THE ABSURDITIES OF THE FAKE NEWS INQUIRY / *OS ABSURDOS DO INQUÉRITO DAS* FAKE NEWS

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Abstract: The present article aims to denounce the legal flaws of Inquiry 4.781, better known as “fake news inquiry”, opened *ex officio* in March 2019 by Dias Toffoli, then Chief Justice of the Brazilian Supreme Court, in order to investigate offenses directed by citizens against members of the Court, especially through social networks. The alluded inquiry was already born with a plethora of legal flaws involving the violation of constitutional principles and rules of criminal procedural jurisdiction, as well as the disregard for the literal wording of provisions of the Supreme Court’s own internal regiment. We conclude the mentioned inquiry to be an attack on the rule of law and the citizens’ fundamental liberties.

Keywords: Fake news inquiry, impartiality, jurisdiction, due process of law.

Resumo: O presente artigo visa denunciar os vícios jurídicos do Inquérito 4.781, mais conhecido como “inquérito das *fake news*”, aberto de ofício em março de 2019 pelo então presidente do Supremo Tribunal Federal, ministro Dias Toffoli, a fim de apurar ofensas dirigidas por cidadãos contra membros do Pretório Excelso, principalmente por meio das redes sociais. O aludido inquérito já nasce maculado por toda uma miríade de inconstitucionalidades e ilicitudes concernentes à violação de princípios constitucionais e regras de competência processual penal, bem como ao desrespeito à literalidade da redação de dispositivos do próprio regimento interno da Suprema Corte. Conclui-se que o referido procedimento atenta contra o Estado democrático de direito e as liberdades fundamentais do cidadão.

Palavras-chave: Inquérito das *fake news*, imparcialidade, competência, ampla defesa.

1 INTRODUCTION

“Someone must have slandered Josef K., because he was arrested one morning without having done anything wrong[2]”.

In the classic book *The process*, by Franz Kafka, the banker Josef K. wakes up one morning and realizes that he is being the target of a secret process for which he does not know the reasons, whose files he does not have access to, and against which he does not have any idea of how to defend himself. It is an acidic criticism of the Judiciary and its arbitrariness against the common citizens (TINÔCO, 2019).

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[2] Initial sentence of Franz Kafka’s *The process*.

Almost a hundred years after the publication of the original work in the Austro-Hungarian Empire, Kafka's Process seems to have materialized itself in *terra brasilis* in the form of Inquiry 4.781 of the *Supremo Tribunal Federal* - STF (Portuguese: Supreme Court), better known as the "fake news inquiry" (Portuguese: *inquérito das fake news*) or "end of the world inquiry" (Portuguese: *inquérito do fim do mundo*).

According to Lívia Tinôco (2019, p. 1), the referred procedure constitutes "a legal aberration, due to its lack of conformity with the Brazilian legal system. It is the expression of judicial absolutism and the functioning of a court of exception" (author's translation). As for Tavares Neto (2020, p. 108), "the STF conducted the most aberrant process of its entire history, later upheld in 2020 by ten of its eleven Justices in *Arguição de Descumprimento de Preceito Fundamental 572*[3]" (author's translation).

The objective of this work is, therefore, to unravel the legal intricacies of the aforementioned inquiry to expose the reasons why it represents an offense against the Brazilian legal system and the democratic rule of law. In Chapter 2, the facts concerning the Inquiry 4.781 will first be discussed. In Chapter 3 and following, by its turn, the legal inconsistencies of the procedure will be addressed in detail.

The method employed is, therefore, the hypothetical-deductive one, initially establishing the hypothesis that the fake news inquiry is legal under Brazilian law and then submitting it to a falsehood test. For that, Brazilian legislation, jurisprudence and doctrine were used as research sources.

2 THE FAKE NEWS INQUIRY

In the prologue of their most recent work on the Brazilian Supreme Court, Recondo and Weber (2019) report the growing animosity of sectors of the Brazilian population towards the Supreme Court and its Justices in recent years.

Increasingly exposed to the scrutiny of public opinion due to the advancement of the media, especially the social networks, and also to the growing intervention of the Court in political issues traditionally reserved for the Executive and Legislative branches, such as the criminalization of drugs and abortion and the rights of minorities,

[3] *Arguição de Descumprimento de Preceito Fundamental* - ADPF (English: Argument of Breaching of Fundamental Precept) is a concentrated control of constitutionality action that enables some authorized actors to challenge the constitutionality of certain acts and law before the Brazilian Supreme Court. In ADPF 572, the Supreme Court unsurprisingly upheld its own inquiry's constitutionality.

the STF Justices saw the missiles against them intensify during and after the 2018 elections, which ended up with the rising of outsider Jair Bolsonaro, a former Army Captain, to the Presidency of Brazil:

> The elections boosted the criticisms that were aimed at the Supreme Court. When he was leading the polls, the then candidate even advocated increasing the number of Justices to "put at least ten exempt ones in there". His son Eduardo had already spoken of the possibility of "a corporal and a soldier" closing the STF. The stage was set for criticism to turn into attacks.
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> The STF was corroded by its internal problems: delay in judgments, precipitation in agendas that by its nature would belong to Congress, overexposure, arguments and hidden agendas of its Justices. But the tone had changed.
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> Bolsonaro assumed the presidency with a conservative agenda, fighting corruption, supporting Operation Car Wash[4]. The Supreme Court, which some sectors considered to be an obstacle to the advancement of this agenda, began to be harassed by congressmen and senators, threatened by requests for a CPI[5] and impeachment proceedings by the outcry of social media (RECONDO; WEBER, 2019, p. 20) (author's translation).

In this tune, Recondo and Weber (2019) list several episodes that illustrate the context described above. In October 2018, in the final stretch of the electoral race, retired Army Colonel Antônio Carlos Alves Correia had posted a video on social media in which he cursed and threatened Justice Rosa Weber of the STF, who at the time was also the president of the Electoral Superior Court. For the Colonel, that "unscrupulous, corrupt and incompetent" Justice should not have received in her office

[4] *Operação Lava Jato* (English: Operation Car Wash) is considered the largest corruption-fighting operation in Brazil ever. Initiated in March 2014, it resulted in the arrests and convictions, some of them controversial, of over a hundred people by the then federal judge Sergio Moro, and officially ended in February 2021. The operation is named after a gas station used for money laundering, discovered in the first phase of the investigations. Its findings uncovered a huge corruption scheme involving government agents of the Brazilian State-owned oil company Petrobras; politicians from Brazil's biggest parties, including former Presidents, Speakers of both the House of Representatives and the Senate and State Governors; and businessmen of huge Brazilian construction firms. One of these convicted was former President Lula, who spent 580 days in jail. However, in November 2019, the STF overturned its 2016 and 2018 precedents and ruled that incarcerations with pending appeals were unconstitutional and Lula, among others, was released from prison as a result. In April 2021, the STF ruled that all of Lula's convictions must be nullified because he was tried by a court that did not have proper jurisdiction over his case, thus restoring Lula's political rights. In March 2021, the STF had also ruled that judge Moro, who oversaw his corruption trial, was biased, thus providing one more reason to nullify all charges on which Moro had convicted Lula. Following the Supreme Court rulings, Lula was legally cleared to run for President again in the 2022 and defeated Bolsonaro in the runoff.

[5] A *CPI – Comissão Parlamentar de Inquérito* (English: Parlamentary Committee of Inquiry) is a Constitution-authorized investigation run by congressmen and/or senators in Brazil as if they were judicial authorities. In order to be opened, a CPI needs the signature of at least one third of either the House of Representatives or the Senate. A CPI lacks the jurisdiction to try or convict anyone, but its findings may be sent to the Prosecution so that any crimes uncovered can be brought to Justice (Article 58, § 3rd of the Brazilian Constitution).

the representatives of the PT and the PDT[6] who were contesting Bolsonaro's candidacy based on a report by the newspaper *Folha de S. Paulo* according to which a network of businessmen had financed the viral spread of false news in favor of the Captain's campaign. All STF Justices sympathized with their colleague and demanded strong measures from the Army's General Staff and the Attorney General's Office in relation to what happened.

In February 2019, already at the beginning of the Bolsonaro administration, information leaked to the press asserted that Justice Gilmar Mendes and his wife Guiomar Feitosa, as well as Roberta Rangel, wife of then Chief Justice Dias Toffoli, were both included in a list of more than one hundred politically exposed people who would be the target of a "tax interest analysis" by the Brazilian Internal Revenue Service (IRS). It would later become known that this investigation was not aimed at possible errors in income tax returns, but at the presence of crimes such as corruption and influence peddling. Again, the STF did react. Toffoli asked the Attorney General's Office, the IRS and the Ministry of Economy to investigate the irregularities in the investigations.

On another front, the STF took a stand in defense of the rights of minorities, an issue that conveyed the risk of setbacks as a result of declarations by members of the administration and its parliamentary base. Justice Celso de Mello, rapporteur for actions that questioned the National Congress' delay in approving legislation that criminalized homophobia[7], insisted with Toffoli that the issue be put on the Court's agenda. By 10 votes to 1, the Supreme Court understood that homophobic and transphobic conducts are equivalent to racism and should be criminalized as such, under the terms of the law. Congress was determined to confront the STF – even before the conclusion of the trial, some congressmen, especially the new ones elected as Bolsonaro's allies, were asking for the impeachment of Justices who had already voted in favour of the actions.

In March, another trial stirred up tempers. At that time, the fate of criminal proceedings against politicians investigated for common crimes and, at the same time,

[6] Both the PT - *Partido dos Trabalhadores* (English: Workers' Party) and the PDT - *Partido Democrático Trabalhista* (English: Labor Democratic Party) are Brazilian left-wing parties who opposed Bolsonaro's right-wing government. Lula, Bolsonaro's main rival and his successor as President of Brazil, is also the main leader of PT.

[7] Such an idea was strongly rejected by Bolsonaro's conservative allies in Congress.

for electoral crimes was being discussed. Should the actions be processed in the Federal Justice or in the Electoral one?

> Prosecutors of the Operation Car Wash task force went to the press and social networks in defense of the jurisdiction of the Federal Justice to prosecute such cases, since the Electoral Court would not have the structure or experience to investigate crimes of great complexity. Here and there the end of Car Wash was hinted at in the event that the Supreme Court determined the transfer of the cases to the Electoral Justice. On the day of the trial, one of the prosecutors, Diogo Castor, denounced that the STF was plotting a coup against the operation. On social media, attacks on the Supreme Court were mounting. In the press, it was read that the bolsonarist social media machine had chosen the STF as its preferred target at that moment (RECONDO; WEBER, 2019, p. 22) (author's translation).

Continuing, Rogério Greco (2020) describes how social networks have enhanced the Brazilian people's scrutiny of its authorities, to the point that the common folk began to know by name the eleven STF Justices, even more than the eleven players of their favorite soccer teams. In this sense, the Court began to be more closely monitored and criticized for its most recent decisions, which ruled against the wishes of the majority of the population, such as in the decriminalization of abortion up to the 12th week of pregnancy and the release of exponents of Operation Car Wash who had been previously arrested, such as notorious businessmen Eike Batista and Jacob Barata Filho.

> The latest STF rulings, with all due respect, have been the worst possible. Judicial activism became the rule [...] in undue and constant interference in the Executive Branch, reaching the point of absurdity when preventing appointments to commissioned positions [...], as occurred with the appointment to Director General of the Federal Police[8].
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> While the processes of corrupt politicians languish on their shelves [...], the STF, acting in a political way, tries to take the nation's directions in its own hands, deciding, often monocratically, what should be done. They forget that they were not "elected" and that the task of leading the country is the primary responsibility of the President of the Republic, with the help of the National Congress.
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> All these absurd decisions made the population revolt against the STF Justices and began to express their indignation through, and mainly, social

[8] In April 2020, Justice Alexandre de Moraes suspended President Bolsonaro's appointment of Commissary Alexandre Ramagem as Director General of the Federal Police (the Brazilian equivalent of the FBI). Under Brazilian law, the President has the prerogative to appoint the Director General of the Federal Police; however, former Minister of Justice Sergio Moro (who was previously the judge in charge of Operation Car Wash) had just left the government accusing his former boss Bolsonaro of placing Ramagem, a friend of the presidential family, at the head of the Federal Police as a way to obstruct undergoing investigations against the President and his allies. Based on Moro's declarations, Moraes ruled Bolsonaro's appointment of Ramagem as illegal.

> networks. Apps like Twitter, Facebook, Instagram etc. began to be crowded with posts against the Supreme Court, posts that were often aggressive and even criminal [...] (GRECO, 2020, p. 88-89) (author's translation).

Recondo and Weber (2019) report that, every Wednesday, before the Full Bench session of the STF begins, Toffoli promotes a lunch with the other Justices in his cabinet. There was a relative consensus among them that the Court's authority needed to be safeguarded against the attacks it had been suffering. They complained about Car Wash prosecutors who accused them of plotting against the operation. The President of the Court revealed that he had sent official letters to the Federal Police so that the attacks on Justices could be investigated, but no action had been taken.

Thus, on March 14, 2019, minutes before the weekly Full Bench session, Toffoli spoke individually with all Justices and told them the solution he had found. Nobody objected.

> Once the session had started, Toffoli spoke and announced the opening of an inquiry "against everything and almost everyone", as defined by a trusted advisor. "The President of the Federal Supreme Court, in the use of powers conferred upon him by the internal regiment [...], considering the existence of fraudulent news, known as fake news, slanderous accusations, threats and infractions perpetrated with *animus caluniandi*, *diffamandi* and *injuriandi* , which hit the honorability and security of the Federal Supreme Court, its Justices and their family members, resolves, as already resolved, pursuant to art. 43 [of the STF's Internal Regiment], to initiate a criminal investigation to investigate facts and corresponding violations in all of their dimensions", he announced (RECONDO; WEBER, 2019, p. 23-24) (author's translation).

Inquiry 4.781 had been established. It was distributed not by drawing lots, as required by Article 66 of the *Regimento Interno do Supremo Tribunal Federal* – RISTF (English: Supreme Court's Internal Regiment) (GRECO, 2020), but rather handed over directly by Toffoli to Justice Alexandre de Moraes.

Criticisms did not take long to come. The STF had opened, on its own initiative and without a say of the Prosecution, an inquiry that would possibly lead to the opening of criminal actions that were to be judged by the Supreme Court itself. But the Court ignored the press' objections. "'One must kick ass. We are just being beaten', [Toffoli] justified to a friend at Justice Barroso's birthday party. And he added, ironically: 'What about the commissary I got?', in a reference to 'Commissary Alexandre de Moraes'" (RECONDO; WEBER, 2019, p. 24) (author's translation).

For Adilson Dallari (2020, p. 140), Moraes was possibly not chosen because of his previous experience with investigations as Secretary of Public Security and Minister of Justice, but rather because the older Justices probably would have refused to assume this “shameful role” (author’s translation).

Rogério Greco (2020) sees the fake news inquiry as the STF’s authoritarian reaction to the offensive criticism it received through social networks and warns that, worse than those who criticized or threatened it, the Court Justices became true inquisitors, worthy of embarrassing Torquemada himself.

The investigation advanced on individuals, social network profiles and press professionals, sparking reactions inside and outside the Court. Its first development that became public was the decision by Alexandre de Moraes which, in April 2019, censored a report by *Crusoé* magazine that denounced possible illegal acts involving Toffoli, whom businessman Marcelo Odebrecht referred to as “the friend of my father’s friend” in one of his plea bargain statements. The censorship decision would be revoked four days later by Justice Edson Fachin, after the reported fact was confirmed to be true (TAVARES NETO, 2020).

> As a result of this investigation, which had the purpose of investigating, for the most part, misdemeanors [...], multiple abuses were committed, such as several search and seizure warrants, with the aim of seizing computers, tablets, cell phones and other electronic devices, as well as any other material allegedly related to the facts narrated in the investigation.
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> Countless people were constrained for issuing opinions contrary to STF Justices, who do not accept any type of disapproval regarding their behavior. The absurdity is evident (GRECO, 2020, p. 93) (author’s translation).

Having made this introduction to Inquiry 4.781 and the context that led to its establishment, we will now proceed to the analysis of the legal flaws that permeate the aforementioned procedure.

3 ARTICLE 43 OF THE RISTF: MATERIAL INCONSTITUCIONALITY AND DISTORCED INTERPRETATION

The first point to be noticed is that the fake news inquiry was opened by Toffoli based on Article 43 of the RISTF, whose *caput* reads as follows: “Art. 43. In the event of an infringement of criminal law **at the seat or dependency of the Court**, the Chief

Justice will initiate an investigation, if it involves an authority or person subject to his jurisdiction, or will delegate this attribution to another Justice" (BRAZIL, 2020, emphasis added) (author's translation).

Next, it should also be noticed that the majority of both doctrine and jurisprudence understand that the internal regiments of the Brazilian Courts have the force of acts in a material sense, since, despite not going through the due legislative process, they must be considered as so in respect for the principles of autonomy and self-government of the three Branches (ANASTÁCIO, 2013).

Thus, we conclude that the internal regiments of Courts, among them the STF, are equivalent to acts in the ordinary sense, which, by its turn, owe obedience to the 1988 *Constituição Federal* (English: Federal Constitution).

The situation on screen, therefore, is part of an interesting problem of Brazilian criminal legislation: the main repressive diplomas of the country's law are Acts elaborated before the current Constitution even existed, such as the 1940 *Código Penal* (English: Penal Code) and the 1941 *Código de Processo Penal* (English: Code of Criminal Procedure) – both issued under the *Estado Novo* (English: New State) dictatorship. The same occurs with the STF's Internal Regiment, which dates from 1980 – that means, it was issued during the Brazilian Military Regime. Thus, all these norms can and should be confronted with the Federal Constitution in order to verify their compatibility with the current Constitutional Text, even more because they were not issued in democratic times.

Doctrine and jurisprudence are unanimous in the sense that the entry into force of the 1988 Federal Constitution brought with it the overcoming of the inquisitive/inquisitorial system established by the 1941 CPP (LOPES JÚNIOR, 2020).

> The main characteristics of the inquisitorial system are:
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> • evidence management/initiative in the hands of the judge (figure of the judge-actor and judicial activism = inquisitive principle);
> • absence of separation of the functions of charging and judging (aggregation of functions in the judge's hands);
> • violation of the *ne procedat iudex ex officio* principle, as the judge can act *ex officio* (without prior invocation);
> • partial judge;
> • lack of full contradictory;
> • inequality of weapons and opportunities (LOPES JUNIOR, 2020, p. 47) (author's translation).

For all these reasons, Aury Lopes Junior (2020) and Renato Brasileiro de Lima (2019) assert that the inquisitive system is incompatible with individual rights and guarantees and with the preservation of the impartiality of the judge, since the same person (judge-actor) will look for evidence (initiative and management) and will decide based on the evidence him/herself produced. Without a judge who keeps an equal distance from both of the parties, one cannot speak of impartiality.

The 1988 Constitution brought an end to this pattern by enshrining the accusatory system in its Art. 129, I (BRAZIL, 1988), which made the filing of public[9] criminal actions an exclusive attribution of the *Ministério Público* (MP) (English: District Attorney's Office). The judge now maintains the management of the process through the exercise of the power of procedural impulse, but he can no longer take initiatives that are not in line with the equidistance that the magistrate must safeguard regarding the interests of the parties. He must, therefore, refrain from performing official acts in the investigative phase, an attribution that must be entrusted only to the police and the Prosecution (LIMA, 2019).

> Currently - and in light of the current constitutional system - it can be said that the accusatory form is characterized by:
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> a) clear distinction between the activities of charging and judging;
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> b) the probative initiative must belong to the parties (a logical consequence of the distinction between activities);
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> c) the judge remains an impartial third party, alien to the investigation work and passive with regard to the collection of evidence, both imputation and discharge;
>
> d) equal treatment of the parties (equal opportunities in the process);
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> [...] (LOPES JUNIOR, 2020, p. 47) (author's translation).

That said, it is clear that Article 43 of the RISTF, by making it possible for a judicial authority to open an *ex officio* inquiry, is incompatible with the Federal Constitution (MONTEIRO, 2020).

According to Aury Lopes Junior (2020), upon becoming aware of evidence of the commitment of crimes, the magistrate should simply forward this information to the

[9] In Brazil, penal actions are legally either defined as public (charges that must be brought against the defendant by the State) or private (charges that must be brought against the defendant personally by the victim[s]). The law previously defines which crimes do require public actions and which crimes do require private ones.

District Attorney's Office, so that, if applicable, the police inquiry is initiated. Not only because the Prosecution has exclusive ownership of public criminal proceedings, but also because of the imposition of the nature of the accusatory system. Even when the offense in theory is a private or conditional[10] criminal action, the judge must send the case to the Prosecution, so that it can file or provide the necessary representation for the filing of the criminal action.

In this wake, it is important to notice that the then Attorney-General of Brazil, Raquel Dodge, in April 2019, requested the archiving of the fake news inquiry. The request was rejected by Justice Alexandre de Moraes on the grounds that the constitutional ownership of the public criminal action by the Prosecution did not prevent the opening of every investigation that is not requested by a prosecutor. The rapporteur's decision thus contravened the above-described logic of the accusatory system, as well as the former jurisprudence of the STF itself in the sense that it was not possible to continue investigations without the consent of the Prosecution's Office (CZESLUNIAK, 2020). In this regard, it should be noted that Moraes himself had previously struck down an excerpt from the Internal Regiment of the Supreme Court of the State of Bahia precisely because it had excluded the participation of the District Attorney's Office in any investigations opened by that Court (TINÔCO, 2019).

Renato Brasileiro de Lima (2019) explains that, alongside the position of the procedural subjects, what effectively differentiates the inquisitorial system from the accusatory one is the management of evidence. In the accusatory model, the production of probative material is exclusively up to the parties. The most important peculiar trait of the accusatory system is that the magistrate is not, *par excellence*, the manager of the evidence – quite the opposite of what happens in Inquiry 4.781.

Faced with such resistance from Alexandre de Moraes, the current Attorney-General Augusto Aras gave in to some extent and, in June 2020, changed the *Procuradoria-Geral da República* - PGR (English: Attorney-General's Office)'s position in order to admit the regularity and continuity of the investigation, although with better defined limits and a larger participation of the PGR (FREITAS, 2020).

[10] In addition to the purely public and the purely private actions, there are also the so-called public conditioned actions, that means, public actions in which the Prosecution needs the victim's consent in order to charge the defendant. In those cases the State is not allowed to charge the defendant if the victim does not ask it to do so. This request by the victim goes by the name of "representation".

It is now time to explain the reason why Moraes' decision was wrong. At the time of the facts narrated here – that is, prior to the entry into force of Act 13.964/2019 –, Article 28 of the CPP (BRAZIL, 1941) determined that, once a prosecutor requested the closing of an investigation, the judge, in case he disagreed with the grounds presented for that purpose, could send the file to the higher authority of the District Attorney's Office. The latter, then, would make the final decision: 1. to agree with the judge and file the action him/herself; 2. to agree with the judge and appoint another prosecutor to file the action; or 3. to disagree with the judge and insist on the request for dismissal, which only then would the judge be obliged to comply with.

It turns out, however, that, in the case of a dismissal required by the PGR, Article 28 of the CPP simply could not apply because, since the PGR is the highest authority of all Brazilian prosecutors, there is no authority above him/her in the structure of the Prosecution to whom the judicial body could submit the decision on the dismissal request (LOPES JUNIOR, 2020). The dismissal request from the PGR, therefore, became **binding** upon the Judiciary, thus configuring the so-called "original dismissal" (Portuguese: *arquivamento originário*), named this way because it refers to actions whose original attributions belong already on the PGR level, without the involvement of lower-level prosecutors in the first place.

It should also be noted that after the reform made by Act 13.964/2019, the so-called "Anti-Crime Package" (Portuguese: "*Pacote Anticrime*"), the CPP itself – of inquisitive nature, based on the Italian fascist model (LIMA, 2019) became closer to the accusatory system, expressly enshrining it in its new Article 3-A and determining that the judge can only intervene in the investigation in the hypotheses of its new Article 3-B. The dismissal of investigations and investigative procedures becomes a decision *intra muros* as a rule, that means, limited to the internal scope of the District Attorney's Office, with no judicial interference. The prosecutor who wishes to dismiss an investigation must submit its request directly to his/her hierarchical superior, and no longer to the judge (BARROS; ARAS, 2020).

Therefore, the rule according to which the final word on the dismissal of a criminal investigation rests with the District Attorney's Office was reinforced, with the addition that this discussion now must not even go through the Judiciary (CZESLUNIAK, 2020). Such changes show that Brazilian law as a whole is

increasingly moving towards the accusatory system, while Inquiry 4.781 moves in the opposite direction.

A final observation on this point deserves to be made: since the Prosecution is the sole owner of the public criminal action, and since the PGR requested the dismissal of Inquiry 4.781 in April 2019, it is understood that the continuity of the investigation after this request has become innocuous from a legal point of view and serves in practice only as a persecutory instrument against critics of the STF, because, given the early refusal of the PGR to charge them, there is no one else who can do so once the investigation ends (GRILO, 2020).

Thus, for all of the above, the rejection by Justice Moraes of the dismissal request made by then Attorney-General Raquel Dodge violated the accusatory system established by the 1988 Federal Constitution, which is now also welcomed by the Code of Criminal Procedure after its latest reform in 2019.

But the arbitrariness of the end of the world inquiry does not stop there. Even if we were to uphold Article 43 of the RISTF as valid before the Constitution, the initiation of the inquiry would run into another obstacle: the very wording of the Regiment itself, which authorizes the Chief Justice to initiate an investigation *ex officio* only in the event of criminal offenses committed "at the headquarters or dependency of the Court" (BRAZIL, 1980) (author's translation).

To bypass this obstacle, Toffoli used an innovative interpretation according to which each Justice personally represents the seat of the Court and its dependencies, since they can act remotely from anywhere in the country. The STF thus becomes a **mobile** Court, following this line of reasoning (TINÔCO, 2019). It is an absurd innovation, which distorts the clear meaning of the Regiment's wording to adapt it to the convenience of its interpreters.

> As already mentioned, the STF's Internal Regiment does not authorize the opening of inquiries to investigate facts that occurred outside the Court's premises. The Court premises are not to be confused with its area of jurisdiction. A State or Regional court has jurisdiction over its State or Region, but its premises are limited to the physical spaces they occupy. The STF has jurisdiction at the national level, but its dependencies are limited to the buildings it occupies in Brasília. Only someone in bad faith can confuse one thing with the other (DALLARI, 2020, p. 240) (author's translation).

This inconsistency gets even more exposed when the lawsuit filed by the *Rede Sustentabilidade* (English: Sustainability Network[11]) party against the aforementioned inquiry points out that

> Resolution n. 564/2015, in its Article 1, sole paragraph, says that the exercise of police power "is intended to ensure the good order of work in the Court, to protect the integrity of its goods and services, as well as to guarantee the safety of Justices, judges, civil servants and other people who visit it". It is clear, then, that the police power referred to in Articles 43 and following of the RISTF is exclusively intended to guarantee order in the STF premises. In case there is an infringement of criminal law at the seat or premises of the Court (FALCÃO; CARNEIRO, 2019, p. 2) (author's translation).

Still on this point, in order to justify Toffoli's interpretative innovation according to which Article 43 of the RISTF, when dealing with crimes committed at the seat of the Court, intended to include in this scope the crimes committed anywhere against Justices of the Court, some have argued that, when the RISTF came into force in 1980, there was still no internet, and, therefore, for a threat or an offense to be made against a Justice, the offender would have to be inside the STF headquarters.

This reasoning is ridiculous. Indeed, there was no internet back then; however, there were already many other means of communication (e.g. newspapers, magazines, television) through which it would be possible to threaten or harm the honor of Supreme Court Justices without necessarily being phisically at the seat of the Court. Therefore, an extensive interpretation of Article 43 on that basis makes no sense.

> Even so, the RISTF did not want the Chief Justice to initiate an investigation to investigate this crime heard hundreds of miles from the Court's headquarters, having instead left this investigation to the police authorities who first heard of the facts - as it always has been, and is expected that will continue to be (MONTEIRO, 2020, p. 79) (author's translation).

In summary, because of both the literal wording of Article 43 of the RISTF and its incompatibility with the Federal Constitution, the opening of an *ex officio* inquiry by the Chief Justice based on this provision cannot be admitted.

[11] Rede Sustentabilidade is another Brazilian party, whose main focus lies on environmental agendas. Despite having strongly opposed Bolsonaro's administration, it also opposed the fake news inquiry just like Bolsonaro's supporters do.

4 LACK OF IMPARTIALITY

As already mentioned above, Justice Alexandre de Moraes was appointed rapporteur for the fake news inquiry not by drawing lots, as is usually done in the distribution of cases in the STF, but rather by direct appointment by then Chief Justice Dias Toffoli.

The rapporteurship is a position of power in lawsuits in general. It is up to the rapporteur, for example, to grant or deny preliminary and precautionary measures until the merits of the case are judged. As an example, Recondo and Weber (2019) report two concerns of Justice Cármen Lúcia during her term as Chief Justice: that of implementing a completely fraud-proof electronic lottery system for the distribution of rapporteurships; and the decision on which procedure to follow for choosing a new rapporteur for Operation Car Wash following the death of Justice Teori Zavascki in January 2017.

With regard to the latter, given the importance of the cases to be judged and Carmen Lúcia's desire that the rapporteurship be given to a "neutral" Justice - that is, someone who was not openly enthusiastic about the operation (such as Justices Fux or Barroso) and neither a persistent critic of it (such as Justices Gilmar Mendes or Lewandovski), the then Chief Justice wanted to dispense the draw and directly appoint Justice Celso de Mello as rapporteur.

> The proposal surprised the dean[12]. “It doesn't make sense, Carmen”, replied Mello. Appointing a rapporteur would distort the necessary randomness in the distribution of processes, it would go against the regiment. Choosing rapporteurs would mean defining results beforehand, as he explained to his assistants (RECONDO; WEBER, 2019, p. 115) (author’s translation).

The rapporteurship, therefore, ended up being drawn among the members of the 2nd Panel of the STF, and Justice Edson Fachin was appointed as rapporteur. Carmen Lúcia was satisfied. Celso de Mello's answer illustrates how the aforementioned randomness in the distribution of rapporteurships, which only a drawing system is capable of providing, is necessary to ensure the impartiality required in conducting the process.

[12] Justice Celso de Mello was at the time the dean Justice of the Supreme Court. He retired in 2020.

In this sense, it is clearly noted that the free appointment of a rapporteur by the Chief Justice, as it was done in the fake news inquiry, corrupts the principle of impartiality, one of the most important in criminal proceedings, according to Aury Lopes Junior (2020) and Renato Brasileiro de Lima (2019). Even so, Toffoli circumvented the lottery and handed over the rapporteurship to a Justice he trusted, apparently aiming to "define results beforehand", as Celso de Mello had said when he rejected the same idea coming from then Chief Justice Cármen Lúcia after the death of Teori.

But the breach of impartiality did not originate only with the appointment of Moraes as rapporteur. In fact, it was already present with the very starting of the inquiry itself. After all, can the defendant of an alleged crime be tried by the alleged victim?

> We can say, however, that the most elementary aspect of due process is the neutrality of the judge. There is no hope of a fair trial when in the judge's chair sits someone who is an interested party in the case, or is a friend or relative of one of the parties - or an enemy of the other.
>
> Thus, in Criminal Procedural Law, as obvious as the rule that the same person cannot be, in the same process, defendant [...] and judge, is the prohibition of the same individual being a victim of the crime [...]. Just as the interest in acquittal is evident in the first case, the interest in the conviction of the defendant is obvious in the second case.
>
> However, incredibly, what can be seen in Inquiry 4.781 is the disrespect for this very elementary rule. Look again at the act that initiated the inquiry: it is clear that this is an investigation (absurdly broad, by the way) of crimes of slander, defamation, insults and threats against STF Justices and their family members.
>
> In the session in which the request for suspension of the investigation was judged, Justice Alexandre de Moraes, during his vote, insisted on reading messages from someone investigated with insults to Justices ("son of a bitch..." – the Justice did not give up uttering the curse in its entirety) and threats directed at Justice and their families. In one of them, there was talk of exploding a bomb in the STF plenary hall; in another, the Justice's daughters were threatened with rape.
>
> Those who followed the reading of the vote on television had the opportunity to perceive the evident tone of indignation – almost hateful, I would say – of Justice Moraes. The Justice's feeling is perfectly understandable: what father would not react like this to someone who threatens his daughters with rape? (MONTEIRO, 2020, p. 79-80) (author's translation).

The problem with of all this, continues the author above, is that this feeling of animosity towards the defendant, perfectly understandable in the victim or the victim's father, goes completely against the neutrality required by the condition of judge. As Marcelo Rocha Monteiro (2020, p. 80) says, "Nobody can deny that a judge considers his capital enemy the guy who threatens to rape his daughters or to explode a bomb

in the magistrate's workplace" (author's translation). Therefore, no victim is able to judge any crime committed against him/herself. This is as true for the fake news inquiry as it is for any other.

If any STF Justices felt offended or even threatened by the content spread by social media, the correct way would be to call the police authorities so that an investigation could be properly initiated (GRECO, 2020). And not initiate the procedure themselves, giving birth to a process with an aura of a private revenge:

> The defendants do not have access to the records. The Prosecution was ignored in its dismissal request, and then ignored in trying to oppose excessive "investigative" measures. The rules of substantive and adjective law are casuistically excluded. It is, therefore, a criminal procedure based solely on the will of the victims. It does not fit into any of the civilized systems, which always demand some rule of law, even if customary. Outside of that, it is not even law, but rather barbarism (TAVARES NETO, 2020, p. 135) (author's translation).

It is noted, therefore, that the end of the world inquiry twice violates the principle of impartiality. The alleged victims opened criminal proceedings against their alleged perpetrators, disregarding their role as guardians of justice in a democratic regime.

Adilson Dallari (2020) reports that the aforementioned procedure had been going on for more than 15 months[13], having been successively extended, and there is no sign that it will end and come to any conclusions someday. Thus, it can be inferred that its purpose is precisely this: to keep those investigated under pressure and restrictions of rights for an indefinite period.

5 VIOLATION OF RULES OF JURISDICTION

As if the previous flaws were not enough, Inquiry 4.781 also fails to respect the basic rules of criminal procedure regarding jurisdiction. The reason is simple: in the case of STF Justices, their prerogative of venue due to their function[14] is only valid when they find themselves in the condition of perpetrators, and not victims, of alleged crimes. This is what determines Article 102 of the Constitution, *in verbis*:

[13] This was back in 2020. Currently, the inquiry has been going on for longer than four years.

[14] In Brazil, many authorities have the so-called *prerrogativa de foro* (English: prerogative of venue), which means they must answer for crimes only before predetermined Courts. STF Justices, for example, can only be tried by the Supreme Court itself.

> Art. 102. It is incumbent upon the Supreme Court, primarily, to safeguard the Constitution, being responsible for:
>
> I - sue and judge, originally:
>
> [...]
>
> b) in common criminal offenses, the President, the Vice-President, the members of the National Congress, **their own Justices** and the Attorney-General (BRAZIL, 1988, emphasis added) (author's translation).

It should be noted that no Supreme Court Justices are being prosecuted for the crimes of slander, defamation and threat. Quite the contrary: they appear as the alleged victims, and not defendants, of the aforementioned crimes.

In this situation, the jurisdiction to process the case does not belong to the Supreme Court, but rather to a Federal Court of 1st instance, insofar as it deals with crimes committed against federal civil servants as a result of their duties. This understanding stems from the jurisprudential interpretation of Article 109, IV of the Federal Constitution that generated Precedent 147 of the Superior Court of Justice[15]: "It is incumbent upon the Federal Justice to prosecute and judge crimes committed against a federal civil servant, when related to the exercise of his/her duty" (BRAZIL, 1995) (author's translation).

> Art. 109. Federal judges are responsible for trying and judging:
>
> [...]
>
> IV - political crimes and criminal offenses committed to the detriment of goods, services or **interests of the Union** or its autarchic entities or state companies, excluding misdemeanors and safeguarding the jurisdictions of the Military Justice and the Electoral Justice (BRAZIL, 1988, emphasis added) (author's translation).

Aury Lopes Junior (2020) clarifies that the interest of the Union in the correct and effective provision of its services is evident, and therefore the Federal Justice is responsible for judging crimes committed by a federal civil servant or that have him/her as a victim, provided that in both cases it is demonstrated that the crime was committed because of the duty performed.

[15] The Superior Court of Justice is the second-highest ranking Court in Brazil, on equal terms with other three same-level Courts with separated jurisdictions: the Superior Military Court, the Superior Electoral Court, and the Superior Labor Court. All these Courts stand only below the Supreme Court in terms of hierarchy.

6 VIOLATION OF DUE PROCESS OF LAW

Last but not least, it is necessary to state that Inquiry 4.781 took place for a long time in secrecy, without the lawyers of those investigated and the PGR itself having access to its records. Negligible is to say that the referred situation denotes a serious offense to the principle of due process of law inscribed in Article 5, LV of the Federal Constitution: “LV - parties, in judicial or administrative proceedings, and the accused in general are assured the due process of law, with the means and resources inherent to it” (BRAZIL, 1988).

By acting in this way, denying the defendants access to a process in which they were directly interested, the STF plainly failed to comply with its own Binding Precedent 14[16], which guarantees lawyers, in the interests of those represented, broad access to the evidence already documented concerning the exercise of the right of defense (GRECO, 2020).

7 CONCLUSIONS

For all of the above, it is possible to draw several conclusions about Inquiry 4.781. The first is that the end of the world inquiry (yes, it deserves that nickname) is null and void because it offends multiple constitutional and procedural precepts. And, therefore, any evidence obtained therein, as well as any criminal action derived from it, will also be null and void as the fruits of the poisonous tree they’re fated to be.

The illegalities are so large and so evident that it is possible to state that this is, in practice, a private revenge carried out by the STF Justices, even though it is wrapped in an appearance of institutionality, which aims only at satisfying the personal will of the victims to see their perpetrators punished – but not in the way determined by the law.

Despite all this – or precisely because of all this –, the end of the world inquiry was approved almost unanimously by the Full Bench of the STF in the ruling of ADPF

[16] Brazilian Courts may issue Precedents (Portuguese: *Súmulas*) containing their consolidated jurisprudence, for observation of the lower Courts and/or judges. The Supreme Court, however, is the only one that can issue Binding Precedents (Portuguese: *Súmulas Vinculantes*), whose observation is mandatory for every other Court and also for the Executive branch. Administrative and judicial decisions that violate Binding Precedents may be challenged by the parties directly before the Supreme Court itself, without the need to go through any other instances before.

572. Which leads us to one more conclusion, this time regarding the Supreme Court ‘s corporatism: the members of the Court, although cultivating notorious political-ideological differences and personal scuffles, are quite united when it comes to defending the institution against attacks from the outside.

We now would like to make an honorable mention to former Justice Marco Aurélio Mello, already known for his minority positions[17] and the only one among his peers to vote against the end of the world inquiry: “If the body who accuses is the same who judges, there is no guarantee of impartiality” (BRAZIL, 2020) (author’s translation).

The Brazilian Supreme Court, which in other times erred by inertia in the face of the Executive's excesses, now errs in voluntarism, becoming itself a source of excesses perpetrated against supporters of a former President.

This renews Rui Barbosa's[18] historical maxim: “The worst dictatorship is the Judiciary’s. Against it, there is no one to turn to.” It is the biggest attack on the democratic rule of law ever perpetrated by the STF in Brazil – because it is practiced openly.

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[17] Marco Aurélio Mello retired from the Supreme Court in 2021. He was known as the “Outvote Justice” (Portuguese: *ministro voto vencido*) because of his tendency to vote against the Court’s majority opinions.

[18] Rui Barbosa was a 19th-century Brazilian jurist, writer, and diplomat. He was a staunch defender of civil liberties, having fought for the abolition of slavery in Brazil, among other causes.

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