What is legal certainty? a theoretical essay

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"*From time to time it is probably necessary to detach oneself from the technicalities of the argument and to ask quite naively what it is all about*"[2]

Friedrich Hayek

Many legal concepts seem to be perfectly clear to neophytes but in fact prove to be highly complex when it comes to determining if not their meaning, then at least their gist. Legal certainty definitely belongs to this category. As for beauty or democracy, it is possible to sense its meaning without being able to explain it clearly.

It formed part of the collective legal unconscious for many years until it was given a firm legal basis in case law by the CJCE in 1962 (SNUPAT[3] and Bosch[4]judgements) and then by the CEDH in 1979 (Marckx judgement[5]). It was not incorporated into the French legal grammar until 2006 via the KPMG[6] judgement made by the *Conseil d'Etat* (Council of State). Since then, post-rationalisations have led to its recognition in the French Declaration of the Rights of Man and of the Citizen (in a clever combination of articles 2 and 7 – on certainty – and 16 – on the guarantee of rights), as an implicit constitutional "value"[7], or indeed as the basis of the rule of law[8]. As for

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2 Friedrich Hayek, *Economics and Knowledge*, 1937, *Economica*, London, vol IV, pp 33-54, p 54; reproduced in Friedrich Hayek, *Individualism and Economic Order*, [1948] 1992, Chicago University Press, Chicago, 272 pages, pp 33-56, p 56

3 CJCE, *SNUPAT v. High Authority*, 22 March 1961, Joined cases C-42 and 49/59

4 CJCE, Kledingverkoopbedrijf de Geus en Uitdenbogerd versus Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn, 14 July 1972, aff. 57/69; also see CJCE, 14 July. 1972, Azienda Colori Nazionali c/ Commission, aff. 57-69

5 CEDH, *Marckx c. Belgique* of 13 June 1979, series A no 31, pp. 14-15

6 CE, KPMG company et al., ass, 24 March 2006, "Considering that in addition to compliance with this requirement, it is incumbent upon the authority invested with regulatory power to enact, for reasons of legal certainty, the transitional measures required, if applicable, by a new regulation"

7 Which did not prevent the *Conseil constitutionnel* (Constitutional Council) from refusing to recognise this principle in 1984 (84-184 DC of 29 December 1984) before constitutionalising its "substance" progressively (the term cearly appears in the judgement 2007-547 DC of 15 February 2007). For example, see, Bertrand Mathieu, "La sécurité juridique, un principe clandestin mais

any new concept, it has led to new readings and new ways of structuring the law, which seems to be unaware of its constitution.

This late appearance of the concept in legal history could be explained by the Tocqueville effect[9]. When a particular phenomenon declines, any reappearances of this phenomenon become increasingly intolerable. The concept of legal certainty may thus have appeared at this precise moment in history in which legal certainty is already very prevalent within modern legal systems and, in a certain sense, no longer poses problems, becoming established as an implicit requirement of a "good" legal system.

Without really seeking to theorise this notion, law, case law and their reinterpretation by the doctrine, have caused legal certainty to become a "global concept"[10] – a concept defined by a sum of components whose completeness is never postulated: non-retroactivity[11], accessibility and intelligibility[12], normativity and quality of the law[13], consistency of the law and case law[14], and the need for transitional measures in order to cope with an instability or unpredictability of the law[15], etc. However, the way in which case law operates leads to a negative affirmation of the notion: it

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efficient", in *Mélanges Patrice Gélard*, 2000, Montchrestien, Paris, 490 pages, particularly p 301. In this article, however, the concept of legal certainty is not described in detail, just some of its "components" play a central role in the reasoning.

8 "The principle of legal certainty seems to be the last rampart of supreme courts wishing to maintain some semblance of order and to allow law to fulfil its normal function" Olivier Dutheillet de Lamothe, Franco-Brazilian seminar, Court of Cassation, 19 September 2005.

9 "The pain that used to be tolerated patiently on the grounds that it was inevitable suddenly seems to be intolerable once the decision has been made to escape from it. Anything that we thus subtract from the abuses only seems to magnify what remains and makes the suffering even more intense: the pain is certainly diminished but the sensitivity has increased" Tocqueville, L'Ancien Régime et la Révolution, [1856], in Tocqueville, Œuvres, vol 3, 2004, Bibliothèque de la Pléiade, Paris, pp 41-451, p 202

10 Or even a "multipurpose concept", Pierre Pescatore, *Les principes généraux communs aux droits des Etats Membres en tant que source du droit communautaire*, Report of the 12th FIDE Congress, 1986, Volume 1, Paris, 24-27 September 1986, p 33

11 Established by both the French Civil Code (*Code civil* - article 2) and by administrative case law (CE, *Société du journal L'Aurore*, 25 June 1948). To quote Portalis, "The function of the law is to sort out the future; it no longer has any power over the past. Wherever retroactivity is permitted, certainty no longer exists and nor does even a shadow of it" (Portalis, Preliminary speech for the first draft of the Code civil, 1801).

12 *Conseil Constitutionnel* (Constitutional Council), no. 99-421 DC of 16 December 1999

13 *Conseil Constitutionnel* (Constitutional Council), no. 2005-512 DC of 21 April 2005. The Constitutional Council states that the rules must also be precise and unequivocal.

14 This is required in order to offer the possibility of understanding the law.

15 CE, KPMG company et al., ass, 24 March 2006

does not say what legal certainty actually is but rather what it is not. This approach never allows a debate to be "closed"; on the contrary it means it is always left open.

While the concept of legal certainty unifies these different components - at least in theory - what creates the unity of the global concept still needs to be defined or, more precisely, is only rarely explained. If the jurist is merely seeking to identify what has been positively identified by the idea of legal certainty, this cataloguing is certainly useful, but if the aim is to build consistency into the legal grammar, it would be absurd to remain at this level. After all, the idea of legal certainty may concern the legal concept of legal certainty and law can no longer be simply designed from within due to the self-reference effect. It is consequently a question of stepping outside the legal field in an attempt to create a rationale for it (which is only legal in terms of its purpose).

It thus proves necessary to theorise the notion. What could be its rationale? What could be its dimensions?[16]

The majority of works on legal certainty only address these issues in a peripheral manner: they either involve specifying the case law or developing an analogous topic. The question of the meaning at the "meta" level, as a concept concerning law rather than a legal concept, is rarely envisaged, to the extent that the function of legal certainty is insufficiently understood. Indeed, legal certainty, as it appears in the doctrine or case law, is no more than a return to a conception of the rule of law. This reading backs up the idea of the Tocqueville effect: legal certainty is only a problem in a well established rule of law and is ultimately just a return to this notion. This point can be clearly revealed in Lon Fuller's and, to a lesser extent, in Hayek's analyses[17]. The function of legal certainty can be reduced to the function of the rule of law (I). The theorising with regard to function of legal certainty is therefore complete. However, its different dimensions have been rarely considered and there is no doubt that they can shed light on the problem of legal certainty (II).

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[16] This is a question of proposing one possible interpretation of legal certainty. It is obviously not the only one possible.

[17] This choice could have been different and many aspects of Hayek's analysis are proposed elsewhere, particularly by Montesquieu.

I. The function of legal certainty: identical to the function of the rule of law

Legal certainty is often considered to be a characteristic of a good law. It is rather surprising that no link has yet been made in order to differentiate between legal certainty and the rule of law. From a functional standpoint, these two notions are identical so that the analyses and remarks made prior to the appearance of the concept allow for a reinterpretation of the current debates by putting them into context. The characteristics of legal certainty correspond quite consistently to the characteristics identified by Lon Fuller with regard to the rule of law (A)… and even to the abstraction of the meaning of each of these characteristics. However, the iusnaturalist dimension must be eliminated from its conception so that it can correspond to its current uses... even if this dimension relates to the system more than to individual rights. This link also reveals an obvious fact: legal certainty is not completely unrelated to a "moral" conception of the law (the relationship in this case is holistic). Similarly, the Hayekian approach stresses the idea of protecting legitimate expectations, which to some extent echoes the idea of legitimate expectations (B). This distinction also helps us to understand a linguistic difference between "legal certainty" and "legitimate expectations". The former remains rooted in a conception of the law that could almost be self-justifying. It is the characteristic of a good law and a means by which the law "operates" properly. The latter instrumentalises the notion to a greater extent. Legal certainty is only pertinent to the extent that its economic effects are taken into account.

A. Legal certainty: a condition for an efficient incentive system - a reinterpretation of Lon Fuller

Lon Fuller, in his book *Law and Morality*[18], expounds on the parable of King Rex. Having recently come to power, King Rex wishes to improve his country's legal system and to this end, he implements reforms. The whole point of the fable is to identify eight parameters of a "good" legal system, which are not unlike the components of legal certainty identified by both the

[18] Lon Fuller, *The Morality of Law*, 1964, Yale University Press, New Haven, 262 pages

doctrine and case law: intelligibility, limited variability, accessibility, non-retroactivity of the law, etc. This reinterpretation has already been proposed by Hart[19]

For Lon Fuller, it is a question of envisaging the characteristics of a good law without looking further into the economic impact of such a situation or the concept of legal certainty. He elaborates on the reasons by which the "rule of law" can be maintained. By reinterpreting his thinking, he identifies the characteristics of an effective and efficient incentive system.

Rex, discovering that establishing general laws is a difficult undertaking, decides to settle disputes on a case-by-case basis only. In such a system, there are only specific rules and the law cannot act as a coordinator of individual citizens' actions. For the system to fail to create legal certainty, there must also be no rules enshrining respect for precedents or the consistency of judgements. In any case, legal certainty is not a characteristic of such a system from the outset.

The failure of this initial reform thus forces the king to make general laws, but he refuses to have them published. Although Rex then strives to enforce the rules that he has laid down, the population is not aware of them. Therefore, it cannot "count on" them to govern its choices of actions. Once again, legal certainty is far from ensured, precisely because the rules cannot be known, apart from through experience, which implies that the rules are invariable, and this is not necessarily the case.

Rex realises that their non-publication is a failure. He thus decides to wait until the end of each year to judge the cases brought to him before publishing the rules that he had applied in order to settle these cases. This raises the problem of retroactivity. None of the laws are published before their application. Individuals cannot rely on the law to guide their choices of actions.

So Rex decides to publish a code in response to the disputes. However, the articles of this code and the links between them are difficult to establish. The rules lack clarity and may even be described as unintelligible. In this case, the citizens are given a code which provides the "rules", but as they are incomprehensible, they cannot be used to change their behaviour or increase legal certainty.

As King Rex's code is criticised, the good king decides to rewrite it in order to improve its clarity. Unfortunately, the rewritten code proves to be hugely inconsistent: there is not a single provision

[19] "to call the principles of the poisoner's art "the morality of poisoning" would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned" H.L.A. Hart, Book Review, 1965, Harvard Law Review, vol 78, pp 1281-1296 , especially p 1286

that is not contradicted by a different provision. The vagueness of the rules cancels out any incentive effects of the laws.

Confronted with renewed criticisms, Rex's irritation boils over. He therefore decides to rid the code of its contradictions, but the rules now impose behaviours which are impossible for his subjects to emulate. They know what they are supposed to do but they are unable to put them into practice. So what is the point of the laws? In this case, there is no legal certainty due to it being impossible for the citizens to adopt a "legal" position.

The magnanimous King Rex then decides to enlist expert help and strives creating the best possible code. As the road to hell is paved with good intentions, his obsession with perfection drives him to modify the code as soon as it is published. The law is constantly evolving and there is no guarantee that a rule laid down yesterday will not be changed tomorrow. Without any doubt, the degree of variability of the law is also a parameter of legal certainty.

Finally, Rex wonders whether he could reduce this variability by settling disputes himself by using or not using the code as he sees fit. In this case, nothing guarantees that the law will be applied by the State with the result that the "legal" positions remain unstable.

For all that, Lon Fuller's approach is not a theorisation of the concept of legal certainty or of the "rule of law". While he certainly identifies components of it, he does not explain the reasons for the structure of his reasoning. It has to be acknowledged that the doctrine and case law have not gone any further. Legal certainty is a list of components whose unity should seem so obvious that there is no point in specifying it.

In addition, Lon Fuller identifies the "problems" encountered by King Rex without envisaging possible trade-offs between the cost of resolving these problems and the gains in terms of the "quality" of the law. However, it was only possible to develop this subject by further instrumentalising the legal system and therefore the concept of legal certainty.

B. Legal certainty: a requirement for an efficient coordination of individuals, Hayekian intuitions

In contrast to Lon Fuller, Hayek is more explicit concerning the function of the rules of law: "*The aim of rules must be to facilitate that matching or tallying of the expectations on which the plans of the individuals depend for their success*"[20]. Legal certainty is thus interpreted as the principle of legitimate

[20] F.A. Hayek, *Droit, Législation et Liberté tome 1*, [1973] 1995, PUF, Quadrige, Vendôme, 208 pages, p 117.

expectations; the meaning of these two concepts is less divergent than the emphasis that is placed on their instrumentality. The reasoning proposed by the professor of economics thus illustrates a possible rationale for legal certainty that is rarely put forward.

For Hayek, the fundamental problem of society is the effective and efficient coordination of individuals. If the rationality of these people is limited, the action is thus primarily based on suppositions. Laws intervene at this level. By formulating rules they provide collective points of reference for individuals, which facilitate coordination to a great extent.

Society is a complex phenomenon and it would be absurd to seek maximum certainty for all expectations. Only legitimate expectations shall receive (and for Hayek must receive) government protection. Ensuring the certainty of legitimate expectations allows society to exist, but too much inflexibility prevents society from evolving. The idea of legitimacy reveals the balance between these two constraints. In other words, it would be absurd and even impossible for laws to provide certainty for all expectations.

The rules must allow individuals to know how the State will use its powers of coercion, which means that they must be aware of them before they are applied[21] This is a fundamental attribute of the rules: "*there is probably no single factor which has contributed more to the prosperity of the West than the relative certainty of the law which has prevailed here*".[22]. This encapsulates the idea of publication and also the idea of the intelligibility of the law (often presumed by Hayek).

Rules of law endowed with relative certainty improve the anticipation of the agents and therefore lead to better overall coordination and a faster response in terms of adjustments. "*The rules merely provide the framework within which the individual must move but within which the decisions are his*"[23]. This need for coordination and certainty means that the rules must not be contradictory. Moreover, this final criterion is crucial for his "test" of justice: "*The test is thus in the last resort, one of the compatibility or non contradictoriness of the whole system of rules, not merely in a logical sense but in the sense that the system of actions which the rules permit will not lead to conflict*"[24].

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[21] F.A. Hayek, *The Road to Serfdom*, [1944] 1994, Chicago University Press, Chicago, 274 pages, pp 80-81.

[22] F.A. Hayek, *The Constitution of Liberty*, [1960] 1992, Chicago University Press, Chicago, 568 pages, p 208.

[23] F.A. Hayek, *The Constitution of Liberty,* op cit, p 152. also see F.A. Hayek, *The Road to Serfdom*, op cit, pp 81, 82: Hayek makes a distinction between "formal laws" and "substantive rules".

[24] F.A. Hayek, *Principles of a Liberal Social Order*, in F.A. *Hayek, Studies in Philosophy, Politics and Economics*, 1967, Routledge and Kegan Paul, London, 356 pages, pp 160-177, p 168. It should be noted that he criticises the purely formal approach to law in general. This point is found, for example, in F.A. Hayek, *The Constitution of Liberty*, op cit, p 238.

Legal certainty could be measured by the lack of legal proceedings. Effective laws are those whose fundamentals can be renegotiated – this bears a resemblance to the Coase approach. Uncertainty about the law inevitably heralds its decline, as individuals can no longer rely on it to coordinate their actions. For Hayek, the certainty of laws does not in any way originate from their formulation – he believes that laws are discovered more than they are created – due to the limitations of language[25]. This does not mean that the formulation of a rule is irrelevant, but that any formulation is bound to be imperfect as it reflects "principles" that individuals must be able to "sense" via written rules or case law.

The Hayekian approach very clearly exploits the concept of legal certainty without really modifying its components. As the value of legal certainty is not assessed in itself, it is possible to define fundamental trade-offs (e.g. between inflexibility and evolution and more broadly between the costs and benefits of legal certainty). These trade-offs are not considered in Lon Fuller's approach.

However, legal certainty is not a requirement of law insofar as it is not used to define law as a right. It is instrumentally perceived as a requirement for "good" law. However, the general function does not allow us to enter fully into the heart of the concept.

II. The three dimensions of legal certainty

Once the functions and rationale of legal certainty have been identified, we can then attempt to conceptualise its dimensions. This conceptualisation does not seek to set anything in stone but to provide a global approach to considering legal certainty as both a theoretical item and a concept of case law. It also allows for the identification of the dimensions of legal certainty that have not yet been mobilised by case law but which could quite easily be.

As legal certainty is dependent on the link between fact and law, three dimensions may appear[26]. Firstly, there is certainty concerning the content of the laws themselves, i.e. material legal certainty (A). Secondly, there is certainty concerning the transition from fact into law - in other

[25] F.A. Hayek, *Droit, Législation et Liberté, tome 1*, op cit, p 105, for example.

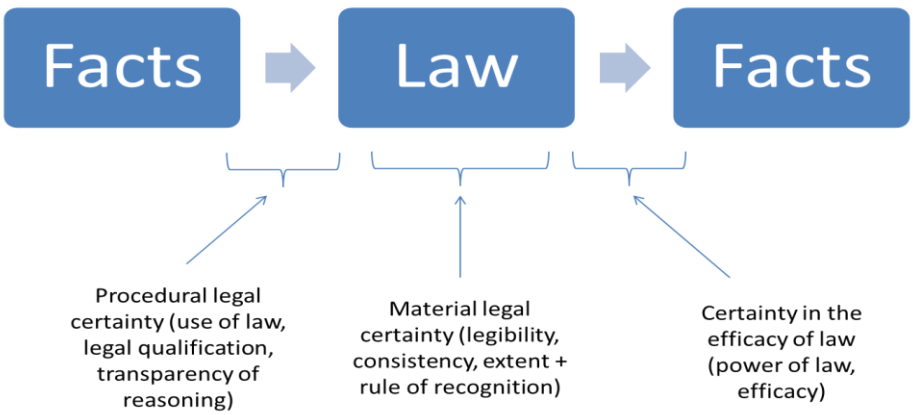
[26] Peczenik distinguishes between formal legal certainty (predictability) and substantive certainty (acceptability) (Aleksander Peczenik, On Law and Reason, 1989, Kluwer Academic Publishers, London, 364 pages, pp 24-33.

words, procedural legal certainty (B). Finally, there is certainty which, in forming a loop, links law to the fact – a form of certainty in the efficacy of law (C).

These different dimensions of legal certainty may reflect the characteristics of an entire legal system (e.g. the French legal system), or of some of its subsets (e.g. administrative law, civil law or contract law). It thus implies the definition of a "field" so that it can be assessed.

Figure 1 shows a graphical representation of the analysis grid (at the synchronic level)

Figure 1



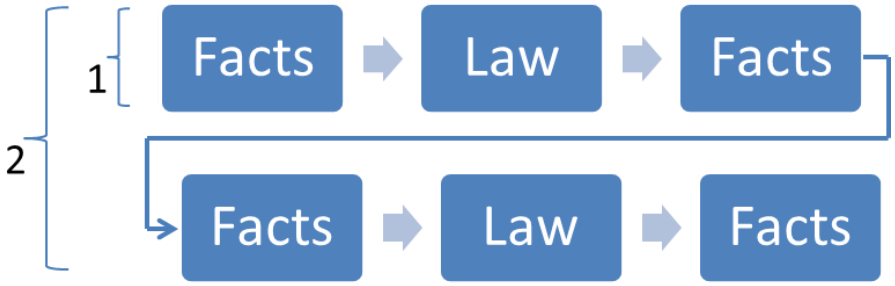
Legal certainty does not appear as an "objective" notion; it depends on an expectation – or even a feeling - of the stakeholders and can even be considered to be purely conventional (see below). This notion is consequently applied in a diachronic approach. The distinctions made subsequently shall not seek to achieve an "objective" assessment, but shall instead seek fields of subjective assessment of the degree of legal certainty that develops with the "looping" and repetition of patterns on the subject. This idea of looping can justify the inclusion of the concept in the context of the Tocqueville effect. The acceptability threshold of legal uncertainty is thus variable[27]. Likewise, as the notion is subjective, there is nothing to prevent distinctions from being made between the legal certainty perceived by one type of stakeholders and that perceived by another type of stakeholders. In other words, "acceptable" legal certainty may depend on a relationship that is maintained with the law. A judge, a lawyer an academic and an

[27] And it is not necessarily in just one direction. It is likely that trade-offs are made between the different dimensions of legal certainty.

ordinary citizen might not have the same perception of the level attained by each dimension of legal certainty.

Figure 2 schematically illustrates the idea of diachronic legal certainty and identifies the existing loops. These loops simply show the learning mechanism that operates for stakeholders in the legal system.

Figure 2



1 : synchronic dimension

2 : diachronic dimension

It may also be possible to add a legal meta-certainty, i.e. a legal certainty concerning the level of legal certainty in a system, but this would have little impact on the analysis (it would just be a question of transposing the concepts developed to the meta level).

There cannot be complete legal certainty throughout each of its dimensions for the reasons put forward by Hayek; the law must be able to evolve. Consequently, legal certainty is not an objective quality but a conventional or "inter-subjective" judgement. Therefore, legal certainty does not impose a mechanical type of law - a legal mathematics covering both syntax and semantics; it is more concerned with a procedural dimension.

It should be remembered that this is a question of legal certainty, which is not a "factual" type of certainty. Even if the laws are not efficient, or are unstable, factual certainty may exist if other normative systems take over from the "official" laws. Factual certainty may be ensured by law and, in principle, is supposed to be less "costly". Economic agents are more interested in seeking factual certainty than legal certainty.

A. Material legal certainty

A rigorous approach requires a distinction to be made between synchronic and diachronic aspects of material legal certainty.

1. *Synchronic material legal certainty* assesses the degree of legal certainty in the legal grammar at a given moment. The legal grammar defines the conditions for the formulation of "correct" legal statements.

a. On an initial level, legal certainty thus concerns the grammar being sufficiently intelligible. This intelligibility seeks to facilitate the identification of links between the legal categories (the public service category is linked to the public interest category, the government control category, the prerogative of public power category and each of the categories is linked to other categories) and semantic intelligibility (the appearance of meaning in the legal field, even though the meaning of law has less to do with synchronic material legal certainty than with procedural legal certainty. The latter may indeed distinguish between language and legal language[28]). It also – and above all – implies the accessibility of law, and without this factor, any law is necessarily less intelligible.

b. For this grammar to be sufficiently intelligible, it needs to be consistent[29]. In other words, the legal categories must be in logical or almost logical relationships (it should be possible to create a mathematics of the concepts, as idealised by Pandectism, but at a semantic level, which explains its failure; by remaining at the syntactic level, the pitfalls can be avoided. At this level, this condition does not need to concern the relationship between the meaning of the categories – since it concerns grammar and semantics.

[28] Without pre-empting, one only has to think about the link between the public interest and "gambling", which is only meaningful in the legal domain. It should also be mentioned that a legal word may "vary" or at least be "adapted" to the circumstances. It is thus unlikely that the Constitution of the United States has the same meaning today as it had two centuries ago, while the words remain unchanged.

[29] It should be noted that the doctrine frequently assumes the existence of this consistency but then goes on to reformulate it or define its meaning… one only has to think back to the debates about the criterion of administrative law at the start of the 20th century.

c. Finally, the grammar must ideally specify its scope. It must allow for the identification of what relates to law and what does not. To this end, we must make a change from simple syntactic formation without becoming bogged down in semantics. This is an intermediate level. The scope of the grammar also depends on the procedural dimension, but even without case law, it should be possible to determine its approximate limits. This dimension also supposes an ability to identify what law actually is (Hart's "rule of recognition" [30])

2. *Diachronic legal certainty* raises the question of the stability of grammar – in other words, of the variability of content or of the relationships between the legal categories. This variability concerns the relationships between the legal categories identified in the texts and the grammatical contribution of case law [31]; this is an indication of the stability of the law over time. It covers the three dimensions identified for synchronic material legal certainty. The greater the assurance of this certainty, the more rigid is the law. The problem of identifying an appropriate level of diachronic material legal certainty is then raised.

This diachronic material certainty also concerns the question of retroactivity. While a variation in the grammar might be understandable for the future, doing so for the past would amount to depriving synchronic material legal certainty of its substance: certainty cannot be guaranteed at the synchronic level if retroactivity is a possibility (from this standpoint, the retroactivity of case law is certainly a heresy[32]). Because of this dimension, transitional measures may be implemented by judges (these measures signify that the legal grammar could be too severely impacted; a balance is directly sought between inflexibility and change)[33].

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[30] H.L.A. Hart, *The Concept of Law*, 2nd Edition, 1967, Clarendon Law Series, Oxford, 315 pages

[31] For example, in administrative law, the APREI order (CE, sect., 22 January 2007) adds to the famous Narcy case law (CE, sect., 28 June 1953) by stating that "*even in the absence of such prerogatives [of public power], a private person must also be regarded, in the absence of legal provisions, as carrying out a public service mission when, in view of the public interest of his or her activity, the conditions of its creation, organisation or operation, the obligations imposed upon him or her and the measures implemented in order to check on the achievement of the assigned objectives, it appears that the administration had intended to entrust such a mission to him or her". This is merely a "grammatical" addition insofar as a new line of justification is now open. Diachronic material certainty may also concern the meaning of categories. The Koné order (CE, ass., 3 juillet 1996) could also be mentioned, in which the* Conseil d'Etat *(Council of State) independently creates or discovers a fundamental principle recognised by the laws of the French Republic.*

[32] For example, see CE, SCI Saint Lazare, 14 June 2004; CE, Louis, 28 September 2005.

[33] The typical example is certainly the Tropic Travaux Signalisation company order of 16 July 2007: "that however, with regard to the necessity for legal certainty requiring that current contractual relationships are not adversely affected, and subject to legal proceedings with the same purpose and which have already been undertaken prior to the date of the reading of this judgement, the action defined hereinabove can only be instigated against contracts whose execution procedure was begun after this date".

This distinction does not mean that the concepts are watertight. It is thus possible for the law to specify the limits of variability of the grammar at a given moment, which will influence diachronic material legal certainty.

Finally, the meta level cannot be excluded. Legal certainty at the meta level targets the degree of confidence in the anticipation of the variability that is possible in both dimensions of material legal certainty.

B. Procedural legal certainty

Procedural legal certainty concerns the use that judges make of legal grammar (including that which they help to create). This legal certainty also concerns two levels.

1. Synchronic procedural legal certainty corresponds to an indication of confidence relating to the methods of reasoning used by judges that may extend to the perfect predictability of their judgements[34]. This supposes that the judges are not machines of random production. Three levels are concerned.

It may firstly relate to the place of the announced law in the judges' reasoning. This level of legal certainty is relatively easy to achieve and means that the judges are using the announced law, even if they do not make exclusive use of it. Substantive law (law and case law) must be included in their reasoning[35] and there must be sufficient compliance with its grammar[36].

It is then concerned with the legal qualification of facts. This involves verifying that the judge conforms to the conventions of a language and that he or she is consistent in the transition from the real world to the legal world (even if the legal world contributes to the creation of the real world)[37]. The law settles for specifying the legal categories and their relationships. It is a language,

[34] Seeing the capacity to predict that resides in legal certainty hides the real reasons for this possibility, i.e. the knowledge of procedures and modes of reasoning used by judges.

[35] Citations fulfil this very need, as does the use of laws, regulations or articles of code(s) in the text of a decision.

[36] This compliance with grammar does not mean that it is impossible to develop it but on the contrary, it points to a reluctance to impoverish it.

[37] From the "monumental perspective" or in the "general interest", does the judge have a conception of what constitutes a "meaning" for his or her audience? On this issue, it should be noted that legal qualifications are rarely the subject of debate in the text of a decision. This obviously influences the level of legal certainty as a whole.

but one whose creation is based on a "natural" language. Ideally, the legal qualification should closely conform to the conventions of natural language. It may also conform to the legal language conventions created by repetition and professional deformation associated with the learning of law. This implies consistency in the reasoning and very directly concerns the predictability of law (this predictability does not imply strict compliance with the texts but rather a consistency in the judges' reasoning; case law regains its primary status). At this level, it is possible to consider the degree of legal certainty about the case-law definition of legal certainty.

Finally, it more deeply concerns the judge's reasoning and therefore the transparency of this reasoning. Insofar as case law contributes to the formation of law, it must comply with the conditions of material legal certainty – particularly the condition of intelligibility. It is certainly at this level that the jurisdictions of countries with civil law systems need to make the most "progress". Indeed, by presenting their solution as a logical one[38], or even as an authoritative solution, the crux of the reasoning is hidden from persons brought before the law or, to a lesser extent, is relegated to a position outside case law proper (e.g. in the conclusions of the *rapporteur public* [reporting judge]) [39]. This knowledge may either be "abstract, i.e. relating to practical experience of non-formulatable law (principles), or more "concrete" when the legal possibilities are clearly presented. It may therefore mean a form of legal certainty relating to the outcome of the reasoning or a form of legal certainty relating to simple procedures, even though the outcome of the reasoning is not completely predictable (beyond a probabilistic approach).

In order to allow procedural certainty to include the reversals of case law, there must be a body of principles that make it possible to identify when such reversals may occur and have an impact. The technique used by the French *Conseil d'Etat* (Council of State) is often to carry out a reversal of case law in situations in which the application of the old or new rule makes no difference to the settlement of a specific case[40]. It should be noted that the reversal may concern either the

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[38] Through the application of the famous syllogism... but also by refusing dissenting opinions.

[39] For example, CE, Commune de Dreux, 13 May 1994 relating to the principle of equality before the public service. The judgement does not mention the issue of taxation, which is however clearly mentioned in the solicitor-general's findings. Moreover, on this subject, if the grammar of administrative law is summed up in the rendering of the orders of the *Conseil d'Etat* (Council of State), the meaning of "legal words" can only be understood on the basis of the findings of the *rapporteur public* (reporting judge). In one sense, these findings contribute to legal certainty... even if it is not compulsory for them to be published! In the case of the Constitutional Council's judgements, there is often mention of the importance of "authorised comments" whose legal significance is ranked below the judgement but above the mere doctrinal comment.

[40] For example, the APREI order and the Nicolo order (CE, 20 October 1989). However, this is not always the case as the Tropic order clearly shows... even though transitional measures were adopted in this case.

grammar (modifying the relationships between categories), or the meaning of the categories with the grammar remaining constant[41].

2. Diachronic procedural legal certainty concerns the possibility of varying the legal reasoning.

It includes the possibility of referring to past reasoning in order to anticipate the reasoning of the future. Even when case law is not the "source" of law, it provides approximations that it would be ridiculous to ignore[42]. Legal certainty requires only gradual changes in reasoning. The reasoning must remain stable for a certain period of time, even if some variability is acceptable when it can be anticipated.

Finally, it concerns mechanisms that allow for the limitation of this variability (e.g. two levels of judicial authority; sanctioning of judges; technique of transitional measures, etc.). It provides guarantees in the event of changes to reasoning by judges in such a way as to limit their effects, either by neutralising them (aborted attempt to reverse case law), by preventing them (modification that can be anticipated as it is announced[43]), or by approving new modes of reasoning while limiting their impact (technique of transitional measures)[44].

C. Certainty in the efficacy of law

Finally, legal certainty also concerns the efficacy of law. Even if the law is intelligible and the judge is not deemed to be eccentric, legal certainty still cannot be a factual reality. For it to become so, the court decisions need to be applied.

Legal certainty firstly concerns the strength of the law. If the law is not the most powerful normative system, it cannot guarantee factual certainty, which must be implemented according to

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41 Paragraph 1 of article 1384, which was only meant to have been a little "scrap of an article", went on to become a major principle due to case law. Similarly, the notion of harm now concerns non-pecuniary loss, which has not always been recognised as a real form of harm.

42 The simple fact that the French Code civil (Civil Code) devotes more pages to case law than to articles reveals the importance of case law.

43 The doctrine considers certain types of case law to be "absurd", for example. From a more legal perspective, if we remain on the Tropic order, the European legal situation required such a change in case law; and what about the Perreux order (CE, ass., 30 October 2009) which is in keeping with the changes in case law, originating from the Cohn-Bendit order (CE, ass., 22 December 1978)

44 Still Tropic, or AC Association!

the procedures of the most powerful normative system (effectively guaranteeing the coordination between individuals). For example, the maintenance of the caste system in India means that, on this issue, the law is not the most powerful normative system. The legal norms are not effective.

Legal power requires the law to be able to impose its authority against the other normative systems in the event of a conflict with them. Being supported by the law thus provides the very best level of certainty when this law is effective. In principle, this form of certainty is less costly (accessorily) than the provision of certainty by different means (e.g. by militia groups).

The law offers three types of techniques for protecting a situation, according to the typology applied by Calabresi and Melamed[45]: property rule, liability rule and inalienability. The property rule means that an individual cannot remove this right from its original "owner" without obtaining the latter's approval, generally after payment. The sanction is supposed to be severe enough to "impose" this prior negotiation. In the case of the property rule, it is possible to acquire the right without obtaining the holder's agreement by paying a certain price (here, the liability rule is conceptualised as a "call", i.e. an option to purchase for the person that does not possess the right). It is not the legal position that is made secure – only its value. The inalienability rule prohibits any exchange of rights.

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These few clarifications of the notion of legal certainty help to reveal its close links to the idea of the rule of law, whether this is the desired goal in itself or a more instrumental dimension. They also provide a general typology that allows for the classification of case law judgements in a broader framework, thus assigning a unity to their content.

This unifying approach also helps to identify the trade-offs and therefore the elements that are not imposed by legal certainty. Legal certainty does not refer to the inflexibility of law but simply to its relatively large amount of predictability, which itself depends on a judgement. In this respect, legal certainty is therefore no different to legitimate expectations. If complete legal certainty leads to factual certainty, then the latter surpasses the strictly legal approach. Therefore, we must beware of confusing these two types of certainty. Finally, and in a traditional economic

[45] Guido Calabresi and Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 1972, *Harvard law Review*, vol 85, pp 1089-1128

rationale, the costs and benefits of legal certainty must be counterbalanced, which seems to be carried out by case law, at least implicitly. Legal certainty can therefore only be understood in its practical dimension and examining it in relation to an unattainable ideal is bound to be unproductive. In other words, it cannot be positively defined – we can only sense its limits... and the typology proposed in the article sets out to improve this general integration of the notion of legal certainty.