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## **The Law Unclad, Free of all A Priori or which is its Own A Priori**

by Jean-Sylvestre Bergé (Law Professor at Université Côte d'Azur (Nice, France) – CNRS GREDEG<sup>1</sup>

**Abstract:** This article is one of a series devoted to the study of *a priori* in law. It is part of the ANTECEDENT research project supported by a Chair of the French government-funded Initiative of Excellence at Université Côte d'Azur.<sup>2</sup> The aim of the project is to revisit the law through its preunderstandings, to leave behind the law only better to return to it, propose an "antecedent" theory of law and apply theoretical reflections to major topical issues. It is based on the following general hypothesis: if *a priori* are everywhere, and if the law is capable of dealing with *a priori*, then the law is everywhere, and not just where we want to allow it to be. Having studied the vocabulary and grammar of *a priori*, *a priori* methods, we devote this fifth article to examining the prospect of a law unclad, free of all *a priori* or which is its own *a priori*.

**Keywords:** *A Priori*, Legal Knowledge, Legal Jurisprudence, Neutrality, Impartiality, Opposing Ideas, Rhetorical Devices

**JEL Classification:** K10, K19

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<sup>2</sup> “Antecedent” project (2021–2027). For a presentation of the project and its output at the time of writing: <https://docs.google.com/document/d/1kmDjBprx1y-Ocv3pnAExFYUqkRZifXZW/edit> - This work has been supported by the French government through the UCA<sup>J.E.D.I.</sup> Investments in the Future project managed by the National Research Agency (ANR) with reference number ANR-15-IDEX-01.

There is in legal thought and practice no general understanding of *a priori*. Only a holistic approach can manage to redress this state of affairs. The different avenues towards achieving this include long-term study of the vocabulary<sup>3</sup> and grammar<sup>4</sup> of *a priori*, *a priori* methods<sup>5</sup>, the prospect of a law unclad, free of all *a priori* or which is its own *a priori*, and the specific role of a law capable of capturing an *a priori* and dressing it up in a potentially specific way.

This work is built around a glossary, whose principal entries are as follows:

#### Glossary

- *A priori* (most common definitions): in its Kantian philosophical sense, transcendental *a priori*, which is presented as a condition of knowledge; in its usual sense, most often pejorative, it is a prejudice or bias.
- *A priori* (scholarly definitions, proposed outside the legal field): we can distinguish between the *a priori* of necessity, which makes experience possible (bridging the divide between rationalism and empiricism – Kant), the *a priori* of essence (phenomenology – Husserl), and the *a priori* of meaning (hermeneutics – Gadamer in particular).
- *A priori* (scholarly definitions in law): we can distinguish between the *a priori* as a condition of legal knowledge (generally criticised or overlooked, although more present than it appears in reality, without being fully accepted, e.g. Kelsen); and ontological, modal, logical, and pre-understanding *a priori* (limited use – Reinach, Gardies, Esser).
- *A priori* (the definition most often used herein): that which precedes, comes first, at first appearance, *prima facie*.
- *A priori* (list): "hypothesis, postulate, presupposition, cliché, paradigm, prejudice, bias, belief, collective imagination, emotion, anteriority, antecedent, precedent, pre-comprehension, preconception, pre-notion, anticipation, prediction, etc.", it being specified that *a priori* are never discussed holistically as I attempt to do here with this type of enumeration.
- "*A priori*" (in inverted commas): the use of inverted commas emphasises a reflective or meta usage of the term each time it raises a question, reflection or, more modestly, remark on "*a priori*" which can be unpacked in relation to *a priori*.
- Understanding through *a priori*: in this research, *a priori* are used as a tool (among others) for understanding (in the etymological sense: to take with oneself) legal phenomena; at the first level, it is therefore neither a tool for theorising the law nor a tool for critiquing it, even though, here and there, it naturally contributes to this dual impulse; at the first level, it is a tool that allows us to grasp the object (see below for more on this term) in question in or around law.
- Antecedent approach: leaving behind the law only to better return to it, with a perspective based on three stages: leave behind the law, debate our *a priori*, return to the law.
- Jurist and non-jurist: the two terms are often used together or separately to answer the following question: "who is speaking?" or "who is being spoken to" (about *a priori*).
- The specific role the law has to play: hypothesis of an *a priori* captured by the law and which evolves in its own way in the legal environment.
- The *a priori* question: question of a methodological nature which on the one hand lies in the point of departure of the legal analysis and, on the other, in the place occupied by *a priori* in legal reasoning.

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<sup>3</sup> Bergé J.-S. (2024a).

<sup>4</sup> Bergé (2024b).

<sup>5</sup> Bergé (2022a), Bergé (2025).

- The law unclad: twofold hypothesis of a law free of all *a priori*, neutral and impartial, and of one that is its own *a priori*, centred on itself.
- Object: this research pays close interest to the objects of law (and at times of other disciplines); from a general perspective, the term *object* can be used to answer the following question: “what is being discussed?”, which implies the question “what is the object?”.

The purpose of this article is to explore the prospect of a law unclad based on a double “*a priori*” on the *a priori* of the legal world: that of a law which sees itself and is practiced as being free of *a priori* (1) and that of a law which sees itself and is practiced as being its own *a priori*, i.e. to the exclusion of everything else (2).

## 1. The law free of *a priori*

Banish all *a priori*! Such is the vision of “*a priori*” in a law that is free of them. Here, there are two main postulates: the first, mainly theoretical in nature, is that of neutrality (1.1); the second, more practical in nature, is impartiality (1.2).

### 1.1 Neutrality

As the starting point of analyses, one finds an *a priori* demand for axiological neutrality (1.1.1) which can lead to a veritable expulsion of all values (1.1.2).

#### 1.1.1 The *a priori* demand for axiological neutrality

How can we understand the *a priori* dimension of axiological neutrality? Initially, academics, including legal scholars, must adopt the premise of a neutral approach in their analyses. Then things become more sophisticated with the question of the possibility of a science of law. Ultimately, all this reflects different links between axiological neutrality and *a priori*. Let’s look at these different points in turn.

In terms of axiological neutrality, it all began with Max Weber, a sociologist (and lawyer) and his 1917 lecture on the theme: ‘Science as a Vocation’ (Wissenschaft als Beruf).<sup>6</sup>

In a discussion on the work of a professor, Weber states that: “(...) the true professor will be careful not to impose any position on his audience from his chair, either openly or by suggestion,” a position that the author justifies by the particular configuration of the lecture hall, in front of “students” who are “condemned to silence”; if the professor wants to be a “prophet” or “demagogue,” then let him “go out into the street and speak in public,” “where he can be criticised.” Weber then extends the discussion to the work of the scholar: “Whenever a man of science brings his own value judgement into play, there is no longer a complete understanding of the facts” (this is the most frequently quoted passage). Finally, on the impossible scientific arbitration between values: “I do not know how one could ‘scientifically’ resolve the question of the value of French culture compared to German culture” and “What

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<sup>6</sup> M. Weber, ‘Science as a vocation’, available online: <https://sociology.sas.upenn.edu/sites/default/files/Weber-Science-as-a-Vocation.pdf>.

man would presume to refute 'scientifically' the ethics of the Sermon on the Mount, or for example the maxim 'do not resist evil', or 'turn the other cheek'?"

The expression “axiological neutrality” (*Wertfreiheit* in German, which has also been translated as “non-imposition of values”) does not appear in Weber's published text. But this is the general idea that has been retained, with two main guidelines for the sake of simplicity. On the one hand, we must separate what pertains to (scientific) facts from values (particularly cultural, political or religious, says Weber in these passages). On the other hand, while scholars must be aware of the values that drive them, they must not confuse them with the full (“comprehensive” in the text) scientific understanding that they seek to convey of the facts.

What of the axiological neutrality of the jurist?

The expression “axiological neutrality” occupies an important place in contemporary legal discourse. Without claiming to provide an in-depth analysis of the principle of axiological neutrality and all the recent discussions on the subject, which would go far beyond a study focused solely on *a priori*, it can be observed that while there are points of divergence, the discussions are most often nuanced (as is also the case in sociology or academia more generally on this topic). It is frequently pointed out that axiological neutrality is not incompatible with the commitment of the legal researcher, as long as they distinguish between their personal choices and a critical descriptive or even prescriptive study of the law. Furthermore, axiological neutrality is rarely presented as a rigid principle to be applied mechanically, without any consideration.

The discussion around axiological neutrality sometimes, and this seems inevitable, turns to the theme of the scientific nature of law. It is no longer just a question of the researcher's ethics: what matters is the possibility of a science of law.

To address this theoretical discussion, we will draw on the work of Véronique Champeil-Desplats on the methodologies of law and legal sciences<sup>7</sup>, which devotes considerable attention to the subject.

The question is: to what extent does axiological neutrality contribute to the demonstration of a science of law - one that is implied to be objective? The question has evolved from its beginnings in the late 19th century to its more contemporary forms. It has expanded, moving from the simple possibility of a science of law to the question of the different possibilities for critical discourses on the law.

The answers to these questions are marked by conflicting thoughts. It may be a matter of "distancing oneself from the dominant forms of discourse: political, ideological or religious discourse" (no. 462). Or of removing a certain number of obstacles to neutrality and objectivity: the "pre-conceptual" baggage of the scholar (no. 467), "the proximity of the researcher to his object" (no. 468), the importance of the "socio-political context" in the “descriptive” analysis of law (no. 470 et seq.). It may be about dispelling myths: the "nature of objectivity that cannot be taken for granted but is socially constructed" (no. 475). Finally, it may be a question of simply contrasting "science" and “knowledge” and its "immanent tendency to reveal the reality

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<sup>7</sup> Champeil-Desplats (2022).

of the object" with "ideology [which], on the contrary, conceals reality" (no. 477, quoting H. Kelsen).

All these battles are far from being won in advance. But neutrality, now associated with objectivity and freed from reference to values alone ("axios", to which we will return later), "is not incompatible with any form of critical approach to law", which can take two main forms: "value judgements denoting a practical attitude" and "judgements of reality denoting an attitude of knowledge" (no. 478, referring to the work of F. Ost and M. van de Kerkove). With this last proposition, we are once again approaching the path initially taken towards the possibility of a science of law.

What does axiological neutrality mean in terms of *a priori*?

In conclusion to these developments on axiological neutrality, let's be clear: *a priori* are omnipresent! If this is not how the topic is generally presented, it is undoubtedly due less to the topic itself than to the invisibility of *a priori* in legal thought and practice.

Let's try, as usual, to counter this state of affairs.

To begin with, let's note that axiological neutrality is frequently put forward as a postulate, *prima facie*, before any analysis, without always knowing precisely, at this preliminary stage, what exactly it means: neutrality of the researcher, of the research, of the law? As a postulate, it is, at the first level, an *a priori* in the chronological sense of the term, that which comes first in the analysis.

To go further, it should be said that axiological neutrality is difficult to demonstrate and, in any case, is rarely discussed. This doubly reinforces its position as an *a priori*. It is easy to adorn oneself with the trappings of an objective, neutral approach, without reference to values, etc., but the fact is that no legal actor, especially no legal researcher, can completely free themselves from their own subjectivity or the subjectivity of the context, particularly the social context (intersubjectivity), in which they live or operate. We act as if objectivity were the norm. In reality, it is most often presupposed. This is yet another *a priori*.

Moving on, it can be noted that axiological neutrality appears to be a theoretical *a priori* when it is the basis for the possibility of a science of the law. This is not far removed from an *a priori* of necessity, said to (alone) make experience possible in legal matters. Without even attempting to enter into purely philosophical considerations, which are beyond my area of expertise, on whether or not is conceivable to connect axiological neutrality to transcendental *a priori* or synthetic *a priori* judgement to the objectivity of experience, the fact is that axiological neutrality contributes, in people's minds, to the recognition of the scientific nature of law. To put it in a nutshell: even if, *a priori*, law is not quite like other sciences, it could well organise its own scientific quality thanks in particular to the *a priori* of axiological neutrality.

On another note, it seems clear that axiological neutrality has, above all, a strong methodological dimension. This neutrality provides a valuable analytical framework for questioning the presence in law of postulates, presuppositions, clichés, paradigms, prejudices, biases, beliefs, collective perceptions, emotions (etc.) that guide analyses without being the subject of systematic discussion. Axiological neutrality potentially fills this gap. It is part of a reflective method and fits naturally into the antecedent approach.

Finally, and this is a conclusion of note at this stage, if axiological neutrality, as just observed, forms all kinds of *a priori* in law, it calls for reflection on the “*a priori*” existence of a neutral law, i.e. one without *a priori*, which amounts to saying that it is in and of itself sufficient. We will return to these questions later (see section 2 below).

Let’s now continue our investigations with a discussion on the field of values.

### 1.1.2 *A priori* banishment of values

The banishment of values also comes in various forms of *a priori*, whether this involves silencing any discourse of jurists in relation to them or discussing them outside the realm of law. Let’s examine these different points in turn.

When it comes to the banishment of values, what are the possibilities in terms of *a priori*?

The relationship between law, fact (reality) and value(s) – whether in the singular or, more often, the plural – has a largely philosophical and theoretical dimension. A great many important works have been devoted to this subject.<sup>8</sup> Various contributions revolve around this rich theme, whether in general terms concerning the relationship between law, morality, politics and more broadly all forms of ideology, or more specifically concerning the “dogmatism or relativism of values” (the existence or absence of absolute and universal values) or “value-based judgements” (assessing what is good or bad, just or unjust, preferable or reprehensible). These discussions have clear links to the theme of axiological neutrality considered above. But they also call for their own specific elaboration.

What matters to us here is not so much to revisit all of these analyses, which go beyond the scope of this work, as to examine the different ways of framing the concept of banishing values in terms of *a priori*.

In this regard, four forms of *a priori* seem to emerge.

To begin with, it may be observed that banishing values from the law amounts to opening up the hypothesis of a law unclad, stripped of values, on the principal grounds that the law is, *a priori*, inapt for informing us in this regard. It is therefore a way of justifying the concept of a law unclad, i.e. stripped of any reference to values.

One might go on to establish a direct link between values and *a priori*. To banish them from the law is to get rid of all manner of *a priori* about what the law ought or ought not to be. It is an *a priori* invitation to remain silent on values.

One might further add that banishing values from the law amounts to placing them schematically either upstream or downstream of legal intervention, that is to say, in a dual *a priori* position whereby the debate on values precedes and succeeds legal intervention, but without strictly speaking any overlap.

Finally, regarding this banishment, there is the possibility of a meta-approach, as considered earlier in relation to axiological neutrality. Banishing values from the law amounts to

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<sup>8</sup> See the expression “value” in both the singular and plural in Sellers, Kirste (2023).

developing an "*a priori*" conception of a law detached from all values, without any *a priori*, one that is self-sufficient.

If we set aside the first possibility, which introduces the discussion on the basis of a hypothetical "law unclad", and the last possibility, which we will look at further on (see section 2 below), let's see how the other two *a priori* approaches might unfold in these efforts to banish values: remain silent on values; discuss them outside the realm of the law.

What does it imply for the legal professional to begin *a priori* by remaining silent on the issue of values?

It is one of two things: either one thinks and practices law with the question of values as the starting point; or, on the contrary, one thinks and practises law with the opposite starting point—the absence of any discussion of values.

Naturally, one may seek to reconcile, at least in part, these two apparent opposites. Approaching the law through a discussion of values does not preclude arriving at objective considerations. Conversely, approaching the law without any reference to values, starting from objectively observable facts and realities, does not preclude subsequently expressing a preference for a law oriented towards one value or another.

But what changes completely in the two approaches is the starting point, that from which everything begins, i.e. the most ordinary form of the *a priori* in the sense in which it is understood herein (see Glossary above): that which precedes, comes first, at the beginning of any analysis.

To my knowledge, the argument is never presented in the form of an *a priori*, which seems trivial from a philosophical point of view.

And yet that is precisely where all this unfolds, at least in part.

If, as here, we accept that the legal professional must begin by complying with the injunction—or, more politely, the recommendation—to remain silent on values, such a position will potentially have a considerable impact on the subsequent analysis. To put it simply, one might say that the absence of reference to values becomes the rule, and the possibility of referring to values the exception.

However, whether in legal practice, teaching or legal research, it is not at all the same thing to begin a discussion with a consideration of values as it is to refrain from doing so *a priori*.

It should be noted in this regard that attitudes can vary greatly from one context to another.

There are environments where, as a legal professional, one cannot seriously address an issue without first framing it in terms of its political, social, economic and other implications.

For example, as a lecturer and researcher, I have experienced this on several occasions in Anglo-American legal environments (or those under their influence). Opening a conference on the Europeanisation of law, the application of the law in a global context, or the edification of a legal system in a situation of total loss of control<sup>9</sup>, cannot begin with an abstract exercise in

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<sup>9</sup> These are references to some of my past research.

definition and conceptualisation. One must first lay the groundwork for an axiological discussion, before possibly addressing more abstract considerations. There are other contexts, such as in France, where the opposite approach is generally taken: the question of values is not addressed *ab initio*, head-on.

These differences in *a priori* approaches also hold true to some extent in practice, even if analyses must be adapted according to the actor and audience concerned, as we shall see later (see section 2 below).

Among other possible illustrations, there is a striking example of the position taken by various French academics in a post published online<sup>10</sup>, from which extensive extracts follow:

“Very recently, a number of law faculty lecturers addressed a petition to the senators of the French Republic, marking their protest against the draft bill on marriage for all. They rely on their academic titles and professional expertise and highlight their numbers (no fewer than 170, they claim) to propagate a whole series of judgements which, on closer inspection, are clearly more value-based judgements than legal analyses. It is this approach that the text below, drafted by four professors of public law at the University of Paris (...) Nanterre, seeks to challenge. In their view, whilst the knowledge of legal experts may be useful in public debate (it enables them to highlight historical developments, difficulties of interpretation, theoretical and contentious issues ... associated with a particular legal concept or particular legislative, constitutional or regulatory reform...), it does not, however, justify opposing marriage for all or legislative reform in the name of a supposed immutability of legal categories. In other words, although they claim to speak in the name of the law, these legal scholars are primarily expressing their personal preferences. At a time when the university’s influence is visibly waning, one might welcome the news that the Senate’s interpellation by 170 academics – “all professors and senior lecturers” – has managed to capture the attention of the mainstream press. Citing their status as “legal experts”, our colleagues describe their “vocation” as “ensuring respect for individual freedoms and the legal protection of the most vulnerable” and alerting the Senate to “the grave harm inflicted on children, deliberately deprived of a mother or father”. Finally, they say they cannot “remain silent” and denounce in advance “the inevitable market in procreation to come, the commodification of the wombs of the most vulnerable women and of children manufactured to satisfy the desires to which they are subjected” (sic). However, alongside these legal experts, there are others who feel no connection to the same vocation and for whom a preliminary question arises: to what extent is the warning sounded by our colleagues the result of strictly legal knowledge, and can it, consequently, be justified by academic titles in general, and the status of academic legal expert in particular? The petition by the 170 colleagues against marriage for all expresses the personal views of its signatories, who cannot speak “in the name of the law”. (...). Until proven otherwise, the law remains the expression of a political will and not the reproduction of an uncertain reality said to supersede or antecede the earthly one that is our own. Despite the appearances fostered by habit, it should be remembered that civil law always stems from political arrangements and legal edifices. When it comes to

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<sup>10</sup> E. Millard, P. Brunet, S. Hennette-Vauchez, V. Champeil-Desplats, ‘Mariage pour tous : juristes, taisons-nous !’, published on 20 March 2013 on [raison-publique.fr](http://raison-publique.fr); the full post is still available online at this other address: <https://www.stophomophobic.com/mariage-pour-tous-juristes-taisons-nous/>.

creating them, the legal scholar cannot claim any particular expertise or monopoly. At best, legal knowledge will be useful and relevant when it comes to implementing these edifices, giving them substance and coherence, or even highlighting their lacunae or contradictions. Without even defending the bill passed by the National Assembly – precisely because such a defence stems from each individual’s political and moral convictions – it is therefore necessary to denounce the fallacious method employed by our colleagues, which is to rely on their status as "legal experts" to dictate what is right and what one ought to think. Yet, as anyone can see, none of the arguments put forward by our “resistance fighters” – who, starting from their opposition to a law on marriage, end up denouncing “child trafficking” (sic) and the deprivation of parenthood – is in fact of a legal nature. On the contrary, these are moral assertions that essentialise legal categories with the aim of preventing, or making appear impossible, the changes to positive law sought by the legislator (...). A few months ago, certain psychoanalysts, responding to their peers who believed they saw in same-sex parenting a tree obscuring a forest of dangers for the child’s well-being, urged them to keep quiet (Sylvie Faure-Pragier, ‘Homoparentalité : "psys, taisons-nous !"', *Le Monde*, 25 December 2012). We can but take inspiration from this today. On the "legal admissibility" of marriage for all and same-sex parenting, we call on legal experts for one more effort: let's keep quiet (...). But if the aim is to reject, on principle, the adoption of a reform whose importance no one can deny, there is no need to claim legal professional status: that of a moralist is more than enough (...).”

While the discussion is interspersed with various legal considerations, which we will return to (see section 2 below), the essence of the message is this: “Legal experts, let's be silent!”—understood, within the context of the *a priori* argument developed here, as “Legal experts, let's begin by being silent!”—when it comes to societal, political, or moral choices, etc.

But if, in law, we must remain silent on values, it is because we must—*a priori*, always—discuss them outside the realm of law.

Let’s further explore this with a few examples of the reasons that might justify an *a priori* position according to which values must be addressed outside the realm of law, before examining its practical implications.

If we draw on the example of “marriage for all” discussed above, the main reason justifying an approach to values from outside legal frameworks can be summed up in one phrase: “Until proven otherwise, the law remains the expression of a political will and not the reproduction of an uncertain reality said to supersede or antecede [one might also describe it as essentialist, divine, or supernatural] the earthly [or ordinary, everyday] one that is our own.”

Here we find the *a priori* expression of an unapologetic legal positivism, that is to say, to borrow from the authors quoted above, “until proven otherwise”. The phrase is clearly a witticism, as the authors evidently do not believe in the possibility of providing proof to the contrary. But it also betrays an *a priori*: one considers—*a priori*—that there is no ontological reality that imposes itself on the law. There you have it.

Let’s take another example, again in a French context, that of the doctrinal commentary by jurists on the anti-Semitic laws under Vichy. One author initiated a critical discussion of the strictly positivist attitude of French academics, who at the time engaged in a technical reading

of the texts without ever directly addressing the question of “values” even in terms of discrimination.<sup>11</sup>

This criticism does not strictly speaking fall within the scope of the argument regarding the “banishment of values.” It is, in fact, the opposite, since the aim here was to denounce the absence of any reference to values in these doctrinal commentaries.

But what interests us here is rather the response to this criticism offered by proponents of a specifically legal descriptive positivism, devoid of any judgment regarding what is true or false. Among other particularly heated debates surrounding this controversy is the response by Michel Troper, notably including this excerpt:

“[The axiological neutrality of positivism] does not prohibit (...) making moral judgments about positive law. It merely indicates that such judgments cannot be made in the name of science”.<sup>12</sup>

If we are permitted an *a priori* reinterpretation of the statement, it could, for example, yield the following: if the jurist can make value judgments about the law [one might add: *a priori*, since the jurist need not necessarily do so], he cannot act in the name of the law [one might add: since the law cannot be considered *a priori* as carrying a value judgment]. Once again, it is all a matter of *a priori*. We will also return to this important point (see section 2 below).

If values are to be discussed outside the law, what is meant by “outside”?

As we have already indicated, to banish values from the law is to place them, schematically, upstream or downstream of legal intervention, that is, in a dual *a priori* position: here, the debate on values precedes legal intervention, and legal intervention precedes the discussion of values, but there is no overlap, strictly speaking.

This schema is undeniably flawed in its simplicity. Law and values are so intertwined that one cannot—other than through a new *a priori*—distinguish the stages of their respective interventions in such a clear-cut manner. Here, we are once again in the realm of *a priori*. As indicated previously, we will return to the theoretical implications of such postulates (see section 2 below).

## 1.2 Impartiality

The notion of a law unclad can also take the form of an *a priori* of impartiality, i.e. the *a priori* requirement for a law—and more specifically, in this context, for a judge—to be impartial (1.2.1), which can lead to a veritable *a priori* hunt for biases and prejudices (1.2.2).

As with the related concept of neutrality, impartiality is not considered here in its own right, but only through the prism of *a priori*.

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<sup>11</sup> D. Lochak, ‘La doctrine sous Vichy ou les mésaventures du positivisme’, in (conference) *Les usages sociaux du droit*, Publications du CURAPP, PUF, 1989, p. 252.

<sup>12</sup> M. Troper, ‘La doctrine et le positivisme (à propos d’un article de Danièle Lochak)’, in (conference) *Les usages sociaux du droit*, Publications du CURAPP, PUF, 1989, p. 288.

Let's therefore begin by setting out the possible terms of the discussion.

Impartiality is closely associated with the idea of justice. It forms part of the standards of the right to a fair trial, established notably at European level.

It is a notion defined by absence. For a judge, to be impartial is to decide without partiality.

The aim here is therefore to banish from the law and, more specifically, from the practice of judges—understood in the broadest sense—any notion of partiality, essentially meaning bias. This notion does not apply solely to judges. It can be extended to all forms of public authority. Whenever an individual is officially placed in a position to decide the fate of others, they must be impartial.

The question arises as to whether a reading or reinterpretation of impartiality is possible in terms of *a priori*.

The answer seems beyond doubt: almost everything concerning impartiality is a matter of *a priori*, whether it involves:

- requiring *a priori* the presence of an impartial judge;
- engaging in an *a priori* examination of biases and prejudices;
- fostering an "*a priori*" reflection on impartial law, understood here as free from partiality and self-sufficient.

We shall examine the first two points in the following discussion, deferring a proper treatment of the last until the next section (see section 2 below).

### **1.2.1 The *a priori* requirement of an impartial judge**

Almost everything seems to be a matter of *a priori* when it comes to the requirement of an impartial judge. But let's begin with an initial overview.

Several approaches exist on this particularly rich subject, whether considered in its negative form (without partiality) or positive form (with partiality).

Let's begin with the symbol of Lady Justice blindfolded. The impartiality of justice can take the well-known form of personified justice (most often the goddess Themis) wearing a blindfold.<sup>13</sup> As reported in Jean-Paul Doucet's dictionary<sup>14</sup> of proper nouns in criminal law, here is what the famous French lawyer André Dupin (19<sup>th</sup> century) is said to have remarked on the subject: "Have no hatred for one party, nor favour for the other. Be, like Themis, blindfolded; not during the investigation of the case, when you must learn the facts and see everything, but at the moment of judgement, when you hold the scales." The symbol of impartiality as a blindfold has of course had its own ups and downs. Sometimes used to stigmatise justice said to be blind or, conversely, to characterise the strength of a judicial system

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<sup>13</sup> Among other examples, see the monumental statue 'A Justiça' by A. Ceschiatti, visible on Praça dos Três Poderes in Brasilia, capital of Brazil, and online here: [https://commons.wikimedia.org/wiki/File:A\\_Justica\\_Alfredo\\_Ceschiatti\\_Brasilia\\_Brasil.jpg](https://commons.wikimedia.org/wiki/File:A_Justica_Alfredo_Ceschiatti_Brasilia_Brasil.jpg).

<sup>14</sup> Translated from the French-language entry for Themis in this online dictionary: [https://ledroitcriminel.fr/dictionnaire/noms\\_propres/noms\\_propres\\_t.htm](https://ledroitcriminel.fr/dictionnaire/noms_propres/noms_propres_t.htm).

focused solely on its objectivity, with no regard for anything that might divert it, it has been the subject of numerous studies which, of those I have been able to consult, show that the blindfold has generally established itself as one symbol among others of the impartiality of justice, with its share of enigmas and contradictions.

The theme of the impartiality of justice has also been the subject of systematic analyses.<sup>15</sup> On the negative side (justice without partiality), the discussion has a strong theoretical, not to say philosophical, dimension. On the positive side (justice with partiality), the research tends to have a more practical dimension. But there are counter-examples.

Among other considerations, legal scholars distinguish, as we shall see again later, between two main forms of partiality: objective and subjective. Under the first category, we find in particular the obligation for judges to recuse themselves whenever they have an objective connection to the case before them, a connection which is likely to cast doubt on their impartiality (prior knowledge of the parties or the situation in question, for example). The second form involves the precise and detailed demonstration that a judge has acted, contrary to their duty of impartiality, on the basis of personal motives or in the interests of a particular party (partiality driven by strictly personal motives, such as friendship or financial interest).

However, the issue may also have a more structural dimension. The principle of judicial impartiality then goes hand in hand with the principle of judicial independence, based on the separation of powers, particularly between the judiciary and the political sphere. Breaches of this independence may thus constitute a structural lack of impartiality.

The approach to such situations may adopt resolutely scientific methods. What comes to mind in particular is empirical studies on law and its practice, which, more often than not, draw on knowledge beyond strictly legal fields. There have been statistical, sociological, computational, cognitive and historical analyses (among others) of judicial practices, seeking in particular to uncover the political, social, cultural and cognitive determinants of judges' decision-making processes, so as to identify any biases and prejudices considered incompatible with the ideal of judicial impartiality. We will return to these later (see section 1.2.2 below).

Let's conclude with some general discourse on the subject. Examples of such discourse on the impartiality of judges are legion, especially when it comes to denouncing the partiality of judges. For example, in France there is a recurring debate on the impartiality of the Constitutional Council, given the essentially political process by which its members and chairperson are appointed. But the question of the politicisation of professional judges, appointed through selection procedures based on their competence and morality, also arises, particularly regarding judges who are committed to a political, social or environmental cause. In such cases, the idea is gaining ground that partiality may potentially influence the thinking of judges in general, or of certain judges in particular, when they reach their decisions, which directly undermines the principle of impartiality. The discourse here remains, for the most part, general. It is fuelled by a dangerous confusion between subjectivity and partiality, as if the impossible concept of an objective judge, entirely devoid of subjectivity, were the only acceptable one. It is also fuelled by a suspicion of partiality, which is most often unsupported

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<sup>15</sup> See entries for "impartial" or "impartiality" in Sellers, Kirste (2023).

by any specific evidence. Equally general discussions also arise from the opposite perspective, defending a model of impartial justice. In periods of political uncertainty, such as those we are experiencing today (though there have been many others in the past and there will be many more in the future), this type of generalisation tends to gain momentum, with conflicting positions on, in particular, the rule of law and the governance of judges—topics readily seized upon by legal literature and the media. Conversely, there is an equally general discourse on the impartiality of judges, especially when they are attacked because of their ambivalent position, as is notably the case with international arbitration.

When it comes to the impartiality of judges, everything seems at first glance to be a matter of *a priori*. The reason for this is simple: impartiality is assumed, and partiality or the risk thereof must be identified. The entire endeavour of the law therefore amounts to dealing with partiality in an environment where impartiality is laid down *a priori*. So what kind of return to the *a priori* principle of impartiality can we expect? Let's revisit these three points.

Even in the most corrupt – in both the strict and metaphorical senses – of systems, the principle of impartiality is posited *a priori*, generally through constitutive or organic legislation, whether in state, international or regional (e.g. European) legal systems. Even the fiercest opponents of genuine judicial independence present themselves as defenders of impartial justice, as if to better repress partisan justice. This impartiality may be underpinned to a greater or lesser extent by various mechanisms. But above all, it is posited. It is an *a priori*.

Here are some examples of the *a priori* assertion of the impartiality of justice:

- in France, the impartiality of justice has been inferred in particular from texts of constitutional status, even though the requirement does not appear expressly in those texts (the 1946 Preamble, the 1958 Constitution); on rare occasions, it is expressly referred to in legislative texts (for example, Article L111-5 of the Code of Judicial Organisation);

- at European level, the term "impartial tribunal" appears both in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6(1)) and in the Charter of Fundamental Rights of the European Union (Article 47);

- at international level, there are several references to the impartiality of judges, for example, in the Universal Declaration of Human Rights (Art. 10), the International Covenant on Civil and Political Rights (Art. 14(1)); and the Rome Statute of the International Criminal Court (Art. 45 in particular).

In these various statements, impartiality is not defined. It is posited *a priori*, as a postulate, implicitly or explicitly, but always in a laconic manner.

Since the impartiality of the judge is posited *a priori*, what about the way we deal with a potential or actual risk of partiality?

Once the principle of judicial impartiality has been posited *a priori*, the serious business, so to speak, begins. For the law endeavours to construct the legal framework for the potential or actual risk of partiality.

As previously noted, three main approaches to this risk can be identified.

The first is intended to be objective. In a number of objectively observable situations, the risk of a judge's partiality is set out by the rule of law and dealt with legally through a mechanism to prevent (recusal, abstention, removal) the judge from ruling. For example, a close relationship between the judge and one of the parties, the judge's personal knowledge of the subject matter or cause of the proceedings, any material or moral personal interest the judge might derive from the outcome of the proceedings, or the manner in which the panel of judges is constituted may be regarded as objective grounds for partiality (see, for example, the rules set out in Articles L111-6 et seq. of the French Code of Judicial Organisation). In such cases, partiality need not be established. Only the risk of partiality is taken into account, which is assessed on the basis of objectively observable criteria that do not intrude upon the judge's private sphere.

The second approach is subjective in nature. The aim here is to penetrate the mystery surrounding, as with any individual, the judge's innermost thoughts, either through direct evidence of his partiality where it is openly displayed, or through indirect evidence inferred from more general conduct. Cases of proven subjective partiality on the part of judges, as observed in case law, are rare, as the materiality of such facts is difficult to establish. The law is deliberately brief on the subject. As for case law, it is that handed down in a decentralised manner, outside national systems, at European level, which is the greatest source of inspiration for our domestic courts, particularly in France. These refer to the judge's "personal conviction" or "bias" (for example, frequently cited: ECHR, 1 October 1982, *Piersack v. Belgium*, application no. 8692/79). However, concrete cases are usually lacking to illustrate these two scenarios.

The third approach is structural in nature. Here, the aim is to address systemic infringements of the rule of law, the independence of the judiciary and, consequently, the impartiality of judges. In these scenarios, it is clearly the very principle of the separation of powers that is being called into question. These challenges, or attempts at such challenges, are affecting a growing number of countries, most of which present themselves as democratic but are tempted by forms of illiberalism, autocracy or totalitarianism. Significant contemporary examples exist, particularly in Europe, such as the cases of Poland and Hungary. The Court of Justice has been heavily involved in this area, in the name of defending the democratic values of the European Union in general, and the independence and impartiality of the judiciary in particular (see, for an iconic example, CJEU, GC, 5 June 2023, C-204/21, *European Commission v Poland*). Here, impartiality as such is not being addressed, but rather the risks posed by recent reforms to the status of judges and the procedures for their recusal to the imperative of independence and, consequently, the impartiality of the judiciary.

So what kind of return to the *a priori* principle of impartiality can we expect? Answer: it is always to be given the lion's share.

The way the law deals with cases of partiality suggests that every effort is made to ensure that the principle of impartiality, posited *a priori*, remains intact and is thus never fully called into question.

From a legal perspective, it is necessary to:

- confine cases of objective partiality to precise, by definition limited, scenarios; this applies to their substantive definition (for example, in France, Article L111-6 of the Code of Judicial Organisation lists specific, restrictive grounds for recusal, such as a marital or family relationship with the parties, and extends as far as "notorious" friendship or enmity); but this also applies to their procedural regime (an appeal to the Court of Cassation on the grounds of a breach of the requirements of impartiality is no longer admissible if the appealing party did not exercise its right to request recusal before the trial courts when it was in a position to do so: Court of Cassation, Plenary Assembly, 24 Nov. 2000, No. 99-12.412);

- open up the possibility of recusal on grounds of subjective partiality, without being able to define its precise scope, while keeping it distinct from objective impartiality; this can be seen as a two-pronged way of sidestepping the issue; there are very few decisions that have identified such cases of subjective partiality<sup>16</sup>, which are only likely to become apparent to all after a wholly ill-considered or suicidal revelation of a judge's innermost thoughts; moreover, to keep objective partiality at arm's length from the notion of subjectivity is to misunderstand the very essence of all forms of partiality: bias in all its most subjective aspects;

- deal vigorously with attacks on the independence of judges, but in cases of structural partiality which cover only part of the broader subject of judicial impartiality.

All these legal approaches suggest that the objective remains the same: never call into question the premise of impartiality, which must, come what may, hold its *a priori* ground.

From the perspective of legal practice, even if one may be critical of existing mechanisms, it is necessary to start from an *a priori* assumption of impartiality as an indispensable marker of judicial independence.

From the perspective of legal theory, the assertion of a law unclad—here stripped of anything that might foster the judge's partiality, in particular every conceivable form of bias—rests on an "*a priori*" conception of a law without *a priori*, which, as such, is self-sufficient. We shall return to this by looking at the concept of law as its own *a priori* (see section 2 below).

### 1.2.2 *A priori* treatment of bias and prejudice

Biases and prejudices are the crudest—if not the most despicable—manifestations of breaches of impartiality. It is hardly surprising that they are largely dismissed *a priori*, but only *a priori*.

I will begin with three anecdotes about the invisibility of biases and prejudices in legal practice, drawn from personal experience, which lead me to conclude that in the practice of law, biases and prejudices are, *a priori*, largely rendered invisible.

The first is from a multidisciplinary seminar held a few years ago at a French university, bringing together legal scholars and computer scientists, on the topic of biases in artificial intelligence. Tasked with delivering the closing remarks, I began by noting that it was not only

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<sup>16</sup> For example, a search on the "Discipline" database of France's Higher magistrature council (*Conseil supérieur de la magistrature*) (<https://www.conseil-superieur-magistrature.fr/missions/discipline>) produces just one result for "subjective impartiality" compared to 56 for "impartiality" (last accessed on 15 February 2026).

computer scientists who held biases, but that jurists were also affected. Seated alongside me was a senior French magistrate (now retired) who, without saying a word, shook his head in a clear sign of disapproval. Without addressing the disagreement, I made the following observations, which I share here. It is clear that a magistrate may not wish to publicly endorse a statement that could cast doubt on the quality of the work done by the men and women of the law. But it may also be that this same magistrate, at the end of a long and distinguished career, has never allowed himself to entertain even the slightest suggestion of bias or prejudice among legal professionals in general (the comment was in no way aimed at judges in particular).

The second anecdote concerns a discussion I had with the editorial staff of a semi-professional journal devoted to issues of justice. During informal exchanges with the journal's management, the idea was raised of putting together a special issue on the theme 'Justice and *a priori*'. Initially approved in principle, this possibility was then rejected on the dual grounds that "the subject was too theoretical" and "it was of no practical interest." Without questioning an editorial decision that is beyond my purview, this gives rise to the following reflection: we know that *a priori* in its most common sense either has a Kantian theoretical meaning or is relegated in a rather vulgar manner to biases and prejudices; here, it is this dual meaning that seems to have justified the decision to reject the proposed topic, with the conviction that biases and prejudices were not likely to be of any interest to the community of legal practitioners. And that was that.

The third anecdote concerns the training of lawyers and judges in France. For lawyers, based on my own experience (I training to practice at the Paris bar in 1991), the only course related to legal humanities—which alone can accommodate any questioning of the sensitive world of biases and prejudices—was devoted to professional ethics. Nothing in these discussions related to the lawyer's own biases and prejudices, or how to address them, particularly when facing a judge or an adversary. It appears the same can largely be said of the training of magistrates. Of the 3.4% of courses devoted to legal humanities<sup>17</sup>, very few address the issue of judges' biases and prejudices. Of course, the impartiality of judges and the judiciary is discussed, but according to the various magistrates and lecturers with whom I have discussed this subject, very little teaching is devoted to how judges can combat biases and prejudices, starting with their own and those of their colleagues.

These three anecdotes demonstrate, if proof were needed, that there is simply no general awareness of the *a priori* existence of bias and prejudice in legal practice.

But this invisibility also has a dimension underpinned by the very notion of partiality.

What is interesting to observe here is how social or general prejudice—or "stereotype"—has, without ever being named as such, been literally excluded from the definition of subjective partiality, although without being included among the admissible cases of objective partiality.

To support this point, let's revisit—even if the excerpt is somewhat lengthy—the terms in which the ECHR formulated its doctrine on the subject, first in an initial ruling (ECHR, 1 Oct. 1982, *Piersack v. Belgium*, Application No. 8692/79) and here developed by subsequent case law:

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<sup>17</sup> Source: F. Hourquebie, *L'indépendance des magistrats*, Éditions dialogues, 2024, p. 46.

- ECHR, Grand Chamber, 15 Dec. 2005, *Kyprianou v. Cyprus*, Application No. 73797/01: “118. The Court reiterates at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused (see *Padovani v. Italy*, judgment of 26 February 1993, Series A no. 257-B, p. 20, § 27). To that end Article 6 requires a tribunal falling within its scope to be impartial. Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. The Court has thus distinguished between a subjective approach, that is endeavouring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect (see *Piersack v. Belgium*, judgment of 1 October 1982, Series A no. 53, pp. 14-15, § 30, and *Grievies v. the United Kingdom* [GC], no. [57067/00](#), § 69, 16 December 2003). As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance (see *Castillo Algar v. Spain*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3116, § 45, and *Morel v. France*, no. [34130/96](#), § 42, ECHR 2000-VI). When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (see *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996, *Reports* 1996-III, pp. 951-52, § 58, and *Wettstein v. Switzerland*, no. [33958/96](#), § 44, ECHR 2000-XII). 119. In applying the subjective test, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, p. 21, § 47). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will or has arranged to have a case assigned to himself for personal reasons (see *De Cubber*, cited above, p. 14, § 25). The principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court (see, for example, *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, Series A no. 43, p. 25, § 58). It reflects an important element of the rule of law, namely that the verdicts of a tribunal should be final and binding unless set aside by a superior court on the basis of irregularity or unfairness. This principle must apply equally to all forms of tribunal including juries (see *Holm v. Sweden*, judgment of 25 November 1993, Series A no. 279-A, p. 14, § 30). Although in some cases it may be difficult to procure evidence with which to rebut the presumption, it must be remembered that the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, p. 793, § 32). In other words, the Court has recognised the difficulty of establishing a breach of Article 6 on account of subjective partiality and for this reason has in the vast majority of cases raising impartiality issues focused on the objective test. However, there is no watertight division between the two notions since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test). (...). 121. An analysis of the Court's case-law discloses two possible situations in which the question of a lack of judicial impartiality arises. The first is functional

in nature: where the judge's personal conduct is not at all impugned, but where, for instance, the exercise of different functions within the judicial process by the same person (see *Piersack*, cited above), or hierarchical or other links with another actor in the proceedings (see court martial cases, for example, *Grieves*, cited above, and *Miller and Others v. the United Kingdom*, nos. [45825/99](#), [45826/99](#) and [45827/99](#), 26 October 2004), objectively justify misgivings as to the impartiality of the tribunal, which thus fails to meet the Convention standard under the objective test (see paragraph 118 above). The second is of a personal character and derives from the conduct of the judges in a given case. In terms of the objective test, such conduct may be sufficient to ground legitimate and objectively justified apprehensions as in *Buscemi*, cited above, but it may also be of such a nature as to raise an issue under the subjective test (see, for example, *Lavents*, cited above) and even disclose personal bias. In this context, therefore, whether a case falls to be dealt with under one test or the other, or both, will depend on the particular facts of the contested conduct."

As seen in this excerpt, there is never any mention of social or general bias or prejudice. Only a strictly framed definition of objective—and especially subjective—partiality is considered.

This invisibility ultimately has a broader theoretical foundation.

If biases and prejudices do not occupy the full place they might in an *a priori* approach to legal practices, it is for other, more theoretical reasons.

The explanation could be as follows: if, in general theoretical analyses of law, it often happens (there are counterexamples as already mentioned, and this is something we will return to) that biases and prejudices are not discussed at the outset, it is simply because they are considered not to be part of law. However, once one adopts the theoretical rigor of studying only law—understood in its specifically legal dimension (an “*a priori*” stance that we will revisit in section 2)—there is “*a priori*” no longer any room for biases and prejudices.

Let's look at two examples among many others.

The first concerns the central concept of “constraint” in law. One might be tempted to draw a link between bias, prejudice, and constraint. Bias and prejudice do indeed potentially exert a very strong constraint on the practice of law and, in particular, on the way judgments are reached. One might therefore expect theoretical studies on the constraints in law to seek to incorporate them into their analyses. Experience has shown that the reality can be quite different, with research focusing solely on constraints internal to law, i.e. those deemed to have a “truly” legal dimension.<sup>18</sup> Counterexamples certainly exist, but they do not share the same theoretical ambition.<sup>19</sup>

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<sup>18</sup> For a distinction between constraints based on their factual or legal nature, focusing solely on those that are internal to the law, “i.e. which result exclusively from the configuration of the legal system”, see the work of M. Troper, V. Champeil-Desplats, Ch. Grzegorzczak (Eds), *Théorie des contraintes juridiques*, Bruylant – LGDJ, 2005, specifically p. 2.

<sup>19</sup> For an open-ended approach to constraints in a pluralist legal environment that does not set out to offer an overarching theory, but rather to examine alternative ways of exploring the law, see A. Popovici, G. Gidrol-Mistral

The second example echoes my discussion of axiological neutrality and the rejection of values. Without revisiting the details of that discussion, an important point should be highlighted: the theme of neutrality concerns law in its collective and permanent essence, whereas that of impartiality more readily concerns individual or specific practices. This difference in scale explains why neutrality has a theoretical scope incomparable to that of impartiality. When discussing a theoretical approach to neutrality, one does not speak of bias or prejudice. When discussing impartiality, the aim is not so much to theorise the law as to use this approach to neutralise bias and prejudice.

The law unclad, largely stripped of the assumption of bias and prejudice in the legal world, is an *a priori* and, in this case, an *a priori* only. Indeed, there are a thousand and one ways to address the subject outside the strict regime of impartiality.

A thousand and one ways to address bias and prejudice outside the strict regime of impartiality ([link](#)).

Addressing bias and prejudice through the strict regime of impartiality is one thing, which has its rationales and justifications grounded in the concept of a law unclad, free from prejudice or bias. Addressing them within the legal environment, considered more broadly, is another.

Without prejudging how the law might make room—potentially in its own way—for prejudices and biases within its structures, let's list some of the major possibilities the law offers for opening itself up to such considerations:

- the existence of so-called “realist” theories that examine the role of extra-legal factors in the formulation and interpretation of legal materials;
- the broadening of reflection to include the existence of social or general biases and prejudices and their even broader connections to the concept of the stereotype, which is very present in law;
- the possibility of empirical research on the subject;
- the myriad ways of addressing these issues through indirect approaches: the awkward, unusual, hidden, invisible, or silent aspects of law;
- the contribution of approaches from outside the law that readily address these questions: philosophy, sociology, anthropology, psychology, information science, etc.

## 2. The law as its own *a priori*

The law is its own *a priori* every time it tries to presuppose—“*a priori*”—that by which it begins, in other words to the exclusion of everything else.

What follows is an analysis in two stages: the possibilities and justifications of such an “*a priori*” approach (2.1) and its potential practicalities (2.2).

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and M. Antaki (Eds), ‘Contraintes et droits’, *Communitas (UQAM)*, special issue, Volume 4, number 1, 2023, 164 pp.: <https://www.erudit.org/fr/revues/communitas/2023-v4-n1-communitas08993/>.

## **2.1 The possibilities and justifications of an “a priori” approach**

What are the possibilities of a law that seeks to be its own *a priori* to the exclusion of everything else?

The question posed in the following discussion concerns the possibility of an “*a priori*” approach to a law that, through various means, presupposes its own origin. As indicated at the beginning of this work (see above Glossary), the use of quotation marks here refers to the possibility of developing a reflexive or meta-approach to the subject. We thus speak of an “*a priori*” regarding the potential *a priori* (plural) of law.

Building on the preceding discussion of the notion of a law unclad, devoid of any *a priori* (see section 1 above), the following “*a priori*” issues can be raised:

- axiological neutrality calls for reflection on the “*a priori*” existence of a neutral law—thus devoid of any *a priori*—that would be self-sufficient;
- by extension, the banishment of values permits the “*a priori*” concept of a law detached from any *a priori* consideration of values, which would likewise be self-sufficient;
- the assertion of a judge’s impartiality also potentially rests on an “*a priori*” conception of a law without *a priori* bias, which, as such, would again be self-sufficient;
- the repression of biases and prejudices likewise rests on an “*a priori*” conception of a law without *a priori* biases or prejudices, which, as such, would always and still suffice unto itself.

If we now strive to broaden our perspective toward a more general understanding of a law capable of defining “*a priori*” its own *a priori*, we must then turn to new “*a priori*” conceptions of the law capable of encompassing it entirely in an “*a priori*” manner. What interests us here is the assertion of a presupposition about the law to which a legal dimension is attributed.

To achieve this particularly demanding goal, two cumulative criteria must be met: 1) the law must seek to place a certain conception of what it is at the starting point of its constructs, and 2) it must posit this “*a priori*”.

What are the justifications for such a quest?

There are multiple reasons to justify the “*a priori*” assertion of a legal *a priori* about the law.

Without delving into discussions of the numerous theoretical or meta-theoretical justifications regarding the law—which fall outside the scope of this work—we can nonetheless identify three major “*a priori*” justifications.

The first concerns the *a priori* search for a truth of the law.

The second concerns the *a priori* search for a specificity of the law.

The third concerns the *a priori* search for a coherence of the law.

The first underlies the assertion of a genuine “*a priori*” law.

The second underlies the possibility of a distinct “*a priori*” law.

The third underlies the existence of a comprehensive “*a priori*” law.

We will encounter these themes throughout the following discussion.

## **2.2 The practicalities of an “a priori” approach**

The “a priori” approach to the law described above requires a certain degree of radicality which, for the purposes of this work, at times means banishing opposing ideas (2.2.1). But it also entails more ordinary “a priori” rhetorical devices (2.2.2).

### **2.2.1 “A priori” banishment of opposing ideas**

Such banishment can come in many forms. Let’s begin with the first: the theoretical rejection of any and all *a priori*.

Sometimes things seem crystal clear: in theoretical approaches to the law, there is no room for *a priori* analyses.

Indeed, many legal doctrines have expressed—or continue to express—hostility toward the formulation of any concepts/principles/guidelines posited *a priori* in analysis of the law.

As a reminder, let’s quote (again, with a slightly longer rendering) this succinct remark by Léon Duguit in the context of his sociological and experimental approach to law, which broke with an abstract *a priori* approach: “Legal science must ascertain facts, affirm as true only what is ascertained through direct observation, and banish from the legal domain all *a priori* concepts—objects of metaphysical or religious belief—that lend themselves to literary elaborations but have nothing scientific about them”.<sup>20</sup>

As a further reminder, we should also mention in particular the numerous doctrinal positions highlighted by Véronique Champeil-Desplats in her work on the Methods of law and legal science, which demonstrate hostility toward an *a priori* approach to law, whether this hostility stems (in the order in which they appear in the text) from positivist (no. 58), Romanist (no. 64), natural law (no. 87), organic (no. 100), historical (nos. 117, 331), inductive or experimental (nos. 127, 130, 240, 261), comparative (no. 338), or pragmatic (no. 562) doctrines.<sup>21</sup>

In these various total rejections of any concepts/principles/guidelines posited *a priori* in analysis of the law, it is generally the law's specificity that is invoked, with the idea that, by its very nature, the *a priori* is prior to and therefore external to the legal field.

Let’s continue the explanation with an example of the “a priori” replacement of a commonly accepted *a priori*.

In previous work, I identified the work of a legal scholar, virtually unique in its kind, entirely devoted to a theoretical approach to *a priori* in law (civil law, in this case). It is authored by Adolf Reinach.<sup>22</sup>

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<sup>20</sup> L. Duguit, *Traité de droit constitutionnel*, 3<sup>rd</sup> ed., 1927-1930, vol 1 p. XV.

<sup>21</sup> Champeil-Desplats (2022).

<sup>22</sup> Reinach (1913).

The author clearly describes in the introduction to his work the “*a priori*” nature of the focus of his study, namely the *a priori* foundations of civil law: “I will show how the formations most often described as specifically legal possess (...) an existence of their own; that this existence is independent of what humans can conceive of, that it is particularly independent of any positive law”; “positive law is perfectly free to emancipate itself from the *a priori* of general legal theory”; “One can only account for the structure of positive law through the structure of the non-positive sphere (...), [by] an *a priori* theory of law as such.” In other words, simplifying the argument to the extreme, one can say that the “non-positive” *a priori* precedes positive law, because it is its essence. The “*a priori*” of law lies in “its *a priori* structure” and not, as is commonly assumed, in positive law. The latter no longer serves as the entry point for legal analysis. It is literally relegated to the background by another *a priori* approach, which is, in the author’s view, superior and even foreign to it in every respect. In its ordinary sense, positive law may well exist in its own right but in a perfectly secondary manner. It does not play an *a priori* role.

The boldness of the author’s doctrinal proposition must be viewed in light of the limited success his doctrine enjoyed. It is undoubtedly asking a great deal of legal scholars to set aside their customary entry point—positive law—in favour of a series of *a priori* intellectual constructs, not merely formal ones, but, as here, ones that could not be more substantive. But, among other examples, it reveals how an “*a priori*” challenge can be mounted against a commonly accepted *a priori*, in this case with the aim of seeking a truth of the law.

If we now broaden our perspective, we are struck by the recurring discussions about what must or should constitute the “*a priori*” nature of the law. Take for example the eternal conflict between natural law and positivist approaches.

In a radical (and here highly simplified) view, natural law and positivist theories fiercely dispute the identification of what occupies an “*a priori*” place in law. One side holds that law is derived from nature, of which positive law is merely the docile expression; the other insists that law is derived from human will, the sole acceptable source of positive law.

These radical interpretations are hardly relevant anymore. Few today still defend the possibility of invalidating positive law on the grounds that it contradicts a pre-existing natural order. Few also view positive law as a totally objective and closed system, impervious in any way to considerations of content—particularly of value—regarding the norms thus produced.

And yet these interpretations persist<sup>23</sup>, especially regarding their respective “*a priori*” positions, which alone concern us here.

It is somewhat as if the origins of law were an eternal debate between natural law-inspired analyses of content and positivist-inspired analyses of form, between natural law-inspired considerations of what is and positivist-inspired considerations of what ought to be, between essentialist approaches inspired by natural law and objective approaches inspired by positivism, first principles guided by morality and those guided by law, etc., and all of this, let's not forget,

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<sup>23</sup> For example McIlroy (2019); Kaufman (2023).

in the name of what is or should be considered the “*a priori*” point of law—that is, that from which everything begins or should begin.

It is almost as if, despite all the advances, developments, and subtleties which have enriched and continue to enrich them, the most simply expressed original opposing ideas continued to clash, again and again, in a recurring manner, over what they truly have in common: a formidable dispute over an “*a priori*.” It is almost as if, as the popular saying suggests (sometimes attributed to Victor Hugo), enemies always end up resembling one another, and, in this case, ultimately meet the same fate.<sup>24</sup>

In all these discussions, the search for an *a priori* truth of law is very much present, interwoven with considerations of specificity and coherence.

### 2.2.2 More ordinary “*a priori*” rhetorical devices

The “*a priori*” definition of law can come in forms less bellicose than the banishment of opposing ideas. These are fairly common rhetorical devices concerning what the law begins with, or ought to begin with, to the exclusion of everything else.

These can be presented in two dimensions: one that is more theoretical, under a general “*a priori*” formula, and one that is more practical, through various “*a priori*” approaches.

Here is the formula: “Knowing precisely where one is going in law before setting off”. What does this mean in terms of “*a priori*”?

This injunction often sounds like a refrain among many legal professionals: in law, one ought to know precisely where one is going before setting off. In other words, one ought always to have a prior definition of the law—by its very nature delimited—before engaging with it in the strict sense.

This injunction can be used, as we have already noted with regard to *a priori*, where the aim from the outset would be to distinguish between what belongs to the world of law and what is foreign to it, which is rather crudely referred to as the world of fact. And it is precisely for this reason that I rejected it quite early on in this work. “*A priori*”, all *a priori* are of interest to us here, even if it means better defining their nature, content and scope *a posteriori*, which I shall attempt to do in subsequent work.

But this injunction can also be understood as the first of the “*a priori*” of law. To set oneself the aim of defining the law in a circumscribed manner, before analysing and practising it, is nothing less than to equip oneself with a formidable “*a priori*” about the law, and to do so by means of various *a priori*.

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<sup>24</sup> Among many other illustrations of how recurring these discussions are, I refer back to the two sequences cited above in relation to “marriage for all” and the “doctrinal commentary on anti-Semitic laws under Vichy”. For another more recent example of such a recurring discussion, in this case with a historic dimension, relating to hidden thoughts surrounding a founding text of human rights, see M. Troper ‘La Déclaration des droits de l’Homme et du Citoyen et le droit naturel’, *Giornale di storia costituzionale / Journal of constitutional history* 50 / II 2025, p. 37.

It can be said that these *a priori* address the following paradox: 1° they offer, as just emphasised, a restrictive definition of law insofar as they aim to determine precisely in advance what will be at issue in the law; 2° yet they function as unverifiable presuppositions insofar as they aim to govern an entirely deductive system of thought, one that is oriented downstream.

This is true, for example, of a radical “aprioristic” view of natural law, said to govern the whole of law (and far beyond). But it is also true of a “pure” science of law which rests entirely on a hypothetical fundamental norm.

These doctrines, and there are many others, have been extensively and diversely amended or adapted. One might describe them as “reductionist”, even though the term (used more frequently in English than in French) carries quite precise meanings, not to say frankly loaded connotations.<sup>25</sup>

Yet they still hold a place today, not only in general legal theory or philosophy—which is beyond the scope of our discussion here—but also in the area that concerns us: the expression of a general “a priori” formulation of a certain truth, specificity or coherence of the law.

Let’s see how this plays out in legal practice.

For the purposes of this discussion, we have identified two forms of “*a priori*” bias: exclusivism and selection.

The use of the term “bias” very often carries a pejorative connotation. But bias can be synonymous with “anchoring bias”, broadly referring to the tendency of individuals to gravitate towards preferences established *a priori*, more or less consciously.

It is this broad sense—which is therefore not necessarily pejorative, though it may be—that I adopt here to describe the “*a priori*” manner, i.e. *ab initio*, by which the law, jurists and even non-jurists approach legal reasoning or practice, reflecting a certain initial—“*a priori*”—approach to the law.

To explore each of the identified biases of exclusivism and selection, I shall proceed by means of practical illustrations, referring general considerations to the methodological issues I have already addressed elsewhere.<sup>26</sup>

Let’s begin with the “*a priori*” bias of exclusivism, discussed here through the example of legal statism in teaching practices in France.

This discussion relates to legal exclusivism, which is often contrasted with legal pluralism. Legal exclusivism refers in particular to the view that there exists only one “*a priori*” form of law: state law, which may also be referred to as “legal statism”.

What can be said about this from a practical perspective?

If, to answer this question, I limit the discussion to teaching practice and my own experience (an empiricism lacking rigour and therefore limited, even though I have had the opportunity to

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<sup>25</sup> See the entries “reductionism” and “anti-reductionism” in Sellers, Kirste (2023).

<sup>26</sup> Bergé (2022a), Bergé (2025).

teach in numerous institutions in France and abroad), there is clearly a bias towards legal exclusivism.

If we consider the situation in France, and the same is true of many other countries, our law faculties and other law schools are overwhelmingly focused on state law. The space given to legal pluralism, particularly in its non-state dimension, is most often marginal, even though there are occasional courses on issues such as customs, private sources of law, transnational law, spontaneous law, legal pluralism in religious matters, in sport, in relation to corporate social responsibility, in overseas territories governed by custom, or in the context of the globalisation of law, etc.

If students are asked what they know about the state model, at best they reply that it is a very recent phenomenon (16<sup>th</sup> century) in human history. And if I dare to tell them that there is no guarantee of the model's survival in an indeterminate future, they look at me in astonishment. University has, for the most part, taught them only one form of law—state law—and this form could one day be threatened with extinction!

The situation is not necessarily any different in schools of legal practice. Allow me, again without empirical rigour, to give a personal example. As a young lawyer in Paris (during my PhD years), my internship supervisor asked me, regarding a case (at first instance in a provincial town), to enquire with our colleague, a trainee lawyer, about the state of case law in the court hearing the case on the disputed point of law. Never, ever, had I heard at the bar school, let alone at university, of the existence of local case law that could steer the legal outcome in a case.

Applied to our discussion, these observations on teaching practices show that there is here an “*a priori*” bias towards legal exclusivism or statism. Almost the entirety of legal education is based on a single premise: state law occupies an “*a priori*” position.

This orientation is clearly the source of anchoring biases. The training of legal professionals is such that they will first and foremost turn to state law. The lacuna inherent in this is that they will know only domestic law, sometimes to the detriment of laws from elsewhere, including in cases where the state remains heavily involved, such as in international and European law in particular.

All this cannot but leave its mark on an “*a priori*” statist conception of law, even outside the strictly educational framework.

In all these exclusivist stances, the search for an “*a priori*” truth, specificity and coherence in the law is very much present. State law is considered *prima facie* to be the only true legal system, which gives the law all its specificity and coherence.<sup>27</sup>

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<sup>27</sup> For a critical biographical reading of Santi Romano and his writings, a reading that literally entrenches the legal pluralisms of one of the author's works [*L'ordinamento giuridico*] within a strict State institutionalism, here a fascist one, see D. Soldini, *Santi Romano (1875-1947) – Tout pour l'Etat*, IRJS Éditions, 2024. For a form of unapologetic legal nationalism, even in a profoundly pluralist author, see, in relation to European law, described as law “from elsewhere”, the comments made (admittedly late) by J. Carbonnier, *Droit et passion du droit sous la Ve République*, Flammarion, 1996, specifically. p. 44 et seq. For a theory of the law as being on the back of State constitutional law, see (among other striking examples) Troper (2001).

We will now look at a second example involving the “*a priori*” selection bias regarding the issue of jurimetrics, as it was addressed in a report submitted to the Court of Cassation.<sup>28</sup>

In the context of *a priori* methods, I have previously discussed the importance of the work undertaken by legal professionals—or indeed anyone engaged with the law—who, consciously or unconsciously, engage in an *ab initio* selection of materials that will enable them to construct, or more modestly, to grasp a legal argument.<sup>29</sup>

This selection process can sometimes constitute an “*a priori*” bias whenever it is guided *ab initio* by a particular conception of the law.

In truth, this is very common and the examples are countless.

But it is interesting to seek to illustrate this, which is what I would like to do using the case of jurimetrics, which was the subject of a report submitted to the Court of Cassation in 2022.

Without going into the details of the subject or the report, what interests us here is the way in which the prospect of open-access dissemination of court decisions—initiated in France several years ago—may, given the growing use of so-called “predictive justice” digital tools (euphemistically termed “jurimetrics” here), have an impact on “the very concept of case law” (letter of engagement, p. 2).

Implicit in the commissioning of this report, we find in the report several references, which are not particularly highlighted, to a distinction between what is referred to as “vertical” case law, produced and reported by the judicial hierarchy (the higher courts, in this case the Court of Cassation), and “horizontal” case law, produced and reported by actors and tools entirely beyond the control of this hierarchy (see the report, pp. 23, 46, 53, 77, 101, 135).

Turning now to the recommendations summarised at the beginning of the report, we find numerous elements reflecting a certain “*a priori*” conception of the law—in this case, case law—a conception that would directly govern the work of selecting and processing decisions likely to form the elements of a legal database made available by the judicial institution for the purposes of analysis and, in particular, jurimetrics.

The recommendations essentially contain the following statements:

- avoid treating all court decisions as equivalent;
- entrust the Court of Cassation with the task of prioritising the decisions of judges ruling on the merits by selecting them, as it already does for its own decisions (through various channels: selection of decisions for the record of judgements, the report, and press releases);

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<sup>28</sup> L. Cadiet, C. Chainais and J.-M. Sommer (Eds), S. Jobert and E. Jond-Necand (report authors), ‘La diffusion des données décisionnelles et la jurisprudence’, report submitted to the president of the Court of cassation and public prosecutor of the Court of cassation – June 2022: [https://www.courdecassation.fr/files/files/Publications/Divers/Rapport%20open%20data/Rapport\\_La\\_Diffusion\\_des\\_donn%C3%A9es\\_d%C3%A9cisionnelles\\_et\\_la\\_jurisprudence.pdf](https://www.courdecassation.fr/files/files/Publications/Divers/Rapport%20open%20data/Rapport_La_Diffusion_des_donn%C3%A9es_d%C3%A9cisionnelles_et_la_jurisprudence.pdf).

<sup>29</sup> Bergé (2025).

- develop a regulatory framework to govern so-called artificial intelligence tools whose results are having an impact on the development of case law;
- ensure, in the reasoning underpinning court decisions, that the citation of relevant previous decisions is properly managed;
- encourage greater consistency between the decisions of the courts ruling on the merits.

If we translate this statement using our analytical framework in terms of *a priori*:

- *a priori*, the digital tool cannot distinguish between them;
- *a priori*, any undifferentiated mass processing of decisions must be banned;
- *a priori*, we must sort through the good and bad decisions of trial judges that could set precedents;
- *a priori*, artificial intelligence tools must be curbed;
- *a priori*, the process of self-referencing court decisions must be controlled;
- *a priori*, a consistent approach to the decisions of courts ruling on the merits must be developed, preventing, by a process of elimination, the risks of inconsistency.

To summarise, the law is indeed its own *a priori*, since it must equip itself with the means to control, as early as possible in the jurimetrics process, what the law ought to be “*a priori*”.

This is clearly an “*a priori*” bias—one that is fully acknowledged in this instance—towards verticality. The latter is *a priori* the truth of the law, its specificity and, above all here, its coherence.

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If we attempt to provide a brief interim assessment of this research in anticipation of the final stage—the presence of *a priori* captured by the law and clothed by it—here is what we might say.

A range of *a priori* can nonetheless be identified and their analysis extended.

The law unclad is, at the most basic level, a law without *a priori*. It is a concept that in a way forms the antithesis of research on *a priori* and the law.

This antithesis is in fact part of the subject, since it allows me to work on its boundaries.<sup>30</sup> As such, rather than seeking to combat it head-on insofar as it may be contrary to my research, I have tried to preserve it in an attempt to deepen our analysis.

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<sup>30</sup> In another example taken from prior research on the law and situations in a state of out-of-control movement (IUF senior IFITIS project, 2016–2021), the study of flows also required perspective on situations of stasis, in which nothing moves.

My conclusion at the end of this study is that behind the law unclad lies a more or less elaborate set of *a priori*. To say that the law is without *a priori* is, at the face of it, an *a priori*. To say that the law is its own *a priori* is, on a reflexive or meta-level, an “*a priori*” in the sense we intend it—with quotation marks (for reference, see the glossary at the beginning).

We must now pursue the analysis, not to directly contradict the concept of the law unclad, but to attempt to extend it.

The search for a distinct aspect of law to be explored in future work thus rests on a new and final working hypothesis: that of an *a priori* effectively captured by the law and capable of evolving in its own way within the legal environment

From this perspective, all the *a priori* identified thus far can be drawn upon, including those developed regarding the law unclad.

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