

Stability of the law – a prerequisite for sustainable development

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Abstract

In my paper, I aim to highlight the key connection between sustainable development and the stability of the law. In order to achieve these objectives, I have made a doctrinal and jurisprudential incursion, which led me to conclude that sustainable development is a concept whose practical implementation is dependent on national policies through its value, highlighting, ultimately, its link with the stability of the law. The results I have reached demonstrate that the law contributes effectively to achieving sustainable development only if there is legislative planning and if impact assessments are drawn up. Last but not least, the sustainability of the law is also ensured by its proper motivation.

Keywords: *sustainable development, stability of the law, legislative planning, impact assessments, motivation*

JEL Classification Code: K

I. Legal content of sustainable development

The concept of sustainable development was launched in 1987 through the so-called Brundtland Report of the World Commission on Environment and Development, entitled 'Our Common Future', which covers under the heading of 'reconciliation' both economic development and protection of social and environmental balance¹. In other words, 'sustainable development' has developed a trend, internationally guaranteed through various instruments², whereby national policies, strategies, legislation and sectoral regulations are intended to contribute, in the long term, to the well-being of communities. Sustainable development is based on sound legal principles that provide a predictable and

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¹ Secretary-General of the United Nations, Report of the World Commission on Environment and Development, *Our Common Future*, New York, 1987, p. 18.

² We refer to the United Nations 2030 Agenda for Sustainable Development and the Paris Agreement on Climate Change, adopted on 12 December 2015 at the Conference of the Parties in Paris (COP21), in force since 4 November 2016. Romania ratified the Paris Agreement by Law No 57/201, published in Official Gazette. no 276 of 20 April 2017. These documents set out objectives and principles to be respected by governments, organisations and individuals to ensure a sustainable future.

stable regulatory framework necessary to implement and support sustainable practices in various sectors³.

The elements that characterize sustainable development also require sustainable practices, including ensuring legislative certainty; predictability of the legal framework; regulatory compliance; investment promotion; dispute resolution; policy implementation.

In other words, the action of the law over time must be predictable in order to be able to support long-term sustainable projects. As such, legislation can ensure compliance with the required standards, contributing to the protection of natural resources and human rights. A stable legislative environment attracts investment in sustainable projects, as investors trust rules and regulations without abrupt changes that could negatively affect the profitability of their investments. Such an environment also requires a climate of cooperation and dialogue between stakeholders, in which sustainable development policies can be implemented coherently and effectively, ensuring their continuity and adaptability to societal needs and challenges.

In these circumstances, sustainable development looks like a transgenerational point that aims to balance the needs of current and future generations, with a long-term positive impact on the environment, the economy and society.

In our view, sustainable development is a technical concept, as its material content brings together a number of tasks, without which it cannot be achieved: 'clarity'; 'coherence'; 'flexibility'; 'adaptability'; 'public participation'; 'equity and social justice'; 'monitoring and evaluation'; 'accountability and transability'. The object of the 'condition' of this concept is the law and its addressee is the 'legislator'. By fulfilling these features, a law can help promote and support sustainable development, ensuring a better future for all generations.

II. Stability of the law

The principle of stability of the law is not enshrined in the Romanian Constitution, but it can be inferred from the constitutional provisions of Article 1(3) and (5) of the Fundamental Law and from the preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms⁴. According to Law No 24/2000, 'legislative acts must, from the draft stage, lay down necessary, sufficient and possible rules leading to the greatest possible legislative stability and efficiency'.

³ Sustainable Development Goal 16 refers to "Promoting peaceful and inclusive societies for sustainable development, access to justice for all and building effective, accountable and inclusive institutions at all levels".

⁴ CCR Decision No 404 of 10 April 2008, published in Official Gazette No 347 of 6 May 2008 and CCR Decision No 51 of 25 January 2012, published in Official Gazette No 90 of 3 February 2012.

It has been held in legal literature that these features must cover the social needs that have been imposed on them, without creating an appetite for increasing laws, leading to regulatory inflation. Solutions promoted by legal rules must be possible in order to be implemented and respected. The rule must therefore provide for timely, coherent and appropriate regulation to the circumstances which gave rise to it⁵.

It has been held in constitutional case-law that legislative technical rules help to lay down binding criteria for the adoption of any legislative act, compliance with which is necessary to ensure the systematization, unification and coordination of legislation, as well as the content and legal form appropriate to each legislative act. Therefore, 'failure to comply with legislative technical rules gives rise to situations of inconsistency and instability, contrary to the principle of legal certainty in its component relating to the clarity and foreseeability of the law'⁶.

Last but not least, the stability of the legislation is an important element of the legislature's credibility, since frequent changes to the rules may disguise the addressees, which is unfortunately common in the practice of legal regulation⁷.

The first pillar to which this principle applies is the Constitution itself. According to Dominique Rousseau, "the constitution appears as a written text, containing both the rules for the realisation of political power and the status of the individual's freedoms, bringing their interpenetration into line with the general interest of society"⁸. Professor Stefan Deaconu stressed that "the stability of the Constitution over time is even one of its defining features"⁹, as it distinguishes itself from legislation that is amended and supplemented according to the political developments that dictate the state's legislative policy.

Unlike the legislative apparatus that is almost dependent on societal developments, the Constitution enshrines fundamental principles, guarantees rights and freedoms, requires the stable character of the State, sets out the guidelines for the organisation and functioning of the fundamental institutions. Thus, the Basic Law is required as the supreme normative power, through constitutional provisions and its spirit, as a force for the people's aspirations.

That is why the Constitution has a heavy task to fulfil. It must be modern enough to be current, but also sustainable, in the sense that it must adapt to the transformations in which the state is undergoing.

⁵ See Verginia Vedinaş, Legislative stability and codification in public administration, Review of Legal Sciences No 2/2015, edited by the Faculty of Law in Craiova in collaboration with the Publishing of the Legal University, p. 45 et seq.

⁶ CCR Decision No 367/2022, par. 35, published in Official Gazette No 815 of 18 August 2022.

⁷ See, for example, the fact sheet of Law No. 227 of September 8, 2015 on the Fiscal Code.

⁸ Dominique Rousseau, *Constitutionnalisme et démocratie*, 2008, in *La vie des idées*.

⁹ Ștefan Deaconu, *Drept constituțional*, C.H. Beck, ed. a II-a, București, 2013, p. 31.

The opinion assessed that the legislator must 'reconcile the idea of sustainability and stability, continuity and actuality between the characteristics of the constitution and the need for revision'¹⁰.

For these reasons, the Constituent legislator did not reject the idea of revising the Constitution, in the sense that it can be initiated by the President of Romania upon the proposal of the Government, by at least one quarter of the number of deputies or senators, as well as by at least 500.000 citizens entitled to vote; the draft or proposal for revision must be adopted by the Chamber of Deputies and the Senate, by a majority of at least two-thirds of the number of members of each Chamber; it is subject to a double constitutional review; the review shall be final after its approval by referendum, organised no later than 30 days after the date of adoption of the draft or proposal for revision. The procedure requires political consensus, which may make it cumbersome or rigid, but it is understood from a constitutional point of view that this difficulty lies in the need for review only by way of exception.

Hans Kelsen, the parent of the concept of 'Basic Law', has laid it at the heart of the whole body of legislation, which must comply with it, thus becoming directly or indirectly valid¹¹.

Mircea Djuvara explained the concept of stability of the law by opposing the capricis of the people. He stressed: 'a Constitution must not change so easily (...) the legal institutions, in order to be sporadic, lead to an achievement in a well-balanced state, must not be prey to all the winds and all the Parties' or the moment in time¹².' In another opinion, it is argued that rigid review procedures create 'a stop for any changes that are frivolous or unjustifiable, as evidence of mistrust towards the ordinary legislature, the authorities that may initiate such measures that are unenjoying rights in this area, but powers, which are strictly delegated by the Basic Law'¹³.

Historically, we can identify 3 key moments that determined constitutional review in some European states: change of political regime, accession to the European Union, internal transformations, such as the COVID-19 pandemic and difficulties in interpreting constitutional provisions with a view to declaring a state of emergency. I note that of these two situations concern single or quasi-unique events in the constitutional history of the states, while the third factor followed an extraordinary situation, which required clarification of the constitutional provisions.

¹⁰ Paul Negulescu, Gheorghe Alexianu, *Tratat de drept public*, tomul I, Editura Casa Școalelor, București 1942,

¹¹ Hans Kelsen, *Théorie pure du droit*, Paris, Dalloz, 1962, pp. 257 și 299.

¹² Mircea Djuvara, *Puterea legiuitoare*, în *Noua Constituție a României și noile instituții europene*, Cultura Națională, Institutul Social Român, București, 1922, p. 91.

¹³ Phillipe Ardant, *Institutions politiques et droit constitutionnel*, Paris, L.G.D.J., 2000, p. 80.

The revision limits of the Romanian Constitution aim at: the prohibition on changing the form of the government republic, the national, independent, unitary and indivisible nature of the Romanian state, the integrity of the territory, the independence of the judiciary, political pluralism and the official language which is Romanian, or the suppression of the fundamental rights and freedoms of citizens and their guarantee. Nor can constitutional changes be made in extraordinary situations arising from the state of emergency, siege or war.

In conclusion, the most important requirement for the legislature to commit itself to the Basic Law is the stability of creating a fundamental legal framework¹⁴.

Mutatis mutandis, the stability of the law must not be understood beyond the concept of events which may occur during the course of the legislative act, namely those amending or supplementing the law¹⁵. In this respect, also Article 61 of Law No 24/2000 states that these legislative events are permitted only if they do not affect the general design or the unitary nature of the act or if they do not concern all or most of the legislation in question. These conditions indirectly ensure the stability of regulatory design. Another guarantee is that the provisions amended or supplementing the legislative act must be integrated smoothly into the act to be amended or supplemented, ensuring the unity of style and terminology and the normal sequence of articles.

The law, in a broad sense, is intended to shape social relations, to impose specific rules requiring the conduct to be taken, both for authorities, citizens and legal persons. For these reasons, the legislator must not abuse the legislative initiative at its disposal so as to bring the impact of the law into a derisory. In order for the law to have the desired impact and to enjoy stability, the legislator must be aware of the development of social relations, be aware of the needs and shortcomings of citizens and legal persons, or anticipate these vulnerabilities, and must not burden administrative or regulatory burdens. The legislator should also work to support sustainable development projects that bring long-term benefits by taking on short-term sacrifices without focusing on immediate results.

III. Legislative planning – a component of the stability of the law

It has been held in legal literature that ‘everything we call as positive is dependent on the existence of legal certainty’¹⁶. This certainty is urgently needed both to ensure the uniform interpretation of the law and to manage the conflict of

¹⁴ Varga Attila, *Constituționalitatea procedurii de revizuire a constituției*, în *Revista Transilvană de Științe Administrative*, 3(15), 2005, pp. 126-138.

¹⁵ A se vedea Ioan Vida, Ioana Cristina Vida, *Legistică formală. Curs universitar*, Universul Juridic, București, 2020, p. 153 și urm; p. 156 și urm.

¹⁶ Gustav Radbruch, *Gesamtsaugsage*, C.F. Müller, Heidelberg, 1990, p. 50.

laws over time, as well as to guarantee the non-retroactivity of the law¹⁷. Referring to European jurisprudence, I shall observe that the human rights court has held that one of the fundamental elements of the primacy of law is the principle of certainty of legal relations¹⁸. It has been pointed out in legal literature that 'if the new law did not comply with what was done in the context of the provisions of the old law, trust would disappear and, with it, would have reached the authority of the law, because the will to listen to the portions and opinions of the law would certainly be demobilised if the person subject to it were not certain that, in doing so, he would be under the shield of the law¹⁹'. In the light of Law No 24/2000²⁰, the principle of legal certainty integrates the accessibility and predictability of the law into its content, often penalising 'poor drafting²¹' or 'insufficiently drafted, sometimes impossible to apply²²' rules. In all its dimensions, in national law, the principle of legal certainty is considered part of the provisions of Article 1(5) of the Fundamental Law, according to which 'in Romania, compliance with the Constitution, its primacy and the laws shall be binding'.

I also agree with the view expressed in legal literature that legal certainty appears to be a 'fundamental principle of the rule of law, a state which is appreciated, to a large extent, by reference to the quality of its laws²³'. As I have noted on another occasion²⁴, the quality of the law is not a desire that the legislator wishes to achieve once, but is a mandatory sub-unit, which is understood by Article 1 (5) of the Fundamental Law, according to which in Romania compliance with the Constitution, its primacy and the laws is mandatory. The quality of the law lies in the form of legislative initiative and the impact it must have in the world. That is why I have pointed out that the law is not an anost act, but has a general and objective content which must be addressed to its addressee, whether it is the person who implements the law or the citizen.

In other words, the stability of the law requires that the work of the legislator be effective, accountable and inclusive, within the meaning of the UN (No 16) object of sustainable development.

¹⁷ Decision no. 98/2002, published in the Official Gazette no. 301 of 8 May 2002 and Decision no. 1345/2008, published in the Official Gazette no. 873 of 23 December 2008.

¹⁸ See the Case of Brumărescu v. Romania, published in the Official Journal no. 414 of 31 August 2000.

¹⁹ Mihail Eliescu, *Aplicarea legii civile în timp și spațiu. Conflicttele de legi în Traian Ionașcu, Tratat de drept civil*, vol. I, Ed. Academiei, București, 1967, p. 80.

²⁰ Republished in Official Gazette no. 260 of April 21, 2010.

²¹ Decision No 710/2009, published in Official Gazette No 358 of 28 May 2009.

²² Decision No 453/2008, published in Official Gazette No 374 of 16 May 2008.

²³ Sorin Popescu, Cătălin Ciora, Victoria Țândăreanu, *Aspecte practice de tehnică și evidență legislativă*, Monitorul Oficial, 2008, p. 7.

²⁴ Ioan Vida, Ioana Cristina Vida, *Reflectarea cerințelor procedurale pentru garantarea calității legii în jurisprudența Curții Constituționale a României*, Revista de Drept Public nr. 4/2017, p. 83 și urm.

The role of parliaments in assessing national progress is mentioned in paragraph 79 of the 2030 Sustainable Development Agenda, which encourages states to carry out regular and inclusive assessments of progress at national and regional level. In this capacity, national parliaments can build a legal framework to achieve the objectives, revise the proposed legislation through sustainable and human rights-based legislation.

Ensuring the stability of the law establishes, in our view, a syllogism:

- (1) identification of legislative solutions;
- (2) sound scientific substantiation;
- (3) applying established principles at European level: accessibility; interoperability; precautionary.

In other words, the stability of the law is determined by the early identification of effective solutions to link benefits simultaneously to minimising the associated costs, whether social, economic or environmental.

The instrument that can achieve these correlations is the impact assessment, which has a tradition of motivation tools, helping to streamline and simplify legislation²⁵. The impact assessment should accompany all draft legislative acts, not just those that are particularly complex, in accordance with Law No 24/2000.

The rationale for legislative solutions requires the establishment of necessary, sufficient and possible rules leading to the greatest possible legislative stability and efficiency. The solutions contained therein must be well founded, taking into account the social interest, the legislative policy of the Romanian State and the requirements of correlation with all domestic regulations and the harmonisation of national legislation with European Union law and with international treaties to which Romania is a party, as well as with the case-law of the European Court of Human Rights.

The preliminary impact assessment of draft laws, legislative proposals and other draft legislative acts is a set of work and procedures carried out with the aim of ensuring an adequate basis for legislative initiatives. The preliminary impact assessment involves identifying and analysing the economic, social, environmental, legislative and budgetary effects of the proposed regulations. The preliminary impact assessment of draft legislative acts is considered to be the basis for the proposed legislative solutions and must be carried out before the adoption of the legislative acts.

The rationale for the new legislation must take into account both the impact assessment of the specific legislation in force at the time of drawing up the draft legislative act and the assessment of the impact of the public policies that the draft legislative act implements. That is why legislative proposals, draft laws and

²⁵ European Commission, *White Paper on European Governance* (Cartea albă privind guvernarea europeană), COM(2001) 428 final.

other draft legislative acts should necessarily be accompanied by a preliminary impact assessment to ensure a balance between short-term needs and legislative dynamics.

According to Article 33 of Law No 24/2000, with the marginal name Impact Assessment, '(1) The purpose of drawing up the impact assessment is to estimate the economic and social costs and benefits resulting from the adoption of the draft law, and to highlight the difficulties that might arise in the process of implementing the proposed regulations.

(3) The impact assessment refers to:

- a) the state of affairs existing at the time when the new legislation was drawn up;
- b) the proposed amendments to existing legislation;
- c) to the objectives pursued by amending existing legislation;
- d) the means available to achieve the intended purposes;
- e) the difficulties that might be encountered in the application of the new provisions;
- f) the assessment of the costs imposed by the adoption of the draft law and of any budgetary savings generated by it, the reasons for that assessment, and the method of calculating costs and savings;
- g) the benefits resulting from the implementation of the draft law other than those of an economic nature;
- h) a comparative analysis of the costs and benefits of the draft law, showing whether the benefits are justified by the costs."

In our opinion, the impact assessment should not be limited to merely presenting socio-economic, financial, legal data or identifying expected changes at institutional and functional level at central and local government level, but should highlight a current picture of societal needs and the most appropriate way in which they can be regulated by a legislative framework. In this way, it is possible to avoid the lack of connection between existing legislative solutions and the choice of the legislator to introduce in the same act or within the existing legislative framework regulations that creates confusion and a lack of predictability in their application.

Such a legislative amendment was also suggested by the Romanian Constitutional Court, which held that 'in the absence of a special law establishing the obligation to draw up an impact assessment, the complaints of the objectors of the unconstitutionality objection cannot be converted into a genuine complaint of unconstitutionality under Article 1 (3) and (5) of the Constitution²⁶'.

²⁶ See recital 66 of Decision No 379 of 11 July 2024 on the objection of unconstitutionality of the Law on consumer protection with regard to the total cost of credit and the assignment of claims as a whole, and in particular the provisions of Articles 1, 2(b), 6, 10(1) and 12 of that Law, published in Official Gazette No 786 of 9 August 2024.

IV. Correlations between sustainable development and stability of the law

Reliance on the need for an impact assessment to accompany a draft legislative act has often been subject to constitutional review.

Depending on the legal nature of the contested law, the Romanian Constitutional Court has developed two types of case-law.

As regards the first typology, if the requirement for an impact study or an impact analysis is laid down in a special law and, if it is lacking, then the legislative act may be found to be unconstitutional²⁷. Thus, the Court found that the Framework Law on Decentralisation nr.195/2006 required a study or an impact assessment to be carried out and that the absence thereof had led to a finding of unconstitutionality of the Law laying down measures for the decentralisation of powers exercised by ministries and specialised bodies of the central public administration and of reform measures relating to the public administration²⁸. The Court has expressly established that failure to fulfil the obligation incumbent on the Government and the Parliament under Article 5 (1) of Framework Law nr.195/2006 to carry out and adopt the law criticised on the basis of the necessary impact assessments constitutes a breach of the provisions of Article 1 (5) of the Constitution on the obligation to comply with the laws.

As regards the second typology, if such an obligation is not laid down in a law of a special nature, the Constitutional Court has held that the instruments of presentation and reasoning of draft legislative acts do not have constitutional value and cannot constitute a reference rule in the review of constitutionality²⁹.

The Constitutional Court recognised that 'the sound reasoning of legislative initiatives is a requirement imposed by the provisions of Article 1 (5) of the Constitution, since it prevents arbitrariness in law-making by ensuring that draft laws and legislative proposals adopted meet real social needs'. However, the Constitutional Court held that it was not competent to review the wording of the statement of reasons. In the present case, given that Parliament enjoys a wide margin of discretion as to how to state the reasons for laws governing financial and banking matters and/or consumer protection, the Constitutional Court found that the allegation that this law infringes Article 147 (4) of the Constitution concerning the obligation to comply with the decisions of the Court and Article 1 (3) and (5) of the Constitution concerning compliance with the legal rules governing the legislative process is unfounded.

Overall, the lack of impact assessments was considered to be an intrinsic unconstitutionality criticism, in that it is not only the lack of impact assessments

²⁷ See recital 244 of Decision no. 650 of October 25, 2018, published in the Official Gazette of Romania, Part I, no. 97 of February 7, 2019.

²⁸ See recitals 94-98 of the Constitutional Court Decision no. 1 of January 10, 2014, published in the Official Gazette of Romania, Part I, no. 123 of February 19, 2014.

²⁹ Decision no. 650 of October 25, 2018, cited above.

that is the point of constitutionality, but is corroborated by the nature and importance of the legislative solutions regulated in the body of the law³⁰. In other words, in order to be sustainable, the Court has held that the requirement that the impact assessment be carried out must be laid down in a special law³¹. In other words, in order to be sustainable, the Court has held that the requirement that the impact assessment be carried out must be laid down in a special law.

It has been noted in legal literature that 'the absence of appropriate impact assessments on the effects of the regulations, prior to their adoption, has often led to them being amended, supplemented or repealed shortly, or otherwise incapable of being applicable due to a lack of resources³²'.

Currently, impact assessments are not used to their fair value. In part, that situation is caused both by the high costs entailed by such a specific analysis and by the human factor, which is not professionally specialised in order to be entrusted with such a task.

In our view, the impact assessment cannot and should not be outsourced, even to scientific research institutes, universities or non-governmental organisations. The legislator should organise its own research structures with access to data, situations, statistics, which can provide a comparative law analysis and be familiar with the policies and projects of international, regional and European Union organisations, including relevant case-law. Impact assessments can make a notable difference in moderating legislative inflation and increasing the quality of the law.

Another situation which results in particularly complex regulatory acts being affected by the lack of impact assessments is caused by the haste of the Romanian legislator to adopt and apply a legislative solution. The legislative programme is not given the opportunity to be properly prepared from a technical point of view before it is made transparent or registered with the competent Chamber.

The legislator lacks prospective legislative analysis when planning, preparing and proposing new legislative solutions.

³⁰ Decision No 345 of 26 May 2022 on the objection of unconstitutionality of the provisions of Article 4 (1 ^ 1) to (1 ^ 3), (3) and (4), Article 5 (3 ^ 1) and Article 8 (5) of Law No 77/2016 on the transfer in lieu of payment of certain immovable property with a view to extinguishing obligations entered into by credit, and of Law No 52/2020 amending and supplementing Law No 77/2016 on the transfer in lieu of payment of certain immovable property in order to settle the obligations entered into by loans, as a whole, published in Official Gazette of Romania No 1260 of 28 December 2022.

³¹ Decision No 69 of 28 January 2021 on the objection of unconstitutionality of the Law on the protection of consumers against excessive interest, published in the Official Gazette of Romania, Part I, No 492 of 12 May 2021.

³² Valentin-Stelian Bădescu, *About the loss of identity and spirit of Romanian law a decade after Romania's accession to the European Union*, Acta Universitatis George Bacovia. Legal, Volume 6. ISSUE 1/2017, George Bacovia University Publishing House, Bacău, p. 54.

In our view, prospective analysis is an essential element in creating predictable, sustainable legislation that ensures long-term legislative stability.

One element of the prospective analysis is the impact assessment. In this way, the primary and delegated legislature can anticipate the effectiveness and cost-effectiveness of the effects of legislative acts.

Expressing technical views on the evolution of law enforcement can help to ensure thorough cooperation between the country's sole legislative authority and the delegated legislator.