

An Introduction to Roman Law: Putting the Preface into Perspective

As many of you know, I am not a Roman lawyer and those who do not yet know it, soon will. So I can say little of interest on the Roman law. I am here because I am a lecturer at BNC and am obeying a command from the Principal to turn up and talk. I may say however that I might have been tempted to spill blood if that invitation had gone to someone else.

I would like to talk about Barry's book **An Introduction to Roman Law** from the viewpoint of a teacher and in particular about the book's approach, which is set out in its excellent **Preface**. If the obscurities which follow encourage at least some of you who have not already read it, to do, it will have been worth the effort. My title is **Putting the Preface into Perspective**. The burden of my song is that it augured a new kind of Roman Law book in England, which steered the teaching into new dimensions and without it, it is possible that many of us might not have supported and urged the retention of compulsory Roman Law in the first year Oxford examinations. The book was a game changer here and it may have saved the Roman tradition in Oxford, since without the first year compulsory paper, takers for the second year and BCL options might simply have fallen by the wayside. This book has been my constant companion in my RL teaching and the one which I urge upon my students with the most enthusiasm.

The Context

I came to Oxford in 1959 when Barry was 40 years old. It was a strange world and the part played by Roman law was even more strange. The Invention of Sex in 1966 was to make its position very vulnerable. Let me list a few points.

1. Roman law had been taught in Oxford since the earliest days but the Common law had only been taught for some 200 years, almost to the day.
2. The University had since the middle ages had a franchise court in Oxford with jurisdiction over the townsfolk. It had taken a statute of 1854 to stop it applying Roman law to cases before it. When Barry was born there were still people whose property had been directly affected by the Digest.
3. Latin was an entrance requirement for all undergraduates, and that means all. This requirement was only removed later after an exceptionally tasteless and bad tempered debate in Congregation. Graduates entrants and Scholars were exempted from this rule.
4. Each of the three university taught courses contained a compulsory Roman law paper and each contained compulsory questions requiring translation from Latin. In the case of the BCL this was as fine a piece of intellectual Philistinism as you could wish for, in the case of students we had admitted knowing they had no Latin and no time to learn it.
5. The syllabus of the first year compulsory paper could only have been defended on the basis that it did not significantly overlap with the compulsory paper in Schools.
6. Roman law was a compulsory paper in the Bar Exams and its existence was delicately poised midway between farce and tragedy.
7. The student textbooks were of the 'dry as dust' tradition and gave only the most perfunctory nod towards justifying their role in university education. They reflected the tone of the Roman jurists who are quite amazingly non-self critical by modern standards. In a [very very] memorable letter which Barry wrote to me in 1999 he said that the books treated Roman Law as if they were dealing with

something which 'came from the mouth of God' Quite something for a devout Roman Catholic, though after Vatican IV, that did not perhaps mean what it had previously meant. But they were very dry and very unengaging. I do remember saying to students in the past that I thought **Buckland's Textbook of Roman Law** was like **Megarry and Wade's Law of Real Property** but without the jokes.

8. First year lectures were delivered by David Daube and were some of the most exhilarating I ever attended, but David knew no more English law than I did at that stage and the lectures were delivered on the basis that it was as natural to talk only about Roman Law and its intricacies as it was to expect the sun to come up every day. He was in this respect very much a child of his time. There is room for the view that this mode of teaching was well suited to the optional paper in Finals, and, apart from the Latin, for the compulsory paper in the BCL, but its function in the first year examinations was far more difficult to justify.

And the public justifications for all of this were very few and far between. Teaching Roman law could have been defended on the grounds that it was outward looking and had much to teach the young about the foundations of law 22 miles away across the sea. There was little point picking any one Civilian jurisdiction to bridge the gap because they are all as different from each other as they are from the Common Law, and at least Roman Law was their *alma mater*. But if so, very little indeed was made of that point. And don't forget England did not join the soccer World Cup till 1950, twenty years into its history...

It could have been cultural history, but we had no business teaching that. We have no professional historical skills, though it is a matter of utmost regret that those who do have those skills have historically had a phobic resistance to black letter law. Maybe it is inevitable. And there was no compulsory paper [quite rightly] on the History of the Common Law, so the cultural justifications were perplexing.

There are of course some horrid explanations for it all based on the view that if we glorify these Roman barbarians as we do, dressing statues of our heroes as Roman generals for example, our own disgusting slavery record obviously can't be all that bad. We must not forget that much of the inherited wealth of the people who ruled us at that time came from the slave trade. Similar arguments might be made for the proliferation of classical architecture in the Deep South, I guess. But we were where we were. This was not a world at all well prepared for the Invention of Sex.

Enter Barry Nicholas

In my second year, Barry lectured on the compulsory paper. This was a very different approach. It is true the paper required a contrast with English law but these were lectures which put Roman law into a timeless context and students were introduced to problems as if they might have been happening today in the real world. This was no *Begriffshimmel*. Concepts there were, but they were grounded in the life we lived and we were invited to think of the good and bad options open to us as well as to the intellectual classical constraints which any decent legal system will impose. As I said to Wolfgang the other day, this was a *Begriffserde*. And Barry's student, Francis Reynolds had taken the point and had begun to lecture in a similar vein. I am disproportionately envious of Francis in this respect but remain grateful to this day for his having picked up the torch and run with it. [It is one of the dark holes at the centre of this paper that I have no knowledge of how F H Lawson lectured and taught but would be willing to hazard a guess that Barry was equally lucky to have had him as a colleague at Brasenose.]

Barry's lectures were what some in Oxford called 'bread and butter' lectures as opposed to what one might call 'high wire'. It is easy to misunderstand this. In my experience bread and butter lectures are extremely difficult to write. At their best they create confidence by setting out an architecture of the topic which may only come from the lecturer's having, after all, done it before, but they also sow the seeds of enquiry by pointing the listener towards the exciting areas off the beaten track. And if they work the listener is inspired to make those enquiries, some of which might become quite frightening. But the lectures have created a 'restoration point', a sort of base camp to which the student can resort when the going gets tough, before making another attempt to push the frontiers of understanding. His lectures were a model of this species. [Brasenose was of course soon to acquire one of the headiest proponents of the high wire. Going to Herbert's lectures was not a good experience if you were having a periodic attack of lack of confidence, though if you had done the prep and were willing to listen to every word, the pickings were rich.]

But the general structure around Barry's work remained. It is easy now to say, but a reaction to this overkill was inevitable, and as I came later to see, intellectually dangerous. The pendulum as usual showed signs of swinging too far the other way. And this is where the book came in. The Fifth Cavalry if ever I saw it.

An Introduction to Roman Law by Barry Nicholas.

The book which revealed Barry's technique to the **outside** world was part of the **Clarendon Law Series**, founded in 1958 and edited by a former Chancery Barrister and philosophy don who had now taken up a job in the Law Faculty. Its founding philosophy was that it was to be **'a general introduction to different fields of law and jurisprudence designed not only for the law student but for the student of history, philosophy or the social sciences, as well as for the general reader interested in some aspect of the law. The aim of the series is to provide not a substitute for legal textbooks but a general perspective of ideas and problems which will make their detailed study more rewarding'**.

The first volume was **F H Lawson's Introduction to the Law of Property**, followed in the *annus mirabilis* of 1961 by books on **Contract, Precedent, Administrative Law, and the Concept of Law** by **P S Atiyah, A R N Cross, and H L A Hart**. [Quite how Herbert managed to smuggle Concept of Law into the series has always puzzled me. Perhaps he was on specially good terms with the General Editor; but that is another story]

But then in 1962 came our book. You knew it was going to be different even before you opened it. This was a man cursed with the longest set of initials of anyone outside the Royal family, but the cover just said **'Barry Nicholas'**: an immediate approachability indicator.

But Barry, unlike The Great Conceptualiser, stuck closely to his brief, by adhering loyally to its general policy. The Preface to the book makes this perfectly clear. It was most definitely not a text book and Barry did not intend his book to replace the existing texts. The contrast with them could not have been more stark. There are no Digest references and this is deliberate. He was putting Roman law into a much more cosmopolitan context, just as his lectures had done. This was to be an evaluative introduction to Roman law, not simply a list of data. Temptations to go further litter the terrain, but the reader is never left fearing that they would lose sight of the path. It is certainly no hagiography of the jurists. Its size was itself an indicator, just 280 pages compared with the books then mainly in use, both of which were well into the 400s. Barry had no need of Churchill's excuse for writing a long letter, that he had had not had time to write a short one.

He came under pressure towards the end of the century to produce a new edition and the pressure was to make it more like the textbooks. On reflection I am sure he was right to resist that, though his fundamental politeness will have caused him to consider it for far too long. He may have been the last contributor to the Clarendon Series to have adhered to the original brief.

Although he had never practised the law, this was also written by a man whom you might have guessed had done just that. This marked him out from far too many Roman law writers who seemed to see the law simply as a philosophical system beset by wire puzzles. Barry saw that it was normative and that results mattered to people. It took Roman law out of ancient history and put it into the timeless world of people having problems which needed solutions acceptable to society at the time. Above all, within the tight constraints of his book, he demonstrated time after time the kind of judgment which should be the highest ambition of all lawyers. I have come across few who have surpassed him in that regard.

I first came across the book in 1963 when I was a BCL student doing the compulsory paper on **Digest 41.1. and 41.2 (the Acquisition of Ownership of Things and the Acquisition and Loss of Possession)**. I remember reading this book first every week to give me a conceptual and practical framework within which to construct my own picture. I came in for some scorn from my fellow students who could not understand why I was reading an undergraduate book. I remember then telling them that the skills needed to write even exposition at this level were worthy of much admiration, but it was not just that. It was a bread and butter book *par excellence* and it gave me extra courage when I ventured into the unknown. **The Introduction to Roman Law** was my Theseus' thread in the cave of the Minotaur. I do remember likening it to **Littleton's Tenures** of 1481, an even smaller book, which contained a phrase which struck me as being the essence of a good student book. Littleton told his reader, that he had sought to explain the '**arguments and reasons**' of the law. There can be no higher ambition and to do it in a short space ranks even higher in the way of achievement. Reading the book did not have the magic of being in the same room as this immensely clever and thoughtful man, watching for the smile or the puzzled raised eyebrow [or two] but it was the next best thing.

You may now understand why I at least am pleased there was no second edition. The academic world had need of this book and still does and I cannot be the only one who will have defended the compulsory first year paper with its wonderfully designed Honoré syllabus because of the inspiration I have received from it. So, taking my cue from Bach's Magnificat, I end as I began. No Barry Nicholas, no first year Roman law. No first year Roman law, little or no Roman law in the BA or the BCL. His input into keeping the study of Roman law alive in the second half of the twentieth century is very great indeed. He was the essential catalyst.

I know the Principal has forbidden me from saying this before dinner, but Barry Nicholas was also one of the most respected and admired and liked of all the work colleagues I have ever had. He was also one of that rare group of lawyers for whom my wife had unqualified affection. So if this disobedience means I lose my supper, I will have to bear that with such fortitude as I can muster.