On balancing and standards in Greek environmental case-law

Eftychia Achtsioglou*
School of Law, Faculty of Law, Economic and Political Sciences, Aristotle University of Thessaloniki, efiacht@yahoo.gr

Abstract

This study attempts to examine the judicial treatment of cases where protection of the environment collides with fundamental rights, such as the right of the individual to property, or with significant public policy objectives, such as national economic growth. My focus will be on the methodology that is followed by the Court, on the legal concepts and standards that the Court employs in its reasoning as well as on the more general legal-theoretical presumptions that underlie its decisions.

We can easily divide Greek case law on the issue into two large periods. The first one begins in 1975, when environmental protection was for the first time introduced as a state objective in the Greek Constitution (article 24), and ends in 1993. During this period the judicial treatment of conflicts between protection of the environment and other fundamental rights or other public policy goals was premised on the concern of the Court how best to serve public or general interest as a whole. In the first parts of my essay I shall argue that, although the public interest approach was certainly conducive to a more rational and more protective management of environmental goods, it often led the Court to adopt a problematic legal-theoretical premise: the maxim that conflicting interests can be ranked according to an abstract, immutable, hierarchical structure containing the whole set of constitutional rights, values and goods.

Since 1993, the content of the public interest has been rendered more concrete. It was now identified with the notion of sustainable development, which has been henceforth permanently present in all the relevant Court's reasoning. Sustainable development was proclaimed to be one among the keystones of all state policies and the main standard for the judicial review of political choices of any kind. Being considered as the content of a norm of constitutional potency, sustainable development forms a legal and political framework in which three important, constitutionally entrenched state objectives are to be reconciled: environmental protection, social cohesion and economic growth. As a notion that expresses moderation and the search of equilibrium, sustainable development binds the political and judicial authorities to proceed to a concrete balancing of interests, often concluded with a cost - benefit analysis, when forming and reviewing the Environmental Impact Assessment. In this regard my study will attempt to provide a categorization of the different ways in which the method of balancing of interests was actually applied by the Court. In doing this, I shall focus on the function of the crucial term (sustainable development) in the methodology followed.

The research demonstrates that both the structural premises and the method chosen by the Court when forming its reasoning results from a specific "pre – understanding" of the content of sustainable development. The meanings that are ascribed to the notion prove to be originating from specific but often unconscious understandings of the relationship between natural space and the human action

developed within it. It is finally argued that Court's approach to sustainable development is crossed with the issue of social legitimization of the decisions made by every state institution.

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1. Introduction

It was not until 1975 that protection of the environment was recognised by the Greek Constitution (article 24 paragraph 1) as a fundamental obligation of the state. Henceforth, and especially during the last two decades, environmental protection has been frequently involved in conflicts, many of which ended up in court. These legal disputes took the form of a conflict between the obligation of state officials to schedule protective measures for the environment and certain constitutional rights that are inscribed, both institutionally and historically, in the very ideological, conceptual and normative core of political liberalism. Not surprisingly, these rights had mostly to do with the protection of the property and of the entrepreneurial freedom of the individual (Jègouzo, 1996). However, protection of the environment seems many times to collide also with social rights, such as the right of members of society to find a job and earn their living through this job and/or with other constitutional state objectives, including, most notably, economic development and protection of foreign investments. Touching both the protection of fundamental rights and important developmental policy issues, the aforementioned conflicts constitute perhaps the most critical, political as well as scientific, stake for the modern state (Papakonstantinou, 2007b).

2. From "public interest" to "sustainable development"

In 1977 the highest administrative court of Greece was called to deliver its judgment with regard to a case that arose from the conflict of socio-economic development with protection of environmental goods. The case concerned with the creation of a unit of boat–building and repairing in the cove of the Isle of Pylos. According to the applicants' allegation, the installation and the operation of this unit would be detrimental, to the natural and cultural environment of the region. However, the creation of the unit would also lead the region to a significant industrial development, which, in its turn, would importantly strengthen state's economy, mainly by creating new workplaces. In a decision that was celebrated by Greek jurisprudence[1], the Court stressed that the judicial treatment of such cases should be based on the normative notion of public or general interest. Doing this, the Court called the administration to take into account all factors (economic and non-economic ones) that may be relevant to such cases and to found its decisions to the interests of the nation broadly conceived. Nevertheless, overcoming the strong minority opinion, the Court finally rejected the petition for repeal of the decree authorizing the creation of the unit. According to the majority opinion, administrative authorities had in fact taken all appropriate measures to prevent the deterioration of the natural and cultural

[1] Council of State (in plenary session) 811/1977, *The Constitution* 1977, 442. [In Greek].

environment of the region. In any case, the statements made in this case formed a significant step of environmental case-law.

For the next twenty years the Court continued to address relevant cases by invoking the general interest as its guiding principle. It was not until 1993 that the term "sustainable development" made its first appearance, provoking a significant change in the premises of the Court's reasoning. From a substantive standpoint, sustainable development took the place of public interest as the determinant "yardstick" for the resolution of the relevant conflicts. Furthermore, although the idea of taking into consideration all relevant factors was adopted almost verbatim, the Court thought that it should actualise a more thorough balancing of conflicting interests.

Staying for the moment at the substantial issue, we can say that the appearance of sustainable development signals a turning point in the Council of State's environmental jurisprudence. It reverses the so far fixed use of an abstract concept such as general interest and leads the Court to adopt a more concrete normative criterion for resolving the relevant cases (Dellis, 2004a). Note, however, that this replacement was neither complete nor absolute. "Public interest" has not disappeared, but it is now conceived as an "umbrella term", condensing the whole set of the developmental and economical values and issues at stake. It thus takes part in legal disputes being a good at stake, being further a pole of the controversy.

A recent decision[2], concerning the building of infrastructure for the exploitation of bauxite deposits in the Prefecture of Fokida, makes a good example of this. In this case the Court pointed that in reaching such decisions legislative and administrative authorities should take into account not only the environmental risks that such a project entails, but also other public interest factors that are relevant to the purposes of economic development, namely ones that concern with enhancing national wealth, strengthening regional development and ensuring employment for citizens. In any case, however, the pursuit of such goals and the balancing of the respective goods should be made so as to ensure sustainable development. For one thing, the latter forms also a significant aim of the legislators of the Constitution.

The identification of public interest with sustainable development by the Court is not accidental. It follows a political and, more generally, a normative transformation in the relation between the respective political and normative objectives. The emergence of sustainable development as "telos" of the judicial decision coincides with its recognition as a political objective, as an important state priority giving actual and concrete content to the abstract notion of general interest. Indeed, the main concern of the modern state, particularly the modern legal system, is to find the golden rule for a viable reconciliation between the postulates of developmental progress, social justice and preservation of natural capital. The principle of sustainable development appears to respond to this fundamental concern, indicating not only the desired target, but also the method of achieving it.

This method can only be the ad hoc balancing of protected collective goods, as they appear in everyday litigations. This methodological innovation, which will occupy us in more detail later on, has significant political and systemic repercussions, broadly conceived. The Court ceases to leave unchecked the judgments of legislative and administrative authorities as to the concretization of the abstract and vague notion of the "most appropriate solution for the public interest". The Court demands that the

[2] Council of State 2059/2007, Legal Database *NOMOS*. [In Greek].

search for such solutions should be adequately justified in the light of sustainable development (Mantzoufas, 2006).

At this point, a digression is necessary so as to shed some more light on the meanings and on the role of "sustainable development" in political and legal practice.

3. On "sustainable development" and its legal status

The theoretical debate on the concept of sustainable development can be traced back to the 1960s and 1970s, when the term was for the first time introduced in the famous Declaration of Stockholm in 1972. Conferences that followed, such as the World Conference on Environment and Development (held in Rio in 1992), worked closely on the content of the term, elaborating its specific descriptive and normative implications (Papakonstantinou, 2007a; Gregoriou, Samiotis and Tsaltas, 1993).

It goes without saying that sustainable development is a compound concept; one that incorporates, as we said, at least three different public policy objectives: environmental protection, economic development and social progress. However, the attempt to define the term cannot be fruitful if we stay at the level of a mere citation of its constituent features. A dialectical-synthetical approach is needed, if we want to bring to the fore the contradictions and ambivalences that permeate the concept of sustainable development, in its normative grounds as well as in its repercussions in institutional, political and legal practice. We could summarize this normative, political and legal contradiction or ambivalence as one between the prevalent paradigms of (capitalist) socio-economic development, on the one hand, and ecological concerns as necessitating major changes in this paradigm, on the other hand. Without taking into account the antagonism between different normative and political aspirations at the heart of the legal notion of sustainable development, it is very difficult to understand why this notion carries with it the need for moderation and reconciliation, as expressed, in terms of judicial practice, in the method of balancing of interests. (See also Pieratti and Prat, 2000).

Of course, differences in the conceptualisation of sustainable development are not always owed to the aforementioned contradiction or ambivalence. It can be many times attributed to the fact that the notion is treated by scholars coming from very different scientific disciplines such as biology and ecology, law and/or economy.

In view of such problems, we must stress that sustainable development should not be perceived as a subjective political choice; as an ideologically biased preference of environmental concerns, one that is doomed to be suppressive to economic freedom. In my view, sustainable development should be understood as a fundamental state responsibility; that is, as a fundamental public duty, one that binds all citizens and all accountable public authorities alike. The political and/or ideological implications of the call for sustainable development should always be understood as genuine normative issues, which are to be solved by an impartial legislator, with the aid of administrative authorities and under the supervision of the judge.

Having said this, there are still important theoretical objections as to whether sustainable development can be a valid legal concept. The main objections can be summarized as follows: (a) the extremely broad conceptual scope of the term deprives it of its normative nature (Haidarlis, 2001) and (b) the implementation of the principle of sustainable development does not always lead to the same legal consequences; thus

it cannot be a legal principle, for it cannot guarantee an adequate level of uniformity in the legal treatment of like cases (Haidarlis, 2001).

As regards the first objection, we should note that, just like a series of other abstract legal concepts, such as "public interest" or "legitimate expectation of the governed", sustainable development is not an indefinite concept, but a concept whose normative meanings cannot and should not be specified a priori, that is, in a context-independent fashion. Of course, when applying and specifying the principle of sustainable development in specific contexts, the judge has to delimit the possible meanings of the term by linking it with less "broad–sense" principles; ones that reflect in a more specific manner both the demand for environmental protection and the normative or institutional requirements that are relevant to socio-economic development. But this specification process does not affect in principle the normative nature of the concept.

According to the second objection, any attempt to specify and to implement the principle of sustainable development in legal practice would necessarily result in undermining legal safety and in violating the principle of equal treatment of like cases. With regard to this objection, we should note that it is exactly this process of specification of the term with view to the critical features of each case that provides us with a more firm guarantee for legal safety and for equality in the application of the law. For one thing, if the principles of legal safety and of equal treatment are to be respected in practice and not only in principle, then we should make a fundamental decision as to the specification of sustainable development and of all the other general principles of constitutional law. That is, we must first decide that the final responsibility for this specification process belongs to the accountable officials of the state, among them the judges. Second, we must stipulate some methodological and substantive standards that will help us assess the performance of public officials, among them, the judges, in undertaking this specification process.

Shortly, the question "what does sustainable development mean?" should be taken to fall within and not outside the realm of legal science precisely on account of the principles of legal safety and of equal treatment. This is not to underestimate the fact that any particular judgment on whether a certain measure or a certain political choice violates sustainable development may require technical estimations and judgments (Dellis, 2004a) that fall outside the jurisdiction of legal science. But it falls within the competence of the judges and of all other accountable state officials to have the final say on the relevance of such estimations to the issues at hand.

Finally, a further clarification is necessary. The constitutional revision of 2001 added in article 24 the concept of sustainability which triggered off a major theoretical debate about the term's meaning (see also Mees, 1992). The relevant clause has as follows: "For the preservation of the environment, the State is obliged to take special precautionary or coercive measures, within the framework that is laid down by the principle of sustainability". It is clear that even the constitutional text takes the notion of "sustainability" as coming from another, an extra-legal and/or extra-political scientific discipline. Indeed, the term comes from forestry science and it firstly suggested that the stores of wood of a forest should be exploited and managed in a way that ensures the preservation of existing natural capital. The principle of sustainability has evolved gradually, moving away from its initially confined usage and today it condenses conceptually the general need for preservation for the sake of future generations and maintenance in perpetuity. The question that reasonably arises here: what exactly is the object of "preservation" and "maintenance

in perpetuity"? The one and only fact of the principle's placement in article 24 of the Greek Constitution sets as an object of the specific goals of preservation and precaution, the goods of natural and cultural environment. Indeed, placed in the second subparagraph of the first paragraph of article 24, the principle of sustainability can only refer to preservation of these assets which have already been mentioned in the first subparagraph, that is, the goods that belong to the natural and the cultural environment. The position just presented explains why the constitutional principle of sustainability can only have a purely environmental content and its implementation would automatically lead to the adoption of environmental protection against other conflicting goods or interests (Papakonstantinou, 2002).

On the contrary, sustainable development has a plural and synthetical content. Giving priority to the normative dimensions of the issue, the dialectical approach of the concept puts forward a demand for inclusion of all relevant interests and, thus, for universally binding political and legal choices. This means that the principle of sustainable development could sometimes promote certain economic interests with higher social relevance and put aside the conservation of environmental goods (Koutoupa-Rengakos, 2005). In any case, it means that sustainable development is a normative-juridical term and as such it should promote a sense of justice. The methodological counterpart of this sense of justice is balancing of competing interests in view of the particular circumstances that determine each case at hand.

4. The logic of balancing and of standards in service of sustainable development

In general, the method of balancing calls the judge (a) to identify all interests that appear to be affected by the administrative or legislative measure, license, ruling etc. under dispute; (b) to translate these interests and all the relevant claims of the participants into values, goods and/or rights of constitutional potency; (c) to come up with a "middle level theory", one that will accommodate all competing normative claims in a reasonable, proportionate and well justified manner. Such a theory will often be concluded (d) with a legal *standard*; that is, with a concept that will condense all relevant normative requirements, without giving the impression that any one of them was excluded. Sustainable development may be viewed as a standard of this kind.

The notion of "standards" should be understood in contradistinction to the binary logic that characterizes the function of legal rules in the traditional sense (see Schlag, 1985; Dworkin, 1978, 22-28). The crucial question for a legal rule in the traditional sense is whether it permits exceptions in its scope of application, calling into force some other rule of equal or of superior legal validity. For example, all drivers should abide by speed limits, unless there exists an emergency situation such that renders necessary the violation of these limits in order to protect some other good of superior legislative importance, such as the life of a gravely injured person who urgently needs to be carried to a hospital. In such cases, what the judge must do is to check if the rule under question permits an exception in its scope of application and, in case of a positive answer, to testify whether the exceptional conditions actually took place.

The logic of exceptions must be replaced by the logic of balancing, when the relevant norm is a standard. Here there are no rigorous rules and no exceptions, but a series of legislative and/or administrative choices that are proposed as equally valid,

at least prima facie, concretisations of one and the same norm. The validity of the final decision among these choices is based not so much on the existence of rules and of events, but on the reasonableness and on the coherence of the judicial syllogism itself. In its reasoning, the Court must actualise the standard at hand taking into account all claims and all interests of the participants. He/she must make his/her final choice in such a way as to give to the participants the impression that all their claims have been answered and all their interests played a role in the formation of the major premise of the syllogism. Whereas the logic of traditional rules puts forward the image of a zero-sum game in which a choice can be valid or invalid, the logic of standards puts forward an image of a reasonable discussion between the conflicting interests and claims. Acceptability of the final judgment is not so much a matter of authority as a matter of argumentative reasonableness. What we need is not so much an arbitrator as reasons. (See Rials, 1980; Koutoupa-Rengakos, 1997; Manitakis, 1989).

The fact that sustainable development is a standard and not a rule in the traditional sense means that every time the judge is about to make use of this term, he/she is obliged to enter a specification process as the one described above. During this process, sustainable development should play the role of a regulative indicator and not the role of a political or ideological claim that participates itself in the controversy as one of its poles. The question that finally must be answered by the judge is: Which among the proposed solutions satisfies better, in a balanced and proportionate manner, the economic, the social and the ecological concerns of the participants as a whole?

5. Balancing of conflicting interests in the Court's reasoning

The Court put into motion the aforementioned methodological guidelines in its decision on the TVX case[3], which concerned the construction and operation of gold mines in Halkidiki, Greece. Reviewing the validity of the ministerial decision which approved the Environmental Impact Assessment for the infrastructure project, the Court highlighted the need for a balancing of conflicting interests, while implementing the principle of sustainable development. The steps of the judicial syllogism in this case may be summarized as follows:

a) The Court based the major premise of its judgment on article 24 paragraph 1 of the Greek Constitution, on the provisions of the Treaty of European Union and of the Treaty establishing the European Communities that take protection of the environment as one of the fundamental aims of EU, also on a series of Greek statutes and of EU directives that are relevant to the issue. Referring to all these provisions, the Court stated that natural environment is a special legal good, which is to be protected for the benefit not only of present, but also of future generations.

b) The Court then proceeded to repeat its timely position about the existence of a straight constitutional obligation of the legislature and of administrative authorities to take all the necessary, preventive as well as coercive measures, in order to safeguard the natural capital. Doing this, all public authorities should intervene "to the necessary extent in any economic or other individual or collective activities" (author's translation).

[3] Council of State (in plenary session) 613/2002, *Legal Forum* 2002, 1972. [In Greek].

c) Then, the Court noted that, while taking the appropriate measures, public authorities should also take into account a series of other factors, such as economic development and the need for enhancement of national wealth, for strengthening regional development and for securing employment of the citizens. Court's reference to these constitutional objectives confirms its timely position that nature does not constitute a value that lies over and above other values in the abstract, that is, in accordance with some pre-given, pre-constitutional hierarchical structure or system of values. As happens with all other constitutional values and goods, environmental goods must also be subjected to balancing with view to the particulars of each case at hand.

d) According to the Court, sustainable development must be the aim and the standard of all the relevant legislative and administrative action, for this is one of the fundamental objectives that is enshrined in the Greek Constitution and in the EU Treaties.

e) In implementing the above clauses, the Court detailed not only the imminent environmental risks, but also the prospective benefits for state's economic development as well as ensuring employment for citizens. The Court concluded that the balance between the anticipated benefits and the environmental risks of the project, as estimated by the Environmental Impact Assessment, is not compatible with the principle of sustainable development. In making this judgment, the Court took particularly into account the technical details that were relevant to the proposed method for extraction and production of gold by the company interested. The Court held that the estimated costs of such a project for the natural capital (forest land, water streams and water reserves, plantation and animal life) of the region were to be far disproportionate to the anticipated benefits, whether the latter have to do with the rational exploitation of the country's mineral wealth or with the rates of unemployment and de-industrialization in the region. The ministerial decision that had approved the Environmental Impact Assessment was based on a deficient balancing of the citizens' interests, as these interests correspond with a series of equally important constitutional values, goods and objectives. It should therefore be annulled (see also Antoniou, 2004).

6. When the Court does not follow the method of balancing

There are still other cases, where the Court did not implement the principle of sustainable development in the way just described. In these cases the Court chose a methodological pathway different from that of balancing; one that distorts the actual normative content of the concept of sustainable development. The avoidance of balancing by the Court is based on three slightly different substantial premises: a) Protection of the environment is a public interest that should be considered as superior to all other public interests. b) Protection of the environment must be considered as a component of the principle of sustainable development, albeit one that is superior to all other components of the same principle. c) The normative content of sustainable development must be reduced to the demand for environmental sustainability.

6.1 Protection of the environment as superior public interest

The tendency to conceive protection of the environment as a superior public interest, one that predominates over all other aspects of the public's general interest, is present to many opinions given by the Court during the last two decades. We can track this tendency even in 1988, at a time when the Court had not yet entered the phase of «environmental vigilance» (Nikopoulos, 1990). In the Judgment of the Council of State 1615/1988[4], the Court gave to environmental goods absolute priority over all the other components of general interest that were also present in the case at hand. The applicants of this case asked for the repeal of a ministerial act which authorized the modernization of a fertilizer plant in the district of Drapetsona. The Court accepted the petition of the applicants on the grounds that the administration had not adequately taken into account the need to protect the environment from the possible effects of the project. The judgment of the Court was nonetheless based on a rather incoherent syllogism.

In "whereas" clauses, the Court repeated that there is a straight constitutional obligation of all legislative and administrative authorities to take all appropriate measures for the sake of the environment, through proceeding to some kind of balancing of all factors that constitute the general interest of the nation, among them that relate to ensuring high rates of employment of the citizens (art. 22, par. 1 of the Greek Constitution) and to promoting the economic development of the country (art. 106 of the Greek Constitution). However, in the subsequent step of its syllogism the Court expressed the opinion that these factors can be taken into account only after the protection of the environment has been absolutely secured. For one thing, protection of the environment is a core component of general interest and it has priority over all other aspects of this interest.

There are two ways to interpret this rather incoherent argumentative move of the Court. The first one is to suppose that the Court finally precluded the method of balancing and preferred to resolve the issue on the basis of a normative doctrine that significantly differs from the doctrine of sustainable development. According to this alternate doctrine, protection of the environment possesses absolute normative priority over all other goods and objectives, for environment as such is pragmatically the absolute precondition for the existence and for the expression of all other human and social interests of any kind. In this way, we should construe protection of the environment not as a special social-public interest but rather as the pragmatic and, thus, as the conceptual precondition of the notion of interest itself. It goes without saying that this strong doctrinal stance stands in firm opposition to the "balanced" concept of sustainable development.

Nevertheless, there is another way to interpret the aforementioned argumentative move. Instead of saying that the Court precluded the method of balancing, we may see that the Court proceeded indeed to a balancing, albeit of a very different kind than the one we described above. More specifically, we could say that the Court proceeded not to a specific, "in concreto", so to speak, balancing of the interests at stake, as appearing in the case to be judged, but to an abstract, "a priori" balancing of the importance that these interests carry in general, as a matter of a normative hierarchy that is prior to the constitution and on which our interpretation of the constitution must be based.

[4] Council of State 1615/1988, *Armenopoulos* 1988, 805. [In Greek].

The shortcomings of this interpretative theory are well known, especially to those familiar with the earlier jurisprudence of the German Constitutional Court (see Kommers, 1991, 837; Stratilatis, 2001, 512-513). In terms of the US jurisprudence, we could give to this theory the name of "definitional balancing" (see Aleinikoff, 1987, 979-981; and for a criticism Faigman, 1994, 677-682). We cannot address the issue in all its depth here. But for the purposes of our argument, we might pose the following question: In such an abstract or definitional balancing of different components of the public interest, what could be the criterion that would guide the judge's reasoning (Pavlopoulos, 1988)? Would not he/she tend to promote his/her subjective positions such as to render the result of this abstract balancing an arbitrary opinion rather than a well-justified judgment? And does not such a well-justified judgment need to take seriously into account the particulars of each case at hand and to abstain from evaluations that precede the relevant claims of the participants? Is not this a very risky methodological pathway to follow?

A good many could react to this criticism, arguing that the judge was justified to defend, through his/her decision, the urgent and absolute need for protection of the environment. However, no matter how desirable the result is, it cannot legitimate the way the decision was taken. To test the pertinence of this remark, let us consider the reverse case; namely, that of a judge whose personal system of values prescribes that priority should be given to economic growth or to reduction of unemployment, a goal which he/she views as rather incompatible to any kind of environmental concern. This judge could, in match, resolve a dispute even without taking into account the impact that her decision would have on the environment.

Therefore, to prevent every legal dispute from being left to judge's personal value scale, it is crucial that the Court follows a strict methodology in the formation of its reasoning, every time it is called on to settle relevant disputes. The example of the TVX case, as cited above, proves exactly that judicial activism is not needed and that a judge who functions as a servant of the law, following strict methodological guidelines, can be equally effective in reinforcing the state's obligation to take all measures necessary for preserving and promoting environmental concerns.

6.2 Giving priority to the environmental dimension of sustainable development

In many cases the Court appears to acknowledge the composite nature of sustainable development; that is, the fact that the relevant principle is composed of three separate public missions: environmental protection, economic development and social progress. Nevertheless, there are instances where the Court seems to consider the three components as unequal between themselves giving its priority to the environmental dimension.

This fallacy can be detected in one of the most significant environmental cases of the last decades, the case of the Bear of Pindos (Judgement of the Council of State 2731 / 1997)[5]. The issue that was raised in this case concerned the design and lay-out of the Egnatia road in the region of Grevena. A non-profit company, responsible for implementing the European project 'Arctos' -a project that concerned the protection of populations and habitats of the Brown Bear in Greece- lodged a petition for repeal of the ministerial decision which approved the Environmental Impact Assessment for the construction of the road in the part of Panagia-Grevena, in Grevena and Trikala Prefectures. According to the applicants' allegation, the region constitutes both an

[5] Council of State 2731 / 1997, Legal Database *NOMOS*. [In Greek].

important habitat for the protected species of Brown Bear and an area of high biological importance for the species, since it is one of the two corridors, which establish communication between metapopulations of the Bear of Pindos, and thereby, the viability of the species.

The Court scrutinized minutely all the documents relating both to the population of the species at risk and to the great importance of the region as habitat of the Brown Bear. It also examined thoroughly the documents concerning the possible impacts of the road crossing on the animal population within these habitats. However, what the Court did not examine at all were other factors, financial or technical, related to the construction of the road, such as the anticipated benefits from the infrastructure or the social needs that rendered the project necessary in the first place (Kontiadis, 1998). Indeed, the examination of these aspects, according to the Court's discretion, was "needless". As the Court explicitly stated, the exclusion of any habitat disturbance must be considered as an overriding criterion for the resolution of the dispute. Any other factors, no matter how weighty they are, cannot stand up to this criterion, "as they are not of the same hierarchical order" (author's translation).

But isn't it true that this very statement of the Court is not consistent with the conceptual origins of the principle of sustainable development? Sustainable development, as already mentioned, expresses the desirable synthesis of state's economic growth and life quality, which comes along with the conservation of biodiversity and the reinforcement of nature's balance. It also expresses the need for balance between economic development and social justice. With regard to these concerns, it is highly important that the component parts be considered as equal among themselves. If not, the principle would lose its conceptual as well as its normative core, which is the need for some kind of balance between its constituent normative-political features.

With regard to the judicial syllogism of the Bear of Pindos case, we may notice that it is possible to see sustainable development turning from a concept of dynamic content into a "dogmatic version" (Kafkalas, 2000, 519; author's translation). This may happen not only when economic growth is privileged but also when the ecological concerns are considered to be the superior ones in abstracto, that is, without any specification of the content of the relevant interests in each case and without any further argumentation to support such supremacy.

Moreover, we may notice that, as far as the political sphere is concerned, the pursuit of sustainable development demands an overall revision of the model of development followed by modern societies and presupposes significant changes not only in the dominant model of production and consumption, but also in distribution of wealth among regions and social groups. This is the meaning of the social component in sustainable development. Consequently, the actual notion of sustainable development may be in danger whenever it is translated into a single dimensioned tool, privileging whatever opinions are at certain times considered to be favourable to environment—in other words, privileging political correctness with regard to ecology and environmentalism. Instead of a notion expressing the potential for a social evolution in accordance with the ecological needs and necessities of future generations, sustainable development would then function as a consolidating power for the actual social order of today privileging blind oppositions with no possibility of some kind of normative, political as well as legal, mediation (Kafkalas, 2000).

6.3 Another judicial fallacy: Identifying sustainable development with environmental sustainability

As already cited above, the Council of State quite frequently adopts a beforehand immutable hierarchical order of the dimensions composing the notion of sustainable development. That hierarchy appears to be normative, but is in fact biased, subjective. It is founded on the judge's "pre – interpretational" and, thus, ideological preference for the superiority of environmental goods. Of course, this superiority obtains normative characteristics; through the Court's reasoning, it is translated into constitutional supremacy.

We may notice a variation of this stance in some recent cases, where the Court comes to identify the principle of sustainable development with the principle of environmental sustainability. In these cases the Court points out that the objective of sustainable development is to preserve the natural capital and to maintain natural resources unchangeable in perpetuity. Not a single mention is made about the socioeconomic aspects of the term. The compound principle of sustainable development is given purely environmental content, the same that may be given to the principle of environmental sustainability, as codified in article 24, paragraph 1 of the Greek Constitution.

According to this jurisprudential position, which is also adopted by a party of theorists, the main function of the principle of sustainable development, as it was adopted by the Greek legal system through art. 24 of the Constitution, is only to set limits to economic and social growth. A typical example of such distortion can be found in the Judgment of the Council of State 161/2000[6] concerning the authorization of developing mining activities. In this Judgment the Court attempts to define the notion of sustainable development by referring only to article 24 of the Greek Constitution (in addition, to article B, 2 and 130 of the Maastricht Treaty), which is dedicated as a whole to protection of the environment. No reference is made to article 106, which is the legal foundation of the objective of economic and regional development. Accordingly, the Court held that the fundamental role of sustainable development is to leave the natural capital of the country untouched in perpetuity. The developmental and the social aspect of the concept were entirely missing.

By establishing the immutability of the natural capital, the Court implies that the ultimate goal of sustainable development is to ensure that human society does not intervene in nature. Apart from the substantial unsoundness of this understanding, we may note that the judicial identification of environmental sustainability with sustainable development plays the role of a methodological shortcut. It leads the Court to circumvent any form of balancing, rendering useless any inquiry into the pros and the cons of the project under examination and leaving unanswered the claims and the interests of those who believe that the project is actually compatible with concern for the environment. As a consequence, the Court's judgment appears to be wedded to dogmatic ideas which are considered self-evident and determine from the outset the reasoning process without leaving room for any reasonable doubt with regard to the particulars of the case at hand.

Once again, we should stress that the above criticism does not question the outcome of the Court's reasoning, but the way it is structured and organised. The aim of my critical remarks is to underline the need for methodological self-awareness, the need for a coherent and sound reasoning process, in order fully to captivate and to

[6] Council of State 161/2000, Legal Database *NOMOS*. [In Greek].

implement a compound normative concept, as sustainable development is. Besides the issue of method, we should also emphasize the need for a more attentive approach of issues that fall into other disciplines, such as ecology or land planning (Kafkalas, 2000). This is so especially when the Court ascribes normativity to the relevant technical judgements by placing them in the major premise of its reasoning. The invocation of sustainable development so as to legitimize the use of personal views as legal rules is at least arbitrary, especially when the interpretative approach of the notion crucially diverges from its original spirit; that is, from the demand for a reconciliation between social-economic prosperity and environmental protection.

7. The Court's environmental activism as a response to administration's inactivity

Due to positions as the ones mentioned above, the Court has often been accused of environmental activism (Dam and Tewary, 2005). However, there is a serious reason for such activism. Through the lines of his/her judgments we often read the judge's concern about the insufficiencies of the state's environmental politics and public policies. He/she worries that the environmental dimension is not taken seriously into account by the executive while scheduling and implementing developmental plans.

Indeed, environmental risk issues seem to be ignored by competent authorities. Therefore, the cause of action is confined to environmental risk predictions, on which the decision is totally based (Mantzoufas, 2006). From this point of view, the arguments are simplified and conclusions become obvious. The sole implication of a species or an ecosystem being at possible risk legitimizes the circumvention, on behalf of the Court, of both legal and methodology rules of judicial review (i.e. ad hoc balance of conflicting interests, proportionality, principle of formal equivalence of constitutional provisions, cost - benefit analysis etc).

Many times judicial activism seems to serve as a corrective to such ignorance. It seems as if one branch of state power assumes the responsibilities and the burdens that the other branch rejects. However, does judicial activism provide the right answer to such ignorance and to such lack of inter-institutional mutuality? The answer would be a positive one, if what was missing from administrative (and/or legislative) action was simply the intention to take any measures to protect the environment. But administrative and/or legislative ignorance of the problem has many times other origins. Often it is not lack of the political intention but inability to give a well-justified answer to dissenters the reason why administration hesitates to take measures protective for the environment. Such an answer requires a thorough and clear balancing on behalf of administration. Even when the latter actually adopts protective policies, lack of justification in terms of balancing destroys the ability of the governors to convince the local and the national audience for the necessity of protective politics. The things get worse and the conflict of interests seems irresolvable every time the judge fails to do what the administration and the legislature should have done in the first place.

The obligation of all state authorities is not only to take appropriate measures in order to protect the environment. It is also to proceed to the necessary balancing between environmental protection and other constitutionally protected goods. For that reason, state action cannot be based on a partial assessment of the facts. State's

actions should come as a result of an overall valuation, meaning that in each case the competent authorities should estimate the possible environmental risk along with the desirable social progress and the developmental objectives involved (Dellis, 2004a). It is obvious that such a demand renders state intervention quite difficult, both in design and in operation, but it is only through this method that the policy which best reconciles the competitive interests can be revealed. What is important in the context of our argument is that the aforementioned responsibility is one that must be assumed by all state powers, within the premises of the procedures that correspond to their function and to their institutional "telos". To say that we need measures and not balancing, when some among state authorities fail to provide both of these things, is an inappropriate answer to the problem of sustainable development.

8. The presumptions underlying Court's reasoning

The judicial activism that was described above results from a more general "eco-centric" approach; one which takes protection of the environment as the sine qua non precondition of all human activities and, thus, for all kinds of political and judicial assessment and judgment. The impact of this approach to environmental law is the ascription of absolute normative priority to environmental concerns and the underestimation of the need for a more thorough and concrete balancing of interests in each case at hand.

As it is easily understood, the eco-centric approach stands in juxtaposition an "anthropocentric" one. The latter is based on a different conception of the relationship between human action and natural space. The eco-centric approach implies the idea that, although the human world can provoke serious damages to nature, the latter is by definition "external" to the former, an environment proper for it. The anthropocentric tends to conceptualise nature as a dimension of living of human beings. Thus, for the anthropocentric approach, protection of the environment aims primarily at safeguarding those goods that are related to human life, such as health or living conditions; it has no value of its own (Mantzoufas, 2006; Siouti, 2003; Koutoupa-Rengakos, 2005; Tahos, 1998). On the contrary, the "ecocentric" approach considers the environmental goods to have intrinsic value; therefore, their protection constitutes an end in itself, completely independent of any human motive or interest (Decleris, 1996; Decleris, 2000). It is then natural for the two approaches to adopt a different normative framework in order to conceptualise protection of the relevant legal goods.

One of the most usual critics that are levelled against the ecocentric approaches in general is that they promote an image of nature as being in perfect balance, as being a harmonious world by itself. The idea of an inherent balance in ecosystems is one of the oldest and most widespread ideas in ecology (Cooper, 2001). According to it, the ecosystems tend to self-regulate, converging on a point of equilibrium (Hovardas, 2009). The representation of a -by definition- harmonious nature leads to the conclusion that any imbalance should result from human intervention (Stavrakakis, 1997). However, such a dualistic approach of the relationship between human and nature sets both parties in a conflict against each other and "fails to note the ways in which the two interpenetrate one another" (Hovardas, 2009, 11; Evanoff, 2005). The nature is thus considered to be outside and above humans' history. Then again, "an "a-historical" version of nature meets its social equivalent to an a-historical version of human societies" (Hovardas, 2009, 8).

At this very point the legal fiction of "future generations" is called up to lend normativity to the ecocentric accounts: nature finally needs absolute protection from disturbing human intervention, and this need is legitimized by invoking the rights of future generations. How else could this judicial invocation be interpreted, if not as an attempt at a legal justification of a purely ideological position?

However, nature cannot be perceived without any reference to human society and vice–versa (Stavrakakis, 1997). This synergy between human behaviour and its impact on nature has been embodied in the principle of sustainable development, promoting a dialectical approach, as the one that is reflected in the image of balancing. From such a perspective, humans structure and are structured by both the natural and the social environment within which they live. The challenge that the principle of sustainable development brings to the fore is to stop asking about the self-evident need for a greater protection of the environment and start asking the right question, namely "at which point socio-economic concerns call off their natural counterparts?" and vice versa.

9. The social legitimacy of the judgments of the Court

If we follow closely the dialectical approach, we will soon realise that the core issue that emerges from the raise of environmentalism is not a technical but a political one. It is the issue of social and political legitimization of the decisions made by every state or even supra-state institution.

We cannot deal with this topic here. What we may say is that, in the same way that the invocation of public interest is used as a legitimizing basis for the choices made by the executive and by the courts (Chevallier, 1975), the invocation of sustainable development legitimizes the respective decisions as a matter of the collective conscience of our societies. Thus, we may also say that the particular environmental sensitivity which we see manifested in the Greek Court's judgments and decisions follows a growing environmental concern and self-awareness of the Greek society. The judge tries to reconcile himself/herself with the dominant ideological framework of the society (Truchet, 1977). This may of course lead to seeking popular but rather unjustified solutions to the detriment of more stable and reason-based answers to the problems that occur. In any case, the environmentalist approach to sustainable development forms an indirect, but celebrated declaration of the Court's unfailing environmental vigilance. The judge proves herself to be fully conscious of the environmental risks and she thus tries to make her decisions appear legitimate. It is an open question for her to supplement this legitimacy that is based on the current ideological framework with another kind of legitimacy, one that will be based on syllogisms and on judgments that no one could reasonably reject.

The urgent character of ecological concerns, whether this character is responding to real dangers or it is a fabrication of the dominant environmentalist discourse, renders sustainable development an even more politically charged concept than the one of public interest. It further leaves the Court with a great range of possible interpretations and thus of law – making, as it has been already observed in Council of State's decisions (Dellis, 2004b). However, the value-based priority given to the environmental protection in the system of social representations cannot further justify a normative supremacy. 'Environment' as legal object is part of a whole of social goods that require legal protection. Thus it shall be governed by the same

rational code that rules the regulatory whole. In other words, bringing ecological issues to prominence is not to be achieved by neglecting legal philosophy and methodology (Dellis, 1998), at least not without falling to metaphysical assumptions.

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PUBLIC PROPERTY AND PROPERTY RIGHTS THEORY

Abstract

The state has a dominant position in property rights. It sets the rules which all persons must follow when exercising those rights. Such institutions critically affect decision – making regarding resource use and hence, affect economic behavior and performance. By allocating decision making authority, they also determine who are the economic actors in a system and define the distribution of wealth in a society. Because certain property rights arrangements can reduce transaction costs in exchange and production and encourage investment, in order to promote overall economic growth, they have public goods aspects. Moreover, it is sometimes possible to create or change rights in land so that public property can be developed privately or commercially. This paper attempts to examine how can property rights on public land be available in an economically efficient way and if the state should limit itself in the exercise of property rights. Finally, it examines the problems encountered in negotiation and the political and economic considerations that influence property rights arrangements on public property, since the political bargaining underlying property rights contracts is essential in order to understand the outcomes.

A. INTRODUCTION

The economists have discovered a more systematic approach to balancing the multiple issues of public goods and, therefore of public property. The system is named for Charles Tiebout (1956), who first identified the possibility of migration and local government as a means of dealing with the provision of a particular type of public goods (Fischel, W., 2003:347).

Before Tiebout economists suggested that the problem of providing these goods was no different from that of providing national defense. The free rider problem engendered by non – exclusiveness of goods required that the only mechanism of dealing with public property was political. While economists from Erik Lindahl (1919), onward have discussed how voting shares might be reconciled with tax shares, the default answer for public property was that elected officials should only deal with it. They would set expenditures and raise tax monies to fund it at the levels that private citizens would have found optimal themselves. State paternalism seemed the best solution to public good provision and so, to the management of public property, because no one saw an opportunity to establish property rights for the provision of such goods.

Because the free rider problem seemed to be no different at the local level than at the state or national level, mainstream public finance theory before Tiebout had no reason to explain the existence of local government, or even prefer it to more centralized governments. Larger units of government actually seem preferable under such conditions. Tiebout (1956) argued, however, that the existence of many local governments within a metropolitan area, might provide an alternative solution to the free – rider problem. As Tiebout envisioned the process, municipal managers would offer a menu of public services and potential residents would choose their residence from among competing communities. By doing so, residents would reveal their demand for local public goods. Municipal managers might act like firms, but even if they were not governed by the profit motive, Darwinian selection (as suggested by Armen Alchian 1950) could winnow out those who did not give potential immigrants what they wanted.

Since this model was also incomplete (it did not explain for instance, how local public goods were financed), got little attention, until Wallace Oates (1969) pointed out that most local governments financed their public services with property taxes and these taxes and the activities they financed provided a guide of the fiscal benefits of each community to potential residents.

Oate's empirical research found that differences in property taxes and public services were reflected in home values: Home buyers purchase a community along with a home. Communities with better schools and lower taxes have higher home values (Dee 2000). This relationship indicates that potential residents do indeed value public goods when selecting a place to live.

This paper is intending to answer some important questions referring to the Greek management of public property. Could the model of establishing property rights be applied to the management of the public property in Greece? Does the Greek legal framework enable a more efficient regime on property rights? If the answer is positive, how can property rights on public land be available in an economically efficient way and in what way the state should limit itself in the exercise of property rights? Finally, in this paper, it is investigated the differences between property ownership and economic ownership and the importance of the latter at the establishment of rights on assets.

B. PROPERTY RIGHTS THEORY

Property rights are the socially acceptable use to which the holder of them can put the scarce resources to which these rights refer. It is the bundle of legal rights which describe what a person may or may not do with the recourses he owns: the extent to which he may possess, use, transform, bequeath, transfer or exclude others from his property.

Private property rights have two other attributes in addition to determining the use of a resource (Alchian A.). One is the exclusive right to the services of the resource. Thus, for example, the owner of an apartment with complete property rights to the apartment has the right to determine whether to rent it out and, if so, which tenant to rent to; to live in it himself; or to use it in any other peaceful way. That is the right to determine the use. If the owner rents out the apartment, he also has the right to all the rental income from the property. That is the right to the services of the resources (the rent).

Finally, a private property right includes the right to delegate, rent, or sell any portion of the rights by exchange or gift at whatever price the owner determines (provided someone is willing to pay that price). If I am not allowed to buy some rights from you and you therefore are not allowed to sell rights to me, private property rights are reduced. Thus, the three basic elements of private property are (1) exclusivity of rights to choose the use of a resource, (2) exclusivity of rights to the services of a resource, and (3) rights to exchange the resource at mutually agreeable terms.

According to the property rights theory, the primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities. Every cost and benefit associated with social interdependencies is a potential externality. One condition is necessary to make costs and benefits externalities (Desmetz). The cost of a

transaction in the rights between the parties (internalization) must exceed the gains from internalization. In general, transacting cost can be large relative to gains because of the difficulties in trading or they can be large because of legal reasons. In a lawful society the prohibition of voluntary negotiations makes the cost of transacting infinite. Some costs and benefits are not taken into account by users of resources whenever externalities exist, but allowing transactions increases the degree to which internalization takes place.

The role of property rights in the internalization of externalities can be made clear within the context of the above examples. A law which establishes the right of a person to his freedom would necessitate a payment on the part of a firm or of the taxpayer sufficient to cover the cost of using that person's labor if his services are to be obtained. The costs of labor thus become internalized in the firm's or taxpayer's decisions. Alternatively, a law which gives the firm or the taxpayer clear title to slave labor would necessitate that the slaveowners take into account the sums that slaves are willing to pay for their freedom. These costs thus become internalized in decisions although wealth is distributed differently in the two cases. All that is needed for internalization in either case is ownership which includes the right of sale. It is the prohibition of a property right adjustment, the prohibition of the establishment of an ownership title that can thenceforth be exchanged, that precludes the internalization of external costs and benefits.

C. THE ECONOMIC OWNERSHIP

1. The definition of the economic ownership

The economic ownership school approaches property from a perspective of the actual appropriation and searches for titles, lawful and unlawful alike, that bring it about. This enables it to reach some pertinent inferences on the deviations of economic from legal ownership.

Economic owners are those into whose hands income flows in the sense that they decide on the utilization of that income are economic owners of thing – good (Bajt, A, 1993:86). While the right of ownership assigns the right to use things – goods, economic ownership expresses actual use as reflected in the distribution and appropriation of income. In this sense, economic ownership is a question of fact. It is economic ownership with which legal ownership is concerned.

The things that people are legally entrusted with may, but need not generate income. If they generate income, owners may not appropriate it or may not appropriate it in its totality. Holders of the right of ownership (legal owners) may not be economic owners in that case. On the other hand the income that people are appropriating may but need not be based on ownership; economic ownership may also be based on public law rights, on adverse operation of any civil law, ownership rights included, and also on no legal rights at all, on illegal appropriation.

2. Distinction between ownership in the legal and ownership in the economic sense:

1. While in the legal sense any object of the external world, whether or not useful, can be owned in the economic sense only economic things – goods are objects of ownership.

2. Since goods are owned to secure the services – income flows they provide, which promotes them to factors, the true object of ownership in the economic sense are factors.

3. The physical form of both the income flow and factor is irrelevant from the economic ownership point of view.

4. The value of any factor derives from the value of the generated income flow. Since income flows extend into the future, the value of any factor equals the present value of the respective future income flow.

In order to make the appropriation of the integral flow possible, the property rights doctrine insists on a rigorous specification of rights, their exclusiveness and clear delimitation and protection and enforcement by the state. Above all, it insists on unrestrained rights, not attenuated either by a ban on some uses or by a diversion of the income stream away from the factor owner.

The reason appears to be obvious. On the efficiency assumption, there exists a perfect positive correlation between the volume of property rights assigned to a factor owner and the volume of the income flow he appropriates. If any of them is lowered – attenuated, the other adapts downwards. If property rights are attenuated, income flows diminish correspondingly. If income flows are diverted form owners to other recipients, use of property rights and factor inputs shrinks.

According to the property rights school, there exist two possible solutions to the problem of externalities. The first is to handle them by taxing (feeing, fining) and subsidizing or other governmental action. This is Pigou' s approach, followed by many economists. As it is regarded as suboptimizing allocation of resources, negotiation between agents whose rights collide is proposed as a superior method. This is the approach of the property rights school.

Assuming transaction costs to be zero, a market perfectly competitive and all factors of an ecomomy privately owned, renegotiation of rights leads to an optimum allocation of resources and maximum growth. According to the so – called Coase theorem, this will be invariant to the original assignment of property rights. Via renegotiation, any original assignment of property rights brings about the same allocation.

Due to the renegotiation, rights are contractually attenuated, realigned. In fact, new rights are created and income flows are correspondingly rearranged. This perfectly fits the contractarian type generation of rights and also accounts for the force of etiquette, social custom and ostracism (Alchian 1965: 129) and social norms and people' s taste for good society (ideology) (Eggertsson 1990: 454) in the emergence of property rights.

Unfortunately, transaction costs are usually not zero but positive, frequently very high; renegotiation is influenced by unequal bargaining power; and many factors are not assigned to private persons at all (public property, social property in socialist countries). In such conditions renegotiation of rights does not necessarily lead to optimum allocation. This is the case for public law intervention forbidding or restraining some uses and stimulating some other. In this case, property rights are attenuated not contractually

but by public law. Along the lines of the property rights reasoning, such interventions if not fully off the track, optimize allocation.

Public law attenuation of property rights is not prompted merely by impediments to the optimum allocation of resources via renegotiation. Old rights are attenuated and new ones are created by autonomous public intervention as well. This is exogenous attenuation. The modern massive public law statutory liability and environmental regulation illustrate this. Of course it could be argued that allocation is suboptimized in this way. Yet, once the public law generation of rights in solving the externalities problem has been recognized to optimize allocation, the argument against autonomous public law attenuation and creation of new property rights leading to realignment of economic ownership becomes unconvincing. In fact, in cases of nonoptimum renegotiation, initiative frequently originates from public bodies rather than private agents. The property rights school criterion of the total effect (Coarse 1960: 44) makes public intervention an unavoidable complement to the structuring of property rights in general.

This allows us to systemize three points that weaken the negativist property rights school stand on the public law rights:

1. The public law shares in the creation, protection and enforcement of property rights. The contractual market derivation of property rights, as opposed to the public law rights, can be accepted as a first approximation and a typical genesis only. Economics teaches us that even within these confines deriviation is truly contractual only if the distribution of bargaining power is not skewed. Besides, because of positive transactions costs and many factors not assigned to private persons, negotiations of rights gives way to public law interventions. Furthermore, while property rights are protected and their observance enforced by civil law instruments and violation prosecuted as criminal act, progressively more liability has been established by public law statutory regulation, so that in the view of some, tort law should be regarded as a stopgap pending future statutory. Finally, the property rights systems as such are protected constitutionally and their observance enforced publicly and by public law instruments and state coercive machinery,

2. The public law contribution to the property rights optimalization of allocation. In many cases both unlawful appropriation and public law rights submaximize income streams. However, it need not always be the case. We have already met situations in which public law interventions into private property rights improve rather than impair efficiency. Quite generally, in modern welfare states large parts of income are subject to redistribution on the basis of public law interventions, such as property and income taxation, especially progressive, high social contributions, collective bargaining, price and rent controls, inflationary money creation, forced savings capital formation and so on. While discussions on the relative efficiency merits of these interventions are not yet concluded, and while many of them probably and some certainly stretch too far, it is beyond doubt that with all of them eliminated and with appropriation based on civil law property rights exclusively, efficiency would be hurt considerably.

3. The ideological underpinning of such treatment. Any theory that worships a specific property rights and / or economic ownership structure as the most efficient irrespective of the relevant circumstances is ideologically biased. In as far as the property rights school insists on exclusively civil law based appropriation, it owes this to its

specific liberal ideology. The same applies to any enforced economic ownership structure.

D. THE BASIC PRINCIPLES AND DIRECTIONS ACCORDING TO THE GREEK CONSTITUTION DETERMINING CHOICES AT THE MANAGEMENT OF PUBLIC PROPERTY:

The most basic elements in defining an economic establishment are the range of exercising and developing of private economic initiative. Pinpointing the ease and extent to which the State can intervene in financial activities is the basis for defining the economic establishment and classifying it according to traditional models. The economic provisions in the Constitution, therefore, reveal the guidelines that the legislators must not trespass.

When considering the institutional framework set by the Greek Constitution, the choices available for administrating public property and determing property rights on it cannot be used to carry out radical liberal policies. Indeed, economic activity is planned and coordinated by the political administration, as defined by the provisions of chapters 1, 2 and 3 of Articles 106 of the Constitution. As a result, the ideological background of the Greek Constitution is more in line with the theoreticians of social contract, than with the neo-conservatives. Public interest, according to the Greek Constitution, is the general will which supersedes the needs of any private economic initiative.

Moreover, the constitutional restrictions according to which private fiscal initiative are not allowed to engage in activities which would damage national economy do not alleviate the related obligations the State is obliged to respect the field of private economic activities. It only sets certain specific and extreme boundaries on the freedom of such activities, especially in sectors that have aspects of monopoly and serve vital needs of society. Similarly, completely banning the regulatory powers of the legislator in the field of private financial activity is not constitutionally accepted when it leaves the general interest and the national economy unprotected and endangers the fruits of economic freedom with possible irrational choices of private financial initiatives. Thus, the Constitution precludes certain extreme options concerning the overall status quo of the economy, disallowing the total nationalization of the economy and the admission of private property rights on them (Tsironas A.:38).

It should be stated at this point that such constitutional obligations function on two levels: on the one hand, they directly bind administrative bodies, as all the State's activities including its contractual activities are subject to the Constitution; on the other hand, constitutional obligations restrict legislative authority as they require regulation of the contractor's selection procedure in such a way so as to safeguard the principle of equality. This contrast is a direct result of the difference in the constitutional quality between contracts in the public and private sectors. With respect to the latter, legislators are negatively bound by human rights; therefore, they can only intervene externally, setting the limits of private autonomy. The opposite holds true of contracts in the public sector, where contractual liberty is absent and the efficiency of contractual relations requires that choices be made in accordance to constitutional provisions (Kaidatzis A., 2006: 65).

This also influences the options available in managing public property; the State may be forced to yield part of its authority. Nevertheless, according to the relevant case law by the Council of State (CoS), the public sector cannot admit property rights on activities that according to the Greek Constitution fall under the direct and exclusive jurisdiction of the State. Typical examples include national defense, law enforcement and the execution of justice or the penalties imposed by authorized courts. The Constitution offers more details as to what these activities are. There are three criteria that can help us define the activities that, according to the Constitution, fall under the direct and exclusive jurisdiction of the State: firstly, exercising public authority; secondly, public authority exercised as part of the social state; and thirdly, all those activities referred to in the CoS relevant case law.

All the above, in conjunction with the scope and content of the constitutional protection granted to private economic initiative, lead to the conclusion that the current Constitution does not enforce an exclusively free market economy. The restrictions imposed on business activity by legislation and regulation, as well as the direct intervention in the function of private enterprises, are considered constitutional State intervention. Naturally, these factors are in no way sufficient to define the Greek economic system as a purely public economy. However, they are sufficient to shake the belief that the Greek constitutional order, that tolerates State penetration in private economic initiative to such a degree, provides for a pure free market economy and is ready to admit property rights on public property. Hence, a more consistent view would be to say that the Greek economic system presents several elements characteristic of a mixed economy – a statement supported by the prevailing view as well as case law.

It is, therefore, obvious that the Constitution grants individual legislators a relevant freedom of action, in other words, a wide discriminationary power to tackle economic problems and shape broader economic policies. Given that the constitutional guarantees of individual rights and the social state are not infringed upon, it follows that the Greek Constitution can be characterized as open with respect to economic policy and the economic regime in general (Manitaki A., 1994: 1204).

However, even if the Constitution does not include special provisions that enforce a particular economic regime, it cannot be considered economically and politically neutral. Besides, the critical element that defines the character of an economic regime is no longer the balance of relations between production and ownership, as defined by constitutional economic provisions, but the constitutional balance between individual liberties and the corresponding State powers. The constitutionally protected economic regime attempts to strike a compromise between two extremes: on the one hand, there is the legal field pertaining to enjoying economic freedom and expressing private economic initiative, and on the other hand there is the field of State intervention, within which the State attempts to coordinate the economy and safeguard public interest. The State's most important means of imposing power is economic penetration and participation in business activities (Tsironas A., : 43).

Taking into account the particular balance between economic rights and their restrictions, one could claim that the Greek Constitution allows for the enjoyment of economic freedom in a mixed liberal economy and can therefore allow property rights on public property. It also makes provisions for exercising private economic initiative in a liberal interventionist economic regime. However, any political position that drastically

departs from the current economic regime, regardless of whether it leans towards extreme liberalism or towards an entirely State-run economy, is incompatible with the Constitution. It follows that the management of public property must be practiced within the framework of neither a purely liberal nor a purely interventionist economic policy.

E. CONCLUSION

Property rights are essential social institutions for combating the potential wealth losses associated with open access. That is, when there is no clear definition of ownership over valuable assets, then parties will wastefully compete for them and underinvest in them (Liedcap, G., 2003 : 165). In the most extreme case, the value of the asset will be fully dissipated through competition for control and through lost opportunities for investment and exchange (Anderson and Hill 1983). More commonly, such extreme cases will be avoided, but the potential wealth from effectively exploiting the resource will not be reached, and some unsatisfactory, underperforming state will prevail. To remedy this situation, individuals have incentives to negotiate privately or through government to develop more complete property rules. The desire to mitigate the losses of open access and to secure the associated gains is not always sufficient to bring beneficial institutional change. Even when some agreement on property rights is possible, its form may deviate sharply from what would seem to be the most desirable arrangement.

The details of the bargaining or contracting process explain why. The parties are motivated by rational self – interest in distribution – their share of the aggregate social returns from agreement. If the anticipated shares make the parties better off relative to the status quo, then agreement is likely. If not, the parties are motivated to continue under the current regime, even if there are aggregate social losses from so doing. The larger the total benefits of devising new or modifying old property rights, the more probable is agreement.

The more homogenous the parties, the more likely they will be able to construct and agree upon an assignment of property rights (shares). Where the parties differ in important dimensions, such as production cost or access to information about the value of the asset, then agreement on property sharing rules will be more difficult. If the numbers are large, the transactions costs of reaching agreement will be increased. These points help explain the persistence of seemingly ineffective property rights arrangements across societies and across time. The parties may agree that something must be done, but they cannot agree on how to proceed most effectively.

Given the importance of property rights institutions for efficient resource use, more attention must be paid to their development, and where they are effective, they must be protected. There is always tension between the productive benefits of secure property rights and the distributional results of a property allocation. Distributional concerns drive the negotiations for developing and modifying property rights. Understanding these concerns and how they impact contracting for property rights are necessary in explaining why a society has the kinds of property rights that it does and the obstacles that are faced in attempts to modify them. High levels of economic welfare cannot be taken for granted. As property rights are abridged in response to distributional concerns, the range of economic opportunities available to the owner is narrowed. The resulting shift in

expected returns can lead to different and less valuable resource use with profound economic welfare consequences for the entire society.

It must be noted that the political and social context are essential for whether or not and in which direction institution change. The change should fit to the institution; any change in the rules governing the use of property rights has to fit in the existing formal uses and informal packages.

Citizenship as a legal and political privilege of the sovereign state ? The case law of the European Court and the construction of a status europeus.

Tsolakou Efthymia (Themis)[*]

Abstract

This paper deals with the borders of the traditional concept of citizenship under the paradigm of the nation-state, and explores its new dynamics in the international and the european level. The notion of citizenship is under the threat of losing its constitutional source and strength because the criteria of its acquisition are gradually no longer conceived as a political choice and a privilege of the sovereign state, due to the new collective bonds that are being created and the multiple criteria of social inclusion that are being implemented. Certainly, the complete abandonment or the total deconstruction of the concept of citizenship is normatively neither feasible nor desired, since citizenship is not only the precondition for being a member of a political community and for the enjoyment of civil liberties, but also a valuable tool for the reasonable and effective organizing of the relations between the persons and the democratic polity. However, the connection of each person to many public spheres and multiple identities calls for the reconception of citizenship in a new, modern and effective way and the re-definition of its acquisition criteria.

Studying Greek constitutional history and the Greek case law regarding the laws on citizenship, the paper sketches the evolution of the concept in the national and the European level and presumes that citizenship is conceived and presented as a legal and political privilege of the sovereign state, since it formulates migration policy and the criteria for becoming a citizen as part of public and not of european law. Thus, the paper explores a new "effective citizenship" in the context of nation states, through a comparison between European citizenship and national citizenship, and concludes that a shift is being made from an economic to a social conception of European citizenship in the case–law of the European Court (EC). In particular, one can observe that the EC, through a pragmatist approach, tries to detach European citizenship from nationality and from the obstacles that the different constitutional identities of the member states pose, and with a view to a social or political unification, supports a social dimension of the European citizenship, enhancing the implementation of national laws under the light of a socio – economic solidarity as a nascent European principle between European citizens. Of course, this practice is insufficient to lead to the independence of the European citizenship from the inherent constraints set by the national identities, nevertheless, it puts again in the forefront the question of the construction of a status Europeus as a bond of individuals in a process of creating a European political community.

[*] The author is PhD candidate in Constitutional Law at the Aristotle University of Thessaloniki, and Scholar of the State Scholarships Foundation of Greece (I.K.Y.). Correspondence at the address : tsolakouth@gmail.com

I. The European Union as a new case in the history of citizenship.

Examining the case law of the European Court one can trace arguments for a new conception of citizenship not as a selective and legalist collection of rights (by several legal texts such as constitutions, charters and international conventions) but as a status of rights and duties inextricably linked to a political community, either national, or post-national. In this context, the emphasis is given in the democratic deficit of the European Union not as a question of participation of the citizens in the making of the european decisions (functional criterion), but as a question of citizens as members of a political community [substantial criterion). Thus, in the case law of the European Court, the judges deploy arguments of ratione personae και ratione materiae in the implementation of the european law and not only do they construct a transition from the european citizen as an economic agent to a european citizen as holder of social rights,but they give a paradigm-basis for new ideas regarding citizenship and modern european constitutionalism.

1. Three ideas on citizenship.

The case law of the European Court deals with the concept of citizenship selectively, partly and legalistically, as a collection of rights by several legal texts (constitutions, charters and international conventions). On the contrary, living experience proves that citizenship is rather a status of rights and obligations inextricably linked to a political community, either in a national or a postnational society. European citizenship is still a fertile ground for the designing of new dimensions of citizenship, but only if one ignores the typical model of the political community. The triple distinction of citizenship {deficient, simple and complete} that follows, describes in substance the stages [historically and in terms of political philosophy] in the evolution of citizenship, while in this way it is shown that the current european citizenship cannot come under a full form of citizenship. In the european case of selection of rights, away from the democratically legitimized political community, like the present european model, citizenship misses guarantees δεδομένες in the political community under the rule of law. In the classification that follows, one can see not only the sense of citizenship, but also the print that leaves in the life of the political community and its institutions[1] :

a) *Citizenship by birth or naturalisation(according to the constitution)*.The existence of a constitution, a prevalent normative framework that recognizes rights and duties to persons within a certain territory gives a first image of the citizenship, which one can trace already in the definitions that Aristotle gave. There lies the idea that in the real *polis* what transforms persons into citizens is the *Politeia (*constitution), in the sense of a prevalent norm that organises the life of the community[2]. Therefore, one conceives citizenship firstly with a connection to the emplacement of a person in an organized and legally regulated life in a community that it is defined by race (genre) and it is partly homogeneous. However, the basis of genre constitutes an incomplete citizenship that one can find mainly in non representative political systems[3].

b) *Citizenship through the integration of the other, the stranger*[4]. In modern times, the nation state is constituted by the consociation of small national entities (ethni) and tribes[5], and appropriates every diversity under the umbrella of one single state that has the supreme authority[6]. At this stage, the nation[7] as a supreme unifying ideology is the means for creating identity for the state. The citizen is subordinate and enjoys the

liberal protection of his private life[8], a series of civil rights and freedoms against the sovereign state which monopolizes political authority[9].The subordinate – citizen is he who mandates and legalizes essentially the sovereign state[10], and enjoys the typical universal equality against the stateς[11]. This is what we may call simple, citizenship, which is subordination to the authority.

c) *Citizenship as participation in the public sphere*: Citizen's participation in the economical, political and social life of the state and his exit form the liberally protected sphere of privacy[12], is done with the participation in the public arena, in the public institutions, at the centres of taking decisions and in the public dialogue. This leads us close to the citizen of the polis[13,] who is not just a citizen of the state [14,] but also enjoys individual, political,and social autonomy and freedom, ceases to be only the agent who mandates and legitimises power and becomes a citizen - social partner[15,] a citizen that has an organic part in the political community. Full citizenship is deployed in and beyond civil society[16], and is completed inside the political community, under the safeguards of democratic participation and collective autonomy[17].

2. Case study:European citizenship as a derivative and dependent on the national one

At the present stage of its evolution, the European Union is not a state, it doesn't refer to a european people that could constitute its political community,[18] and there is no common identity. Therefore, for the time being, european citizens enjoy an identity which is derivative, indirect and dependent on the national one. The political system of the European Union is constituted by member states and expresses their will, represents nation states and not individuals or societies. As long as member states are the sovereign subjects in the making of Europe, european citizenship is condemned to be dependent from national citizenship. The conditions for the acquisition or the loss of the national citizenship belong exclusively to the authority of the member state, and in practice this means either the lack of the possibility of a separate recognition of the European citizenship to third country national or its deprival from a national of a member state.

II. The European citizenship in the case law of the European Court before and after the Maastricht Treaty.

1. The attachment of the European citizenship to the economic liberties.

A serious step in the evolution of the European citizenship was the recognition of its political and administrative dimension, namely the recognition of rights of participation in the European institutions[19], like the right to vote for the European parliament, the judicial protection before the European Court and the right to report and refer to the European authorities. Until then, European citizenship was partial, incomplete and not explicitly established, however, one could deduce it from the economic powers of the E.U. and by the representative political system of member states and within the E.U. Until the Maastricht Treaty – when it was for the first time expressively established art 17 EC- European citizenship was strictly connected to national citizenship and mostly to the economic freedoms (free work and circulation). More specifically, only the

actively economic population (workers professionals, and recipients of services) could claim the freedom of free circulation and residence, with the exception for tourists, students, and pensioners(according to directives 90/364-66). Article 18EC law was, before the Maastricht Treaty a general declaration and an institutional guarantee,that just completed hermeneutically the core community liberties of free circulation of workers, of residence and services (αρ. 39, 43, 49 EC law) that were applied.

2. An important interpretative"shift" in the case law of the European Court..

During the last few years, the evolution in the case law of the European Court shows a turn in the interpretation and the implementation of article 18 EC law, in a way that this article is now a general and complete right of free circulation and residence that all European citizens enjoy, irrespectively of any economic activity (as long as they have reason to move and reside, financial means and health insurance). In a series of cases the Court (Baumbast, Sala, Bickel, Wigsenbeek, Collins, and D' Hoop decisions) expanded the normative field of the implementation of article 18 detaching it from the strict economic activity, using as its interpretative criteria, article 17 EC that establishes European citizenship, article 12EC that establishes the equality principle and also the proportionality principle. In particular, as far as social services are concerned, the Court has expressed a general claim for the equal treatment of all the European citizens that are on the ground of another member state, with this state's nationals.

Equally, in the same logic of widening the normative content of article 18 EC, it is worth mentioning a series of cases concerning the attribution of social benefits by member states (C–456/02 M. Trojani, C–11/06 & C–12/06, 23.10.2007, Rhiannon Morgan vs Bezirksregierung Koln, and Iris Bucher vs Landrat des Kreises Duren). A common element in all the above cases is that the European Court interprets the freedom to reside within the European Union in light of the European citizenship and a wider interpretation of article 18 EC. In this way, it recognizes and extends the rights to social benefits, irrespectively of the exercise of an economic activity. And this is really important, since social policy is exercised only by the member states and does not fall within the jurisdiction of the European Union.

Moreover, another series of cases confirms the above choice on the interpretation of article 18EC law and attaches it expressively to the European citizenship. Thus, the Court, on the basis of the European citizenship, establishes citizenship rights that not only they are not connected to economic freedom and social policy, but also refer to the dignity, the personality, the name, the freedom of choice, namely to the basic freedoms and rights that are recognized and protected by the internal law of the member states (and not by the EU conventions). At this stage, the Court makes a step further and founds these rights directly in the European citizenship (article 17EC) without any reference to the general right of residence of article 18 EC. Moreover, in two recent decisions (Zhu-Chen C–200/02 και Garcia Avello C–148/02), this connection of European citizenship to rights that are established by the nation states, transcended the field of social benefits as the Court used the concept of the European citizenship, without the argument of equal treatment, to recognise rights that belong in what, according to the French theory, seems to be the "domain reserve" of every sovereign state.

III. Procedural guarantees for the formation of the European citizenship: the dialogue of the national and the European judge on the basis of the Community *acquis*.

1. The limits of a European citizenship as constructed by the European Court.

As the case law of the European Court deals with cases not only ratione materiae, but also ratione personae, a shift is made in its methodology . The European judges use as a base for their rulings the article 17 EC alone, and not an interpretative combination of articles 18, 12, and 17EC[20]. The aim was an interpretation that will allow the emergence of a European citizenship as a legal status of civil and social rights within the field of the European Union. Certainly, this course is the exact reverse from that of the national citizenship paradigm, since in all the liberal and democratic member states citizenship, as the sign of the inclusion in the political community, is the condition for the recognition of rights and duties (civil, social, political)[21] . In the EU however, the inexistence of a political community has led the European Court in a reverse course and in the connection of civil and social rights to European citizenship with a view to create and establish a self contained European citizenship.

This choice is familiar to the practice of the Court to establish a priori the prevalence of the European law vis a vis the national one. Having the same goal, the European integration, and in the same way, the Court approaches European citizenship pragmatically in an effort to render European citizens agents of the European law order and to dissociate European citizenship from the national one and from the burdens of the many distinct constitutional identities[22]and traditions of member states. Through the enrichment of the European citizenship with a social dimension, the aim of the Court seems to be, during the last decade, the transformation of the European Union from an economic organization to a political union, to a Europe of Citizens, and an establishment of a European citizenship.

However, this tactic is legally and constitutionally problematic, due to the fact that the European Union is equipped with economic powers only, with the member states as its primary agents. More specifically, there is a complete absence of a European people with a territorial, psychological and historical bond with the Union, of a legitimation of the practice of the European union as a political community through democratic participation processes for the citizens in the public sphere, while there is no social politics by the European Union itself[23], in an autonomous and uniform way for all European citizens.

Besides, there are inherent limits in the dynamic character of the rights of the European citizen and their dilative interpretation and implementation by the European Court. As it was described, the character of the European citizenship is limited and strictly rights based. The rights are established only for those who already have the nationality of a member state (even if they don't reside within the European Union), while they are not attributed to those that reside within the European Union but are third state nationals[24]. European citizenship, as it is established at the article 17 EC law does not entrench a status of a membership into a certain people- *demos*- , nor constitutes a separate and complete legal bond with a certain law order[25], instead it is about a very limited status that has a derivative character. European citizenship is a intermediated bond of the person to a European political society that is under constant formation and evolution.

Even in the rejected plan for a European Constitution, European citizenship was again inspired by the logic of a community of member states and by a perspective of a European integration with new legitimizing bases[26]. At a first level, the establishment of the rights of the citizens still seems really distant, as long as the right to free circulation and residence is dependent on the economic liberties entrenched by the European communities. At a second level, there is the danger that European citizenship will not ever been identified with membership in a European social entity, if it is not conceived and implemented as a direct bond of the citizen with the Union itself, without the mediation of the nation- states. For that purpose, what is needed is the creation of direct bonds of solidarity between all the persons that co-inhabit the territory of Europe in a common and unified public space of dialogue and participation. Europe needs procedures that will ensure participation in the process of collective autonomy, in order for a European political society that will belong to everyone, either national of a member state, or a third country national who lives in a European country and participate in the social life[27].

2. The community acquis of the case law of the European Court as an interpretative guide for the national judge when implementing national law: the bond of socioeconomic solidarity between european citizens.

Certainly, the aforementioned case law of the European Court does not offer safe and substantial criteria for the construction of a European citizenship; however, it offers some perspectives for the formation of those procedural guarantees that will possibly lead to the enrichment of the concept of the European citizenship, and will deal with the democratic deficit in the function of the E.U. Thus, the need to find new methods that could overcome the democratic deficit becomes really apparent, if one takes into consideration the weaknesses and the limits of the European citizenship, namely the indirect (through the nation state) participation of nationals in the European institutions, the non implementation of the existent participatory procedures, the absence of a public European sphere of dialogue and communication, and the limits and weaknesses of European citizenship as discussed above. The aforementioned case law certainly makes steps towards this direction, by putting in new terms the effect that the European law has on the national one, away from the problematic usual pattern of the jurisdictional conflict. In a few words, the practice of the Court offers a minimum community acquis, which, although it is certainly weak to support the construction of a European political community, it is indeed rich in normative content and expediency.

Moreover, except for the procedural guarantees, one can assume that underneath this case law a bond of socioeconomic solidarity is built among the people of the Union, by using residence as a criterion for the enjoyment of rights and the equal attribution of social benefits. In a way, one can detect the enfeeblement of the nationality criterion for citizenship in favour of the residence criterion which also enhances the promise of equal treatment and recognition of social rights and benefits to third country nationals. This is more obvious in the case law of the European Court on free circulation and residence, which was codified with the 38/2004 directive that set the sufficient financial means and the health insurance as the only conditions for the free movement of the European citizens within the E.U. (art. 7 & 14 par.1). In this way the case-law of the Court was transformed into derivative law and was thus incorporated in a unified way into the national legal orders harmonising the relevant regulations. However, there is

the possibility of a "conflict" with the national legislation on social care and protection, but also with the one that brings into effect traditional rights and freedoms.

In one point of view then, the above case law enhances a European identity of rights and abandons a logic of conflict that does not foster the European Union. This theory on the "genetically modified right" of rights in the european vision that the case law of the European Court supports, suggests the reconciliation of the two law orders through a simultaneous implementation of all the rights' declarations and the hermeneutical exchange between the national and the European legal order. Such an approach is certainly fruitful in the field of the respect of fundamental rights, where the conflict is almost impossible and charming because it comes close to an idea of «multilevel-constitutionalism[28]». Of course, it only refers to the respect of rights, without dealing with the classic notion of sovereignty[29], but the respect for basic rights that the E.U. recognizes, remains a distinct issue with regard to the one of who has the jurisdiction for bringing these rights into effect. More specifically, the E.U. doesn't have the power of setting rules in this field, since the member states have not yet transferred to the Union their relevant sovereign powers.

Thus, it is worth examining the way the national judge would react in a case where the aforementioned directive – on the status of the European citizen- conflicted for example with the national rules on the conditions of acquiring the Greek citizenship, or on the social and migration policies. In such a case where the Greek judge finds himself/herself in difficulty to interpret an internal rule in light of the freedom of residence or the equal treatment rule (directive 2004/38) or he/she is in front of a conflict of these regulations with an internal law (regulations for social insurance, terms of residence, migration law, etc.), he/she could deliberate using the jurisdictional criterion that the Greek Constitution offers in article 28 par. 2 &3 that set the limits in the transfer of the sovereign powers to the E.U. This article gives the power to the Greek judge to act also as European judge and be able to control and decide whether a European regulation can be implemented against a national one. If the case law of the European Court is regarded as not violating the Greek constitution, then one can expect national judgments that will bring about new forms of social solidarity, of a European inspiration and of national implementation.

This perspective must be realised not through using the de facto arguments of the European Court and the European citizenship as a legal notion; instead the national judge and the national legislator should use the case law of the European Court as an interpretative means and as a paradigm, with a view to the enrichment and the expansion of the notion of the national citizenship towards a European perspective. The dialogue between the national and the European judge could create a solid ground for the harmonisation at least of the interpretation by the national judges when dealing with the citizen's status in the European Union and the relevant European policies. Otherwise, the case law of the European Court, analysed in this paper, could be dangerously expansive and lead Europe to an immature and distorted political Union.

Conclusions

The procedural guarantees and the interpretative means provided by the elaboration of the case law of the European Court regarding article 17EC, have a limited potential; they could be used in order to solve a possible conflict between a European and a national rule, and offer a harmonizing practice with the development of a minimum community acquis on the co- residence of the european citizens and their equal access to social services in member states. Thus, the communication between the courts offers, on the necessary conditions of impartiality and of uniform implementation, these procedural guarantees that can work as an institutional method to compensate for the institutional democratic deficit in the inner of the E.U. They are not adequate though, to counterbalance the democratic deficit of the EU itself. The courts' decisions are inadequate and incapable of substituting the living political communities of member states that make up the E.U. A procedural guarantee of a judicial character is not capable to give the European citizenship a role in the European integration, if it is not complemented by a substantial guarantee of legitimation. This precondition must be "seek and found" in the democratic will of the member states as political entities, as the ground where the values of participation in the public sphere, of collective autonomy and of equal treatment for all, are being tested.

However, the formation of a European citizenship is a perspective that cannot be dealt with partly and sporadically, without the shaping of a certain stance for the national or the postnational character of the European Union, for its state or federal formation, for the existence of a European people -*demos*- or multiple peoples, for a concentrative administration system or the enhancement of the peripheral democratic systems. All the above dilemmas were only implied in this paper, while a safe legal and political way for the construction of the European citizenship is of course not a matter of one presentation. However, irrespective of the form, the governance model and the political future of Europe, the process towards the construction of the European citizenship cannot ignore the guarantees of a democratic political society, namely, the rule of law, the principle of equality, the participation rights, and mostly the procedures of social autonomy and control.

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