

***Ethos and Pathos in Justice-Rapporteur's Discourse in Brazilian
Federal Supreme Court / Ethos e pathos no discurso do Ministro-
Relator do Supremo Tribunal Federal***

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ABSTRACT

In a democratic and pluralistic lawful society, countless clashes of opinion often give rise to heated polemics. In Brazil, the promulgation of the Biosecurity Act 2005 was followed by a wide debate about its constitutionality, especially in relation to the permission to use embryonic stem cell for research. In 2008 the Federal Supreme Court (FSC), responding to a Direct Action of Unconstitutionality (ADI 3510), filed by the Prosecutor General of Brazil, found it constitutional and maintained their initial position. This decision was guided by the *Rapporteur's* vote, which was preceded by a procedural report and widely presents the polemic generated by this Act. Aiming to understand the development of the legal argumentation, this study is intended to show how the ideological sphere of law reflects and refracts this clash of opinions discursively and linguistically. In order to comprehend, analyze and interpret this text, - i.e. the vote of the *rapporteur*, Justice Carlos Ayres Britto, we are theoretically and methodologically grounded in the dialogical discourse analysis, which is inspired in the works of Bakhtin and the Circle, and also in the rhetoric notions of *ethos* and *pathos*. We observed that, although the legal discourse preferably seeks a *consensus*, it is not what always occurs. In the particular case of this article, a *consensus* was not reached either in the FSC or in society in general.

KEYWORDS: Legal Discourse; Bakhtin and the Circle; Rhetoric; Ethos; Pathos

RESUMO

É próprio da sociedade de Direito - democrática e pluralista - os inúmeros confrontos de opinião que, muitas vezes, suscitam polêmicas acirradas. A promulgação da lei da Biossegurança, em 2005, foi seguida de um vasto debate acerca de sua constitucionalidade, especialmente em relação à liberação das pesquisas com células-tronco embrionárias. Em 2008, respondendo a uma Ação Direta de Inconstitucionalidade (ADI 3510), ajuizada pelo procurador-geral da República, o Supremo Tribunal Federal considerou a Lei constitucional, mantendo a posição inicial. Guiando tal decisão, o voto do relator, precedido do relatório processual, expõe amplamente a polêmica encetada. Visando à compreensão do desenvolvimento da argumentação na área jurídica, este trabalho tem como objetivo mostrar como a esfera ideológica do Direito reflete e refrata esse embate discursiva e linguisticamente. Metodológica e teoricamente, utilizaremos a análise dialógica do discurso, de inspiração na obra de Bakhtin e o Círculo, aliada a noções retóricas de ethos e pathos, na compreensão, análise e interpretação deste texto - o voto do relator Ministro Carlos Ayres Britto. Constatamos que, embora o debate jurídico busque de preferência o consenso, nem sempre isso ocorre – e não ocorreu, tanto no STF como na sociedade.

PALAVRAS-CHAVE: Discurso jurídico; Bakhtin e o Círculo; Retórica; Ethos; Pathos

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Countless clashes of opinion often give rise to heated polemics in a democratic and pluralistic lawful society. In Brazil, the promulgation of the Biosecurity Act 2005 was followed by a wide debate about its constitutionality, especially in relation to the use of embryonic stem cell for research. The polemic surrounding the claim was that this kind of research would violate the right to life and the dignity of human beings. It was stimulated by the different media and was part of the varied clashes of opinion present in our society at that time. In 2008, the Brazilian Federal Supreme Court¹ (hereinafter FSC), in response to a Direct Action of Unconstitutionality (ADIN 3510) filed by the Prosecutor General of the Republic, considered the act constitutional and maintained their initial position. The vote of the *rapporteur*,² Justice Carlos Ayres Brito – which was preceded by the procedural report and widely exposes the polemic initiated³ – guided the decision of the FSC.

How is the *rapporteur*'s vote constructed discursively and rhetorically? How is its argumentative strength structured? With which institutions and ideas does it dialogue? How does the ideological sphere of law reflect and refract that social polemic? Under the discursive studies perspective as conceived in Bakhtin and the Circle's oeuvre, the analysis of the *rapporteur*'s vote aims not only to understand the argumentation development in the legal area, but also, simultaneously, to better comprehend the society in which we live, our time-space, our culture, our community. This is because, in this work, discourse is understood as the language in its "concrete and living" reality so as to encompass the extralinguistic, which Bakhtin called "metalinguistics" in his discussion on Dostoevsky's discourse (BAKHTIN, 2011,

¹ T.N. The Federal Supreme Court is "Brazil's highest court" and it has "the role of acting as the principal guardian of the vast collection of individual, social, political, and economic rights that are textually enumerated" (ROSENN, 2014 p.298). It "is composed of a mix of career judges and jurists with distinguished careers outside the judiciary" (ROSENN, 2014 p.299). In addition to this, in Brazil, which is a "civil law country," "most judges are career judiciary. The Brazilian judicial career begins soon after law school, and judges generally work their way through the ranks, being promoted to higher courts on the basis of merit and seniority" (ROSENN, 2014 p.298). Full reference: ROSENN, K. S. Recent Important Decisions by the Brazilian Supreme Court. In: *U. Miami Inter-Am. L. Rev.*, v.45, iss.2 2014, pp.297-334. Available at: [https://repository.law.miami.edu/cgi/viewcontent.cgi?referer=https://www.google.com.br/&httpsredir=1&article=2471&context=umialr]. Accessed on: November, 13, 2017.

² T.N. "the *rapporteur* (in Brazilian Portuguese, *relator*) reviews the file and prepares a report and an opinion for the rest of the court. While any minister may disagree with the *rapporteur* and ask to review the record, the vote of the *rapporteur* is generally followed. This process concentrates enormous power in the *rapporteur* to whom a computer has randomly assigned the case." (ROSENN, 2014 pp.301-302). For full reference, see previous footnote.

³ The full vote of the *rapporteur*, Justice Carlos Ayres Brito can be read in Portuguese at <http://www.stf.jus.br/arquivo/cms/noticiario/stf/anexo/adi3510relator.pdf>. Accessed on March 19, 2017.

p.181)⁴ ⁵. Thus, we observe the dialogue between the different axiological positions of institutions and individuals - the *dialogic relationships*, that “although belonging to the realm of the *word*, do not belong to the realm of its purely linguistic study” (p.182, italic in the original),⁶ as they are extralinguistic; “but at the same time they must not be separated from the realm of *discourse*, that is, from language as a concrete integral phenomenon” (p.183).⁷ In addition to this Dialogic Discourse Analysis (DDA), we also use categories of - old and new – Rhetoric for examining the vote once both theoretical frameworks are interested in participation, evaluation, decision, and action. And both provide us elements to analyze not only how the enunciator’s image is discursively constructed - the *ethos* of the *Rapporteur* of the Proceedings - but also the way this utterance expresses and arouses passions - the *pathos* - by means of its emotional-volitional tone.

More specifically, in the understanding, analysis and interpretation of this concrete utterance - the Vote of the *Rapporteur* Justice Carlos Ayres Britto, we seek to observe (i) the way in which the meanings are constructed in a broader and more specific social context of the ideological sphere of law, particularly in the dialogic interaction that the genre itself presupposes; (ii) how the word of the other, even outside the limits of the author’s discourse, is taken into account by him, expressing new intonations and positions that shape and amplify social polemic; and (iii) the dialogues that the stated standpoints propose through the linguistic forms that conveys expressive intonations, which constitute the orator’s *ethos* and arouse the audience’s *pathos*

In the next section, we present brief theoretical considerations about the essential concepts for the understanding of this work. We observe that, in accordance to the

⁴ BAKHTIN, M. *Problems of Dostoevsky’s Poetics*. Twelfth Printing. Translated into English by Caryl Emerson. Minneapolis, MN: University of Minnesota Press, 2011.

⁵ In the essay *The Problem of the Text in Linguistics, Philology, and the Human Sciences: An Experiment in Philosophical Analysis* (2013, pp.103-131), Bakhtin also explains that the “subject of linguistics is only the material, only the means of speech communication, and not speech communication itself, not the utterances in their essence and not the relationships among them (dialogic), not the forms of speech communication, and not the speech genres” (p.118). The speech communication, i.e. the concrete utterances and the (dialogic) relationships, which produce an infinite chain of utterances, is the subject of what is today known as Dialogic Discourse Analysis. The full reference of the quote in this footnote is: BAKHTIN, M. *The Problem of the Text in Linguistics, Philology, and the Human Sciences: An Experiment in Philosophical Analysis*. In: _____ *Speech Genres and Other Late Essays*. Thirteenth Printing. Translated into English by Vern W. MCGee. Edited by Caryl Emerson and Michael Holquist. Austin, TX: University of Texas Press, 2013a, pp.103-131.

⁶ For full reference see footnote 2.

⁷ For full reference see footnote 2.

necessities perceived in the analysis of the object, other notions will be explained in the analysis section.

On Rhetoric and DDA

As earlier stated, this study is primarily grounded in dialogic discourse analysis (DDA), which was inspired by Mikhail Bakhtin and the Circle's oeuvre. However, we consider the theoretical proximities between the Bakhtinian work and classical rhetoric,⁸ combining concepts from both frameworks to understand, analyze, and interpret the selected Vote.

As for rhetoric, we consider it, from the Aristotelian notion, as “the faculty of observing in any given case the available means of persuasion” (*Rhetoric*, 1355b).⁹ It is the place of *controversy* and the seeking of other's *adherence* to a certain way of seeing the world in search of a *consensus* for a decision, just as it happens in the procedural legal discourse. Aristotle also teaches us that the orator discursively persuades through three proofs: the moral character that is showed in his/her speech – *ethos*, the audience disposition set by him/her – *pathos*, or the speech itself, through what it demonstrates or seems to demonstrate – *logos* (1356a).¹⁰ We highlight two of these proofs in the analysis – *ethos* and *pathos* – to show how they argumentatively work in the *Rapporteur's* Vote. However, we recall that the three proofs are expressed in the integrality of the discourse and that persuasion is rhetorically elicited by the intimate relation between them. *Ethos*, which is the first rhetoric proof and perhaps, in accordance to Stagirite's words, the most important, can be understood as a *mode of being* of the orator/author revealed in his/her *mode of speaking*.¹¹ An image that is

⁸ See PISTORI, M. H. C. Mikhail Bakhtin e Retórica: um diálogo possível e produtivo [Mikhail Bakhtin and Rhetoric: A Possible and Productive Dialogue]. *Rétor.* pp.60-85, 2013. Available at [http://www.revistaretor.org/pdf/retor0301_pistori.pdf] and BIALOSTOSKY, D. *Mikhail Bakhtin*. Rhetoric, Poetics, Dialogics, Rhetoricity. Anderson, South Carolina: Parlor Press, 2016.

⁹ ARISTOTLE. *Rhetoric*. Translated into English by W. Rhys Roberts. Edited by W. D. Ross. New York: Cosimo, 2010.

¹⁰ For full reference see previous footnote.

¹¹ The Aristotelian concept of *ethos* has been the focus of numerous recent studies, at least since the 1980s. We recall here only a few of them, such as those by Dominique Maingueneau (cf. 1996, 1997, 2008, among others). Maingueneau states that *ethos* involves a tone of voice, a corporeality, a way of inhabiting the social space that does not act “in the foreground, but in the sideways. It implies a sensitive experience of the discourse, it mobilizes the affectivity of the addressee” (2008, p.14, our translation), leading the enunciator and the enunciatee to constitute an “imaginary community of those who adhere to

constructed in and by discourse, because “persuasion is effected through the speech itself when we have proved a truth or an apparent truth...” (*Rhetoric*, 1356a).¹² *Ethos* guarantees credibility by creating the image of a trusted orator/author that contributes to persuading and convincing the addressee.

We can claim that, in a concrete utterance, the *ethos* can be found in what Bakhtin refers to as “second voice in discourse.” This voice creates, evaluates and reveals itself in the situation and position before the infinite chain of discourses. It reproduces “(for one purpose or another) the text (another’s)” and creates “a framing text (one that comments, evaluates, objects, and so forth)” (BAKHTIN, 2013a, p.104).¹³ This “second voice” is characteristic of the concrete utterance, since taken separately the words lack double-voicing and have no author. For this reason, the author is a “pure depicting origin,” not a depicted image, and we find it in the whole of his/her work, in the image that he/she creates of him/her – his/her *ethos*, we state, is “nature creating” (BAKHTIN, 2013a, p.110).¹⁴ In this way, we understand that the author - the *Rapporteur*, is, in the work - in this case, the Vote -, as a whole (BAKHTIN, 2013a, p.110).¹⁵ And it is in this whole that we observe the image that he creates of himself - his *ethos*. In expressing himself/herself, the author makes himself/herself object to the other, and this other also constitutes his/her identity. It is important to point out that, in accordance to both rhetoric and Bakhtinian perspectives, the author takes into consideration the addressee and the anticipation of the latter’s responsive understanding in his/her speech (BAKHTIN, 2013b, p.95).¹⁶ This leads us to reflect on *pathos*. We recall that Aristotle deals with the passions aroused in the listener in Book II of *Rhetoric*, enumerating them and explaining their functioning in the orator-audience relation. Although, according to the philosopher, it is the relation *ethos/pathos/logos* that defines the rhetorical discourse, passions appear, in Aristotelian Rhetoric, as usable

the same discourse” (2008, p.18; our translation). Or the studies of Amossy (1999a; 1999b); the various articles of different authors organized by her in *Images de soi dans les discours. La construction de l’ethos* (AMOSSY, 1999); Fiorin (2004). Especially in the legal area, cf. Pistori (2008, among others).

¹² For full reference see footnote 7.

¹³ For full reference see footnote 3.

¹⁴ For full reference see footnote 3.

¹⁵ For full reference see footnote 3.

¹⁶ BAKHTIN, M. The Problem of Speech Genres. In: _____. *Speech Genres and Other Late Essays*. Thirteenth Printing. Translated into English by Vern W. MCGee. Edited by Caryl Emerson and Michael Holquist. Austin, TX: University of Texas Press, 2013b, pp.60-102.

recipes to provoke persuasion.¹⁷ Aristotle recognizes the importance of passions especially in the judicial genre.

In an analogous way, Bakhtin recalls the dramaticity that the speaker confers on the utterance, anticipating the responsive understanding of the addressee in the utterances in general, but more external in the rhetorical genres (2013b, p.96). In other texts of the Circle, this drama is also called the emotional-volitional tone, or emotional intonation of the utterance. In the Vote, this dramaticity stands out at various moments and serves persuasion, as we will point out in the analysis.

Particularly characterized in the context of rhetoric, which always refers to a discourse for and against a matter, some aspects of polemic and of polemical discourse require clarification. In fact, the term *polemic*, widely used in current everyday communication, can be understood in a broader or narrower way. As we have hitherto used - the social *polemic* surrounding the possibilities of using embryonic stem cells for research, the term refers to the set of opposing social interventions on the issue. On the other hand, the *polemical discourse* is that which defends only one side of the matter (cf. AMOSSY, 2004, pp.45-70). Thus, the vote to be analyzed reflects and refracts the social polemic that is constituted, above all, by reported discourses; however, it is a *polemical discourse* in itself once it positions itself - and, as a vote, must take a stand - regarding the issue.

Polemic and polemical discourse can be best understood through the work of Amossy (2014), which addresses the possibilities of a rhetoric of *dissensus*. In historically recovering the notion, this author retrieves several authors who, since antiquity, have condemned polemic, accusing it, above all, of escaping argumentative rationality, because the public space would require *rational* collective decision-making via agreement.

However, the aforementioned author argues that it is not only the passionate character that would characterize the polemic and presents some very specific aspects to it. If the term *polemic* etymologically refers to war, it is important to note that this

¹⁷ Much of Book II of *Rhetoric* is devoted to the definition of each of the passions enumerated by the philosopher: anger, mildness, love, hate, fear, confidence, shame, shamelessness, gratitude, lack of gratitude, pity, indignation, envy, emulation, contempt. Besides, it brings the definitions of the characters that are proper to their ages, the social positions and all discourse genres. This is always for the purpose of teaching how such knowledge can serve discursive persuasion. Also among the Romans, rhetoric gave great prominence to the role of passions in the production of rhetorical discourse (cf. CICERO, *De Oratore*). At the present time, cf. also, among others, Fiorin (2004) and Pistori (2008) in the legal area.

“bellicose” character, somewhat ostensible, is maintained and sometimes manifests itself in verbal violence, adversary’s disqualification, or virulent debate. Another important aspect of the polemic debate is its occurrence in the public space - necessarily democratic, around a public issue. Although this debate can start from a private matter, the assumed positions are intended to be valid for society as a whole. This is what happens, for example, regarding the use of the Muslim veil in French schools, or the use of embryonic stem cells for research for therapeutic purposes in Brazilian society. In the case of the vote that we have analyzed, even the Justice affirms that “direct action of unconstitutionality is of such social importance that it comes to concern all of humanity” (§7, our translation).¹⁸

Another important feature of polemic is how it operates conflict through *dichotomization*. That is, polemic is characterized by the polarization of opinions and eventually generates a social division around the issues at stake: two contrary, explicitly opposing positions are expressed - exactly as we will see in the *Rapporteur’s* vote, which reports on the issue of embryonic stem cell research. At present, it is also important to highlight the decisive role the media plays in the development of polemics, even though it seems that the debates they present - or propose - on a number of occasions have the first objective of arousing the curiosity and the emotions of the audience. Moreover, at times they appear to have a clearly sensationalistic character, with the ill-concealed purpose of selling news to as many consumers as possible (readers or viewers). Then, consumers see / read / listen to the polemic as if they were watching a match in search for a winner, i.e., the one who best manipulates the very verbal violence.

Independently of this last aspect, Amossy also points out that “[...] polemic fulfills important social functions precisely because it is often reproved: a *verbal operation* of the conflict produced from disagreement” (p.12; our translation).¹⁹ It does not aim at social agreement, but “it fulfills important functions that range from the possibility of public confrontation in the midst of insoluble conflicts to the formation of

¹⁸ In the original: “ação direta de inconstitucionalidade é de tal relevância social que passa a dizer respeito a toda a humanidade” (§7).

¹⁹ In the original: “[...] la polémique remplit des fonctions sociales importantes précisément en raison de qui lui est généralement reproché: une *gestion verbale* du conflit effectuée sur le mode du dissentiment” (p.12; italics in the original).

communities of protest and public action” (p.13, our translation).²⁰ This formation of communities that unite around a common position can also be seen very clearly through those who propose or oppose the Action of Unconstitutionality and are named in the Vote by the *Rapporteur*.

Finally, it is important to note that polemic, as an argumentative modality, can manifest itself in different discourse genres, although preferably in the media. One of them is precisely the *vote* in the FSC: a relatively stable type of utterance, with its own theme, composition and language style, responding to specific purposes in the ideological field of law in a defined time and space and constituting a link in the historical creative chain of utterances, all of which dialogue with one another (cf. BAKHTIN, 2013b, pp.60-61; VOLOŠINOV, 1986, pp.95-96).²¹ This is because, based on Bakhtin and the Circle, we understand dialogue in a broad sense, not only face-to-face dialogues. Dialogue is constituted of verbal interaction, a social phenomenon that constructs speakers and interlocutors, subjects of enunciation. As for dialogic relations, Bakhtin also clarifies that they occur between *semantic positions*, axiological positions, and are not logic-semantic; therefore, they can occur between utterances, words - even an isolated word, “if we hear in it someone else’s voice” -, or elements expressed in any “*semiotic material*” (BAKHTIN, 2011, pp.184-185, italics in the original).²² The constitution of a meaning occurs dialogically, for “Each word (each sign) of the text exceeds its boundaries. Any understanding is the correlation of a given text with other texts. [...] The dialogic nature of this correlation” (BAKHTIN, 2013c, p.161).²³

The brief definition of these few constitutive elements of the Bakhtin Circle’s discourse theory would be incomplete if we did not expose the basic methodology of the dialogic discourse analysis, as it is inferred by reading the works of the Circle, all of which present analyses of discursive communication (often literary communication). However, it is clearly exposed in *Marxism and the Philosophy of Language*

²⁰ In the original: “Elle remplit [...] des fonctions importantes qui vont de la possibilité de la confrontation publique au sein de tensions et de conflits insolubles, à la formation de communautés de protestation et d’action publique” (p.13).

²¹ For full reference of Bakhtin’s work see footnote 14. VOLOŠINOV, V. N. *Marxism and the Philosophy of Language*. Translated by Ladislav Matejka and I. R. Titunik. Cambridge, Massachusetts: Harvard University Press, 1986.

²² For full reference see footnote 1.

²³ BAKHTIN, M. M. Toward a Methodology for Human Sciences. In: _____. *Speech Genres and Other Late Essays*. Thirteenth Printing. Translated into English by Vern W. MCGee. Edited by Caryl Emerson and Michael Holquist. Austin, TX: University of Texas Press, 2013b, pp.159-172.

(VOLOŠINOV, 1986, pp.95-96).²⁴ Thus, the analysis procedures are carried out by examining the verbal interaction in connection with the broader and more immediate concrete conditions in which it is developed; then, by observing the genre and its connection with the ideological sphere to which it originally belongs; finally, by considering “language forms in their usual linguistic presentation.” To conclude this section, we endorse Brait’s words regarding the dialogic discourse theory:

[...] developed within the philosophy of language, it is based on an ethics and an aesthetics that can not be reduced to pre-established categories, which would be ready to be applied. To think about man, cultures, knowledge production, the particularities of human activities, the role language and social interactions play in the construction of meaning, otherness as a condition of identity, for example, are some of the possibilities offered by the Bakhtinian reflections. They are certainly of interest to theories of literature and the arts in general, as well as the critical and reflexive approaches of everyday language in its most diverse manifestations and varied plans of expression (2006, p.48, our translation)²⁵

Vote of the Rapporteur: Direct Action of Unconstitutionality 3.510-0 Federal District

The vote of Justice Carlos Ayres Britto is a long text with 71 paragraphs, 72 pages in the original. We particularly focus on its first part – the Report. Then, we address some aspects of the document’s second part - the Vote, which is important for achieving our proposed goals: in brief, the text’s constitution of meanings, the dialogues that constitute it axiologically, and, finally, the recognition of the speaker’s *ethos* and the audience’s *pathos*. It is important to emphasize that, in the analyzed utterance, at first, we find what could be understood only as a reported polemic - an indirect speech that would revisit the “real” polemic that occurred / occurs in society.

We are aware that the tone, style, and even the form of authorship, among other factors, are determined by genre, which in this study is the genre Vote in the FSC. In

²⁴ For full reference see previous footnote.

²⁵ In the original: “[...] nascido no âmbito da filosofia da linguagem, funda-se numa ética e numa estética que não podem ser reduzidas a categorias fechadas, prontas para serem aplicadas. Pensar o homem, as culturas, a produção do conhecimento, as particularidades das atividades humanas, o papel da linguagem e das interações sociais na construção dos sentidos, a alteridade como condição de identidade, por exemplo, são algumas das possibilidades oferecidas pelas reflexões bakhtinianas e que certamente interessam às teorias da literatura e das artes em geral, assim como às abordagens críticas e reflexivas da linguagem cotidiana em suas múltiplas manifestações e variados planos de expressão” (2006, p.48).

judicial proceedings, a vote can be defined as an “opinion expressed about a certain fact. [...] With the vote, the person gives his/her *legal advice*, expresses his/her opinion ...” (DE PLÁCIDO E SILVA, 1997, p.508, our translation).²⁶ The text analyzed here is an *advisory vote*, because it has no power to decide, but to guide; in other words, it does not determine what the resolution will be. In this case, the decision is reached by the full FSC sitting *en banc*, which is a legal procedural ritual of that court. This means that the *rapporteur* is responsible for further studies on the subject, for a broader understanding of the issue on which to decide. However, by having a guiding function, such as legal advice, a vote expresses an opinion and justifies it. Therefore, it expresses the social polemic in the axiological position assumed by the Minister. Thus, it is constituted by a polemical discourse. Furthermore, while a *consensus* is preferably sought when presenting opposite reasonings on an issue, it is not what always occurs. In the specific case of this article, a *consensus* was not reached either in the FSC or in society in general. For this reason, there was a decision, which can always be further discussed.

The Report

The Report begins with the presentation of the Action and its subject, the Brazilian Biosecurity Act of May 24 of 2005. In this presentation, Article 5 of this Act is fully transcribed. It permits the use of embryonic stem cells extracted from surplus human embryos from *in vitro* fertilization treatments under certain conditions, such as the donors’ consent, the use for research and therapy purposes, the respect for ethical conditions and non-commercial purposes.

Following the article presentation, the minister outlines the positions at stake and transcribes the main arguments of each party. He starts it with the transcription of the arguments of those who oppose embryonic stem cell research in §§2 and 3, respecting the highlights (italics and in bold from the original) and using quotation marks for the party’s words. These procedures produce the meaning effect of integrity and authenticity to the quotations:

§2. The plaintiff argues that the impugned provisions contradict “*The inviolability of the right to life, because the human embryo is human*”

²⁶ In the original: “a opinião manifestada a respeito de determinado fato. [...] Pelo voto, a pessoa dá o seu parecer, manifesta sua opinião...” (DE PLÁCIDO E SILVA, 1997, p.508).

life, and they destroy the foundation of the Democratic State of Law, which lies in the preservation of the dignity of the human person” (p.12)

§3. In sequence, the plaintiff states that: a) **“human life begins at and with fertilization,”** and it continuously develops; b) the zygote, consisting of a single cell, is an *“embryonic human”*; c) a woman becomes pregnant from the very moment of fertilization, when she carries a zygote and provides a proper environment for its development; d) adult stem cell research is objectively and certainly more promising than embryonic stem cell research (our translation).²⁷

On the other hand, the enunciator presents, in a single paragraph (§4), those who defend the constitutionality of the act, by enumerating the authorities that are in favor of it, such as the President of the Republic, the public attorney Rafaelo Abritta (responsible for the legal defense), and Justice Álvaro Augusto Ribeiro Costa (who at the period was the Attorney General of the Union). All of them shared “unrestricted adherence” to it. Afterwards, he “extracts” a “conclusive excerpt” from the petition, transcribing it in italics: *“... with a focus on the right to health and the free expression of scientific activity, the permission to use embryonic material, in the process of being discarded, for research and therapy purposes, is consubstantiated with values covered by the Constitution”* (our translation).²⁸ He adds that the National Congress also reached the same conclusion. It is a position whose defenders are named, differently from the first, conferring to it greater persuasive force.

However, in the Report’s sequence, the identification of those who espouse each of the positions is more detailed, and then we explicitly observe the broader social context in which the polemic is inserted, expressed by those who assume each of the positions. On one side, there are representatives from the *legal sphere*: the Attorney General of the Union, the Public Prosecutor’s Office, the Attorney General of the Republic, Professor Claudio Fonteles, with his legal opinion. On the other side, there

²⁷ In the original: “§2. O autor da ação argumenta que os dispositivos impugnados contrariam ‘a inviolabilidade do direito à vida, porque o embrião humano é vida humana, e faz ruir fundamento maior do Estado democrático de direito, que radica na preservação da dignidade da pessoa humana’ (fl.12).

3. Em sequência, o subscritor da petição inicial sustenta que: a) **“a vida humana acontece na, e a partir da, fecundação”**, desenvolvendo-se continuamente; b) o zigoto, constituído por uma única célula, é um *“ser humano embrionário”*; c) é no momento da fecundação que a mulher engravida, acolhendo o zigoto e lhe propiciando um ambiente próprio para o seu desenvolvimento; d) a pesquisa com células-tronco adultas é, objetiva e certamente, mais promissora do que a pesquisa com células-tronco embrionárias.”

²⁸ In the original: *“... com fulcro no direito à saúde e no direito de livre expressão da atividade científica, a permissão para utilização de material embrionário, em vias de descarte, para fins de pesquisa e terapia, consubstancia-se em valores amparados constitucionalmente.”*

are representatives from the *governmental sphere*, other representatives from the *legal* and the *legislative spheres*. The petition is also of interest to those whom the enunciator calls “friends of the Court” (*amici curiae*), representatives of Brazilian civil society, who are also representatives of the wider social context – Pro-life and Pro-Human Rights movements, CNBB [National Conference of Brazilian Bishops], CONECTAS HUMAN RIGHTS; CENTRO DE DIREITOS HUMANOS [the Human Rights Center], among others. The *Rapporteur* emphatically acknowledges the representativeness by stating that they are “Entities of *salient* social representativeness” (our translation).²⁹

Continuing to represent this broader social context and the scientific aspects involved in the decision, the Minister invites, for a **public hearing** (bold in the original), “twenty-two (22) of the most respected Brazilian scientific authorities,” whose participation is registered in a “graphic, auditory and visual reproduction” (our translation).³⁰ That is, there is a broad social context represented in the report, with whom the vote preferably (but not only) dialogues. Actually, the dialogic relationships of agreement-disagreement, statement-complement, question-answer occur between complete utterances, although these dialogues are only recognized through the excerpts selected by the enunciator.

Then, the text outlines the dichotomization / polarization of the debate, moments in which we begin to observe how the *Rapporteur* constructs an image of himself - an *ethos* of fidelity and precision in the exposition of the “elongated as well as substantial public audience” (our translation)³¹ presented by representatives of science. He introduces his exposition by affirming that the dichotomization is expressed in “two clear currents of opinion” (§8, our translation).³² It is interesting to note that opinion is a domain of rhetoric, not science. The scientific authorities were called to clarify the facts that are under discussion. In order to make a decision on this particular case, the most important fact to be clarified is the establishment of the moment when human life begins. In characterizing the two scientific positions as “currents of opinion,” the *Rapporteur* positions himself rhetorically, expressing some subjectivity and placing in dialogue *doxa* and *episteme*, respectively related to opinion and truth. Well, rhetorical

²⁹ In the original: “entidades de *saliente* representatividade social.”

³⁰ In the original: “22 (vinte e duas) das mais acatadas autoridades científicas brasileiras”; “reprodução gráfica, auditiva e visual.”

³¹ In the original: “tão alongada quanto substancial audiência pública” (§8).

³² In the original: “duas nítidas correntes de opinião” (§8).

discourse, relative to opinion, starts from the assumption that it can be challenged. Thus, in the *Rapporteur's* words we find the dialogue between rhetoric and science and between rhetoric and the Law, in which rhetoric always stands out - this might surprise, since it is an indirect discourse regarding scientific expositions...

Next, in the Report, the enunciator presents the conflicting positions in two long paragraphs. The *ethos* of trustworthiness and credibility continues to be constructed, especially when he ponders as he presents the positions: he inserts, in parenthesis, expressions, such as “it is my reading”; “in my reading between the lines of the explanations in focus” (our translation)³³ in both paragraphs. Nevertheless, we observe, using Voloshinov’s words (1986, p.128),³⁴ that they recreate in their “own creative fashion way, following the specific direction proper to that pattern alone,” especially by inserting values in them. In fact, the two passages are indirect speeches that simultaneously analyze the expression and content of the words of others, but also reveal the enunciator emotionally and affectively. Consider the following excerpt:

I – one, failing to recognize embryonic stem cells, at least for human therapy purposes, superior to those of adult stem cells. The same current that attributes to the embryo a progressive function of *self-constituency* that makes it a central protagonist of its process of hominization, when compared to the female uterus (whose role is auxiliary, in the condition of its *habitat*, nest or environment, besides being a nurturer). Moreover, arguing that the withdrawal of stem cells from a particular embryo *in vitro* destroys the unit, the personalized cell set in which it consists. That already corresponds to the practice of a poorly disguised abortion, since, even in the product of the conception in laboratory, there is already a human creature or organism that is to be seen as if it were the one that is originated and develops in the body of the pregnant woman. Creature or organism, it should be emphasized, does not break out as a simple project or a mere promise of a human person, only existing in fact during birth labor (*italics in the original, our translation*).³⁵

³³ In the original: “é a minha leitura”; “é a leitura que faço nas entrelinhas das explanações em foco.”

³⁴ For full reference see footnote 21.

³⁵ In the original: “I – uma, deixando de reconhecer às células-tronco embrionárias virtualidades, ao menos para fins de terapia humana, superiores às das células-tronco adultas. Mesma corrente que atribui ao embrião uma progressiva função de *autoconstituidade* que o torna protagonista central do seu processo de hominização, se comparado com o útero feminino (cujo papel é de coadjuvante, na condição de *habitat*, ninho ou ambiente daquele, além de fonte supridora de alimento). Argumentando, sobretudo, que a retirada das células-tronco de um determinado embrião *in vitro* destrói a unidade, o personalizado conjunto celular em que ele consiste. O que já corresponde à prática de um mal disfarçado aborto, pois até mesmo no produto da concepção em laboratório já existe uma criatura ou organismo humano que é de ser visto como se fosse aquele que surge e se desenvolve no corpo da mulher gestante. Criatura ou organismo, ressalte-se, que não irrompe como um simples projeto ou u’a mera promessa de pessoa

In this first section, we highlight some emotional and value elements that show us how the enunciator analyzes the arguments of those who take the first position: the removal of cells from a particular embryo *in vitro* would be “a poorly disguised abortion,” emphasizing (“it should be emphasized,” states the enunciator) that to call such an embryo a “creature or organism” or to regard it as a “*simple project or a mere promise of a human person*” (without emphasis in the original), is the position of those who are against that law. At the same time, by highlighting “the *personalized cell set in which it [the embryo in vitro] consists*” (without italics in the original), the *Rapporteur* begins the dialogue with the constitutional legal discourse on which the conclusions of the vote will be based, discussing the possible existence of *personality* in this stage of human formation. Consider the continuation of the excerpt:

No! For this line of thought (I am interpreting it), the human person is more than individuality protracted or postponed to the factual event of female labor. The human person in its genetic individuality and ontic specificity already exists at the very moment of the fertilization of a female ovum by a male spermatozoid. Coinciding, then, conception and personality (quality of who a person is), no matter the process in which such conception occurs: whether artificial or *in vitro*, whether natural or *in life*. The issue of the human shaping is only different by an existential moment. This is because the first moment begins with conception and lasts while the female pregnancy lasts, understood as a continuous process because it comprehends all stages of prenatal human life. The second moment starts when labor ends (as long as it is a successful one, as we have already stated, because then there is the *birth of a living child*). But in both periods or stages of the process, the human person already exists and deserves the same attention, respect, and legal protection (our translation).³⁶

humana, somente existente de fato quando ultimados, com êxito, os trabalhos de parto” (itálicos no original).

T.N.: Our translation has followed the sentence structure of the excerpts, even when they are fragmented.

³⁶ In the original: “Não! Para esse bloco de pensamento (estou a interpretá-lo), a pessoa humana é mais que individualidade protraída ou adiada para o marco factual do parto feminino. A pessoa humana em sua individualidade genética e especificidade ôntica já existe no próprio instante da fecundação de um óvulo feminino por um espermatozoide masculino. Coincidindo, então, concepção e personalidade (qualidade de quem é pessoa), pouco importando o processo em que tal concepção ocorra: se artificial ou *in vitro*, se natural ou *in vida*. O que se diferencia em tema de configuração da pessoa humana é tão-somente uma quadra existencial da outra. Isto porque a primeira quadra se inicia com a concepção e dura enquanto durar a gestação feminina, compreendida esta como um processo contínuo, porque abrangente de todas as fases de vida humana pré-natal. A segunda quadra, a começar quando termina o parto (desde que realizado com êxito, já dissemos, porque aí já se tem um ser humano *nativivo*). Mas em ambos os estádios ou etapas do processo a pessoa humana já existe e é merecedora da mesma atenção, da mesma reverência, da mesma proteção jurídica.”

In this excerpt, the enunciator's efforts to analyze the expression of the defenders of the first position (that is, of outrage before the permission of embryonic stem cells extracted from surplus human embryos from *in vitro* fertilization treatments for research purposes) are stressed out: in the beginning of the passage, he uses an exclamation mark in "No!", which is followed by the statement "*the human person* is more than individuality protracted or postponed to the factual event of female labor" (without italics in the original). As we can observe, when presenting that position, the *Rapporteur* puts at stake the issue of the shaping of personality again, which is defined between parentheses as the "quality of who a person is," subject to "legal protection." For this first line of thought, the moments of conception and personality shaping coincide, as the synthesis produced at the end of the presentation of this point view shows:

In a synthesis, the idea of the zygote or the female egg already fertilized as a simple embryo of a human person is reductionist, because the right thing is to see it as an embryonic human being. A person in its embryo stage and, therefore, not an embryo in the way of becoming a person (our translation).³⁷

The second positioning follows this paragraph. Initially, we emphasize again that it is an indirect speech that evaluates expression and content. The first element that identifies the expression is the use of "enthusiastically," which appears in the very beginning of the excerpt. And the group's enthusiasm for research seems to have been transferred to the enunciator, as we shall see below. This already suggests what the *Rapporteur's* final position will be in his vote.

II - the other current of opinion is the one that invests, enthusiastically, in scientific experiments with stem cells extracted or taken from human embryos. Cells considered as having greater plasticity or superior versatility to transform into all or almost all human tissues, replacing them or regenerating them in their respective organs and systems. A type of climax of biological research and human therapy, revealing a very bright future for the fair aspirations towards human's quality of life and life span. A line of thought that does not suffer

³⁷ In the original: "Numa síntese, a ideia do zigoto ou óvulo feminino já fecundado como simples embrião de uma pessoa humana é reducionista, porque o certo mesmo é vê-lo como um ser humano embrionário. Uma pessoa no seu estágio de embrião, portanto, e não um embrião a caminho de ser pessoa."

moral pains or troubles of conscience, because, for it, the *in vitro* embryo is a reality of the world of being, something really alive that is set as the logical beginning of human life, but not completely or in every aspect similar to the embryo that is generated and develops in a woman's body. Given that the dimension of the incipient physical and neural characteristics of a human person is only reached by an embryo or zygote, even in its last stage of development to a fetal condition with the meticulous collaboration of the uterus and time. Not in the pure and simple instant of conception, abruptly, but by an ingenious metamorphosis or *laborious partnership* between the embryo, the womb and the running of the days (italics in the original, our translation).³⁸

Every positive evaluation of content is present there in the appreciative intonation. The “research” at its “climax” is presented, coinciding with the “the *fair* aspirations towards human's quality of life and life span” (without *italics* in the original), which are also the aspirations of the enunciator. He points out that this group does not “suffer from moral pains or troubles of conscience,” and explains that for them there is a rational (logical) difference between the embryo *in vitro* – “a reality of the world of being [...] that is set as the *logical* beginning of human life” (without italics in the original) – and the embryo in a woman's body. He highlights thus that human life does not start “abruptly,” but “by an ingenious metamorphosis or *laborious partnership* between the embryo, the womb and the running of the days” (italics in the original). The *Rapporteur* himself emphasizes a “*laborious partnership*,” but also “an ingenious metamorphosis,” that is, something that relates reason, creation/inventiveness and work, involving “the embryo, the womb and the running of the days.” However, it is by the end of the paragraph that we notice the greater emotional involvement of the enunciator in the presentation of this position, in a language that borders poetics:

³⁸ In the original: “a outra corrente de opinião é a que investe, entusiasticamente, nos experimentos científicos com células-tronco extraídas ou retiradas de embriões humanos. Células tidas como de maior plasticidade ou superior versatilidade para se transformar em todos ou quase todos os tecidos humanos, substituindo-os ou regenerando-os nos respectivos órgãos e sistemas. Espécie de apogeu da investigação biológica e da terapia humana, descortinando um futuro de intenso brilho para os justos anseios de qualidade e duração da vida humana. Bloco de pensamento que não padece de dores morais ou de incômodos de consciência, porque, para ele, o embrião *in vitro* é uma realidade do mundo do ser, algo vivo, sim, que se põe como o lógico início da vida humana, mas nem em tudo e por tudo igual ao embrião que irrompe e evolui nas entranhas de uma mulher. Sendo que mesmo a evolução desse último tipo de embrião ou zigoto para o estado de feto somente alcança a dimensão das incipientes características físicas e neurais da pessoa humana com a meticulosa colaboração do útero e do tempo. Não no instante puro e simples da concepção, abruptamente, mas por uma engenhosa metamorfose ou *laboriosa parceria* do embrião, do útero e do correr dos dias” (itálicos no original).

The womb begins to lead the whole complex process of gradual shaping of a new anthropomorphic individuality, with its ethico-spiritual developments; the woman's womb (this is the reading I do between the lines of the explanations in focus) draws upon its old and unfathomable affective-rational experience with the brain of the pregnant woman. Perhaps, it draws upon the cosmos itself, which, underlining scientific remarks on the guiding role that a mother's womb plays, appears as an aura of woman's exaltation – and, mainly of the woman who is a mother or is about to become one – as the bearer of a sixth existential meaning already situated in the domains of the indescribable or unutterable (our translation).³⁹

The *ethos* of reliability and prudence continues to be constituted with the humility with which the enunciator presents these statements as “the reading I do between the lines of the explanations in focus.” But it is a reading that observes and positively values the content of the scientific exposition of the second positioning, adding evaluative aspects that were certainly not found in it, such as referring to the connection between the woman's womb and the embryo as “its old and unfathomable, affective-rational experience with the brain of the pregnant woman” and stressing out the embryo's relation with the “cosmos,” the “new anthropomorphic individuality, with its ethico-spiritual developments,” which confers on it “an aura of woman's exaltation,” who is “the bearer of a sixth existential meaning already situated in the domains of the indescribable or unutterable.” And he concludes the presentation of this position with an argument of authority - William Shakespeare. Such argument, after all, corroborates his use of “currents of opinion” to refer to the scientific positions, as one can read below.

Domains that Science itself seems doomed neither to confirm nor to distrust, because they already belong to that ontic sphere of which the genius of William Shakespeare tried to give account with the famous sentence that says that⁴⁰ “There are more things in heaven and earth,

³⁹ In the original: “O útero passando a liderar todo o complexo processo de gradual conformação de uma nova individualidade antropomórfica, com seus desdobramentos ético-espirituais; valendo-se ele, útero feminino (é a leitura que faço nas entrelinhas das explanações em foco), de sua tão mais antiga quanto insondável experiência afetivo-racional com o cérebro da gestante. Quiçá com o próprio cosmo, que subjacente à cientificidade das observações acerca do papel de liderança do útero materno transparece como que uma aura de exaltação da mulher - e principalmente da mulher-mãe ou em vias de sê-lo - como portadora de um sexto sentido existencial já situado nos domínios do inefável ou do indizível.”

⁴⁰ T.N. This part was translated by us. In the original: “Domínios que a própria Ciência parece condenada a nem confirmar nem desconfirmar, porque já pertencentes àquela esfera ôntica de que o gênio de William Shakespeare procurou dar conta com a célebre sentença de que.”

[Horatio], Than are dreamt of in your philosophy” (Hamlet, 1600/1601, Act I, Scene V).⁴¹

After Shakespeare’s quotation, the enunciator states that “to better illustrate the dichotomic view of the issues that we should examine in the light of Law, especially of Brazilian Constitutional Law,” (our translation)⁴² and presents, in direct speech, part of the explanation of two of the referred scientific authorities. The transcribed passages present the divergent positions quite clearly and concisely. The sense of hierarchical eminence of science in relation to the issue under debate in the legal sphere determines its direct and continuous quotation, without any room for the enunciator to add a comment or replica. However, they serve to prove once again the enunciator’s credibility, who transcribes exactly what was affirmed. But, we remember that he selected the passages transcribed.

In the final segment of the Report, the first part of the Vote, the Minister writes that “the core of this ADIN’s issue [Direct Action of Unconstitutionality] is outstandingly multidisciplinary” (our translation).⁴³ Then, he enumerates the fields of knowledge that it encompasses “Law, philosophy, religion, ethics, anthropology and the medical and biological sciences, notably genetics and embryology” (our translation)⁴⁴ and asserts that the conclusions are not coincident – this is the dichotomization of positions. However, although social discourses from different spheres were conveniently reported, this does not configure one of the aspects of the polemic that we discuss here: bellicosity. A characteristic of the ideological sphere of the Law, at least as it is reported in this Vote, is the fact that the debates as vocalized “in an open environment of urbanity and **unison recognition of the intrinsic dignity of life in any of its stages**” (bold in the original, our translation).⁴⁵ And such “urbanity” is reported as the quality of any of the addressees and proponents of the Direct Action, who, in their active responsive understanding of the debates (and also of the Vote), presented

⁴¹ For this part of the translation, we transcribed the very words of Shakespeare’s on page 34 of his published work. The full reference is: SHAKESPEARE, W. *The Tragedy of Hamlet*, Prince of Denmark. Edited by Jack Randall Crawford. New Haven, Connecticut: Yale University, 1917.

⁴² In the original: “para ilustrar melhor essa dicotomia de visão dos temas que nos cabe examinar à luz do Direito, especialmente do Direito Constitucional brasileiro.”

⁴³ In the original: “o tema central da presente ADIN é salientemente multidisciplinar.”

⁴⁴ In the original: “o Direito, a filosofia, a religião, a ética, a antropologia e as ciências médicas e biológicas, notadamente a genética e a embriologia.”

⁴⁵ In the original: “debates vocalizados, registre-se, em arejada atmosfera de urbanidade e unísono reconhecimento da intrínseca dignidade da vida em qualquer dos seus estádios.”

[I] unequivocal demonstration of the unity of humanitarian formation of everyone who responded to the call of this Federal Supreme Court to collaborate in the rendering of a judgment that, whatever its content is, will be historical. This is due to the multiplicity of the constitutional scope of the issue and its keen interest in scientific circles around the world since 1998, the year in which the team of the American biologist James Thomson first isolated embryonic stem cells and managed to cultivate them in the laboratory (our translation).⁴⁶

The Vote

Considering the constraints of the academic article genre, it is not possible to analyze the second part of the Vote in all its extension in this text. For this reason, we will highlight only a few elements that contribute to reach the objectives aimed in this study.

The *Rapporteur* initiates the vote by stressing out the merits of the Direct Action, which is opposed to all the provisions of Art. 5th of Brazilian Biosecurity Act (§14). In §15 he transcribes this Act again, organizing it in four “deontic nuclei” in a meticulous and detailed reading of *what should be* imposed in the regulation, with emphasis on (I) the aspects of its purposes - regenerative medicine and its parallel with research with adult stem cells; (II) the “cumulative conditions for the effective initiation of the mentioned research studies with embryonic stem cells” (our translation);⁴⁷ (III) the role of ethics committees and the bioethical commitment of research; and (iv) the existence of a ban on the commercialization of the collected material, which “has a clear ethical purpose or the submission of Science to the imperatives of this new branch of philosophy, which is bioethics, and the newest discipline in Law, the so-called ‘biorights’” (our translation).⁴⁸ In the next paragraph, §16, we already observe the

⁴⁶ In the original: “[I] inequívoca demonstração da unidade de formação humanitária de todos quantos acorreram ao chamamento deste Supremo Tribunal Federal para colaborar na prolação de um julgado que, seja qual for o seu conteúdo, se revestirá de caráter histórico. Isto pela envergadura multiplamente constitucional do tema e seu mais vivo interesse pelos meios científicos de todo o mundo, desde 1998, ano em que a equipe do biólogo norte-americano James Thomson isolou pela primeira vez células-tronco embrionárias, conseguindo cultivá-las em laboratório.”

⁴⁷ In the original: “cumulativas condições para o efetivo desencadear das citadas pesquisas com células-tronco embrionárias.”

⁴⁸ In the original: “ostenta uma clara finalidade ética ou de submissão da própria Ciência a imperativos dessa nova ramificação da filosofia, que é a bioética, e dessa mais recente disciplina jurídica em que se constitui o chamado ‘biodireito’.”

anticipation of his conclusion by the dialogue established with those who accuse the Act of being ill-elaborated, vicious and arbitrary:

From this it is inferred - it is my reading - that one should keep legal rule safe from the macula of the bias or the vices of the oddness and arbitrariness in matters as religiously, philosophically and ethically sensitive as biotechnology in the area of medicine and human genetics (our translation).⁴⁹

Again, the intercalation “it is my reading” builds the *ethos* of pondering, to which is added, throughout the text, the *ethos* of spirituality, generosity and compassion for the pain of others. Those are qualities that together give credibility to the *Rapporteur*. His position before the “legal rule” is explicitly and emphatically presented as “safe from the macula of the bias or the vices of the oddness and arbitrariness in matters as religiously, philosophically and ethically sensitive as biotechnology in the area of medicine and human genetics.” At the same time, even though he emphasizes (and extensively develops further on) the medical, genetic and biotechnology aspects involved with statistical data on the possible outcomes of the research (§§17 and 18), the *Rapporteur* reaffirms that the issue of this Direct Action of Unconstitutionality is multidisciplinary. This aspect is developed extensively throughout the second part of the Vote, but it starts with a legal discussion about what it is to be a “person in a biographical dimension.” This discussion is presented in accordance with the Brazilian Civil Code, the Federal Constitution (since the debates in the National Constituent Assembly of 1986/1987) and several Law scholars - Brazilian or otherwise. It also refers to the scientists mentioned at the beginning. After this, the *Rapporteur* states that

Then, in a first synthesis, it is possible to conclude that the Federal Constitution does not make every stage of human life an autonomous legal good, **but the life that already belongs to a concrete person, because it was born and, in that condition, endowed with physical or natural constitution.** It is like affirming that the inviolability to which Article 5 refers is exclusively reportable to an already personalized individual (the inviolable is for the Law what the sacred is for religion). And since it is about a Constitution that in relation to the beginning of human life is *as silent as the grave* (I allow myself

⁴⁹ In the original: “Daqui se infere – é a minha leitura - cuidar-se de regração legal a salvo da mácula do açodamento ou dos vícios da esdruxularia e da arbitrariedade em matéria tão religiosa, filosófica e eticamente sensível como a da biotecnologia na área da medicina e da genética humana.”

the pun), the question does not lie precisely in determining the beginning of the life of *homo sapiens*, but in knowing what aspects or moments of this life are validly protected by infra-constitutional Law and to what extent (§24; bold in the original; our translation).⁵⁰

The analogies between Law and religion - “inviolable” and “sacred” -, the wordplay emphasized by the enunciator himself about the Constitution not referring to moment of the beginning of human life are aspects raised to lead the addressee to understand, as him, which aspects of life are protected by the law and in what moment it begins. His argumentation intends to be logical, rational, as we see once again: “**For this reason, there is no embryonic human person**, but an embryo of a human person, which necessarily goes through this entity we call ‘fetus’” (§29, bold in the original, our translation).⁵¹ About this “human person [...] who is as much a part of the social whole as a whole apart. Part of something and something else” (§29, our translation),⁵² the *Rapporteur* declares that it is

a microcosm, then, to be seen as⁵³ “the measure of all things,”⁵⁴ in the ever-present philosophical proposition of Protagoras (485/410 BC) and to work as an inspiration to the Brazilian songwriters Tom-Zé and Ana Carolina, who affirmed that “Man alone is the house of humanity.” And Fernando Pessoa, in the immortal poem “TOBBACO SHOP,” who says that:⁵⁵

*“I’m nothing.
I’ll always be nothing.*

⁵⁰ In the original: “Numa primeira síntese, então, é de se concluir que a Constituição Federal não faz de todo e qualquer estágio da vida humana um autonomizado bem jurídico, **mas da vida que já é própria de uma concreta pessoa, porque nativa e, nessa condição, dotada de compostura física ou natural.** É como dizer: a inviolabilidade de que trata o artigo 5º é exclusivamente reportante a um já personalizado indivíduo (o inviolável é, para o Direito, o que o sagrado é para a religião). E como se trata de uma Constituição que sobre o início da vida humana *é de um silêncio de morte* (permito-me o trocadilho), a questão não reside exatamente em se determinar o início da vida do *homo sapiens*, mas em saber que aspectos ou momentos dessa vida estão validamente protegidos pelo Direito infraconstitucional e em que medida” (§24, negrito no original).

⁵¹ In the original: “**Donde não existir pessoa humana embrionária, mas embrião de pessoa humana,** passando necessariamente por essa entidade a que chamamos ‘feto’” (§29; negritos no original).

⁵² In the original: Sobre essa “pessoa humana [...]que tanto é parte do todo social quanto um todo à parte. Parte de algo e um algo à parte” (§29).

⁵³ In the original: “Um microcosmo, então, a se pôr como [...]”

⁵⁴ For this part of the translation, we consulted BOSTOCK, D. *Plato's Theaetetus*. Oxford: Oxford University Press, 1988.

⁵⁵ In the original: “e a servir de inspiração para os compositores brasileiros Tom-Zé e Ana Carolina afirmarem que “O homem é sozinho a casa da humanidade”. E Fernando Pessoa dizer, no imortal poema “TABACARIA”: [...]”

*I can't even wish to be something.
Aside from that,
I've got all the world's dreams inside me” (§29).⁵⁶*

As one can observe, the argumentation dialogues not only with constitutional debate and legal doctrine, but also with philosophers, musicians and poets, who are referred to as authorities. Philosophy and poetry are combined with the already mentioned spirituality (also poetic) in the understanding of the issue in order to produce an analogical-metaphorical reasoning:

Let us agree: God fecundates the dawn for the daily birth of the sun, but the sun is not even at dawn, nor is the sun the dawn. There is no judicial litigation without an initial application for filing a claim or for judgment, but no judgment or judicial sentence is mistaken with that original application (§31, our translation).⁵⁷

In an effort to “scrutinize the law” (§33, our translation)⁵⁸ and prove its correctness, the *Rapporteur* demonstrates he has a scientific knowledge that surpasses that of the public audience with 22 scientists, thus referring to extra bibliography (§32), proposing hypotheses to refute them (the issue of non-interruption of pregnancy, reproduction in the laboratory, etc.) and always reaffirming his position even in a graphically emphatic way:

It should be stated, then, **once and for all**, that the Biosecurity Act does not convey permission to extirpate from the female body this or that embryo. To eliminate or unravel this or that zygote on its way to the endometrium, or already in it. **It is not that** (§37, bold and underlines in the original, our translation).⁵⁹

⁵⁶ For this part of the translation, we consulted: PESSOA, F. *Poems of Fernando Pessoa*. Translated from Portuguese into English and edited by Edwin Honig and Susan M. Brown. San Francisco, CA: City Lights Books, 1998, p.98.

⁵⁷ In the original: *Convenhamos: Deus fecunda a madrugada para o parto diário do sol, mas nem a madrugada é o sol, nem o sol é a madrugada. Não há processo judicial contencioso sem um pedido inicial de prolação de sentença ou acórdão, mas nenhum acórdão ou sentença judicial se confunde com aquele originário pedido (§31).*

⁵⁸ In the original: “dissecar a lei” (§33).

⁵⁹ In the original: “Afirmar-se, pois, **e de uma vez por todas**, que a Lei de Biossegurança não veicula autorização para extirpar do corpo feminino esse ou aquele embrião. Eliminar ou desentranhar esse ou aquele zigoto a caminho do endométrio, ou nele já fixado. **Não é isso**” (§37; negritos e grifos no original).

That is, the enunciator invokes the constitutional knowledge of the possibility of family planning (§39), the necessary implication between the processes of artificial fertilization and the responsibility of using all the eggs (§42), the need for the “maintenance of the pregnant woman’s life” (§48, our translation)⁶⁰ in order for the fetus to continue alive. And the rational aspect also stands out in the very organization of the Vote, in which the reasoning is comprised of three partial syntheses. In the second partial synthesis (§52), the speaker points to the constitutional validity of the right to family planning and the option of fertilizing *in vitro* eggs, and to the fact that it does not create a “legal responsibility of reproductive use of all embryos eventually formed and rendered genetically viable” (our translation).⁶¹

And, in the third partial synthesis (§61), he presents a new syllogistic reasoning with emphasis:

if in ordinary law it is permitted to coincide brain death with the cessation of life of a given human person; if it is already so positively ruled that encephalic death is the precise terminal point of personalized human existence to justify the removal of organs, tissues and parts of the body still physically pulsating for transplantation, research and treatment; finally, if the human embryo, to which Article 5 of the Biosecurity Act refers, constitutes an entity totally incapable of any remnant of brain life, **so the claim of incompatibility of the latter with the Constitution is to be fully and promptly rejected.** This affirmative completely lacks a positive support from the law, notwithstanding the unquestionable purity of purpose and frank intellectual honesty of those who affirm it (bold in the original, our translation).⁶²

If the emphasis and insistence on the logical reasoning presented constitute the emotional (and passionate) tone of the *Rapporteur* in the defense of his position, his generosity and compassion, at various moments, are shown with great clarity. Only two

⁶⁰ In the original: “continuidade da vida da gestante” (§48).

⁶¹ In the original: “dever jurídico do aproveitamento reprodutivo de todos os embriões eventualmente formados e que se revelem geneticamente viáveis.”

⁶² In the original: “se à lei ordinária é permitido fazer coincidir a morte encefálica com a cessação da vida de uma dada pessoa humana; se já está assim positivamente regado que a morte encefálica é o preciso ponto terminal da personalizada existência humana, a justificar a remoção de órgãos, tecidos e partes do corpo ainda fisicamente pulsante para fins de transplante, pesquisa e tratamento; se, enfim, o embrião humano a que se reporta o art. 5o da Lei de Biossegurança constitui-se num ente absolutamente incapaz de qualquer resquício de vida encefálica, **então a afirmação de incompatibilidade deste último diploma legal com a Constituição é de ser plena e prontamente rechaçada.** É afirmativa inteiramente órfã de suporte jurídico-positivo, sem embargo da inquestionável pureza de propósitos e da franca honestidade intelectual dos que a fazem” (negritos no original).

examples are highlighted here: the first one is the argument by illustration, in which he mentions a specific case that could benefit from the research:

Hence the nagging question of a paraplegic three year old Brazilian girl, according to the report of geneticist Mayana Zatz: *Why don't they open up a hole in my back and put inside it a battery so that I can walk like my dolls?* (§68, our translation)⁶³

Another example of affectivity is found in §69, when the enunciator rhetorically questions that the rejection of the constitutionality of the Law would be “A sad conclusion that the monster of indifference has already settled in the heart of Brazilian law” (Otto Lara Resende)? Would it be an acknowledgement or even a confession that our Legal System fails to place itself in favor of those who suffer in order to be on the side of suffering?” (our translation)⁶⁴ And, in the final paragraph of the vote (§70), he decidedly presents himself as the bearer of the Aristotelian qualities of the persuasive *ethos*: good sense, virtue, and goodwill (*Rhetoric*, 1378a).⁶⁵ ⁶⁶ He therefore concludes that it is

under the influence of this post-positivist perspective on Brazilian law, a conciliatory view of our Legal System with the imperatives of humanistic ethics and material justice that I reach the moment when I definitely deliver my vote. In doing so, I add, to the three previous synthesis, these two other constitutional foundations of the right to health and the free expression of scientific activity in order to judge this Direct Action of Unconstitutionality, as I judge it, in fact, as totally unfounded. Not without first expressing my excessively profuse apologies to those who think differently, whether by juridical, ethical or philosophical conviction, or by article of faith. This is how I vote (our translation).⁶⁷

⁶³ In the original: “Donde a lancinante pergunta que fez uma garotinha brasileira de três anos, paraplégica, segundo relato da geneticista Mayana Zatz: - *por que não abrem um buraco em minhas costas e põem dentro dele uma pilha, uma bateria, para que eu possa andar como as minhas bonecas?* (§68)”

⁶⁴ In the original: “Um triste concluir que no coração do Direito brasileiro já se instalou de vez ‘o monstro da indiferença’ (Otto Lara Resende)? Um atestado ou mesmo confissão de que o nosso Ordenamento Jurídico deixa de se colocar do lado dos que sofrem para se postar do lado do sofrimento?”

⁶⁵ For full reference, see footnote 9.

⁶⁶ Cf. Pistori (2008).

⁶⁷ In the original: “ao influxo desse olhar pós- positivista sobre o Direito brasileiro, olhar conciliatório do nosso Ordenamento com os imperativos de ética humanista e justiça material, que chego à fase da definitiva prolação do meu voto. Fazendo-o, acresço às três sínteses anteriores estes dois outros fundamentos constitucionais do direito à saúde e à livre expressão da atividade científica para julgar, como de fato julgo, totalmente improcedente a presente ação direta de inconstitucionalidade. Não sem antes pedir todas as vênias deste mundo aos que pensam diferentemente, seja por convicção jurídica, ética, ou filosófica, seja por artigo de fé. É como voto.”

Final Remarks

By analyzing the *Rapporteur's* vote, we aimed to showcase the way the senses are constructed in dialogue with the broader and more specific context in which they are inserted as well as the dialogical interaction that the argumentation of the vote presented. Taking these into consideration, we observed the discursive constitution of the enunciator's *ethos* and the way he generates passions from the audience. We could observe that the *Justice-Rapporteur's* active-responsive understanding of reality leads him to discursively construct an *ethos* of broad knowledge of Law - laws and doctrines-, as well as of philosophy, erudite culture - nearly erudition -, and popular culture. Quotations abound throughout the text, although only a few have been exemplified in this work: they are quotes from philosophers, various scientists, saints and Church Fathers, jurists, prestigious magazines, etc. At the same time, however, he takes heed in quoting those texts as he always stresses that this is "his" reading. This way, he constructs an image of scientific humility and consideration, generosity and compassion, of reasonableness. All this creates the enunciator's image of credibility.

In fact, the same is true regarding his great knowledge of polemic as an argumentative modality. That is why he highlights that there were no "virulent debates" in the Court. Amossy (2014) reminded us that passion does not produce controversy, but it exacerbates dichotomies. By contrast, passion and reason are present in the vote as complementary components. They construct the *Rapporteur's* image as someone who is compassionate and sensitive to the pain of others, but who seeks to discursively attenuate the dichotomy in a respectful way by finishing his vote with the following hyperbole: "Not without first expressing my excessively profuse apologies to those who think differently, whether by juridical, ethical or philosophical conviction, or by article of faith."

Social polemic and polemical discourses are regularly present in our daily lives. In this sense, analyzing a polemical discourse from the ideological sphere of law and observing how it reflects and refracts the broader social reality through language helps us to understand society itself in a deeper way. And the description and analysis of the ways in which discursive interaction creates senses - in this case, very persuasive senses

- by recognizing the dialogues that weave the text, are an important knowledge for all those who use and are interested in legal argumentation.

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Received October 10,2017

Accepted November 24,2017