

Libellus ad Thomassium

Essays in Roman Law, Roman-Dutch Law and Legal History
in Honour of Philip J Thomas



FUNDAMINA
Editio specialis



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PRAEFATIO

This *Festschrift* is dedicated to our friend and colleague Philip Thomas. The seed for it was sown in December 2008 at a conference in Edinburgh when a number of participants from different countries were discussing colleagues soon to be retiring. Everyone agreed: Philip was to be honoured as *jubilandus*. It is not surprising, then, that our invitation to Romanists and legal historians to contribute to the *Festschrift* was met with great enthusiasm. As the project became known, we were approached by even more of Philip's colleagues and friends who wanted to honour him in this way.

We should mention that in view of the fact that our contributors come from so many countries, and are accustomed to varying editorial styles, we decided to allow authors to follow the style of their choice. Consequently, only "aesthetical" changes were made to the individual contributions in order to create an overall impression of uniformity. We trust that this will not detract from the value of the work.

This *Festschrift* is presented to Philip as a token of respect, friendship and gratitude. As stated in the *Laudatio*, he is a versatile academic. This versatility is echoed in the wide range of topics covered here. And we all know that he will approve of that: he was never prescriptive and always wanted something new, something original, something different.

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LEGAL CERTAINTY v LEGAL PRECISION

Some thoughts on comparative law

Jean-François Gerkens*

I'm delighted to offer this short paper to my dear friend Philip Thomas. I will never forget his very generous hospitality in Pretoria, and I wish to thank him – and his wife Luanda (Lulu) Hawthorne – once again for this!

This text is a paper I delivered at the University of Tilburg, in Philip's native Netherlands, more specifically at the Tilburg Institute of Comparative and Transnational Law (Ticom) on 12 March 2009.

Starting this paper by trying to sketch a legislator's work in a few words is not so easy. There are many possible definitions of what a legislator is or should be.

For instance, the description for "lawgivers",¹ chosen in Washington, the capital of the United States, seems to be very broad, and includes people as divergent as emperors (like Justinian and Napoleon) and kings (like Alfonso X or St Louis), soldiers (like Simon de Monfort), popes (like Gregory IX or Innocent III), prophets (like Moses), philosophers (like Maimonides), jurists (like Papinian or Grotius) and even Gaius, a law professor!

One cannot fault this list. On the contrary, it is fine to recognise all these people who were – probably all in different ways – important in the world's legal history.

Now, if one speaks of legislation as written texts, what English lawyers call statute law, then one can probably try to narrow the field down.

Of course, even if one speaks of statute law, it is still possible to give very different definitions of precisely what that entails. I will proceed from a broad definition of statute law.

The purpose of this paper is to establish – broadly – how legislation may be considered to have brought about legal security to the people.

Excluding the Code of Hammurabi and some Greek statutes, the significance of which today is rather limited, I would say that for continental lawyers the history of our private law actually starts with the Law of the Twelve Tables.

1 The complete list of lawgivers may be found at <http://www.aoc.gov/cc/art/lawgivers/index> (10 May 2010)

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The history of this piece of legislation is interesting and quite well known,² so I shall recall it only briefly.

We're in the first half of the fifth century B.C. and Rome is divided between Plebeians and Patricians. Roman law has received no publicity and only the patrician class knows the rules of law. To make it worse, these rules were enforced with untoward severity against the plebeian class. So the Plebeians demanded to be able to know the law. They requested that the law be published, so that they would no longer be surprised by the enforcement of rules unknown to them.

The Patricians long opposed this request, but finally accepted the idea of publishing the law. But of course, drafting such a code was not an easy thing to do. As the Romans understood that it was very important to be accurate, a decemvirate – that is, a board of ten men – was appointed to reduce the law to writing.

Livy, who tells the story, says that for their inspiration, these *decemviri* travelled to Greece, to read the laws of Solon.³ This is rather doubtful. Many scholars say that the *decemviri* never went to Greece, but most likely to southern Italy, where the cities were founded by Greeks and were part of the so called Magna Graecia. Actually even this is not undisputed, because it does not seem that the content of the Law of the Twelve Tables displays any Greek features.⁴

Nevertheless, what is significant is that the Romans – or at least Roman historians – seem to have found it normal to study some foreign law before drafting their own. One may even say that this is surprising, considering what Roman jurists wrote about foreign – and specifically Greek – law in the later Republic. Cicero,⁵ for instance, wrote that Greek law is so poor that it is almost ridiculous. The Romans were proud of their law and even developed a superiority complex as far as it was concerned.

Anyway, the Law of the Twelve Tables was promulgated and posted in the Forum, so that every Roman citizen could read and be informed about it.

One may think that this was good for legal certainty and security. With the help of these Twelve Tables, all Romans were able to know the law. But, in fact, we know that in the fifth century B.C. only a small section of Roman society was able to read. Therefore, as regards legal certainty and security, one should not overestimate the contribution of the Twelve Tables for the Roman people as a whole. Yet, we also know that at the time

2 See e.g. Franz Wieacker, *Römische Rechtsgeschichte*, München 1988, pp. 287-309; Antonio Guarino, *Storia del diritto romano* 12 ed., Napoli 1998, pp. 146-160 (nos. 65-72).

3 Liv. 3. 31: *Cum de legibus conveniret, de latore tantum discreparet, missi legati Athenas Sp. Postumius Albus, A. Manlius, P. Sulpicius Camerinus, iussique inclitas leges Solonis describere et aliarum Graeciae civitatum instituta mores iuraque noscere.*

4 A. Guarino (*op.cit.* p.150) calls it "del tutto fantasioso e arbitrario è il racostamento delle stesse (XII Tables) alla legislazione di Solone ad Atene".

5 M.T.Cicero, *De Oratore*, I, 197: *Percipietis etiam illam ex cognitione iuris laetitiam et voluptatem, quod, quantum praestiterint nostri maiores prudentia ceteris gentibus, tum facillime intellegitis, si cum illorum Lycurgo et Dracone et Solone nostras leges conferre volueritis; incredibile est enim, quam sit omne ius civile praeter hoc nostrum inconditum ac paene ridiculum; de quo multa soleo in sermonibus cotidianis dicere, cum hominum nostrorum prudentiam ceteris omnibus et maxime Graecis antepono. His ego de causis dixeram, Scaevola, eis, qui perfecti oratores esse vellent, iuris civilis esse cognitionem necessariam.*

of Cicero's youth, some four centuries later, good Roman citizens still had to learn the law of the Twelve Tables by heart at school, just like others would learn their prayers or their poems.⁶

Nevertheless, it is important to remember that knowing the law does not mean only knowing the words, but also their potential legal force, in the words of Celsus, l. 26 Dig. (D.1.3.17): *Scire leges non hoc est verba earum tenere, sed vim ac potestatem.*

Finally, the Twelve Tables certainly had a very important impact on our contemporary legal systems in the area of civil law. It also represented a significant progress for legal certainty at the time. But it is important to bear in mind that it did not mean that from then on, all Romans were able to understand all of the law.

Moving from the one end of Roman law to the other, what about Justinian's codification? Here again, nobody doubts its incredible importance for human history. The work Tribonian and the compilers accomplished was enormous. And it really has influenced almost all the legal systems in the world. But what did it mean for the Byzantines of the sixth, seventh and eighth centuries A.D.? We know that the Digest was written in Latin, but only a few Byzantines were still able to speak Latin. So, for the citizens of the Eastern Roman Empire, the law of the Digest must have been almost impossible to understand and remained accessible only to those jurists who knew Latin.

If we take a look at the law during the Middle Ages – and hopefully I do not prolong my historical introduction unnecessarily – we know that access to Roman and canon law was limited to the elite. Adding customary law to these two systems of law that were applied during that period, it is easy to understand how difficult it must have been for a layman to acquire any significant knowledge of the law. And this is precisely why, with the Philosophie des Lumières, the scholars wanted to draft civil codes, to help the layman to understand the law!

The examples of the kind of codes that were meant to make the law accessible to the layman are well-known. The first code most people think of for this period and probably also the most famous one is the Code Napoléon. Of course, there are many other codes from the same period, like the Austrian Allgemeines Bürgerliches Gesetzbuch (ABGB) or the Allgemeines Landrecht der Preußischen Staaten (ALR). These codes naturally differ significantly, but each of them is aimed at being accessible to the layman. The ultimate goal was to create a society without lawyers, or at least to reduce their importance to an absolute minimum.

In this respect, there is an article in the ALR (introduction § 6) that says:

Auf Meinungen der Rechtslehrer, oder ältere Aussprüche der Richter, soll, bey künftigen Entscheidungen, keine Rücksicht genommen werden.⁷

To this article, Frederick II⁸ added:

6 M.T.Cicero, *De Leg.*, II, 23: (...) *Nostris quae sequuntur. Discebamus enim pueri XII ut carmen necessarium, quas iam nemo discit.* (...).

7 Translation: "Judges should pay no attention to opinions of legal scholars and of judges in previous trials."

8 Frederic II, *Œuvres de Frédéric II, Roi de Prusse*, I, Berlin 1791, p. 140.

Des lois précises ne donnent pas lieu à la chicane, elles doivent s'entendre selon le sens de la lettre: lorsqu'elles sont vagues ou obscures, elles obligent de recourir à l'intention du législateur, et au lieu de juger les faits, on s'occupe à les définir. La chicane ne se nourrit pour l'ordinaire que de successions et contrats; et par cette raison les lois qui roulent sur ces articles, ont besoin de plus grande clarté. Les juges ont deux pièges à craindre, ceux de la corruption et ceux de l'erreur: leur conscience doit les garantir des premiers, et les législateurs des seconds: des lois claires, qui ne donnent pas lieux à des interprétations, y sont un premier remède, et la simplicité des pleadings, le second. On peut restreindre les discours des avocats à la narration du fait, fortifiée de quelques preuves, et terminée par un épilogue ou courte recapitulation.⁹

In short, Frederick II thought that it was easy to write clear rules that would not need any interpretation. Besides explaining the facts, lawyers would in consequence have almost nothing to do.

The French revolutionaries and the drafters of the Austrian Civil Code (Von Martiny and Von Zeiller) held similar opinions about the judge's task.¹⁰ Portalis's opinion was probably already different.¹¹ For him, the judge's interpretation of the rules was already unavoidable. But it is also true that the letter of the code allows the judge very little leeway. The judge was supposed to apply the law and no more. Pretending that there was a lacuna in the law was a pretext.¹² If it was a pretext, it also meant that there could not be such thing as a lacuna in the Code Napoléon as it was also supposed to be easily accessible to laymen.

In this respect, it is also well-known that Napoleon himself was not a jurist but that he nevertheless took an active part in the discussions around the drafting of the Code. He personally chaired 57 of the 102 meetings of the Conseil d'Etat. He was absent, though, when the discussion became too technical and concerned legal obligations. The result of this has long been praised. The Code Napoléon was marvellous, written in a very elegant form.

Take, for example, article 2279: "En fait de meubles, possession vaut titre". Linguistically brilliant, but what does it mean? How does the legal rule work? It is impossible to tell by only reading the text. Of course, the possessor had to be in good

9 Translation: Precise statutes do not give opportunity to pettifoggery; they must be interpreted in conformity with the meaning of the words. When they are vague and obscure, they force recourse to the legislator's intentions, and instead of judging the facts, one spends the whole time qualifying them. Pettifoggery is often used in successions and contracts; therefore, the statutes on these topics have to be extremely clear. Judges have two traps to avoid: corruption and error; their conscience should prevent them from the first, and the legislators from the latter. Clear statutes which are not open to different interpretations are a first remedy and simple pleadings another. The speeches of the advocates could be limited to the narration of the facts, consolidated with some evidence and concluded with an epilogue or a short summary.

10 On this, see also: J.F. Gerkens, *Droit privé comparé*, Brussels 2007, p.82-85

11 J. Portalis, "Discours préliminaire au Code civil", in P.A. Fenet, *Recueil complet des travaux préparatoires au Code civil*, Vol. 1, Paris 1827, p.470-471.

12 Code Napoléon, art. 4: "Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice."

faith, but why does this text not say so? There are many more examples of articles with similar problems.

And actually, it has become clear that even the Code Napoléon is not accessible to the layman. Is there any reason to doubt this? Nobody really does anymore. Even the style of the French Legislature is no longer the same. When it amends articles in the French Code, the style of Portalis is no longer employed.

It is known that the French Code borrowed the framework of the Institutes of Gaius and Justinian:

- Livre premier, *Des personnes* (arts. 7 to 515);
- Livre II, *Des biens et des différentes modifications de la propriété* (arts. 516 to 710);
- Livre III, *Des différentes manières dont on acquiert la propriété* (arts. 711 to 2281).

This framework has been severely criticised. In classical Roman law, it made sense to have a third part of the manual referring to “*actiones*”. Legal actions were at the centre of Roman-law thinking. French jurists did not think the same way. Like almost all modern jurists, the French think in terms of subjective rights. So they changed the title of the third part to “*Des différentes manières d’acquérir la propriété*” – the different ways to acquire ownership.

In this third title one finds many different topics, such as Aquilian liability, unjust enrichment and prescription. So, for the French, Aquilian liability is a way in which to acquire ownership!

But while foreign lawyers criticise the Code Napoléon, French scholars like Planiol¹³ find no problem with the fact that the third book is, as it were, a “holdall”:¹⁴

L’entassement de toutes ces matières hétérogènes dans un livre unique est peu logique ... L’ordre scientifique, qui convient à l’enseignement donné sous la forme du cours ou du livre, n’est point nécessaire ni même utile dans un code. L’enseignement est une initiation; c’est pour cela qu’il a besoin d’une méthode particulière. Un code est fait pour des gens qui ont fini leurs études, pour des praticiens qui connaissent le droit. Il suffit que la répartition des matières soit claire et commode.¹⁵

Now this justification is quite interesting, because Planiol explains that it doesn’t matter if the Code does not use a pedagogic method. The Code is not aimed at beginners; it was drafted for qualified practitioners who know the law. This is a strange argument, completely incompatible with the original aim of the Code.

So, it becomes clear that after all, the Code Napoléon is not accessible to laymen. The fact that Napoleon chaired more than half of the sessions of the Conseil d’Etat should not

13 Planiol, *Traité élémentaire de droit civil*, 5 ed., Paris 1950, pp. 33 and 36.

14 The authors of the Code – especially Maleville – are conscious of this defect. See: Sh. Herman/D. Hoskins, “Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations”, in: *Tulane Law Review* 54 (1980) pp. 992ff.

15 Translation: The collection of all these heterogeneous topics in one sole book has little logic ... The scientific classification, suited to teaching, in the form of lectures or a textbook is not necessary or even useful in a code. Teaching is an initiation; that’s why it needs a particular method. A code is made for people who have finished their studies, for practitioners who know the law. It suffices to have a clear and handy table of content.

conceal the fact that he was also absent from the remaining sessions, when the discussion became too technical for him. Consequently, a part of the Code at least would never be accessible to laymen.

Let's change legal systems and have a quick look at German law. Except for the *Allgemeines Landrecht der Preussischen Staaten*, the Germans have not been tempted to draft an accessible civil code. During the nineteenth century, German jurists were probably the best in the world. The method of the Pandectists has played an important role in many legal systems, such as those of the Netherlands, Switzerland, Austria, Italy, Greece and Portugal, to mention but a few. But the method of the Pandectists that led to the drafting of the German Civil Code (*Bürgerliches Gesetzbuch*) was certainly meant to be technical, a so-called "Professorenrecht". Being elegant was not an issue; it had to be scientifically precise and exact. The text of this Code is the perfect image of the dogmatic way of thinking.

Reading Eduard Maurits Meijers recently, I found an elegant definition of legal dogmatics: "Rechtsdogmatiek is de wetenschappelijke bearbeiding van rechtsvoorschriften of beginselen uitsluitend met behulp van wetten van de logica."¹⁶ This is an apt description of legal dogmatics and I would say that today, many German jurists still tend to favour a dogmatic approach.

Of course, when a civil code is drafted by such a jurist, there is little doubt about the outcome: it will not be accessible to laymen. There has been a subsequent attempt to draft a popular civil code. Eugen Huber (of Switzerland) tried to draft a code based on pandectist rules, but written in understandable, or rather, more understandable language. This attempt has been partly successful. One has to admit that the Swiss Code is easier to understand than the German one. But even so, laymen will find it hard to understand the Swiss Code correctly without assistance.

Since then, there has never again been an attempt to make subsequent civil codes accessible to laymen. As far as the Dutch Civil Code is concerned, it is obvious that Meijers did not have a popular code in mind.¹⁷

I will conclude this brief overview by looking at the problem of legal terminology.

It's a euphemism to say that French legal terminology is not very precise. The concept of "acte juridique" may serve as an example. When a French jurist uses this phrase, it can have two very different meanings. Sometimes it means legal transaction (*negotium*, or what the Germans call "Rechtsgeschäft") and sometimes it means deed (*instrumentum* or what the Germans call "Urkunde"). Of course, these two meanings are very different. French and Belgian¹⁸ jurists are well aware of this and as a rule it does not

16 Translation: Legal dogmatics is the scientific elaboration of legal rules or principles exclusively with the rules of logic.

17 Meijers was very clear about this choice in a paper he delivered in Paris, at the "Société de législation comparée" on 26 Feb 1948. The full text of this paper was published as E.M.Meijers, "La réforme du code civil néerlandais", in: *Bulletin trimestriel de la Société de Législation Comparée* 71 (1948), pp. 199-215, esp. pp. 207-208.

18 See, e.g., H. De Page, *Traité élémentaire de droit civil belge*, Book I (Introduction, Théorie des droits et des lois) Title II, Chapter I, no. 19 (p.33): "La terminologie du Code n'est pas toujours d'une précision rigoureuse. Il en est de même dans la pratique judiciaire. Tantôt le mot 'acte' signifie

create too many problems.¹⁹ Nevertheless, I have encountered several people, and not only students, who were confused about these homonyms. But if even jurists become confused, how is it that laymen do not become confused? Somehow, it seems that “acte juridique” has been used in both meanings precisely because it was an easily understood concept, accessible to the layman but ambiguous to the jurist!

This ambiguity has long been criticized by foreign jurists, for instance Zweigert and Kötz.²⁰ Their favourite example is article 778 of the Code Napoléon:

L'acceptation (d'une succession) peut être expresse ou tacite: elle est expresse, quand on prend le titre ou la qualité d'héritier dans un *acte* authentique ou privé; elle est tacite, quand l'héritier fait un *acte* qui suppose nécessairement son intention d'accepter, et qu'il n'aurait droit de faire qu'en sa qualité d'héritier.²¹

For the German jurist this article has many defects. First, it shows the defects of the legal terminology employed in the Code Napoléon by using a polysemous term. Secondly, and that is probably even worse, it uses the same term twice in the same text, and with different meanings without informing the reader. Indeed, the first occurrence of “acte” means *instrumentum*, and the second one, means *negotium*. In their handbook on comparative law, Zweigert and Kötz explain that this is an error unlikely to be encountered in the German Code.²²

Why, then, does the French terminology give rise to this problem? As indicated, it may be the result of their attempt to draft a popular code, accessible to the layman. In contrast, Roman law did not have the problem, and that is perhaps why French jurists use the Latin terms to distinguish between *negotium* and *instrumentum*. It is not surprising then that Rodolfo Sacco²³ recently wrote an article on the similarities and dissimilarities between the French “acte juridique” and the German “Rechtsgeschäft”.

Many legal systems have adopted the German “Rechtsgeschäft”, for example those of Scandinavia, Russia, Poland, Taiwan, Japan, Austria, Czechoslovakia, Romania, Greece, Italy, Spain, Cuba, Peru, Chile, Equador, Columbia, Argentina, Paraguay, Uruguay, the Netherlands and Hungary.

That is why the Italians now speak of “negozio giuridico” and the Hispanic jurists speak of “negocio jurídico”. These are clearly neologisms, invented to fill a specific need

l'écrit, l'instrumentum qui a pour objet de constater un fait juridique, et en constituer la preuve (écrit probatoire). Tantôt il désigne l'opération juridique elle-même, le negotium.”

19 A complete list of the articles of the French Civil Code in which the word “acte” has been used in the meaning of *negotium* or *instrumentum* has been drawn by Jean Ray (*Index alphabétique du Code civil*, Paris 1926).

20 See e.g.: K.Zweigert/H.Kötz, *Einführung in die Rechtsvergleichung* 3 ed., Tübingen 1996, p.89.

21 Translation: The acceptance (of an inheritance) can either be explicit or tacit: it is explicit when one takes the title or the occupation of the heir in an authentic or private act; it is tacit, when the heir acts in a way that necessarily implies his intention to accept, which he would only have the right to do as an heir.

22 K.Zweigert/H.Kötz, *op.cit.*, pp.89f.: “... ein Lapsus, wie er den Vätern der deutschen Kodifikation gewiß nicht unterlaufen wäre.”

23 R.Sacco, “Acte juridique et Rechtsgeschäft, deux voisins qui s'ignorent”, in: *Mélanges Xavier Blanc-Jouvan*, Paris 2005, pp.647ff.

because these legal systems followed the French and used the ambiguous concept of "acte juridique".

The most recent legal system to have changed its terminology in this way is Brasil.²⁴ In their new Civil Code, promulgated in 2002, the terminology has been systematically changed by using "negócio jurídico" to avoid the ancient confusions.²⁵

So it seems that for no apparent reason, the French is the last to resist change. The only reason for this rigidity one can think of is ignorance of the advantages of comparative law.

I used this example – "acte juridique" – to show that French legal terminology is imprecise. And yet some Belgian politicians still feel that we have to simplify legal terminology, to make it accessible to laymen. One example will suffice: It has been proposed to replace "synallagmatic contract" by "mutual contract". It may be true that the Greek word "synallagma" is not an easy one. But it is certainly not true that by replacing it by "mutual" every layman will be able to understand what this type of contract means. Changing the name will not solve the legal problem. And in the end, laymen are just not interested enough to try and understand technical legal problems. The illusion is the same: If law were fully accessible to laymen, there would no longer be a need for jurists. In the past, some philosophers hoped that this goal could be attained. However, what has happened is that because the legal system has become so wide-ranging, modern jurists specialise in one or more fields of their own law. So I would follow Meijers on this: Let's not sacrifice the quality of the legal technique on the illusive altar of rendering the law accessible to laymen.

Finally, what lies ahead for legal terminology? It is noticeable that today papers on comparative and European law are mostly written in English. As a member of the Editorial Board of the *European Review of Private Law*, I can tell you that more than ninety per cent of the articles we receive are written in English. This is not surprising: academics writing in an international journal want to be read by as many readers as possible. English is the language that most European jurists are able to read, so the choice becomes obvious.

However, this choice causes the same problem as the one discussed in connection with French legal terminology. To be able to explain a problem in private law, you are often forced to use terminology that does not really suit the problem you are trying to explain. To give but one example: the Roman concept of *compensatio* exists in all European languages. However, it cannot be translated in English as "compensation" because that would mean something totally different. So you are supposed to use the word "set-off". But set-off has little or nothing to do with the original Roman legal concept.

What is more, the author who writes in a language he is familiar with, but not as a native jurist, will make some errors. When I read a text for the *European Review of Private Law* I often get the impression that it has been translated from French or German into English, and I can tell what was the original language of the text. And that is exactly

24 The new Brazilian Civil Code came into force on 1 Jan 2003.

25 On this particular topic, in the Brazilian Civil Code, and on the whole Brazilian codification, see e.g. A.Petrucci, "Il nuovo codice civile brasiliano fra tradizione ed innovazione", in: *Africana (Rivista di Studi Extraeuropei)* 2003.

my case: when one writes or speaks in a language that is not your mother tongue, it is easy to lose precision. The question is whether we should really sacrifice the quality of legal technique?

To return to Meijers: he did not want to forfeit the quality to the illusion of rendering the law accessible to the layman. Many people criticised Meijers – who was so intelligent and interesting – for writing most of his books and articles in Dutch, a language not many European jurists are able to read. The question is, was he not a great jurist exactly because he wrote in Dutch?

On a more positive note, having pleaded for the use of our mother tongue when writing about the law, so as not to sacrifice the quality, all comparatists know that this does not apply totally to comparative law. In comparative law, precision is very difficult to attain, much more difficult than in national law. And somehow lawyers from different countries have to be able to communicate. So someone has to make the sacrifice of speaking (and to some extent writing) in a foreign language. My point on this is just that, as far as private law is concerned, English is not the best possible choice!