

# THE STF DECISION ON ABORTION OF ANENCEPHALIC FETUS: A FEMINIST DISCOURSE ANALYSIS

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- **ABSTRACT:** This article presents an analysis of the Federal Supreme Court appellate decision in the Action for Breach of a Fundamental Precept number 54 (ADPF 54), which sought to resolve the controversy about the possibility of voluntary interruption of pregnancy in the case of fetuses with anencephaly. Through discourse analysis with a feminist approach, the paper focuses on the paradoxical way in which the Court met a feminist demand and women's rights movements: (1) concealing the bonds with activists of these groups and with the discourses they defend about the autonomy of women in relation to their bodies; 2) maintaining the traditionalist and androcentric standard of law. Thus, the analysis describes three language devices that stand out in the articulation of this paradox: explanation, naming and representation. The paper points the persistence of the traditional and androcentric paradigms in the Law field that Justice values and with which it operates. This study aims to contribute to the debate on the decriminalization of abortion in Brazil, as well as to discuss the relationship between language / gender / law.
- **KEYWORDS:** Discourse. Gender. Feminism Law. Abortion. Anencephaly.

## Introduction

In this text, I propose to discuss the relationship between language, gender and law with a discursive analysis of a decision of the highest court of the Brazilian Justice on abortion, a recurrent theme from the claim of feminist groups and social movements that fight for the implementation and widening of women's rights. It is the Action for Breach of a Fundamental Precept No. 54 (ADPF 54), which sought to resolve the controversy about the possibility of voluntary termination of pregnancy in the case of fetuses with anencephaly<sup>1</sup>.

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<sup>1</sup> "Anencephaly is a neural tube closure disorder that is diagnosable in the first weeks of pregnancy. For various reasons, the neural tube of the fetus does not close, leaving the brain exposed. The amniotic fluid gradually dissolves the encephalic mass, preventing the development of the cerebral hemispheres" (DINIZ; VELEZ, 2008, p.648).

In its conclusion, in 2012, the decision was acclaimed as a significant progress in the materialization of the reproductive rights of women within the Brazilian constitutional jurisdiction. Nevertheless, in a previous study (FREITAS; LOIS, 2015), when analyzing the vote of the ADPF 54 rapporteur, Justice Marco Aurélio de Mello, I pointed out that the STF approved the legalization of voluntary interruption in case of anencephaly, in response to a claim of feminist theories, excluding from the debate the discourses of this field and even concealing the effort of its representatives.

This happens because the perspective of the decriminalization of abortion, a celebrated feminist claim, which is tainted throughout the text of the decision, is not addressed in the ADPF 54. On the contrary, there was a textual effort very committed to evidence that the decision restricted its scope, exclusively, to cases of anencephalic pregnancy, and that any consideration regarding the right of women to freely interrupt their pregnancies was excluded.

Recently, in face of the considerable increase in cases of microcephaly in infants whose mothers were affected by the Zika virus epidemic, the debate on the topic was re-ignited. Anthropologist Débora Diniz, a professor at the University of Brasília, a feminist activist and researcher at ANIS<sup>2</sup>, an entity that co-authored ADPF 54's petition and which has fought, throughout the entire process, to grant pregnant women with anencephalic fetuses the right to decide on the anticipation of childbirth, said in an interview to the BBC Brazil that the organization is preparing an action to ask the Supreme Court to authorize the abortion of fetuses with microcephaly associated with the Zika virus.

The discursive analysis I propose in this article aims to contribute to the debate on the decriminalization of abortion in Brazil, as well as to discuss the language / gender / law relationship, a topic to which I have dedicated myself in research since 2010 (FREITAS; PINHEIRO, 2010, 2013; FREITAS, 2011a, 2011b, 2013, 2014). For this, I adopt a theoretical-methodological clipping that I call Feminist Discourse Analysis, following feminist epistemologies (HARAWAY, 1995; PAREDES, 2010) and modes of discourse analysis of feminist linguists, such as Michele Lazar (2005, 2007), Viviane Heberle, Ana Cristina Ostermann and Débora Figueiredo (HEBERLE; OSTERMANN; FIGUEIREDO, 2006). Throughout the text, I clarify this partnership in more detail.

## **ADPF 54, abortion of anencephalics and disputing camps**

The document I bring for analysis is a textual legal genre called Action for Breach of a Fundamental Precept (ADPF) and is used to avoid or repair injury to a fundamental precept, which in the legal sphere is directly linked to the supreme values of the State and Society. It is a type of action, filed exclusively in the Federal Supreme Court, which

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<sup>2</sup> Anis - Institute of Bioethics and Human Rights is a feminist, nongovernmental and nonprofit organization of federal public interest, founded in 1999 in Brasília (Information available on the official Anis page: <<http://anis.org.br/sobre>>).

may be proposed by the following agents: I - the President of the Republic; II - the Bureau of the Federal Senate; III - the Bureau of the Chamber of Deputies; IV - the Bureau of the Legislative Assembly or the Bureau of the Legislative Chamber of the Federal District; V - the Governor of State or the Governor of the Federal District; VI - the Attorney General of the Republic; VII - the Federal Council of the Brazilian Bar Association; VIII – a political party with representation in the National Congress; IX – a Union confederation or class entity of national scope.

The Action for Breach of a Fundamental Precept 54 (ADPF 54) was filed in 2004 by the National Confederation of Health Workers (CNTS) before the Federal Supreme Court (STF), with advice from ANIS (Institute of Bioethics, Human Rights and Gender) to question the constitutionality of the interpretation of articles 124, 126 and 128, sections I and II, from the Criminal Code, which deal with the crime of abortion, in face of the possibility that pregnant women with anencephalic fetuses voluntarily interrupt pregnancy.

Brazil is the fourth country in the world in number of deliveries of fetuses with anencephaly (DINIZ; VELEZ, 2008). There is no treatment or cure and, in more than half of the cases, the fetuses do not resist the pregnancy and the few who come to term have a short period of survival. Prior to the trial, pregnant women with anencephalic fetuses who wished to react to the trouble of such pregnancy had to turn to the judiciary individually<sup>3</sup>. There was no standardization of jurisprudence and, in most cases, the decision only occurred after birth.

Until the final judgment of ADPF 54 in 2012, the uncertainty over the nature of the procedure had been dragging on for more than a decade. Also in 2004, at the time of the trial, Justice Marco Aurélio de Mello granted an injunction authorizing the anticipation of birth of anencephalic fetuses. This injunction, however, was annulled in a Supreme Court plenary session, four months after it came into force, resuming the obligation of women to remain pregnant despite the diagnosis of fetal impotence.

In reconstructing the history of ADPF 54, Camargo (2011) clarifies that, shortly after the revocation of the injunction, the National Confederation of Bishops of Brazil (CNBB) petitioned the Court to participate as *amicus curiae*<sup>4</sup>. However, at the time the request was denied with the justification that Law 9882, which regulates the ADPF, does not anticipate such a hypothesis. However, other requests followed, most of them from religious entities contrary to the ADPF 54 proposal. In 2005, the pressure of this

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<sup>3</sup> It is important to emphasize that Brazil has one of the most restrictive legislation in terms of abortion. Until the ADPF 54 trial, our Penal Code (CP) only permitted abortion: I - If there is no other way to save the life of the pregnant woman and; II - If the pregnancy results from rape and the abortion is preceded by consent of the pregnant woman or, when incapable, of her legal representative.

<sup>4</sup> The Latin term *amicus curiae* means “court friend”, that is, representatives of parts of society, as well as authorities, technicians and scientists, called to speak at public hearings, based on their knowledge and experience, collaborating with the Court in the decision-making process. According to Carvalho (2011, p.92), the law provides as attribution of the Supreme Court president and the rapporteur to convene a public hearing “to hear the testimony of people with experience and authority in a particular subject, whenever they understand it necessary to clarify fact questions or circumstances, with general repercussions and relevant public interest, discussed within the Court.”.

mobilization led to a polarization of opposing forces and in favor of the litigation, time when the Justice Nelson Jobim suggested holding a public hearing. Notwithstanding the importance of the theme, it was only in July 2008 that hearings were finally determined<sup>5</sup> (CARVALHO, 2011).

In this dispute, three main segments stood out, representing positions, in certain points, quite antagonistic: the doctor, the religious and the feminist<sup>6</sup>. The position of the Churches in general, and of the Catholic Church specifically, is that abortion is a sin before God, and it hurts the right to life, which is considered since the fertilization (ALDANA, 2008). In contrast, abortion is seen by feminist movements as a matter of individual right to women's free choice over their bodies, including maternity (SCAVONE, 2008). Among medical professionals, the issue of abortion is controversial, however, there was a consensus in the CNTS regarding abortion of anencephalics for the sake of protecting the professionals who intervene in these cases from the criminal consequences they may incur when practicing the procedure.

This intricate scenario required a very complex argumentative effort on the part of the STF Justices, who had to address, discursively, fully ideologically opposed social segments and deal with disparate situations, such as: on the one hand, to give pregnant women of anencephalic fetus the right to legally abort without significantly changing abortion legislation in force in the country; on the other hand, to guarantee the secular position of the Brazilian State, without disregarding the importance of religious segments and their beliefs about life and death.

As Miranda Netto and Camargo (2010) point out, the Justices of the Constitutional Court must justify their every decision-making act in the constant search for popular adhesion, in order to guarantee their role as representative in face of their represented (the people), that is why they invest a lot of argumentative effort in their votes. In the case of ADPF 54, this effort is expressed both in the length of the decision-making text, which occupies 433 pages, and in the time demanded for the judgment, almost a decade.

My analysis falls precisely on the discursive effort, in this emblematic case of women's rights, considering this intricate field of disputes. I have as a guide the

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<sup>5</sup> The participants in these hearings were from twenty-two institutions, represented by twenty-nine people. Carvalho (2011) reports that of the twenty-two institutions, fourteen were in favor (63.6%); seven, against (31.8%); and one (4.5%) presented arguments in both directions, in this case, the Legislative. From the twenty-nine representatives, fifteen were men (51.7%) and fourteen were women (48.3). In those moments, there was a very emotional polarization of views for and against the decriminalization of abortion.

<sup>6</sup> The first one can be considered the arguer himself, included in the National Confederation of the Workers in Health - CNTS and represented by it. Several entities of this segment and even named personalities are listed in the judgment report, as *amicus curiae*. They are: Brazilian Federation of Gynecology and Obstetrics; Brazilian Society of Clinical Genetics; Brazilian Society of Fetal Medicine; Federal Council of Medicine; Federal Deputy José Aristodemo Pinotti former Dean of Unicamp, founder of Campinas Maternal and Child Research Center - CEMICAMP and specialist in pediatrics, gynecology, surgery and obstetrics. In the group of religious entities are: National Conference of Bishops of Brazil; National Association Pro-life and Pro-family; Association of Family Development and Universal Church, although the last one has stood in favor of the lawsuit. In the feminist bloc or aligned with it are the ANIS, the Institute of Biotechnology, Human Rights and Gender that, in the initial petition, is considered co-author of the action; the National Feminist Health Network; Social Rights and Representative Rights; the School of People (human rights). Also aligned with this segment are Catholics for the Right to Decide, an entity composed by groups of theologians within the Catholic Church, contrary to the position of the institution in the case of ADPF 54.

questions of Castilho (2008) and Pimentel (2009): when deciding, do the Justices recognize the gender perspective and contemplate the discourses that seek to evidence the subsistence of patriarchy, the relations of domination between the sexes and the material inequality between men and women? With this direction, I develop a discursive analysis articulated by the issues of gender / sexuality (HEBERLE; OSTERMANN; FIGUEIREDO, 2006) and Feminist Theory (HARAWAY, 1995; PAREDES, 2010), which I call here Feminist Discourse Analysis (LAZAR, 2005, 2007; BAXTER, 2003, 2008), on which I dedicate the next topic.

## **Feminist Discourse Analysis**

The feminist discourse analysis that I propose to develop on the text of the ADPF 54 is an assumption based on a growing field of discursive studies focusing on the gender and sexuality theme that assume a declared feminist perspective and that claim the inclusion of the term “Feminist” to Discourse Analysis works.

Although in Applied Linguistics there has been, since the last three decades, a large bibliography of studies based on gender / sexuality and discourse (HOLMES; MEYERHOFF, 2003; EHRlich; MEYERHOFF; HOLMES, 2014) and many authors of these papers join Feminist theories, the term Feminist itself only begins to appear in partnership with the Discourse Analysis in the 2000s. One of the first examples of this junction is the article by Ann Weatherall and Anna Priestley, published in 2001 in *Feminism & Psychology*, whose title was: “A Feminist Discourse Analysis of Sex ‘Work’” (WEATHERALL; PRIESTLEY, 2001).

Defining a linguistic approach that can be labeled as “Feminist Discourse Analysis” is a complex task, as Mary Bucholtz (2003) observed. Both because the discursive studies articulated by the “gender” and “sexuality” categories are not necessarily feminist, and that one single form of feminism, to which these studies affiliate, cannot be measured.

The “feminist” label, in the singular, actually covers a plurality of theories with their own specificities, such as cultural feminism, liberal feminism, postmodern feminism, radical feminism, etc. (SOUSA, 2015). Nevertheless, even in plural, feminism, in its different strands, converges to the common interest of understanding and overcoming social inequalities related to gender and sexuality (BUCHOLTZ, 2014).

As feminism itself is not unified, the growing field of discursive studies with a feminist perspective is not unified either. Examples of this attempt are proposals like the Feminist Talk Analysis (KITZINGER, 2000), Feminist Style (MILLS, 1995), Feminist Pragmatics (CHRISTIE, 2000), Critical Feminist Discourse Analysis (LAZAR, 2005, 2007) and Post-Structuralist Feminist Discourse Analysis (BAXTER, 2003, 2008). These theories are somewhat unified in their general political objectives, but are divided in the theoretical-methodological forms that follow to reach them.

It is observed that such proposals develop from theoretical theories already considered canonical within language studies, such as Critical Discourse Analysis (WOODAK; MEYER, 2001), Conversation Analysis (SACKS, 1992), the Pragmatics (MEY, 2001), the Style (BRADFORD, 1997) and so on. Recurring discursive studies on gender and sexuality of feminist bias were being produced under these headings without, however, being made visible. Gradually, a stated stance was taken to include the term “Feminist” in these labels as a political strategy to establish and strengthen feminist representation within the mainstream of Applied Linguistics.

Basically, these studies undertake a reappropriation of the theoretical-methodological points of view and the analytical tools of those canonical theories, with specifically feminist ends: the challenge of social inequalities related to gender and sexuality, recognizing the intersections with categories such as race, class, generation, ethnicity, etc.; the deconstruction of codes that naturalize and perpetuate these inequalities and the effort to overcome the sexist systems. Reappropriation and recreation are recurrent and recommendable dynamics to feminist practice, as Audre Lorde (2007) notes. In her famous essay on the risks of appropriation of “master’s tools”, the author warns on the power exercised by the dynamics of patriarchy, of which science is also invested, and proposes the reappropriation of knowledge and the use of the creative force, in feminist research and activism.

The feminist discourse analysis that I develop in this article is also a reappropriation of theory assumptions already in force in language studies with a feminist bias. Basically, I seek support in the work of Michele Lazar, for whom the goal of a critical feminist discourse analysis is:

To show the complex, subtle, and sometimes not so subtle forms in which the often assumed gender assumptions and hegemonic power relations are produced discursively, sustained, negotiated, and challenged in different contexts and communities. (LAZAR, 2005, p.145).

The approximation of this author’s proposal is due to my experience with Critical Discourse Analysis, in which she lends the theoretical-methodological tools to her feminist approach and of which I have been using in my own works (FREITAS, 2013, 2014). I do not, however, adopt the same name as the author, because I assess, in a first moment, that the term “criticism” is redundant in feminist studies, considered in advance as critical approaches (GUBA; LINCOLN, 1994), thus, I prefer a more succinct form: Feminist Discourse Analysis.

Secondly, I justify this choice also by the understanding that feminist research operates from the outset within a program politically invested in the struggle for recognition and to that extent it is imperative to claim own labels that represent us and highlight our location (HARAWAY, 1995) on the pathways of knowledge. For some time now Brazilian linguists such as Ana Cristina Ostermann, Débora Figueiredo, Viviane Herberle (HEBERLE; OSTERMANN; FIGUEIREDO, 2006), Carmen Rosa

Caldas-Coulthard (1996), Suzana Funck (2007), just to name some, have published works under language / gender / sexuality axes with feminist perspectives, without, however, assuming them nominally.

In this article, therefore, I follow in the footsteps of Audre Lorde, towards a reappropriation and recreation of knowledge in feminist studies, and of Julieta Paredes (2010), who preaches the need for the autonomy of Latina feminists in the face of western feminist epistemologies. Thus, I adopt this label, both for the search of self-identification and for its potential to shelter, under the same naming, different forms of discursive analysis united in the feminist effort to challenge sexist knowledge systems.

The discursive analysis that I develop on the text of the ADPF 54 turns precisely on the knowledge system that bases this well reasoned decision on the scope of Law. On this system, authors affiliated to Feminist Theories of Law (BARTLETT, 1991) denounce that it incorporates ontological notions that underpin modern institutions, in which man is the universal referent and woman is the special and the derivative. As a consequence of this relationship, women's rights are subordinated to this subject, and always in reference to the same places: of sexuality, of conjugality and of procreation. Such dynamics mean that legal reforms are merely palliative, delude reality, but do not transform it properly (SOUSA, 2015).

ADPF 54, in deciding on the possibility of abortion, a right that has been claimed for decades by women's and feminist movements, is therefore a special object for an analysis that seeks to unveil, in language, the ideologies and the acting ways that structure the decisions in such an emblematic case of women's rights. This is what I propose next, by the combination of Discourse Analysis and Feminist Theory.

### **A feminist analysis of the Supreme Court Justices discourse in the ADPF 54**

The starting point for my analysis of the ADPF 54 appellate decision (BRASIL, 2012) is the paradoxical perception that, although the Court has met a feminist demand and women's rights movements, it has done in a way to conceal the bonds with these groups and the discourses they defend about the autonomy of women in relation to their bodies and without breaking with the traditionalist and androcentric standard of law. On the contrary, the appellate decision reveals the resistance that exists in this field in facing these paradigms that Justice values and with which it operates. Thus, my analysis focus on the description and discussion of the language devices that articulated this paradox, of which I highlight three specifically: explanation, naming and representation, as I develop below.

### **Approving anencephalic abortion in a Christian country: justifications and explanations**

One of the problems of any communication is the risk of compromising the social image of the participants, and therefore the need for strategies that soften this

impairment, that is, an elaborate “face-work”, as Goffman named (1967) the effort we make to be well evaluated. This concept has been more widely explored in studies that define their academic objects as face-to-face interaction, thus, excluding asynchronous and written communication.

Nevertheless, appellate decisions are textual genres of highly interactive nature, as they record the argumentative exchanges that the Court members, in their votes, repeatedly address among themselves and to more participants. Therefore, although it is a written piece, the appellate decision is constructed based on those interactions which, at times, are undertaken face-to-face, as was the case in ADPF 54, where public hearings were part of the decision-making process and in which, as Camargo (2011, p.14) observes, “the orality and the presence of the public prevail”.

Thus, throughout the text, we perceive the Justices concern with the evaluation of their interlocutors who, ultimately, comprehend the Brazilian “Nation” itself, as it is textually assumed by Justice Celso de Mello:

Recalling the late Justice LUIZ GALLOTTI and considering the high significance of the decision to be taken by this Supreme Court, in this Action for Breach of a Fundamental Precept, on the intended right, in favor of pregnant women to the therapeutic anticipation of childbirth, in the exceptional situations of fetal anencephaly, I bear in mind his grave warning that, in such emblematic cases as this, the Federal Supreme Court, in rendering its judgment, may itself be “judged by the Nation.”. (Vote of Justice Celso de Mello, 317).

Considering this judgment, various discursive resources are mobilized by the Justices to protect themselves from possible negative evaluations. Among these resources, I highlight the “explanation” or “accountability” (PASSUELLO; OSTERMANN, 2007; OSTERMANN; ANDRADE; FREZZA, 2016). These terms are translation attempts for the English-language correlate *accountability*, coined by Garfinkel (1967 apud OSTERMANN; ANDRADE; FREZZA, 2016) to refer to the notion of normative responsibility that, once broken, makes room for apologies, explanations and rendering of accounts.

On the first page of the appellate decision, just below the heading, we read the following sequence: STATE - SECULARISM. Brazil is a secular republic, appearing absolutely neutral regarding religions. Considerations.

This textual arrangement obeys the norms of thematic content indexing by keywords that are proper to the schematic conventions of the jurisprudential summary (GUIMARÃES, 2004). The sequence of words emphasizes the State and Secularism relation. Immediately afterwards, the two sentences that also observe the norms required for the summaries, privileging conciseness and clarity (GUIMARÃES, 2004), highlight Brazil’s neutral position as a secular republic in relation to religions. Since the separation of state and religion is an essential condition of modern democracies, which require



secularism as a logical consequence of the application of its principles, affirming the secularism of the state would be a redundancy. However, the sequence serves as an early explanation of the authorities signing the decision, on dealing with a lawsuit that goes against fundamental religious principles such as life and death. The emphasis on religious neutrality of the Court beforehand, at the very beginning of the text, has the functionality of an account.

In the words of Ostermann, Andrade and Frezza (2016), accounts are attempts to justify yourself, to explain yourself or to undertake some other action that demonstrates the orientation of participants to a possible problem, whether moral or rational, even, of practical order, in face of what was said. Still according to the authors, these explanations may be spontaneous or required. In the first case, those who provide them try to anticipate the possible moral implications that certain discursive follow-up may generate.

Such a perspective is latent throughout the decision, the text of which is composed of recurrent explanations of how the position of secularity of the State is not incompatible with respect for religious beliefs, as the following excerpts show:

In the secular State, marked by the separation of State and religion, all religions deserve equal consideration and profound respect; however, there is no official religion, that is transformed into the only state conception, to abolish the dynamics of an open, free, diverse and plural society. It is the duty of the State to guarantee the conditions of equal religious and moral freedom, in a challenging context in which, if, on the one hand, the contemporary State seeks to penetrate the domains of the State (e.g. religious seats in the Legislative). Two strategies are highlighted here: a) to reinforce the principle of state secularism, with emphasis on the Declaration of Elimination of All Forms of Discrimination based on Religious Intolerance; and (b) to strengthen progressive readings and interpretations in the religious field, so as to respect human rights. (Vote of the Justice Joaquim Barbosa, p.229-230, citing: *Direitos Humanos* (Coord.). Curitiba: Juruá editora, 2007, p.24-25).

In his vote, the then Minister Joaquim Barbosa justifies his position favorable to the decriminalization of abortion of the anencephalic fetus, emphasizing the need to guarantee the laity of the State and, for this, makes a long explanation, in which he appropriates the words of jurist, about how laity does not constitute disrespect or disregard for religions. The same emphasis on respect is also given by Minister Celso de Mello in the explanation he lays about secularism to justify his vow, in line with that of his colleague:

Indeed, pluralism is one of the essential characteristics of contemporary societies. Within a single state, there are people who embrace different

religions - or do not adopt any-; who profess different ideologies; who have disparate or even antagonistic philosophical moral conceptions. And today, it is understood that the State must respect these life choices and orientations, not being allowed to use its repressive apparatus, not even its symbolic power, to coerce the citizen to adjust his conduct to hegemonic conceptions in society, nor to stigmatize the “outsiders”. (Vote of the Justice Celso de Mello, p.336, citing: Daniel Sarmiento “Legalização do Aborto e Constituição”. In: Nos Limites da Vida: Aborto, Clonagem Humana e Eutanásia sob a Perspectiva dos Direitos Humanos, p.03/51, 26-27, 2007, Lumen Juris).

Explanations and justifications such as those in these excerpts are identified in critical discourse studies in the category of *implicit*, as Fairclough (2003, p.42) states: “what is said in a text is always in relation to what is not said”. Thus, the laity of the Brazilian state is affirmed in relation to the enormous symbolic force that religions, especially those of Christian bias, still hold on our society and its institutions. Indeed, as feminists as Vuola (2001) argue, the triumph of secularization over religion, a promise of modernity, did not materialize as a global phenomenon. On the contrary, it is evidence of Western Europe that, in the rest of the world, and there it emphasizes Christian Latin America, represents one more exception to be explained than a pacified rule.

### **The state is secular, but not atheistic: the pervasiveness of Christian culture**

Throughout the decision secular / religious form an antagonistic pair indicative of the duality that crosses ADPF 54 in deciding in favor of women’s right to abortion in a country heavily dominated by the symbolic power of religion. Feminist theory denounces the eminently androcentric, hierarchical and sustaining character of a patriarchal structure (ROSADO, 2001), which in turn also shapes the field of law (SOUSA, 2015).

Without articulating a rhetoric to highlight this subsistence, the ministers of the Supreme Court eventually accommodate the decision in the same way without confronting them. On the contrary, in the appellate decision there are many language arrangements that in face-to-face interaction studies would be associated with engagement marks that collaborate in the management of positive impressions (GOFFMAN, 1967). One of the tactics I identified in this management, besides the explanations about the compatibility between lay state and religiosity, was an approximation with the religious discourse itself. The best example is the opening of the vote of the rapporteur of the ADPF54:

JUSTICE MARCO AURÉLIO (RAPPORTEUR) - Father Antônio Vieira told us: “As time has not, nor can it have any consistency, and all things

from the beginning were born together with time, so neither it, nor they can stop for a moment, but with a perpetual moto, and an unsurpassable resolve to pass, and always go by “- Sermon on the First Sunday of Advent. (Vote of Justice Marco Aurélio, p.32).

It is noted in this section that Minister Marco Aurélio de Mello, inserts a passage in a quotation to the First Sunday Advent Sermon by Father Antônio Vieira, in the first lines of his text, seeking an approximation with the religious discourse, guided by a Christian and Catholic bias. The rapporteur’s vote has a guiding role in the decision, since it is from this that the other members of the Court stand against or in favor. Thus, in supporting a lawsuit that runs counter to religious dogma, especially the Catholic Church, which undertakes a real moral crusade against abortion in any situation, it seeks protection in the words of a religious.

The judge could have directly triggered a view of the liberal tradition of the state, in which self-ownership is the indispensable basis for access to citizenship, and to assume that freedom of choice to carry on or interrupt unwanted gestation is an autonomy of about half the population. But instead, he chose to accommodate his rhetoric in less direct ways and clothed in a perspective that is not incompatible with Christian bias. Thus, he appropriated the words of the religious priest, who emphasize the need to accept changes that are invariably demanded according to each historical time, referring, therefore, to the object of the ADPF54, that only in the current stage of advancement of medical studies on anencephaly, led to a change of perspective of the judiciary over abortion of anencephalic fetus.

At the end of his vote, after a long exposition on the premises that sustained his decision, the minister concludes, emphasizing the separation between state and religion, but with a caveat:

It is concluded that, despite the preamble, devoid of normative force - and could not be different, especially with regard to divine protection, which could never be judicially demanded -, Brazil is a secular state tolerant, due to Sections 19, item I, and 5, item VI, of the Constitution of the Republic. Gods and Caesars have separate spaces. The state is not religious, nor is it an atheist. The State is simply neutral. (Vote of the Minister Marco Aurélio, p.39).

The manner in which the minister closes his discussion, in which secularity and religion are central themes, corroborates the critique of feminists such as Vuola (2001), who I have already commented on and who is supported in Montero’s work on the distinctive characteristics of the State national in Brazil, determined by a particular conformation with the religious field. In affirming that the secular state is not an atheist, the minister protects himself from the stigmas that fall on this figure in our society, the opposite to the religious man, who is distrusted for his lack of faith, perceived “as

a refusal to establish relations of reciprocity and alliance with the supernatural sphere and, ultimately, with human congeners” (MONTERO, 2011, p.3).

For the author, understanding what defines the peculiarities of the national state in Brazil demands to consider the historical hegemony of the still pervasive Christian culture in our society. To this extent, the ADFP judgment<sup>54</sup> is illustrative, because throughout the text this bias is latent and in some moments emerges verbatim, revealing personal engagements with this field, as can be seen in the following excerpt:

This morning, I woke up and thanked God for being able to contribute to humanity through a decision that could avert sorrows, anguish, pains, afflictions and, at the same time, I asked God for reason and passion to accompany me in the exercise of this highest apostolate that a human being can dedicate himself in this world of God: the magistracy. (Vote of the Justice Luiz Fux, p.154-155).

This clipping seems to provide support for what the Rapporteur has pointed out in a previous clipping about the fact that the state being secular does not imply it is contrarily being an atheist. This is what can be inferred from what was stated in this passage of the speech of Minister Luiz Fux, who, in the wake of Judge Marco Aurélio de Mello, at the beginning of his explanation accompanying his colleague’s vote, assumes an explicit religious articulation.

From what I have shown in these analyzes, I understand that the State’s secular argument, so recurrent in the ADPF<sup>54</sup>, as opposed to attesting a genuine and pacified incorporation of that value by the Court, reveals more ambivalence about such incorporation. The volume of explanations provided to justify such a premise is proportional to the danger of breaking the normative responsibility that the argument imposes on the STF when deciding on a subject such as abortion, so dear to the Christian tradition of our society.

But beyond the Brazilian society itself, I still consider another scope of dialogue to which the decision is addressed, although not in an assumed way. According to Diniz and Velez (2008, p.649), despite the laity of the Brazilian State, “it causes little political controversy the existence of religious congressmen or confessional political base, whose legislative agenda is to promote and defend the specific accommodated interests of their moral communities of origin and not an idea of reasonable moral pluralism.”. Although the text does not allow more evidence on this interlocutor, he has a brief mention in that clipping that I set pages back, of the vote of the Minister Joaquim Barbosa, on the “religious benches in the legislative”.

In any case, what stands out most about the textual arrangements that have manipulated the secular / religious pair, is that the Court has triggered them in order to dribble the tensions that decide on the decriminalization of the abortion of anencephalics imposed on its members in the context of a certain cultural order. Tensions that the

ministers and ministers of the FTS accommodated by a discursive strategy that, contrary to openly defying the hegemonic discourse, it aligned itself.

### **Deciding about abortion without talking about it: management of naming**

This strategy of accommodation is what stands out in the judgment, and here, to continue my analysis, I highlight another discursive device that articulated it, management with appointments to deal with other dualities: life / death, fetus / woman. This is the pair: abortion and the therapeutic anticipation of childbirth. Demonstrating that, paradoxically, to approve the abortion was necessary before talking about it. I begin to demonstrate this paradox with an excerpt in the vote of Minister Celso de Mello, the only one to outline an argument that could have opened an interpretive gap for the extension of the right to interrupt pregnancy beyond cases of anencephaly:

**The Federal Supreme Court, Mr. President, at the stage of this trial, is recognizing that a woman, based on reasons directly based on her reproductive rights and protected by the undeniable effectiveness of the constitutional principles of the dignity of the human person, freedom, of personal self-determination and of intimacy, **has the insurmountable right** to opt for the therapeutic anticipation of childbirth, **in cases of proven fetal malformation due to anencephaly, or, therefore, legitimized for reasons deriving from its private autonomy, the right to express** its will the physiological process of gestation. (Vote of the Minister Celso de Mello, p.315, author's highlighting).**

It is observed that the minister is based on the constitutional rights of the dignity of the human person, self-determination and intimacy, following a liberal tone, in which ownership of oneself is the basis for citizenship. These same principles are highlighted by other colleagues of the judge. However, he is the only one who comes to coordinate an extension of the right claimed by pregnant women of anencephalics to all women. Nonetheless, in her argument, she confines herself to women's freedom to "manifest" individual "will" for the continuation of any pregnancy, but fails to develop a more articulated defense to freedom from abortion, a term he even avoided.

As I introduced it further, not talking about abortion to approve it was one of the discursive strategies used in the judgment. In substitution, the Court adopted the nominal structure anticipating the therapeutic delivery, creating a set of meanings established in the initial petition, proposed by the current STF minister, Luis Roberto Barroso, at the time the lawyer of the National Confederation of Health Workers (CNTS). By a very instrumental rhetorical feature, Luis Roberto Barroso, in the previous note of the petition, states: "Therapeutic anticipation of delivery of anencephalic fetus is not abortion."

In language studies, naming is to consider the relation between name and thing symbolically. Subjects name from their position in a discursive formation, thus a name functions not simply as a label, but it produces meaning historically and ideologically (FAIRCLOUGH, 2003) and social effects. In this way, namings have discursive and ideological functionality. The lawyer creates a distinction between abortion and <sup>7</sup>*therapeutic anticipation of childbirth*, arguing that, in the context of the ADPF 54 decision, the first is discarded.

The term *therapeutic anticipation of childbirth* is a nominal structure composed of lexical elements specific to the field of medicine. After Foucault's (2005) studies, the medical discourse had its neutrality questioned, even though the formal rules of power and of knowledge enunciation exercise in this field continue to act legitimizing the most varied social practices. This is how, in ADPF 54 an articulated naming from this order of discourse was appropriately functional to a discursive alignment along the lines of legal argumentation, which seeks what Ferraz Júnior (2013) calls subsumption.

The author explains that the subsumption refers to the submission of the case to the proper rules of law for its application. Thus, by disqualifying the practice of interrupting a pregnancy as an abortion, this practice is removed from the illegality field and from all its associations to the heinous world, such as homicide, relocating it into the hygienic field of medicine, where procedure acquires therapeutic status.

In this sense, according to Pires (2013), in ADPF 54, the opportunity to address the collision between the interests of the unborn child and the reproductive autonomy of women has been lost. The decision, on the other hand, eliminates any further discussion on this topic, strongly excluding the topic of voluntary abortion, as the following excerpts show:

I emphasize the allusion made by the arguer herself to the fact that the proclamation of abstract unconstitutionality of the criminal types is not postulated, which would remove them from the legal system. It is only intended that the mentioned statements are interpreted according to the Constitution. In this way, it is entirely unwarranted to convey that the Supreme Court will examine in this case the decriminalization of abortion, especially since, as will be seen, there is a distinction between abortion and therapeutic anticipation of childbirth... (Excerpt from the vote of Rapporteur Marco Aurélio, p.33).

[...] (c) since there is nothing that can be done for the fetus, its withdrawal is the only therapeutic indication for the pregnant woman; (d) the withdrawal of the fetus by a qualified physician constitutes therapeutic anticipation of childbirth, and not abortion according to the Penal Code,

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<sup>7</sup> The term was proposed by Débora Dinis who represented ANIS.

a crime whose characteristic is the death of a fetus that is viable for extrauterine life caused by an abortive procedure (Excerpt from the vote of Justice Rosa Veber, p.90).

Therefore, it is apparent that, in the final analysis, the present ADPF takes care of the freedom of choice of the woman in disposing of her own body in the specific case in which she carries in her womb a fetus whose independent extrauterine life is absolutely impracticable. Thus, it is important to emphasize, the wide possibility of interrupting pregnancy is not discussed. The question here refers exclusively to the interruption of a pregnancy that is doomed to failure, since its outcome, even if all possible efforts are made, there will invariably be the death of the fetus. (Excerpt from the vote of Justice Joaquim Barbosa, p.147).

I also want to point out that this Federal Supreme Court, this afternoon, is not deciding or allowing abortion. This is a question posed to society. What we are dealing with here is essentially whether the interpretation that is possible to be given to the provisions of the Penal Code are compatible or not with the interpretation that has been given in the sense that it is also considered a crime to interrupt the pregnancy of an anencephalic fetus. (Excerpt from the vote of Justice Carmen Lúcia, p.172).

In these excerpts, we see again a series of explanations and justifications based on the normative responsibility of the Court in debating on a taboo subject in our society. As Warat (1985) proposes, a judicial decision is a persuasive piece that employs all kinds of argumentative resources, which tend to have an importance, not logically derived, but which obtains its acceptance by psychological and emotional association. In this sense, the persuasive nature of legal discourse inevitably determines the presence of <sup>8</sup>fallacies in its content, as was the case of the strategy articulated by naming and denial exchange, which favored an interpretative opening to the reception of the request seen in the ADPF. The success of this tactic demonstrates, on the other hand, the degree of marginalization in the legal environment and in Brazilian society itself of the feminist argument that abortion constitutes a woman's moral right of autonomy over her own body and over her own conscience. On the other hand, the discursive articulation of the ADPF 54 mirrors the Brazilian feminist articulation in its historical struggle for the legalization of abortion, of strong negotiating nature that, according to Bila Sorj (2002), is rooted in the Brazilian "political culture" itself to avoid conflicts and seek conciliatory solutions.

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<sup>8</sup> The term fallacy is being used here in line with the pragma-dialectic perspective (EEMEREN; GROOTHENDOR, 1992), which broadly understands that the fallacy is a speech act that violates one or more rules of critical discussion, which, when used as an argument, promises to be decisive in the problem in question, while in reality it is not.

## **Maternal suffering, health and female autonomy: management of representations**

The management of namings shaped a feminist cause to legal hegemonic discourses. However, in order to guarantee the traditional and patriarchal bias of this field, it was still necessary to manage certain female representations, emphasized not in the autonomy and freedom of women, but in maternal suffering and its harmful consequences to the health of pregnant women. The term representation in language studies with focus on gender refers to the discursive construction from the ways of being woman / man (LAZAR, 2005). These studies also highlight the fact that representations are shaped from particular perspectives of specific communities of practice in the interest of maintaining certain power relations. Along these lines, the female representation profile emphasized by the Court supports such relations within the framework that the Law values.

According to Pires (2013, p.581), in ADPF 54, “the mental health of women has acquired a greater scope of protection, on the grounds that the science of anencephaly on the part of the pregnant woman generates a state of psychic disturbance to a high degree, that their interests must prevail over the fetus’s right to life as a constitutional value. “The following excerpts illustrate this evidence:

[...] although in the context, there are other people involved, nobody’s suffering is greater than that of the pregnant woman, because the anencephalic fetus is an event in her body. The pregnant woman, in this case, will not even become a mother, because there will not be - or there is not even - a child. By forcing a woman to keep a dying fetus or a technically dead one, the state and society meddle in her right to bodily integrity and to make decisions about her own body. In the case of healthy fetuses, it is still possible to discuss whether the woman is obliged to have the child, since the fetus will be a person and therefore presumed to have the right to be preserved. But the anencephalic fetus will never be a person, it will not have a human life, it is not even a subject of potential rights... (Doctors Telma Birchal and Lincoln Frias discourse in public hearings transcribed in the ADPF Report 54, p.65).

Anyone (who does not even need to read legal literature), anyone who has had the opportunity to read “Manuelzão e Miguilim”, from Guimarães Rosa, will know that perhaps the greatest example of human dignity that God has given was exactly that of Mom - and this considering I have a super dad! The dignity of the mother goes beyond herself, beyond her body. When Guimarães Rosa puts the woman carrying a dead son in her arms, who had a piece of cloth tied at his feet, hurt a few days before, she seeks to bathe the small body of her dead son and almost bumps into the basin; She then takes care that, even dead, he does not have any bumps



because it would be a suffering imposed on that little body. Whoever has read so much will know that when a choice is made of interrupting what could be the life of a moment or life for another month, it is not an easy choice, it is always a tragic choice; It is the choice that is made to continue and not to stop; it is the choice of the possible in an extremely difficult situation. Therefore, I think it must be known that all options like this, even this interruption, are of pain. The choice is which is the smallest pain; it is not to not hurt, because the pain of living has already happened, the pain of dying as well. She only makes the possible choice in this sense. (Anticipation of Carmen Lúcia's vote, p.174).

These excerpts summarize the main argument in ADPF 54 in favor of abortion / abortion of anencephalic pregnancy: the enormous suffering of women in this situation. In this direction, a discourse of solidarity is generated for these women. The representation of maternal suffering in the appellate decision generally precedes arguments in favor of female autonomy and their reproductive rights, as can be seen in the excerpt from the discourse of the doctors, in which they resort to this device and then defend the bodily integrity of the women and their rights to make decisions about their own bodies. The woman / fetus pair is very recurrent and is directly associated with the life / death pair in the emphasis given to the inevitable death of the fetus, its vital unfeasibility in direct relation to maternal suffering.

Although the suffering of women and the detriment of their health are almost indisputable arguments, there was an effort to carry emotional weight and dramaticity to the condition of the anencephalic pregnant, engendered by a representation of femininity based on the historical configuration of the emotional woman, with a certain appeal to the pathologization of the body, to the centrality of motherhood, which may even include self-denial, suffering, etc. In both clippings, a number of explanations and justifications also helps to compose this representation, “the mother in this case not even come to be a mother, for there will be - not even there - a son,” “the choice is which lower pain; not to hurt, because the pain of living has already happened, the pain of dying too. “

This engendering, articulated to meet claims of women's reproductive rights, does so in order to frame the discourse in the hegemonic patterns of the patriarchal structure, in which the power of medicine has always had a regulatory role of women's autonomy for the control of their body. Control that the legal discourse also regulates, and that doctors Telma Birchal and Lincoln Cold do not make a point of answering when they ponder: “in the case of healthy fetuses, it is still possible to discuss if the woman is obliged to have the child, therefore it will be a person and therefore is presumed to have the right to be preserved.” This is, in my view, the great duality expressed in the decision: to deal with women's rights without touching on the regulatory ways that maintain the status quo of our society and its gender asymmetries.

## Final considerations

In developing this analysis, I have always been aware that ADPF 54 has been acclaimed in some media as a major achievement of women's rights, providing an opening for the decriminalization of abortion in Brazil. However, as I endeavored to demonstrate, such a conquest was engendered in a paradoxical way, in which to deal with a demand for feminist struggles, and which had the direct commitment of representatives of these groups, it was necessary to silence about such struggle, and to disregard the fruitful scientific production on the theme from the feminist academic milieu.

Simone de Beauvoir was mentioned in the decision by the rapporteur, Justice Marco Aurélio de Mello, and by Justice Carmen Lúcia, a fact that at first sight gives the impression that there was a discursive alignment with the author's ideas. Nevertheless, as I tried to explain, rather than approaching the discourse defended by this icon of feminism, the Court triggered a textualization supported by settings that the author herself attacked.

In her referential work, the *Second Sex*, the same from which the mentions in the decision were withdrawn, Simone de Beauvoir highlights how abortion is treated in bourgeois society in a hypocritical way and as a repugnant thing. And she exemplifies: "That a writer describing the joys and sufferings of a parturient is perfect; if he mentions an abortive he will be soon accused of wallowing in filth and describing mankind in an abject way" (BEAUVOIR, 1967, p.248). Paradoxically, the strategies triggered in the decision to (not) speak of abortion, leave latent the implicit idea that it is "a repugnant crime that is indecent to allude" (Ibid.), as the feminist criticized.

As noted by Scavone (2008), the debates and feminist political actions in favor of the liberalization of abortion in our country were marked by numerous political negotiations and, above all, by advances and retreats. Thus, I understand that the discursive strategies that define the decision reflect the negotiating and conciliatory nature of the Brazilian feminist approach. It seems that there was, as Miguel (2012, p.671) pointed out, "a 'realistic' accommodation to conditions of debate in the political field."

Thus, I understand that, on the one hand, the feminist movement was able to account the Supreme Court's decision as a progress, although limited, in the struggle for the expansion of women's rights. On the other hand, the strategy of accommodating this decision to the conditions molded by a structure that, as denounced by the feminist theorists of the Law area (BARTLETT, 1991; CASTILHO, 2008; PIMENTEL, 2009), traditionally gave normative strength to the inequalities of gender, ends up not investing in the dismantling of such structure and, to the contrary, to some extent, collaborates with its permanence.

It is necessary, therefore, now at the end, to reflect on the warning made by the feminist Audre Lorde (2007), already cited in this text, on the dangers of using the "Master" tools to dismantle his "house." Tools that, according to her, may even allow us to beat him temporarily at his own game, but will never allow us to bring up genuine changes.

FREITAS, L. A decisão do STF sobre aborto de fetos anencéfalos: uma análise feminista de discurso. *Alfa*, São Paulo, v.62, n.1, p.11-33, 2018.

- *RESUMO: Este artigo traz uma análise do acórdão do Supremo Tribunal Federal na Ação de Descumprimento de Preceito Fundamental nº 54 (ADPF 54), que buscou solucionar a polêmica acerca da possibilidade de interrupção voluntária da gestação em caso de fetos com anencefalia. Por uma abordagem feminista de análise de discurso, o trabalho foca a forma paradoxal pela qual a Corte atendeu uma demanda feminista e de movimentos de luta pelos direitos das mulheres: 1) escamoteando os vínculos com ativistas desses grupos e com os discursos que elas defendem sobre a autonomia das mulheres em relação a seus corpos; 2) mantendo o padrão tradicionalista e androcêntrico próprio do Direito. Assim, a análise descreve três artifícios de linguagem que se sobressaem na articulação desse paradoxo: explicação, nomeação e representação. O trabalho aponta a persistência no campo do Direito de paradigmas tradicionais e androcêntricos que a Justiça valoriza e com os quais opera. Este estudo visa contribuir para o debate sobre a descriminalização do aborto no Brasil, bem como discutir a relação entre linguagem / gênero / direito.*
- *PALAVRAS-CHAVE: Discurso. Gênero. Feminismo. Direito. Aborto. Anencéfalo.*

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Received in March 20, 2017

Approved in September 15, 2017

