERAL, inclusive no que diz respeito a líderes religiosos, familiares e advogados". Pet. 9.844, Available at: [https://static.poder360.com.br/2022/10/Moraes-decisao\\_monocratica-Roberto-Jefferson-23-out-2022.pdf](https://static.poder360.com.br/2022/10/Moraes-decisao_monocratica-Roberto-Jefferson-23-out-2022.pdf). Accessed on: April 24, 2024.





the Federal Constitution<sup>83</sup> the prisoner's complete isolation is prohibited and even during a State of Siege, a prisoner cannot be kept complete isolated.

We emphasize that according to the law of the "Lawyer's Statute", it is a prerogative of the lawyer to access their client in any prison facility, with or without power of attorney, at any time, even if the facility is without the presence of its responsible director<sup>84</sup>. According to the "Abuse of authority Law", violating this prerogative became a crime under Article 20: "Art. 20: Preventing, without just cause, the personal and private interview of the prisoner with their lawyer."

The decision of the rapporteur was clearly contrary to the Constitution and ordinary laws that the Brazilian Bar Association petitioned into the inquire and appealed against Moraes' decision on the lawyers' prerogatives. Under attack and facing a clear configuration of abuse of authority, Moraes retreated and stated that the prohibition of visits by lawyers did not applied to "the defendant's lawyers who had power of attorney in the lawsuit."<sup>85</sup>

Despite the retreat, two problems persisted: 1- In the interim between Moraes' initial decision and the "retreat" decision, the defendant's lawyers were prevented from accessing their clients, i.e., their prerogatives were materially violated, and 2- The "Lawyers' Statute" is crystal clear in stating that there is no need for a power of attorney for the lawyer to access their imprisoned clients<sup>86</sup>. In other words, the retreat decision, despite under different wording, continues to commit the same infringement on lawyers' prerogatives.

With this last strategy we finish the demonstration of the strategies that the Justice Alexandre de Moraes uses to persecute his political adversaries.

## 9 CONCLUSIONS

In order to discuss Lawfare in reference to political objectives, it is necessary to analyze the actors who operationalize the law, the victims of these operators and

<sup>83</sup> Art. 136, § 3.º, IV, Federal Constitution.

<sup>84</sup> Art. 7, item III, Law nº. 8,906, of July 4, 1994.

<sup>85</sup> Lawsuit 0058937-79.2021.1.00.0000, PET 9844. Decision of October 24, 2022.

<sup>86</sup> Article 7, III: "comunicar-se com seus clientes, pessoal e reservadamente, mesmo sem procuração, quando estes se acharem presos, detidos ou recolhidos em estabelecimentos civis ou militares, ainda que considerados incomunicáveis". Law nº. 8,906, of July 4, 1994





the strategies implemented. So, choose Moraes and not the Court, fill the requirement of specify the individual actor responsible for the operationalization of the Law. And as we can see, Moraes has demonstrated his political objectives multiple times: to combat supporters of President Jair Messias Bolsonaro and the former president himself, who are considered members of a radical right by the judge.

The Justice tactics are not just narratives and political discourse, they gave him control over who can be prosecuted by transforming the jurisdiction of the Supreme Court, through who presents a request for investigation against suspects, by replacing the PGR with political agents and policeman of his trust, through the imposition of fines on suspects, forcing them to comply with any irregular investigation order, the Justice can literally investigate any person, for any reason, in any way, for any length of time.

These “innovative” strategies have a great impact on Brazilian judicial system, because they create precedents that can be replicated in the entire national system, mining the rights of defendants across the nation. This have been seeing, from the judicial community to the rest of civilian society, as a corrupt form to implement the Law.

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