



Culture and the Language of the Law

法律語言與文化

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Definition of Culture

- Culture: A Critical Review of Concepts and Definitions, Kroeber v. Kluckhohn (1952)
- Western Culture goes back to Greco-Roman roots and Christianity.
- World view harkens back to the Pax Romana.
- 19th Century Social Darwism, comparison of civilization.

A view of Late Qing Chinese Law

“With Chinese law we are carried back to a position whence, we can survey so to speak, a living past and converse with fossil men”,
Parker China Review, Vol 8(p. 6 Jamieson,
Chinese Family and Commercial Law)

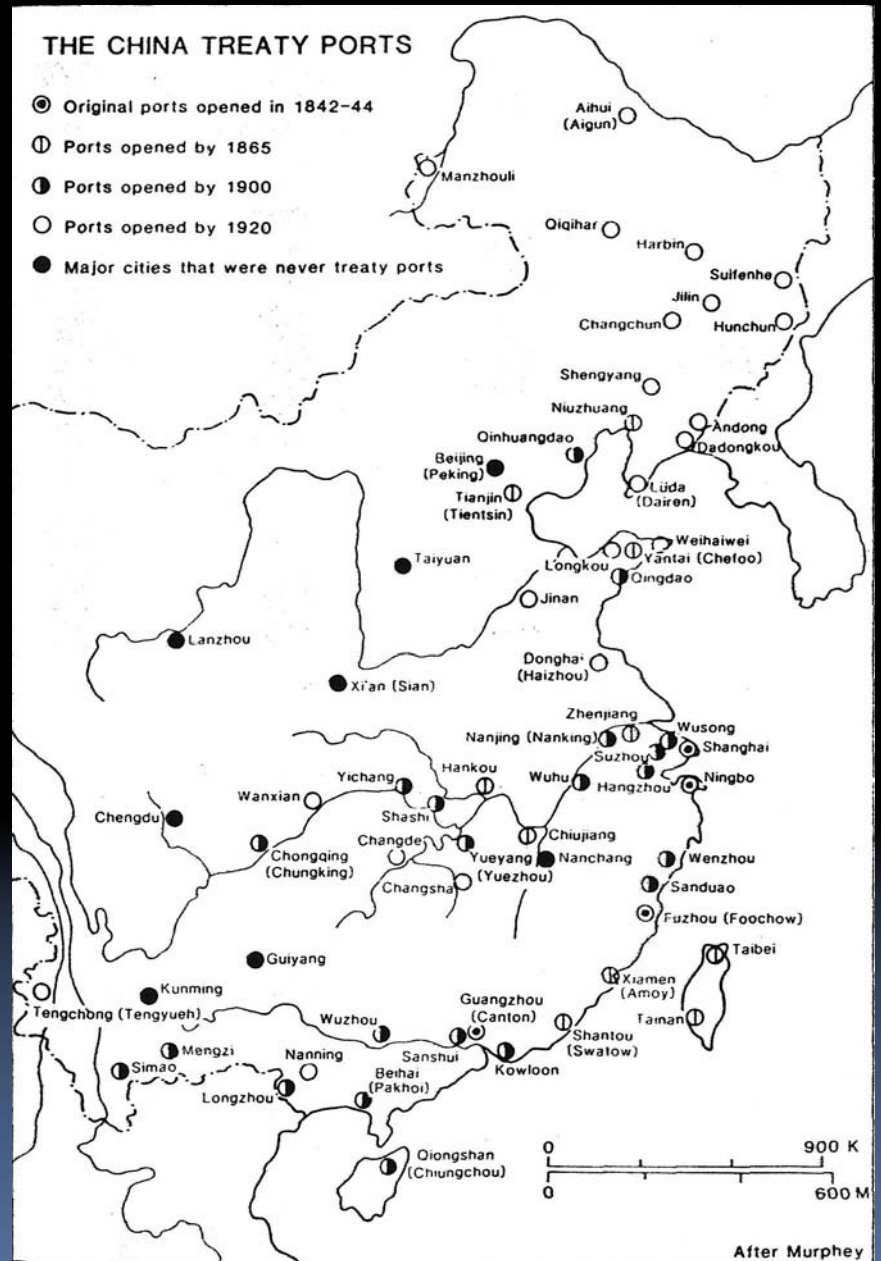
不平等条约通商口岸

1842-1844 5个

1860 14个

1900 80个

<http://www.geocities.com/treatyport01/treatyportlist.html#treaty%20port%20list>



Corpus Juris Civlis AD 529 - 534

THE CODE OF OUR LORD THE
MOST SACRED EMPEROR
JUSTINIAN.

SECOND EDITION. BOOK I.

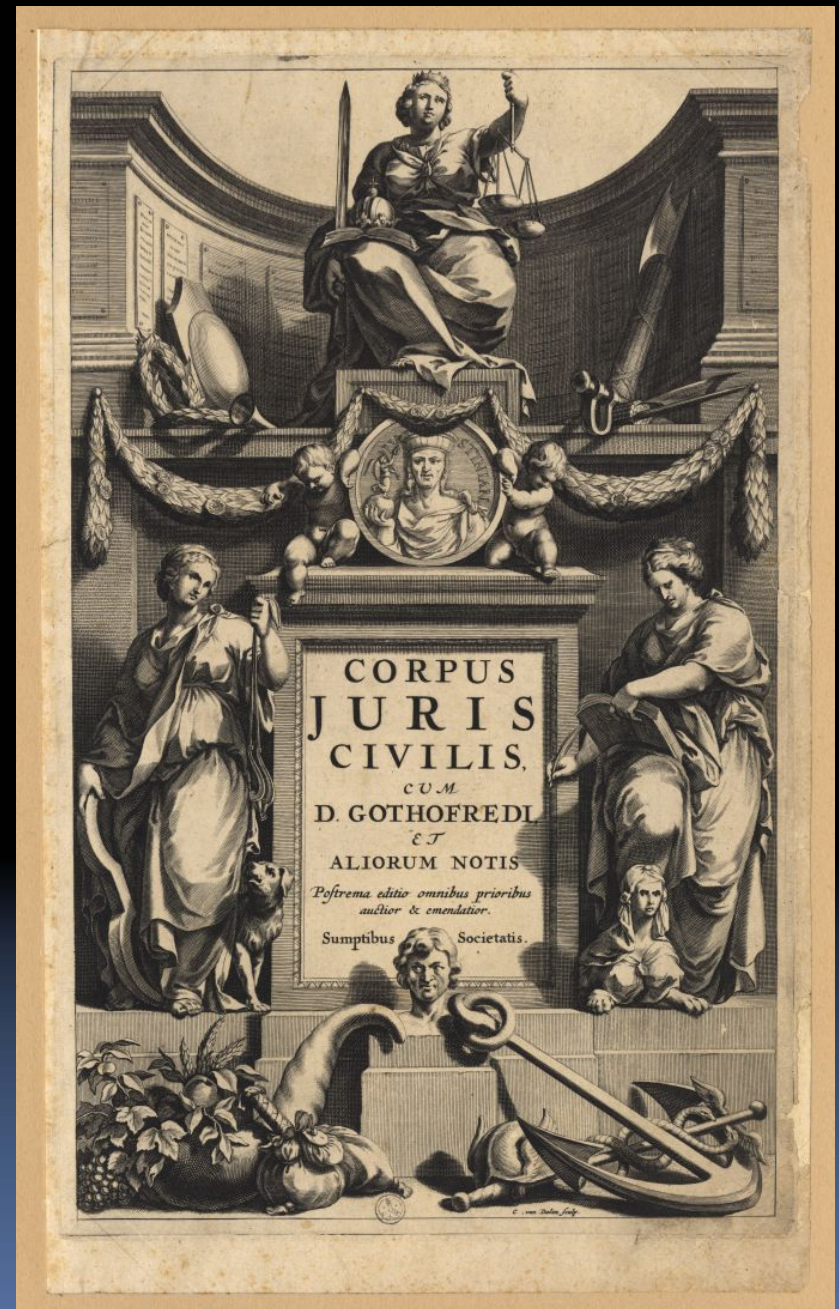
TITLE I.

CONCERNING THE MOST
EXALTED TRINITY AND THE
CATHOLIC FAITH, AND
PROVIDING THAT NO ONE SHALL
DARE TO PUBLICLY OPPOSE
THEM.

1. *The Emperors Gratian, Valentinian,
and Theodosius to the people of the
City of Constantinople.*

(1) We order all those who follow
this law to assume the name of
Catholic Christians, and considering
others as demented and
insane.....

(SP Scott Translation)



C

Corpus Juris Civilis AD 529 - 534

Codex - Digesta-Institutiones-Novella

THE INSTITUTES OF OUR LORD JUSTINIAN.

BOOK I.

TITLE I.

CONCERNING JUSTICE AND LAW.

Justice is the constant and perpetual desire to give to each one that to which he is entitled.

- (1) Jurisprudence is the knowledge of matters divine and human, and the comprehension of what is just and what is unjust.
- (2) These divisions being generally understood, and We being about to explain the laws of the Roman people, it appears that this may be most conveniently done if separate subjects are at first treated in a clear and simple manner, and afterwards with greater care and exactness; for if We, at once, in the beginning, load the still uncultivated and inexperienced mind of the student with a multitude and variety of details, We shall bring about one of two things; that is, We shall either cause him to abandon his studies, or, by means of excessive labor — and also with that distrust which very frequently discourages young men — conduct him to that point to which, if led by an easier route, he might have been brought more speedily without much exertion and without misgiving.
- (3) The following are the precepts of the Law: to live honestly, not to injure another, and to give to each one that which belongs to him.
- (4) There are two branches of this study, namely: public and private. Public Law is that which concerns the administration of the Roman government; Private Law relates to the interests of individuals. Thus Private Law is said to be threefold in its nature, for it is composed of precepts of Natural Law, of those of the Law of Nations, and of those of the Civil Law.

DE IUSTITIA ET IURE. Iustitia est constans et perpetua voluntas ius suum cuique tribuens. 1. Iurisprudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.

- 2. His generaliter cognitis et incipientibus nobis exponere iura populi Romani ita maxime videntur posse tradi commodissime, si primo levi ac simplici, post deinde diligentissima atque exactissima interpretatione singula tradantur. alioquin si statim ab initio rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum oneraverimus, duorum alterum aut desertorem studiorum efficiemus aut cum magno labore eius, saepe etiam cum diffidentia, quae plerumque iuvenes avertit, serius ad id perducemus ad quod leniore via ductus sine magno labore et sine ulla diffidentia maturius perducipotuisset.
- 3. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.
- 4. Huius studii duae sunt positiones, publicum et privatum. publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem pertinet. dicendum est igitur de iure privato, quod tripartitum est; collectum est enim ex naturalibus praeceptis aut gentium aut civilibus.

西方法律文化：教皇的革命

- 1075年 Gregory VII (Dictatus Papae) (教皇的指令)：
 - 教會是天主所立，教皇是天主所任，有權替天主立法，該法律是至高無上的，教皇有權罷免何君主的皇位。
 - 教會成爲第一個現代化 以法律構建 的主權 <實體>。
 - 160年的鬥爭，终于在1130年教會與各君主取得妥協。從此，教會法系與君主法系共相處。

(見： Law and Revolution Harold Berman)

西方法律文化：法律的革命

- 羅馬法 (Roman Law) 的原有文獻被從新編輯，註解，並體系化。羅馬法的研究，發展與教授成爲新興大學的主要課程，其理念被普及至全歐洲，成爲各地君主立法的法理基礎。
- 教會法 (Canon Law) 來自原羅馬法，教會的頒令以及聖經，經從新註解及編輯后亦成體系。其體系包括一套程序法，被後世的非教會法院採用。
- 因爲法律佔社會的核心地位，法律工作者必然成爲西方社會的精英分子。

西方法律文化：教育的革命

- 11世紀歐洲學者從新發現古希臘羅馬文獻（包括帕拉圖，亞理士多德，以及Justinian 的 Corpus Juris Civilis）.
- 以上文獻被學者們發揚為人文運動 (Humanist Movement).
- 大學的成立。

西方法律發展與教育

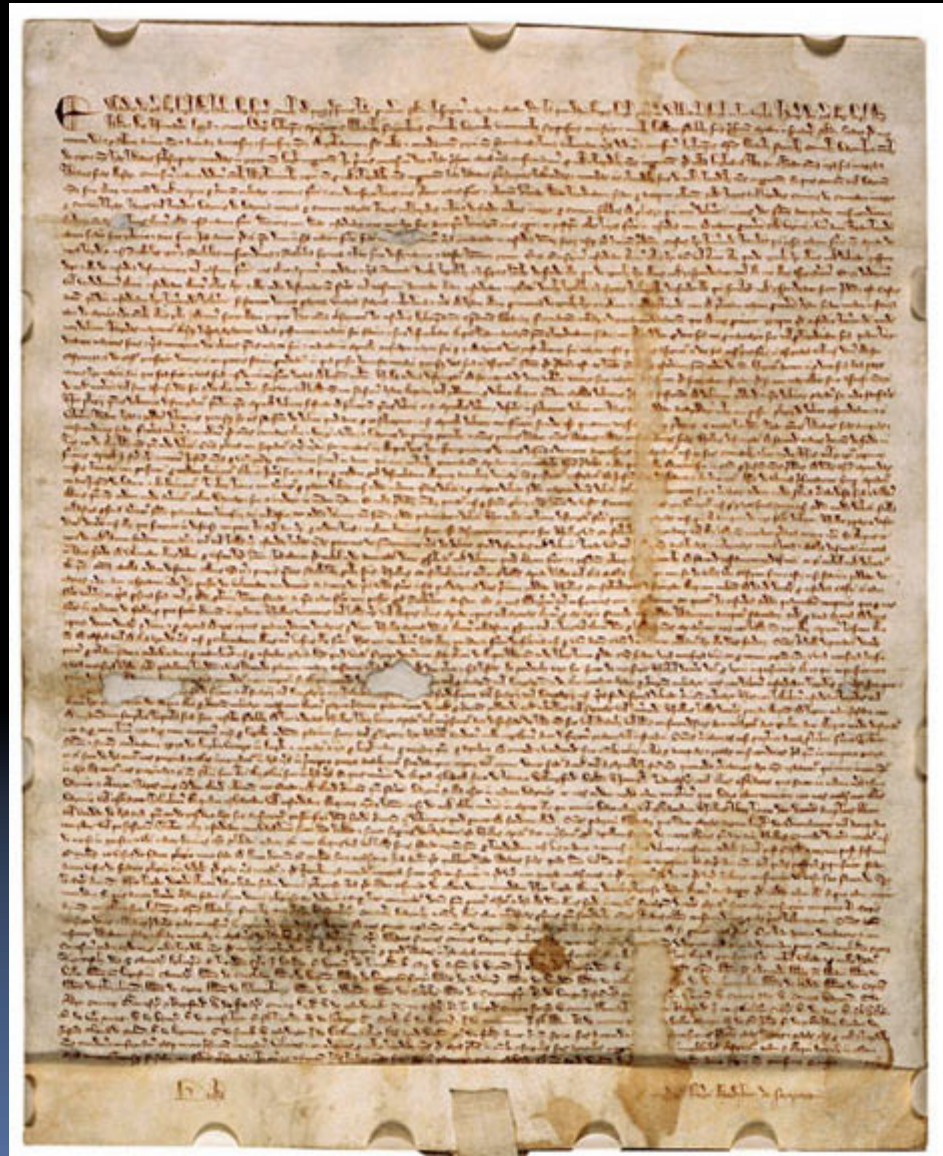
- 十一世紀后從Bologna 起，復興羅馬法並設大學教授羅馬法。從此，歐洲大陸各地推行以羅馬法為基礎的法制。因此稱之為“民法”。法律教育落在大學。法理的發展落在學者手裏。
- 與此同時，英倫在儼曼地（NORMAN）皇朝的推動下（尤其是亨利二世-Henry II (1133-1189)，設立中央集中法院，著書歸納當時習例，Glanvill - 1187 - Tractatus de Legibus et Consuetudinibus Regni Angliae - Treatise on the Laws and Customs of the Kingdom of England). 100年后有Bracton 同一名稱的專著。18世紀有Blackstone 的 “Commentaries on the Laws of England” 因此，稱之為“普通法”（則普及于全國也）。法理的發展落在法官與執政者手裏。

The Magna Carta

http://www.bl.uk/treasures/magnacarta/shockwave/magna_carta_broadband.htm

“Nullum vendemus, nulli negabimus aut differemus rectum aut justiciam”

“To no one will we sell, to no one deny or delay right or justice”.



西方法律文化：體系之分流

民法體系：

- 採用羅馬法為基礎的法律。
- 法官的本位為運用法規去判案，不宣告或解釋法律（因此，判例並非重要，後人稱該體系為法規至上的體系，到了世紀中期歐洲法院經常請求立法機關解釋法律）。因此有“立法之上”之稱。
- 與教會法庭並存。

普通法體系：

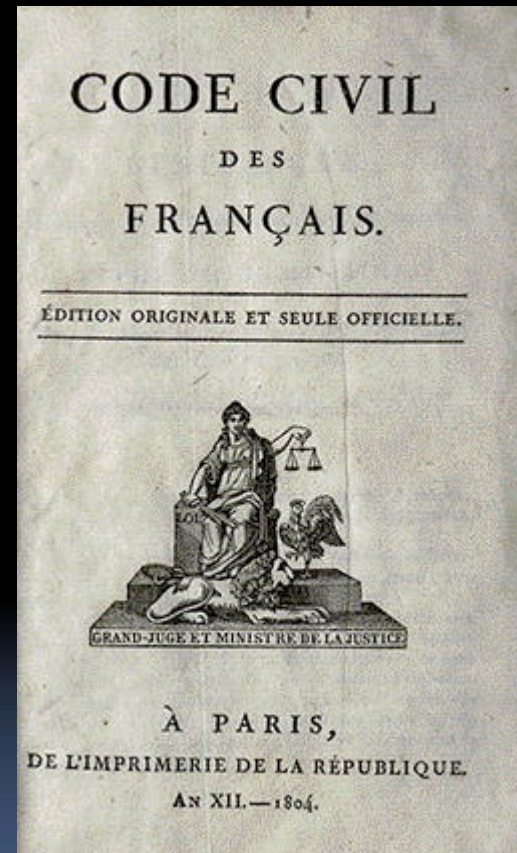
- 採用原有習俗為內容加上度身訂造的程序-Forms of Action- 解決英國當時的土地糾紛。
- 因此法官有責任把習俗宣判為法律（因此，判例非常重要也要設立既定制度-stare decisis - 後人稱之為“法官之上”的體系，法官可以解釋法律並法院的解釋是終局的）。
- 普通百姓陪審案件。
- 與教會法庭並存。

Code Civil Des Français

拿破侖民法典

« *Ma vraie gloire n'est pas d'avoir gagné quarante batailles ; Waterloo effacera le souvenir de tant de victoires ; ce que rien n'effacera, ce qui vivra éternellement, c'est mon Code Civil* ». Napoléon Bonaparte

«我的真正光榮不是贏了四十場戰役；滑鐵盧已將它們一筆勾銷；但永遠不能勾銷的是我的民法典» 拿破侖



法民法典

French Civil Code

BOOK II. Of Property, and the Different Modifications of Property

Decreed 25th of January, 1804. Promulgated February 4th.

TITLE I.

Of the Distinction of Property.

516 All property is moveable or immoveable.

CHAPTER I.

Of Immoveable Property.

517 Property is immoveable either by its nature, or by its destination, or by the objects to which it is applied.

518 The soil of the earth and buildings are immoveable by their nature.

TITLE II.

Of the Distinction of Property.

Decreed the 27th of January, 1804. Promulgated the 6th of February.

544 Property is the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes.

546 No one can be compelled to give up his property, except for the public good, and for a just and previous indemnity.

546 Property in a thing, whether real or personal, confers a right over all which it produces, and over all connected with it by accession, whether naturally or artificially.

- This right is termed the "*right of accession.*"

- L 2, DES BIENS

- *des biens, et des différentes modifications de la propriété*

titre premier

de la distinction des biens

(décrété le 4 pluviôse an xii. Promulgué le 14 du même mois)

516. Tous les biens sont meubles ou immeubles.

Chapitre premier

des immeubles

517. Les biens sont immeubles, ou par leur nature, ou par leur destination, ou par l'objet auquel ils s'appliquent.

518. Les fonds de terre et les bâtimens sont immeubles par leur nature.

Titre ii

de la propriété

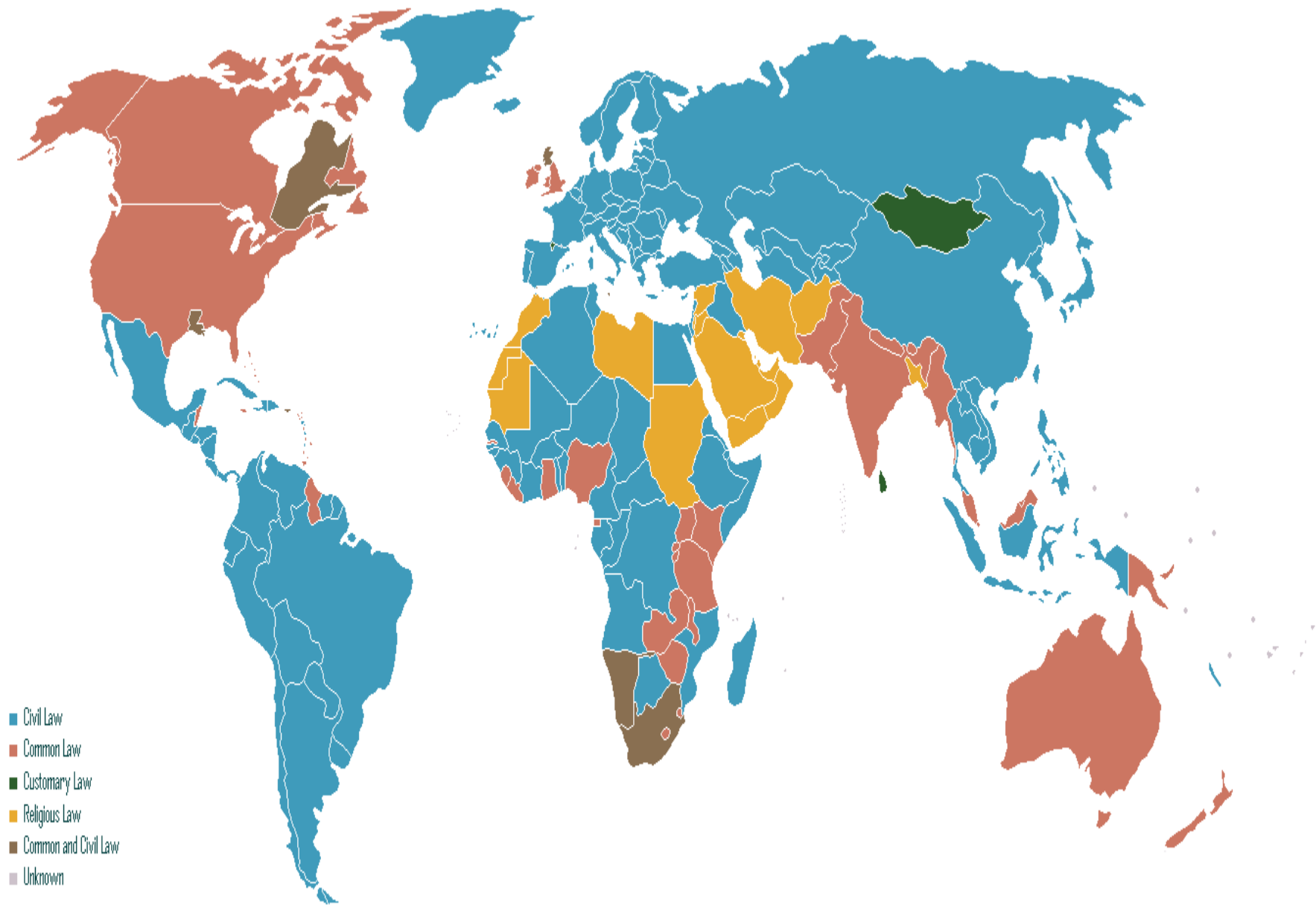
(décrété le 6 pluviôse an xii. Promulgué le 16 du même mois)

544. La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les réglemens.

545. Nul ne peut être contraint de céder sa propriété, si ce n'est pour cause d'utilité publique, et moyennant une juste et préalable indemnité.

546. La propriété d'une chose, soit mobilière, soit immobilière, donne droit sur tout ce qu'elle produit, et sur ce qui s'y unit accessoirement, soit naturellement, soit artificiellement.

Ce droit s'appelle *droit d'accession.*



- Civil Law
- Common Law
- Customary Law
- Religious Law
- Common and Civil Law
- Unknown