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Spanish Judicial Decisions in Public International Law, 2011–2012

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I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

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IV. SUBJECTS OF INTERNATIONAL LAW

1. The State

– Universal Criminal Jurisdiction –

National High Court Order, 6 April 2011, Criminal Division, Section 2
Dismissal of the appeal submitted by the Public Prosecutor against a complaint – from a citizen of Morocco – based on tortures in the Guantanamo Military Base (Cuba), under US administration. The claimant was acquitted by the National High Court before, after he was transferred by the US in order to be judged of terrorism in 2005. Following the opinion of the Public Prosecutor, there is no need to wait the answer from the competent US authorities in the various opened proceedings. Secondly, it is not possible to exercise the universal jurisdiction, according to article 23.4 LOPJ, as amended on 3 November 2009.

The Chamber considered that the "real connection link" of the claimant is based, firstly, on his legal residence in Spain during ten years, secondly, in the fact that he was born in the former Spanish protectorate in the North of Africa, before his trip to Afghanistan in 2000 (where he was imprisoned by the US Army). Seven judges, in their dissenting opinions, questioned the "real connection link" of the aforementioned circumstances.

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Supreme Court Order, 6 October 2011, Criminal Division, Appeal n. 857/2011
A wide-ranging group of organizations and a particular individual supporting Tibet initiate a proceeding before the National High Court. They appeal before the Supreme Court. The claimants [*el Comité de apoyo al Tíbet y otros*], consider that the Spanish jurisdiction is competent for the judgment of the crimes against humanity committed by Chinese authorities in Tibet (based on article 23.4 of the LOPJ, as amended by LO 1/2009 of 3 November). The Supreme Court considers that the exercise of the Spanish jurisdiction is subject to "the existente of a real connecting link with Spain" – as a *conditio sine qua non* –; this view is correcting "a *vis expansiva* that does not satisfy the requirements of the universal criminal jurisdiction, being those cases susceptible to be judged by international tribunals". Due to the abovementioned reasons, the appeal against the Order of the National High Court of 27 October 2010 was dismissed.

National High Court Order, 23 March 2012, Criminal Division, Section 1
Dismissal of the appeal against a previous order of dismissal of the case concerning the memoranda from the US Department of State on torture methods in Guantanamo; a previous complaint against the authors of these Memoranda was dismissed. Seeing the letter rogatory requested to the United States, the Chamber considers that investigations, judicial procedures and criminal sanctions have been developed in conformity with the conditions determined by the LOPJ (universal jurisdiction).

Three judges maintain, in their individual opinion, the possibility to investigate the alleged facts, in the event of crimes against the international community, as a violation of *ius cogens*. No procedure (investigation, criminal prosecution) against the authors of the Memoranda has been opened at the United States (merely professional ethics procedures). Furthermore, some Guantanamo detainees are Spanish citizens. In their opinion, the dismissal meant granting impunity.

Supreme Court Order, 20 December 2012, Criminal Chamber, Appeal n. 1133/2012
The association *Pro dignidad de los presos y presas de España y otros* submitted a complaint against some Spanish citizens, based on the commission of crimes against protected persons and property in the event of armed conflict (Chapter III, Title XXIV of the Spanish Criminal Code); the complaint is based on the establishment of a systematic plan of torture and cruel treatment of detainees at the detention centre in the Guantanamo Bay. The complaint and the appeal were dismissed; this former appeal to the Supreme Court is based upon article 23.4 LOPJ.

The Supreme Court dismissed this appeal; the subsidiarity principle contained in article 23.4 LOPJ is the main argument of the tribunal. Some administrative procedures and criminal investigations on detainees' treatment were opened at the United States at the same time. On the contrary, as the General Prosecutor has pointed out, there does not seem to be criminal prosecutions against the ideologists of the juridical architecture of the detention centre, acting *bona fide*, within the legal framework determined by the Office of the Legal Counsel. On the field of judicial co-operation, it referred to the Mutual Legal Assistance Treaty of 20 November 1990, between Spain and the United States, and the Agreement between the European Union and the United States on Legal Assistance, of 25 June 2003.

The Supreme Court dismissed the appeal against the Order of the National High Court (Criminal Division) of 23 March 2012.

– *Universal jurisdiction for international crimes* –

Supreme Court Decision, 27 February 2012, Criminal Division, Appeal n. 20048/2009
Two far-right organizations complain against the judge dealing with the case on the crimes commited by the Franco regime; this one was based on a complaint submitted before the National High Court by a group of private persons and associations of relatives and friends of those persons dissapeared or murdered during the Civil War and Post-War period. They claim their "right to know" the circumstances of the death and the location of their relatives, together with all necessary actions to locate and identify the victim's mortal remains and deliver them to their relatives.

The sitting Judge of the Central Investigative Court (n. 5) of the National High Court held that it had jurisdiction to entertain the matter on "those who stood against the legitimate Government of the country and committed a crime under the Constitution at that time and against the nation's highest bodies, induced and ordered the previous, simultaneous and resulting mass killing, illegal detentions of political opponents, and led to the forced displacement of thousands of people". He further notes that it seems to be "a continuous crime of illegal detention, without knowledge of the victim's whereabouts, in the field of the crimes against humanity, together with crimes against persons and against the nation's highest bodies".

The Supreme Court considered that the localization and exhumation of the victim's bodies of the Franco regime cannot be fulfilled *in toto*; the so-called "truth trials" must be dismissed as a consequence of the existence of circumstances of extinction of criminal responsibility (such as death, prescription and amnesty). This requirement, in the opinion of the Tribunal, contravenes the criminal procedural rules (imposing a penalty); in their opinion, this is a matter for historians, not for judges and courts.

The tribunal observes that there was no prevarication in the conduct of the judge; there was not a knowingly unjust judicial decision, but a misapplication of the law: the legality principle was not respected. International Criminal Law, in order to be applied, needs an "accurate transposition into national law"; customary law cannot tipify certain criminal offences directly applicable by Spanish courts.

Under this reasoning, the Martens clause cannot be understood as a substantive rule of criminal law; on the second hand, the Nüremberg Principles are not applicable in this case, because Spain did not participate in their formation and they were not transponed in our legal system until 1952, when the Vienna Conventions were ratified, a later date to the period analyzed in this case.

The conducts are prescribed. Concerning the permanent character of the crime of illegal detention, the Tribunal decides that the criminal offence was not tipified in the Spanish Criminal Code. The imprescriptibility character cannot be accepted, at least until the ratification of the international instruments that contained this possibility; this measure cannot have a retroactive character. The Supreme Court affirms that the annulment of the amnesty laws declared in international instruments, and reflected by

the international practice is not pertinent (cannot be applied to previous facts and the application of customary rules may provide legal uncertainty).

– *Extraterritorial jurisdiction* –

Supreme Court Decision, 12 December 2011, Criminal Division, Appeal n. 11164/2011
The condemned and some crew members of the Spanish fishing vessel Alakrana (hijacked by Somali pirates in the Indian Ocean), appeal the Decision of the National High Court (Fourth Section), of 3 May 2011.

This decision is relevant, dealing with international and European legal order, for the following reasons: the jurisdiction of Spanish Courts in this case and, secondly, the possible membership of a terrorist or armed group.

Dealing with the first question, the Supreme Court is in line with the previous instance Decision; the Spanish jurisdiction is based on article 23.1 LOPJ, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the United Nations Convention on the Law of the Sea (UNCLOS), and the Council Joint Action 2008/851/CFSP of 10 November 2008, on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (supporting the UN Security Council Resolutions 1814, 1816 and 1838).

Secondly, some members of the crew qualified this situation as terrorist acts (serious disturbance of public peace, together with terrorist actions). In the opinion of the Court, creating social alarm is not sufficient to qualify a conduct as terrorism: a systematic and repeated action and social alarm for a large sector of population are necessary conditions. The claimants proposed an interpretation based on article 1 of the Council Framework Decision of 13 June 2002 on combatting terrorism (2002/475/JHA); this argument was rejected by the Court. The observance of the principle of legality in criminal proceedings, the parliamentary legitimacy of criminal rules, together with other requirements was not found in the Framework Decision. This argument was applicable to the International Convention against the Taking of Hostages and to the International Convention for the Suppression of the Financing of Terrorism.

The authors have been convicted of the offence of unlawful association, abduction (36) and armed robbery; they have been sentenced to provide compensation to their victims. The Court admitted some aspects of the appeal to the Decision of 3 May 2011 of the National High Court (Fourth Section), as explained above.

V. THE INDIVIDUAL IN INTERNATIONAL LAW

– *Right to freedom* –

Constitutional Court, Decision 108/2012, 21 May 2012
This is an appeal against a previous Order of the Supreme Court (Criminal Chamber); this case concerns the cumulative character of criminal offences punishable by deprivation of liberty (the so-called "Parot doctrine"). The appeal is based on the infringement of the right to equality, the right to freedom and security, the right to effective judicial

protection, the right to defence and the principles of legality and legal certainty. The Court dismissed the appeal.

Constitutional Court Decision, Second Chamber, Decision 141/2012, 2 July 2012
Appeal against previous judicial decisions on urgent voluntary confinement because of a psychriatic diagnosis. The request is based on the violation of fundamental rights to freedom (art. 17 of the Spanish Constitution) and the right to effective legal remedy (art. 24.1 of the Spanish Constitution).

The Constitutional Court analyzes the legality or not of the confinement "of a person of unsound mind"; art. 5.1 e) of the European Convention on Human Rights, and the interpretation of this provision done by the ECHR are fundamental aspects to be taken into account (case *Winterwerp v. The Netherlands*; Decision of 24 October 1979). Art. 9.1 of the International Covenant on Civil and Political Rights, and the interpretation of this provision given by the UN Human Rights Committee, are essential aspects considered by the Constitutional Court. This right must be applicable "respect to all the forms of deprivation of liberty (…) such as, for example, mental illness".

The Court has decided to grant the protection, recognising the right to freedom of the claimant, and holding the previous orders null and void.

– *Right to marriage* –

Constitutional Court Decision, Plenary, Decision 198/2012, 6 November 2012
The Constitutional Court solves an exception of unconstitutionality lodged by Spanish parliament members of the "Partido Popular", against Act 13/2005, amending the Spanish Civil Code (extending marriage to same-sex couples). In their opinion, the most important consequence of this Act (a new paragraph of art. 44 of the Spanish Civil Code) "will change the secular, constitutional and legal conception of the marriage as a union between a man and a woman". Following this point of view, there is an infringement of article 10.2 of the Spanish Constitution (interpretation in the light of fundamental rights and freedoms contained in international human rights treaties ratified by Spain): the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Rome Convention on the protection of human rights and fundamental freedoms. In their opinion, art. 32 of the Spanish Constitution ought to be understood considering that "the members of a couple must be a man and a woman". Their interpretation of the decisions of the ECHR (art 12 of the European Convention) follows the same positions.

The Constitutional Court argues that "the interpretation of legal texts must be done taking into account the international activity of States as manifested on international treaties, on judicial decisions of interpretative organs, in the advisory opinions of the United Nations system, and in the opinions of international organisms, universally recognized". For these reasons, art. 10.2 of the Spanish Constitution require an interpretation of the affected human rights in conformity with the Universal Declaration of 1948, and the international treaties ratified by Spain. This interpretation "cannot be done without the perspective of the monitoring bodies established by international treaties", because "the hermeneutic rule of art. 10.2 include an evolutive interpretation".

In the opinion of the Court, international law and international judicial decisions showed "a possibility of opening the traditional notion of marriage". There is no total consensus in Europe on "same-sex marriage" because on each State this institution has had a particular evolution. For these reasons, the Strasbourg Court has understood that "art. 12 of the European Convention on Human Rights cannot impose, at present, the obligation to open the institution of marriage to same-sex couples to State Parties in the Convention; but, on the contrary, the literal wording of art. 12 do not prohibit the regulation of marriage in these situations". In the same way, "art. 9 of the Charter of Fundamental Rights of the EU, as interpreted by the Praesidium in the Explanatory Report, neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex". In the opinion of the ECHR, art. 9 of the Charter suppose an updated version of art. 12 of the European Convention, "to cover cases in which national legislation recognises arrangements other than marriage for founding a family" (cases *Schalk and Kopf v. Austria* – Decision of 24 June 2010, parr. 60 –).

Due to the aforementioned reasons, the Constitutional Court dismissed the exception of unconstitutionality; the decision is followed by four dissenting opinions.

– *Right to privacy* –

Constitutional Court Decision, First Chamber, Decision 241/2012, 17 December 2012
Application for amparo (right to privacy and secrecy of communications). A software application was installed by the applicant and a colleague in a joint computer of the company where they worked. Using this programme, these workers exchanged private information (thinking that this information was private); but, on the contrary, the texts transmitted, the usernames and the e-mail addresses were filed in the computer system (in a public folder sharing). Later, both workers were called to a meeting by the Director of the enterprise; during this meeting, in the presence of senior managers, the content of some messages was read. The Director admonished them.

The Constitutional Court remembers in its Decision, that the ECHR underlined the notion of secrecy of communications (case *Malone v. United Kingdom* – Decision 2 August 1984, párr. 84 – and case *Copland v. United Kingdom* – Decision of 3 April 2007, párr. 43 –). According to the Court's case-law, telephone calls from business premises are prima facie covered by the notions of "private life" and "correspondence" for the purposes of Article 8.1 (case *Copland v. United Kingdom* – párr. 41 –; case *Halford v. United Kingdom* – Decision of 25 June 1997, párr. 44 –; and case *Amann v. Switzerland* – Decision of 16 February 2000; párr. 44 –).

The Constitutional Court dismissed the amparo due to the following reasons: firstly the election of a joint computer is not compatible with "a private use"; secondly, "the need conditions to preserve secrecy have no constitutional coverage"; and thirdly, the installation of this software – being a conduct prohibited by the enterprise – proofs that no reasonable expectations of confidentiality exists.

The Decision is followed by one dissenting opinion, signed by two judges.

– *Right of association* –

Constitutional Court, Decision 138/2012, 20 June 2012
Dated 18 May 2011, the courts' solicitor, acting on behalf of a group of people and the political party Sortu, brought an appeal against the ruling of 30 March 2011 of Supreme Court Special Chamber (Article 61 of Judiciary Act). The ruling found the constitution of the political party Sortu to be inapplicable because it was the continuation or succession of Batasuna, a political party which was declared as illegal and, consequently, dissolved; it pointed out that its registration in the register of political parties was not appropriate. The interested party submitted the application for dismissal of actions against the aforesaid order, which was dismissed because of the Chamber consideration that it pretends the reopening of the same procedural issue. Legal protection is raised because of the infringement of the right of association, in its aspect of the right to establish political parties, regarding the rights to ideological freedom, to freedom of speech and to political involvement, with regards to joint an expression of political pluralism (Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

Constitutional Court evaluated the legal protection request and it found that the right to association of applicants had been infringed, in its aspect of the freedom to establish political parties, and the court acknowledges the right of the applicants to establish the aforesaid political party. Three dissenting votes are submitted.

– *Right to not be subjected to torture or to cruel, inhuman or degrading treatment* –

Constitutional Court, Decision TC 131/2012, 18 June 2012
Dated 6 September 2011, the applicant brought an appeal for legal protection against Vizcaya Provincial High Court, Section One Order, which has dismissed the appeal filed against Bilbao First-instance Criminal Court No. 9 Order, which ratifies the determination of dismissal without prejudice and the discontinuance of the case. It is a report of a torture crime which was dismissed due to pathologist's reports. Constitutional Court, according to the European Court of Human Rights jurisprudence, establishes that the right to effective protection of the court for who reports the suffering of torture or inhumane and degrading treatment requires, in accordance with the reinforced cannon of grounding, a well-founded resolution according to the total prohibition of such behaviour. Quoting the Court, the reasons to justify the dismissal fail to satisfy the constitutionally demanding duty of reinforced ground in these cases.

The Court decides to consider the appeal for legal protection and acknowledges that the right to effective protection of the court has been violated, regarding the right to not be subjecting to tortures.

– *Family reunification* –

Supreme Court Decision 8 June 2012. Chamber for Administrative Proceedings. Rec. 5946/2011
On this judgment, the Supreme Court find admissible the appeal to this Court filed against the Madrid High Court of Justice 20 July 2011. Mr. Juan Carlos appeals to the Supreme

Court against the Madrid High Court of Justice judgment, Chamber for Administrative Proceedings Section One, which partially estimated the administrative appeal filed against the refusal of a Family Regrouping Visa for European Union of one of the applicant's sons. In order to accept applicant's claim, the court evaluates a key concept for obtaining a Family Regrouping Visa: "to be in charge of". The fact of being a member "in charge" of a family "is the result of a situation in which the community citizen who exercised the right to free movement or his/her spouse guaranteed all necessary resources for the family member sustenance." [...] following the doctrine from the Court of Justice of the European Union, compiled in Decisions of 19 October 2004, case C-200/02, and of 9 January 2007, case C-1/05, since it should not be forgotten the expression "in charge" used by Royal Decree and applicable in this case, comes from the Directive 2004/38 (European Union Law – *Legislación de las Comunidades Europeas/LCEur* 2004, 2226 and European Union Law 2007, 1364) and from previous provisions. With the only purpose of specifying when it could be achieved the quantity that guarantees such resources, it is possible to turn to very different criteria of interpretation, keeping in mind that there is no rule which requires that all incomes of the regrouped person come from who made the regrouping. The most important thing for being "in charge" of somebody else is that such person must cover every necessity."

– *Right of Asylum* –

Supreme Court Decision of 27 December 2012, Chamber for Administrative Proceedings. Rec. 1630/2012

The Supreme Court Decision of 27 December 2012 dismisses the appeal to this Court filed by a Sierra Leone citizen against Ministry of the Interior resolution of 30 June 2009, which refused to recognize the refugee condition and the right of asylum to him. The applicant alleges the existence of a risk for his/her personal safety in case of coming back to Sierra Leone and the violation of Article I.A.2 of 1951 Geneva Convention relating to the Status of Refugees and Article I.2 of New York Protocol of 1967 (Statute Book – *Repertorio Cronológico de Legislación/RCL* 1978, 2290, 2464) for the aforesaid status, according to the Article 3 of the Asylum Act. The Chamber decision is unfavourable for applicant's claim for two reasons: on the one hand, "the applicant's arguments have no sense about the required evidentiary harshness to confer asylum and about circumstantial evidence consistent with this court doctrine".

The appeal was dismissed due to the absence of evidence. The circumstances in the applicant country of origin have notably changed (in 2003, year of his departure and in 2006, when he submitted the petition of asylum).

The UNHCR Report of 6 June 2008, mentioned in the contested decision, and the recommendation of the UN High Commissioner for Refugees support this changement of the circumstances in Sierra Leone.

The spirit and the aim of the humanitarian protection (art. 17.2 of the Spanish Asylum Act, RCL 1984, 843) is to promote asylum-seekers with a mechanism for protection and safeguarding (in case of general conflict or violations of human rights in their country of origin). This is not the case of Sierra Leone at this moment, on the basis of the evidence, as described above.

Supreme Court Decision, 26 October 2011. Chamber for Administrative Proceedings. Rec. 2544/2008

The Supreme Court dismisses the Appeal submitted by the *Administración General del Estado* (the State) against a previous Decision of 16 November 2007 of the National High Court; the former uphold in part the appeal against a resolution of the Spanish Ministry of Internal Affairs of 2 December 2004, refusing to grant to the applicant refugee status and asylum right, but authorizing him to stay in Spain (article 27.2 of the Asylum Act). *Bona fide* principle must be under consideration.

The asylum-seeker was acquitted of charges as a result of the coup d'État in his country of origin; he had no difficulties in exercising his profession. He obtained an official passport and leaved his country without obstacles. These facts may justify the argument of the Court (following the recommendations of UNHCR), refusing the asylum petition, but considering the possibility to stay in Spain.

The Report submitted by UNHCR showed that the applicant had been arrested, tortured and prosecuted in the past; he belongs to a family where there is opposition to the political regime in Equatorial Guinea. There are continuous violations of human rights in this country; for this reason, the prosecution of the applicant in the next future can not be fully excluded.

– *Diplomatic protection* –

National High Court Decision 1 February 2012, Chamber for Administrative Proceedings. Rec. 157/2010

The National High Court analyses the eventual pecuniary responsibility of the State as a consequence of the potential harm caused to the Spanish company FLM Internacional SL. Spain denied the exercise of diplomatic protection in favour of this company, concerning its investments in Cuba (Agreement between the Kingdom of Spain and the Republic of Cuba on Mutual Promotion and Protection of Investments, 27 May 1994). The National High Court dismisses the appeal, considering out of time the complaint of diplomatic protection submitted before the Spanish Ministry of Foreign Affairs and Cooperation.

– *Protection of stateless persons* –

National High Court Decision 10 December 2012, Chamber for Administrative Proceedings. Rec. 598/2008

This is an appeal against a Resolution of the Spanish Ministry of Interior of 23 April 2008, rejecting the status of stateless person to the claimant. The Chamber allowed the claim pursuant to well-settled caselaw of the Supreme Court concerning the recognition of the status of stateless persons to people of saharawi origin.

VI. EUROPEAN UNION

– *Environmental protection* –

High Court of Justice of the Autonomous Community of Madrid, Decision of 8 March 2012, Chamber for Administrative Proceedings

This is an administrative appeal of a private person against the Madrid City Council agreement of 15 February 2011, adopting the Ordinance against thermal and acoustic pollution. The High Court of Justice determines the parties positions: on the one hand, the claimant considered that this Ordinance violates article 15 of the Spanish Constitution (fundamental right to the physical and moral integrity), together with article 1 c) of the Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise: "The aim of this Directive shall be to define a common approach intended to avoid, prevent or reduce on a prioritised basis the harmful effects, including annoyance, due to exposure to environmental noise. To that end the following actions shall be implemented progressively: (c) adoption of action plans by the Member States, based upon noise-mapping results, with a view to preventing and reducing environmental noise where necessary and particularly where exposure levels can induce harmful effects on human health and to preserving environmental noise quality where it is good". From the point of the defendant, there is no violation of the Directive in this case.

The High Court dismissed the appeal, based upon former decisions of the Supreme and the Constitutional Courts, and the lack of legitimacy. The Aarhus Convention of 25 June 1998, on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters may also be relevant. This convention was ratified by Spain (*BOE*, 16 February 2005, entry into force 19 March 2005); article 9 is referred to the access to justice on these subjects. There is a lack of legitimacy in this case, following articles 22 and 23 of the Act 27/2006, 18 July on Access to Information, Public Participation and Access to Justice in Environmental Matters.

VII. INTERNATIONAL ORGANIZATIONS

High Court of Justice of Galicia; Decision of 11 July 2012, Chamber for Administrative Proceedings

This is a dismissal of the appeal submitted by several dozen people (participants in peacekeeping international operations) against the Spanish Ministry of Defence. They consider that, as members of the frigate "Blas de Lezo", (participant in the "Allied Protector" NATO operation), under Ministerial Order 7/2008, their mission must have the same character and the same economic conditions than the ships of the "Atalanta" operation of the European Union against piracy (the principle of discrimination and violation of art. 14 of the Spanish Constitution are under discussion).

Initially, the frigate was framed within the NATO operation "Allied Protector"; subsequently, they have to support the Spanish participants of the "Atalanta" operation, for several months. The Court inderlines the differences between these operations: the

"Atalanta" operation is conceived as a peacekeeping operation in order to assure the World Food Programme transport and to fight against piracy in Somali waters. The "Allied Protector" is not considered a peacekeeping operation, but a NATO Rapid Reaction Force; the "Atalanta" operation was created by the EU to fight against piracy (in the field of the Common Foreign and Security Policy). In the opinion of the Court, the "Allied Protector" NATO operation fights against piracy in the same way as another warship, following article 105 of the UNCLOS Convention (*Montego Bay Convention, 1982*). The different character of these operations justify the economic conditions of them.

The principle of equality and non-discrimination has not been violated. The appeal was dismissed.