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STABILITAS LEGIS¹ AND THE RULE OF LAW: THE PROBLEM OF SLOVENE CORPORATE LEGISLATION

Summary: *Modern Western societies have witnessed a massive growth of legislation and other legal acts. This stems from the fact that modern life in general is increasingly complex and develops very fast, which is reasonably reflected in more frequent legal changes than were common before. But in certain situations it seems that the dynamic content of law might be exaggerated resulting in unreasonably frequent changes. This is typical of the (present) situation in Slovenia as a transitional country, in which legal certainty including legal predictability as two important components of the rule-of-law principle are to a certain extent jeopardised. Consequently, now more than ever we have become aware of the need to put more attention to static components in law. These have ever been part of law, so my claim in this article is that it should be re-emphasized to a necessary extent in order to counterbalance unreasonably frequent changes in our law. A particular example of a very instable legal discipline in Slovenia is corporate law. Thus, the application of the stabilitis-legis principle to this problem by the Constitutional Court, also in the area of corporate law, could potentially be one of the remedies to deal with it.*

Keywords: *Stabilitas-legis principle, Canon law, constitutional law, rule of law, legislative changes, corporate law*

1. INTRODUCTION

In the course of time every society must navigate its regulation between permanence and stability, as well as change and development. For its quality development and overall balance

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1 I would like to thank prof. dr. Viktor Papež for referring me to the principle of *stabilitas legis* in the Canon Law of the Catholic Church. I see that principle very useful in order to address certain problems of contemporary Western law, and especially the problems discussed here, in Slovenia.

both stability as its static component and change as its dynamic element must take place. Both must be applied carefully and thoughtfully otherwise the general social balance might be jeopardized: the social stability must withstand rigidity as well as the social change too quick changes. Since a perfect balance is philosophically as well as practically impossible to be reached, it is up to a specific time and place to achieve as much social equilibrium as possible. For our time of fast social movement and continuing change, originating from a very complex system of global social co-existence with all the developments in means of production, transportation and exchange supported by information technology, it seems, however, that social instability as a result of too frequent changes is somehow increasingly outweighing social stability. Still, even today there are societies which are socially relatively stable.

All the above-mentioned certainly applies to law as an important social subsystem. Moreover, normative legal frameworks seem to be a very important barrier between desirable and undesirable dimensions of social stability or social change. Law makers and those who apply law have thus an important tool in their hands in order to ensure social balance. All lawyers and lay persons are surely aware of various procedures for adopting legal rules and their amendment, but they are probably not very much aware of the fact that stability is also a very important component of a legal system. We will notice in the continuation that this should also be part of a state governed by the rule of law, and legal certainty. Perhaps this has to be emphasized as a special constitutional (sub) principle, and be appropriately applied in practice. In fact in its short history the Slovene legislation has simply gone too far with the number and frequency of legislative changes, with the legislation of corporate law being a typical example of an exaggerated rush for change causing legal instability.

What is discussed initially in this contribution is the hypertrophy of law as a social malaise. This certainly decreases social and also legal stability. Next, a historical discussion of examples of the societies which favoured social stability and disfavoured legal change follows, which is very useful when a comparison with contemporary societies is made. Then the importance of the static and the dynamic dimensions of law and a legal system is presented the knowing of which is crucial for the understanding of the dialectic character of a society. Since the gaining of independence more than twenty years ago, one of the legal areas that too often was changed and is therefore particularly instable is corporate law.

Finally, the general idea of *stabilitas legis*, which is taken from Canon law, as a sub-principle within the constitutional rule-of-law principle is introduced, and its special situation and importance for the Slovenian legislation presented. Slovenia is one of those societies which in recent times has undergone many structural changes thus, in terms of social and legal aspects, it cannot be considered as a stable legal environment. Thus, a proper understanding and applying of the *stabilitas-legis* principle could bring important benefits to developing this legal system into a coherent whole.

2. THE HYPERTROPHY OF LAW AS A SOCIAL MALAISE IN GENERAL AND WITH RESPECT TO SLOVENIA

One of the examples of social instability, which to an important extent is connected with legal instability, is certainly the hypertrophy of legal acts and law itself.

Nowadays it seems to be already notorious that particularly Western civilization is facing emphasized hypertrophy of its laws. This not only refers to all the legal dimensions, either legal acts from law creation and law application processes, but also to lawyers as a special social group. Both are being multiplied very much. In the course of historical development the modern state has become ever more complex and this entailed a steady increase of its various legal areas. It seems that the Westerners have entrapped ourselves in a circle of legal formality: by continuously trying to emancipate our freedom from legal decision-makers, by emphasizing the legal form as an important pillar of legal certainty in our society, we simultaneously tend to legally formalize and regulate virtually every situation possible. But if you try to regulate and thus legally formalize too much you at the same time decrease, not increase, legal certainty as you end up in a situation of excessive legal normativity. Such prevents a consistent application of law because social circumstances continuously change, and lead to a constant need for changes in the law. If there are too many legal changes in a relatively short period of time this creates nothing but confusion.

The hypertrophy of the modern state goes hand in hand with the hypertrophy of the modern law. Although there seems to be several reasons for such hypertrophy let us examine at least two. The first one could be designated as the sociological reason, and is related to the fact that the modern society has become a very complex system due to a demographic growth, technological inventions, and the consequent spreading of social institutions. This type of social development with a constant increase in population, their social relations and institutions has necessarily increased the potential for social disputes and the actual occurrence of such. Consequently, all this calls for a greater scope of normative legal activities. However, too many legal regulations and the ensuing difficulty for a comprehensive legal thinking have caused that the legal system became less organized and less harmonious. In such a manner traditional social theories emphasise the fact that the possibilities for a successful normative integration decrease with an increase of the scope and complexity of a certain society (Vertovec, 2010). The more a legal system is complex the lesser the possibility that it is taken "seriously" by the people. These would consider such a complicated legal system, which is composed of a number of legal acts that are difficult to understand, as alienated from them since it is not alike them. Instead they would consider it as a product of narrow elites, which certainly questions its legitimacy. Therefore, it seems possible to link the problem of a crisis in relation to the authority of law with the issue of the hypertrophy of the law (Novak, 141–162).

The second reason is of an axiological character that refers to the concept of modern anomie is also to some extent related with the first one. Historically, legal norms were only one type of norms that existed in a parallel manner in society along with other social norms such as moral norms, values, and customary norms. Not only legal norms but also other social norms have played an important role in stabilizing social relations. In today's absence of the one-time social role of those other social norms, which means that they are no longer taken into consideration in the extent as they should be taken, there is too much pressure on the law. For the law to be efficient enough there need to exist parallel social norms that help prevent and resolve social disputes. If there is too much pressure on the law this means that these parallel legal norms failed to contribute to dispute resolution to a necessary extent.

In recent decades the law has simply become too much important for resolving social disputes. Let us not forget that until the appearance of modern legal codifications, i.e. at the

beginning of the 19th century, people had all around the globe lived according to mainly unwritten customary legal norms, which were very much perplexed with morality. Today such unwritten customary legal norms hardly function as a sort of formal legal sources. Instead of them we need precise written legal norms to prevent the arising of disputes and to resolve them. With the development of the modern state and the modern law the need for explicitly written laws has even increased. Hand in hand with that the trust of people in decision-makers has decreased. Thus, too much pressure on the law today entails excessive legal formalization of what used to be part of unwritten moral norms and customs. Furthermore, there are also too many existing legal disputes on the shoulders of courts to resolve since the law has become the last resort for maintaining social harmony. This led certain courts to become overloaded with cases and their delays ensued.

The problem of the hypertrophy of legal norms is necessarily also connected with the question of the right measure of normative activities. We should seriously reflect upon the issue of when we really need to adopt a new legal norm and when it is better not to adopt or change such and leave the factual situation unregulated, or leave such to be regulated by some other social norm. Connected with such could also be the issue of how much the upper premise of logical syllogism should be detailed. Should we limit the decision-maker in deciding completely or leave for them some scope of discretion? As it follows in the continuation, the extent of legal normativity in general legal acts is proportionate to trust in the one who is responsible for law application.

The hypertrophy of legal acts seems to be a general problem of Western civilization, however, there seems to be important differences between different parts of it. A more specific study of that touching upon certain differences in legal culture between different parts of the Western hemisphere could be very interesting, however, it is not part of this contribution and would require a separate study. Still it appears that older democracies, with a long tradition of law-making and law-amending, are somewhat more immune to and easier withstand social pressures for new legal regulation than some of the new democracies, like Slovenia. The older democracies have more stable political institutions and legal procedures that better deal with everyday changes in society. Accordingly, it would be very superficial not to see the contemporary hypertrophy of the law as a serious problem. It jeopardizes social stability by devaluating the legal system as an important pillar for maintaining such stability. In terms of normative legal components we will see in the continuation how legal stability as an important aspect of legal certainty, and thus of the constitutional rule-of-law principle, can thereby be undermined.

3. HISTORICAL LESSONS OF LEGAL STABILITY

Historically stable societies have always valued positively stable conditions of social life including stable legal systems. In such they were usually disinclined to too frequent social changes, which would also refer to an increase in the number of legal acts and their changes. Their preferred resistance to too frequent social changes was in a longer run primarily due to conceptual, not practical reasons in such that it was, even physically, a great problem to alter legal rules carved in a stone, e.g. in the Code of Hammurabi.

At the apex of the ancient Greek culture it is known that they were also disinclined to changing laws. Their favouring of the stability and durability of laws follows from the literature of that time (see e.g. the literary works by Aeschylus, Thucydides, Aristotle) (Quass, 20–21). Also in the same spirit King Solon ordered that his laws must be in force for 100 years (Plutarch, 226). Perhaps the most extreme example of reluctance to legal change was reported by Demosthenes and came from the polis of the Locrians, a Greek colony at the bottom of the Italian peninsula. There the one who proposed that a law should be amended was given a rope around his neck, and if his proposal failed at voting the rope was tightened (Kelly, 11). The Athenians were not such extremists regarding the changing of legislation, however, one who proposed the adoption of a new law or its change had to file some kind of indictment (Gr. *graphe*) against the old law and took a risk to be prosecuted for unconstitutional conduct, if he failed to take into consideration a certain formality or if it was possible to consider that thereby he violated some fundamental value. However, when approaching the decline of the Athenian era such a procedure was very much relaxed, laws were multiplying and the legislative procedure degraded to the level of being a mere machinery for political battles. Moreover, the recording of laws became chaotic so that it was unclear whether a certain law still applied, or not, or if two completely contradictory laws could apply at the same time (Kelly, *ibid.*).

In general the Old Greeks emphasized the value of unwritten law and were sceptical of written laws since they more appreciated the value of internalized legal values and the thereby connected legal rules rather than those that were merely written down and in such a way externalized (Škrubej, 59). Furthermore, in old Rome at the time of Augustus' Principate the so-called classical jurists (such as Gaius and Ulpianus) distinguished themselves by a clear and precise style of writing their legal opinions, which they issued with the weight of Emperor's authority. However, in the post-classical period in the era of the Dominate, lawyers were not anymore allowed to give their opinions with such authority since all the legal power was transferred to the Emperor's hands. In that period the diction of laws that were multiplying became verbose and unclear, and there were no great lawyers known from that era (Korošec, 13–24).²

The Middle Ages also favored social as well as legal stability. Although in that era people usually found such in religious norms, occasionally there was also the need to write that down in a positive law. One such example is from the beginning of the 14th century. In the Municipal Statute of Piran, a then Venice-dominated city state, it was provided that the statute was to remain in force for at least 25 years. The Latin phrasing of that provision read as follows: *De non corrigendo statuae usquead uigintiquinque annos* (Škrubej, *ibid.*).

A type of law that has endured for more than two millennia is certainly the Canon law of the Catholic Church. In order for such to be preserved through time as unaltered as possible it had to develop certain general principles to guarantee that only essential changes are acceptable. In such a manner the legal principle of *Stabilitas Legis* was provided for in Can. 78, § 1. This ensures the presumption of stability and durability of Church laws. According to its nature a statute should be firm or at least should not be adopted for (only) a limited period of time. Such presumption can be rebutted if determined otherwise, if there are good reasons for amending a legal rule. Such a general principle of Canon law is considered as a privilege that

² Pretty much at that time, in the second decade of the 2nd century AD, Tacitus wrote in his *Annals* the following saying: *Corruptissima re publica plurimae leges*, which quite faithfully depicted the normative conditions of that time.

is an expression of activity of the legislative power. It is presumed for such to be permanent if not proved to the contrary (Košir, 156–157).

Would it be possible today, either in Slovenia or elsewhere, to take seriously a proposal determining that a constitutional or statutory provision is adopted to prohibit a too frequent changing of legislation, e.g. by prohibiting that a legal regulation is changed for one or two years? Concerning that we should bear in mind the sociological maxim that not only the society produces legal norms on the basis of relevant social interests but that also legal norms adopted have a backward affect on the society. And if we manage to achieve a greater stability and durability of the legal system we could at least contribute something to trust in the law in the society and at the same time to a greater awareness about the importance of the rule-of-law principle.

4. THE STATIC VERSUS DYNAMIC DIMENSION OF LAW AND A LEGAL SYSTEM, THE SOCIAL AND THE LEGAL CHANGE

There are several ways according to which we could evaluate the law and its elements from the perspective of its being static or dynamic.

First, Kelsen has made a distinction between a static and a dynamic theory of law depending on whether what is emphasised is the law as a system of valid norms (the law in its state of rest) or the process in which the law is created and applied (the law in motion). Following Kelsen, in the first case the cognition is directed toward the legal norms created, applied, or obeyed by acts or human behaviour, whereas in the second case it is directed toward the acts of creation, application, or obedience determined by legal norms (Kelsen, 70–71). Under the static aspect of law, Kelsen dealt for example with the sanction, legal obligation and liability, law in a subjective sense: right and authorization, competence, the concept of organ, legal capacity, representation, the legal relation, the legal subject, while under the dynamic aspect of law he considered his basic norm as the reason for the validity of a normative order and the hierarchical structure of the legal order (Kelsen, 108–111). Very similarly, Hart has differentiated between primary legal rules, as those that determine legal rights and obligations, and secondary legal rules that include the rule of recognition, the rule of adjudication, and the rule of change (Hart, 79–99).

The second variety of the static-dynamic distinction would refer to the so-called fundamental groups of law. These include a differentiation between on one hand substantive law (including legal norms being part of, e.g., civil law, criminal law, and administrative law) and on the other hand procedural law (referring to legal norms constitutive of, e.g., civil procedure, criminal procedure, and administrative procedure). The substantive legal rules are of a more static character, while procedural legal rules of a more dynamic character.

The third distinction relating to the dynamic/static dichotomy of law, which is the most important for this inquiry, deals with a difference between more abstract and less abstract legal norms. Those more abstract legal norms include general legal principles, constitutional rights and other constitutional norms such as (ordinary) constitutional rules. Their purpose is *inter alia* to ensure the preservation of important social values including those that are indis-

pensable for the existence of a legal system. It is a commonplace that constitutional norms can only be altered following a quite complicated procedure in which a specially qualified majority of votes has to be obtained in parliament. In addition to that, it is traditionally established in the legal profession that the general principles of law, especially those in main legislative legal acts such as the penal code, the criminal procedure act, the civil code, the civil procedure act, etc., change even slower and more difficult than constitutional norms. As a consequence this kind of legal norms ensure the stability of the legal system and thereby also social stability. Since such legal norms do not change very often their potential change must be very much substantiated and well argued. In this perspective they can be considered as a static component of the legal system.

On the contrary, those less abstract legal norms that can be designated as 'ordinary' legal rules appear in legislation and other general legal acts. For them to be changed only a simple majority of votes in parliament is often required. They are much more often changed than general legal principles and constitutional norms, and as such they represent the dynamic component of the legal system.

According to Connell, there is an assumption that social change is necessary for a social progress (Connell, 1519–21). Moreover, in the 20th century the law was seen as a route to implement desired social change. That was particularly important for development of the welfare state and its social reform. Relying on law as a source of social change was also typical for liberals and conservatives too (Ginsburg, 541–7). However, one needs to be careful about a "too simplistic instrumental approach to legal and social change: the one does not necessarily nor easily translate into the other" (Roach Anleu, 2–3).

Certainly the need for a social change should lead to a legal change as the law is nowadays typically considered as a social concept. But the problem occurs in a situation in which the legal change is not the result of a social change, and also when a social change is not properly legally carried out. When a certain legal change results from not enough social support, suppose not a prevailing social interest dictates such or merely stems from the interests of very narrow political elites, such a legal change cannot be considered as 'social' or organic [Gr. *organikos*: being whole or harmonious, coherent, wholesome]. 'Social organic' would thus mean socially whole or represented by a prevailing number of social members. If a certain legal change is not socially organic we could say that such a change is not legitimate or that the substantive rationality (Weber, 656–657) of law is at risk. People would generally refrain from abiding by such laws. Such problems usually occur in undemocratic political regimes. Here what is at issue is the "what" of legal change. Such 'inorganic substantive legal changes' would be a result or narrow elites rather than prevailing social interests.

Furthermore, if a social change is not properly carried out we would usually invoke formal criteria (formal rationality) trying to find formal (or procedural) deficiencies for the non-legality of a social change. If there is a plain violation of procedural law it is evident that such a legal change would be inadmissible. For example, if the Constitution requires that there needs to be a three-stage procedure for the adoption of a statute and if such only went through one state, it could be designated by the Constitutional Court as unconstitutional. If a certain legal change did not result from a bona fide interest in improving procedural law it could be considered as a 'procedural inorganic legal change'.

As the title of this article suggests *stabilitas legis* should be a part of the rule-of-law principle of every legal system. In modern states the rule-of-law principle is a leading constitutional legal principle. Metaphorically speaking it could be labelled as a red thread of the entire law or its Grundnorm. As such it should help ensure the stability of the legal system. Thus, in the continuation we will see how the stability of a legal system can be jeopardized especially by the hypertrophy of legal acts, most frequently by too quick and too often changes in legislation, etc., and how the *stabilitas-legis* principle can contribute to a greater stability of the legal system.

“The law must harmonize and reconcile two ideals: stability and change: Stability requires a continuity with the past, and is necessary to permit members of a society to conduct their daily affairs with a reasonable degree of certainty as to the legal consequences of their acts. Change implies a variation or alteration of what is fixed and stable. Without change, however, there is no progress.” (Abadinsky, 37).

5. INSTABILITY OF SLOVENE CORPORATE LEGISLATION

Since Slovenia had gained independence, more than twenty years ago, very few areas of social life which had to be developed on completely new foundations, departing very much from the previous social socio-political and legal system, succeeded in achieving some kind of social stability. A typical area of such instable legislation is undoubtedly economy or business. Obviously there were not enough social opportunities for this area to have gone through a successful transformation from the social and communist variety of economy to the modern capitalistic one. An obvious result of such social instability is the hypertrophy of legal acts adopted in this area of law, and also a frequency on the basis of which the corresponding legislation has been amended. Certainly, what contributed to this instability in business law were not only the (a) economic and political circumstances surrounding the political, economic and thus also legal transformation, but also the (b) social circumstances associated with Slovenia's entering into the EU, which also required certain legislative amendments of business-law legislation to adjusted with the EU standards; and finally (c) the fact that the present economic crises calls for quite a number of changes of this kind of legislation for Slovenia to be able to successfully cope with it.

In this paragraph I would like to focus, first, on certain statutes from the area of business law (and, more narrowly, corporate law) which have been most frequently amended among the statutes in the area of law. This necessarily indicates how Slovenia as a Central European post-communist country has been (un)successfully struggling in the two decades of its existence for some kind of social stability to be achieved in the area of business and economy. Second, the above-mentioned example of legal instability is juxtaposed with what is supposed to be the most stable part of Slovene legislation: i.e. those areas of civil law that used to be part of the Austrian Civil Code (the *Allgemeines bürgerliches Gesetzbuch* – abbreviated as the ABGB). Not only that the Code was adopted in 1811 after 40 years of preparatory work but there had been many centuries of reception of the old Roman law at various European universities behind the adoption of this great codification.

The statutes that have been most frequently amended from those in the area of corporate law include the Companies Act and the insolvency act. Below I will point to the number and frequency of changes in these two legislative acts.

First, I start with the Companies Act (hereinafter the CA) that had been adopted in 1993, and in its twenty-year existence faced – no less than – 18 amendments, which is almost one per year. This Act was a consequence of the 1991 Constitution which brought important changes to the area of business law. Although there are no specific provisions in the Constitution on introducing a free market economy, this could be construed from a set of several articles. That kind of economy deviated quite a bit from what used to be the predominant type of economy in former communist countries, namely state planned economy. Actually the CA was not a result of the revolutionary changes in business law but rather of an evolutionary development which former Yugoslavia chose as a consequence of the deep economic crises having resulted mostly from the uncompetitive system of such kind of communist economy. Before changing completely the economic system to free market oriented one, in 1989 the Enterprises Act was adopted enabled private ownership in business firms, however still providing for social ownership thus the so-called concept of mixed ownership was dominating at that time.

Finally in 1993 the CA completely cut with all the previous transitional forms of mixing new elements of free market oriented solutions with the old socialist ones. Constitutionally speaking the adoption of the CA was possible due to the new fundamental right of free enterprise that appeared in Art. 74 of the Constitution.³ This also enabled free establishment of business companies.

The insolvency act, currently entitled the Act on Financial Operations, Insolvency Procedures and Compulsory Liquidation,⁴ has been amended 10 times since 2007, when it had been adopted in the new form. All these legislative amendments date from 2009 onwards, which means about two legislative changes to this statute per year. This is allegedly due to the economic crises that began in 2009 and forced many business companies to go bankrupt or at least caused them severe financial problems to lead them into reconstruction. Still, prior to 2007, in 1993 the Compulsory Composition, Bankruptcy and Liquidation Act⁵ was enacted and until 2007 it was subject to 6 changes.

When asked by the National Assembly to provide its opinion on the 7th amendment to the Act on Financial Operations, Insolvency Procedures and Compulsory Liquidation, abbreviated as the ZFPPIPP-F amendment, which was to be adopted following an urgent procedure,⁶ in November, 2013, the Council for the Judiciary of the Republic of Slovenia replied by giving the following opinion:

3 This article reads as follows: "Free economic initiative shall be guaranteed. The conditions for establishing commercial organizations shall be established by law. Commercial activities may not be pursued in a manner contrary to the public interest. Unfair competition practices and practices which restrict competition in a manner contrary to the law are prohibited."

4 Off. Gaz. RS, No. 126/07 *et. seq.*

5 Off. Gaz. RS, No. 67/93 *et. seq.*

6 One study made in 2009 indicated that in Slovenia, since the gaining of independence in 1991 up to 2005, about 90% of all statutes were adopted following an urgent or summary legislative procedure (Rupnik, 2009). Otherwise, according to the Slovene Standing Orders regulating legislative procedures, the urgent legislative procedure is provided for legislative changes on the basis of more or less emergency situations or natural disaster situations, while the summary legislative procedure for small amendments to be made following new EU directives or to comply with Constitutional Court decisions.

“The Council for the Judiciary is critical about the suitability of adopting the proposed statutory amendment following an urgent procedure, which does not make possible a prior public debate on the proposed new statutory procedures of financial reconstruction and compulsory composition. The proposed amendment is quite comprehensive because at least 90 articles are thereby regulated anew. However, the matter concerns new substantive changes that have not yet been presented to the professional public, not even to the direct potential users of the act, namely creditors. There has not been any thorough public discussion on some of the new legal institutions proposed in this amendment. This creates a danger that important questions will arise in judicial practice after the enactment was made which will definitely adversely affect the course and dynamism of these new procedures, the effectiveness of the administration of justice, and the application of these new institutions in practice.”

In its opinion the Council for the Judiciary continued: “This is already the sixth amendment to the ZFPPIPP in five years, which means that this act has been changed at least once per year, although it had been adopted in October 2008 as a completely new and modern statute, with more than 500 articles. Too frequent changes to a law that regulates a substance that is very important for economic subjects definitely adversely affect legal certainty and also effectiveness of the administration of justice system. It also indicates that legislative solutions are adopted without a necessary and thorough public debate on the correctness and suitability of adopted solutions.”

If we compare these frequent changes with more traditionally stable areas of civil law, we find out that, e.g., the Code of Obligations⁷ was since its enactment in 2001 so far amended only twice, the Property Code⁸ of 2002 only once, and the Inheritance Act,⁹ which was adopted in 1976 within the previous socialist state and is still applying in the Republic of Slovenia, only 7 times from its adoption in the 70's.

Certainly, the number and frequency of the changes in the corporate legislation have to an important extent resulted from the present economic crises. However, it seems that so many legislative changes could be avoided if some of them were better studied, prepared and finally applied. As a consequence some ideas for improvement in this area follow in the conclusion.

6. THE STABILITAS-LEGIS PRINCIPLE AND THE RULE OF LAW IN SLOVENIA¹⁰

As already mentioned the problem of the hypertrophy of legal acts, including too many and too quick changes in them, is a current problem of the Western civilization. However, it seems that in Slovenia the situation is even worse than in other Western countries. In addition to general civilizational reasons for the mentioned hypertrophy, there seem to exist also special reasons

⁷ Off. Gaz. RS, No. 83/01.

⁸ Off. Gaz. RS, No. 87/02.

⁹ Off. Gaz. SRS, No. 15/76 *et seq.*

¹⁰ In the article I this part I analyze the situation in Slovenia, however, it could also apply to any comparable country.

that particularly apply to Slovenia. One of them is certainly a lack of democratic tradition,¹¹ which is reflected in a certain extent of instability that occasionally affects the political community.

Here I am referring to the external or 'political' reason for legal instability in Slovenia. I do not want to go into internal reasons of such that would refer specifically to the legal system and the legal profession in Slovenia. Such would emphasize at least rigid legal formalism, neglect for the existing nomotechnics, the past negative selection of lawyers, conceptual and practical problems with observing precedents, etc.

A kind of middle-ground political body has not yet been established that would resist unnecessary legal changes, i.e. whenever a governing political coalition changes. I had too often been the case that laws had to be changed since the governing political coalition that adopted such also changed. A new governing political option was too often likely to change such laws merely because they were adopted by the opposite political power. It seems that Slovenia still lacks a moderate middle political stratum, which could refer to Aristotle's idea in his *Politics* that a polis for its well-functioning needed a strong middle social stratum. Only such a middle-ground political power is able to keep the society within the framework of social stability and continuity. If such is missing the society is not very far instability, and consequently hypertrophy, also regarding the law and the legal system.

Therefore it seems that at the time being a society like Slovenia very much needs the stability and durability of its legal system. That could have some important positive impact on the society at large. Such legal stability should be recognized and emphasized at first at the constitutional level. From there it could subsequently descend and permeate also the lower parts of the legal pyramid.

In Slovene legal system, by interpreting Art. 2 of the Constitution¹² the Slovene Constitutional Court has discovered in the rule-of-law principle an entire array of special principles or sub-principles that constitute the (general) rule-of-law principle. Such include the principles of legal certainty, trust in the law, proportionality, clearness and definiteness of legal acts, mutual consistency of statutes, etc. Here I claim that the general rule-of-law principle should also include the *stabilitas-legis* principle that, however, very much resembles the principles of trust in the law and legal certainty since all of them require some kind of stability in a legal system. Furthermore, it seems that a special principle of *stabilitas-legis* could add to a constitutional dialogue a new special position on two general issues: (a) when a certain change in an existing law is justified; and even (b) when the adoption of a new legal act is justified. To fulfil this purpose special criteria should be developed by the Constitutional Court in its case-law. The adoption of such criteria should introduce some kind of a test to weigh the reasonableness of a legal change, which if successfully passed would rebut the presumption of stability of legal regulation. That would on one hand be certainly a good message to the legislature to avoid not well founded or not well prepared statutory amendments, and on the other hand would help strengthen the general public interest for legal change thereby excluding narrow political or private interests for legal change from being seriously publicly considered. For this approach to be finally successful I do not claim that a decision by the Constitutional Court would be necessarily required in which it finds the unconstitutionality of a statute, or even strikes it

11 For the first time in their history the Slovenes can nowadays say that they live a true democracy.

12 This reads as follows: "Slovenia is a state governed by the rule of law and a social state."

down, for reason of violating the *stabilitas-legis* principle. Perhaps it would be enough that the Constitutional Court gives a proper signal about a potential solution of that problem to the legislature in one of its decisions in the form of *obiter dicta*?

Certainly the rule-of-law principle must also provide for the possibility of changing a law in order to ensure the dynamic aspect of the law and the legal system since social circumstances incessantly change and law must also not be too rigid. In a legal system this should be ensured by the basic legal rule of change. E.g. in the Slovene Constitution this is determined in Art. 89 providing that the National Assembly shall adopt laws in a several-phase procedure. Moreover, the basic rule of constitutional change is primarily determined in Chapter IX of our Constitution providing for a special procedure for constitutional change. As already mentioned the application of the basic rule of legal change is not a problem, and there is no need to re-emphasize it. In my opinion it is even misused in contemporary societies so it seems to be much more necessary to point out its antipode.

7. CONCLUSION

Given the existing too easy changing of legislation, which in Slovenia certainly deviates from Western co-members in the European Union, it seems reasonable to limit at least to a certain extent this kind of hasting for legal change. This is primarily the tasks of the legislature or those who propose new legislation and changes to such. However, if these so far have not acted in such a manner it is illusorily that they would begin to act otherwise.

As already mentioned it would be more than welcome if the Constitutional Court of Slovenia, which among Slovene state bodies enjoys one of the highest degrees of social legitimacy in the society, suggests in its case-law by appropriately interpreting the rule-of-law principles consideration for greater stability of the legal system. As already mentioned, it would be more than suitable if the Constitutional Court finds in the rule-of-law principle a sub-principle of *stabilitas legis*, and applies it appropriately to troublesome legal situations. In light of the too much exaggerated dynamism of our legal system, this would contribute at least something to its becoming more static and thus more stable.

The suggested reaction to be made by the Constitutional Court would surely be an important impetus for other social subsystems to be aware of the problem and be more cautious in future situations of amending legislation. This would certainly contribute to developing a different political and legal consciousness when legal stability is considered, in the direction of achieving a perception that changes to legislation should not be made too easy and not too often, but if they are truly necessary they should be made prudently and organically, on the basis of a common consensus thereby ousting selfish political "adventures".

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STABILITAS LEGIS I VLADAVINA PRAVA: PROBLEM SLOVENSKEG ZAKONODAVSTVA O PRAVU DRUŠTAVA

Sažetak

U suvremenim društvima zapadnoga svijeta svjedočimo masovnom povećanju broja zakona i drugih pravnih akata. To je rezultat činjenice da je suvremeni život sve složeniji i ubrzano se razvija, što se odražava na češćim promjenama zakona nego što je to bilo prije. Ali čini se da u nekim situacijama i pretjerano naglašavanje dinamičkog karaktera prava može rezultirati nerazumno učestalim izmjenama zakona. Takva je (trenutačno) situacija i u Sloveniji, kao tranzicijskoj zemlji, u kojoj su pravna sigurnost i pravna predvidljivost kao dvije važne sastavnice načela vladavine prava do izvjesne mjere ugroženi. Zato smo sada više nego ikada svjesni potrebe da se više pozornosti posveti statičnim komponentama prava. One su uvijek bile dijelom prava i moja je teza u ovome radu da ih je potrebno ponovno naglašavati u dovoljnoj mjeri kako bi se stvorila protuteža nerazumno čestim promjenama u našem pravu. Ilustrativan primjer iznimno nestabilne pravne discipline u Sloveniji jest pravo društava. Stoga primjena načela *stabilitas legis* u rješavanju ovog problema od strane Ustavnog suda i na područje prava društava, moglo bi potencijalno biti jedno od primjerenih pravnih sredstava.

Ključne riječi: načelo *stabilitas-legis*, *kanonsko pravo*, *ustavno pravo*, *vladavina prava*, *zakonodavne promjene*, *pravo društava*