

Law and Order

The principle of sustainability is cited as a state goal within the constitutional framework of the Swiss federation (art. 2, section 2 of the Swiss Constitution) and is further dealt with in an entire separate constitutional article (art. 73) [1]. In its report "Sustainable Development Strategy 2002," the Swiss Federal Council states that it does not view sustainable development as a separate policy sector, but rather as a "governing idea" encompassing all areas of policymaking.

On April 11, 2002, the Swiss Department for Spatial Development declared unabashedly: "Every second, 0.86 square meters of space are claimed as new space for settlement purposes. Currently, the total built-up area comprises 2,859,369,128 square meters." *Fictio cessat, ubi veritas locum habere potest* – Fiction ceases, where truth can take its place. Is sustainability nothing more than fiction?

What relation exists between the ideals of law and reality? At first glance, the standing afforded the principle of sustainable development in art. 2, sec. 2 and art. 73 of the Swiss Constitution should be significant enough to bring about a verbal consensus between policymakers, the business community, and society at large. However, putting sustainability into practice with concrete proposals and regulations is another matter, as is the case with many other well known ideals and principles. Yet to forgo the idealism of the law would be a misinformed strategy and approach: "To view the law as nothing more than a reflection of current circumstances would be to overlook its most important dimension, namely its role as both a catalyst and a framework for the development of society." [2]

Legal systems seek to put in place a framework that guarantees individual rights and freedoms while serving to advance the common good. The norms of a state's legal system build a static order in which norms can only be established, changed, or abolished by lawmakers themselves. A commonly accepted understanding of a state's legal framework relies on the assumption that it is a permanent feature of society. Yet this assumption overlooks not only the fact that

political, social, economic, and spatial realities and goals change over time, but also that the law must be able to adapt to the dynamic of these changes and thereby prove itself capable of continuous development. *Tempora mutantur lex et mutatur in illis*. [3]

The effectiveness and continued relevance of legal norms and instruments must therefore be put to the test on a permanent basis. As soon as a legal norm no longer influences the sectors and problems it was designed for in the manner desired, or if its underlying principles and goals have changed, it must be adapted to fit new realities and circumstances. In addition, it should be noted that legal norms do not exist independently, but rather in a series of dependent relationships. As such, the revision of one norm or the introduction of a new one may well necessitate changes in other legal norms, a possibility that policymakers must always keep in mind.

However, we will go even one step further in our discussion of law and order: "Dynamic legal frameworks, as opposed to static ones, are made up of a series of principles, rather than laws and orders decreed by legislators." [4] De Robilant is convinced that dynamic legal frameworks with malleable and competing principles at their core are better suited to the challenges of complex societies than static frameworks [5]. This belief begs the question of whether the principle of sustainability can be viewed as a component of dynamic legal frameworks as understood by de Robilant? And within the substance of this question there exists a great deal of potential insight.

The principle of sustainability views itself as bearing responsibility for the future according to the principles of social justice between different generations and world regions. Yet responsibility for the future also necessitates an ethical stance where rights and duties are weighed equally among equal partners. As such, conflicts of interest should be resolved according to the legitimacy of claims, and not according to the rules of the reigning balance of power. [6] The principal of sustainability is to be seen as all encompassing for policymaking at each level of government: from strategy

formulation at the federal level to the implementation of projects at the local level.

Sustainability can generally be compared to freedom [7]: both are based on principle, both need to be anchored in the consciousness of politics and society, and the level of sustainability or freedom in a society is determined by the effectiveness of the regulations designed to prevent their violation.

The first step has already been taken: sustainability has been established as a goal of the state. The second step is currently underway: regulations protecting and guaranteeing the principle of sustainability are being implemented. The third step will then have to follow: sustainability has to be firmly established within societal consciousness. The future *ceterum censeo* for politics, planning, economy and society is therefore: *Ceterum censeo vitam esse conservandam*. [8]

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Notes

[1] Art. 73 Nachhaltigkeit: Bund und Kantone streben ein auf Dauer ausgewogenes Verhältnis zwischen der Natur und ihrer Erneuerungsfähigkeit einerseits und ihrer Beanspruchung durch den Menschen andererseits an.

[2] Klenner, H. (2002): Realitäten und Idealitäten des Rechts. In: Jäggi, V.; Mäder, U.; Windisch, K. (2002): Entwicklung, Recht, Sozialer Wandel – Festschrift für Paul Trappe. Social Strategies Vol. 35. Verlag Peter Lang AG, Bern, p. 233

[3] In Anlehnung an/following: *Tempora mutantur nos et mutamur in illis* – Die Zeiten ändern sich und wir ändern uns in ihnen.

[4] De Robilant, E. (2002): Gestaltung des Rechts in der komplexen Gesellschaft. In: Jäggi, V.; Mäder, U.; Windisch, K. (2002) a.a.O., p. 354 f.

[5] *ebda.*, p. 356

[6] vgl. Bericht des Bundesrates «Strategie Nachhaltige Entwicklung 2002» vom 27. März 2002

[7] cf. Seidler, G.L. (2002): On the concept of liberty. In: Jäggi, V.; Mäder, U.; Windisch, K. (2002) a.a.O., p. 304

[8] Lendi, M. (2002): Nachhaltigkeit in der Bürgergesellschaft. Verantwortungsvolles Planen und Entscheiden, Nachhaltigkeit in der Kommunalpolitik. In: Jäggi, V.; Mäder, U.; Windisch, K. (2002), a.a.O., p. 132