BARRY NICHOLAS AS A COMPARATIVE LAWYER

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It is a tremendous honour and pleasure to speak to you this evening about ‘Barry Nicholas as a Comparative Lawyer’. I do so not merely in my capacity as the current holder of the Chair which Barry occupied for seven years before becoming Principal of Brasenose, but also – and more particularly – as someone who actually had the privilege of being taught by him. My very first undergraduate tutorial at Oxford, almost exactly twenty years ago, was with Barry, and it was in Roman law.

Preparing my contribution for today really brought home to me quite how closely intertwined were for Barry on the one hand his work on legal history and on the other his thinking about systems of modern private law. They were, indeed, wholly inseparable – two sides of the same coin. He brought to bear on them the same deep understanding, the same clarity of analysis, and the same ability to covey to his audience a ‘feeling’ for the law. Nowadays, of course, it is so widely acknowledged as to be almost banal to observe that both theoretical and practical comparative work benefits greatly from an awareness of *how* and *why* similarities or differences between the laws of different countries came about. But in Barry’s case, it seems especially artificial to try and separate out his contribution to the teaching of Roman law, his modern comparative scholarship and his involvement with the Vienna Sales Convention (CISG).

So to add to the picture that Francis Reynolds and Wolfgang Ernst have already painted of Barry’s scholarship, I want to pay tribute to his work on modern civilian and mixed legal systems. In order to do this – and to illustrate why his writing is so appealing and powerful – there is really no better starting point than Barry’s own description of one of the essential points in which the ethos of the English common law tradition contrasts with that of civilian systems (these are systems that have evolved on the Continent from a mix of Roman, Canon and customary sources). I quote from a 1993 conference contribution:

> “There is … an important difference of emphasis between the Common law and the Civil law. Any generalisation is an exaggeration, but I think that one can venture to say this. The philosophy of the Common law is utilitarian and its primary concern is with the economic exchange between the parties. The philosophy of the Civil law […] is closer to that of Kant. It is primarily concerned, not with the economic exchange between the parties, but with the exchange of consents and with the moral evaluation of the behaviour of the parties. This difference reflects differences in the histories of the two systems – the influence of Canon law on the Civil law and of commercial practice on the Common law. A consequence of this commercial orientation of the Common law is that if a choice has to be made between certainty and justice in the individual case, it is likely to be made in favour of certainty.”

This is typically Barry: in just a few words exposing a subtle (yet absolutely central) nuance of accent between the common law and the civilian tradition; explaining the identified discrepancy in its broader historical, philosophical and economic setting; and at the same time always staying balanced in his account and careful not to overstate the case, lest a helpful and perceptive characterisation of a system (or group of legal systems) should turn into a distorting and potentially misleading caricature.

As far as civilian systems are concerned, Barry’s main academic interest lay in the French or Napoleonic legal tradition, although he did keep an eye on German law and occasionally delved quite far into that as well. Barry’s focus on Romance legal systems was, it seems, a product of two factors. First, he had been brought up to speak French fluently by his mother, who was a trained modern linguist. The second factor lay in the Oxford comparative law syllabus at the time, which – for various reasons – was quite strongly orientated towards French law. This was therefore the natural system for Barry to investigate and engage with.

Today, I want to single out three of his contributions which I think deserve special mention. All three relate to private law, but I should say that Barry’s interests were actually broader. He wrote, for instance, on fundamental rights and judicial review in France, long before English lawyers considered that it was time to ‘bring rights home’ and use them as a yardstick against which to measure the legality of executive action (which didn’t happen until the end of the 20th century).

Barry’s most well-known work on French law is undoubtedly his introductory textbook on the *French Law of Contract*, first published in 1982, with a second edition in 1992. This is a book that generations of comparative law students have read and profited from. Through it, they not only acquire a solid and reliable foundation in French law generally and contract law in particular, but are also enabled to look at English law from the outside, through the lens of another legal order, thus learning a great deal about their own system in the process.

Barry’s stated aim in writing the book was “to see French law through Common law eyes”. To this end, he masterfully arranged the material in a way that would make it accessible to common lawyers (for instance, by placing more emphasis on cases than a traditional French textbook would have done). Yet at the same time he also ensured that the reader got what he called the proper ‘feel’ for French law as experienced by an insider, and what post-modern comparative scholars might describe more elaborately as an appreciation of the distinct ‘mentality’ and the specific legal culture of the French system.

Barry had an acute sense of the various nuances and connotations that a legal community associates with particular terms/concepts or institutions. It was his ability to ‘translate’ (in the non-linguistic sense) the law of one system into the language of another, that made Barry’s textbook into such a long-lasting success. In fact, we in the comparative law teaching group have only just – and very reluctantly – started replacing it with more contemporary literature, simply because the French law of obligations underwent a major reform last year, which led to many areas of contract law being either codified for the first time, re-codified, or in some cases completely overhauled and changed in substance.

The second piece I want to draw your attention to is a 1974 article entitled “Rules and Terms”. This is a real *tour de force* through comparative contract law. The discussion begins with an analysis of how civilian systems have built up their theory of contract from a series of specific ‘types’ of contracts (each imbued as a matter of law with various default rules governing the parties’ relationship), contrasting this with the common law tradition, which starts from a general unified law of contract and relegates the details of specific transactions to terms either expressly or impliedly agreed by the parties; the article further ranges via a dissection of the notion of breach as well as a treatment of impossibility and frustrating events, all the way to why it was not a good idea for English law to borrow (or to attempt to borrow) so much of the French doctrine of mistake from authors like *Pothier* during the 19th century.

Barry had the foresight to see at an early stage that, with the accession of the United Kingdom to the European Communities, the movement striving for harmonisation or even unification of the law was likely to gain momentum – he actually wrote so himself in 1981. But it was his firm belief that “before there can be harmonisation or unification there must first be mutual understanding”. His work on comparative contract law was intended to promote that understanding and also to warn of the dangers of an unreflected or insufficiently sensitive transplantation of legal rules from one system to another.

The third contribution I want to talk about steers us away from contract law, and it takes us even further back in time. It’s a piece published in the *Tulane Law Review* in 1962 on the law of unjustified enrichment (or as common lawyers prefer to say: restitution for *unjust* enrichment).

Barry had spent some time teaching at the Tulane Law School in New Orleans in 1960, and his article was a product of the course he gave there. It juxtaposed the Louisiana law on unjustified enrichment with that of France and Germany. Louisiana has a so-called ‘mixed’ legal system, combining elements of the civilian tradition with elements of the common law, which Barry found very attractive and kept coming back to.

The remarkable thing about the topic of this piece and Barry’s interest in it was that, as far as English law was concerned, unjust enrichment wasn’t even recognised as a discrete subject at the time. In United States, the first

Restatement of Restitution had been published in 1937, but in England the first and seminal textbook in the area, *Goff & Jones*, was not to appear until 1966.

Barry’s article proved to be very influential with the judiciary in Louisiana. (Though of course it was not in his academic self-perception to worry about such things as ‘impact factors’ – as anyone who knew him was quick to note).

Today, the article is still extremely instructive, despite being written over half a century ago. It contains a number of fundamental and timeless comparative observations about the law of unjust/unjustified enrichment and its relationship and interaction with surrounding areas. For the benefit of the enrichment lawyers in the room, I’ll give just one example before concluding. Barry notes that:

> “[T]he more readily a system gives abstract effect to a conveyance or other transaction (i.e., allows it to be effective although its accompanying cause is vitiated by mistake or other defect), the more prominent will be the need for a remedy in terms of unjust enrichment.”

Understanding this link between a system’s rules of conveyance and the size and importance of its law of unjust enrichment is absolutely key – the surprising thing perhaps that it is still not universally appreciated. But Barry, characteristically, had hit the nail straight on the head.

To my mind, Barry’s comparative law scholarship is amongst the most admirable Oxford has produced. And I think that even if a reader didn’t know Barry, they would get a good sense from his publications of quite how enthusiastic and wonderful a teacher he was!