

## THE VOCABULARY OF *A PRIORI* IN AND AROUND THE LAW<sup>1</sup>

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### ABSTRACT

This article is the first in a series devoted to the study of a priori in law. It is part of the ANTECEDENT research project<sup>3</sup> supported by a Chair of the Initiative of Excellence Université Côte d'Azur sponsored by the French government<sup>4</sup>. The aim of the project is to revisit the law through its preunderstandings, leave behind the law only better to return to it, propose an “antecedent” theory of law and apply this theoretical reflection 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 leave it. To begin the research, this first study takes stock of the vocabulary of a priori in and around the law.

**Keywords:** Legal knowledge, A priori, Multidisciplinary, Vocabulary

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<sup>3</sup> For an overview of the project hosted by Université Côte d'Azur see: <<https://docs.google.com/document/d/1kmDjBprx1y-Ocv3pnAExFYUqkRZifXZW/edit>>.

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The *a priori* approach to law deserves an open, eclectic and sometimes even anecdotal analysis. As we will see in a forthcoming article on the grammar of *a priori*, there is no *a priori* theory of law that covers all the meanings that this term can have in the legal field. To counter this state of affairs, it is necessary to be open to what might constitute, in the broadest possible way, the vocabulary of an encompassing approach to *a priori* in law.

What are the words associated with *a priori*, whether the expression itself (1) or its derivatives that are likely to be of interest in law (2)?

## 1 THE EXPRESSION *A PRIORI*

The expression *a priori* is used in law (1.1) and, of course, outside law (1.2).

### 1.1 IN LAW

There are two main ways in which jurists use the expression *a priori*: either they give it a precise and specific legal meaning, or they borrow it from everyday language, but integrate it completely into legal discourse. These two uses are often intertwined. In an attempt to establish the state of the art, we will distinguish between different types of doctrinal, textual or jurisprudential corpus, distinguishing sub-categories for each of these categories. Finally, we will present the first elements of synthesis at this preliminary stage of the research.

### **Doctrinal Corpus: Legal Dictionaries**

What place does the expression *a priori* occupy in French or English dictionaries of legal terms?

In the two leading French-language legal dictionaries that are

regularly republished (GUINCHARD; DEBARD, 2023; CORNU, 2022) the expression *a priori* does not appear among the entries. The situation is no different in older legal dictionaries<sup>5</sup> or more specialized dictionaries (for example: ARNAUD, 1993; ALLAND; RIALS, 2003). If we extend the search to full text, bearing in mind that only a small proportion of dictionaries are available in digital format, the result is disappointing to say the least. The term *a priori* is rarely used, and when it is, it has no particular legal connotation. If we now look in printed dictionaries for entries that might include the expression *a priori*, such as *présomption* (presumption) or *ex ante*, we find nothing of this kind.

The situation is different for English dictionaries. For example, in *Black's Law Dictionary* (GARNER, 2019) we find one entry: “*A priori*: Deductively; from the general to the particular, or from previous experiences or facts to an inference of what the likely result or effect will be <as an analyst, he reasoned *a priori* — from seemingly self-evident propositions to particular conclusions”. The same is true of another dictionary, where the term is associated with another and has a fairly general meaning:

*A priori* assumption: an assumption that is true without further proof or need to prove it. It is assumed the sun will come up tomorrow. However, it has a negative side: an *a priori* assumption made without question on the basis that no analysis or study is necessary, can be mental laziness when the reality is not so certain.<sup>6</sup>

The Latin origin of the expression *a priori* certainly explains why the situation is not the same in works compiling legal adages and idioms. In a famous French work (ROLAND, 2016) of Latin expressions (H. Roland, LexisNexis, 2021), we find the following entry:

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<sup>5</sup> Available on the website *Gallica de la Bibliothèque de France*: <<https://gallica.bnf.fr>>.

<sup>6</sup> Legal Dictionary, Law.com; compare with the WEX dictionary, published by Cornell University: <https://www.law.cornell.edu/wex>

A priori - Beforehand: As opposed to a posteriori, refers to data that are accepted at face value, without any examination of the facts. In law, it characterizes the anteriority of processes. This is the case for the constitutionality review of laws, which is exercised on the one hand a priori, i.e., before the law is promulgated on the initiative of certain political authorities, and on the other hand a posteriori, once the law has come into force, on the initiative of a litigant claiming that the provision invoked against him or her is contrary to the Constitution.<sup>7</sup>

In the English literature on the use of legal Latin, the expression *a priori* is generally used in its argumentative sense (FELLMETH; HORWITZ, 2021): “From the former. Derived by deductive reasoning from self-evident or assumed propositions; derived by a chain of reasoning starting at general propositions to deduce specific conclusions.”.

### **Doctrinal Corpus: Law Textbooks and Treatises**

There are a great many textbooks and treatises on the law and its various branches. In our necessarily limited reading experience, we have never come across the expression *a priori* as a main index entry, although it is sometimes found in association with other terms, as we will point out later. This does not mean that the expression does not appear as such in the body text of the books.

To take the measure of this state of affairs, we begin by taking the example of an introduction to French law (GHESTIN; BARBIER; BERGÉ, 2018). Of the 61 instances in which the expression *a priori* is used, 16 refer to a priori constitutionality review and 25 to an initial opinion on a question. In these latter cases, it is worth noting that some analyses offer a general reflection on the law or legal reasoning, such as:

- “A priori, these rules resulting from laws, customs, and even judicial precedents, can be considered as the hypotheses

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<sup>7</sup> Unless otherwise noted, all translations are original.

of a deductive system whose consequences can simply be developed, without having to worry about their intrinsic value” (n.º 97);

- on the process of legal qualification: “We will choose the *a priori* applicable rule and then determine whether or not the facts of the case fall within the situation governed by it” (n.º 98);
- “The jurist uses rules to determine what is prohibited, authorized or imposed in given circumstances. *A priori* these rules are, in themselves, neither true nor false” (n.º 100);
- quoting an author (P. Perrot) “The judicial syllogism may, however, be reduced to a ‘formal overgarment [...] insofar as, holding the conclusion to be an immutable given predetermined on the basis of an *a priori* judgment, for perfectly respectable reasons of legal policy, the judge bends the premises accordingly in order to justify a solution which, from the outset, seems desirable” (n.º 117);
- “In the field of legal theory, the answer to the question of whether case law is a source of law depends *a priori* on the definition of law previously given” (n.º 632);
- “*A priori*, the existence of antinomies [between rules belonging to the same legal system] seems excluded. It is in fact the hierarchically superior rule that prevails and, between rules of the same level, the most recent” (n.º 649).

What is the situation in works of general legal theory? If we take one of the most comprehensive in the French literature (BERGEL, 2012), we see that it contains five occurrences of the expression *a priori*: three are drawn from everyday or technical usage, unrelated to general theoretical reflection, but two are relevant to this type of analysis. Thus, we can read the following completely different meanings:

- “the law has its own philosophy [...]. This must not be separated from its immediate purpose. We must then adopt a ‘phenomenological method’ [citing the work of P. Amselek] consisting of observing concrete realities, free from any preconceived ideas, and approaching the law through ‘its phenomenal aspect’ of norms objectively subjected to examination, rather than apprehending it through the distorting prism of an ‘a priori’” (n.º 14);
- [quoting F. Geny] “Legal methodology is, in short, ‘an extremely complex and nuanced procedure, steeped in casuistry and dialectic, a constant blend of analysis and synthesis, where a posteriori procedures, which provide adequate solutions, presuppose a priori directions, proposed by reason and will’” (n.º 246).

We continue our examination with a work of legal method (CHAMPEIL-DESPLATS, 2022). The expression *a priori* is used 23 times, 5 times in a common, technical sense and 18 times in a theoretical sense. Without quoting all the occurrences, we note that depending on the nature of the elaboration, the meaning of the expression varies somewhat, even if the notion of the metaphysical or abstract *a priori* remains dominant in this work. Here are just a few excerpts:

- [quoting L. Duguit] “Legal science must [...] banish from the field of law all *a priori* concepts, objects of metaphysical or religious belief [...] that are not at all scientific” (n.º 57);
- regarding a certain formalist approach to law: “Kelsen calls on [...] positivist theorists to concentrate on the formal and structural dimensions of law in order to be able to identify their object by means of criteria determined *a priori*, intended to be universally valid and operative whatever the subjective or local appreciations of what constitutes law and whatever the content of legal norms” (n.º 58);

- on Roman juriconsults [citing J.-M. Cabasse]: “For [them], the rule is not an *a priori*. It is not about imposing a pre-established standard against the force of reality. The approach is exactly the opposite. The idea is to take actual legal situations as a starting point in order to derive, *a posteriori*, a principle [called] a rule” (n.º 64);
- on natural law [quoting H. Grotius]: “There are two ways of proving that something is governed by natural law: *a priori* and *a posteriori*. It is proved *a priori* by demonstrating the suitability or unsuitability of a thing with reasonable and social nature; it is proved *a posteriori* by concluding [...], that a thing is governed by natural law because it is believed as such among all nations [...].” (n.º 87).

Other references to theoretical *a priori* are also presented in this work. Most of these are based on schools of thought that are hostile to *a priori* concepts/principles/directions: the proponents of organic (n.º 100), historical (nos. 117, 331), inductive or experimental (nos. 127, 130, 240, 261), comparative (n.º 338) or pragmatic (n.º 562) methods. One reference is the favorite of promoters of mathematical models in the legal field (n.º 92).

It should be noted that the two scholarly monographs devoted to the theory of *a priori* in law (REINACH, 1913 ; GARDIES, 1972), to which we will return in the next article on the grammar of *a priori*, are not referred to in the abovementioned works, although our selection is not completely exhaustive (MATHIEU, 2015, p. 332; MONGOIN, 2022, p. 373).

### **Doctrinal Corpus: Legal Encyclopedias**

Legal encyclopedias can also be used to identify the main uses of the expression *a priori* generally found in legal literature.

If we take the example of the French legal encyclopedia *Répertoire Dalloz*, all volumes combined, *a priori* occurs more than 2,800 times.

Unsurprisingly, the *Répertoire de droit civil* (French Civil Law Digest) contains no entry that includes the expression *a priori*. A full-text search reveals 552 occurrences. The vast majority of cases are based on a common, literary use of the expression to denote a *prima facie* approach that is likely to be contradicted on closer examination of the question or situation under analysis. In a stricter, essentially technical legal sense, the term refers to what comes before, what is prior, in keeping with the Latin origin of the expression. For example, the obligation to provide information and advice is presented as an *a priori* test for the integrity of consent, more effective than the *a posteriori* control exercised by defects of consent (Entry *Echange* [Exchange]). Another example: a distinction is made between proof of a person's status, which is provided *a priori* by civil status records, and *a posteriori* by possession of status (Entry *Etat et capacité des personnes* [Status and capacity of persons]). Finally, more rarely, the expression may have a broader and possibly more abstract legal meaning. For example, Philippe le Tourneau states that “Any *a priori* and schematic conception [of causality] is doomed to failure (even if, in econometrics, causality is evaluated by statistical models). Law, like history, would exhaust itself in the search for scientific truth, where there can only be approximation” (Entry *Responsabilité: généralités* [Responsibility: generalities]).

The *Répertoire de droit international* (French International Law Digest) shows similar results: 250 occurrences, no entries referring to *a priori*, frequent common usage and a few technical uses, notably procedural (for example, in arbitration, the term *a priori* refers to acceptance of this method of dispute settlement prior to any dispute, as opposed to acceptance *a posteriori* (Entry *Arbitrage* [Arbitration])); it also refers to national criminal justice, which operates *a priori*, while international justice has, in principle, only a subsidiary nature (Entry *Compétence pénale internationale* [International Criminal Jurisdiction]).

## Textual Corpus: International and EUROPEAN Texts

We begin with international treaties.

Countless texts feed into international law. If we limit ourselves to the treaties collected in the United Nations Treaty Series<sup>8</sup>, a search for the expression *a priori* yields 54 occurrences, many of them redundant (model agreements – different language versions of the same agreement), which is not very many.

The use of the expression generally has two main meanings:

- the first is a precaution regarding the language used to describe a first impression or *prima facie* analysis; for example, it refers to the handling of complaints by Djibouti's local or national police forces in cases where they do not fall *a priori* within the jurisdiction of French authorities or courts (France – Djibouti Cooperation Protocol, 1988); In another example, in an economic and industrial cooperation agreement (and others of the same type), it is specified that no sector of activity is *a priori* excluded (Egypt - Spain Agreement, 1991);
- a second meaning refers to what happens beforehand: for example, a proposal to change the status of an entity with which the United Nations is cooperating must be communicated *a priori*, i.e., beforehand, to the international organization (UN - Austria, 1974); a conciliation agreement between two countries which provides for possible recourse to arbitration on certain points of disagreement, with the obligation to refer to the arbiter *a priori* in the event of a dispute over the scope of the said points (e.g., the interpretation of the treaty) (Hungary - Switzerland Agreement, 1924).

We now move on to the European Union's secondary legislation.

<sup>8</sup> Available at: <<https://treaties.un.org>>.

In the EU's EUR-LEX database<sup>9</sup>, if we restrict ourselves to the categories of regulations and directives, we find 68 occurrences of the expression *a priori* for regulations and 21 for directives, which is also low (there are several thousand EU regulations and directives).

Examples include:

- references to a chronological *a priori* with a strong legal aspect: “Pre-established [*a priori* in the French version], systematic written procedures for the organization, conduct, data collection, documentation and verification of clinical trials shall be required” (Dir. 2001/83/EC); “It is desirable that provision also be made for official pre-control [*a priori* in the French version] of certified seed, and that the obligations should be laid down which are to be fulfilled by the person marketing standard seed and certified seed made up in small packages” (Dir. 2002/55/EC); “It is therefore appropriate to exclude the fixing of any prior [*a priori* in the French version] upper limit for such compensation” (Dir. 2006/54/EC); “At the time of submission of requests to participate or of tenders, contracting authorities shall accept the European Single Procurement Document (ESPD), consisting of an updated self-declaration as preliminary [*a priori* in the French version] evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions” (Dir. 2014/24/EU);
- a reference to a more literary *a priori* to temper a legal statement: “A previous visa refusal shall not lead to an automatic [*a priori* in the French version] refusal of a new application.” A new application shall be assessed on the basis of all available information (Reg. EC 810/2009); “[...] Some of those end-user protection provisions which *a priori* apply only to consumers” (Dir. EU 2018/1972); “Other substances in which incidental contaminants cannot be assumed *a priori*

<sup>9</sup> Available at: <<https://eur-lex.europa.eu>>.

to be absent or be easily excluded, including mixtures, oligomers, and polymers produced from waste should be subject to this Regulation.” (Reg. EU 2022/1616).

### Textual Corpus: National Texts

A search of the French legal database *Légifrance*<sup>10</sup> reveals the expression *a priori* only 6 times in the codes. The Civil Code contains no reference to the term. However, it does appear in the French Commercial Code regarding the situation where “the price of a service cannot be determined *a priori*” (art. L441-1 in particular). The Labor Code refers to it in a way that we have not yet encountered: “The agents of the labor inspection system carry out their duties impartially, without expressing any preconceived ideas [‘*a priori*’ in the French version] in their behavior, words or actions” (art. R8124-18). The same applies to the Pensions for Military Invalidity and War Victims Code: “The expert’s attitude must be benevolent, marked by a clear neutrality, and devoid of a *a priori* suspicion” (Appendix 2). The remainder are references to a *a priori* control by the public authority (see also in this sense, below).

It is worth noting that the expression *a priori* is absent from the French Constitution. On the other hand, considering all national texts, it appears in 29 titles, essentially designating the presence or absence of a *a priori* control exercised by the administration in budgetary matters (for example: Decree n.º 97-845 of September 10, 1997 modifying the Intellectual Property Code and replacing a *a priori* control of the execution of the budget of the National Institute of Industrial Property by a *a posteriori* control). In this small corpus, we also find a text relating to a completely different field: the *a priori* fight against fraud in certain legal acts (“Circular of March 20, 2019 relating to the presentation of provisions intended to fight a *a priori* against fraudulent acknowledgements of paternity and maternity”).

<sup>10</sup> Available at: <<https://www.legifrance.gouv.fr>>.

## Case Law Corpus: European Courts

To what extent do the two major European courts - the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) - use the expression *a priori* in their decisions?

When queried, the HUDOC<sup>11</sup> legal database, which contains all the decisions of the ECtHR, returns 1,117 occurrences of the expression *a priori* (with numerous redundancies). Restricting our search to Grand Chamber judgments alone, which are generally the most reasoned, this number drops to 239 occurrences (again with numerous redundancies). If we confine ourselves to the Court's reasoning (excluding the arguments of the parties and dissenting opinions of judges), we can draw up the following sample:

- we find *a priori* assessments of situations of violation or non-violation of the European Convention on Human Rights (ECHR); for example, with regard to the care provided to a detainee (over a well-defined period covering only part of the case), we read that “It thus appears that, in accordance with the requirement to provide appropriate therapeutic care, the authorities have adopted a multidisciplinary and – on the face of it – [‘*a priori*’ in the French version] coherent approach” (App no 18052/11, *Rooman v Belgium*, ECtHR (GC), 31 Jan. 2019, § 250); or regarding the potential violation of the right to life: “In this regard, it stresses that *Cihan Tunç*’s death did not occur in circumstances which might, *a priori*, give rise to suspicions against the security forces as an institution” (App no 24014/05, *Tunç v Turkey*, ECtHR (GC), 14 Apr. 2015, § 255);
- this type of *prima facie* approach can also be found in relation to the rules of the ECHR; for example, on the absence of an *a priori* hierarchy between the right to a fair trial and freedom of expression, in relation to the disclosure by a journalist of information covered by the secrecy of a

<sup>11</sup> Available at: <<https://hudoc.echr.coe.int>>.

judicial investigation, we can read: “While emphasizing that the rights guaranteed by Article 10 and Article 6 § 1 deserve equal respect in principle [‘a priori’ in the French version], the Court reiterates that it is legitimate for special protection to be afforded to the secrecy of a judicial investigation, in view of what is at stake in criminal proceedings, both for the administration of justice and for the right of persons under investigation to be presumed innocent” (App no 56925/08, *Bédât v. Switzerland*, ECtHR (GC), 29 March 2016, § 68);

- finally, in another register, the *a priori* assessment may characterize the regulatory context of the case, without any direct connection with the ECHR: for example, concerning an elected official’s use of his Facebook account: “In the present case, no regulation required the automatic filtering of comments and there was no practical possibility of prior content moderation on Facebook” (App no 45581/15, *Sanchez v France*, ECtHR, 15 May 2023, § 191).

### What is the situation in the European Court of Justice?

Taking all ECJ documents together, the EUR-LEX<sup>12</sup> database contains 2,395 occurrences of the term *a priori*. If we limit the search to judgments of the “Court of Justice” *stricto sensu*, the figure falls to 544, of which 327 are preliminary rulings, i.e., decisions handed down on referral from a Member State court. This latter corpus, which is different from the previous cases brought before the ECtHR, notably includes:

- regarding an *a priori* assessment of a situation giving rise to a reference for a preliminary ruling: for example, “In the present case, the minor child of M.D, and the child’s mother, enjoy, as citizens of the European Union, the rights enshrined in Article 20 TFEU. Therefore, it cannot *a priori* be excluded that the ban on entry and stay imposed on M.D. would lead to

<sup>12</sup> Available at: <<https://eur-lex.europa.eu>>.

those Union citizens being, de facto, deprived of the genuine enjoyment of the substance of the rights which they derive from their status as Union citizens” (Case C-528/21, M.D., ECJ, 27 April 2023, § 61);

- concerning the interpretation of a European text: for example, “Finally, an interpretation of Article 8(1) and (5) of Directive 95/46 or Article 9(1) and Article 10 of Regulation 2016/679 that excluded *a priori* and generally the activity of a search engine from the specific requirements laid down by those provisions for processing relating to the special categories of data referred to there would run counter to the purpose of those provisions, namely to ensure enhanced protection as regards such processing, which, because of the particular sensitivity of the data, is liable to constitute, as also follows from recital 33 of that directive and recital 51 of that regulation, a particularly serious interference with the fundamental rights to privacy and the protection of personal data, guaranteed by Articles 7 and 8 of the Charter” (Case C-136/17, CNIL, ECJ (GC), 24 Sept. 2019, § 44);
- concerning the application of a European text in the context of the case presented to the referring court: for example, “In the present case, evidence such as that relied on in the main proceedings relating to the temporal proximity between the administering of a vaccine and the occurrence of a disease and the lack of personal and familial history of that disease, together with the existence of a significant number of reported cases of the disease occurring following such vaccines being administered, appears on the face of it [*a priori* in the French version] to constitute evidence which, taken together where applicable, may lead a national court to consider that a victim has discharged his burden of proof under Article 4 of Directive 85/374” (Case C-621/15, Sanofi, ECJ, 21 June 2017, § 41);

- finally, with regard to a fundamental European right that should not suffer due to any *a priori* on the part of judges: for example, “Observance of the right to be presumed innocent requires that court to be free of any bias and any prejudice [‘*a priori*’ in the French version] when it carries out that examination” (Case C-205/21. V.S., ECJ, 26 Jan. 2023, § 108).

We now consider the French context.

### Case Law Corpus: French Jurisprudence

We will base our analysis solely on the jurisprudence of the Constitutional Council.

The *Légifrance* database shows only 10 instances of the expression *a priori* being used by the Constitutional Council, in all decisions since its creation in 1958. The vast majority of these relate to the factual or contextual account of the referral or the reasons behind it. Only two instances relate strictly speaking to a judicial reasoning formulated by the Constitutional Council:

- to define the constitutional system of an *a priori* rule: “[...] the *a priori* limitation on the number of students who may have access to medical or pharmaceutical studies [...] falls within the scope of the law [...]” (Decision 91-167 L - December 19, 1991);
- to describe a *prima facie* analysis: “*A priori*, it seems difficult to accept that expenses incurred by a committee supporting a presidential candidate should not be included in the candidate’s accounts” (Decision 95-93 PDR - December 08, 1995).

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This selection of the uses of the expression *a priori* in the doctrinal, textual and jurisprudential legal corpora provides an initial, if far from completely rigorous, idea of the place of *a priori* in law.

Without prejudging future analyses, we can, at this preliminary stage of the research, note a wide variation in legal expression:

- *a priori* refers to everything that is the subject of a *prima facie* legal analysis, at first glance, based on first elements, on what has been previously observed, all of which is subject, more often than not, to further examination;

- it describes also that which comes before, in advance, in law; it may refer to purely technical mechanisms, such as an *a priori* test or the implementation of a step or an action required *a priori*, but its meaning may be broader: everything that comes into the law before anything else, such as the concept, principle, direction or rule that the law grants *a priori*, and which plays a potentially central, sometimes transcendental, role in all or part of the subsequent legal construction;

- *a priori* is sometimes found as a prejudice or bias, especially when assessing the work of a person (a judge, an authority, a decision-maker) charged with adjudicating on a situation of legal significance;

- finally, in the normal usage of *a priori* by jurists, we observe that *a priori* is an argument - the *a priori* argument - used in a wide variety of reflections on the law, its justification, interpretation and application, which surprisingly does not necessarily appear in the terminology provided in works on legal argumentation.

## 1.2 Outside of Law

To research the use of the term *a priori* outside of law, we will limit ourselves to non-legal dictionaries and artificial intelligence tools.

## In French-Language Dictionaries

The *Dictionnaire Historique de la Langue Française* (Historical Dictionary of the French Language) (RAY, 2022) states that the expression

appears in scientific language (1626) borrowed from the scholastic Latin terms “a” and “priori”, which is itself from prior ‘that which is first’, although “a priore” would have been more classically correct. The more general scientific word means “before verification by observation or experiment”; it took on a pejorative sense (1738): “before examining the facts, based on prejudice”. When it became a noun (1845), it kept both meanings.

The *Dictionnaire de l’Académie Française*<sup>13</sup> (Dictionary of the French Academy) states the following for this entry:

Seventeenth century. Borrowed from the scholastic Latin, meaning “starting from what is before”. 1. Logical. From data prior to experience, based on the principles of reason [...]. To argue a priori. Adjectival. A priori reasoning. 2. By extension. Prior to examination, at first sight, or, pejoratively, on the basis of a preconceived idea, principle, prejudice, etc. A priori, I accept your proposition. They are hostile to this project a priori. Invariable n. An a priori. To pose or formulate one or more a priori.

Searches in other dictionaries, especially English-language dictionaries, gave the following results.

## In English-Language Dictionaries

In the Cambridge Dictionary<sup>14</sup>, we find the following definition of a priori: “Relating to an argument that suggests the probable effects of a known cause, or using general principles to

<sup>13</sup> Available at: <<https://www.dictionnaire-academie.fr>>.

<sup>14</sup> Available at: <<https://dictionary.cambridge.org>>.

suggest likely effects: ‘It’s freezing outside; you must be cold’ is an example of a priori reasoning.”.

In the Oxford English Dictionary<sup>15</sup>, which has a strong historical dimension, the entry for a priori reads:

- adjective: relating to or denoting reasoning or knowledge which proceeds from theoretical deduction rather than from observation or experience: a priori assumptions about human nature;
- adverb: in a way based on theoretical deduction rather than empirical observation: sexuality may be a factor but it cannot be assumed a priori;
- origin late 16<sup>th</sup> century: Latin, “from what is before”;
- meanings: 1710– A phrase used to characterize reasoning or arguing from causes to effects, from abstract notions to their conditions or consequences, from propositions or assumed axioms (and not from experience); deductive; deductively. 1834– Hence loosely: Previous to any special examination, presumptively, in accordance with one’s previous knowledge or prepossessions. 1841– By some metaphysicians used for: Prior to experience; innate in the mind.

What can be found in more specialized dictionaries?

### **In Specialized Dictionaries: Turning To Philosophy**

*Le Dictionnaire Philosophique* (The Philosophical Dictionary) (COMTE-SPONVILLE, 2001) states:

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<sup>15</sup> Available at: <<https://www.oed.com>>.

Everything in the mind that is independent of experience, and especially that which makes it possible (the transcendental), which must therefore, at least logically, precede it. Thus, for Kant, the *a priori* forms of sensibility (space and time) and of understanding (categories). *A priori* should not be confused with innate. Innate refers to a chronological or *de facto* anteriority; *a priori*, to a logical or *de jure* anteriority. The innate belongs to metaphysics, psychology or, increasingly, genetics; the *a priori*, to gnoseology or the theory of knowledge. [...]. The *a priori*, if it exists, is this logical anteriority of the mind in relation to all the empirical data that give it the opportunity to operate. [...]. In everyday language, the expression *a priori* designates a hypothesis yet to be verified, or even a prejudice or bias. This usage, which leads to confusion, should be avoided in philosophical discourse. This is what makes it impossible to say that the concept of *a priori* (in the technical sense) is an *a priori* (in the trivial sense). But that does not prevent us from thinking it.

The *Vocabulaire Technique et Critique de la Philosophie* (Technical and Critical Vocabulary of Philosophy) (LALANDE, 2010) states:

A. From a gnoseological point of view, we call [...] *a priori*, knowledge that experience presupposes and is not sufficient to explain, even though it only has application in experience. *A priori* therefore does not designate a chronological (psychological) anteriority, but a logical anteriority [...]. B. From a methodological point of view, any idea or knowledge prior to a given experiment or series of experiments is called *a priori*. [...] Thus, an *a priori* idea is a hypothesis. Critique – The oldest meaning of this expression, which is found in the Middle Ages but has fallen almost completely into disuse, is to designate *a priori* reasoning (starting from the antecedent), that which goes from cause to effect, from principle to consequence [...]. It seems useful for the clarity of philosophical language to reserve *a priori* [...] for sense A.

Finally, in the *Dictionnaire d'Histoire et de Philosophie des Sciences* (Dictionary of the History and Philosophy of Science)

(LECOURT, 2006), we find an *a priori* entry written by J. Benoit. The notion is closely linked to its opposite – *a posteriori* - to which we will return later (see *infra*, § 2 of this section). The author explains that throughout the different ages of thought, *a priori* has made it possible to “deduce God’s existence from his essence”. He established “knowledge through reason”, in a “transcendental” dimension, “independent of all experience”, or as a “pure *a priori* condition of possible experience”. It could also have a “material” dimension in a form of “reontologization”, “which characterizes [in phenomenology] the *a priori* constitution of a thing insofar as its nature comprises, outside of any logical implication, this or that property.”.

### A Search Using Artificial Intelligence Tools

The following example is taken from ChatGPT<sup>16</sup>.

ChatGPT, what is the definition of *a priori* in English?

The term “*a priori*” is a Latin phrase that has been adopted into English. It is used primarily in philosophy and epistemology to describe a type of knowledge or reasoning. In English, ‘*a priori*’ is typically used as an adjective, and it refers to knowledge or reasoning that is based on theoretical or abstract principles, independent of empirical evidence or experience.

In essence, something that is known ‘*a priori*’ is known or deduced through pure reason or prior to any specific sensory experience. [...]. Here’s a more formal definition: *A priori* (adjective) - Relating to knowledge, judgment, or reasoning that is based on principles, concepts, or deductive reasoning prior to, and independently of, empirical evidence or experience. It implies knowledge that is self-evident or known to be true without the need for empirical verification.

For example, in mathematics, certain truths, such as mathematical axioms or theorems derived through formal logic, are often considered *a priori* knowledge because they are known to be true based on logical principles rather than empirical observation.

<sup>16</sup> Available at: <<https://chat.openai.com>>. Consulted: September 27, 2023.

Similarly, some philosophical arguments and ethical principles may be considered *a priori* if they are derived from reason and not dependent on empirical data.

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This brief incursion into extralegal vocabulary explicitly referring to *a priori* highlights, as in the case of law, a wide variation in the expression:

- *a priori* was first used as an adjective or adverbial phrase before also becoming a noun (in French; in English, the derivative “apriorism” seems to be more commonly used, which also exists in French in a rare form: *apriorité*);
- its history and etymology show that it has evolved considerably over time: from “that which comes before or first” to “the condition or possibility for experience”, then to the “constitutive essence” of a thing;
- the expression has a distinct philosophical, scientific and technical meaning, but it also has a more common meaning, sometimes described as trivial;
- these two main meanings are not equally accepted, especially in philosophy, which shows a clear preference for the transcendental or phenomenological aspect of *a priori*.

## 2 DERIVATIVES OF THE EXPRESSION *A PRIORI* LIKELY TO BE OF INTEREST TO THE LAW

Without claiming to be exhaustive, and in a less systematic way than we have been able to do previously, we will focus on three main types of derivatives of the expression *a priori* likely to be of interest to law: its main antonym: *a posteriori* (2.1), its potential synonyms: hypothesis, postulate, presupposition, commonplace, paradigm, prejudice, bias, belief, imaginary, emotion (2.2) and its other extensions: anteriority, antecedent, precedent, preconception, preunderstanding, prenotation, anticipation, prediction (2.3).

## 2.1 ITS ANTONYM: A POSTERIORI

The expression *a posteriori* is used in three main ways: in everyday language, in philosophy and in law.

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### In Everyday Language

The *Dictionnaire Historique de la Langue Française* (RAY, 2022) has an entry for *postérieur* (posterior), which includes the following:

borrowed (1475) from the scholastic Latin *posterior*, meaning “from behind” and “that which comes after, follows”, especially in both spatial and temporal terms, and “last”, also figuratively “that which is below, inferior”. It’s the comparative of *posterus* “coming after, following”, derived from *post* “after, then, since.”.

The *Dictionnaire de l’Académie Française*<sup>17</sup> states the following elements:

Etymology: Seventeenth century. Borrowed from the scholastic Latin, meaning “starting from what comes after”. 1. Domain: logical. Starting with data from experience, going from effects to causes, as opposed to *A priori*. Formulate a physical law *a posteriori*. Adjectival. *A posteriori* reasoning. 2. By extension. After the fact, experience has shown. I recognized afterwards [“*a posteriori*”, in the French version] that this man could not be trusted.

### In Philosophy

*Le Dictionnaire Philosophique* (COMTE-SPONVILLE, 2001) offers the following definition: “Everything that comes

<sup>17</sup> Available at: <<https://www.dictionnaire-academie.fr>>.

after experience and depends on it. Opposes *a priori*, supposes it (according to Kant) and is better (according to common usage). You are only right after the fact. Even a calculation or a demonstration – which are like thought experiments – are only true, for us, once we have done them.”.

The *Vocabulaire Technique et Critique de la Philosophie* (LALANDE, 2010) refers to the entry on *a priori*, defining the two expressions in opposition to each other. In particular, there is a reference to:

From a gnoseological point of view, knowledge that comes from or depends on experience is called *a posteriori*. Critique – The oldest meaning of this expression, which is found in the Middle Ages but has fallen almost completely into disuse, is to designate [...] by *a posteriori* reasoning, that which goes back from consequences to principles, from what is conditioned by nature to what conditions it [...].

Finally, in the *Dictionnaire d'Histoire et de Philosophie des Sciences* (LE COURT, 2006), reference to *a posteriori* is also included in the *a priori* entry. Its author (J. Benoist) points out that, throughout the ages, we have been able to speak of “*a posteriori* proof of God with regard to that which goes back from his effects (created things) to him as cause”, that is “knowledge from experience”, or even “experience proves *a posteriori* the possibility of a thing”.

### In Law

The expression *a posteriori* is absent from French legal dictionaries, but it can be found in legal works containing Latin adages and idioms.

In the famous lexicon of Latin expressions (ROLAND, 2016), we find an entry on *a posteriori* with the following statement: “After the fact, subsequently. An ellipsis of a *posteriori ratione*

*quam experientia* (based on data from experience). Indicates the posteriority of the legal mechanism, especially the control exercised by the supervisory authority over decentralized institutions.”.

In an earlier work (ROLAND; BOYER, 1998), we also find other elaborations:

Indicates subsequence, whether it involves the creation of a subjective right or the control exercised over the pertinence or lawfulness of a legal situation. This is how the guarantee for civil servants works [...]. There is nothing to prevent the victim from taking direct action before the judicial courts: the guarantee consists in the fact that the conflict will be dealt with by the Administration, once the action has been taken: it comes into play *a posteriori*.

Black’s Law Dictionary (GARNER, 2019) devotes two entries to it:

*A posteriori*: adv. [Latin ‘from what comes after’] (16c) Inductively; from the particular to the general, or from known effects to their inferred causes <as a legal analyst, she reasoned *a posteriori* — from countless individual cases to generalized rules that she finally applied>;

Posteriority (16c): The quality, state, or condition of being subsequent.

- This word was formerly used to describe the relationships existing between a tenant and the two or more lords the tenant held of; the tenant held the older tenancy ‘by priority’ and the more recent one “by posteriority.”.

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This brief examination highlights the undeniable existence of an *a priori* - *a posteriori* pairing.

Outside of law, *a priori* and *a posteriori* do not carry the same weight. In the philosophy of science, the former is highly

structured from a theoretical point of view, while the latter has a more descriptive dimension of simply what comes after, i.e., more often than not, experience. In linguistics, there seems to be a difference too. *A priori* can have a noun form that is not used for the expression *a posteriori*. But they still form a pair, in the sense that they are systematically defined in relation to each other.

In law, although the two expressions present a lower level of construction, *a priori* and *a posteriori* can also function together as a kind of dialectic that makes it possible to question when and how legal constructions intervene [...] before or after. We will no doubt come across the notion of *a posteriori* again and again in this work focused on *a priori*.

## 2.2 POTENTIAL SYNONYMS OF A PRIORI: HYPOTHESIS, POSTULATE, PRESUPPOSITION, COMMONPLACE, PARADIGM, PREJUDICE, BIAS, BELIEF, IMAGINARY, EMOTION

The expression *a priori* is apt to have multiple synonyms. Keeping the broadest possible range of perspectives open at this preliminary stage of the research, the following can be listed: hypothesis, postulate, presupposition, commonplace, paradigm, prejudice, bias, belief, imaginary, emotion.

For each of these terms, taken separately or together, we will seek to identify their use and meaning, where they are likely to relate to the theme of *a priori*. We will conclude with an initial summary.

### **Hypothesis**

How is the term “hypothesis” used outside of law and in law?

*The Dictionnaire du Centre National de Ressources Textuelles*

*et Lexicales*<sup>18</sup> (Dictionary of the National Center of Textual and Lexical Resources) offers three separate entries for the term *hypothèse* (hypothesis). In the usual sense: “Supposition or conjecture by which the imagination anticipates knowledge in order to explain or foresee the possible realization of a fact, to deduce consequences.”. In the mathematical sense: “A proposition supplied as a datum of a problem, or which, without needing to be demonstrated, serves as the basis for proving a theorem by logical means.”. In the philosophical sense: a) “A proposition taken, independently of its truth value, and from which a given set of propositions is deduced; b) Proposition (or set of propositions) put forward, provisionally, as an explanation of facts or natural phenomena, and which must subsequently be verified by deduction or experience.”. *Le Dictionnaire Philosophique* (COMTE-SPONVILLE, 2001) specifies that this usage applies to “hypothetical-experimental sciences: their hypotheses are scientific [...] only insofar as they can be subjected to experiment and, where appropriate, refuted by it.”.

In legal vocabulary, the expression is absent from the most commonly used French dictionaries. However, it is described in detail in the French-language Canadian legal<sup>19</sup> dictionary, which states:

A frequent procedure in legislative and regulatory drafting, the hypothesis in legal reasoning consists in foreseeing cases and stating a rule, a procedure, a sanction, an effect, or a consequence, if what is foreseen happens. Prepositional phrases (in case of, in the event of), conjunctive phrases (in the case that, in the event that, in any case, each time that, for the case that, every time that, supposing that, if it happens that, if it occurs that) and conjunctions (if, whenever, when) introduce the hypothesis.

<sup>18</sup> Available at: <<https://www.cnrtl.fr>>.

<sup>19</sup> Available at: <<https://www.noslangues-ourlanguages.gc.ca/fr/juridictionnaire/index-fra>>.

These linguistic means express a pure and simple hypothesis, in other words a supposition, a mental conjecture, or an eventuality, stated in an antecedent subordinate proposition (If this happens, such and such a consequence will follow), and, in the main proposition, the legal effect or consequence that follows. This is why we usually begin by evoking the hypothesis, before formulating the effect or consequence of its realization or refutation. “If, within one month of this request, the planned agreement has not been reached (= formulation of the hypothesis), the seats will be distributed in accordance with the above conditions. In this case, the period for exercising the right of withdrawal is extended by six months.”.

Black’s Law Dictionary (GARNER, 2019) devotes an entry to it with two distinct definitions: “1. A supposition based on evidence but not proven; a proposed explanation, supported by evidence, that serves as a starting point for investigation. 2. A theory or supposition proposed for the sake of debate.”.

As we can see, there are both practical and more theoretical hypotheses, which have the characteristic of being able to introduce a line of reasoning or a demonstration, i.e., to intervene at an early stage – or we could also say *a priori* – in the construction of the law.

## Postulate

How is the term “postulate” used outside of law and in law?

The *Dictionnaire du Centre National de Ressources Textuelles et Lexicales* lists various definitions for *postulat* (postulate), one of which is intended to be legal (although the term is absent from the French and English legal dictionaries we consulted). It includes the following details:

*SCI*. An unproven principle that is accepted and formulated as the basis of research or theory; *LAW, regional*. (Switzerland). A statement made by a parliamentarian to the executive (with this

example: *This week, we have had the rare personal satisfaction of seeing one of our postulates come to fruition, one from more than a year ago, calling for the introduction of summer time, Le Pays*, 17 June 1977).

In Christian Atias's book (ATIAS, 1985, n.º 37), we find a telling reference to the postulate in law:

Legal epistemology must study the postulates on which the knowledge of the law is based. There are undoubtedly many of them: it would be a very difficult but useful task to try and list them all. There is, for example, probably a postulate of continuity over time. [...]. Another postulate that inspires legal science is that of the relative identity of observed phenomena. Cases can be compared with one another and, consequently, any legal solution is, *a priori*, generalizable. Such a postulate is put into practice on a daily basis, without any verification by jurists [...].

This latter analysis finds an extension, for example, in a study by Danielle Pinard, who describes this identity of observed phenomena as “factual postulates” or “fact-postulates” which, even though they do not have to be legally verified empirically, form the basis of the rule of law. A case in point is the assertion that “seeing a witness's face is necessary for a fair trial.”. The author wonders: “Should we not instead believe in this necessity to provide the rationale for certain rules of evidence?” (PINARD, 2014, p. 44)

The postulate is a potentially very powerful *a priori* in law, even if it is only identified as such in works of an essentially theoretical nature.

### **Presupposition, Commonplace**

How are the terms “presupposition” and “commonplace” used outside of law and in law?

The *Dictionnaire du Centre National de Ressources Textuelles et Lexicales* defines the common usage of the term *présupposé* (presupposition) as “that which is implicitly or explicitly admitted prior to an act, conduct or intellectual approach.”

The word is also present in the *Vocabulaire Juridique* (Legal Vocabulary) (CORNU, 2022) with the following two meanings:

Data taken for granted *a priori* as a basis for reasoning. 2. In the structure of a rule, the case it governs with regard to the consequence attached to it; the hypothesis in which it applies in relation to the effect it produces; the presupposition of its application in relation to its legal effect [...].

It has been shown that presuppositions are particularly significant when they are given a common dimension. For example, appeals to “common opinion” or “common values” often play a decisive role in legal argumentation. But these are usually presuppositions, in the sense that they are generally not supported empirically (MATHIEU, 2015, p. 372).

This is also true of “commonplaces,” understood as “widely accepted presuppositions, habitual sources from which speakers can draw their arguments.” (MATHIEU, 2015, p. 376).

## Paradigm

How is the term “paradigm” used outside of law and in law?

The *Dictionnaire du Centre National de Ressources Textuelles et Lexicales* gives the following definition for *paradigme* (paradigm): The “dominant theoretical conception current at a given time in a given scientific community, which is the basis for the types of explanation that can be envisaged, and the types of facts to be discovered in a given science.”

One author in particular has appropriated the word in law (ATIAS, 1985, n.º 84) in a sense that brings it closer to the concept of *a priori*. Referring to “good and bad paradigms,” he points out that: “Legal concepts and theories are founded on intuitive convictions and more or less formalized postulates. [...]”. Quoting the well-known work of Thomas S. Kuhn (*La structure des révolutions scientifiques* [The Structure of Scientific Revolutions], reprinted by Flammarion in 2018), he continues: “the establishment of a paradigm provides a scientific community [...] with the means to choose problems that can be assumed to have a solution, as long as the paradigm is taken for granted [...]”. And Christian Atias adds that:

Legal science offers many illustrations of this type of approach. The adoption of the positivist paradigm has relieved jurists of the need to continue questioning the content of natural law and the correspondence of positive law with it. The same paradigm that emphasizes the subsumption of the concrete case under the rule may have helped dissuade jurists from using the teachings of sociology or anthropology: most of their findings could not be directly linked to the application of the law.

Even if the study of paradigms is inseparable from the practices that may prevail among jurists in an identified circle at a given time, and even if paradigms are thus often constructed *a posteriori* to legal statements, the fact is that they are likely to acquire the stature of an *a priori* that is not, or only very weakly, discussed and that guides the way in which law is made and thought.

### Prejudice, Bias

How are the terms “prejudice” and “bias” used outside of law and inside law?

The *Dictionnaire du Centre National de Ressources Textuelles et Lexicales* lists four meanings of the term *préjugé* (prejudice), the

first of which has a legal scope:

A. What has been judged in a similar or analogous case. This ruling is *unpréjugé* (a precedent) for our cause. B. 1. A favorable or unfavorable *a priori* opinion of someone or something based on personal criteria or appearances [...]. 2. Pej., often pl. Hasty, preconceived opinion often imposed by the environment, era, education, or due to the generalization of a personal experience or a particular case [...]. PSYCHOSOCIOLOGICAL. Racial prejudice. Pejorative opinions and feelings established on the basis of superficial assessments of representatives of another race considered inferior [...].

*Le Dictionnaire Philosophique* (COMTE-SPONVILLE, 2001) devotes an entry to it in the following terms: “What has been judged before. Before what? Before having really thought it through. It is the classic and pejorative name for opinion [...] insofar as it is preconceived [...]”.

The term prejudice is absent from the French-language legal dictionaries we consulted. It does, however, appear in Black’s Law Dictionary (GARNER, 2019) “Prejudice: a preconceived judgment formed without a factual basis; a strong bias”, as well as in Chaïm Perelman and Lucie Olbrechts-Tyteca: “Prejudice can be seen as a braking technique, a technique that prevents having to constantly revisit the conception we have of a person, and which contributes greatly to its stability.” (PERELMAN; OLBRECHTS-TYTECA, 2008, p. 423).

### Belief, Imaginary

How are the terms “belief” and “imaginary” used outside of law and in law?

The *Dictionnaire du Centre National de Ressources Textuelles et Lexicales* offers two sets of definitions for the term *croyance* (belief):

1. A greater or lesser degree of certainty by which the mind admits the truth or reality of something. [...] 2. An adherence of the mind which, without being entirely rational, excludes doubt and involves a degree of personal conviction, of intimate persuasion. [...] B. 1. In relig. mat. Religious belief(s). [...] 2. Opinions which, without being religious, have the character of an intimate conviction and which exclude doubt [...].

The *Vocabulaire Juridique* (CORNU, 2022) speaks of “the fact of believing, the fact of trusting [...]”. In its definition, the Encyclopedic Dictionary of Theory and Sociology of Law (ARNAUD, 1993) refers to another entry [“Opinion”], for which three meanings, common, sociological and philosophical, are described. The last one specifies: “a state of mind consisting in thinking that an assertion is true while admitting that one may be mistaken in one’s judgment” (with an explicit reference to Kant and his *Critique of Pure Reason*).

The *Dictionnaire du Centre National de Ressources Textuelles et Lexicales* lists the following elements for the term *imaginaire* (imaginary): “Created by the imagination, existing only in the imagination [...]” and “An oeuvre, domain, or world of the imagination.”. The Encyclopedic Dictionary of Theory and Sociology of Law (ARNAUD, 1993; see also: DEL MAR, 2020; KASSOUL, 2023) devotes an entry to it:

An approach to legal phenomena that sees law as an active representation of reality, as an active vision of the world. [...] the approach in terms of the imaginary responds [...] to a new expectation of legal science: to recognize and interpret law as a global social object, and not simply to study it as a technique [...]. G. Bachelard emphasizes the creative force of the imaginary, its “power to inspire” that anticipates the reality to come, and gives meaning to the reality already formed [...]. While the peculiarities of legal discourse often lead jurists to engage with the legal imaginary without realizing it, its influence is easier to spot in certain circumstances, at times of change and innovation [...]. By periods of change we mean those

[...] when existing legal categories have ceased to be able to meet political or social needs and expectations, and must give way to new categories or standards. [...] The new legal discourse generally echoes, rather than precedes, other political, sociological and economic discourses. It is not, however, conflated with them, as is shown by the frequent coexistence in the same text of an explanatory statement and a normative mechanism, but it reduces these external representations to highly simplified terms and categories [...].

Reading these different definitions, we understand that belief and imagination are likely to be part of an *a priori* approach, anticipating legal solutions, even if belief and imagination can naturally be part of the legal process as a whole and not just at a preliminary stage.

### Emotion

How is the term “emotion” used outside of law and in law?

The *Dictionnaire du Centre National de Ressources Textuelles et lexicales* defines *émotion* (emotion) in the following way: “Reactive, reflexive, involuntary state experienced at the level of the body in a more or less violent manner and at the same time affectively in the form of pleasure or pain.”

No French-language legal dictionary devotes an entry to it. On the other hand, it is found in a derived form in Black’s Law Dictionary (GARNER, 2019) with the expressions “emotional abuse; emotional distress; emotional harm; emotional incapacity; emotional insanity” which refer to the assessment of agents’ behavior whenever it can be interpreted legally (establishing liability, assessing evidence, etc.).

Little or nothing in these definitions specifically prefigures an *a priori* function for emotion, which can be present at every stage of legal intervention. But nothing prevents us from understanding it in this way.

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What can we deduce from the ways these different synonyms for *a priori* are used?

Three points are worth highlighting at this stage of the research. The first, which we have already noted in the analysis above, is that a term can sometimes carry an *a priori* dimension in essence (hypothesis, postulate, presupposition, prejudice), or it can have a scope that is broader but does not exclude this *a priori* function (commonplace, paradigm, bias, belief, imaginary, emotion).

The second, to which we will return later, reflects a philosophical distinction between expressions that denote rational *a priori* (hypothesis, postulate, presupposition, paradigm) and those that refer to perceived *a priori* (bias, belief, imagination, emotion), bearing in mind that some of them clearly belong to both categories (prejudice, commonplace).

The third relates to the approbatory or pejorative dimension of expressions used specifically in the legal world: a pejorative connotation is more frequent for perceived *a priori* (bias, belief, imaginary, emotion) than for rational *a priori* (hypothesis, postulate, presupposition, paradigm), and also tends to prevail for a *a priori* belonging to both categories (prejudice, commonplace).

### 2.3 OTHER EXTENSIONS OF A PRIORI: ANTERIORITY, ANTECEDENT, PRECEDENT, PRECONCEPTION, PREUNDERSTANDING, PRENOTION, ANTICIPATION, PREDICTION

Many other extensions to the expression *a priori* can be found. Without claiming to be exhaustive, we have selected the following terms: anteriority, antecedent, precedent, preconception, preunderstanding, prenotion, anticipation and prediction.

In addition to a brief review of common meanings (where they exist), we will focus on some of the most salient academic meanings given to these terms by various disciplines, both outside of law and in law. We will conclude with an initial summary.

### **Anteriority, Antecedent, Precedent**

How are the terms anteriority, antecedent and precedent used outside of law?

In everyday language, anteriority, antecedent and precedent refer to everything that comes before, as opposed to everything that comes after (see, for example, the *Dictionnaire du Centre National de Ressources Textuelles et Lexicales*). As commonly understood, the terms have a temporal meaning. On a given time scale, events follow on from one another, and approaching them with the concepts of anteriority, antecedent and precedent situates them a timeline in relation to one another. The terms under analysis here generally have a neutral meaning, in the sense that, except in special cases, nothing says that what is before is absolutely primary, in relation to what comes after. For example, an earlier, antecedent or precedent event may be later than another event that is earlier, antecedent or precedent to it.

In a more academic sense, the terms anteriority, antecedent and precedent are given other meanings. Without claiming to be exhaustive, we note that in philosophy, anteriority has a logical meaning that “consists in being the principle, premise or condition of a proposition.” (LALANDE, 2010).

The term antecedent has an even richer meaning. The *Vocabulaire Technique et Critique de la Philosophie* (LALANDE, 2010) proposes

1. a logical meaning: “In any implication, the implying term is said to be the antecedent and the implied term the consequent. In particular, in a hypothetical relationship, the proposition

- that states the condition is called the antecedent, and the proposition that is conditional is called the consequent,”;
2. a meaning in psychology and theory of knowledge: “antecedent of a phenomenon, any phenomenon that precedes it in time”; and
  3. a meaning in psychoanalysis: “antecedents, all events, either individual or hereditary, that can explain certain psychological abnormalities of a subject under consideration.”.

Finally, the term precedent is sometimes used in a perspective that can be described as historical: “A fact or event that occurred at an earlier time insofar as it can be evoked as identical (partially or wholly) to a later event or fact,” sometimes as an argument from authority: “A fact, event, or previous case cited as authoritative” (*Dictionnaire du Centre National de Ressources Textuelles et Lexicales*).

What is the case in legal language?

The terms “anteriority”, “antecedent” and “precedent” are not used equally in law.

For anteriority (or anterior and the Latin term *ante*), both general and precise references can be found in the legal vocabulary. In general terms, the *Vocabulaire Juridique* (CORNU, 2022) refers to “that which comes before, which precedes a given fact or event in time.”. The same dictionary refers (for the term *antérieur* [anterior]) to an archaic meaning: “bygone, existing in the past, as opposed to new.”. The *Lexique Juridique des Expressions Latines* (Legal Lexicon of Latin Expressions) (ROLAND, 2016) devotes an entry to the expression “*ex ante*”: “Starting from what is before – Marks anteriority in time and means that it is on the basis of pre-existing data that a calculation is made, a check carried out, a decision made.”. In another French legal dictionary, we find the following specific meaning: “Older law or fact, enforceable

against an industrial property title and rendering it null and void.” (GUINCHARD; DEBARD, 2023). But it is unquestionably in Black’s Law Dictionary (GARNER, 2019) that the harvest is most abundant: *ante litem motam*, *ante mortem* interest (or statement), *antenatus*, *antenuptial*, *ante omnia*, *ante redditas rationes* [...] with essentially factual meanings that describe the situation prior to the occurrence of a given fact.

The term antecedent is not treated in the same way. Absent as a main entry from the most common French-language legal dictionaries, it once again occupies an important place in Black’s Law Dictionary (GARNER, 2019) with 18 entries. As is often the case in this dictionary, we find common definitions, referring to the idea of what comes before (see above), indiscriminately combined with definitions that have more legal connotations. Without being exhaustive, we can cite the following expressions: antecedent basis, antecedent crime (or offense), antecedent debt, rule of the last antecedent [...]. If we focus on the expression “rule of the last antecedent,” we find the following definition:

An interpretive principle by which a court determines that qualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing. For example, an application of this rule might mean that, in the phrase “Texas courts, New Mexico courts, and New York courts in the federal system”, the words in the federal system might be held to modify only New York courts and not Texas courts or New Mexico courts.

This leaves the term precedent. The *Lexique de Termes Juridiques* (Lexicon of Legal Terms) (GUINCHARD; DEBARD, 2023) devotes an entry to *précédent* (precedent) and defines it in these terms: “Solution previously given in a similar dispute, invoked as a reference, endowed with de facto authority, sometimes of a binding

nature, particularly in Common Law countries.”. The *Vocabulaire Juridique* (CORNU, 2022) gives it two main meanings:

1. Antecedent: a previous decision taken as a reference; in relation to a decision to be made, a solution already adopted in the past in a similar case or circumstances; denotes [...] a decision [...] which, depending on the legal system, may have exemplary value, de facto authority or a binding character (*stare decisis*).
2. Sometimes, a fact, act or previous behavior to be taken into consideration in determining a custom [...].

As this precedent has its strongest roots in Common Law countries, it is naturally in Black’s Law Dictionary (GARNER, 2019) that we find the most extensive references. The noun precedent is defined as:

1. Something of the same type that has occurred or existed before.
2. An action or official decision that can be used as support for *later* actions or decisions; esp., a decided case that furnishes a basis for determining later cases involving similar facts or issues (*stare decisis*).

The long list of derived expressions includes: binding precedent, original precedent, condition precedent, persuasive precedent, declaratory precedent, precedent sub silencio, authoritative precedent, doctrine of precedent, duty to disclose adverse precedent, failure of a condition precedent. If we take, for example, the entry “doctrine of precedent,” we find:

1. The rule that precedents not only have persuasive authority but also must be followed when similar circumstances arise.
  - This rule developed in the 19<sup>th</sup> century and prevails today [in US].
2. A rule that precedents are reported, may be cited, and will probably be followed by courts.
  - This is the rule that prevailed in England until the 19<sup>th</sup> century.

## Preconception, Preunderstanding, Prenotion

How are the terms preconception, preunderstanding and prenotation used outside of law and in law?

In law, none of these three expressions – preconception, preunderstanding, prenotation – is found in any of the dictionaries or indexes we have consulted, in either French or English.

We have to turn to everyday language, the language produced by other forms of knowledge, or to very specific legal literature, in order to find them.

The *Dictionnaire du Centre National de Ressources Textuelles et Lexicales* defines *préconception* (preconception) as an “Idea formed in advance; prejudice.”. But the term is absent from specialized dictionaries, notably in philosophy.

The term preunderstanding is absent from most standard dictionaries. It appears in the Encyclopaedia Universalis dictionary under this brief definition: “prior understanding.”<sup>20</sup> But it is mainly used in philosophy, particularly in studies that consider that interpretation passes through a phase of preunderstanding (GADAMER, [1960], 2013).

This leaves the term prenotation. The *Dictionnaire du Centre National de Ressources Textuelles et Lexicales* offers two definitions, one philosophical and the other sociological, for *prénotation* (prenotion): “*PHILOS.* [P. ref. to Epicureanism and Stoicism] Spontaneous, general knowledge drawn from experience, prior to any reflection. *SOCIOL.*, gen. *plural*. Concept formed spontaneously by practice and which has not yet undergone the test of scientific criticism,” with for this last meaning, the concise judgment of E. Durkheim: “All prenotations must be systematically ruled out [...]. The sociologist [...] must [...] resolutely refrain from using those concepts which have been formed outside science and for needs which have nothing to do with science” (DURKHEIM, [1894] 1901, p. 40).

We will return to this later.

<sup>20</sup> Available at: <<https://www.universalis.fr/dictionnaire>>.

## Anticipation, Prediction

How are the terms “anticipation” and “prediction” used outside of law and in law?

In everyday language, as well as in fields of knowledge other than the law, the terms anticipation and prediction are discussed in detail. In the *Dictionnaire du Centre National de Ressources Textuelles et Lexicales*, anticipation has the following two definitions: “EPIST. [Action of] representing a priori what will then be given *a posteriori*. Thus, we call the hypothesis the anticipation of the experiment; the hypothesis is considered as one of the stages of the experimental method and is subjected to a test of facts in the process that academics call experiment. PSYCH. Anticipation is not the simple attempt at forecasting by which we often try to guess what is going to happen: it involves the preparation and even the outline of future action, subjects orienting their present actions to direct the subsequent course of events in their favor.”. For prediction, the same dictionary includes the following common definition: “Action of announcing an event in advance by calculation, reasoning or induction.”.

In the language of law, the term anticipation has an essentially factual meaning (e.g., in relation to what is “anticipated”, such as payment: see *Vocabulaire Juridique* (CORNU, 2022)). As for the expression prediction, it is of interest to the theme of a priori only if it is taken in its theoretical dimension. For example, in Black’s Law Dictionary (GARNER, 2019), we find this entry

Predictive theory of law: The view that the law is nothing more than a set of predictions about what the courts will decide in given circumstances. This theory is embodied in Holmes’s famous pronouncement, “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 460-61 (1897) [on this doctrine, see also: Encyclopedic Dictionary of the Theory and Sociology of Law (ARNAUD, 1993, p. 563)].

Interest in the term has been renewed with the controversial topic of predictive justice.

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What can we conclude from the ways these different terms are used, at this stage of the analysis?

The possible extensions to the expression *a priori* reveal a huge variety of approaches.

Extensions can take the form of nouns, adjectives, both singular and plural, each of which can affect their meaning (see, for example, “antecedent”).

They can have an essentially descriptive dimension (see, for example, anteriority, antecedent, precedent), especially when used to describe the situation where one event occurred before another on a given time scale.

But they can also be used to explain or demonstrate (this applies to all the expressions) the sequence of events or operations that lead to a given result.

All these expressions exist outside of law, whether in everyday language or in the academic language of a discipline.

In law, none of these expressions generally predominates.

In their abstract form, however, these expressions offer great potential.

This is what we will be looking at in a forthcoming article on the grammar of *a priori* in law and outside of law.

More to follow...

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