"ANTECEDENT" PROJECT

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UCA[JEDI] Advanced Research Programme
2021 Internal Campaign

What came before our disciplines? What are our *a priori*? These questions, which come to us from the philosophy of science, have been the subject of much theorisation. The "Antecedent" project has the entirely original ambition to place law at the heart of these fundamental questions in an effort to establish, both within and beyond the academic community, a dialogue between our various branches of knowledge about the different prejudices, presuppositions, paradigms, beliefs (etc.) that forge our theoretical and practical constructs and allow us to shed light on and discuss their meaning.

The advanced research project entitled "ANTECEDENT" sets out to explore an innovative theme in law, building on major international collaboration efforts. Its twofold objective is, first, in late August 2022, to submit an ERC Advanced Grant application and, in the longer term, to set up an institute within UCA to explore the intersections between the different theoretical and practical epistemological approaches in our academic disciplines. The ultimate aim of this research is to show how law – which is not strictly speaking a science – offers a way to revisit the contemporary usage, particularly in the philosophy of science, of *a priori*. This will involve creating and promoting a new legal epistemology that can feed into legal education and research as part of a fully interdisciplinary and international framework with both theoretical and practical dimensions. This ambition can only be achieved if we manage to develop and organise – on a sufficiently large scale – significant participation from legal scholars in a process of critical reflection on the theories of knowledge.

1. Analytical point of departure: leave behind the law only better to return to it

Research on antecedents in law cannot result from some ready-to-use legal theory that would allow us to mechanically sketch out our analytical contours.

A new method must be invented.

But not one that is totally free of influence from existing theories.

1.1. What might an antecedent approach in law entail?

To answer this question, we need to imagine what an open discussion on the *a priori* of the law might look like.

The ambition of addressing *a priori* as a theme might be to conduct critical work deconstructing/reconstructing central notions of various disciplines, including law.

In very general terms, one might say that an *a priori* is a presupposition underpinning our disciplinary constructs, with the characteristic of being deliberated to a limited extent if at all.

To put it another way, an *a priori* is a non-erudite representation of the subjects (in a broad sense) to which we apply our constructs. Once we begin to focus our analysis on these constructs, we generally pay little if any attention to this antecedent approach that involves specifying our conception, perception and comprehension of the subjects we claim to be working on with our different branches of knowledge, including of course legal knowledge.

There are many ways to question the relationship between *a priori* and law. Here we will look at three approaches.

In what might be described as a technician's approach, the law can be seen above all as an applied discipline built on a specific technical apparatus that benefits from its own vocabulary and methods of reasoning. If one wishes to be heard in law as a discipline, one must be technically irreproachable, i.e. rigorous and respectful of its canons. This technical perspective is so important that the vast majority of legal scholars make it the A to Z of their knowledge. From this point of view, *a priori* are generally non-existent. Legal scholars begin their analysis with the rules of the law. Only rarely do they ponder the existence of any ordinary conception, perception and comprehension of that to which they apply their constructs.

Under the second approach, which might be described as practical, the law begins with the facts. Practitioners know that the bulk of their work involves shaping the facts in such a way as to make them produce a given legal effect. Inherent in this "shaping" is the whole legal apparatus for qualification, i.e. translating facts into law. But there is also room for work on *a priori*. For every time that the facts cannot – or cannot yet – be qualified in standardised legal terms but instead play a potentially crucial role in determining the legal solution, one is in the presence of an *a priori*.

The third approach can be described as theoretical. The law is also a discipline for theorists. We need abstract constructs to model the techniques and practices of the law. Indeed, it is the primary function of researchers to abstract models – or where applicable super

models – from reality. Under this theoretical approach, it may be that the legal scholar constructs *a priori* that cannot be deliberated or verified through legal techniques or practices. If we draw a parallel with scientific theory, the approach here is a Kantian one. It is clearly metaphysical.

These three approaches can lead legal scholars to adopt very different attitudes from one another. They may endeavour to construct a link between the *a priori* and the law. Or they may keep them separate and perhaps decide to study them in parallel with other disciplines. Finally, they may challenge the very existence or utility of *a priori* in law.

1.2. What might be the project's theoretical dimension?

Under an essentially theoretical approach, without a doubt the most interesting dimension would be the search for a link between the antecedent and the law.

Without claiming to be exhaustive, let's try to formulate various working hypotheses by drawing on some of the best-known legal texts, usually with global reach.

While none of these texts, strictly speaking, staged the kind of research we would like to conduct in this project on antecedents in law, it is nonetheless useful to refer to them to show how the antecedent approach can raise questions considered essential in law.

To begin with, we could, like the Austrian legal scholar Hans Kelsen, try to postulate in law the existence of fundamental hypothetical norms (*Gundnorm*), which in essence are not discussed and are such that they legitimise other norms. Here, the antecedent takes the form of a theoretical *a priori* that can be used to consolidate the normative edifice, which, to put it in simple terms, is built on the validation of each norm in reference to another norm (e.g. legislation validated by the constitution). Even the highest norm – the constitutional norm – still needs another norm to validate it. This is where the hypothetical fundamental *a priori* imagined by the author comes into play.

Another approach, adopted by the Italian legal scholar Santi Romano, would be to consider that any social organization gives birth to a legal order (*ordinamento giuridico*). Santi Romano's very important work involved integrating into the law the phenomenon of social order, generally seen as an "antecedent" (on several occasions the author uses the term *antecedente*) of the law. This could of course be the State's social order, but the author, condemning all forms of legal exclusivism, agreed to include other types of social organization: international society, church, business, school, family, mafia, etc.

Lastly, one could look at studies that endeavoured to theorise certain *a priori*. Examples that come to mind include the work of the German author Adolf Reinach in civil law and the Italian Francesco Carnelutti in commercial law. The terms *possession*, *promise*, *claim* and *obligation*, central to the former's work, and the iconic term *circulation*, studied by the latter, are avenues to pursue as part of a renewed approach to what might be referred to as the antecedent modalities of law.

Here are the references to the texts cited above:

- H. Kelsen, *Pure theory of law* (1960; Knight trans.), Law Book Exchange 2005;
- S. Romano, *The Legal order* (1918 & 1945; Croce trans.), Routledge 2017; see also our

commentary in French: *Les ordres juridiques*, Dalloz, coll. Tiré à Part, 2015;

- A. Reinach, *The Apriori foundations of the civil law* (1913; Crosby trans.), Ontos Verlag 2012;
- F. Carnelutti, *Teoria giuridica della circolazione*, Cedam 1933.

2. Opening up this subject to an interdisciplinary and international approach is the focus of this response to the PRA IDEX UCA 2021 call for applications

This is the starting point for the work we intend to focus on in this response to the PRA IDEX UCA 2021 call for applications, with the aim of submitting, in 2022, an ERC Advanced Grant application and ultimately creating a dedicated institute to explore this area.

In order to achieve this difficult ambition, two paths will be explored: interdisciplinary and international.

2.1. The interdisciplinary approach

The antecedent approach in law, as explained above, requires one to leave behind the law only better to return to it.

Such a manoeuvre demands a fully interdisciplinary approach.

To prepare for this, it is essential to open up the question of the antecedent approach to other disciplines.

The first discipline to reach out to in order to develop the problematics of this subject is naturally the philosophy of science. The *a priori* approach was theorised by Kant in its transcendental dimension. Although, intuitively, we believe it is necessary to depart from this theoretical schema – which is why we also believe it is preferable to use the term *antecedents* –, these analyses must nonetheless be the starting point for an exploration of the contemporary vitality of Kant's reading of *a priori* in theories about knowledge. On the first level, this requires identifying the historical and contemporary literature to have addressed this subject, and on the second level comparing and contrasting ideas with philosophers and historians, for the most part not legal scholars save a few exceptions (two thinkers are indicated as references for the project).

But in reality, this approach aims to be much more open from a disciplinary perspective. The questions raised by the research into antecedents can be asked about any discipline.

At UCA in Nice, we have had the opportunity to explore this deliberately open approach as part of two major events:

- For more on this kind of exploration in relation to the "meaning of economic freedoms of movement" (studies published in French and English), see the international and multidisciplinary conference (law, economics, history, philosophy, management science, digital science, political science and sociology) held in May 2019 on the Law Faculty campus: http://www.universitates.eu/jsberge/?p=24450
- And to learn more about the first collective research experiment (law, economics, management science and sociology), launched in 2020 in the GREDEG laboratory (UMR CNRS n° 7321) addressing the theme "Debating our *a priori*!": https://gredeg.univ-

cotedazur.fr/manifestations-scientifiques/seminaire-pluriannuel-1

2.2. The international approach

Law is not a universal discipline. The study of law can be confined to a given territory. But once one is willing to open up to questions of a theoretical nature, the stakes change radically, potentially creating very broad prospects of international research.

And drawing on our considerable experience abroad, we intend to include various selected interlocutors to explore the project's central hypothesis with the hope of steering both existing and future links towards the new research theme proposed herein – antecedents in law.