

Liberté publique 1, 3^e cours

21/09/2021

Paragraphe I. Les sources historiques et constitutionnelles

A. Sources historiques

1. L'origine politique

Dans une démocratie athénienne il est question de la liberté politique de l'homme libre ce qui exclu l'esclave.

Rome qui a mis en place la République : elle s'est attachée de la même façon que la Grèce aux libertés politique. A Rome on trouve une réflexion sur la liberté juridique individuelle mais encore une fois ce sont les garanties sociales qui font l'Homme libre. Il y a une origine politique très lointaine

2. L'origines juridique

L'origine juridique des droits et de la liberté en droit français est la DDHC.

a.) La DDHC et la controverse sur sa valeur juridique

En France juridiquement la controverse est la DDHC de 1789 mais sa valeur juridique n'a pas été réglée avant 1971 soit 182 ans plus tard.

En 1789 elle est votée dans le but de guider les rédacteurs de la constitution du 3 septembre 1791. La DDHC est donc un guide. Dans l'idée des révolutionnaires les constituants qui vont suivre doivent s'inspirer de la DDHC. Ce texte est assez court et très universaliste qui fait que 17 articles courts et qui privilégie une société libérale qui repose sur des **droits individuels et droit de propriété**. La finalité de la DDHC est de définir les droits de l'H et du citoyen comme la cellule de base d'une nouvelle société politique.

On dit de la DDHC qu'elle constate des droits davantage qu'elle les proclame. Elle constate des droits qui sont inhérents à la qualité humaine. Cela est inspirer de **l'école du droit naturel**, celle-ci affirme un droit antérieur, il est attaché à la personne humaine ce droit.

Pendant un temps on a considéré que l'H est ancrée par dieu et le droit naturel serait celui de dieu donc confusion entre droit naturel et droit divin. Puis l'école de droit naturel se laïcise et il ne reste attaché qu'à la personne humaine on sort dieu de l'adéquation, on fait désormais appel à la raison et non plus à dieu.

Grotius et Pufendorf : laïcisation des droits naturels avant la DDHC.

Au XVIIIe la philosophie des lumières reprend la théorie du droit naturel pour faire valoir à cette époque que même un état monarchique doit respecter ses droits naturels. La DDHC rompt avec l'État monarchique mais elle garde ses droits inaliénables.

On a des sources de droits naturels dans notre droit positif.

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Table of Contents **Liberteacutes Publiques Cours**

1. Understanding the eBook **Liberteacutes Publiques Cours**
 - The Rise of Digital Reading **Liberteacutes Publiques Cours**
 - Advantages of eBooks Over Traditional Books
2. Identifying **Liberteacutes Publiques Cours**
 - Exploring Different Genres
 - Considering Fiction vs. Non-Fiction
 - Determining Your Reading Goals
3. Choosing the Right eBook Platform
 - Popular eBook Platforms
 - Features to Look for in an **Liberteacutes Publiques Cours**
 - User-Friendly Interface
4. Exploring eBook Recommendations from **Liberteacutes Publiques Cours**
 - Personalized Recommendations
 - **Liberteacutes Publiques Cours** User Reviews and Ratings
 - **Liberteacutes Publiques Cours** and Bestseller Lists

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 - Liberteacutes Publiques Cours eBook Subscription Services
 - Liberteacutes Publiques Cours Budget-Friendly Options
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 - ePub, PDF, MOBI, and More
 - Liberteacutes Publiques Cours Compatibility with Devices
 - Liberteacutes Publiques Cours Enhanced eBook Features
7. Enhancing Your Reading Experience
 - Adjustable Fonts and Text Sizes of Liberteacutes Publiques Cours
 - Highlighting and Note-Taking Liberteacutes Publiques Cours
 - Interactive Elements Liberteacutes Publiques Cours
8. Staying Engaged with Liberteacutes Publiques Cours
 - Joining Online Reading Communities
 - Participating in Virtual Book Clubs
 - Following Authors and Publishers Liberteacutes Publiques Cours
9. Balancing eBooks and Physical Books Liberteacutes Publiques Cours
 - Benefits of a Digital Library
 - Creating a Diverse Reading Collection Liberteacutes Publiques Cours
10. Overcoming Reading Challenges
 - Dealing with Digital Eye Strain
 - Minimizing Distractions
 - Managing Screen Time
11. Cultivating a Reading Routine Liberteacutes Publiques Cours
 - Setting Reading Goals Liberteacutes Publiques Cours
 - Carving Out Dedicated Reading Time
12. Sourcing Reliable Information of Liberteacutes Publiques Cours
 - Fact-Checking eBook Content of Liberteacutes Publiques Cours
 - Distinguishing Credible Sources
13. Promoting Lifelong Learning

- Utilizing eBooks for Skill Development
- Exploring Educational eBooks

14. Embracing eBook Trends

- Integration of Multimedia Elements
- Interactive and Gamified eBooks

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