

PARTIE I: INTRODUCTION AU DROIT COMPARÉ

CHAPITRE 1: HISTOIRE DU DROIT COMPARÉ

Opinion répandue selon laquelle le droit comparé apparaît au XIXème avec les codifications qui auraient créé le besoin de comparaison des différents systèmes juridiques. En contrepoint l'esprit nationaliste ou communautariste aurait retardé l'épanouissement de cette discipline, créant dans chaque droit la conviction de sa supériorité sur les autres. Mais certains comparatistes pensent que le droit comparé est apparu bien avant l'époque moderne: ses racines se trouveraient dans l'Antiquité.

§1: La préhistoire du droit comparé

1. Antiquité

On y trouve l'idée de comparaison des droits notamment chez les **philosophes grecs**. Chaque ile grecque avait son propre droit, ses propres coutumes et ses propres principes de gouvernement. **Platon** fut le 1er à les comparer (= Les Lois =) **Aristote** est allé plus loin en comparant les constitutions de 158 cités grecques, il présente dans sa « Politique » une typologie des **constitutions**. On trouve donc dans l'Antiquité les prémices du droit comparé.

2. Moyen Age

C'est au Moyen Age seulement que la **science du droit** est née en Occident. Cela a permis l'émergence du concept du **droit commun** qui sera décisif pour l'affirmation ultérieure de la méthode comparative. En effet, au delà de la diversité des peuples, les droits des peuples avaient quelque chose en commun à l'ensemble de la **chrétiété** (Occident, Europe). Cette notion exprimait l'idée qu'il y a un droit qui est le même pour tous les **chrétiens** voire pour tous les hommes, elle trouve ses racines dans le **droit romain**. Le droit commun est avant tout une **méthode** consistant, à partir des **sources formelles** (lois romaines + canoniques) à **comparer et hiérarchiser** les lois afin de distinguer celles qui ont un **caractère général** de celles qui n'en ont pas. L'idée de comparaison était donc déjà à l'état implicite dans le concept de droit commun.

§2: La naissance du comparatisme

1. Le comparatisme coutumier: 16ème siècle

C'est au 16ème siècle que les juristes français notamment ont fait l'usage conscient et scientifique de la **méthode comparative**. La France y apparaît donc à cette époque comme le chef de file du mouvement. On a voulu créer non pas un droit chrétien mais un **droit français**. Ainsi ce comparatisme n'était pas encore une confrontation des droits nationaux mais plutôt un moyen de révéler une identité nationale, il était question de dégager et d'appliquer le droit commun sous-jacent aux coutumes. Le droit français est donc né d'une méthode comparative. Le Code civil est d'ailleurs le produit d'un travail de comparaison.

2. Le comparatisme des lois

Le comparatisme et l'humanisme français du 16ème, avec son idée d'identité culturelle se sont poursuivis d'une certaine manière à travers l'oeuvre de Montesquieu pour y devenir une comparaison des lois nationales. « **L'esprit des Lois** » est en entier une étude comparative où Montesquieu **compare un grand nombre de droits** qu'il nommait « lois ». Pour lui, le droit n'est donc pas universel et naturel (doctrine de l'époque) mais il est au contraire divers, **propre à chaque peuple**, dépend de plusieurs facteurs. Montesquieu est donc un précurseur du **pluralisme**. Sa description des différents droits nationaux vise à montrer que des **facteurs objectifs** déterminent des régimes profondément différents. Ainsi avec Montesquieu, une page décisive de la **genèse du droit comparé** est tournée, celle qui a conduit à comparer le droit des nations, et non plus simplement le droit commun aux droits propres.

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Patrick Vollmar



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Table of Contents Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise

1. Understanding the eBook Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise
 - The Rise of Digital Reading Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise
 - Advantages of eBooks Over Traditional Books
2. Identifying Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise
 - 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 Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise
 - User-Friendly Interface
4. Exploring eBook Recommendations from Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise
 - Personalized Recommendations

- Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise User Reviews and Ratings
 - Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise and Bestseller Lists
5. Accessing Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise Free and Paid eBooks
- Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise Public Domain eBooks
 - Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise eBook Subscription Services
 - Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise Budget-Friendly Options
6. Navigating Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise eBook Formats
- ePub, PDF, MOBI, and More
 - Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise Compatibility with Devices
 - Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise Enhanced eBook Features
7. Enhancing Your Reading Experience
- Adjustable Fonts and Text Sizes of Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise
 - Highlighting and Note-Taking Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise
 - Interactive Elements Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise
8. Staying Engaged with Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise
- Joining Online Reading Communities
 - Participating in Virtual Book Clubs

- Following Authors and Publishers Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise
- 9. Balancing eBooks and Physical Books Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise
 - Benefits of a Digital Library
 - Creating a Diverse Reading Collection Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise
- 10. Overcoming Reading Challenges
 - Dealing with Digital Eye Strain
 - Minimizing Distractions
 - Managing Screen Time
- 11. Cultivating a Reading Routine Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise
 - Setting Reading Goals Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise
 - Carving Out Dedicated Reading Time
- 12. Sourcing Reliable Information of Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise
 - Fact-Checking eBook Content of Introduction Au Droit Compareacute Egraveme Eacutedition Strateacutegie Politique Dentreprise
 - 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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