

Domestic Lawfare in South America

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Domestic lawfare, using legal measures or their potential utilisation as strategic tools in political or ideological disputes within a nation, is a prevalent phenomenon in South America. Such measures may include lawsuits, investigations, and other legal mechanisms aimed at eradicating, intimidating, penalising, or undermining rivals to achieve specific political or policy objectives. This practice can be identified as domestic lawfare by prioritising legal technicalities over substantive matters. Its impact is of particular concern, as it is employed to suppress dissenting voices and curtail essential liberties, such as freedom of speech. This article sheds light on the significant challenge that constitutional democracies in South America currently face due to the rise of lawfare. This does not mean that it is an exclusively South American phenomenon. Influential individuals or entities around the world equipped with ample resources, financial means, influence, or political clout could deploy these assets to target individuals or organisations they perceive as threats to their interests. By examining the potential legal ramifications that may arise from rigid adherence to legal requirements, this study aims to underscore the crucial importance of legal protection as a topic requiring meticulous deliberation. Lawfare presents formidable challenges in theory and practice, making it essential to comprehend its implications fully. Understanding and addressing this issue can safeguard democratic values and protect fundamental rights.

Keywords: lawfare, threat, lawsuits, democracy, risk

Introduction

In dealing with the instruments of war, the work of Carl von Clausewitz is indispensable. In his classic monograph *On War*,² he explains the concept of attrition.³ On closer examination, lawfare can also be understood as the equivalent of attrition. Legal warfare is lawfare in a country's political or ideological conflict. It can include using judicial and other official procedures, investigations and other legal means to oust, threaten, punish or humiliate opposition, opponents or competitors and achieve political or policy goals.

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² CLAUSEWITZ 1989.

³ FORGÁCS 2017: 32.

Domestic legislation may also be characterised by a focus on legal techniques rather than on substantive issues. In South America, lawfare is often used to silence critics and restrict freedom of speech and other fundamental rights. Those with significant resources, finances, influence or political power usually use their capabilities to target individuals or groups that they perceive as threatening their interests. This article aims to clarify that protecting rights is a vital issue that requires careful consideration. Naturally, it should be noted that the methods outlined above are not exhaustive in encompassing all kinds of tactics, nor are they universally applicable to all South American countries. Instead, the focus lies on presenting strategies that pertain to distinct domains within law enforcement.⁴

Effective battlefield selection in legal warfare

Battlefields are carefully chosen in every war after considering strategic advantages and disadvantages.⁵ In legal conflict, selecting an appropriate strategy and tactics is essential. In this context, “battlefield” refers to the preferred international or national platform, administrative entity, or governing body tasked with enforcing legal regulations or to which the involved parties willingly opt or acquiesce to be subject. The selection of a particular governing body can significantly impact the effectiveness of lawfare strategies.⁶

Equally significant is the selection of appropriate legal mechanisms, which, drawing an analogy from kinetic conflict, might be likened to weaponry. The application of the law is intricately linked to the selection of the forum, as the law and the chosen forum are mutually binding. Insufficiently heavy legal action may result in ineffectiveness, underscoring the critical significance of selecting appropriate legal tools. The following list comprises the ten most significant legal tools in the context of lawfare.⁷

Legislative machination

Legislative manipulation refers to the deliberate act of enacting or modifying laws in a manner that is detrimental to an individual.⁸ As an example, it is pertinent to note that a legislative approach employed against Brazilian President Luiz Inácio Lula da Silva (re-elected in 2022) was the deliberate utilisation of the Clean Records Act as a means to impede his candidature in the 2018 presidential elections. The majority decision of the Supreme Electoral Tribunal, led by Minister Edson Fachin, resulted in the rejection of Lula’s candidature registration. This occurred after implementing a precautionary measure by the U.N. Human Rights Committee aimed at prohibiting the former president from participating in the electoral process. Hence, it may be inferred that the strategic use of the Ficha Limpa legislation has the potential to impede an adversary’s participation in

⁴ KIRCHHEIMER 2015.

⁵ SUN TZU 2006.

⁶ MAZANEC-WHYTE 2023.

⁷ CARR 2012; GOH 2007.

⁸ FLETCHER-WEINSTEIN 2002: 573–639.

electoral processes. The strategic use of the legislation of impeachment has the potential to lead to the removal of an elected political adversary from their position of authority. These practices can also be categorised as lawfare. Legal rules were first created with seemingly legitimate intentions. However, eventually wielded as tools to target specific adversaries.⁹

Forum non conveniens: The principle against abusive forum shopping

In the field of law, we come across the term *forum shopping*, i.e. the choice of the law or jurisdiction where the claim is brought. The European Parliament has pointed out in a special report¹⁰ that “[the] courts will only accept jurisdiction if the case has a satisfactory, substantial or significant connection with the country where the action is brought, as this makes it easier to achieve a balance of interests, in particular between the right to freedom of expression and the right to reputation and privacy”. In this exercise, the aim is to choose the most favourable law (“weapon”) and jurisdiction (“battlefield”). The objective of this exercise is to select the most advantageous legal framework (“weapon”) and jurisdiction (“battlefield”). In light of the availability of many platforms, it is inherent that the customer would opt for the one that appears to offer the most safeguarding of their interests.¹¹ Lawfare occurs when the exercise of a legal right is incompatible with good faith and is accompanied by a distinct aim to inflict harm, such as destruction, impairment, or delegitimation.¹² Furthermore, the necessity of a jurisdictional shift is frequently imperative in the context of defensive enforcement. Strategically withdrawing from a geographical region in which the outcome is predetermined due to the presence of a prejudiced adjudicator is a viable manoeuvre that can effectively counteract an offensive action. The practice of forum shopping does not fall within the scope of the exemption from the prohibition of abuse of rights, whether in the context of offensive or defensive lawfare.¹³

The principle preventing abusive forum shopping is *forum non conveniens*. According to this principle, a judge may decline jurisdiction based on various criteria, some too subjective. More precisely, *forum non conveniens* means the court’s discretion to refuse to exercise jurisdiction if another court or forum is more appropriate to hear the case.¹⁴ The dismissal of a case based on *forum non conveniens* does not constitute a bar to *res judicata* and therefore does not prevent the plaintiff from restarting his criminal case in a more appropriate forum. The defendant or the court may also invoke this doctrine. Courts will not uphold a refusal of *forum non conveniens* if the alternative forum’s system of justice is seriously inadequate. For example, a court in a State governed by the rule of law would not uphold a refusal of *forum non conveniens* if the alternative forum were a court in a state that does not respect fundamental rights. Courts generally apply a two-part test

⁹ MARTINS et al. 2021: 45–46.

¹⁰ ZWIEFKA 2010.

¹¹ BLOCK-LIEB 2018: 1–52.

¹² RINGE 2020: 1–19.

¹³ JONES 2016: 221–239; GOLDENZIEL 2020: 1085–1171.

¹⁴ SURI 2018: 54–55.

to decide whether to grant a defendant's application for forum non conveniens. The first part is a balancing of private and public law factors, and the second part is an assessment of the availability of appropriate alternative courts.¹⁵ First and foremost, it is imperative to establish an alternative venue, distinct from the one where the legal proceedings are initiated, with the authority to adjudicate the matter at hand. Ensuring that this forum is designed to maximise convenience and comfort for all involved parties is imperative. To evaluate the aspect of "convenience", it is necessary to investigate the private interests associated with the lawsuit. The pertinent private interests of the parties encompass various factors, such as the ability to get evidence, the impartiality of the court, the origin of witnesses, the execution of the judgement and the expenses associated with the legal proceedings.¹⁶ In the event that the party or defendant's private interests are not fulfilled, the court will assess the theory of forum non conveniens concerning the pertinent public interest. In this context, it is possible that the court may lack knowledge of the relevant legal principles pertaining to the case. Ultimately, the forum conveniens, the most suitable legal forum, should handle claims that fall within its jurisdiction. This entails imposing sanctions that align with the forum's jurisdiction, ensuring that the individual seeking justice will not be deprived of their rights in a foreign jurisdiction.¹⁷ Regrettably, despite the diligent and unbiased implementation of the theory of forum non conveniens, litigants have a proclivity to depart from the jurisdictions and forums they first selected. This phenomenon might be especially evident during legal warfare, wherein the selection of jurisdiction by strategists is deliberately upheld artificially.

Lawfare strategists are more likely to succeed when they engage in legal battles inside a certain jurisdiction where there is a favourable probability of achieving their objectives. In pursuit of this objective, they demonstrate a willingness to manipulate the jurisdiction. Instances where individuals misuse legal norms and principles sometimes involve the manipulation of jurisdictional regulations as well. When considering the manipulation of jurisdiction, several aspects are taken into consideration. Various variables can influence the administration of justice, such as the potential bias of the judge and prosecutor, the jurisdiction's historical, cultural and socio-economic environment, or the personal ties among the authority members. In instances of this nature, unlawful prosecutions may be initiated, resulting in the potential conviction of judges who have demonstrated personal prejudice or lack the requisite jurisdiction or competence of the court. According to some Brazilian lawyers,¹⁸ Sergio Fernando Moro, a Brazilian lawyer, former federal judge, university professor and politician, serves as a prominent illustration.¹⁹ Moro concurrently served as the Minister of Justice and Public Security under the administration of President Jair Bolsonaro from 2019 to 2020. In April 2020, Moro tendered his resignation from the administration, asserting that the president had engaged in unwarranted interference in the Ministry of Justice and Public Security operations. In 2022, a panel established

¹⁵ ZHENJIE 2001: 143.

¹⁶ ZABOROVSKYY et al. 2022: 418–428.

¹⁷ RECHSTEINER 2019: 274–275.

¹⁸ MARTINS et al. 2021; CHADE 2022.

¹⁹ ROUSSEAU 2016.

by the United Nations determined that Sergio Moro had exhibited prejudice in all of his interactions with Brazilian President Luiz Inácio Lula da Silva. Moro's conviction was rooted in his belief that he could hold the strong, including President Lula, accountable and pronounce judgement upon them. It involves strategically selecting a jurisdiction most conducive to achieving the objective of incapacitating the adversary. By carefully choosing the appropriate legal arena, one can secure a conviction, even on a weak or unsubstantiated accusation, due to the advantageous conditions prevailing in that jurisdiction.²⁰ In order to destroy the enemy, the right 'battlefield' is chosen where, under favourable circumstances, one can be convicted with finality, even on a flimsy charge.

Another tactic related to geography, which is included in the concept of forum shopping, is the practice of so-called "libel tourism". This means choosing a country that is biased against the accused, thus presumably accepting the accusation and not demanding detailed evidence. This is a case of manipulation of this jurisdiction, where a state is sought not in a specific forum but under universal jurisdiction in general.²¹ In this case, international law is therefore applied in national fora, but in the hope that the state's involvement in question will lead its courts or authorities to take a more stringent decision or a more favourable decision to the initiator. In this way, because of the universal jurisdiction of the courts in cases of international law and specific crimes, criminal proceedings are not brought before the International Criminal Court but before the court of a deliberately chosen State on the pretext of alleged war crimes. Universal jurisdiction is a legal principle that enables states to assert criminal jurisdiction over individuals suspected of committing crimes, irrespective of the location where the alleged offence took place or the nationality of the accused. Suppose the accusations are manifestly unfounded and are deliberately brought against the suspect by the authorities of a hostile country. There are also examples of the reverse, where international legal protection can be invoked before domestic courts.²² In jurisdictions where defamation tourism occurs frequently, it is common for the defendant to bear the burden of establishing their own innocence.

The legal challenges of doxing: Domestic criminal law implications

Doxing is the deliberate disclosure of personally identifying information about an individual or organisation, commonly executed via online platforms. The process entails consolidating and disseminating confidential data acquired from diverse origins or by unauthorised or illegal techniques. The term doxing has a terrible reputation because it aims to invade privacy and harm by exposing the personal data of individuals or groups without their consent.²³ Those who engage in doxing may use strategies such as variants of harassment, extortion, deceptive online registration, unauthorised access to email or dating app accounts, or the delivery of an unsolicited food. Doxing is a widely seen strategy in

²⁰ CHADE 2022.

²¹ ROBERTSON-NICOL 2007: 127.

²² KITTRIE 2016: 31–34.

²³ LEVER 2021; FLEWELLING 2023.

the realm of online harassment, which has been utilised in contentious circumstances such as the Covid-19 vaccine debates. This practice significantly harms individuals' privacy, safety and overall welfare. Efforts should be undertaken to mitigate and proactively deter deleterious internet behaviours.²⁴

As individuals increasingly disclose more significant and intimate portions of personal information on the internet and certain governments gain extensive authority over online platforms, doxing may be employed to identify and target specific groups. The legal prohibition of expressive actions presents a vague structure for addressing the practice of doxing, which entails the targeted online harassment of non-public figures, perhaps resulting in actual physical damage. This reflects the field of domestic criminal law, as well as surrounding the topic of domestic terrorism.²⁵

The prevalence of states engaging in doxing is relatively low, albeit not entirely absent. The most appropriate remedy would be to criminalise doxing to incite war crimes. However, it seems likely that individual criminal responsibility can only be established when the incited crimes are committed. A government stands accused of engaging in the practice of doxing, which involves the public disclosure of personal information about individuals.²⁶

Baseless accusations and unfounded lawsuits

In contemporary times, lawfare strategies encompass the utilisation of unfounded and forceful legal actions, such as defamation and hate speech lawsuits, targeting individuals such as authors, politicians, media figures and even cartoonists who exhibit courage in expressing their views or employing satire pertaining to matters of national security or public concern. Lawfare includes legal actions, such as workplace harassment lawsuits, directed towards counterterrorism professionals who engage in discussions regarding radical Islam, aiming to suppress individuals who express critical views on Islam. These legal proceedings may also encompass private legal connections, diminishing one of the defining attributes of lawfare, namely its distinctiveness in public international law.²⁷ The prevailing standard also in Brazil necessitates that, apart from the essential explication of the act that constitutes the offence, a legal fact must encompass the circumstances that substantiate the accusation brought forth by the prosecution. In compliance with legal requirements, the indictment serves the purpose of substantiating a criminal accusation by providing evidence to establish the occurrence of the alleged crime. In order to establish the veracity of the charges outlined in the indictment, it is imperative that the indictment is accompanied by precise elements that substantiate the defendant's real commission of the alleged offences. This is commonly referred to as establishing probable cause in legal terminology. The absence of a criminal offence in the circumstances of the indictment or

²⁴ MATHEWS 2014; FLEWELLING 2023.

²⁵ SHEHABAT-MITEW 2018: 81–99; FLEWELLING 2023.

²⁶ FLEWELLING 2023.

²⁷ AUST 2021: 301–307.

the non-involvement of the accused in its commission is deemed to be in violation of the law.²⁸ Several critics have described the handling of the Covid-19 pandemic in Brazil as deeply catastrophic. During the pandemic, the combination of neoliberal authoritarianism, scientific denial, and reliance on our purported abilities has resulted in a terrible situation for Brazil. Allegedly, the government has tried to discredit experts and professional critics.²⁹

Inspecting pre-trial detention: Targeting accused individuals

Unjustified pre-trial detention refers to incarcerating individuals before they have been convicted of a crime without sufficient legal grounds or justification. Pre-trial detention can be seen as a legal measure that involves restricting an individual's freedom by the judiciary, specifically targeting individuals who have been accused of a crime but have not yet undergone a trial. Pre-trial confinement may alone be mandated according to explicitly delineated criteria. The order can only be requested when its implementation would render the case more challenging or unfeasible to establish or when it represents the sole means to avert the recurrence of an offence. The individual facing charges may be subjected to various restrictive measures that curtail personal liberty, such as physical restriction, criminal supervision, arrest and mandatory temporary treatment. If an offence is penalised by deprivation of liberty, coercive measures may be implemented when a person is suspected or charged. These measures are necessary to achieve the intended objective and cannot be accomplished through alternative methods. The general condition for the imposition, prolongation and maintenance of a coercive measure involving personal liberty with a judicial authorisation is that the presence of the suspect can only be ensured in this way because the suspect has absconded, attempted to abscond or is hiding from the court, prosecution or investigating authority (1), or there exist legitimate reasons to assert that he or she would abscond, hiding (2), the suspect has intimidated, unlawfully influenced, or destroyed, tampered with or concealed material evidence, electronic data or confiscated property in order to prevent the production of evidence (3), there exist legitimate reasons to assert that the suspect would compromise the production of evidence, in particular, to intimidate, unlawfully influence, destroy, falsify or conceal material evidence, electronic data or confiscated property (4), the suspect has continued to commit the offence in question after being questioned, or has been questioned as a suspect for a new intentional offence punishable by imprisonment committed after the suspect was questioned (5), there exist legitimate reasons for arguing that the suspect would commit the attempted or prepared offence, would continue the offence which is the subject of the proceedings or would commit a new offence punishable by imprisonment (6). In cases where these components are lacking, the objective of interim detention might be to impose punitive measures or compel cooperation from the detained individual. Excessive confinement can potentially

²⁸ MEIRELLES 2020: 127–144; ZUGAIBE 2019; CUTRUPÍ FERREIRA 2020: 202–222.

²⁹ ORTEGA–ORSINI 2020: 1257–1277.

be regarded as a manifestation of torture. Furthermore, the utilisation of torture not only compromises the reliability of any evidence derived from “confessions”, but it has been widely acknowledged for ages that individuals exposed to torture are inclined to provide false information to halt the torment inflicted upon them. A noteworthy indication arises when an individual, after pre-trial imprisonment, is promptly released once more. The expeditious dissolution of the grounds for pre-trial detention is challenging to conceive. In certain countries, the unique purpose of incarceration is disregarded, leading to its use to infringe upon the rights of defendants and coerce them into cooperation and the extraction of confessions.³⁰

Overcharging as a tool of coercion: Forcing guilty pleas

In the majority of criminal cases, the public prosecutor’s office conducts the prosecution since it assumes the role of the prosecuting entity. In certain instances, the aggrieved party may assume the role of the prosecuting entity, as exemplified by private prosecution and private surrogate prosecution. Following the initiation of legal proceedings, the case proceeds to the trial phase. The initial step taken by the court is to arrange a preparatory hearing, wherein the prosecution, the accused and the defence are all asked to attend. During the preparatory hearing, the accused can provide a confession and forgo additional evidence, potentially resulting in immediate sentencing. In the event that this occurrence does not transpire, the court will proceed to schedule a trial, whereby the presentation and examination of evidence will occur.³¹

In criminal proceedings, the prosecution may use overcharging, known as “overcharging”, to ensure that the accused is pressured. Criminal law doctrine defines overcharging in two ways: vertically and horizontally. Vertical overcharging is when the charge is more severe than what happened. For example, when the accused is asked to pay a penalty that is so severe that the offence does not justify it. Horizontal overcharge, on the other hand, refers to when an offence is charged for several offences. This can be the case when one offence is charged with corruption, money laundering, negligence, misappropriation and embezzlement. Prosecutors then play on the fear of excessive punishment. Overcharging becomes the prosecutors’ primary tactic to force the accused to confess to the less threatening crime in the criminal proceedings. Prosecutors set the bar by overcharging and then prosecuting the defendant in court for a correct or lenient sentence, giving the defence the impression that they have achieved victory.³² This can also result in the accused pleading guilty to crimes he did not commit in exchange for benefits. Under this logic, the defendant accepts a predetermined, supposedly less severe plea bargain to escape punishment that corresponds to the facts initially alleged in the indictment. Some criminal lawyers describe what might happen to informants and defendants when a criminal case

³⁰ MARTINS et al. 2021: 47–52.

³¹ HEINZE–FYFE 2019: 343–388; GOLOVKO 2020: 98–106.

³² LIPPKE 2011: 31.

pressures them.³³ Sometimes, a businessman of public standing is accused in a criminal case, and the situation is emotionally distressing. He is afraid of prison, he is threatened without a plea and with coercive measures, he is pressured to lose his assets. His close friends fear his complicity and treat him with reservations. The media already presume his guilt and refer to him as a criminal. In the context of criminal prosecutions, instances of unwarranted accusations and excessive actions are more often than commonly perceived. It is imperative to bear in mind that instances of legal misconduct, which may transpire concerning those in the public eye, can similarly manifest in the lives of those who find themselves in more precarious circumstances. Consequently, the defence attorney must address instances of legal abuses and misapplications. The proper functioning of justice within democratic states necessitates this aspect.³⁴

Negotiating with the prosecution: The role of self-denouncement

The objective of this approach is to enable companies to voluntarily disclose and report specific violations before the authorities become aware of any misconduct committed by their employees through alternative channels. By engaging in voluntary reporting, companies may have the opportunity to negotiate an agreement with the prosecution, potentially resulting in a reduced sentence. The self-denouncement approach serves as a mechanism to mitigate legal action against firms in cases where they proactively reveal their transgressions, demonstrate complete cooperation, and take appropriate efforts to rectify these violations. This strategy entails the implementation of reduced penalties for entities that willingly confess the offence, exhibit complete cooperation and acknowledge accountability for their actions.³⁵

Indeed, self-denouncement and collaboration among corporations serve various purposes and mutually benefit both the private sector and prosecuting entities. Law enforcement authorities promote such conduct as it reduces their operational expenses.³⁶ One prominent issue pertains to the lack of ongoing judicial scrutiny that should be applied to this technique. Establishing transparency within the legitimate judicial process, accompanied by the presentation of counterarguments and a comprehensive defence, is of utmost importance in ensuring effective oversight of prosecutions. Applying judicial scrutiny is especially warranted in cases where a heavy penalty is deemed acceptable. This phenomenon can result in convictions without the requirement of stringent evidentiary standards.³⁷

³³ FRAGOSO 2018.

³⁴ Migalhas s. a.

³⁵ SCHORMAIR–GERLACH 2020: 475–493.

³⁶ Migalhas s. a.

³⁷ KENTON 2023.

Lawfare and obstruction of legal protection: Frightening legal professionals

Lawfare might be employed as a means to frighten legal professionals. Specifically, it is employed by autocratic governments who perceive lawyers as simply hired collaborators. One illustrative instance of employing the lawfare strategy is evident in the precarious and susceptible circumstances endured by the inmates held at Guantánamo. Individuals are occasionally apprehended without the presence of substantiating evidence of their involvement in criminal activities, afterwards enduring instances of torture and inhumane treatment. Government policies have regularly imposed barriers to hinder the provision of legal representation for detainees, thereby demonstrating a deliberate effort to undermine their entitlement to legal safeguards. This objective was accomplished by implementing a restriction that prohibits solicitors from engaging in “disclosing confidential information” to their clients. Indeed, this material was not clandestine but rather vital for the defence, namely as to the rationale behind the apprehension. The lack of presence failed to develop a foundation of confidence between the legal representatives and the individuals under suspicion. Furthermore, the inmates were deprived of the opportunity to use telephones, and the authorities frequently intercepted any local mail that experienced significant delays. Hence, the preparation of the accused’s case was hindered by practical challenges and the client’s lack of confidence, thereby impeding the attainment of a successful defence.³⁸

Based on the 2016 comprehensive report by the *United Nations Special Rapporteur on the Independence of Judges and Lawyers*, there is a pressing need for a renewed dedication to upholding the fundamental tenets of independent and impartial justice. To realise these promises, it is imperative that all relevant parties, including political figures, judicial members, prosecutors and civil society leaders, maintain a comprehensive understanding of the significance of attorneys within a democratic framework. For legal practitioners to fulfil their professional responsibilities with efficacy, they must be safeguarded by the due process rights ensured by domestic and international norms. Additionally, they must be able to operate without undue influence from the judges, prosecutors and the media. In order to ensure the equitable and efficient dispensation of justice, legal practitioners must be able to do their duties without coercion or intimidation. Individuals must uphold and protect their autonomy, recognising their pivotal responsibility in ensuring the preservation of the fundamental rights of the populace.³⁹

Strategic lawsuits against public participation

This behaviour encompasses detrimental instances of using the privilege to initiate legal proceedings. Strategic lawsuits against public participation (SLAPP) refer to legal actions initiated by organisations and people to curb fundamental rights. These lawsuits are characterised by their protracted nature, lack of merit and substantial financial burden,

³⁸ HANDMAKER 2020; BOT 2019: 421–445.

³⁹ KEITH et al. 2009: 644–660; GARCÍA-SAYÁN 2017.

primarily in the civil and criminal domains. Their ultimate objective is to stifle the voices of journalists, critics and professionals. One issue with this litigation is its potential to impede the enjoyment of fundamental rights, undermining its underlying principles and operations.⁴⁰

In South America, judiciary members have brought several legal actions against social networks, journalists and bloggers who have expressed their opposition to the law. They have seized assets or imposed heavy fines, severely violating freedom of expression. The semiotic definition of lawfare also highlights the importance of media involvement. In the semiotic interpretation, lawfare is a weapon aimed at destroying the enemy through the use and abuse of law and the media to incite and mislead public opinion.⁴¹ The weapon used is the rule of law, which was not initially created to silence the innocent but to restrain authoritarians and criminals. Ironically, it is precisely this rule of law in which the law can even be used to restrict fundamental rights.⁴²

Media, corruption and public perception: Analysing scandal-mongering

Throughout history, using war propaganda to advocate for the annihilation of the adversary has been a longstanding occurrence in times of armed conflict. During periods of peace, the efficacy of war propaganda is in its ability to substitute the concept of a destructive adversary with an alternative entity that can captivate the attention of the populace and media, eliciting a sense of outrage. During periods of peace, corruption emerges as a prevalent phenomenon.⁴³

The criminal proceedings involving those engaged in corrupt activities exert a significant influence and possess a remarkable ability to garner support from both the media and the general populace. The enactment and subsequent scrutiny of anti-corruption legislation can give rise to significant media spectacles, potentially eroding the accused individuals' social reputation, privacy and financial stability.⁴⁴

Corruption is brought to public attention and becomes a subject of scandal through media coverage, specifically through the programming conducted by media outlets. The media disseminates information regarding a corruption case, transforming it into a theatrical production complete with narratives, main characters and supporting cast members. This is the genesis of the scandal. A scandal is a phenomenon constructed by the media, characterised by a singular narrative, accompanied by a distinctive label, and encompassing much information, statements, anecdotes, documents and legal actions.⁴⁵

⁴⁰ MIROCHA 2019: 76–93; PETRUSKA 2022a: 1–12; PETRUSKA 2022b: 1–16.

⁴¹ TIEFENBRUN 2010: 29.

⁴² VEGH WEIS 2023: 909–933.

⁴³ FOREST 2021: 13–33; MUTONYI 2021: 3001–3010.

⁴⁴ BREIT 2010: 619–635.

⁴⁵ JAIN 2001: 71–121; SCHULTZ–SØREIDE 2008: 516–536.

The role of the media in public perception: A key aspect of legal warfare

The media and the internet significantly support legal warfare beyond their traditional function as mediators. This refers to the assistance offered by the media or specific segments of the media using diverse, sophisticated communication methods.⁴⁶ The objective is to optimise the tactical utilisation of legal mechanisms in order to exert influence over the adversary. The media has the potential to establish a context that validates the utilisation of lawfare by displaying a predisposition towards the guilt of the adversary, rather than their innocence. Lawfare can potentially lead to the unjust condemnation of individuals without substantial proof, as well as the mobilisation of public opinion to seek official intervention from society.⁴⁷ The media has the potential to augment the efficacy of legal instruments by serving as a conduit for various functions such as shaping public opinion and gauging public sentiment.⁴⁸

Conclusions

The primary objective of this article was to demonstrate how, within the framework of promoting the elimination of war, terrorism, corruption, crime and numerous other unpleasant phenomena, individuals can inadvertently face persecution and experience limitations on their rights through the utilisation of legal mechanisms.

It is evident from the present study that lawfare is a matter of considerable importance, thus warranting substantial and meticulous consideration. The author expresses their anticipation that this study would make a valuable contribution towards exposing the alarming phenomenon wherein the law transforms from being a tool for democracy and the rule of law to an adversary of these principles. Many legal professionals typically associate the term “lawfare” with its use in international law and defence, overlooking its relevance to private law disputes as a form of legal warfare. There are other grounds for the author’s rejection of this method. Lawfare refers to a defined set of practices encompassing a strategic use of the law, either directly or indirectly, to undermine, inflict harm against, or dismantle an opposing party to delegitimise their position.⁴⁹ It can be applied in public law and, as shown in this article, already in private and criminal law.⁵⁰

⁴⁶ CALED–SILVA 2022: 123–159.

⁴⁷ CALED–SILVA 2022: 123–159.

⁴⁸ CALED–SILVA 2022: 123–159; BREIT 2010: 619–635.

⁴⁹ PETRUSKA 2021: 97–106; PETRUSKA–VIKMAN 2021: 1–18.

⁵⁰ MARTINS 2010.

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