THE DEEP JUDICIAL CONTROL OF PUBLIC POLICY, CONDITION SINE QUA NON FOR ENVIRONMENTAL ORDER AND SUSTAINABLE DEVELOPMENT

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SUMMARY

The legislative and administrative branches are held hostage to special interests and therefore unreliable advocates for sustainable development. In fact, over the last decade we have witnessed a kind of schizophrenia: Positions talk of protecting the environment while they contribute to its destruction. The judicial control of public policies by professional judges is the best means for formulating and enforcing general principles of sustainable development. The jurisprudence of the 5th Chamber of the Hellenic Council of State (the Supreme Administrative Court) provides a characteristic example of the evolving role of judges in promoting the idea of sustainability even when the Legislator or the Administration fall behind. The author summarizes general principles of sustainable development developed by the Chamber as well as sustainable public policies it has implemented and their social impact.

1 WHY THE JUDGES

Ten years after Rio, it is a common conclusion that, while the concept of sustainability has gained widespread acceptance; the actual state of environment has been constantly deteriorating. We already have a wealth of literature on sustainability, but at the same time we witness a flagrant failure of public environmental policy. Hence, the question arises, whether it would be more realistic to content ourselves with the limited environmental law of the Stockholm era and forgo the unattainable vision of sustainable development.

The position of this Report is that no matter how popular the Stockholm environmental law is, it is impossible to maintain a stable environmental order without the judicial control of the sustainability of all public policies. In other words, the pursuance of a self-contained environmental law is a self-defeating policy. Such a law is foredoomed to remain a paper law. On the contrary, an effective judicial control can both ensure environmental order and accelerate sustainable development by shaping its principles and thereby improving public policy. The role of the Judiciary can be decisive not so much due to its coercive potential but rather because judicial decisions are made in a long institutional perspective, there-by having a deep and permanent influence on public opinion. Politics is a hostage of vested interests, incapacitated by bargaining and compromise. Only, judicial decision-making takes the requirements of the future seriously.

There are three reasons for the increased role of the Judiciary today. Despite the fact that after Rio, the State has assumed the role of the great protector

of the environment, it is the political system, which continues to be its main enemy. It is the political system that constantly destroys the environment either through positive harmful actions or through equally dangerous omissions. In terms of positive actions, one can think of many examples of conflicting policies, i.e., transport policy conflicting with energy policy, economic policy conflicting with spatial planning, policy on tourism conflicting with cultural policy etc. Even when environmental damages are attributed to private actions, there is always a public policy failure in the background. For example, the notorious air pollution in Athens is in fact the post-effect of combined policy failures, including bad industrial policy responsible for the concentration of the 60% of the industrial installations in Athens area, poor town-planning due to clientelistic land use policy, as well as incompetent transport policy neglecting the clean means of mass transportation. As far as omissions are concerned, one cannot help thinking that, ten years after the unanimous voting of Agenda 21, its instructions for the necessary aid to the poor countries have not been implemented. Neither the poor have received their aid, nor did the rich countries change their consumption patterns. Therefore, we are justified in ascertaining a sort of schizophrenia in current politics: on the one hand, it continues its sentimental appeals for the salvation of the environment; while on the other it keeps destroying it.

The second reason is that the judicial control of public policies, when entrusted to a Supreme Administrative Court, can indeed succeed in coordinating public policies better than the government itself. The failure of politics to deal effectively with the problems of sustainable development is due to the notorious reluctance of politicians to shoulder the so-called 'political cost' resulting from the resistance of interests vested in the status quo. Such considerations are unacceptable to judges who hold the view that problems of environment and sustainable development should be handled only by the professionals of public administration using the appropriate policy analysis methods.

Finally, there is a third reason favoring judicial control, and this is that sustainable development cannot emerge automatically from commands, prohibitions and sanctions imposed by legal norms. In fact, it is a dynamic regime, which will be formed gradually by instructions of the Agenda '21 type. This has always been the case: Historically, the best instructions have derived from the general principles of law created by judicial case law of the roman praetors (roman law), or the royal judges (common law) or the conseil d'etat (droit administratif), while the law made by legislatures is practically a codification of judicial rulings. Therefore, the role recognized by this Report for the judiciary is not actually an institutional innovation. In the last two centuries, judges shaped the principles for the protection of human rights; in the present century, judges are now needed for creating the general principles of sustainable development.

2 THE GREEK EXPERIENCE

The Hellenic experience of the decade 1990-2000, which I have the honor to present to you, supports the above position. Greece, a country with a great cultural and natural capital, entered the club of the privileged countries last among its partners who pursue systematically so-called 'economic growth'. Her zeal to reach the level of her European partners has driven her so far as to adopt policies causing significant harm to the Greek environment in a very short time. As soon as this became evident in the late '80s by the abrupt increase of disputes concerning environment and spatial planning, judges felt the need to take

the initiative. Following our proposal, a new Chamber was set up at the Council of State entrusted with the exclusive jurisdiction on matters of environment and Sustainable Development. According to the approved organizational scheme, the new Chamber has been equipped with enhanced powers. The idea permeating the mission of the Court was to ensure the deep and effective control of all public policies related to environment and sustainable development. To this effect, the Court assumed and exercised the review of constitutionality of statutes, the preliminary control of all regulatory decrees, plus the power of annulling illegal governmental decisions and suspending their implementation. In this way, public policy concerning environment and sustainable development was brought under the scrutiny of the Court at all levels.

Without such extensive powers, the Court would have never been effective against a Government reluctant to follow a consistent environmental policy and prone to clientelistic practices. Owing to these powers, however, challenged decisions could be suspended, if necessary, within hours in order to prevent the tactics of accomplished facts. In addition to this, when exercising judicial review of governmental decisions, the Court did not confine itself to formalities, but proceeded to the structuring of the actual environmental problems and ensured their right solutions. Moreover, through the preliminary control of the regulatory decrees, the Court was able to dictate the general principles of sustainable development, and thereby to adjust public policies to the requirements of these principles. These general principles of sustainable development were formulated in the course of the constitutional control of statutes performed on the basis of the relevant rules of International and European environmental law, both hard and soft. In fact, the Greek Constitution and specifically its clause (article 24) Protecting the Environment, was interpreted in the light of the Stockholm and Rio principles.

Beyond such creative legal thinking, all sixteen judges of the Court felt themselves responsible for the maintenance of environmental order and were highly inspired by the idea of sustainable development. The decade 1990-2000 will be remembered in Greece as a period of rare stability and consistency both in the decisions of the Vth Chamber of the Council of State and in the expectations of public opinion. From some quarters, frustrated politicians in particular, a complaint against 'judicial activism' was voiced. It was unfounded, because sustainability in Greece is guaranteed by the Constitution itself. This means that the government has no political choice to pursue or not sustainable development. Sustainability is a fundamental legal norm whose guardians are the courts.

In this Report I shall confine myself to a general evaluation of the work performed by the Court, as a good example of what can be accomplished by the deep judicial control of public policy. Matters concerning the psychology and dynamics of the Court as a human group will be discussed in the paper of Justice Karamanof, a member of the Court from its beginnings, who handled important cases. Also, matters concerning the protection of culture environment will be dealt with in the paper of former Justice Kapelouzos, who has particular experience in the field.

First of all, it is important to note that the Court has acquired its experience on environmental matters from an ideal observational standpoint. In fact, the Court acted as the general headquarters of sustainable development in Greece, having an overall view of both the actual environmental process and the public policy making related to it. More specifically, from the continuous flow of statutes, decrees and decisions brought before it for review, the Court

accumulated a commanding knowledge of the entire environmental problematique and of the relevant policy failures. The problems handled by the Court actually belonged to two distinct generations; the Stockholm generation of classical environmental problems, related to pollution, waste, environmental standards etc, and the Rio generation of problems concerning the incorporation of sustainability criteria into public policy making. It is the latter which gave the Court the unique opportunity to develop a system of general principles of sustainable development. In terms of numbers, the Court handled more than 15.000 cases in the decade of 1990-2000, which provides a solid statistical base for an objective evaluation of the validity of these principles.

3 THE GENERAL PRINCIPLES OF SUSTAINABLE DEVELOPMENT

All twelve general principles of sustainable development have been formulated by the Court in the context of a system of interrelated and inter-dependent elements. These principles can be enumerated here in the following order:

- Principle of public environmental order, meaning that the state bears the primary responsibility for sustainable development while all other so called 'partners' (market, NGO's etc) have complementary roles.
- Principle of sustainability, meaning that all policies, decisions and actions, no matter whether public or private, should be designed and implemented in a way which does not reduce or damage natural, cultural and social capital. When there is a doubt about the impact of human action, the actor should abstain from it.
- Principle of carrying capacity, meaning that human intervention must not violate the carrying capacity of both anthropogenic systems and ecosystems.
- Principle of obligatory restoration of disturbed ecosystems, meaning that environment reclamation is an enforceable obligation.
- Principle of biodiversity, meaning that no policy benefit can justify the loss of species.
- Principle of common natural heritage, requiring the absolute protection of an inviolable part of wild nature.
- Principle of mild development of fragile ecosystems, prescribing an increased protection of such sensitive ecosystems as forests, coasts, small islands, mountains etc.
- Principle of spatial planning, making it a fundamental prerequisite for any public intervention.
- Principle of cultural heritage, giving it the same protection with natural environment
- Principle of the sustainable urban environment, ensuring the best possible conditions of life for human settlements
- Principle of the aesthetic value of nature, protecting landscape and the morphology of geosystems
- Principle of environmental awareness, ensuring the citizens' rights of information, participation in the public decision-making and easy access to Justice.

From the above general principles, more principles of lesser scope could be logically drawn, when necessary.

4 THE SUSTAINABLE PUBLIC POLICIES

Through the systematic application of the above principles on all matters brought before it, the Court has consistently sought to convert all public policies into sustainable ones. More specifically, the Court has ruled that:

- Natural environment with all its ecosys-

tems is the basic measure of sustainability. It constitutes the natural capital, which should be registered and monitored. No reduction or degrading of natural capital can be tolerated. On the contrary, environment reclamation, where necessary, is obligatory. Biodiversity is strictly protected because of the inherent value of all wild flora and fauna species. This principle has been repeatedly applied by the Court either to preserve rare species of fauna in Greece threatened by extinction, such as the sea turtle Caretta-caretta, the Monachus seal, the golden eagle, the gray bear etc. (but more common species, as well, such as wolves and foxes) or more generally to protect the exceptional diversity of flora and fauna in Greece, as i.e. when the Court banned air-crops spraying with phytochemicals.

- Agriculture should be sustainable and such should be the relevant public policy as well. Farmland should be delimited and cannot be converted to building plots.
- Forests are strictly protected and must be registered.
- Fishing should be sustainable and techniques that harm marine ecosystems are prohibited.
- Water Management should be systemic and include recycling.
- Mining and Quarrying should be sustainable, i.e., based on a long-term sustainable management of the countries' mineral wealth. Irreplaceable natural recourses (i.e. bauxite) should be protected. Mining should be harmonized with forestry and mountain protection policies.
- Industry should be sustainable. Industrial installations exceeding the carrying capacity of an area are prohibited. Polluting industries are closed down.
- Public works should be sustainable, i.e. compatible with the local ecosystems, and subject to systemic impact analysis.
- Energy policy should be sustainable, i.e. harmonized with other public policies protecting public health, or cultural capital, or fragile ecosystems like the small islands. Energy supply in the latter should be based on local sources and renewable recourses, especially wind and solar energy.
- Urban environment must be sustainable: Town plans must be rational so that they combine the functionality of the settlement with the best possible living conditions for people. Building conditions must not be made worse. The urban environment is already severely degraded and can only tolerate measures that improve it. The further development of the cities must be checked. The enlargement of Athens has gone beyond every appropriate limit. Protection is extended to the natural life-supporting systems in the cities. Free public areas (squares etc) are strictly protected. Sustainable traffic in towns means the use of public transport and not private cars.
- Tourism should be sustainable, i.e. not exceeding the carrying capacity of the anthropogenic systems and ecosystems affected by it. New hotels are banned in saturated areas, i.e. the island of Myconos. Founding of new settlements for purposes of second residence is also banned, unless existing settlements have become saturated and their legal enlargement is also impossible. In no case is it permitted to create settlements within fragile ecosystems.
- Sustainable development of such fragile ecosystems as coasts and small islands that abound in Greece are of particular importance in terms of both natural and cultural capital of the country. These ecosystems are constantly subject to

heavy pressures. The Courts' jurisprudence on their protection is created: A spatial plan for each island is required. Strict control of urban development encodes the total banning of new settlements on the islands. Development must be only mild: Intense energy systems are banned and so are industrial or storage and technical installations on coasts.

- A central place in the Courts' jurisprudence occupies the principle of Spatial Planning, which is considered as the fundamental prerequisite of sustainability. In the decisions of the Court, spatial planning is a logical imperative of the principle of sustainability, and is therefore the main expression of public environmental order, which constitutes the generally obligatory framework within which the development of private initiative can be permitted. The Courts' jurisprudence developing this principle has been fertile and effective. The Court ruled that it is obligatory to prepare a national spatial plan and regional spatial plans. As a result of the state's compliance to this ruling, a statute on spatial planning has finally been voted. The principle of spatial planning was applied to the construction of ports and to the execution of port projects, design of the road network, siting of waste disposal sites and even prisons.

5 THE SOCIAL IMPACT

The social impact of the above stated case law of the Court could be summarized as following:

- It put an end to the rapid deterioration of both the Greek cultural and natural environment, which had started in the preceding years of wild economic growth.
- Many harmful public policies had to be abandoned.

Subsequent statutes adopted many rulings of the Court.

- The case law of the Court was supported by mass media. This contributed to the development of environmental awareness of the citizens and to the strengthening of the environmentalist movement in Greece.
- The scientific structure of the Court's jurisprudence exposed and discredited the clientelistc practices of the political system. Thus, it made their repetition in the future difficult, at least in several sector of public policy.
- The interaction of the Court with the political system is worth of particular mentioning. Throughout the critical decade 1990-2000 the political system, devoted to the pursuance of further economic growth and always relying on the clientelistic practices of the past, was reluctant to comply with the Court decisions. In fact, at times, it became audacious and attacked the Court: Two years after the Vth Chamber of the Court had been instituted, the government tried to dismantle it but failed. The plenary of the Council of State declared the relevant statute unconstitutional and refused to apply it (1993). Having failed in using legislative powers against the Court, the political system didn't hesitate later (2000) to use the process of constitutional revision in order to reduce the protection of the environment and thereby, indirectly, the powers of the Court. This time it was the popular outcry that forced the political system to abandon its plans. Thus, eventually the Court has consolidated its constitutional role as the independent guardian of the environmental order.
- The Courts' jurisprudence contributed to the rising of social expectations for quality of life: Today, all political interventions to the environment are closely monitored by a significant number of non profit organizations which take active part on

their evaluation and — if meaning — take the cases to the Court.

6 EPILOGUE

There are two basic reasons why the deep judicial control of public policy has been effective in Greece. The first is that the idea of sustainability is in fact a restoration of the classical Greek values of nature, order, justice, moderation ('measure') and grugality. Therefore, the jurisprudence of the Court was in line with the Greek cultural tradition, which dates thousands of years back in the Orphic Hymns (X, LXXX, LXII, LXIII, LXIV). It is the same tradition that has always placed Law and Justice above the political system in Greece, no matter whether monarchical or democratic, and assigned with the judges the responsibility of reviewing the political decisions in terms of their conformity with Law. That is why the 5th Chamber of the Council of State, applying the law of sustainability in a steadfast manner against a reluctant political system, felt comfortable in honoring the long cultural tradition of Greece.