

The Argentine Supreme Court of Justice and the Equality before the Law in Crimes against Humanity

Supremo Tribunal de Justiça da Argentina e a Igualdade perante a Lei nos Crimes contra a Humanidade

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Abstract: The aim of this paper is to analyze a selection of arguments used by the Argentine Supreme Court to reduce the sentence of individuals convicted of crimes against humanity. The focus will be primarily centered on “Muiña’s case”, in which a lenient outdated ruling was made. The questions that this work will try to answer revolve around the court’s merit in issuing this lenient ruling to Muiña’s case and its justification. First, Muiña’s case is analyzed in depth. Then, a critical analysis about the ruling and a decision concerning the existence of a true justification will be developed. Finally, we will discuss the appropriateness of the Court’s decision in Muiña’s case as opposed to the decision made in “Batalla’s case”, in which a less beneficial law was applied retroactively.

Keywords: human rights; interpretation; sentence; permanent crime; supreme court.

Resumo: O objetivo deste artigo é analisar uma seleção de argumentos usados pela Supremo Tribunal de Justiça da Argentina para reduzir a sentença de indivíduos condenados por crimes contra a humanidade. O foco será principalmente centrado no “caso Muiña”, no qual foi proferida uma decisão benevolente desatualizada. As questões que este trabalho tentará responder giram em torno do mérito da decisão do Supremo Tribunal em emitir esse julgamento benevolente no caso Muiña e sua justificação. Primeiro, o caso Muiña é analisado em profundidade. Em seguida, será desenvolvida uma análise crítica sobre a justificação. Por fim, discutiremos a adequação da decisão da Corte no caso Muiña em oposição à decisão tomada no “caso Batalla”, no qual uma lei menos benéfica foi aplicada retroativamente.

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Palavras-chave: direitos humanos; interpretação; sentença; crime continuado; Supremo Tribunal de Justiça.

Introduction: philosophic assumptions

This paper will analyze two decisions made by the Argentine Supreme Court of Justice. This Court deals with the interpretation of the constitutional norms and principles, which allows for the understanding of the arguments expressed in the sentences as mostly political and moral in nature. In other words, concepts such as justice, liberty, equality and general welfare, as well as their relationship with the judicial system of the country or the government actions, are objects of the Court's jurisdiction.

Even when the decisions of this Court operate as precedents of great importance for the lower courts and the rest of the state branches, they are not the only references that these courts may consider to make decisions on cases. Argentina's Civil Law system allows the courts to make decisions based on the crimes being judged, the rule applicable to these crimes, and the solution that this rule provides. Many times, this mechanism is not clear, and second order arguments are needed, giving origin to a justification as regards the applicability of a rule. For example, when two rules are valid in a particular case, it is necessary to justify which rule is applicable and why, and how to construe both rules in this situation to solve the case³.

Considering these circumstances, in this work we will deal with a specific and nodal problem for Argentina: equality before the law. What happens when equality before the law only benefits people who have committed crimes

³ Carlos Nino (2003, pp. 321-338) has characterized the performance of Civil Law jurists by stating that they begin with a dogmatic acceptance of positive law to construe the rules, so that their contributions fit certain rational and axiological ideals. Their purpose is to make the construction of the solution look as derived from positive law and not as an amendment of it. In order to achieve this, they base their work on a series of premises, such as the rationality of the legislator and the absence of legal loopholes. This implies that contradictory or meaningless acts cannot be passed, and that there are no gaps. Thus, all the cases have a solution given by positive law.

against humanity? Is it worth abiding by equality before the law in these cases? Or must the principle of constitutionality be construed in a restrictive way? With a non-unanimous decision, in “Muiña’s case”, the Argentine Supreme Court determined that the rules limiting criminal benefits should be expressly determined; otherwise, they should be equally applied to all people.

The objective of this paper is to defend the decision of the Supreme Court because the rules and principles appealed are valid and justified. To conduct this analysis, we first describe the historical background of the Argentine Military Dictatorship and Muiña’s case. Later, we reconstruct the arguments behind the majority and minority votes. We particularly consider the construction of Section 2 of the Argentine Criminal Code and the calculation of the prescription of the crimes committed. Finally, we consider Batalla’s case and its relationship to Muiña’s case.

Historical Background

On March 24th, 1976, the constitutional government of Argentina headed by President María Estela Martínez de Perón was overthrown by a military coup. This new military government adopted the name of “National Reorganization Process”. During the period of the military dictatorship, many people were arrested for their political ideas or just because they were supposedly connected to left-wing ideologies. People were tortured in clandestine centers spread all over the country in strategic locations. In addition, a lot of political prisoners were killed or disappeared⁴.

⁴ There is an illustrative “open letter to the military government” written by Rodolfo Walsh. He was a journalist that reported the crimes committed during the first year of the military government. It is available on: https://www.espaciomemoria.ar/descargas/Espacio_Memoria_Carta_Abierta_a_la_Junta_Militar.pdf

Over the years, international organizations started to complain about violations of Human Rights committed by the military government. The combination of economic problems, a high level of social protest, and the defeat in the Malvinas/Falklands War against England was the catalyst for the dissolution of this dictatorship in 1983.

In 2017, the decision of the Argentine Supreme Court in Muiña's case gave origin to a huge debate in the legal field. Such decision was also a source of much controversy in the Argentine society because it dealt with crimes against humanity perpetrated in the last military dictatorship and the rights of a criminal related to them.

A summary of his judicial history could be presented as follows: In 2011, the Oral Federal Criminal Court No. 2 of the City of Buenos Aires sentenced Luis Muiña - an officer and also a member of a security group during the last military dictatorship in Argentina - to thirteen years of imprisonment for crimes against humanity. The sentence was subject to the calculation of the pre-trial detention, and the expiration of the sentence imposed when the decision became final. The latter happened when the Federal Chamber of Criminal Cassation confirmed the sentence.

The Oral Federal Criminal Court calculated the detention time and the penalty according to Section 7, Act 24.390⁵, basing the argument on Section 2 of the Criminal Code⁶. This act ordered the following computation: two days for each day served in pre-trial detention after a two-year time (2x1 benefit). The problem here was that the Act 24.390 was enacted in 1994 and repealed in 2001. In other words, the act was in force after Muiña's crimes and before his detention. In Argentina, this benefit is called *intermediate lenity*. According to Section 2 of

⁵ Section 1°: Pre-trial detention may not exceed two years. Section 7°: Once the two-year term provided for in Section 1 has elapsed, one day of pre-trial imprisonment shall be computed as two days of imprisonment or one day of confinement.

⁶ Section 2°: If the act in force at the time of committing the crime is different from the act in force at the time of sentencing or in the intervening period, the more lenient act shall always be applied.

If a more lenient act is passed during the sentence, the penalty shall be limited to that established by that act. In all the cases of the present section, the effects of the new act shall operate as of right.

the Criminal Code, courts are compelled to apply the most lenient act, even if it was passed before the sentence. Up until this decision, there was a unanimous agreement among the jurists and jurisprudence to accept this benefit. However, as Muiña was being prosecuted for crimes against humanity, the prosecution appealed the Oral Federal Criminal Court's decision.

The Court that had to decide the appeal ordered to revoke the calculation made by the previous court on the grounds that the provisions of Section 2 of the Criminal Code did not apply to the case, since the right to the most lenient treatment was based on the social assessment of the crimes to which it applied. This is clearly explained by some jurists as an exception to the principle of non-retroactivity of criminal law, whose political basis lies in the unreasonableness of dictating or maintaining the execution of sentences for actions that are no longer considered crimes, or when the severity of the penalty has been diminished. Moreover, the prohibition of criminal retroactivity seeks to protect defendants from a stiffening of the penalties, but it does not prevent them from benefiting from a reduction of the penalties (Bacigalupo 1999, p. 188). Since this assessment was not modified with the enactment of Act 24.390 with respect to crimes against humanity, it is not applicable to the case. This decision was appealed before the Supreme Court, which ordered the application of the 2x1 benefit. Even when different analyses could be made regarding the ruling, in this paper we will focus on analysing the arguments stated by the Justices.

The competence of the Supreme Court – in matters of appeal – is limited to questions of a *federal nature* or decisions that are contrary to the hierarchy of the rules established by the National Constitution itself. This situation makes the Court the *last interpreter* of the Constitution and, therefore, its decisions are generally limited to interpretative criteria. That is why the judgment does not question the facts that are the object of the appeal, but rather the arguments that are related to how Section 2 of the Criminal Code should be interpreted.

Legal Arguments of the Argentine Supreme Court

The Supreme Court based its decision on Section 2 of the Argentine Criminal Code. This section establishes that “If the act in force at the time of committing an offense or a crime is different from the one existing when the decision was pronounced or in the intermediate time⁷, the most lenient act shall always be applied. If a more lenient act is passed during the period in which the sentence is being served, the penalty shall be limited to that established by the more lenient act. In all the cases of this section, the effects of the new act will be fully operative”.

Majority Position Arguments

The votes of Justices Carlos Rosenkrantz, Elena Highton de Nolasco, and Horacio Rosatti represent the majority position of the Court⁸. The solution given by these Justices was based on a literal interpretation of the act: the text of Section 2 of the Criminal Code does not establish that crimes against humanity are exceptions to it; thus, it must be concluded that it is fully applicable to Muiña’s case. The arguments may be summarized as follows:

1. The first argument raised by the Justices is a defense of the literal interpretation of the act. As the same court has established in the precedents “Lodi”, “Vera González”, and “Banco de Mendoza Sociedad Anónima”, the first source of interpretation of an act is its letter. The terms used therein must not be understood as superfluous, but rather as having been used

⁷ It is the application of the most lenient act (either because it discriminates the conduct, reduces the sentence, or reduces the nature of the penalty) that has been put into effect after the beginning of the execution of the criminal action and has been repealed before the judicial sentence of the defendant.

⁸ Although the latter Justice developed his opinion in an independent vote, he shared the main arguments of the other two Justices, so we will not reconstruct this vote.

with a specific function related to expanding or limiting the concepts applied. Furthermore, as held in “Ballvé’s case”, when there is no effort in understanding an act, the latter must be applied directly.

Bearing in mind these precedents, the Justices understood that the sections of the Argentine Criminal Code applicable to this case were clear: the pre-trial detention was in the intermediate time. Moreover, Section 3, conversely, establishes that “In the calculation of pre-trial detention, the act that is most lenient to the defendant will be observed separately”.

Thus, as Act 24.390 is an intermediate act and legislates pre-trial detention, it is fully consistent with the rules established in the Criminal Code, which is the reason why the argument that denies the computation of the 2x1 benefit should not be accepted (Recitals 6 and 7).

2. In a democratic state, changes in the assessment of criminal conduct are documented through the enactment of new laws. However, Act 24.390 did not mean a change in the evaluation of crimes against humanity, but of the consequences of the excessive duration of pre-trial detention. In fact, this law regulates Section 7, paragraph 5 of the American Convention on Human Rights⁹, which establishes the requirement of reasonableness of the period in which a person must be tried (Recital 8).

3. In relation to the above points, the Justices were categorical in emphasizing that the crimes for which Muiña was convicted were “permanent crimes”. This is undisputed. However, according to Section 2 of the Criminal Code, retroactive and intermediate lenity must be applied to all crimes. Moreover, the defining characteristic of permanent crimes – like the disappearance of persons – is that they continue or that they are permanent as long as the fate or whereabouts of the victim has not been determined. In this case, Muiña was convicted of the disappearance of Jorge Mario Roitman, who at the time of the Supreme Court’s sentence was still missing. For this reason, the crime will

⁹ 5. Any person arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His liberty may be conditioned by guarantees to ensure his appearance at trial.

continue until Roitman is found. However, this characteristic does not preclude the possibility that, during the commission of the crime, a more lenient law may be applied (Recital 9).

4. If the legislators had wanted to exclude permanent crimes from the application of Section 2, they should have expressly stipulated it. Given their silence, it is not up to the judiciary system to make an extensive interpretation of this alleged exclusion (Recital 10).

The same argument should be made with respect to crimes against humanity. In this regard, the Justices pointed out that the Criminal Code establishes the opposite, since Section 2 uses the adverb “always”, which proves the universal applicability of the principle of intermediate lenity (Recital 7).

5. Should there be any doubt as to the application of Section 2 of the Criminal Code, it must be decided in favor of the accused. In relation to this, the Justices appealed to the well-known adage *in dubio pro reo* to explain that, when it comes to recognizing protected rights, one must appeal to an extensive interpretation; whereas, if it is a question of establishing restrictions to the exercise of rights, one must appeal to a restrictive interpretation.

In Muiña’s case, the discussion is directed toward the application of the benefit of intermediate lenity to a person convicted of crimes against humanity. In addition to the fact that the sections under discussion are clear in recognizing this right, a restrictive interpretation would openly violate the above mentioned adage, since circumstances not expressly recognized by the legislature would be included by way of interpretation (Recital 11).

6. Finally, the Justices understood that the best response that a law-abiding society can give to crimes against humanity is strict compliance with the laws and principles of the rule of law. Otherwise, it would be doing the same which is being fought and condemned. The principle of intermediate lenity is not only found in the Criminal Code, but also in Section 18 of the Argentine

Constitution¹⁰, Section 9 of the American Convention on Human Rights¹¹, and Section 15.1 of the International Covenant on Civil and Political Rights¹², international conventions that are part of the Argentine legal system. Moreover, both conventions have constitutional hierarchy¹³.

Thus, one could say that the majority vote of the court was near to a positive position – like Hart's¹⁴. That is, they want to show how the case was solved by the Section 2 of the Criminal Code. The literal interpretation was the best solution to the case. The Justices did not need to create a rule by the “interstitial” power, because Section 2 solved the case. Moreover, these Justices said that it was not necessary to follow moral or political principles to solve the case. The conclusion drawn by the majority vote of the court was that the appeal filed by Muiña should be upheld. Consequently, the calculation of the prison term should be made applying the intermediate lenity recognized by Sections 2 and 3 of the Criminal Code and Act 24.390.

¹⁰ Although the section does not expressly recognize it, there is a shared agreement among judges and jurists, embodied in institutional practices that the principle of lenity arises from an extensive interpretation of the constitution.

¹¹ Section 9. Freedom from Ex Post Facto Laws. No one shall be convicted of any act or omission that did not constitute a criminal offense under the applicable law at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If, subsequent to the commission of the offense, the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

¹² No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

¹³ In the Argentine regulatory system, the National Constitution itself establishes in Section 75, paragraph 22, that the American Convention on Human Rights and the International Covenant on Civil and Political Rights have constitutional hierarchy. Although there are several discussions on this point as to whether these treaties have an identical or inferior value to the constitution, it can be stated that it is the constitution itself that grants them a higher hierarchy than the laws.

¹⁴ We understand that the concept of “positivism” involves different ideas and positions. We do not pretend to ignore this. Rather, we want to show that the majority vote focus on the interpretation problem and to explain why the literal interpretation about Section 2 of the Criminal Code is clearly relevant to the case.

Minority Position Arguments

Justices Ricardo Lorenzetti and Juan Carlos Maqueda represent the minority position. Lorenzetti's arguments can be summarized as follows:

1. The decision in this case must consider the system of normative sources that make up the Argentine legal system. Thus, the National Constitution, human rights treaties, criminal and procedural laws must be interpreted in order to come to a coherent conclusion. For this reason, a literal interpretation of the law is insufficient to decide the application of a repealed law to an issue of institutional relevance. The Argentine legal system in its entirety must be considered, respecting its consistency, completeness and independence (Recital 7).

2. The case involved a conviction of crimes against humanity, as conceptualized by the same court in the precedent "Simón". In this precedent, the court determined that these crimes did not admit amnesty. On the contrary, in "Mazzeo's case", the court established that the prosecution of these crimes was part of the objectives of international law; therefore, pardon was not possible in these cases. Furthermore, these crimes did not have a statute of limitations, as the same court stated in "Arancibia's case".

For Justice Lorenzetti, these normative characteristics were not modified. Instead, they were considered as having consistency in the definition, qualification and prosecution of this type of crimes that remained unalterable throughout the judicial branch, to such an extent that it became a state policy ratified by the three branches of government at different times.

Bearing this in mind, Justice Lorenzetti affirmed that the execution of the sentence was part of the normative concept of crimes against humanity, so that an interpretation of the law could not imply the frustration of the prosecutorial purpose (Recital 7 of the vote).

3. For this Justice, the solution to this case required a weighing of the principle of retroactivity of the most lenient criminal law in relation to the norms referred to in argument 2.

This task, in the first place, requires a comparative analysis of all the laws containing the conflicting regulations. Their integrity must be observed, without taking isolated precepts from either one law or the other, so as not to create a legally non-existent alternative, and of a Praetorian nature. Secondly, it must be examined whether there is a change in the assessment of the crime being considered.

Lorenzetti concluded that the 2x1 benefit is not applicable in this case. The premises of his reasoning were the following:

a) It cannot be stated that the 2x1 benefit is based on Section 9 of the American Convention on Human Rights, Section 15 of the International Covenant on Civil and Political Rights, and Section 2 of the Criminal Code. In the precedent “Héctor Torea”, it was stated that penalties should not be imposed or maintained when the social assessment that may have justified them in the past was modified, in the sense that the conduct is no longer reprehensible or is reprehensible to a lesser extent (Recital 12).

b) The 2x1 benefit was not the result of a change in the reprobation of crimes against humanity, but it was approved as a mechanism aimed at temporarily limiting pre-trial detentions (Recital 13).

c) Act 24.390 is procedural in nature, which means that it refers to a criminal process rather than a Criminal Code crime. Thus, it cannot modify the social valuation of crimes against humanity, and it only applies at the time of its entry into force, as it is not retroactive (Recital 14).

d) As a result of these arguments, Act 24.390 cannot be considered as “more lenient”, since its purpose is not related to the assessment of the crimes, but as a rule for calculating the sentence for pre-trial detention exceeding two years (Recital 15).

4. “Arce’s precedent” (See the following page for details) is not applicable to this case, since in addition to the fact that Muiña's defence had incorrectly raised this claim, Act 24.390 benefited defendants who had been in pre-trial detention for a period longer than two years during the validity of the Act.

The appellant was seeking an ultra-active application, which was not admitted in the procedural considerations (Recital 16).

5. The permanent nature of the crime implies that, if during the period of consummation of the crime, two laws were in force, there is coexistence and not a succession of laws (which is included in Section 2 of the Argentine Criminal Code). Therefore, only one law must be applied, and that is the law in force during the last stage of the punishable conduct (Recital 17).

Justice Maqueda's main argument was the following:

1. The factual and normative circumstances of the present case are different from those judged in the precedent “Arce”. For this reason, it cannot be concluded that what was decided therein should be applied here. Indeed, in that precedent, the Supreme Court had to decide whether a criminal convicted of homicide was entitled to the application of the computation established in Section 7 of Act 24.390, even though such provision – in force at the time of the commission of the crime – was not in force at the time of the calculation of the sentence. The court endorsed the arguments put forward by the Attorney General of the Nation and stated that this law, which was in force at the time of the crime, was the one that should be applied; otherwise, a more severe law would have had to be applied retroactively, a situation prohibited by the principle of legality.

The nodal point that distinguishes the two cases is that Muiña's, in addition to having been convicted of crimes against humanity, is the perpetrator of a permanent crime - that is, one that has not yet ceased. Indeed, Muiña was convicted of the disappearance of Jorge Mario Roitman, who at the time of this sentence was still missing. This circumstance prevents the crime from being a consummated one, since the characteristic of the disappearance is the lack of certainty about the person.

The permanent nature of the crime implies that if two laws are in force during the consummation of the crime, the one in force during the last stage of the punishable conduct must be applied, even if it is the most severe one. This factual circumstance – according to the Justice – is different from that covered by Section 2 of the Criminal Code, which is characterized by a succession of criminal

laws, a situation in which the application of the more lenient law does apply (Recitals 8 and 9).

As it can be seen, in this position, the Justices focused in showing that the 2x1 benefit was not relevant to the case because the Argentine Legal System prohibited it. In other words, a comprehensive interpretation of the legal system would show that the crimes against humanity cannot benefit from the laws that decrease the penalty.

Disagreement with respect to the Concept of Legality in Crimes against Humanity

Having described the case and the arguments of the votes cast by the Justices, we must now turn to the conceptual problem involved in the principle of legality as applied to crimes against humanity. This is the point on which the disagreements between the majority and minority votes in Muiña's case lie.

Thinking about the construction of the legal syllogism for this case, a first observation is that the factual premise is determined: Muiña committed a crime against humanity during the Argentine military dictatorship and he was convicted of it. The existence of the crime, Muiña's responsibility and the sentence imposed are not in dispute. The problem lies in the value given to the calculation of the time that Muiña was in prison to assess whether he was entitled to the benefit of parole.

The purpose of this paper is to defend the majority position, and to show why their arguments are more reasonable than those of the minority position are. To do so, we focused on the normative interpretation of the principle of legality.

The Adverb "Always" ("siempre")

Part of the discussion was related to the scope of the legal precept of crimes against humanity. This principle is legislated in Section 2 of the Argentine Criminal Code, and it states that "If the law in force at the time that the crime was committed is different from the law in force at the time that the sentence is pronounced or in the intervening time, the more lenient law shall always be applied".

On the one hand, the majority position construed that the most lenient criminal law should be applied whatever the nature of the crime was - permanent, common or against humanity - because the text of the section does not differentiate among them, and the use of the adverb of time, "always" (*siempre*), refers to all cases. On the other hand, the minority's vote understood that the expression "the most lenient criminal law will always be applied" was limited by the international regulations incorporated to the National Constitution, which mandate the prosecution and punishment of crimes against humanity. Part of the problem is the interpretation of the scope of the adverb "always". In both votes, the interpretation of the adverb is different, and therefore, they differ in the scope of the most lenient criminal law.

Even if Section 2 of the Criminal Code did not distinguish the nature of the crime, it could be argued that the rule was clear, and therefore, it should be applied to all crimes. One way to solve this problem is to offer an argument based on the analysis of the meaning of the adverb and its syntactic function in the sentence.

The word "always" is an adverb, and its meanings in ordinary language are "the whole time or any time", "for all time or for an indefinite time", "perpetually or forever". Another assumption takes place when the adverb is subject to a particular conditional marker (provided that, unless, except that, etc.). The adverb "always" has limitations because it is subject to a condition. The text of Section 2 of the Criminal Code does not contain a conditional clause, as would be the case if it had been "the criminal law will apply the most lenient law except

in the case of crimes against humanity”, or “the most lenient criminal law will apply unless it contradicts the international treaties assumed by Argentina”.

According to this, we can distinguish two problems as regards the minority vote. First, the use of the adverb “always” in the text of Section 2 of the Criminal Code is not subject to any conditional clause. Moreover, even if a conditional were present, it would need to expressly state in what way it would limit the temporal scope of the adverb.

An objection to this argument could be that a comprehensive interpretation of the legal system can limit the scope of the legal precept. According to this, although Section 2 of the Criminal Code says “always” and does not clarify to which crimes it should be applied, the section should be construed in a manner consistent with the principles that compelled the Court to punish the crimes against humanity. If this were the case, sufficient reasons should be given to argue that a literal interpretation is not consistent with the legal system. However, neither the National Constitution nor the American Convention on Human Rights expressly contains a condition for applying the most lenient criminal law to crimes against humanity. On the contrary, its application arises from the International Covenant on Civil and Political Rights (Section 15.1).

Moreover, a proponent of the minority position would defend the exclusion of crimes against humanity for intermediate lenity by appealing to the rules of language in the legal field. To this end, it could be argued that the rules of natural language do not simply apply to legal language, but that the concepts of law form a specific technical language that generates a conceptual framework, within which the concepts acquire a meaning of their own (Strawson 1992)¹⁵. In other words, legal concepts, although expressed in natural language, acquire their own meanings in the field of law. In this case, the intermediate lenity principle must be understood in relation to norms regarding crimes against humanity. That is, a comprehensive interpretation of the Argentine Legal System shows that crimes against humanity cannot take advantage of acts that decrease the penalty. For this reason, the 2x1 benefit cannot be applied to Muiña’s case.

¹⁵ For a specific analysis about civil law, see Agüero-San Juan (2018) and Moreso (2004).

While it is true that the meanings of legal concepts build up in the legal conceptual network, it does not follow that the adverb “always” is conditioned to the fact that crimes against humanity have not been committed. At this point, the minority position should be able to explain how the principle of legality is related to the calculation of sentences for these crimes and, furthermore, what is the criterion for justifying this decision. As it will be explained below, even appealing to a comprehensive interpretation of the legal system, the best reconstruction of the principle of intermediate lenity is unconditional.

Permanent Crimes against Humanity and Intermediate Lenity

It is true that the minority's argument was not only based on the fact that the crimes for which Muiña was convicted were crimes against humanity, but also on the fact that one of these crimes was permanent. In fact, at the time of the conviction, Roitman was still missing, so the crime continued to be current. Therefore, it was not appropriate to speak of intermediate lenity, but of a succession of laws, which implies that only the last of them applies.

However, the permanent nature means that intermediate lenity is allowed to be. Since this type of crime is permanent, Act 24.390 was in force in that intermediate time. There is a general agreement among Argentine jurists that the most lenient law can be applied even if it has been passed after the crime was committed but before the sentence. In one of his works, Eugenio Zaffaroni argues that the most lenient law is the one that enables the least exercise of punitive power, put into effect from the beginning of the execution of the crime and before the exhaustion of the effects of the imposed penalty. More than two criminal laws may succeed each other between these moments, but the more lenient one is always applied, even if it is the intermediate one or one of them (not in force at the time of the commission of the crime or at the time of the exhaustion of the effects of the conviction or sentence). (Zaffaroni 2006, p. 104).

Although the act began to be executed before the entry into force of the law, given its permanent nature, the execution went through the validity of the law. This doctrine of intermediate lenity was held by Francesco Carrara (1977) to justify the application of the more lenient criminal law.

Interpretation Criteria and Conceptual Elements in the Principle of Intermediate Lenity

The clarification of interpretation criteria or conceptual elements is not a simple task. An activity of rational reconstruction is necessary to clearly visualize these components in legal reasoning and the consequent application of the law. The interpretation criteria - or conceptual elements - used by the dissenting vote to determine that the most lenient criminal law is not applicable to permanent crimes, and in particular, crimes against humanity according to the minority vote were two:

1. The absence of changes in the assessment of crimes against humanity. Indeed, part of the reasons for preventing the application of intermediate lenity was based on the fact that there were no institutional changes that would allow us to affirm that these crimes should be treated more leniently. On the contrary, there is an institutional history to prosecute and punish these crimes to such an extent that it is possible to recognize it as a state policy.

2. The execution of the sentence is part of the same normative concept of crime against humanity. Hence, even if Muiña had been tried and convicted, acts as if the 2x1 benefit cannot affect the computation of the number of imprisonment days.

These two elements are extremely confusing. The first confusion is between normative principles and policy guidelines. In *Talking Rights Seriously*, Ronald Dworkin argued that while policies are those standards that propose a goal to be achieved - such as an improvement in some economic, political, or

social feature of the community -, principles constitute a requirement of justice, equity, or some other dimension of morality (Dworkin 1978, pp. 22-28). Thus, it is true that the political guidelines regarding crimes against humanity have remained unchanged, since trials and convictions are being carried out throughout the country. There is a special division created by the Attorney General's Office to prosecute the repressors of the dictatorship. There is a constant repudiation of the different bodies and levels of government towards these crimes and their perpetrators. Moreover, the state and the government created policies of "memory and justice" that allowed for a critical reconstruction of the events that took place during the dictatorship in order to repudiate state violence and crimes against humanity.

However, these policies were not at issue in this case. The question here was whether the principle of intermediate lenity applied to offenders convicted of crimes against humanity perpetrated during the last military dictatorship. This was where the concept of principle came into play, since the issue was specific to the field of justice, in the sense that the existing rules and principles were applied generally to ensure equality in a democratic state. Although the application of this principle is not welcome for certain crimes, the fact is that its legitimacy was fully in force. Moreover, it is widely agreed that lenity is always applied retroactively or intermediately. This situation, coupled with judicial impartiality, requires recognizing that this case is not exempt from its application.

Similarly, the possibility that sentencing is part of the normative concept in crimes against humanity cannot be accepted. There is broad agreement that punishment is analytically distinguished from crime in this regard. So much so, those two different procedural moments are involved: on the one hand, there is the guilty verdict and; on the other, there is the determination of the punishment. Although it is true that they are deeply related, the seriousness of the crime will necessarily affect the sentence. However, it does not follow that the penalty is part of the crime. The execution of the penalty is framed within the sphere of political guidelines rather than the content of the normative concept itself, since it is the legislators who are concerned with determining how the

conduct is to be punished. To this end, they appeal to different criteria that are alien to the judicial decision itself.

Although in Argentina – and several other states –, the Criminal Code establishes a range of punishment for each crime, this range is determined by the Legislative branch. The particular punishment for an offender is determined by the court. The judges have discretion and they are obligated to justify the sentence. However, this justification is focused on the censure of the crime that was previously determined on the guilty verdict.

From a logical point of view, whether the conduct is prohibited or not is independent of the type of penalty that we are going to apply. Perhaps one way to resolve this ambiguity of the minority vote is to distinguish two aspects. (a) The problem of punishment as part of the concept of normativity, which as we have already said, cannot be sustained. (b) The fact that it is true that, many times, crimes and their penalties are legislated together, but this is part of a legislative strategy. Thus, it can be argued that what is stated by the dissenting vote lacks force, since it is based on serious conceptual confusions.

In addition to this, it is necessary to point out one more issue: the decision of the majority vote is the one that gives the best moral light to the principle of lenity. Indeed, this way of understanding is entirely consistent with fundamental normative principles in our societies, such as equality and legality. When people are condemned for crimes against humanity, there is awareness that they have committed heinous crimes which cannot be forgiven or forgotten. The judicial processes are a clear example of reproach towards these criminals that conclude with high sentences and, above all, with a punishment of imprisonment. At the same time, this reproach is about acknowledging that citizens are condemned because we live in a democracy. Just as we reject the crimes and the way they acted during the dictatorship; we reaffirm the need for institutions to be governed by existing laws. Hence, since the principle of intermediate lenity is applicable, it must also be recognized for these cases (Nino 2015, pp. 218-220).

Universe of Discourse: The Principle of Intermediate Retroactivity

Argentina's Civil Law system allows the courts to make decisions based on the crimes being judged, the rule applicable to these crimes, and the solution that this rule provides. Hence, a fundamental issue in each decision is the determination of the rules to be applied to a particular case. It is not necessary to analyze all the rules of the normative system, but only those that are relevant. This is where the notion of *Universe of Discourse*, proposed by Carlos Alchourrón and Eugenio Bulyigin (1971), comes into play. This determines the limits and the scope of an interpretative analysis, as well as its starting point. Specifically, it is the set of all possible situations and states of affairs characterized by one or several determined properties (Martínez Zorrilla 2010, p. 40).

In order to know whether Section 7 of Act 24.390 is applicable to the case, it is necessary to find out whether the rule established therein is supported by another rule that obliges or allows for its application. This is the one established in Section 2 of the Criminal Code. Although the normative formulation is clear as to its scope, at the moment of analyzing the rule, it seems that there are problems of contradictions with other rules (according to the minority position).

Such a contradiction seems difficult to sustain. The rule established in Section 2 of the Criminal Code is what is commonly called the *principle of favorable retroactivity*, by which all conducts must be judged by the rules in force at the time of its commission (or result), unless a later rule is more favorable to the person who perpetrated the crime. As a logical derivation (and as it is expressly stated in the same section), intermediate lenity arises when an act passed after committing the crime (or obtaining the result) is repealed before the perpetrator is sentenced and must be applied provided that it is more lenient for him/her.

The contradictions raised by the minority position seem to occur outside the universe of discourse, since persecution, prescription or state policies are not being discussed. Only the scope of the norm, its logical consequences

comes into consideration (Navarro 2000). Neither the concept nor the scope of the principle of favorable retroactivity, stated in Section 2 of the Criminal Code, form the same universe of discourse as the problems raised by the minority position. While one establishes a criterion of interpretation to apply the norm, the others establish issues related to the characteristics of a specific type of crime: crime against humanity.

Moreover – as we have seen above – forcing this category of crime as a normative element when interpreting Section 2 is contrary to a fundamentalist interpretation, and therefore, it is inconsistent. In fact, this section does not distinguish between different types of crimes. If there is any doubt in this regard, the interpretation must always be favorable to the accused, by application of the principle of *in dubio pro reo*.

Political and Moral Dimension

Beyond the legal analysis, there is no doubt that the case raises problems of a political and moral nature. The conflict arises between the granting or not of the benefit of the computation of two days for each one served in pre-trial detention to a person convicted of crimes against humanity in Argentina. The decision in favor of Luis Muiña was widely repudiated by society. Immediately, there were massive demonstrations all over the country, repudiations from different groups, NGOs, political parties, declarations from provincial and municipal parliaments, etc. Moreover, in less than 24 hours, the National Congress passed Act 27.362, which expressly establishes the inapplicability of Act 24.390 to crimes against humanity.

Justices are no strangers to this situation. In the sentence, they express it¹⁶. However, since they cannot explain their position based on internal personal considerations, but by means of a legal argumentation that applies legal norms (Atienza 2005, pp. 25-26), the discussion – at first sight – seems to be whether to enforce Section 7 of Act 24.390, or not.

In the case under analysis, the existing evidence regarding the actions of the Supreme Court shows that this Court chose which cases to analyze and rule on. Section 280¹⁷ of the Code of Civil and Commercial Procedure of the Nation allows it not to deal with those cases in which “there is no sufficient federal grievance” or those where the issues raised “are insubstantial or lacking in transcendence”. The paradoxical aspect of the matter is that the admission or rejection of the cases is at the discretion of the Supreme Court, since the rejection is clearly discretionary, and the interpretations of “sufficient federal importance” and “issues of transcendence” are likewise the product of the Supreme Court.

It is also observed that the opinion of the Attorney General of the Nation dates back to July 8th, 2013, and it is repeated two years later, on July 15th, 2015. From this, it can be derived that the file was in the orbit of the Supreme Court for four years, but it was considered in 2017. This shows a clear discretion of the Supreme Court to act, which is not in line with what is expected from a judge in a democratic and liberal State, from whom neutrality at an evaluative level should be desired¹⁸.

¹⁶ For example, in Recital 11, Justice Rosatti expressly states, “this Court cannot avoid the moral dilemma posed to the judge by the application of a criterion of lenity to those convicted of crimes against humanity. It is a dilemma that must be solved by applying the Constitution and the law”.

¹⁷Section 280: Appeal. Rejection of the extraordinary appeal. Briefs in the ordinary appeal. When the Supreme Court hears an extraordinary appeal, the reception of the case shall imply the calling of the case.

The Court, according to its sound discretion, and with the sole invocation of this rule, may reject the extraordinary appeal, for lack of sufficient federal importance or when the issues raised are insubstantial or lacking in transcendence

¹⁸ We use this concept in a Rawlsian perspective, in the sense that a democratic and liberal state must be such that respects the pluralism of society and therefore, its decisions must be the product of a crosscutting consensus of different comprehensive doctrines. Rawls (1999).

“Batalla’s Case” and “Interpretation Act”¹⁹

In December 2018, in “Batalla’s case”, the Argentine Supreme Court declared in a very different way from Muiña’s case. Batalla was not favored by the most lenient 2x1 benefit.

In this case, Justices Elena Highton and Horacio Rosatti, who had been in favor of applying the 2x1 benefit in Muiña’s case, changed their criteria at the time of solving Batalla’s case by denying Batalla the application of the 2x1 benefit.

Justices Maqueda and Lorenzetti were against granting this benefit to the accused, and Justice Rosenkratz - with an isolated vote - was in favor to benefiting the accused. All of them kept the same criteria stated in Muiña’s case. Justices Rossi and Highton de Nolasco changed their criteria favorable to the accused based on Act 27.362. Although this act was passed after Muiña’s case and it was in force at the time of solving Batalla’s case, it is not legally applicable with retroactivity because it is not the most lenient law for the accused.

Details of the Laws

On May 10th, 2017, the Argentine Congress passed the Crimes against Humanity, Genocide or War Crimes Act (27.362). This regulates that “the provisions of Act 27.156, Section 7 of Act 24.390 – repealed by Act 25.430 – is not applicable to criminal conduct that falls within the category of crimes against humanity, genocide or war crimes, according to internal or international law” (section 1).

For the majority of Supreme Court’s judges, the debate over the application of the benefit of the 2x1 benefit for crimes against humanity needed

¹⁹ An Act of Parliament that rules how words used in other Acts of Parliament are to be understood.

the passing of an “interpretative act” on the part of the Congress of the Nation. In the opinion of Justice Rosatti, recorded in his vote at “Muiña’s case”, the judge could not make up for this gap.

In Batalla’s case, the Supreme Court applied the “explanatory rule” according to Act 27.362. The 2x1 benefit should not hereinafter be applied to crimes against humanity. In a few words, the Supreme Court validated Act 27.362.

Similarly, the Supreme Court confirmed that the existence of an interpretive act, such as 27.362, which establishes the meaning that must be given to a previously passed act (in the case of Act 24.390), has been peacefully recognized by the judicial doctrine, provided that said rule could be subject to judicial control. This control covers both the analysis of whether the law - beyond the name assigned by legislators - qualifies as “interpretative” (judges called this scrutiny “consistency test”), as well as the study of whether its content is reasonable and does not violate any fundamental right (magistrates called this a “reasonableness test”).

According to the reasonableness test, Act 27.362 fits into the “interpretive” framework because: 1) it does not retroactively modify the criminal legislation in terms of criminalization or punishment, but rather it clarifies how the law applicable to the case should be construed. 2) It does not extend the sanction of those who are already convicted, because this sentence remains intact, but it establishes how the time spent in preventing detention is calculated to define when the sentence will be served. Once that the “interpretative” character of the “second” Act (27. 362) in relation to the “first” Act (24.390) has been determined, it is concluded that both are applied jointly. It is understood that the first Act has always governed – that is, since its entry into force – in the terms of and with the same meaning as those established in the second Act, whereby there is no conceptually retroactive application of the second provision.

In relation to the “reasonableness test”, the Supreme Court argued that the application of Act 27.362 is not arbitrary or discriminatory insofar as it is directed to a universe of people in the same legal status (convicted of crimes against humanity). It is not stigmatizing for a sector of the population, or for any

activity, but rather it is aimed at those who committed the most aberrant crimes. To review the distinctive notes of the crimes judged in the case, and the political regime within which they were perpetrated – with a magnitude and systematicity never seen before – the Justices referred to the extensive considerations formulated by Justice Rosatti in his previous votes relapsed in the “Villamil’s case”.

Finally, the Supreme Court considered that the application of Act 27.362 in Batalla’s case does not violate any constitutional standard in relation with human rights. This is because the timely determination of the stipulated penalty was preceded by the scrupulous fulfillment of the due legal process contemplated in Section 18 of the National Constitution. Moreover, prior to the application of the explanatory law on the calculation of the 2x1 benefit, the condemned himself – through his lawyer – had the opportunity to exercise his specific technical defense, as recorded in the case file.

The position of the Supreme Court is clear, and the interpretation acts are usually used to construe the law when there are confusing words. However, in Batalla’s case the interpretation of Act 27.362 has two problems:

1. Its application is retroactive.
2. It is more severe.

According to (1), the act infringes the non-retroactivity principle since it can be applied to the previous cases. Then, the 2x1 benefit does not apply to cases such as crimes against humanity by the law of interpretation.

According to (2), the act infringes the principle of the most lenient criminal law because the interpretation law increases the burden of the legal situation of the accused.

Indeed, the application of the “interpretation act” breaches the principle of legality. The principle of legality is a rule included in the Argentine criminal legislation. Are we sacrificing the Rule of Law for an uncomfortable moral matter? Or are we sacrificing the Rule of Law because a significant section of the public opinion rejects the legal decision of the Supreme Court? In this sense, we agree with Rosler’s reflection: “it is very important that in crimes against humanity

trials, we search for memory, truth and justice, without forgetting that this search should include the law; that is to say, it should take place within the frame of a State of Law in democracy” (Rosler 2018, p. 34). In addition, we must remember the dissident vote of Justice Rosenkrantz at Batalla’s case: “the central character of the guarantee of the non-retroactivity of criminal law is clearly seen in the fact that this Court had never ruled, up to now, a case where a construction of a retroactive and less lenient criminal law was at stake”.

Final Reflections

Two general conclusions can be drawn from the analysis presented: on the one hand, Muiña’s case can be interpreted from different perspectives. In this paper, we limit ourselves to an examination from a purely legal dimension, where we restrict ourselves to the analysis of the interpretation of Section 2 of the Criminal Code.

On the other hand, in the analysis of the political and moral dimension, we have only considered the Court's discretion in the choice of the case. Indeed, this court can choose cases where injustices are palpable; however, it decides to rule them when the only beneficiaries will be those people in situations analogous to Muiña's, that is to say, accused of crimes against humanity committed during the last military dictatorship.

Returning to the legal analysis and accepting the above premises, the logical consequence that follows is that as the rule stated in Section 2 of the Criminal Code can be applied, the computation of the sentence in Muiña’s case must be followed according to the parameters established as stated in Section 7 of Act 24.390.

By extending or limiting the scope of a term to cases not considered - especially in criminal law, where analogy is prohibited - one can lose sight of the object of reference of the interpretation, namely the norm. By contrast, Law

is eventually created, which affects the validity of constitutional guarantees, starting with the principle of equality before the law.

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