"The Judicial control of Sustainability: The Greek Experience"

Maria Karamanof

Councillor of the Hellenic Council of State

In the slow and difficult course of mankind towards sustainability, the Greek judicial experience constitutes a significant step. It is only natural that Greece, endowed with a unique natural and cultural heritage, should take the lead in the field form its European partners and other western countries. In the first place, the new culture of sustainability, which is destined to dominate the new millennium, is familiar to the Greek spirit, since it in fact a restoration of the classical ancient Greek values of justice, order, nature, measure and frugality. These values have kept Greece's natural wealth almost unscathed until only recently, when the mania of ruthless development took over the country. The rapid dissipation of our natural and cultural wealth compelled the judiciary and particularly the Council of State (the country's Supreme Administrative Court) to assume its responsibility and compensate for inadequate, non existent or even disastrous legislation.

The Council of State has a long tradition in the protection of natural and cultural environment and is equipped with the necessary powers to exercise effective control. Moreover, the constitutional revision of 1975 provided the judiciary with a valuable legal tool a new article (art. 24) was enacted which imposes preventive and suppressive protection of the environment, both natural and cultural, as well as spatial planning which is inseparably linked to it, and guarantees the quality of life of citizens.

The enactment of this pioneer legislation coincides with the entrance of Greece in the European Union and the ruthless 'development' drive which followed immediately thereafter, often encouraged by the Community's financial aid. Soon it became evident that traditional 'Stockholm type' jurisprudence was unable to cope with the gravity of the situation. The logic of judicial review appeared outdated, since it was limited to the conventional legal methodology of striking a 'reasonable' balance between private rights and public interests or among conflicting public interests

themselves. Sustainability problems, however, cannot be dealt with on the basis of reasonable compromises but require a new logic.

The answer to the problem was provided by the judiciary itself. Upon the proposal of the Vice President of the court, Mr. Justice Michael Decleris, acting on the basis of a well studied systems project, a new "Environmental" Chamber (the Vth Chamber) was instituted in the Council of State, empowered to control public decisions on all environmental matters, covering nearly everything related to sustainable development. These issues were brought before the Court either at the level of preliminary control of regulatory provisions or at the level of regulatory disputes, thus providing the Court with an overall view of public policy and its pathologies and permitting it to formulate an integrated and consistent jurisprudence. The new Chamber was staffed with experienced judges, dedicated to the task, who were introduced to systems methodology and to the sustainability problematic and worked in constant collaboration with scientific experts and the Administration in an atmosphere of fertile dialogue and creative problem solving.

The result was a real breakthrough in the Court's jurisprudence. Approached from the Rio perspective ordinary legal problems revealed their true depth and complexity. In order to deal with them the Vth Chamber invoked directly the article 24 of the Constitution, which it interpreted in a novel way, in the light - as it said - of the principles of the Rio declaration and the provision of Agenda 21, as well as the legal provisions of the Maastricht and Amsterdam treaties concerning sustainable development. The basic requirement of sustainability is the harmonization of all public policies and social practices and their convergence towards the coevolution of man made systems and ecosystems. From the general legal concept of sustainability the Court derived its logical implications for both public policy making and private decisions and converted them into twelve specific principles for sustainable development, namely the Principles of Public Environmental Order, Sustainability, Carrying Capacity, Obligatory Restoration of Disturbed Ecosystems, Biodiversity, Common Natural Heritage, Restrained Development of Mild Ecosystems, Spatial Planning, Cultural Heritage, Sustainable Urban Development, Aesthetic Value of Nature and Environmental Awareness. From those principles the Court proceeded to the specification of the appropriate criteria to be incorporated into the respective public and private decisions, depending on the sector of the

public policy or the nature of the private rights involved. In that way, the legal definition of sustainability is based on a rigorous delimitation of the natural, cultural and social capital that should be preserved, restored or improved by both public and private decisions and actions.

The former President of the European Commission Mr. Jaques Santer characterized the jurisprudence of the Vth Chamber of the Council of State as pioneer. In fact, the novelty of this jurisprudence consists in that it made clear the distinction between the classical environmental problems of the Stockholm era, referring to relatively simple issues such as pollution, waste etc, and the complex problems of the Rio generation, referring to genuine sustainability issues. It is in the latter that the court contributed in a creative way, inspired by the vision and leadership of its President. The following analysis refers exclusively to such Rio generation problems, of which some characteristic examples are presented.

In order to compel the Administration to apply the principles of sustainable development to the design of every public policy, the Court rejected the fragmentary approach favored by the established clientelistic practices, and insisted upon sustainable spatial planning of the national, regional or sectoral level. In the Court's philosophy, sustainability means above all order in space, which alone allows for restrained intervention in the environment and judicious use of its resources. Thus the Court repeatedly invalidated development projects or public works which were undertaken in an isolated way without being part of an overall plan covering the country or a broader region as a whole. In order to be sustainable such a plan should begin with the delimitation of the natural and cultural environment to be preserved and should take into account criteria belonging to other interrelated areas of public policy, such as carrying capacity, compatibility or conflict of land uses, energy, communication and water recourses available in the area etc. In that context, the Court ruled that the construction of a new port must be the subject of a broader sectoral planning of the country's network of ports. Such a plan should take into account on the one hand the need for the port and on the other the principle of protection of the coastal and marine ecosystems influenced by the port, namely conserving natural capital, avoiding damage to cultural assets (e.g. marine antiquities), respecting the geomorphology and natural profile of the shoreline etc. The same principle was applied to the popular economic activity of fish farms in view

of their intense interaction with the marine and coastal ecosystems, as well as quarries, waste disposal sites, the road network and even to prisons; the Court declared illegal the founding of a new prison which was not based on an overall regional plan for penitentiary establishments.

Another important innovation introduced in the sustainability theory by the jurisprudence of the Vth Chamber is the principle of carrying capacity applied both to human systems and ecosystems. The Court required that no human activity, public or private, could exceed the carrying capacity of the existing manmade systems and ecosystems and compelled the Administration to find and take into account the carrying capacity of all such systems affected by its policies.

The issue of carrying capacity was raised by the Court particularly with respect to fragile ecosystems, such as small islands, coasts, biotopes and sites of natural beauty, which constitute microcosms with unity and self sufficiency and are thus the first victims of ruthless development.

The Court paid special attention to sustainability problems of small islands. On numerous occasions the court ruled that small islands must determine and monitor their carrying capacity and prepare long term plans permitting only their mild development and aiming at checking acute settlement pressures and mass tourism. In fact the Court went as far as to formulate the sustainable model of such spatial plans for small islands integrating all public policies appropriately adjusted to the scale of the island.

In order to check the unrestricted urbanization of small islands used as summer residents by settlers form the mainland, the Court did not permit the construction of new settlements unless proven that the existing traditional settlements cannot absorb the normal demographic increase of the indigenous population. In the case of the small island of Myconos, saturated from the point of view of both intense tourism and urban development, the Court declared that new tourist installations, peripheral roads and other development projects are not permitted because they exceed the carrying capacity of the island. In another case, when residents of the same island challenged the government's decision to construct a large and luxurious marina near the traditional settlement, the Court invalidated the

project on the ground that it would cause a direct and impermissible alteration of the traditional character of the settlement, an inseparable feature of which is its old harbour. The same principle was applied to prevent further deterioration of overdeveloped areas, such as the greater area of the city of Athens. The Court declared unconstitutional any further expansion of the city, banning the spread of settlements on the ground that it exceeded the carrying capacity limits of the relevant life support systems, i.e. the ecosystems which ensured the clearing of the atmosphere, recycling of water, management of waste etc. On the same grounds the court rejected the establishment of new industrial units in the Athens area.

Many hard sustainability cases refer to conflicts between incompatible public policies. In the Court's judgement the sustainability criterion in such cases consists in the ordering of public policies according to the hierarchical level of the legal values affected them. Thus the Court did not permit the construction of a fish marina within the designated archaeological site of the coast of Marathon, on the ground that it would entail a certain danger of changing the historical shoreline, which is a substantive feature of the historical harbour in view of the part it played in the conditions of the historical battle.

In order to preserve the historical and traditional character of small islands, the Court ruled that it is the energy demand and not the energy supply that should be managed in a sustainable way. Thus the court prohibited a plan for an electric power supply complex among several small islands via a high voltage electric current network system established on the mainland, on the ground that it would inevitably render those islands mere extensions at the mainland by providing the infrastructure for their ruthless development. In another case, when a small mountain community complained that mining activities (extraction of bauxite) were destroying the natural and cultural environment of the historical mountain of Parnassus (site of Delphi), the court found the opportunity to order the harmonization of mining policy with forestry and cultural policy. Moreover, it lay down the principles for a sustainable mining policy, giving emphasis to the protection of scarce and irreplaceable material resources, such as bauxite. In the same contest, the Court's decision for the protection of the brown bear, an internationally endangered species which has retained two of its most important habitats in Greece, deserves special attention. The Administration, invoking reasons related to speedy communications

and cost effectiveness, decided that the Egnatia road, an important national motorway crossing the country, should pass by the Pindos mountain habitat of the bear, thus dividing it in two, a thing which would gravely endanger the survival of the bears according to zoological experts. The Court proceeded to the right ordering of public policies involved and gave priority to the protection of wild life against cost or technical considerations related to the construction of the road.

The rapid urbanization as well as the deterioration of the quality of life in the cities has given the Court the opportunity to formulate a system of principles for a sustainable urban environment. Thus the Court ruled on numerous occasions that the founding and extension of settlements cannot be permitted haphazardly nor can it be left to private initiative (private individuals or land development enterprises). On the contrary, it must be included in the planning of the settlement subsystems of the corresponding regional plan. It is not permitted to create settlements within fragile ecosystems such as forests, biotopes or areas of natural beauty. The further expansion of big cities must be checked, building conditions must not be made worse priority must be given to improving degraded areas in cities, protection is accorded to natural life supporting systems in the cities (mountains, forests etc) as well as to cultural monuments and antiquities. Moreover, the jurisprudence of the Court strictly prohibits even the slightest reduction of open space and public areas in the cities and bans any use, even public, of forested areas around the city.

The above jurisprudence had a significant appeal both to the legal community and the public in general. Court decisions on sustainability were analyzed and commented upon and became a standard subject of study in the Law Departments of the Universities, welcomed and publicized by the mass media they served to awaken the environmental sensitivity of the public and to empower the ecological movement in the country.

Vested with the authority of the judiciary the values of sustainability gained broad public support and encouraged citizens and environmental organizations to bring more disputes to the Court. In a political system dominated by clientelism and party politics, the attitude of the V th Chamber of the Court gave back to the State some of its lost authority and credibility. The reaction, however, was immediate. Only two years later, the political system, resenting the curtailment of its established

clientelistic practices, attempted by statute to dismantle the Vth Chamber of the court. The 'coup' failed since the Plenary of the Court declared the statute unconstitutional. For the next eight years the Court consolidated its power and authority, thus increasing the resentment of the political system. The constitutional revision of 2001 gave to the latter the opportunity to strike back. In order to deprive the Court of the legal foundation of its jurisprudence it attempted to amend the constitutional clause (art.24) for the protection of environment. It had, however, underestimated the impact of the court's jurisprudence upon public opinion. This time it was the spontaneous popular reaction manifested by mass action which forced the government to step back and withdraw the amendment. In view of the above it is not an exaggeration to say that the jurisprudential lead in sustainable development can change not simply the legal culture but public values and attitudes as well.