

Le droit pénal, la loi pénale et l'infraction pénale

I. LE DROIT PÉNAL

A. LE DROIT PÉNAL DANS L'ORDRE JURIDIQUE

Le droit public (*öffentliches Recht*), qui règle les rapports entre l'État et les particuliers, s'oppose au droit privé (*Privatrecht*), qui règle les rapports entre les particuliers.

Le droit pénal (*Strafrecht*) appartient, aux côtés du droit constitutionnel (*Staats-, Verfassungsrecht*) et du droit administratif (*Verwaltungsrecht*), au droit public.

B. LES BRANCHES DU DROIT PÉNAL

Au sens large du terme, le droit pénal couvre deux domaines : le droit de procédure pénale (ou droit pénal de forme) et le droit pénal matériel (ou droit pénal de fond).

Sans autre précision, l'expression «droit pénal» s'entend du droit pénal matériel (*infra* 2).

1. Le droit de procédure pénale

Le droit de procédure pénale (*Strafprozess-, Strafverfahrensrecht*) institue les autorités appelées à mettre en œuvre le droit pénal matériel (organisation judiciaire), définit leurs attributions (compétence) et règle leur manière d'opérer pour établir si une infraction a été commise, en rechercher les auteurs, puis (le cas échéant) statuer la conséquence (procédure pénale au sens strict).

Les dispositions correspondantes trouvent leurs sources principales dans la loi fédérale sur l'organisation des autorités pénales de la Confédération (LOAP), la procédure pénale militaire (PPM), les vingt-six lois cantonales d'organisation judiciaire (pour Genève, LOJ), la loi fédérale sur le droit pénal administratif (DPA), le code de procédure pénale suisse (CPP) et la loi fédérale sur la procédure pénale applicable aux mineurs (PPMin). Ces deux derniers textes sont complétés par vingt-six lois cantonales d'application (pour Genève, LaCP).

Ce sont toutefois le code pénal suisse (CP), la loi fédérale régissant la condition pénale des mineurs (DPMIn) et le code pénal militaire (CPM) qui traitent des principaux aspects de la plainte pénale (art. 30-33, art. 104, art. 333 al. 1 CP ; art. 1 al. 2 let. a + k + n DPMIn ; art. 148a CPM)¹ et de la prescription de l'action pénale (art. 70 al. 3, art. 97-98, art. 101, art. 104, art. 109, art. 118 al. 4, art. 178 al. 1, art. 302 al. 3, art. 333 al. 1 CP ; art. 1 al. 2 let. j-k + n, art. 38 DPMIn ; art. 51a al. 3, art. 55-56, art. 59, art. 60e, art. 148b CPM)², les art. 303-304 CPP – auxquels renvoie l'art. 3 al. 1 PPMIn – complétant simplement la réglementation sur le premier objet. Ce découpage s'explique historiquement, par les sept décennies qui ont séparé l'unification au niveau fédéral du droit pénal ordinaire de fond (1^{er} janvier 1942 ; art. 392 CP) et de forme (1^{er} janvier 2011 ; art. 457 al. 2 CPP ; arrêté du Conseil fédéral du 31 mars 2010)

¹ Sur l'appartenance de ces dispositions au droit de procédure pénale : arrêts cités aux notes 317-318.

² Sur l'appartenance de ces dispositions au droit de procédure pénale : ATF 76 IV 123 c. 4 ; ATF 116 IV 80 c. 2a ; ATF 118 IV 325 c. 2b ; ATF 119 IV 92 c. 2a ; ATF 142 IV 383 c. 2.1 ; ATF 146 IV 58 c. 2.1. Confer : TF 1P.372/2000 c. 3e = *Fa* 2001 n° 22. Indécs : ATF 106 IV 7 c. 1a ; TF 1P.207/2000 c. 2b = *SJ* 2001 I 118. *Contra* (apparemment) : ATF 132 IV 1 c. 6.1.1 + 6.2.1.

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