A MORAL READING OF ARGENTINE CONSTITUTIONAL CASE LAW

Una lectura moral sobre la jurisprudencia constitucional argentina

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Resumen: Como han remarcado varias escuelas de Filosofía del Derecho, la naturaleza abstracta del lenguaje constitucional significa dejar una puerta abierta para diversas apreciaciones políticas, éticas y filosóficas. En dicha línea, Ronald Dworkin ha sostenido insistentemente que la dimensión creativa, moral y teleológica de la interpretación legal no es excepcional ni separable de una comprensión neutral de las fuentes legales de manera independiente.

Palabras claves: Derecho Constitucional - Ronald Dworkin - Jurisprudencia - Filosofía del Derecho.

Abstract: As has been previously remarked by various legal-philosophical schools of thought, the abstract nature of constitutional language remains an open door to political, ethical, and philosophical assessments. As Ronald Dworkin has insistently sustained that the creative, moral, and teleological dimension of legal interpretation is neither exceptional, nor separable from a neutral understanding of legal sources independently.

Keywords: Constitutional Law - Ronald Dworkin - Jurisprudence - Philosophy of Law.

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1. Introduction

As has been previously remarked by various legal-philosophical schools of thought, the abstract nature of constitutional language remains an open door to political, ethical, and philosophical assessments. In Rawlsian terms, this door opens the "comprehensive conceptions" of those who interpret and adjudicate Law[2]. Such an inevitable combination of legal and moral reasoning is the object of an intense, ongoing discussion concerning Law´s ability to check the interpreter´s moral "pre-conceptions".

Some authors take a negative stance either out of systematic distrust of the intentions of legal operators of sticking to the law, as is the case of Duncan Kennedy; or out of semantic skepticism, as is the case of Stanley Fish[3]. On the other extreme, Andrei Marmor argues, just as Hart had done some time before, that legal adjudication involves moral reasoning only on the rare occasions where the semantic meaning of legal discourse is underdetermined[4]. Accordingly, Dennis Patterson distinguishes between understanding and interpretation. For Patterson, while understanding amounts to a neutral identification of the abstract *given* meaning of legal sources and of its applicability to concrete cases, interpretation "depends upon understanding […] already being in place". Interpretation would thus be a "therapeutic" activity, consisting of filling in the gaps left open by a "breakdown or failure in understanding"[5].

Against this two-steps description, Ronald Dworkin has insistently sustained that the creative, moral, and teleological dimension of legal interpretation is neither exceptional, nor separable from a neutral understand-

2 See Rawls, J. (2005): *A Theory of Justice*. the belknap press of harvard university press cambridge, Massachusetts.

3 Stanley Fish has settled his skeptical position mainly in opposition of Dworkin's claim that interpretation may and should "fit" with legal practice, among other works, in Fish, S. (1982). "Working on the Chain Gang". *Texas Law Review*, 551; and (1983). "Wrong Again". *Texas Law Review,* 299. A good synthesis of the discussion may be found in Sadowski, M. (2001). "Language is not Life". *Connecticut Law Review*, 1099, ss.

4 See Hart, H. L. (1994): "Postscript" to *The Concept of Law,* 2.ª ed. Oxford, Clarendon Press. and Marmor, A. (1995). *Law and Interpretation: Essays in Legal Philosophy*. Clarendon Press, 23, where he distinguishes (neutral) understanding and (creative) interpretation from a general point of view; and *idem:* 122, applying this same distinction to the law.

5 See Patterson, D. (2005). "Interpretation in Law". *San Diego Law Review,* 692.

ing of legal sources independently. In the first place, legal interpretation is always intermingled with moral reasoning because it is also necessarily "justificatory", and therefore always teleological. In the second place, moral reasoning remains present at all of the partial judgments or stages of interpretation; including those which Patterson would call "understanding[s]". Notwithstanding the holistic, moral nature of interpretation, he also sustains that it is possible to objectively distinguish between valid and invalid "moral readings" of the law, both in the case of dogmatic or scientific analysis and in the case of judicial adjudication[6]. In his view, so long as the moral reading "fits" both the general purpose of Law and the concrete way in which each legal practice has actualized its general purpose along its respective historical development, the practice does not amount to sheer construction[7].

Under this double-fit condition, the moral reading of a constitution remains legal if, and only if, it is coherent with the final values that all legal practices claim to instantiate, and with the manner in which each particular legal practice determines, concretizes, or specifies in those common values. The former condition is intended to adjust legal interpretations to the goals that distinguish the law not only from other kinds of social practices, but also and mainly from sheer violence. The latter proposes to adjust legal interpretations to the specific legal practices *within which* each interpretation takes place[8].

Focusing our analysis on the substantive content of these two conditions, they may be restated in a *frame* that confines the moral reading of constitutions within two margins: a justificatory-teleological "horizon", and a semantic foundation. The justificatory horizon of interpretation encom-

6 The term "moral reading" is taken from Dworkin, R. (1996). *Freedom's Law. The Moral Reading of the American Constitution*. Cambridge. Harvard University Press, 17.

7 See Dworkin, R. (1977). *Taking Rights Seriously*. London. Duckworth, chaps. I-IV; (1985): chaps I-VI, specially, 17 and 143-145; (1986). *Law's Empire*. New York. Harvard University Press, 65-68-, 411-413; (1996). Ob. cit., 10; (2006). *Justice in Robes*. Cambridge Mass, 18-21; (2011). *Justices for Hedgeghos.* Cambridge. Harvard University Press, 130 et sq.

8 The idea that Law substitutes violence as a way of solving social conflicts entails the logical conclusion that the *claim* to replace violence is a necessary element of any legal system. At this level of abstraction, this idea does not yet involve any answer to the question "how should sheer violence be replaced?", and it is partaken by the analytical tradition in the work of authors such as Hart, H. L. (1994): "Postscript" to *The Concept of Law,* 2.ª ed. Oxford, Clarendon Press: 172; or Raz, J. (2003). "About Morality and the Nature of Law". *American Journal of Jurisprudence*, 13, and, most famously, by "non-positivist" authors such as Alexy, R. (2002). *The Argument From Injustice. A Reply to Legal Positivism.* Litschewski Paulson, B. and Paulson, Stanley, L. (transl.). Oxford University Press, 47. For an updated analysis of the current discussions around the conceptual relationship between Law and violence, see Weinrib, J. (2016). *Dimensions of Dignity. The Theory and Practice of Modern Constitutional Law.* Cambridge University Press, 78 et sq.

passes the values, goods, and ends that justify the existence of legal practices generally; and the anthropological and semantic (epistemic) tenets entailed in the assertion of these values[9].

The semantic ground is composed, on its part, by the textual (in a lexicographic sense), grammatical, and discursive rules that govern the specific texts under interpretation[10].

Discursive rules allow the reader to pass from a static to a "dynamic" understanding of the texts, by contextualizing the texts' lexicographical and grammatical meanings, both in the general field of law and in the specific legal practice wherein the interpretation takes place. Given the fact that this contextualization can only be performed under the light of the very ends, values, or goods that justify legal practices generally, discursive rules should neither be conflated with, nor reduced to, the interpretative directives that govern each legal practice or each field of law therein. Discursive rules are the outcome of interpreting interpretative directives, but only under the light of the named, final justificatory values[11].

Three key conclusions should be made at this point. In the first place, as this brief incursion into the nature of discursive rules proves, the two margins of interpretation do not function separately but in a check and balance manner, both limiting and guiding each other. Thus, the identification of the *relevant* legal texts that make up the "semantic margin" of interpretation is the outcome of a preliminary, interpretative judgment (referred to by Ronald Dworkin as the "pre-interpretative judgment"), concerning the nature of both legal sources and the legal system to which the sources

9 See Zambrano, P. (2015). "Fundamental Principles, Realist Semantics and Human Action". *Rechtstheorie*, 323-324.

10 It might be argued, as we do, that the semantic ground is never enough a reason for justifying an interpretative statement. Nevertheless, it is hardly discussable that it is always a necessary element of any justified act of interpretation. See, Wròbleski, J. and Mac Cormick, N. (1994). "On Justification and Interpretation". *ARSP-Beiheft*, 260; Zambrano, P. (2009). *La inevitable creatividad en la interpretación jurídica. Una aproximación iusfilosófica a la tesis de la discrecionalidad*. México. UNAM, 65 et sq.

11 In a very similar vein, Jerzy Wroblewski argues that contextualization is a necessary condition of every act of interpretation, and that it engenders problems of fuzziness that should not be confused with semantic fuzziness, Wroblewski, J. (1985). "Legal Language and Legal Interpretation". *Law and Philosophy,* 242. Focused on the field of international public law, Daniel Peat and Matthew Windsor notice that "a range of issues pertaining to the meaning of the Vienna Convention on the Law of Treaties rules continues to be debated, which is hardly surprising given that the rules on interpretation themselves require interpretation", in Peat, D. and Windsor, M. (2015). "Playing the Game of Interpretation". In *Interpretation in International Law.* Oxford University Press, 6. Against, finding that discursive rules are capable of being neutrally identified, see Patterson, D. (2005). Ob. cit., 687.

pertain[12]. The semantic frame of interpretation is therefore not somewhere "out there", already made up, waiting to be discovered. It is, instead, the outcome of a preliminary interpretative act that involves giving prevalence to certain legal sources over others. So long as this act entails choice, it is blindly (and hence arbitrarily) made, or it is grounded on the values, ends, or goods that justify legal practices. In the latter case, the teleological frame of interpretation is at stake from the very beginning, when the semantic "ground" is set up by the interpreter. These considerations explain why the one-step moral reading model has more explanatory power than the two-step picture of legal interpretation, stuck in the distinction between understanding and interpretation.

The second conclusion is that the justificatory margin may be studied under from either a general or concrete perspective. In the first case, the question is which values, ends, or goods justify general legal practices, and which are the anthropological and semantic (epistemic) theories encompassed by these values. Under a concrete perspective, the question is which values, ends, or goods justify a certain legal practice as a matter of fact, according to the interpretative judgments historically entrenched in them. The answer to this question is that which Ronald Dworkin names "inclusive integrity"[13].

Finally, asserting that the teleological margin of interpretation controls the whole of legal interpretation does not deem legal interpreters as Herculean philosophers, as has so frequently been understood following Dworkin's interpretative theory[14]. It only means that each time a legal text is interpreted and applied, the named justificatory tenets are put at stake both at a general and at a concrete level, whether or not the interpreter is aware of it. In the face of the inevitable margin of choice that always remains open by the semantic margin of interpretation, any interpreter who sincerely aims at "playing the game of law", should choose the answer that they believe best realizes the concrete values entrenched in the concrete practice wherein the interpretation takes place. However, given that the "entrenched" values may be understood and combined in different ways, all

12 Ronald Dworkin sustains that, even though the "pre-interpretative" judgment is inseparable from the justificatory one, he also notices that it is the less constructive dimension of interpretation. See Dworkin, R. (1986). Ob. cit., 69; Dworkin, R. (2006). Ob. cit., 169. We believe that this is an oversimplification, in view of the fact that one of the most controversial dimensions of interpretation is, precisely, the way that the sources (be them principles or rules) are ordered and balanced among themselves.

13 Dworkin, R. (1986). Ob. cit., 404-407.

14 On these critics and Dworkin's response, see Dworkin, R. (2003). "Response to Overseas Commentators". *International Journal of Constitutional Law,* 661-663.

of them feasible from a semantic point of view, the teleological values that justify legal practices from a general perspective are also at stake on this second level of decision[15]. Moreover, the fact that interpreters more often than not remain unaware of the justificatory or philosophical implications of their reasoning is a good reason for analyzing judicial decisions.

Against this backdrop, our general purpose is to analyze Argentinian constitutional case law regarding the legal status of unborn human life, under the guidance of the one-step moral reading model and in view of revealing its justificatory and semantic postulates.

Argentine constitutional case law may be divided in two distinct eras in regards to the legal *status* of unborn human life. The first era was initiated by the leading cases *Tanus* (2001) and *Portal de* Belén (2002), when courts upheld that constitutional and international human rights Covenants that are binding in Argentina, recognize a personal quality in each and every human being from the time of conception, which was, in turn, placed at the moment of fertilization[16]. On this basis, it was understood that these same norms proscribe making the legal term of human life –which is always the life of a person– dependent on its stage of development or on its (chances of) viability inside or outside the womb. Following, the second era commenced with the more recent case *F.A.L.* (2012)[17]. Even though the decision did not explicitly overturn *Tanus'* and *Portal's* interpretative judgments, it strongly revised Argentina's constitutional and international legal obligations to protect unborn human life, almost to the point of turning down the former interpretative premises.

Three strands of study will be deployed in the next paragraphs in order to reveal the justificatory and semantic postulates sustaining these decisions. In the first place, a review of Argentine constitutional case law will be carried out, in order to identify the interpretative arguments that have been explicitly posed. This will focus on three leading cases, all regarding the acceptance or rejection of pre-natal legal personhood (Sections II and III). In the second place, analysis will be focused on the semantic margin of interpretation sustaining these interpretative arguments (Sections IV and V). At this stage, our analysis shows that a one-step moral reading interpretative model retains more explanatory power than the alternative two-steps one. Finally, the study will be directed towards the underpinning justificatory and semantic postulates (Section VI). In the final stage, we aim at

15 Dworkin, R. (1986). Ob. cit., 65-68; (2011). Ob. cit., 130 et sq.

16 "T., S. c/ Gobierno de la Ciudad de Buenos Aires s/ amparo", *Fallos*: 324:5 (2001); "Portal de Belén - Asociación Civil sin Fines de Lucro c/ Ministerio de Salud y Acción Social de la Nación s /amparo", *Fallos*: 325:292 (2002).

17 Case F. 259. XLVI. "F., A. L. s/ medida autosatisfactiva", 13-3-2012.

testing the coherence between the categorical nature of fundamental rights and the anthropological and semantic or epistemic theories assumed by the Court when interpreting the legal *status* of unborn human life (Section VII).

2. The Pro-Life Era (2001-2012): Tanus and Portal de Belén

In *Tanus* and *Portal de Belén,* the Argentine Supreme Court determined the sense and scope of the fundamental norms that expressively recognize the right to life in relation to pre-natal life. Both judicial decisions, when considered as a whole, give rise to the following interpretative rule: unborn human beings are entitled to the right to life, which scope is equal to the right to life of already born persons, and no differences based on the life´s development stage or on its viability prospect shall be established.

In *Tanus,* the majority of the Court affirmed a previous judicial decision, which had authorized the induction of childbirth labor of an anencephalic fetus in a public hospital. In grounding this decision, the Court pointed out that, even though the authorization to perform the childbirth labor induction had been requested in the twentieth week of pregnancy, at the moment the case was to be decided by the Supreme Court, the mother had reached the eighth month of pregnancy. According to the Court, this temporal difference allowed for differentiating childbirth labor induction on the one hand and an abortion on the other. It was argued that the death of an anencephalic fetus outside the mother's womb, once the stage of extrauterine viability is reached, is not to be endorsed by the anticipated childbirth labor induction, but by the congenital condition.

This noticeable effort to distinguish the facts of the case from those in the case of abortion, was grounded on the underpinning normative interpretation, according to which the fundamental right to life remains enforced since the moment of conception under the American Convention for Human Rights (Law 23.054), Article 4.1, and under Article 2, (Law 23.849), that approves the International Covenant on the Rights of the Child[18].

18 "Tanus" (Cons. 11°). Art. 4th of the American Convention for Human Rights states: "Right to life. 1. Every person has a right to her life being respected. This right shall be granted by Law and, in general, from the moment of conception. Nobody shall be arbitrarily deprived of his life" (the translation is ours). Article 2º of Law 23.849 states: "When ratifying the Convention, the following reserves and declarations shall be stated: […] In relation to article 1º of the Convention, the Argentine Republic declares that it shall be interpreted in the sense that the term 'child' is understood to refer to all human beings from the moment of conception and until eighteen years old" (The translation is ours). In Spanish: "Al ratificar la Convención, deberán formularse las siguientes reservas y declaraciones: […] Con relación al artículo 1º de la Convención sobre los Derechos del Niño, la República Argentina declara que el mismo debe

In *Portal de Belén,* the Court reaffirmed this normative interpretation, further specifying that conception takes place at the moment of fertilization. In stating this, the Court relied on scientific findings:

> "[…] it is a scientific fact that the 'genetic construction' of the person is there, all set and ready to be biologically aimed because 'the egg's [zigote] DNA contains the anticipated description of all the ontogenesis in its tiniest details"[19].

From the factual point of view, the Court considered it proven that a contraceptive device, the marketing and distribution of which had been already authorized by the national Ministry of Health and Social Action, would operate under three key guidelines. Firstly, the device would prevent ovulation, or secondly, it would operate as a spermicide. These posed no constitutional objection from the point of view of an embryo's right to life. However, in a third manner, and in order to prevent conception in the event that the two primary means were not successfully activated, the challenged contraceptive would operate by modifying the endometrial and therefore prevent embryo implantation. The Court found that it was this third purpose that violated the embryo´s right to life. On the basis of these normative and factual premises, the Supreme Court turned down the appellate court's decision that had permitted the national Ministry of Health and Social Action to authorize the marketing and distribution of the contraceptive in question.

The ruling established in both cases regarding the legal *status* of prenatal life could be, thus, summarized as follows:

> Legal personhood is acknowledged since the moment of conception, under both the Argentinian Constitution and International Human Rights Law. Based upon scientific findings, conception is deemed to occur at the moment of fertilization. Therefore, the scientific debate regarding the distinction between pre-embryos and embryos, or between viable embryos and non-viable embryos, lacks any legal basis.

The most relevant, normative roots for the recognition of a right to life from the moment of conception (fertilization) are Article 4.1 of the American Covenant on Human Rights (ACHR) and the declaration introduced by Argentina when ratifying the International Covenant on the Right of

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interpretarse en el sentido que se entiende por niño todo ser humano desde el momento de su concepción y hasta los 18 años de edad".

19 Cons. 7º).

the Child. Although the Court not explicitly argues its own interpretation of Article 4.1 (ACHR), the fact of having used it as a normative premise in the finding indicates that, in its view, the expression "in general" does not exempt Argentina from its international legal duty to refrain from deploying health policies that have an effect of interrupting the embryo´s development from the moment of fertilization. In the same vein, by using the declaration made by Argentina when ratifying the International Covenant on the Rights of the Child as a source of international human rights law, the Court equated its legal force to that of the main text of the Covenant itself.

Finally, it should be noted that the Court used a declaratory judgment of the Inter-American Court of Human Rights (IACHR) as sufficient normative ground for issuing a writ of mandamus against the executive branch of government. In so doing, it turned what some authors call "soft law", into a valid source of international human rights law[20].

Summing up, the Court made at least three types of interpretative judgments. Firstly, it performed an underpinning "pre-interpretative" judgment (in Dworkin's terms), according to which the sources of international human rights law include the main text of Conventions, the reservations and declarations introduced by signatory states, and the interpretative practices developed by the IACHR. Secondly, it issued a grammatical interpretative judgment, according to which the expression "in general," stated in Article 4.1 ACHR, does not allow for exceptions to the State obligation to defend unborn human life. Thirdly, it stated a scientific or factual finding, according to which defines conception as taking place in the moment of fertilization.

Even though the abstract, pre-interpretative judgment concerning the sources of international human rights' law would later be reaffirmed in *F.A.L,* this decision drastically changed the criteria used in *Tanus-Portal* for balancing the relevant sources influencing the interpretation of Article 4.1 ACHR and the obligations undertaken by Argentina under this norm and in regards to unborn human life.

3. The Pro-Abortion Era initiated in F.A.L.

F.A.L. is the first decision of the Argentine Supreme Court directly concerned with the constitutional interpretation of Article 86, inc. 2 of the federal criminal code. This norm makes it a crime to procure an abortion,

20 Portal: cons. 15, citing Consultive Opinion 11/90:23.

"except when pregnancy is the outcome of rape, or of an offense to the honor of an idiot or insane woman"[21]. Since its promulgation in 1901, this rule has never been constitutionally challenged; however, it has become the object of fierce interpretative debates within the field of criminal law.

Those favoring a pro-abortion position argued that the comma inserted in between the words "rape" and "or" meant that the exception to the criminalization of abortion was double: it covered both the case of pregnancies that are the outcome of the rape of any woman, and the cases of pregnancies that are the outcome of an "offense to the honor" on insane women. Pro-life positions claimed that this interpretation was unsubstantiated, for pregnancy can never be the result of an "offense to honor". Accordingly, it was argued that the coma had the function of distinguishing between pregnancies that are the effect of rape committed on an insane or idiot woman, and pregnancies through consensual sexual intercourse between a sane male and an insane woman, whose consent, precisely because of coming from an insane person, is inherently void[22].

In *F.A.L.,* the Supreme Court decided a final ruling to this historical semantic dispute, not only based on the former grammatical argument, but also and mainly on a strictly constitutional one. The *holding* of the case was stated in the Eighth Consideration, where the Court affirmed "only the ample interpretation of Article 86, inc. 2 is valid, according to Constitutional and International human rights law". This holding was sustained on the following normative and interpretative arguments:

a) Article 75, inc. 23 of the national constitution does not affirm a state´s obligation to protect unborn human life with the force of criminal penalties, but only to pass on a social security normative framework (cons. 9).
b) Under the fundamental rights of equality, non-discrimination, and dignity, recognized by Article Sixteen of the National Constitution, and "diverse" Human Rights Covenants; and under the fundamental principles of legality and *pro homine* recognized by Article Seven-

21 In Spanish: "[…] si el embarazo proviene de una violación o de un atentado al pudor cometido sobre una mujer idiota o demente".

22 About this longstanding discussion in Argentine Criminal Law, see Zambrano, P.; Sacristán, E. (2014). "El derecho a la vida y el aborto en la Constitución Argentina". *Tratado de Derechos fundamentales* (Legarre, S.; Rivera, J., eds.). Buenos Aires. La Ley, 655-701, 658-660; and Rabbi - Baldi Cabanillas, R., (2012). "Consideraciones sobre el sentido de la norma permisiva y prospectivas desde una Filosofía del Derecho Constitucional, a partir del caso 'F., A. L.' de la Corte Suprema". *Pensar en Derecho*. Buenos Aires. Facultad de Derecho, Universidad de Buenos Aires, 331-378.

teen of the National Constitution (Considerations 8 and 18), women have a right not to be criminally prosecuted for having an abortion in case of rape.

c) Under these same rules, women that are the victims of rape also have a right to access to free, quick, secure and healthy abortion procedures in public health institutions.

The Court did not straightforwardly deny that the State is obliged to protect the *nasciturus* as a subject of rights. Nevertheless, it warned that neither the *nasciturus* remains entitled to an absolute right to life, nor is the state obliged to use the weight of criminal law in securing this (relative) right[23]. Performing a double leap forward, the Court then jumped from the state's *faculty* not to turn abortion into a criminal offense, to the state's *obligation* not to criminalize it in cases of rape and, furthermore, to the positive state's obligation to facilitate quick, secure and healthy abortion procedures to any woman who claims to have been raped, being her mere assertion as sufficient evidence to sustain the allowance of the procedure.

This triple downgrade of the state's obligations concerning the protection of unborn human life was sustained on a radically different grammatical judgment from those issued previously in *Tanus* and *Portal*. Thus, the Court argued that the expression "in general" within Article 4.1 ACHR was explicitly intended by its drafters to constrain the obligations undertaken by States with respect to the protection of unborn human life, excluding the duty to secure it with the force of criminal law. This classical perspective of the interpretation of Article 4.1 ACHR was, in turn, sustained by a report from the Human Rights Committee of the Convention on the Human Rights of the Children (CHRCH).

Regarding the declaratory judgment introduced by Argentina while signing the CHRCH, the Court found that it lacked binding nature, for it was not a "reserve" under the terms of Article Two of the Vienna Convention on the Law of Treaties. Finally, the Court cited the reports from different Human Rights Committees as a valid legal source for its interpretation that Argentina was under the international obligation not to place undue burdens on abortion procedures[24].

23 Cons. 10.

24 See Consideration 6, citing the Final Observations issued by the Committee on Human Rights CCPR/C/Arg/Co /4, of 22-3-2010, and the Final Observations issued by the Committee on the Rights of Children, CRC/C/ARg/Co/3-4, of 21-6-2010.

4. A shared plain monist conception of the international practice of Human Rights

As was formulated in the introduction, legal interpretation operates within two margins: a semantic or textual "ground", and a justificatory or teleological horizon of interpretation. The semantic margin is made up by all the relevant legal sources applicable to the case, *plus* the textual, grammatical and discursive rules that apply to the language of these sources.

Along these lines, the most basic interpretative judgment that any Court is bound to make concerns the choice of the relevant normative sources that make up the semantic margin that is applicable to the case in question. This judgment entails, as was also noted above, a certain conception of the nature of legal sources and of the legal system to which these sources pertain.

According to Article 75.22 of the National Constitution, the constitutional Bill of Rights is complemented with those rights recognized in all of the Human Rights Conventions signed and ratified by Argentina. Therefore, Courts in Argentina are required to determine whether or not Argentine constitutional law integrates a loose monist system, under which Argentina would only be bound by the texts of the Conventions and by its own interpretative practice of them; or, else a plain monist system, under which Argentina would also be bound by the interpretative practice jointly developed by other relevant officials of international human rights law.

The answer to this question shouldn´t be expected to be drawn from a "neutral" reading of the sources of international law, as if these were "out there", waiting to be discovered[25]. The question regarding which are the relevant sources of law is perhaps one of the most disputed ones in the field of international law, given the fact of the plurality of actors and practices that converge in its construction[26].

The discursive rules used by both compositions of the Court show that they share a plain monist conception of the system of international human rights law. In *Portal* and *Tanus,* the Court extended the formal (textual) frame of international sources of human rights law, incorporating as (new) binding sources, some interpretative rules issued by the American Court of Human Rights in cases not involving Argentina. Similarly, in *F.A.L.*, the

25 About the impracticability of formalism in the field of international law, see for example Peat, D.; Windsor, M. (2015). Ob. cit., 5.

26 See Venzke, I. (2012): Ethos, ethics and morality in international relations. *In The Max Planck encyclopedia of public international law* (Rüdiger Wolfrum ed., Oxford University Press 2012).

Court extended the formal textual frame, incorporating as binding, some interpretative rules stated in recommendations and reports that had been issued by different Human Rights Committees.

The Court thus assumed in both stages an underpinning plain monist conception of the international system and practice of human rights, according to which national and international bills of rights should be interpreted and applied in a unique, coherent, and systematic way, by all national and international authorities.

5. A different lecture of the "semantic" margin of interpretation

The concurrence of both Court's compositions in a plain monist system of international human rights law does not hide a deep disagreement concerning the way of balancing the sources within the system. In effect, the Committees´ recommendations and reports that were used in *F.A.L.* as interpretative rules leading to the recognition of a right to abortion in cases of rape already existed at the time that *Tanus* and *Portal* were decided. Nevertheless, the Court did not even discuss their applicability to the interpretation of Article 4.1 ACHR, using instead the interpretative declaration introduced by Argentina to the CCHHR.

Instead, the Court in *F.A.L.* dismissed the interpretative force of this declaration, altering it in favor of the named recommendations and reports. In light of this deep disagreement, it is pertinent to analyze the extent to which one and other "pre-interpretative judgments" were actually respectful of the textual, grammatical and discursive rules that make up the semantic margins of interpretation.

Article Three of the ACHR asserts the right of every *person* to be recognized as a *legal* person, and Article Six of the ICCPR states that "every *human person* is entitled to its inherent right to life". Had the Court interpreted these rules in isolation, the Court in *F.A.L.* could have argued that unborn human beings are neither "persons" in the language of the former Convention, nor "human *persons*" in the language of the latter. Nevertheless, at least from a textual point of view, this interpretation is undermined by Article 4.1 ACHR that adjudicates the right to life; not to every person, but to every human being. Thus, it clarifies that the concept of "person" in Article Three refers to every human being. This co-extensive scope of the concepts of person and human being remains even clearer in the case of UDHR Article Six, which directly recognizes the right of every human being (as well as every person) to be indeed recognized as a person.

Along these lines, it is understandable that the Court in *F.A.L.* did not make any effort to deny the *nasciturus'* wholly legal personhood, as the

American Supreme Court had done previously in *Roe vs. Wade*[27]. Simply put, the textual frame of interpretation did not allow this reading. On the contrary, and perhaps paradoxically, the Court affirmed both the personal *status* of the *nasciturus* and its right to life, while simultaneously denying the State´s obligation to protect it in every case. Here it should be reminded that the Court asserted that the obligation of the state "to legally protect the *nasciturus* as a subject or rights", required by ACHR Article Three, should be interpreted together with Article 4.1 that only requires from States "a limited legal protection to the *nasciturus'* right to life"[28].

Regarding the choice made in *F.A.L.* not to abide to the Argentinian declaration in the CHRCH, neither a textual nor a discursive analysis leads to a *conclusive* denial of its binding force. From a textual point of view, an interpretative declaration is, by definition, a unilateral assertion of the meaning of one's statements. If the statements at stake are part of an International Convention, it necessarily follows that the declaration partakes the binding force of the rules to which it applies. In the context of international conventions, declarations are understood as unilateral expressions of the sense that a certain State bestows to the obligations thereby assumed, that might be useful in case of future interpretative conflicts, but which are not essential conditions either for their acceptance or continuation. Instead, reserves always function as a necessary and exclusionary condition both for becoming and for remaining a part of a Treaty or a Convention. Notwithstanding, it is widely accepted that this difference does not flow from the title under which either declarations or reserves are incorporated to Treaties and Conventions. States rather frequently introduce actual reserves under the name of interpretative declarations (so called "conditional declarations"), whose intended effects are exactly the same as those of the reserves. Under this light, the Court was required to argue (but did not argue) in this case why and how did it come to the conclusion that the interpretative declaration incorporated by Argentina was an actual declaration and not, instead, a "conditional" one[29].

Neither do the textual and discursive meanings of "recommendations" and "reports" lead to the conclusion that their binding force outweighs that of interpretative declarations. From a textual point of view, a recommendation is, by its very definition, an optional counsel. In respect to reports, nothing in the definition of a "report" includes a binding nature. From a discursive-contextual perspective, it should be added that none of the norms

27 Roe v. Wade, 410 US 113 (1973): 158.

28 Cons. 10.

29 See "Report from the UN Committee on International Law", 2011, directives 1.3.2, and 1.4.

ruling the effect of recommendations and reports state that these are binding for the admonished State, let alone third party States.

Sticking to this discursive analysis, it should be added that although the *stare decisis* strictly considered is not incorporated to Argentine constitutional law, there remains an entrenched practice of explicitly justifying brusque shifts in case law. Nevertheless, the Court in *F.A.L.* did not say a word regarding the need to overrule the use of *Tanus-Portal* in the interpretative declaration as a valid interpretative rule. At this point, we might conclude that the Court in *F.A.L.* was not respectful of the semantic margin of interpretation. Nevertheless, it may still be argued that this semantic margin left a thin, but real, open window for the named shift. In effect, once the Court in *Tanus-Portal* adopted a plain monist system conception of human rights law, what actually needed to be justified was the substantial conception of justice that led the Court to make such a brusque shift in its understanding of international human rights law. Is this shift sustained by compelling reasons of justice that justify the loss of legal coherence?

6. The deep discussion at the justificatory level

The Court´s decision to give prevalence to the interpretative declaration of the CCHHR in *Tanus-Portal* was explicitly acknowledged as follows:

> "The right to life is the chief natural right of the human person, previous to all positive law […]. The human being is the central axis of the whole legal system and, as an end in itself –beyond its transcendental nature– its person is inviolable and constitutes a fundamental value respecting which all other values are instrumental" (Cons. 12).

This paragraph contains quite an explicit statement of the justificatory, anthropological and semantic postulates that sustain the Court's decision to give precedence to the Argentine interpretative declaration in the ICHR, over the rest of the sources. Regarding the justificatory postulate, the whole legal practice is justified on its potential to secure respect of pre-existing, natural rights that stem from the inviolable, personal nature of *every* human being. The final value that justifies the existence of legal practices, both in general and in the concrete case of Argentina, therefore acts in its ability to secure the named, natural rights and their root, human dignity.

The anthropological and semantic tenets implied in this final value are in fact two sides of the same coin. From an anthropological perspective, it is understood that all human beings are persons, independently of their physical conditions. Thus, all human beings are dignified, dignity being the

name for the "inviolable nature" of each and all persons or human beings. This anthropological view falls within the semantic postulate, according to which neither the legal concept of person nor rights generally are conceived as purely social or institutional constructions. They are, instead, comprehended as intelligible forms, stemming from the intelligible nature of the human being.

The teleological horizon sustaining the Court´s decision in *F.A.L.* is not as explicit as it was in *Tanus* and *Portal*. Nevertheless, even if the meanings of the concepts of person and dignity are not defined, they are somewhat made apparent in the way the Court uses them, notably when balancing the right to life of unborn human beings against women allegedly contradicting rights to dignity and non- discrimination.

In the first place, the Court switches the pivotal role assigned in *Portal* to "previous natural rights" from "principles of equality and non-discrimination", which are now taken as "the axis of both the national and international human legal order"[30]. In the second place, the meanings of both principles are determined following (a chosen section of) the international human rights´ interpretative practice. This switch reveals a conventional semantic postulate, according to which the meaning of legal concepts is not determined by any intrinsically intelligible reference, but rather by the legal interpretative practices themselves. Using Putnam´s distinctions, the meaning of legal concepts is conventionally constructed, and this construction "is prior to reference"[31].

The Court then more deeply analyzes the (conventionally constructed) meaning of "non-discrimination", asserting that decriminalizing abortion only in the case of insane women is an unreasonable discrimination against victims of rape and, furthermore, it entails using women as "means" and thereby affecting their dignity. One may ask at this point why is the Court only concerned with the use of women as a mean to protect unborn human beings, and not with the likewise use of unborn human beings as a mean to protect women's dignity. The fact that the Court does not even pose this obvious question sufficiently reveals the justificatory horizon it is us-

30 (Cons. 16).

31 As it is well known, the alternative between giving priority to reference over meaning when determining the sense of concepts was stated and developed in the field of Philosophy of Language by Saul Kripke and Hillary Putnam, in Kripke, Saul (1980), and Putnam, Hillary (1975). These theories were applied to the problem of legal interpretation by Michael Moore, among many other works, in (2001): 2091 and, with some differences, by Nicos Stavropoulos (1996), and David Brink (2001): 12-65. For a critical revision of these theories see Bix B. (September 2003), "Can Theories of Meaning and Reference Solve the Problem of Legal Determinacy?". *Ratio Juri, V 16,* N° 3,281-295. About the role of semantics in legal interpretation see, also, Wróblewski, Jerzy (2001): 108; and Zambrano, P. (2009). Ob. cit., 131-152.

ing in interpreting the legal practice as a whole. That is, a self-conflicted understanding of human rights according to which rights are undetermined spheres of liberty with no other limit than the most probable chance of clashing with others´ liberties, and the entrenched way of solving similar clashes in a given legal practice[32].

Conflictivism is actually the other side of the coin in semantic conventionalism. If legal concepts are pure conventional constructions, there are no reasons why they should be constructed in one way or another, nor why the scope of human rights should be traced to one point or another. All we are left with are more or less disguised but polite passing conflicts of interests, where the winning segment is blessed with the language of rights, while the losing segment is stricken from the discursive practice, at least for the time being.

7. A comparative synthesis from the justificatory and semantic points of view[33]

The comparative synthesis between both stages of the Court's rulings show the unfolding of a semantic-justificatory debate relating to the most radical, conceptual distinction in the world of law: the one that separates things, on the one hand, and persons, on the other. The substantive question at stake is whom do we call the person or subject of the Law, why, and what does it mean to be a person from a legal point of view.

But this justificatory or teleological topic cannot be solved if no viewpoint is previously adopted in relation to the joint, but more abstract semantic and epistemic debate: how are things generally classified in the world, and, in particular, in the legal field? Are conceptual classifications the result of a reflexive and somewhat explicit social debate that the Law is destined to adopt, as far as there be prior consent? Are concepts the interested impositions of a social group, picked up by the Law and clothed with its coactive force? Or are they something similar to the representation of reality, which emerges before us, already classified, if not thoroughly, at least partially?

Regarding the unborn being's legal personhood, these questions could be restated in the following way: does the Constitutional judicial practice

32 See Cianciardo, J. (2009). *El principio de razonabilidad. Del debido proceso sustantivo al moderno juicio de proporcionalidad*. 2ª Edición. Buenos Aires. Ábaco, 130-131.

33 The reflections deployed under this title are deeply inspired in, and connected to, Zambrano, P.; Sacristán, E. (2013). "Semantics and Legal Interpretation. A Comparative Study of the Value of Embryonic life under Argentine and U.S. Constitutional Case law". *Journal of Civil Law Studies*, 130-140.

here reviewed *find* the personal or un-personal nature of unborn human life as the product of some sort of social construction? Or instead, does it view it as something already given to intelligence, as an *ob*-jectum? Which are the semantic and epistemic theories implied in the interpretative arguments used in one and other judicial stage?

Perhaps aiming for profit from the credibility of scientific discourse, the Argentine Supreme Court in *Portal* based its interpretation concerning the moment of conception almost exclusively on geneticists´ findings[34]. Nevertheless, it should be noticed that the Supreme Court in *F.A.L.* managed to uphold the same normative framework and scientific concepts and findings, and still attributed to them quite different moral and legal consequences. The availability of the same scientific findings and of the same normative framework for both compositions of the Court shows that the decisions in *Tanus, Portal,* and *F.A.L.* were neither grounded in a neutral scientific description of human life, nor in a downright legal interpretation of the normative framework. The main questions being posed to both compositions of the Court were neither "when do genetics situate the appearance of a new human being?", nor "do valid legal rules grant a right to life to unborn human beings"? The most fundamental question remains whether or not unborn human beings are entitled to the same concern and respect that is due to born human beings and, if so, why.

Along this line, the strongest reason sustaining the *Tanus-Portal* pre-interpretative and interpretative conclusions was an answer to this meta-legal question, according to which in the first place, the reference of the concept of dignity is co-extensive with the reference of the concept of human nature and therefore independent of the factual possibilities of either being actualized. Therefore, all human beings are persons both in an anthropological and legal sense. Secondly, it is this reference that determines the *legal* meaning of "dignity" and of the broad concept of fundamental rights, and not the other way round. Accordingly, the content of the obligations of the Head of the State in order to secure rights is not *only* determined by a self-sufficient legal tradition, but *also* and mainly, by the nature of this reference.

Although the deepest reason sustaining *F.A.L.*'s pre-interpretative and interpretative conclusions is not as obvious as it was in *Tanus-Portal*, it is still noticeable. Once it was recognized that unborn human beings were legal persons, what justification was there to assert that women are entitled to a right to receive public health assistance in receiving an abortion? It should be once more remarked that the Court could have only affirmed that women are entitled to a right to not be penalized. In so doing, it might have

34 See footnotes 15 et sq.

argued, for example, that criminalizing women in cases of abortion in rape induced pregnancies is a disproportionate and thus unreasonable politic. Notwithstanding how controversial this line of argument might be, it does not necessarily entail negating all practical effects to the recognition of legal personhood to unborn human beings.

On the contrary, the positive obligation of the Head of State to direct government assistance for abortion procedures is nothing more and nothing less than an obligation to sacrifice one holder of rights (the fetus) in favor of another (the mother). This in turn can only be understood as an underpinning downgrade of the inherent worth of the former in relation to the latter. The inquiry may still go further, in search of the reasons for this downgrade, to which the Court in *F.A.L.* would answer pointing to the discursive dynamics of the legal practice itself, and saying "it is the way the concept of "person", as applied to unborn human beings, has been understood in the field of human rights international law".

It is as if Wittgenstein's theory of "language games" had been radically reinterpreted, and the "legal game" had been taken to be completely alien, both to other "language games" and to its own reference. This aspiration for a plain autonomy of legal language discloses at least two semantic assumptions. First, that the justificatory viewpoint of interpretation is internal to the legal practice. Secondly, that the reference of legal concepts is absolutely determined by their use within the practice. However, in application both assumptions are mutually dependent. If the legal concept of personhood bears no relation to the moral concept of the person, or even to scientific findings about human life, it seems that the legal concept is nothing more than a product of legal decisions[35].

8. Which semantic and justificatory theories best fit with constitutional law's goal?

Two semantic postulates that ground the two interpretative stages are here compared: traditional or "criteria" semantics on the one side, and a sort of "light" –with ample space for social construction– realist semantics on the other. The last question to be posed is which of these is more coherent with the categorical and universal nature of fundamental rights?

The discussions regarding which semantic *praxis* better fits these features of fundamental rights are ample but unfit to be reviewed in this ar-

35 For a critical comparison of these two ways of understanding "human dignity" in the legal field, see Zambrano, P. (2016). "Understanding Human Dignity, or Saving Dignity from Ockam's Razor". *Jurisprudence.* Hurt Publications, 150-155.

ticle. However, it seems appropriate to point out that they lead us back to the basic choice that was stated above, i.e., that either fundamental rights are social constructions that precede and determine their own reference or else their reference –some basic human good– precedes and determines its meaning.

If the meaning of fundamental rights is exclusively the product of a more or less controlled social construction, and what is more important, if construed meaning determines its own field of reference, it would be extremely hard explain the categorical and universal nature of rights. By contrast, both the universal extension as the categorical nature of rights would depend upon the will leading the social construction of meaning, which is almost impossible to reconcile with the purpose of any constitutional practice, of "making the exercise of public authority accountable neither to the many, nor to the few, but to human dignity of each and every person subject to law's authority"[36].

Some political philosophers sustaining this constructive approach to fundamental rights principles have openly admitted that the approach is irreconcilable with their categorical and universal nature. Particularly, when applied to the legal concept of person[37]. Others are much more reticent to admit this failure openly. For example, Ronald Dworkin has expressly rejected what he deems to be a criterial, semantic approach to Law, according to which all legal concepts –including the concept of Law– are constructed from inside the practice itself, with no grounds other than the sheer fact of convergence about their criteria of use within the practice. Against this claim, Dworkin contests that legal concepts are interpretative and thus there is no need of fundamental convergence in their use[38]. Secondly, he has pointed out that legal and political concepts are the product of a collective, constructive practice in the light of moral and political values and, in the end, reflected in the light of a substantive conception of to what counts as a good life. In this sense, he aims at distinguishing himself not only from classical, positivistic approaches to Law which claim that the neutral nature of legal concepts' constructive process; but also from Rawls' *Theory of Justice*, which aspires to exclude "comprehensive conceptions" from the constructive process of political values[39].

Ronald Dworkin answers to both of them, explaining that all interpretative concepts are the product of a holistic, constructive practice that

36 See Weinrib, J. (2016). Ob. cit., 18.

37 See for example Rawls, J.ohn (2005): XVI. A Theory of Justice. the belknap press of harvard university press cambridge, Massachusetts.

38 See Dworkin, R. (1986). Ob. cit., 46; (2006). Ob. cit., 12, 151.

39 See Dworkin, R. (2006). Ob. cit., 160-161; 225-226.

synthesizes natural, moral, legal, and political concepts. This holistic account seems much more faithful to legal practice than the "criterial one". In effect, as it has been shown above, both compositions of the Court rely on a holistic approach to the concept of legal personhood, no matter how much both compositions try to disguise this fact.

Now, as we have said above, it is obvious that criterial semantics imply a negative answer to the question of deference to reality. But the opposite is not obvious. For the question is not only how much are legal concepts related to moral, political or natural concepts, but also, if there is anything prior to the whole conceptual constructive process itself. And to this, Ronald Dworkin would answer "no", or better, "it doesn´t matter": the only ground for the whole constructive process is a "reflective equilibrium" between coherence and conviction[40]. However, this mix of conviction and coherence is all that Dworkin claims for moral objectivism.

According to him, there is no place in his theory –nor any need–, neither for self-evident or self-justified practical propositions nor, at least, for the claim that these propositions bear any relationship with human nature[41]. As well, it should be noted that although self-justified practical propositions are generally the object of moral and political convictions, this is neither always the case nor, much more important, the epistemic justification.

Now, without a reference to self-justified practical propositions, there is no critical instance against which to confront the whole conceptual constructive process[42]. Instead, if reference leads the abstraction of meaning, when legal authorities construe intricate and obscure meanings –as, in fact, they have already done in relation to the legal concepts of "person"–, the reality referred to by these legal and moral concepts would cast light on their abuse in the use of language. For no matter how much *imperium* courts may have to construct and reconstruct concepts in the generic social sphere, and in the world of law in particular, they lack the power to transform and, least of all, to deny the referential frame of this construction. In other words, if reference precedes meaning, then the human or fundamental right principles, and their characteristic universality –for each and

40 See *Idem,* 162.

41 See Dworkin, R. *Idem*: 226-227.

42 Both the possibility of grounding moral and legal objectivity in self-evident practical principles, and the possibility of acknowledging a connection between these principles and natural human ends, has constantly be defended by the New Natural Law School and, especially in the field of Law, by John Finnis. See, among many other works, Finnis, J. (2011). *Natural Law and Natural Rights.* 2nd. Edition. Oxford University Press, chapter 23-24; and Finnis, J. (1991). "Introduction". In *J. Finnis* (comp.). *Natural Law*. Dartmouth. Volume I, xi.

every one– and absoluteness –in all cases – would be invulnerable to the abuses of language[43].

Having reached this stage of the discussion, it is worthwhile asking, one last time, which semantic practice fits better in the conceptual, and, therefore, the necessary characteristics of human rights? A practice that construes concepts from a *vacuum*, or a practice that construes them out with a grasp of reality? In the latter case, how does the reality referred to by the concept of human rights narrow down the construction of the legal concept of person? Is it not by imposing the only condition that its admittance be universal –for every human– and absolute –in each and every situation?

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43 For an approach to the constructivist semantics that underlies the line of cases following *Roe,* see, Breen, J. M.; Scaperlanda, M. A. (2006). "Never Get out the Boat. *Stenberg vs. Carhart* and the Future of American Law". *Connecticut Law Review,* 39, 304.

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