THE TECHNOSCIENCE SELECTIVE RHETORIC AS SYMBOLIC VIOLENCE IN BRAZILIAN DECISION JUDICIAL MONOLOGUE: WITH HANNAH ARENDT FOR A POLITICALLY ACTIVE JURIDICAL AGORA

A RETÓRICA SELETIVA DA TECNOCIÊNCIA ENQUANTO VIOLÊNCIA SIMBÓLICA NO MONÓLOGO JUDICIAL DECISÓRIO BRASILEIRO: COM HANNAH ARENDT POR UMA ÁGORA JURÍDICA POLITICAMENTE ATIVA

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ABSTRACT: This paper aims to analyze the ministers of the supreme Court argumentation on direct action of unconstitutionality (ADI) n. 3510, which deals with the unconstitutionality of art. 5 of Law n. 11.105/2005 (Biosecurity Statute), which permits the destruction of human embryos for research and therapy. We used as theoretical reference the political philosophy of Hannah Arendt and rhetoric-analytic as method for analysis of discourse. The argumentation in the analyzed case uses symbolic violence hiding the monologic discourse through the use of a grammar institutionally formalized and legitimized. We conclude that the process of legal decision in the contemporary world was affected by the rise of social and that the judging
should be developed under the sign of plurality, as a political activity \textit{(inter hominis esse)} performed in legal agora.

**KEYWORDS:** Rhetoric-analytic, Hannah Arendt, ADI 3510, Symbolic violence.

**RESUMO:** Este trabalho tem como objetivo analisar a argumentação dos ministros do Supremo Tribunal Federal na Ação direta de Inconstitucionalidade (ADI) n. 3510, que trata da inconstitucionalidade do art. 5 da Lei n. 11.105/2005 (Lei de Biosegurança), que permite a destruição de embriões humanos para fins de pesquisa e terapia. Utilizamos como referencial teórico a filosofia política de Hannah Arendt e a retórica analítica como método para a análise do discurso. A argumentação no caso analisado utiliza de violência simbólica ocultando o discurso monológico por meio do uso de uma gramática institucionalmente formalizada e legitimada. Concluímos que o processo de decisão jurídica no mundo contemporâneo foi afetado pela ascensão do social e que o julgar deve ser desenvolvido sob o signo da pluralidade, como uma atividade política \textit{(inter hominis esse)} desenvolvida na ágora jurídica.

**PALAVRAS-CHAVE:** Retórica analítica, ADI 3510, Hannah Arendt, Violência simbólica.

1. Introduction: Technoscience Rhetorical Selectivity In Decision Juridical Process

Modernity, as “ideal-type”, can be understood like a historical peculiar process of connection between rational and utilitarian technical science, existing the creation of a technoscientific model strongly directed to the satisfaction of economic interests. Inferring Hannah Arendt’s theoretical reference, this paper postulates that in the jurisdictional power activity of modern societies, considering underdeveloped countries like Brazil as example, action (archein) and speech (lexis), which in Greek polis found their
space in the public sphere, were replaced by the inaction of individualistic subjects and the procedural monologue of their decision products, mechanically accomplished in the uncommon social world. As consequence, there is a reification process that incorporates the juridical universe. This work tries to identify this phenomenon through a referential from the rapporteur vote in Direct Action of Unconstitutionality - ADI 3510, which treats of the possibility of human life existence in initial embryonic stage by means of a material modes description of the rhetoric-discursive strategy engaged in it, especially in the aspects that it seeks to hide.

2. First Moment: Presenting Arendtian Theorical Categories As Signs And Metaphor, And Analogy As Techniques Of Exchanging Meanings Between Philosophical And Juridical Grammars.

When this paper refers to such philosophical category as aggregator of the three activities that human beings practice actively in the world: labor, work and action; it is referring to a metaphor, in the sense of a life symbolic representation and the ways by which humans make sense to their existence, without seeking its essence. Thus it is noticed that Arendt comprehends her own grammar like a human metaphorization, since she admits that there is not a “human nature” in itself and human existence is presented in terms of mere “condition”. So Arendt refers to modes of being historically situated in a philosophical approach largely came from Martin Heidegger. What is proposed here is to re-metaphorize the sense of juris activa through a reference from Arendtian grammar. For that, it is initially necessary to present the original sense of vida activa formulated by the author, presented in the essay Labor, Work and Action¹, published in the 19670s, and mainly

¹ The original paper can be consulted in the website: http://memory.loc.gov/cgi-bin/query/P?mharendt:4:/temp/~ammem_EMMO::
in *The Human Condition* (1958). In this work, Arendt defends the thesis that a public sphere decay occurred, identifying the formation of a consumers society, an increment in alienation strategic forms, announcing that there would be from modernity an activity predominance that is unique of *homo laborans*, what represents the victory of labor and domain in human business area: “Action was soon and still is almost exclusively understood in terms of making and fabricating, only that making, because of its worldliness and inherent indifference to life, was now regarded as but another form of laboring, a more complicated but not a more mysterious function of the life process (ARENDT, 1998, p. 322).” Such phenomena were deepened in contemporaneity, influencing juridical forms structure and its decision methods, formatting largely the “World Law” and its agent’s *praxis*. The concept of *vita activa* such as presented by Arendt is then synthesized:

**Labor:** would correspond to human activity toward nature due to the own biological process to which it is subordinated, seeking the satisfaction of constant requirements of metabolism, which happens from birth to death. The product of this activity is not long-lasting, it vanishes when it is produced and consumed. Consumer goods, the immediate result of labor process, would be the least durable among tangible things. After a brief permanence in the world, they would return to nature either by deterioration or absorption in human metabolic process. Wherefore labor would produce an endless cycle of consumption that makes human beings live under the banner of “necessity”;

**Fabrication:** activity that would distance from the purely biologic sense of species life cycle, producing an artificial world of objects that would have durability, and would tend to last more than the own existence of their creators. These objects wear, but would not be destroyed by human consumption, and because of this they would be gifted of certain independence concerning to humans who produce them. The mark of fabrication is to have a beginning and a predictable end that can be determined by *homo faber*.

**Action:** the only aspect that would relate directly to humans without needing any mediation of natural or artificial object. It would be the act of establishing something new and would correspond to human condition of plurality. In detriment of the various forms of violence, the action would raise the power through communication among individuals.
While pre-political human activities (labor and fabrication) would not persist indefinitely in time, integrating the nature becoming, politics would escape from the natural world necessity and would persist as it was perceived like a human joint construction, capable of putting up something new democratically from the context and its singularity. So it is noticed that among the activities of labor, fabrication, and action, it is established a tension between “necessity versus permanence”, which also stays in juridical sphere. Rationalization, which is presented cartesianly as the act of limiting, was radicalized in the modern positivist paradigm, pervading the method and practice of Law, ensuring at the same time the existence of “game rules” between the subjects-players and the autopoietic operation of the system according to such rules, being determinant as formal internal factor of societal legitimation. The juridical security would come precisely from this pretense certainty resultant of the fact of previously knowing the system dynamic and how its agents would behave. In this model, signification pragmatic freedom becomes semantically restricted by the dogma of linking to the legal text, hermeneutic methods, jurisprudence, previous etc. This is the model of necessity, which induces individuals to believe that there is a “natural” operation inherent to Law, without which there would be certain damage to judicial concretization of justice value. Thus such juridical modernity has devoted more and more a conception of Law from which it is not possible to deny its starting points. This paradigm is dogmatical (and jusnaturalism is not clearly lesser extent) not only for not considering elements and criteria of decision alien to the system, but mainly for depositing truths through procedural argumentation of its agents, who do

2 Adeodato (2009a, p. 146) comments that “The unquestionability of starting points, however, does not mean that legal dogmas are static interpretations of social conduct, since they must be constantly reviewed to keep pace with the mutability inherent to that conduct. A legal dogmatics lies precisely in the systematization and handling rules that ensure that the process of revision and updating will remain within the limits set by their own legal standards, establishing interpretation and integrators modes to adapt the norm to the fact.” (TRANSLATED)
not notice they are inserted in this pre-political environment of dogmatic signification. Therefore, for "legal world", the project of modernity represented more than the predictability and security human desire, more than searching for elucidation (Aufklärung) and justice, it became in contemporaneity the main engine of a bureaucratic society, alienated by politics through the specialized juridical language rhetoric effects. If in the 18th century, “making” laws meant saying what Law “was”, there is, nowadays, mainly in the constitutional jurisdiction area, a growing “laborious” juridical activity that subliminally reifies the society, as juridical decision has become an activity that keeps individuals linked to the necessity of consuming the product of juridical activity, the sentence, diurnally. In this sense, normative positivism appears like an extremely effective ideology, implying the emptiness of Law political feature, which ceded before the wishes of the mentioned consumer society. This non-political Law model, in Arendt’s sense, would be masked by the rhetoric of its social utility, and it would occur from the ascension of the social over the political, occurring because of the inversion identified by Arendt, when in modernity labor fills the place that belonged to work and action before, representing the social ascension as set of private activities that become a public worry and a requirement. The salvation for Arendt would stay in judging\(^3\) as a political activity (inter hominis esse), developed under the sign of plurality and not of solipsism, of speech and not of monologue.

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\(^3\) The controversial character of "Lectures on Kant's Political Philosophy", in which Arendt point out the question "how to judge a particular for which there is not previously an universal rule?", consists of isolating judging as a pure mental activity trying to demonstrate there is a strong political element that is inherent. The judging, based on an enlarged mentality, should be based on common sense, a sense common to all, or a "community sense" (Gemeinschaftlicher Sinn), which considers the mode of representation of all men in thought, comparing my wits facing the entire community. The act of judging would have as criterion the communicability or publicity, because it would be proper to judging the search for a common understanding among men.

The Law text that allegedly served as reference for the respective action was as follows, *in verbis*:

Art. 5th It is permitted, for purposes of research and therapy, the use of embryonic stem cells obtained from human embryos produced by fertilization *in vitro* and not used in the respective procedure, attending to the following conditions:

I – being impracticable embryos; or

II – being frozen embryos for 3 (three) years or more, until the date of this Law publication, or that, already frozen on the date of this Law publication, after completing 3(three) years, counted from the date of freeze.

§ 1st In any case, it is necessary the donors’ consent.

§ 2nd Institutions of research and services of health that conduct research or therapy with human embryonic stem cells should submit their projects to appreciation and approval of the respective committee of ethics in research.

§ 3rd It is forbidden to sell the biological material to which this article refers and its practice implies the crime typified in art.15 of Law no 9.434, from February 4th 1997. *(Buying or selling tissues, organs or parts of human body: penalty – confinement, from three to eight years, and fine, from 200 to 360 days-fine)*.

The symbolic violence aspect graphed in this essay title finds its justification in the description of the respective passage that composes the beginning of the speech-object written in seventy-two pages, that is:

In a first synthesis, then, it is concluded that Federal Constitution does not make every and any stage of human life an autonomized legal asset, but life that is already unique of a concrete person, because *nativiva* is, in this condition, possessor of physical or natural composure [...] And as it is about a Constitution that is about the beginning of human life, *it is like a death silence* (let me use this pun), the question does not stay exactly in determining the beginning of life of *homo sapiens*, but in knowing which aspects or moments from this life are validly protected by the infra-constitutional Law and in what extent. (item 24, p.26).
There is a symbolic violence when the arbitrary selection in juridical perspective excludes strategically and topically two perspectives equally possible to observe the controversial theme: a) the theological and b) the scientifical. It is emphasized that the detachment strategy of the two referred perspectives is topical since the rhetor-judge, in another moment of his speech, relinquishes the scientific perspective in order to make his arguments more persuasive due to his initial option for juridical perspective, while the denial of the theological perspective is maintained. It is observed the use of three main theses, which will be soon submitted to the proper rhetoric-analytical scrutiny.

4. Thesis 1: Frozen Embryo, When Not Being An Embryo Nidated In Womb, Does Not Have Its Right To Life And Human Dignity Protected Legally (P. 34, 35)

Note that in the Law text referenced by the rhetor-judge in his speech the expression “embryo nidated in womb” does not exist. This is a new expression used in judiciary area but not in legislative, what problematizes the common use of the expression “interpretation” for the method that precedes the “decision” method, since, in its more usual sense in Brazilian doctrine, the expression “interpretation” commonly means an act whereby it is aimed to establish “the real, true sense […] learning the content of standard, its essence” (GUIMARÃES, 2009, p. 369). Another common sense among the lawyers takes the “meaning” (rule of law) like something existent in “sign” (Law text), abdicated from the idea of truth as correspondence to the legal text for the legally relevant reality, in favor of the idea of reasonableness as correspondence to the “created meaning” for the “decision rule of law” (particular/concrete) to the “given meaning” for the “regulation rule of law” (generical/abstract). Both the senses imply, each in its own way, the use of two sustained strategies, however not verbalized by the rhetor-
judge, but that will be highlighted here through Philosophy of Language, especially, Semiotics: a) strategy of truth as correspondence between the representative language and the represented reality and b) strategy of decision as use of a signification deductive-prudential action taking as cogent reference a law text.

5. Thesis 2: The Act Of Resorting To The Fertilization Techniques In Vitro Is A Legally Protected Right, Based On The “Family Planning” As “A Result Of Couple’s Free Will”, However, The Duty Of Gestating All The Embryos Produced By Such Techniques Does Not Exist, Based On The Incompatibility With The Mentioned Right

In this part of the analyzed vote, the rhetor-judge uses the following discursive strategy: observing the legal text subject of the controversy, he argues the existence of an implicit reference to the couple’s legal claim to the use of the extra-uterine insemination biotechnological techniques, according to the following legislative option in the law-text of biosecurity: (PM) “Art. 5º § 1o In any case, the parents’ consent is necessary”. For that, He uses the systemic interpretation hermeneutic technique of the constitutional text:

CF/88, Art. 226 - Family, base of society, has special protection of the State. § 7º - Based on the principles of human dignity and responsible parenthood, family planning is a couple’s free will, being duty of the State to provide educational and scientific resources for this right practice, sealed any coercion form by official or private institutions.

And from it he extracts rhetorically the following rule-base:

(PM) If there is guardianship of the couple’s legal claim to the use of the extra-uterine insemination biotechnological techniques as implicit rule of the relative law text (Law 11.105/05, art. 5º, § 1º)
If such infraconstitutional rule, through a systemic interpretation, finds its basis of validity in the constitutional rule of family planning, as the couple’s free action, as extracted from the fundamental principles of human dignity and responsible parenthood (CF/88, art. 226, § 7º);

(C) Therefore, the nonexistence of legislative references in the Law 11.105/05, art. 5º about a couple’s duty of gestating all the embryos artificially produced (Pm2) can be inferred deductively as a result of the incompatibility of this nonexistent duty with the existent right (PM), prevailing to the previous reasoning strategy (Pm1).

It is interesting to note that not only the decision juridical norm (C) (particular/concrete) was used by the rhetor-judge, but also the regulation juridical norm (PM) (general/abstract). Although the creation of the first one is rhetorically hidden by the persuasive effect whereby it would come from the supposed concerned legal text, the creation of the second one appears rhetorically hidden for its non-verbalization, because “this subjective arbitrariness must not be explicit, being necessary that the speech considers those texts and other sources components of juridical planning (ADEODATO, 2009b, p.5).” In the same way of thinking, the intended data of fact (Pm1) to be submitted to the rules of the regulation juridical norm (PM) (general/abstract), and then to make possible the creation of the decision juridical norm (C) (particular/concrete), is equally a discursive construction, a last report among a range of reports about facts that are presented in the previous procedural sentences, what prevents the thesis of a relationship between such semiotic fact (Pm1) and the reality that aims to represent/communicate as sign (social conduct), being such relationship only indirect, since language in itself is the reality in which linguistic subjects act, not existing an exterior reality in it.4 But how are such discursive practices

4 Note the risk of the linguistic mirage be considered as a realistic scenery, because human beings “get the mistake to believe that they have such things – facts – immediately before themselves, as pure objects. They forget that the initial intuitive metaphors – semiotic facts – are metaphors – signs – and take them as things in themselves. But the induration and solidification of a metaphor do not guarantee this metaphor need and justification” (NIETZSCHE, 2005, p. 17) (TRANSLATED), since there is not an extralinguistic reality serving as evaluation criterion of its metaphorical quality as a supposed reference degree with that supposed non-linguistic reality.
produced? Using a specific grammar which guarantees both the regimented use of the semiotic facts and a partial communication of what was monologically produced by the grammarians at the beginning. The semiotic facts produced in the symbolic scope of law (PM, Pm and C) are discursively collectivized after having the contents that boost (subjective perceptions) selected individually by the jurist legally competent to utter them and after being rhetorically managed to hide such linguistic isolation, aiming to persuade the extra-juridical audience that the given decision (C) results from a deduction of the empirical fact (Pm1) according to the regimented conduct model of the legal text (PM), seeking to expose intentionally how controlled the problematic subjectivity always intrinsic to such process is.

6. Thesis 3: Brain Death Is The Precise Endpoint Of Human Existential Personality And Human Embryo In Vitro, Being Unable Of Any Vestige Of Brain Life, Is Not Embryonic Human Life, But Mere Human Being’s Embryo, Having His/Her Right To Life And Dignity Legally Denied. (P.65, 66)

The rhetorical strategy used results in a performative contradiction according to the chronological reference that is used, since using the “brain death” criterion with the meaning of “the precise endpoint of human existential personality” the rhetor-judge exposes two flanks in his speech to the following criticisms:

a) When he harnesses his criterion to the necessity of “brain life”, a chronological problem appears, because in order to exist brain death, there must have been necessarily life in the same sense, what does not occur, because the empirical finding of biotechnological intervention exposes that the posterior embryonic phases which are capable of providing the brain system formation were intentionally prevented to occur by it, in other words, it is not possible to use such death formal criterion simply because its material presupposition does not exist;
b) When he uses the expression “human existential personality” he resorts to an extrajuridical grammar, relinquishing the semantic control that the juridical grammar offers through the use of the expression “person” and he abdicates the formalization of the juridical expression “personality” when adjectiving it materially as “human existential”, that is, going beyond the limits of its semantic-grammatical protection, going dangerously to venture in pragmatic paths in which its intended signification control is found seriously doubtful in terms of persuasive effectiveness.

Finally, it is doubtful the thesis that “human embryo in vitro, being unable of any vestige of brain life, is not embryonic human life, but mere human being’s embryo”, since in order to support it, the rhetor-judge would need the previous retro-presented rhetorical strategy persuasive effectiveness in its fragilities, especially in the biotechnological compulsory impediment imposed to the embryo of having two successive realizable vital phases. From the exclusive strength of this non-natural interventional process is that the expression “embryonic human life” legally protectable could be strategically replaced by the expression “human being’s embryo” non-protectable legally.

7. Conclusion: With Hannah Arendt For A Politically Active Juridical Agora

“ [...] we live today in a world in which not even common sense makes sense any longer.”
(ARENDT, 2005, p. 91)

The influence of social under legal world can be identified in the decision analyzed in that the persuasive effectiveness of the decision speech is essentially dependent of an isolationist attitude in terms of use of a peculiar grammar institutionally formalized. This attitude prevents judging based on publicity, leading to a monological decision-making. If the decision from the legal process of logical subsumption has no absolute objectivity, because the subject gives semantic content to the universal as represented in the law,
creating the norm for the particular case as a product of his hermeneutics, it is possible that legal actors are using meaning modulation to the various elements of law and the discourse of neutrality dogmatic just to hide their own convictions. It is the symbolic violence we identified in technoscience selective rhetoric used in the case of ADI No 3510.

The act of judging in law is complex not only because there are multiple methods of decision-making, but because there is still not in legal world an accurate way to prevent the escape to sensus privatus of judge. We inherited a model of modernity in which the legal decision, especially in countries where demands for enforcement fundamental rights is a constant, became a product in a assembly line in a factory called Justice. Arendt says (1992, p. 113): “The real danger in contemporary societies is that bureaucratic, technocratic, and despoliticized structures of modern life and indifference increasingly encourage render men less discriminating, less capable of critical thinking, and less inclined to assume responsibility.” It missed the public nature of legal rationality, and in a moment the sheer complexity of the law turns against jus dicere we should rethink the positivist paradigm in favor of a law that takes seriously the plurality.
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