

Environmental Justice Moot Court

Joined Moot Cases C-123/2022 Miluska v Central Bank of Concordia

and

Case C-456/2022 GreenRock vs Republic of Concordia

1. Tucked away in the fairy mountains of central Europe lies the landlocked Republic of Concordia. A member of the European Union since 2007, Concordia is known for its lush landscapes and for its competitive agricultural economy. Concordian farmers produce well and export a lot, on the European markets and beyond. True, the country has been favoured by its geography. Sans Soleil, the capital perched on an outcrop of the Tetris mountains, dominates vast expanses of meadows and grassland. In the north, forests of oak, spruce and pine provide the resources for a prosperous wood industry. In the south, the Rodowod River irrigates highly fertile land where wheat, corn and rapeseed grow easily.
2. In recent years however, Concordia has suffered from changing climatic conditions. Precipitations, which were once spread over the year, now fall in a few weeks at the end of spring. The snow no longer covers the slopes of the Tetris. Glaciers melt and the aquifers are barely replenished. Since 2020, the level of the Rodowod is at an all-time low. The summers are longer and harsher. The scorching heat has caused massive forest fires in the northern provinces. If the ecosystems of Concordia are under considerable pressure, so is the Concordian economy. The logging industry faces generational losses and questions its capacity to supply the demand in the long term. Crop yields are decreasing and investment in agricultural industry has plummeted. According to a recent survey, a majority of Concordians believe that the standard of living of the children and grandchildren will decline.
3. The climate crisis has also complicated an issue that has considerably tarnished the reputation of Concordia.
4. Concordia is home to the Concordians and the Samyns. Ethnic Concordians are descendants of the pastoral communities of the Ural who settled in central Europe in the early centuries

of the common era. They then mixed with Slavic tribes and eventually developed a syncretic culture and language. They grew to compose the majoritarian group in the modern state of Concordia. Much smaller in number, the Samyns constitute an ethno-religious minority who live on the southern plains of Concordia for immemorial times. Samyns speak a unique language and strive to preserve their traditional modes of life. Central to their identity is the belief that humans, animals, and natural elements are fundamentally interconnected in the physical and metaphysical worlds.

5. Ethnic Concordians have treated indigenous Samyns as less than humans for centuries. Victims of abuse and violence, often with the complicity of the authorities of Sans Soleil, Samyns were deprived of their land, treated with contempt for their language and culture, and systematically excluded in the political and economic life of the country. After the situation of the Samyns began attracting a great deal of public attention, the successive governments of Concordia drew strong criticism from the international community. In forceful language, the United Nations High Commissioner for Human Rights once qualified the status of the Samyns in Concordia as that of a "dominated, demeaned and deprived minority."
6. During the accession process to the Union, under the negotiation chapter concerning justice and fundamental rights, the European Commission took the view that the government of Sans Soleil needed to tackle discrimination against the Samyns more seriously. It required Concordia to ratify the Council of Europe Framework Convention for the Protection for the National Minorities and strongly recommended it to become party to the International Labour Convention on the Rights of Indigenous and Tribal Peoples in Independent Countries.
7. Under the pressures of international and European scrutiny, Concordia slowly but surely initiated a process of transitional justice. In 2006, Concordia ratified the two international conventions required and preconised by the European Commission. In 2010, the Concordian government appointed the Samyn Truth and Reconciliation Commission, whose purpose was to investigate anti-Samyn policies and to propose forms of redress. Over the years, the successive reports of the Truth and Reconciliation Commission contributed to transform the political culture of Concordia. By 2015, a strong majority of Concordians endorsed the work

of the Commissioners and considered that recognising the rights of the Samyns was both a moral and a political imperative. At the end of that year, with great public support, the Parliament of the Samyns was established by law.

8. In 2017, the Truth and Reconciliation Commission delivered a report on the restitution of stolen lands. A major part of the report concerned the fields of the Rodowod River basin, which were historically occupied by Samyn tribes until they were confiscated in the eighteenth century. The Commissioners advised the government of Concordia, notably in light of its obligations under Part II of the ILO Convention on the Rights of Indigenous Peoples, to settle the territorial claims of the Samyns in the basin and to revise the governance of the Rodowod River system as a whole.
9. The Rodowod is central in the Samyn cosmogony. According to the myth, humans worshiped an all-knowing god who kept all forms of existence in the universe under his control. Maddened by its power, a hermaphrodite goliath killed him. From the mortal wound, a giant serpent sprung and brought a new earth into existence. The serpent promised to fertilise the land for all and for eternity if the death of their god was not avenged. The serpent then transformed into Rodowod. In the Samyn worldview, the river is the genesis of all things and of all living beings are interrelated in a sense of balance and proportion. Following a Samyn saying, "I am the river, the river is me."
10. In 2019, the Concordian parliament voted the Rodowod Settlement Act to address the proposals brought forward by the Samyn Truth and Reconciliation Commission. The legislation is founded on two principles: the recognition of the ancestral rights of the Samyns in the basin of the Rodowod and the ecocentric protection of the river system. To that end, the act innovatively confers the legal personality to the Rodowod river system itself and delegates the trusteeship of the river to the Samyns.
11. The relevant provisions of the Rodowod Settlement Act are drafted as follows:

Article 1
Definitions

In this Act:

Rodowod means

- a) *the body of water known as the Rodowod River that flows continuously or intermittently from its source in the Tetrus to the inland delta of the Southern Province of Concordia is located within the Rodowod River catchment; and*
- b) *all tributaries, streams, glaciers, and other natural watercourses that flow continuously or intermittently into the body of water described in paragraph (a) and are located within the Rodowod River catchment; and*
- c) *all lakes, wetlands, and aquifers connected continuously or intermittently with the bodies of water referred to in paragraphs (a) and (b) and all tributaries, streams, and other natural watercourses flowing into those lakes, wetlands, and aquifers.*

Samyn community refer to the collective group comprising every individual speaking the Samyn language and/or believing sincerely in the Samyn traditional spirituality.

Decision makers refer to any legislative, executive or administrative authority in Concordia.

Article 2
Principle

1. *Rodowod is an indivisible and living whole, comprising the River from the mountains to the delta, incorporating all its physical and metaphysical elements.*

2. *The Samyns have an inalienable connection with, and responsibility to, Rodowod and its health and well-being.*

Article 3

Legal status

1. *Rodowod is a legal person. It has all the rights, powers, duties, and liabilities of a legal person.*
2. *The rights, powers, and duties referred to in the first paragraph must be exercised or performed, and responsibility for its liabilities must be taken, by the trustee, on behalf of, and in the name of Rodowod, in the manner provided for in this Act.*

Article 4

Decision makers

1. *Decision makers adopt the highest level of protection of Rodowod at all times and proactively.*
2. *In drawing up the programme of measures referred to in Article 11 of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, decision makers prioritise the rights, health and well-being of Rodowod.*

Article 5

Trusteeship

1. *The trustee of Rodowod is the Samyn Parliament, or, subsidiarily, any member of the Samyn community as defined in Article 1.*
2. *The functions of the trustee are*

- i. to act and speak for and on behalf of Rodowod; and*
 - ii. to uphold Rodowod status; and*
 - iii. to promote and protect the rights, health and well-being of Rodowod.*
3. *The powers of the trustee include the right to be a party in legal proceedings before national, European and international courts.*

12. On the basis of the act, the Concordian legislator and the Samyn Parliament adopt a common decree in December 2019 a programme of measures that includes the following provision:

Section 2

- 1. In regulating the human activities that may impact the rights, health and well-being of Rodowod, the decision makers only authorise activities that are proven to be sustainable. In the determination of the sustainable character of an activity, decision makers take due account of all European and international standards.*
- 2. If practicable, decision makers provide for a more extensive protection of the rights, health and well-being of Rodowod than the one required by European and international standards.*
- 3. In regulating the use of primary energy sources that may impact the rights, health and well-being of Rodowod, decision makers prioritise the use of energy derived from natural sources that are replenished at a higher rate than they are consumed.*

13. In March 2021, while performing a geological survey, a group of scientists led by Prof. Candice Pepperpot of the University of Sans Soleil discover the existence of a vein deposit of uranium ore in the Tetris. The vein is located under Concordia's largest glacier and in the close vicinity

of the source of the Rodowod. The deposit soon proves to have exceptional properties. It contains coarse-grained sandstones that are extremely rich in uranium 235, the fissile isotope that can sustain a nuclear chain reaction.

14. The government of Concordia takes great interest in the discovery. The exploitation of the Tetris deposit would improve the energy independence of the country. It soon commissions a study of the exploitability of the deposit, which reveals that it is so rich that it would provide twice as much nuclear fuel for operating all nuclear reactors in the European Union. Ultimately, the extraction of the uranium ore from the Tetris would significantly contribute to diminish the cost of nuclear energy in Europe.
15. For the Parliament of the Samyngs, the discovery of uranium deposits is a godsend. It would provide employment in a region struck by poverty and deprivation. It announces that if the deposit were to be exploited, all the requirements of the Rodowod Settlement Act would be complied with.
16. The discovery is also welcomed by the European institutions. The European Commission emphasises that, through the Supply Agency of the European Atomic Energy Community, and on the basis of Article 52 of the Euratom treaty, it has a right of option on the ores and an exclusive right to conclude contracts relating to the supply of ores coming from inside the Community. It also notes that on the basis of Article 41 of the Euratom treaty that all nuclear investment projects need to be notified to it to determine whether a communicated investment project raises doubt regarding the objectives of, and compliance with, that treaty. On that background, the European Commission declares that the exploitation of the Tetris deposit would be key in achieving security of supply of nuclear fuel for all the Member States of the Union, which is one of the objectives contained in Article 2 of the Euratom treaty.
17. The citizens of Concordia are strongly opposed to the exploitation of the deposit, however. Nuclear energy, they claim, is not sustainable. Extracting the uranium ore would contravene the Rodowod Settlement Act, since there is a high risk that mining would contaminate the entire river system. Demonstrations in favour of solar and wind energy are organised in the streets of Sans Soleil by students and environmental groups. A leader of the movement

against the project is a young woman named Gražina Miluska, an activist of Samyn origin who gained many followers by organising school strikes to call for stronger governmental action against climate change. On social media, Miluska repeatedly calls the Samyn Parliament to take its responsibilities as trustee of Rodowod.

18. In response, the government of Concordia contends that these concerns are unfounded. Far from being unsustainable, they claim, mining the newly found uranium would help Concordia in its transition to carbon neutrality and comply with the objectives contained in Regulation 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality. The Rodowod Settlement Act would also be complied with, and an environmental impact assessment would be performed as required by European Union law.
19. In an article published in summer 2021 in the Journal of Nuclear Materials, Prof. Pepperpot explains the sandstones in which the ore is contained can be mined and processed easily at an *in-situ* facility. If the deposit is to be exploited for its uranium concentrate, the geologist suggests, it would suffice to bore holes into the ore deposit and resort to hydraulic fracturing to create pathways into the sandstone. An acidic or chloride solution is then injected to penetrate the deposit. This method would greatly limit the environmental risks associated with the extraction of uranium. Nevertheless, the academic admits, the waste by-product of the raw uranium ore would have to be stored in so-called "tailing ponds" close to the mining site to be allowed to dry out. Radioactive sand risks then to seep away and enter the bodies of water nearby. Costly precautions would have to be taken, but the activity could generally be considered safe.
20. On the 9 of March 2022, the Commission adopts the Delegated Regulation 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities, which recognises that nuclear energy can contribute to the decarbonisation of the economy of the European Union.

21. In January of that year, Miluska had requested, as a member of the Samyn minority in Concordia, to take part in a consultation process within the meaning of Article 9 of Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. By letter of the 1st of February 2022, the European Commission rejected the application of Miluska because it considered that she was not a member of the public affected or likely to be affected. Miluska did not bring the matter further.

22. The Delegated Regulation is controversial. A group of Members of the European Parliament point out that the act was adopted without consulting the public, as required by the Aarhus Convention, to which the European Union is a party. In that regard, the European Commission replies:

[The] relevant technical and policy issues concerning (...) nuclear energy have been in the public domain during the course of the legislative deliberations on the Taxonomy Regulation as well as the work of the Technical Expert Group on Sustainable Finance, and the finalisation of the Climate Delegated Act. Stakeholders have submitted extensive feedback to the Commission on these activities, based on (...) the report of the Joint Research Centre and expert committee reviews for nuclear activities. The feedback received was considered sufficiently broad and informative by the Commission to take a decision. Further open consultation was, therefore, not considered necessary to prepare this Delegated Act.

23. Comforted by the policy of the European Commission, the government of Sans Soleil signals its intention to exploit the Tetris uranium deposit. It quickly obtains the assent of the Parliament of the Samyns, as the government promises that the enterprise will deliver substantial financial return for the Samyn community as a whole. To answer to the concerns of citizens, the government announces that Rodowod will be protected. Vaclav Todorov, Concordian prime minister, declares in an interview with a national newspaper:

"The uranium of the Tetrin brings the promise of a green future for Concordia. But I understand the anxieties of my compatriots! If ever our mountains and rivers are damaged and polluted, those who seek to profit from it will be held accountable! The sword of justice will be swift and sharp for those who only care about themselves and their bank account."

24. The government quickly realises that it cannot run the project in-house. The need for financing is such that it must structure a public/private partnership to build and operate the mining and milling facilities. In compliance with the applicable rules on public procurement, the authorities of Sans Soleil create a joint venture with a European multinational company named Fleuve Rouge, which has extensive experience in mining activities, and mining uranium in particular. The joint venture will be a public law company named Vodyanoy. Once incorporated, Vodyanoy would have to obtain all the necessary permits to begin its operation.
25. Soon after, the government adopts an ordinance containing the statutes of Vodyanoy, whose activities is to extract and mill, within the framework of the Euratom, the uranium ores of the Tetrin deposit. Article 39 of the statutes is drafted as follows:

The Board of Directors authorizes the contracting of loans by the issue of bonds or debentures, whether secured by mortgage or not.

26. In July 2022, Vodyanoy markets a public offering of shares. As the offering closes, Vodyanoy has approximately raised EUR 500 million from a multitude of private and institutional investors. Amongst them, on the basis of a decision of the 1st of August 2022, the Central Bank of Concordia buys shares in Vodyanoy for a value of EUR 200 million. In September, the board of directors decide to issue international bonds with a 10% maturing in 2030 for a value of EUR 200 million. Most of these bonds are bought by GreenRock, a Portuguese pension fund.
27. On the 1st of September, the Concordian legislator, on proposal of the government acting on its promise to "hold profiteers accountable", enacts the following provision to the Criminal Finances Act of 2015:

Section 40a

Institutional bondholders of a company whose activities turn out to cause significant harm to one of the environmental objectives listed in Article 9 of Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment shall be liable to pay a fine at least equivalent to the half of the initial total value of their investment. The fine will not be higher than ten percent of the annual turnover of the institutional bondholder.

28. Appalled by the passiveness of the Parliament of the Samyns to respect the letter and the spirit of the Rodowod Act, Miluska raises the funds to challenge the decision of the Government before the courts of Concordia. She lodges an action for annulment of the decision of the Central bank to buy shares Vodyanoy before the State Council, Concordia's unique administrative jurisdiction. She claims that this decision was made in violation of the Rodowod Settlement Act since the central bank relies on an invalid act of EU law. Indeed, she contends, the Delegated Regulation of the European Commission that classifies nuclear energy as sustainable violates the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to the extent that no public consultation took place before its adoption. The European Commission also failed to respect the rights of the persons belonging to minorities as required by the Charter and Article 2 TEU in failing to organise such consultation.

29. In its first skeleton argument, the Central Bank of Concordia contests the violation of the Rodowod Settlement Act and asserts that the Delegated Regulation of the Commission is valid. There was no obligation of consultation since the Taxonomy Regulation on which it is based is not in the material scope of the Convention.

30. Under an obligation to refer the question of validity to the Court of Justice of the European Union, the Council of State formulates the following question for preliminary ruling:

- **Is the Delegated Regulation 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities classifying nuclear energy as environmentally sustainable invalid insofar the public concerned within the meaning of Article 6, 7 and 8 of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters was not consulted?**

31. At the same time, GreenRock soon realises that if Vodyanoy causes damage to the environment while exploiting the Tetris Deposit, it will be exposed to criminal sanctions that will not only strain its books, but also threatens its very authorisation to be active in the internal market. It thus requests the Constitutional Court of Concordia to review the validity of the new Section 40a of the Criminal Finances Act. GreenRock submits that this provision violates general principles of EU law, such as the expressed in the Charter of Fundamental Rights and the Directive on the protection of the environment through criminal law, including the principle of proportionality, legal certainty and equality. The legislator replies that European Union norms are minimal and do not apply when national law provides for more extensive protection of the environment.

32. The Constitutional Court refers the following question to the Court of justice of the European Union:

- **Should European Union law, and Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law in particular, be interpreted as precluding a national legislation imposing criminal sanctions on institutional investors that invest in bonds issued by companies whose activities turn out to causes significant harm to one of the environmental objectives listed in Article 9 of Regulation (EU) 2020/852 of the**

European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment?

33. The Court of justice decided to join cases **C-123/2022** and **C-456/2022**. The registrar of the Court notifies the parties that written observations have to be lodged by **15 December 2022**.