

# PREPARING JUDGES FOR THE EVOLVING ROLE OF THE JUDICIARY

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## SUMMARY

The author describes the success of the Chamber of Environment and Sustainable in the Hellenic Council of State. Creating a separate environmental chamber allowed for a comprehensive overview of sustainability and the development of a common set of principles. Beyond the structural requirements for the promotion of sustainability the quality, administrative background, and continuous training of the chambers judges helped insure its success. Finally, the author notes the vision and leadership of the President of the Chamber as a major factor contributing to its accomplishments.

## 1 INTRODUCTION

The innovative jurisprudence of the 5th Chamber of the Hellenic Council of State developed and matured under particular circumstances, which played an important role in its making. Looking back at the decade 1990-2000 as a member of this Court, who took an active part in the formulation of this jurisprudence, I cannot help feeling that these circumstances deserve special attention, particularly from those who seek a deeper understanding of the enforcement process, or those who might attempt to repeat a similar experiment in a different legal and cultural environment.

## 2 INSTITUTIONALIZING THE NEW ROLE OF THE JUDICIARY

New ideas are usually born in new settings. The setting up of the 5th Chamber of the Council of State in 1991 as a new institution having overall jurisdiction on matters of environmental protection and sustainability proved to be the sine qua non condition for the evolution of a creative jurisprudence on these matters. The idea was conceived and put into effect by its

President, Justice M. Decleris, who envisaged the new Chamber as the appropriate institutional instrument that would allow for:

- comprehensive overview of sustainability problems arising in every field of public policy;
- development of a set of common principles for dealing with these problems;
- transformation of these general principles into objective and operational criteria permitting their uniform application on different cases.

While the 5th Chamber was indeed something novel in terms of competence, it remained at the same time an integral part of the Council of State (Conseil d'Etat), the prestigious Supreme Administrative Court of Greece, with a hundred years' history in the effective control of government policies and the protection of individual and social rights. So we can say that the 5th Chamber was endowed from birth with unique qualities: a modern organizational frame ensuring expertise and effectiveness on one hand, a long tradition of authority and independence on the other.

It is often the case with new institutions that, although designed with vision

and care, they fail to produce the expected outcome. Fortunately, this has not been the case with our Court. The secret lies in a happy combination of a number of factors, which we will briefly discuss below.

### 3 TRAINING FOR THE NEW ROLE

First comes the human factor, in other words the individual members appointed to the Chamber from the start. All of them were experienced judges, already serving at the Council of State from ten to twenty years, who were selected by its President, not so much because they were familiar with sustainability problems, but rather on the basis of their creativity, independence of spirit, steadfastness and environmental sensibility.

To the surprise of outsiders, these strong personalities with completely different backgrounds, political beliefs and legal philosophies, collaborated so well with each other and were so well integrated into the new Chamber that most, if not all, of its pioneer decisions were reached unanimously. As the problems brought before the Court became more complex, original and difficult, requiring a deeper and deeper understanding of the logic of sustainability, the members of the Court, far from being discouraged or overworked, developed an increasing sense of purpose and commitment.

The members of the new Chamber were equipped from the start with the appropriate methodological tools enabling them to exercise the deep control required for sustainability problems, namely they were introduced to systems methodology. To judges trained to apply the classical methods of administrative control (i.e. careful study of the case file, prepared by government officials, and identification of errors occurring in legal interpretation, procedure, reasoning etc.), introduction to systems methodology, though not an easy task, revealed a completely new dimension in the exercise of judicial review.

In order to understand the necessity of this new approach, one must bear in mind that sustainability is a substantive notion; therefore, the answer to the perennial question put before the courts, whether a particular policy or decision is sustainable or not, has to be a substantive one as well. Such an answer presupposes thorough knowledge not only of the file of each case but of the actual problem, which lies behind it. The judges entrusted with the task to solve such a problem, should know it in and out, better than the administrator who attempted to solve it in the first place and whose decision is challenged before the Court. To do that, a judge should:

- command the systemic techniques of problem structuring, formulation of optimal policy models and evaluation of alternative solutions. To that end those judges of the 5th Chamber who were unfamiliar with systems methodology became quickly acquainted with it through constant training by the President, himself an expert in the field since the 60's.
- have a full view not only of the facts of the case, but also of the scientific problematique behind them. That was achieved through close collaboration with government officials and experts charged with the design and implementation of the relevant public policy, as well as through the practice of seeking expert opinion on disputed scientific matters.

With the help of the above tools the judges of the 5th Chamber were in a position not only to point out to the government exactly where its policy under review failed (e.g. at the stage of design, implementation or enforcement), but also whether such a failure was curable or not, and what exactly should be done to correct it. Among the 15.000 decisions issued by the Court in the decade 1990-2000 many provoked a strong reaction from adversely affected pressure groups and interests. It is, howev-

er, noteworthy, that virtually none of these decisions has been seriously challenged on its merits by specialists in the respective fields. The most common criticism against them was that, though substantively correct, these decisions adopted solutions far too maximalistic for a world accustomed to bargain and compromise.

#### 4 SOCIAL SUPPORT

An important factor, which greatly reinforced the morale of the members of the Court and increased their dedication to the value of sustainability, was the attitude of the general public. Both citizens and the mass media enthusiastically received decisions on environmental protection, no matter how strict. Their active support compensated for the often-severe attacks coming from the lobbies of affected interests. Environmentalists as well as common people, disappointed from government inertia and clientele politics, found in the Court an unexpected and reliable ally in their effort to save the Greek environment, both natural and cultural.

The 5th Chamber's case law was the first to introduce the language and ethics of sustainability into public vocabulary. Vested with the Court's authority, this language awakened the environmental conscience of the Greek public, who welcomed the return of its long-forgotten traditional values. This close interaction between Court and public proved to be a crucial factor, whose impact upon the morale of both should not be underestimated. The importance of this factor was proven during the constitutional revision of 2000. An attempt to revise the famous article 24 of the Greek Constitution, which guarantees environmental protection, and thereby to render practically inactive the jurisprudence of the Court, met with such an unexpected and strong public reaction that it proved to be abortive.

#### 5 LEADERSHIP

Last but not least in the list of factors which determined the course of the 5th Chamber was the strong presidency of Justice Decleris. The mark of his personality has been so deep that it is generally acknowledged that without him the Court would not have been the same.

His commitment to the values of justice and sustainability was so intense that it made him completely impermeable to pressures from any direction. He effectively defended the Court's independence against political intervention and this made him very popular to the public, if not to the political system itself. This spirit of steadfastness was transferred to all members of the Chamber and maintained their high morale even throughout periods of grave conflict.

Besides being a judge, he was a scholar in a wide range of scientific fields and an expert in systems methodology, which allowed him to approach complex matters in a comprehensive manner. In that way, he was a live source of information and education for the members of the Court, who felt confident in making the jurisprudential breakthroughs necessary for sustainability problems.

#### 6 CONCLUSION

The evaluation of the court's performance during the decade 1990-2000 permits us to draw the following conclusions:

- Judicial control of public environmental policies should be encouraged.
- In view of the nature of environmental disputes, involving grave conflicts over economic, social and political issues, judicial review should be entrusted to professional judges enjoying life tenure and a status of independence towards the government.
- It is also advisable that these judges

should be recruited from the body of administrative judges since the latter are familiar with the exercise of control of the administration and can easily handle conflicts with the government. In case such a body does not exist, special tribunals should be instituted.

- In order to achieve effective control with actual impact upon the environment, it is essential to empower judges with comprehensive jurisdiction, i.e. vertical and horizontal competence on sustainability matters. This means that governmental policies should be open to review at all stages, from their initial design (e.g. control of constitutionality of laws, preliminary review of regulatory instruments) down to the annulment of governmental decisions and suspension of their implementation.

- As recommended by Agenda 21, it is important to ease access to justice by broadening the concept of locus standi.
- The training of the above judges should include their initiation into systems thinking, which is the unique methodology for sustainability problems, as well as modern decision making methods including problem structuring, optimal modeling and evaluation.
- Finally, all actors involved in the judicial control of public sustainability policies should realize that in the 21st century the legal value of sustainability stands at the same level with the fundamental values of equality and human rights.