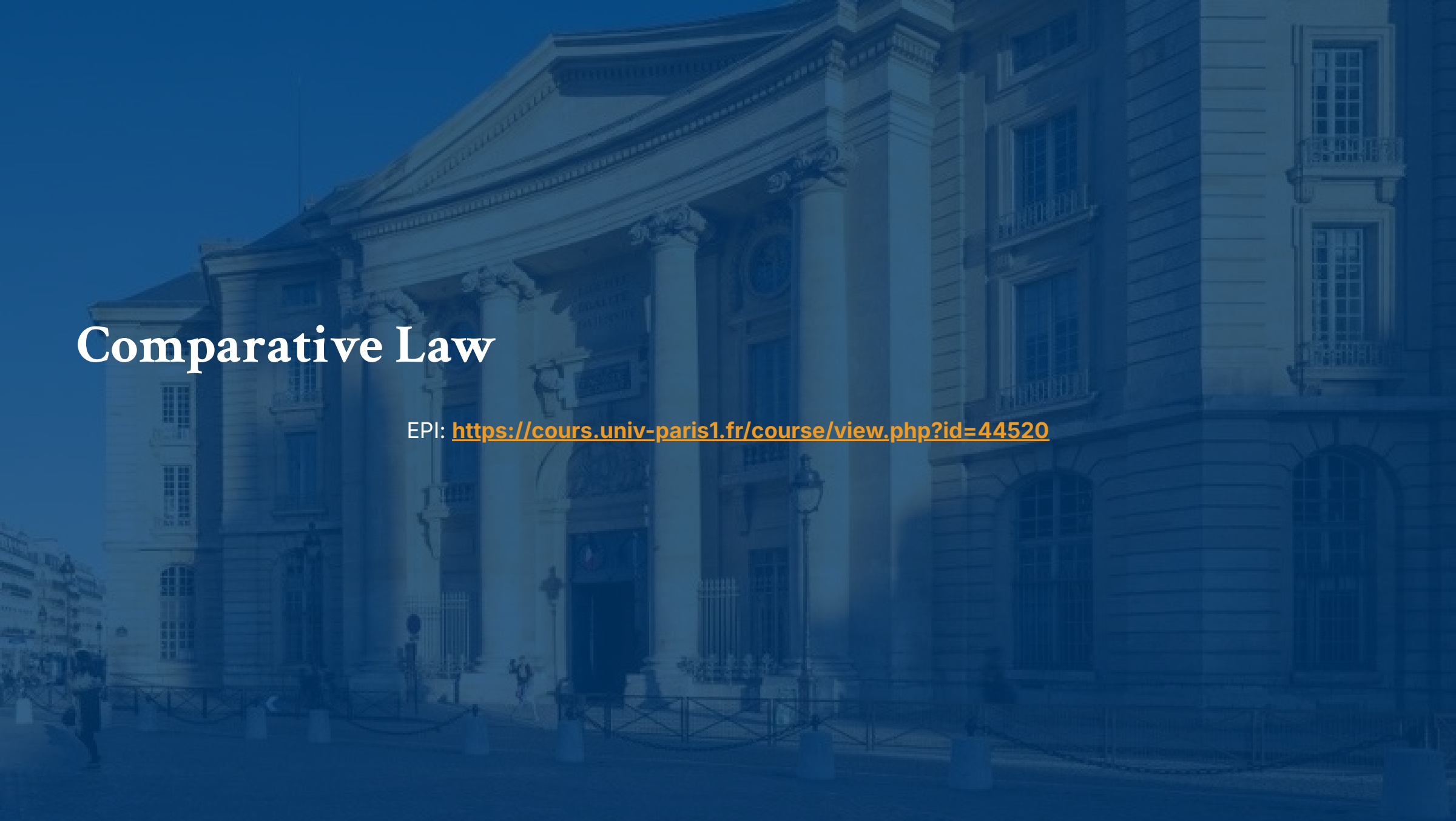


Comparative Law

EPI: https://cours.univ-paris1.fr/course/view.php?id=44520

Comparative Law and Legal History

Temporal Comparison

Legal historians engage in 'comparison over time', examining the evolution and transformations of legal systems. This temporal dimension provides crucial context for understanding contemporary legal differences.

Historical Evidence

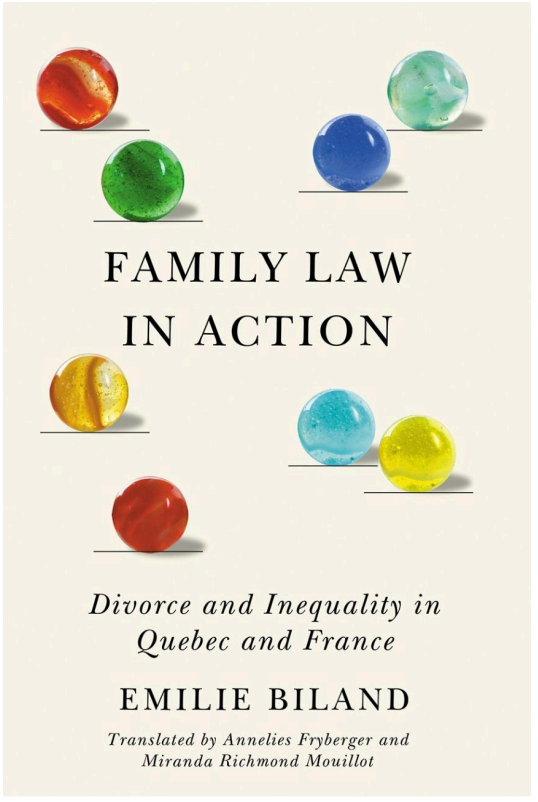
Comparativists frequently utilise historical examples to illustrate patterns of legal development. Their synchronic analysis often gains depth through a diachronic historical perspective.

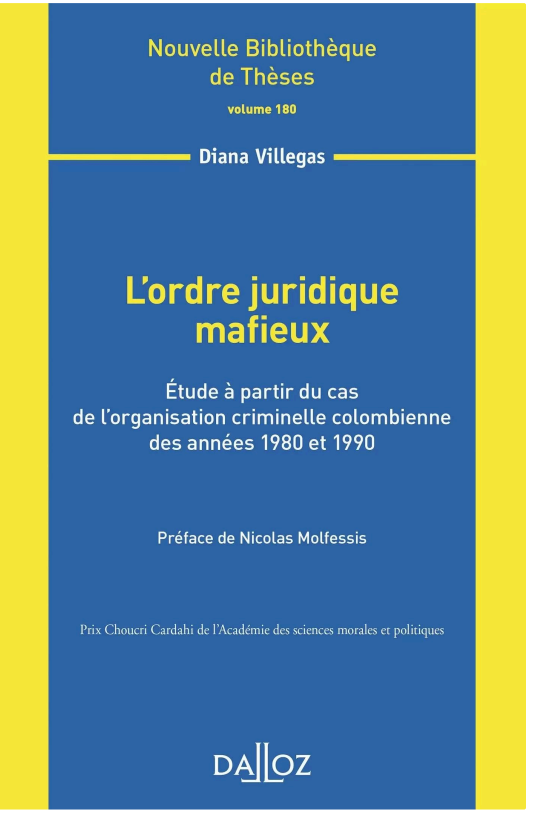
Mutual Enrichment

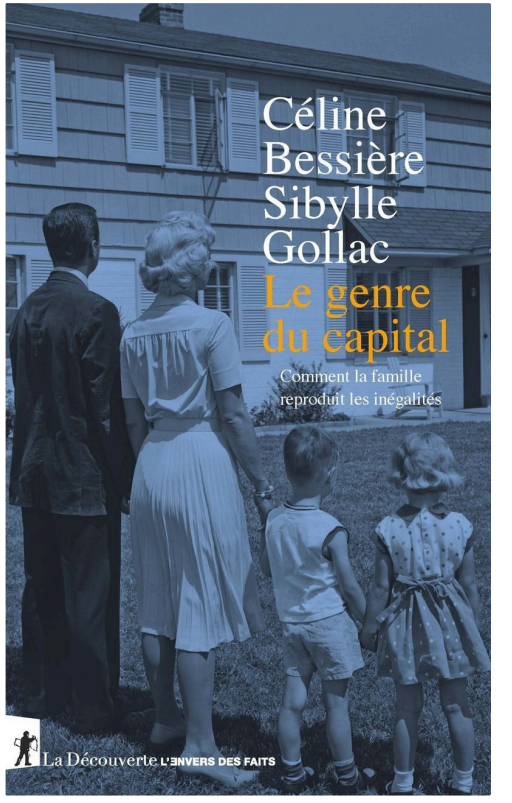
Comparative research ultimately contributes to historical understanding by revealing patterns of legal change and continuity across different societies and periods.

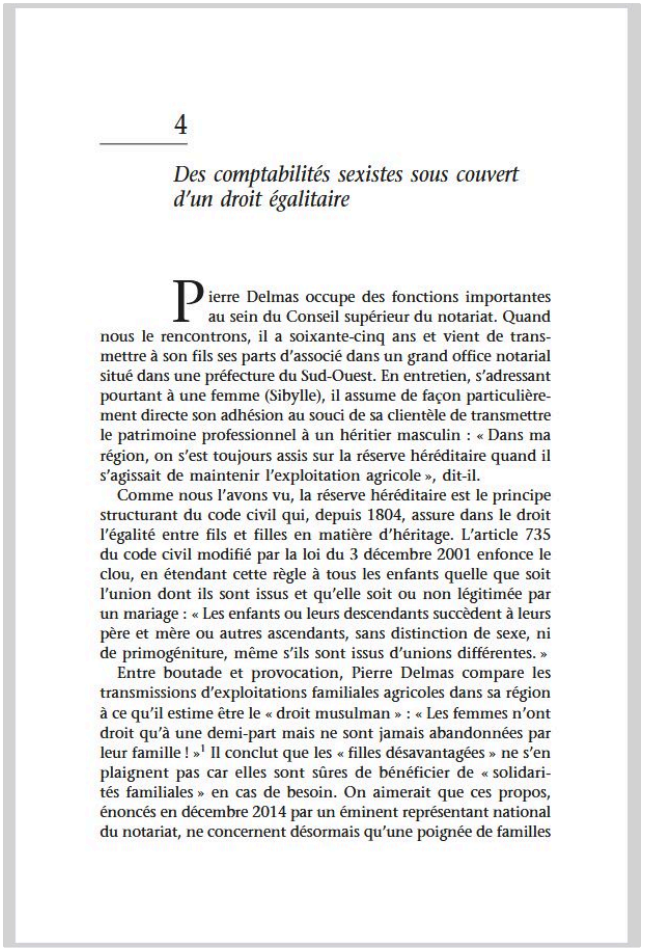
Methodological Integration

Leading academics such as **Patrick Glenn** and **Reinhard Zimmermann** have promoted the use of historical methodology as a foundation for comparative research, arguing that understanding legal traditions requires an appreciation of their historical development.


FAMILY LAW
IN ACTION
Divorce and Inequality in Quebec and France
EMILIE BILAND
Translated by Annelies Fryberger and Miranda Richmond Mouillot


Nouvelle Bibliothèque de Thèses
volume 180
Diana Villegas
L'ordre juridique mafieux
Étude à partir du cas de l'organisation criminelle colombienne des années 1980 et 1990
Préface de Nicolas Molfessis
Prix Choucri Cardahi de l'Académie des sciences morales et politiques
DALLOZ


Céline Bessière
Sibylle Gollac
Le genre du capital
Comment la famille reproduit les inégalités
La Découverte L'ENVERS DES FAITS



4

Des comptabilités sexistes sous couvert d'un droit égalitaire

Pierre Delmas occupe des fonctions importantes au sein du Conseil supérieur du notariat. Quand nous le rencontrons, il a soixante-cinq ans et vient de transmettre à son fils ses parts d'associé dans un grand office notarial situé dans une préfecture du Sud-Ouest. En entretien, s'adressant pourtant à une femme (Sibylle), il assume de façon particulièrement directe son adhésion au souci de sa clientèle de transmettre le patrimoine professionnel à un héritier masculin : « Dans ma région, on s'est toujours assis sur la réserve héréditaire quand il s'agissait de maintenir l'exploitation agricole », dit-il.

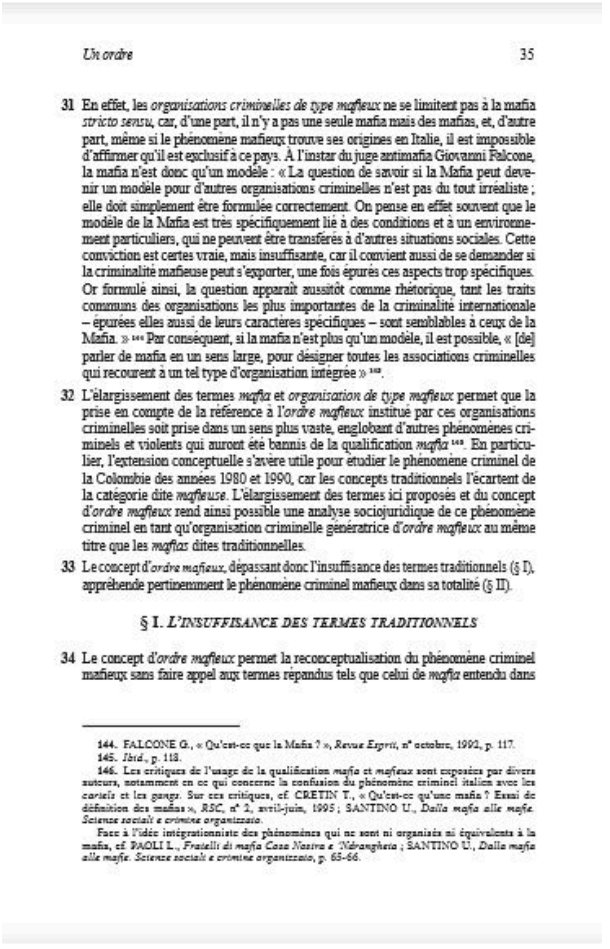
Comme nous l'avons vu, la réserve héréditaire est le principe structurant du code civil qui, depuis 1804, assure dans le droit l'égalité entre fils et filles en matière d'héritage. L'article 735 du code civil modifié par la loi du 3 décembre 2001 enfonce le clou, en étendant cette règle à tous les enfants quelle que soit l'union dont ils sont issus et qu'elle soit ou non légitimée par un mariage : « Les enfants ou leurs descendants succèdent à leurs père et mère ou autres ascendants, sans distinction de sexe, ni de primogéniture, même s'ils sont issus d'unions différentes. »

Entre boutade et provocation, Pierre Delmas compare les transmissions d'exploitations familiales agricoles dans sa région à ce qu'il estime être le « droit musulman » : « Les femmes n'ont droit qu'à une demi-part mais ne sont jamais abandonnées par leur famille ! »[1] Il conclut que les « filles désavantagées » ne s'en plaignent pas car elles sont sûres de bénéficier de « solidarités familiales » en cas de besoin. On aimerait que ces propos, énoncés en décembre 2014 par un éminent représentant national du notariat, ne concernent désormais qu'une poignée de familles

Le Genre du Capital by C. Bessière and S. Gollac

A Work in Legal Sociology

Those two sociologists reveal the discrepancy between the French rules on matrimonial property and inheritance, which aim at an equal distribution between spouses, and their actual application, which tends to put women at an economic disadvantage.



Un ordre 35

31 En effet, les *organisations criminelles de type mafieux* ne se limitent pas à la mafia *stricto sensu*, car, d'une part, il n'y a pas une seule mafia mais des mafias, et, d'autre part, même si le phénomène mafieux trouve ses origines en Italie, il est impossible d'affirmer qu'il est exclusif à ce pays. À l'instar du juge antimafia Giovanni Falcone, la mafia n'est donc qu'un modèle : « La question de savoir si la Mafia peut devenir un modèle pour d'autres organisations criminelles n'est pas du tout irréaliste ; elle doit simplement être formulée correctement. On pense en effet souvent que le modèle de la Mafia est très spécifiquement lié à des conditions et à un environnement particuliers, qui ne peuvent être transférés à d'autres situations sociales. Cette conviction est certes vraie, mais insuffisante, car il convient aussi de se demander si la criminalité mafieuse peut s'exporter, une fois épurés ces aspects trop spécifiques. Or formulé ainsi, la question apparaît aussitôt comme rhétorique, tant les traits communs des organisations les plus importantes de la criminalité internationale – épurées elles aussi de leurs caractères spécifiques – sont semblables à ceux de la Mafia. » [144] Par conséquent, si la mafia n'est plus qu'un modèle, il est possible, « [de] parler de mafia en un sens large, pour désigner toutes les associations criminelles qui recourent à un tel type d'organisation intégrée » [145].

32 L'élargissement des termes *mafia* et *organisation de type mafieux* permet que la prise en compte de la référence à l'*ordre mafieux* institué par ces organisations criminelles soit prise dans un sens plus vaste, englobant d'autres phénomènes criminels et violents qui auront été bannis de la qualification *mafia* [146]. En particulier, l'extension conceptuelle s'avère utile pour étudier le phénomène criminel de la Colombie des années 1980 et 1990, car les concepts traditionnels l'écartent de la catégorie dite *mafieuse*. L'élargissement des termes ici proposés et du concept d'*ordre mafieux* rend ainsi possible une analyse sociojuridique de ce phénomène criminel en tant qu'organisation criminelle génératrice d'*ordre mafieux* au même titre que les *mafias* dites traditionnelles.

33 Le concept d'*ordre mafieux*, dépassant donc l'insuffisance des termes traditionnels (§ I), appréhende pertinemment le phénomène criminel mafieux dans sa totalité (§ II).

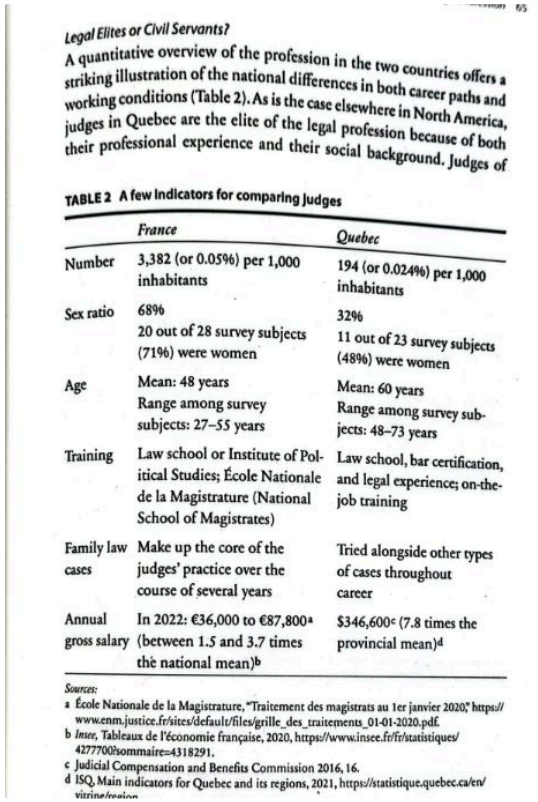
§ I. *L'INSUFFISANCE DES TERMES TRADITIONNELS*

34 Le concept d'*ordre mafieux* permet la reconceptualisation du phénomène criminel mafieux sans faire appel aux termes répandus tels que celui de *mafia* entendu dans

144. FALCONE G., « Qu'est-ce que la Mafia ? », *Revue Esprit*, n° octobre, 1992, p. 117.
145. *Ibid.*, p. 118.
146. Les critiques de l'usage de la qualification *mafia* et *mafieux* sont exposées par divers auteurs, notamment en ce qui concerne la confusion du phénomène criminel italien avec les *cartels* et les *gangs*. Sur ces critiques, cf. CRETIN T., « Qu'est-ce qu'une mafia ? Essai de définition des mafias », *RSC*, n° 2, avril-juin, 1995 ; SANTINO U., *Dalla mafia alle mafie. Scienze sociali e crimine organizzato*.
Face à l'idée intégrationniste des phénomènes qui ne sont ni organisés ni équivalents à la mafia, cf. PAOLI L., *Fratelli di mafia Cosa Nostra e 'Ndrangheta* ; SANTINO U., *Dalla mafia alle mafie. Scienze sociali e crimine organizzato*, p. 65-66.

L'Ordre Juridique Mafieux by Diana Villegas

The author demonstrates that the mafia develops its own legal system, possessing normative force and juridical legitimacy—distinct from, and often in conflict with, the legal order of the state.



Legal Elites or Civil Servants?

A quantitative overview of the profession in the two countries offers a striking illustration of the national differences in both career paths and working conditions (Table 2). As is the case elsewhere in North America, judges in Quebec are the elite of the legal profession because of both their professional experience and their social background. Judges of

TABLE 2 A few indicators for comparing judges

	France	*Quebec*
Number	3,382 (or 0.05%) per 1,000 inhabitants	194 (or 0.024%) per 1,000 inhabitants
Sex ratio	68% 20 out of 28 survey subjects (71%) were women	32% 11 out of 23 survey subjects (48%) were women
Age	Mean: 48 years Range among survey subjects: 27–55 years	Mean: 60 years Range among survey subjects: 48–73 years
Training	Law school or Institute of Political Studies; École Nationale de la Magistrature (National School of Magistrates)	Law school, bar certification, and legal experience; on-the-job training
Family law cases	Make up the core of the judges' practice over the course of several years	Tried alongside other types of cases throughout career
Annual gross salary	In 2022: €36,000 to €87,800[a] (between 1.5 and 3.7 times the national mean)[b]	$346,600[c] (7.8 times the provincial mean)[d]

Sources:
a École Nationale de la Magistrature, "Traitement des magistrats au 1er janvier 2020," https://www.enm.justice.fr/sites/default/files/grille_des_traitements_01-01-2020.pdf.
b *Insee*, Tableaux de l'économie française, 2020, https://www.insee.fr/fr/statistiques/4277700?sommaire=4318291.
c Judicial Compensation and Benefits Commission 2016, 16.
d ISQ, Main indicators for Quebec and its regions, 2021, https://statistique.quebec.ca/en/vitrine/region

Family Law in Action by E. Biland

A Work in Comparative Legal Sociology

This book 'reveals the persistent class and gender inequalities embedded in the process of separation and its aftermath in Quebec and France

Comparative Law and Sociology

Definitional Challenges

Sociological approaches often define 'law' more broadly than traditional legal scholarship, including informal normative systems, customary practices, and non-state regulatory mechanisms.

Methodological Tensions

The sociology of law employs empirical research methods (surveys, interviews, ethnography) which can complement or challenge traditional doctrinal comparative analysis.

Scope of Analysis

Sociological perspectives encourage the examination of the social context of law, including its relationship with economic systems, cultural values, and power structures.



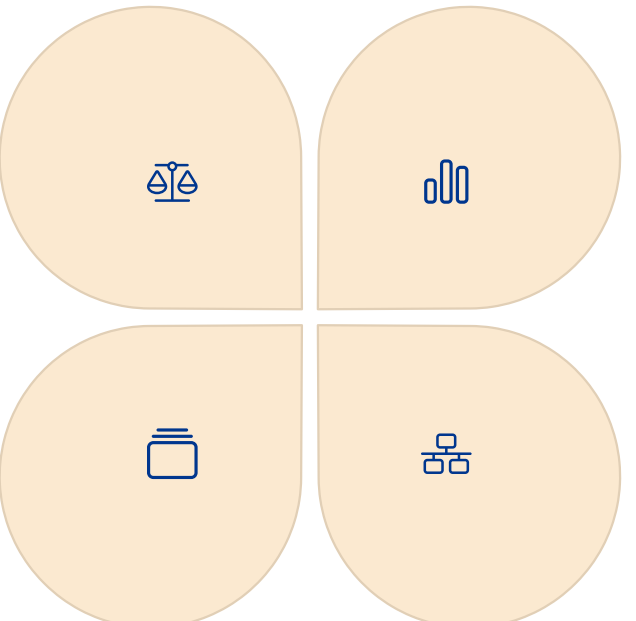
Interdisciplinary Approaches

Doctrinal Analysis

Traditional examination of legal rules, principles, and institutional structures.

Historical Context

Tracing the development of legal traditions over time.



Empirical Research

Data collection on legal behaviours, compliance patterns, and system effectiveness.

Institutional Study

Examining the interaction of legal institutions with broader social and economic structures.

This multidisciplinary approach enriches comparative legal analysis by offering multiple analytical lenses and research methodologies, leading to a more comprehensive and nuanced understanding of legal systems.

Distinction of Comparative Law and Public International Law

While both fields involve studying **legal systems beyond national borders**, Comparative Law and Public International Law serve distinct purposes.

Comparative Law

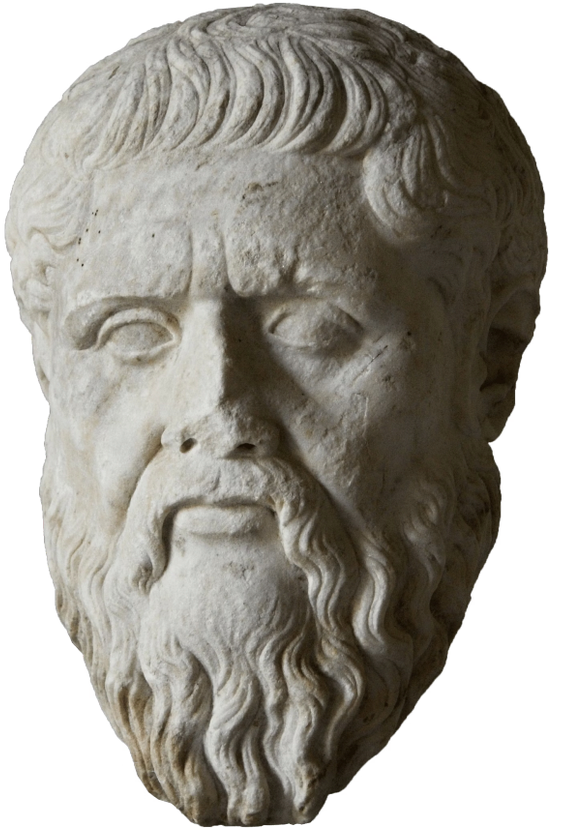
Primarily a methodology for analysing and contrasting the laws, legal systems, and institutions of various national jurisdictions. Its aim is to identify similarities and differences, understand their causes, and potentially inform legal reform or harmonisation efforts.

Public International Law

A distinct body of substantive rules and principles that govern the relationships between states, international organisations, and, to some extent, individuals. It addresses issues like treaties, human rights, armed conflict, and diplomatic relations.

Ancient Roots: Plato's *Laws*

> "**Athenian**: [...] if, as is very likely, in our search after the true and good, one of us may have to censure the laws of the others, we must not be offended, but take kindly what another says.
>
> [...]
>
> **Megillus**: [...] the laws of Sparta, in as far as they relate to pleasure, appear to me to be the best in the world; for that which leads mankind in general into the wildest pleasure and licence, and every other folly, the law has clean driven out; and neither in the country nor in towns which are under the control of Sparta, will you find revelries and the many incitements of every kind of pleasure which accompany them; and anyone who meets a drunken and disorderly person, will immediately have him most severely punished, and will not let him off on any pretence, not even at the time of a Dionysiac festival"



Plato compared the constitutions of the Greek city-states, praising Spartan discipline in contrast to Athenian democracy.

This constitutes an early example of legal comparison motivated by political ideals.

Aristotle's Empirical Approach

158

Constitutions

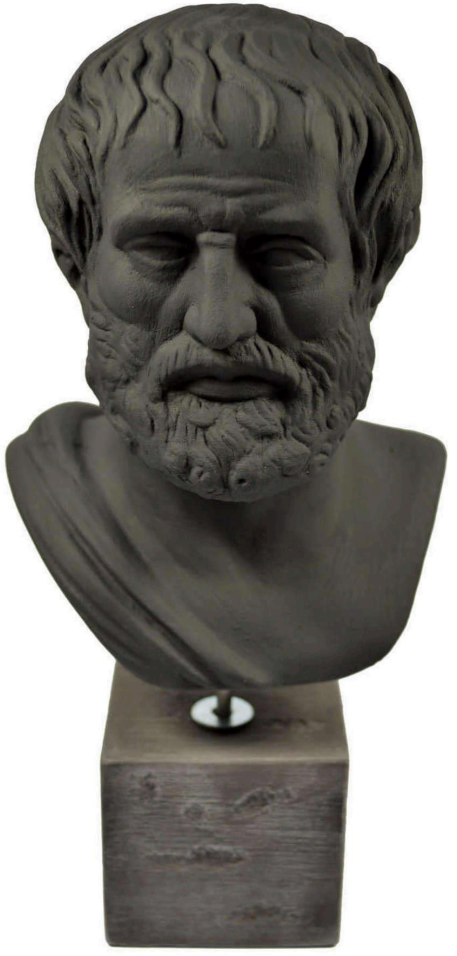
Compiled by Aristotle's school from Greek city-states and beyond.

1

Surviving

Only Athens' constitution remains extant today.

Aristotle's approach was more systematic than Plato's, emphasising empirical data collection prior to drawing theoretical conclusions.



Comparative Approaches in Ancient Rome

753 BCE

Founding of Rome

451-450 BCE

Comparative Law Event: Did the Romans send a delegation to Greek city-states to seek inspiration for the Law of the Twelve Tables?

509 BCE

Transition of regime to the Republic

27 BCE

Transition of regime to the Empire

circa 160 CE

Comparative Law Event: Gaius alludes to foreign customs in his *Institutes*

395 CE

Division of the Empire into Eastern and Western Empires

476 CE

"Fall" of the Western Roman Empire

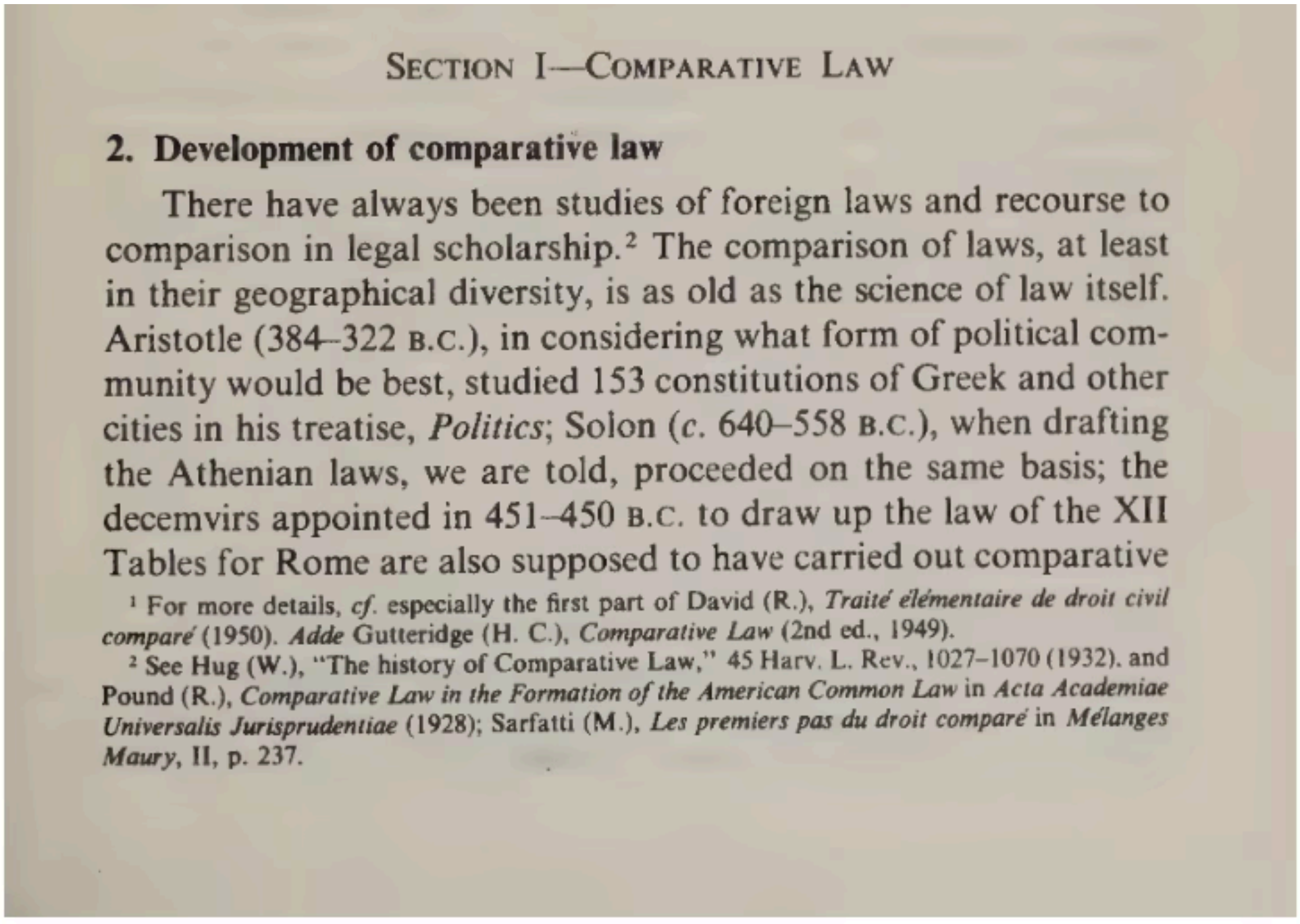
528 CE

Justinian commissions the *Corpus Juris Civilis*

12th Century

Rediscovery of Roman law in Northern Italy

The Historical Foundations



SECTION I—COMPARATIVE LAW

2. Development of comparative law

There have always been studies of foreign laws and recourse to comparison in legal scholarship.[2] The comparison of laws, at least in their geographical diversity, is as old as the science of law itself. Aristotle (384–322 B.C.), in considering what form of political community would be best, studied 153 constitutions of Greek and other cities in his treatise, *Politics*; Solon (*c.* 640–558 B.C.), when drafting the Athenian laws, we are told, proceeded on the same basis; the decemvirs appointed in 451–450 B.C. to draw up the law of the XII Tables for Rome are also supposed to have carried out comparative

[1] For more details, *cf.* especially the first part of David (R.), *Traité élémentaire de droit civil comparé* (1950). *Adde* Gutteridge (H. C.), *Comparative Law* (2nd ed., 1949).

[2] See Hug (W.), "The history of Comparative Law," 45 Harv. L. Rev., 1027–1070 (1932). and Pound (R.), *Comparative Law in the Formation of the American Common Law* in *Acta Academiae Universalis Jurisprudentiae* (1928); Sarfatti (M.), *Les premiers pas du droit comparé* in *Mélanges Maury*, II, p. 237.

"The comparison of laws, at least in their geographical diversity, is as old as the science of law itself"

R. David & J. Brierley, *Major Legal Systems in the World Today* (1976), p. 1

Montesquieu's Main Works



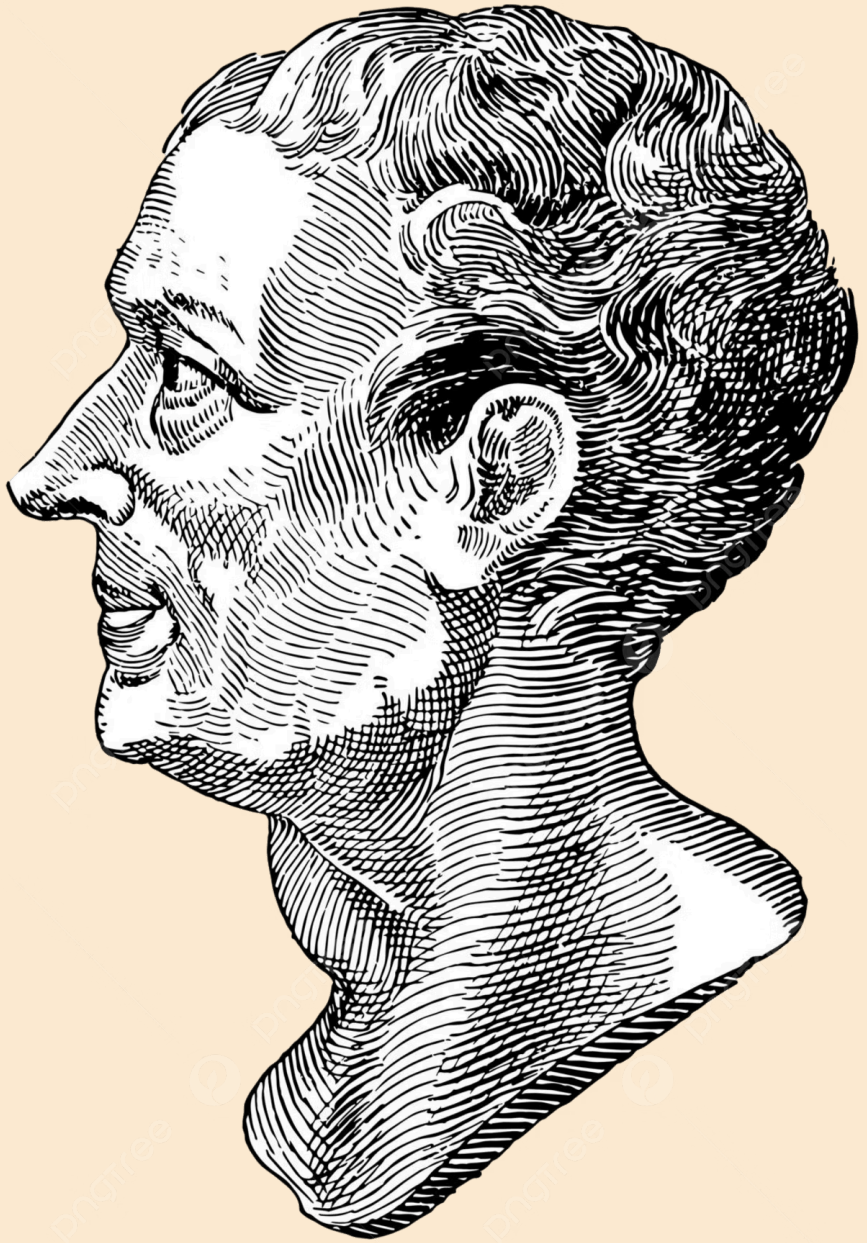
De l'Esprit des Lois (1748)

A groundbreaking comparative analysis explaining legal diversity through:

- Political factors
- Physical and climatic conditions
- Cultural circumstances

A pioneering work in comparative law and sociology.

> Montesquieu’s comparative method was his greatest contribution to the human sciences. (M. Richter)



Climate and Legislation: Montesquieu's Perspective

Montesquieu contrasted warm and cold regions to illustrate how environmental factors influence the laws (Book XIV, here Chapter 10).

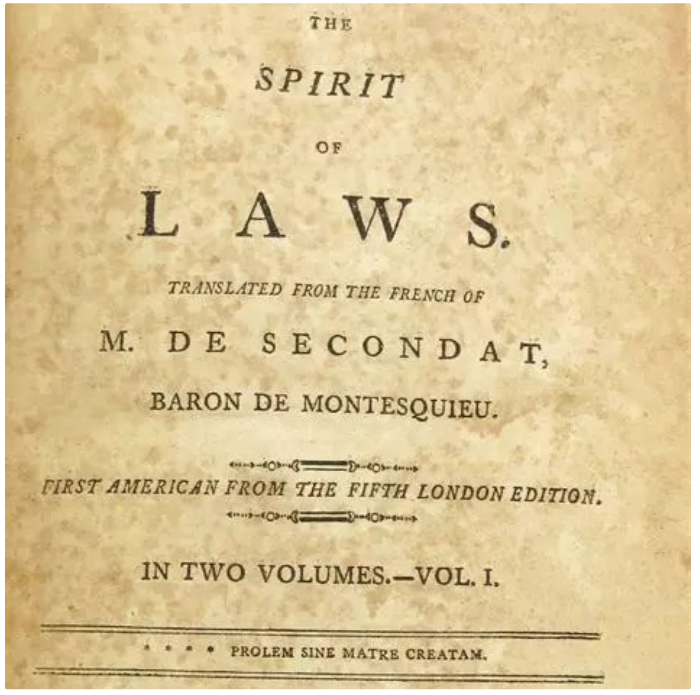
Warm Climates

'The law of Mohammed which forbids the drinking of wine is thus a law of the Arabian climate, and before Mohammed water was the common beverage of the Arabs. The law[1] which forbade the Carthaginians to drink wine was also a law of the climate ; indeed the climate of these two countries is about the same.'

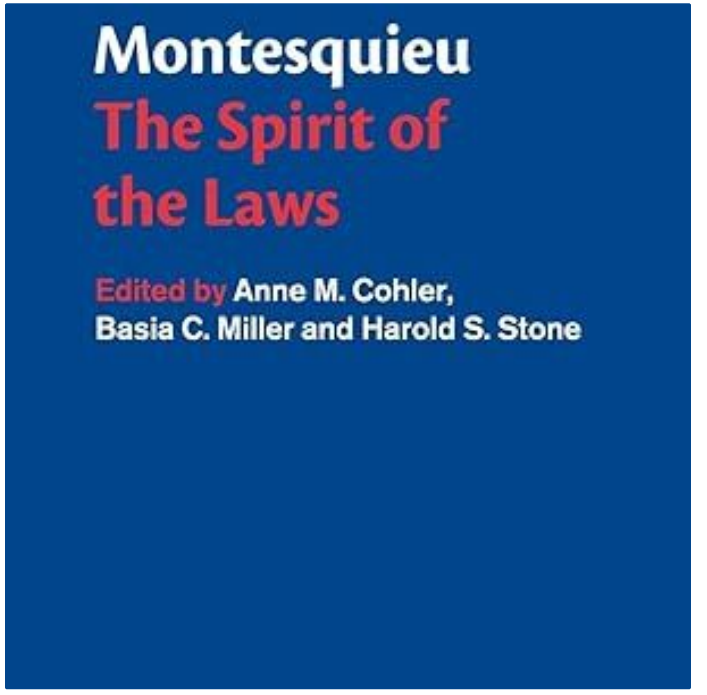
Cold Climates

With less perspiration, spirituous liquids can be tolerated and even become customary, leading to widespread "national inebriation." Laws punishing drunkenness often target individual excess rather than a climate-induced social norm. Higher energy demands in cold climates also dictate a greater need for food.

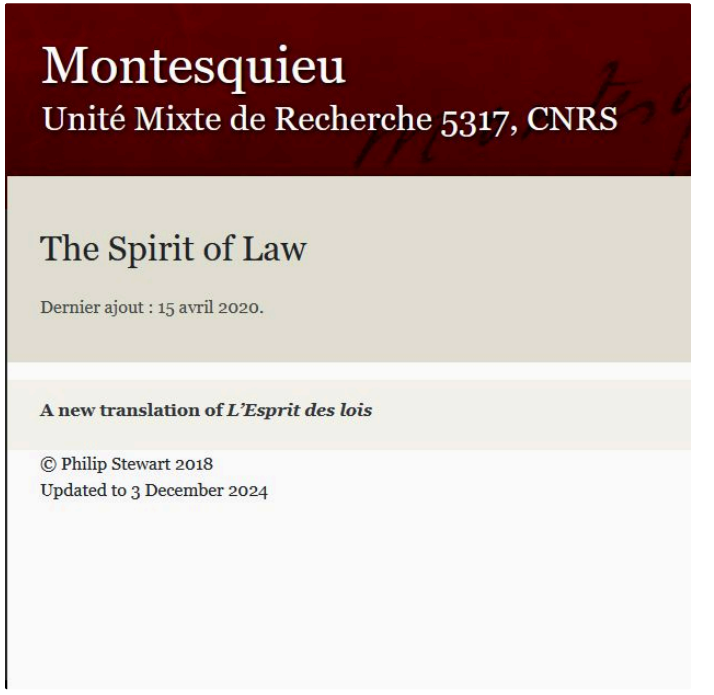
Translating *De l'Esprit des Lois*


THE
SPIRIT
OF
LAWS.
TRANSLATED FROM THE FRENCH OF
M. DE SECONDAT,
BARON DE MONTESQUIEU.
FIRST AMERICAN FROM THE FIFTH LONDON EDITION.
IN TWO VOLUMES.—VOL. I.
PROLEM SINE MATRE CREATAM.

1750: *The Spirit of Laws*



1949/1989: *The Spirit of the Laws*



2018: *The Spirit of Law*