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Discontinuity of Law and Legal Security*

Nicolas Molfessis**

There exists, it would appear, a total incompatibility between the two words that make up the title. Legal security, a basic assumption, calls for continuity in the law. It banishes ruptures and revolutions, the oversight of the past and all forms of abolition. It condemns the loss of memory as much as the convulsive movements of the law. Considered from that point of view, one would not be surprised that it had been raised, by Roubier, to the status of “first social value to reach,” to the point that the author could state that “where this essential value, legal security, has disappeared, there is no longer any value which can remain; the very word ‘progress’ becomes meaningless and even ridiculous, and the worst injustices multiply with the disorder that settles in.” Legal security requires, before anything else, respect for past legal situations. It is so fundamental that, without any doubt, it is the foundation of the existence of a principle of continuity in the law which persists “through the changing forms of the State.”

Though it is the enemy of discontinuity, legal security does not, by the same token, call for stagnation or steadfastness. Although it seeks stability, it can also require change, whenever it becomes the condition for adjusting the rule of law to the social, economic and political circumstances. It calls also, therefore, for the progressive movement of the law, but a movement that is measured and controlled, a movement that illustrates, if not the hold of the law on the time, at least its persistence beyond the convolutions of history and events. In this respect, legal security is assuredly the basic need. It makes up the first order of the law without which the temporality of actions and behaviours is negated and erased in defiance of any foreseeability.

Such a requirement could not remain on the level of the principles of elementary natural justice. In the international order, legal security has been upheld by the courts entrusted with enforcing the respect of principles and rights of a value superior to that of legislation. The European Court of Justice has stressed its importance to the point of referring to it as “a fundamental requirement,” to which the ECJ added the principle of the protection of “legitimate expectation and confidence,” itself a

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guarantee of the respect for the stability of the rule. The ECJ did see many effects in that rule.

In the internal order, the Conseil Constitutionnel (Constitutional Council) was to follow quite logically the movement initiated at the European level when, in its decision of December 16 1999, it formally acknowledged "the aim of constitutional value to the accessibility and understanding of the law."

Thus, legal security will appear to have many ramifications. It is obvious that it carries with it effects that are as diverse as essential: protection against the retroactivity of the rule of law, requirements of clarity and precision in the expression of the law, respect of commitments and promises or, still, confidence in the effectiveness of the protection of public order, The requirement of security in the law permeates relations governed by private law as well as relations with positive law. It imposes itself on those who formulate the rules as well as on those who apply them.

However, let us not be mistaken: a new principle has greater chances of being recognized and to gain formal power, as the causes for its violation of being multiplied. Thus, the principle of legal security makes progress in positive law because the challenges to principles have increased. Known tragedies prove the point: inflation of statutes, poor legislative drafting, multiplication of reversals of jurisprudence, without forgetting the suffocation we are experiencing under the plethora of information under which we are all more and more buried. As a result, the rise of a principle of security must first be understood as a reaction against the dysfunction of a legal system which is characteristic of our contemporary systems and their 'bureaucratization.'

The article aims to establish that to promote the principle of legal security is to seriously question the French legal system itself. The hypothesis is based on the fact that legal security goes against the contemporary evolutions of the sources of law, a manifestation of the disorders and dysfunctions of the law. The principle of legal security, because it grows within a legal system that increasingly ignores the requirements that it carries within itself, necessarily runs into a conflict with the legal system and calls for its overthrow. Consequently, a tension emerges between the evolution of the sources of law and the aspirations that legal security calls for. The proof can be found in the study of the instances of the lack of continuity in legislation and in jurisprudence. Among the various evolutions that the rise of legal security brings about or is led to bring about, it appears that the very position of the jurisprudence ought to be turned on its head: the critical analysis of the instances of the courts' reversing themselves and the insecurity that such reversals create should indeed lead to the creation of a 'transitory or temporary law'

of such reversals. Should that happen, the jurisprudence would then officially climb to the rank of source of law as it is in the common law system.

