

PETER BIRKS AND COMPARATIVE LAW

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[See table of contents](#)

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Article abstract

This paper studies aspects of the thought of Peter Birks in relation to comparative law, Roman law, legal scholarship and legal education. Birks valued comparative law, and thought that it could be more thoroughly integrated into research and teaching in law. About Roman law, however, he was passionate. He viewed it as a fascinating object of study and reflection, and as an essential part of undergraduate legal education. He deprecated the decline of Roman law as part of the law school curriculum. In this paper, I suggest that one reaction to the decline of Roman law in legal education could be a more comprehensive embrace of comparative law. If comparative law were integrated carefully into the curriculum, it could bring to students all of the benefits that Birks found in the study of Roman law.

## ARTICLE

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### PETER BIRKS AND COMPARATIVE LAW

par Lionel SMITH\*

*Cet article examine quelques aspects de la pensée de Peter Birks en ce qui concerne le droit comparé, le droit romain, la recherche et l'enseignement en droit. Birks avait le droit comparé en haute estime et pensait qu'il serait bénéfique de mieux l'intégrer dans la recherche et la formation juridique. Quant au droit romain, il en était passionné. Il le concevait comme un objet d'étude et de réflexion fascinant, et comme un élément essentiel de l'enseignement du droit au premier cycle. Selon lui, le déclin du rôle de droit romain dans le cursus était déplorable. Dans ce texte, je suggère qu'en réaction au déclin du droit romain dans l'enseignement du droit, une place plus systématique devrait être faite au droit comparé. Le droit comparé, s'il était intégré soigneusement dans le cursus, pourrait rendre aux étudiants tous les avantages que Birks avait trouvés dans l'étude du droit romain.*

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*This paper studies aspects of the thought of Peter Birks in relation to comparative law, Roman law, legal scholarship and legal education. Birks valued comparative law, and thought that it could be more thoroughly integrated into research and teaching in law. About Roman law, however, he was passionate. He viewed it as a fascinating object of study and reflection, and as an essential part of undergraduate legal education. He deprecated the decline of Roman law as part of the law school curriculum. In this paper, I suggest that one reaction to the decline of Roman law in legal education could be a more comprehensive embrace of comparative law. If comparative law were integrated carefully into the curriculum, it could bring to students all of the benefits that Birks found in the study of Roman law.*

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### **TABLE OF CONTENTS**

<b>I.</b>	<b>Introduction .....</b>	<b>195</b>
<b>II.</b>	<b>Peter Birks and Comparative Law .....</b>	<b>196</b>
<b>III.</b>	<b>Peter Birks and Roman law .....</b>	<b>198</b>
<b>IV.</b>	<b>Comparative Law as Roman Law? .....</b>	<b>203</b>
<b>V.</b>	<b>Conclusion .....</b>	<b>208</b>

## I. Introduction

Peter Birks was a distinguished academic lawyer who was renowned as a scholar, in the fullest sense of that word that captures the advancement of human understanding; the teaching, training and guidance of undergraduates, postgraduates and colleagues; and the taking of leadership in the governance of the university and of the wider academic community. During his lifetime, he was an enormously influential figure, who worked actively in several fields of law, most notably English private law (especially the law of unjust enrichment) and Roman law. He was also preoccupied with legal education, in both the academic and the vocational stages, and with respect to the proper relationship between the two stages<sup>31</sup>. Birks once made an admiring jest about Tony Honoré:

Brilliant and prolific, he could have been a professor of law in any number of sub-disciplines. On his election to the Regius Chair he already enjoyed an international reputation, not only in Roman law and Roman-Dutch law, but also in legal philosophy and the law of trusts. Some misguided scholar of the future, inverting the theory that

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1. For some accounts of Birks's scholarly achievements, see Andrew BURROWS, "Professor Peter Birks QC, DCL, FBA" [2004] *Restitution Law Review* ix; Gerhard DANNEMANN, "In Memoriam Peter Birks" (2004) *Oxford U. Comparative L. Forum* 2 at <ouclf.iuscomp.org>; Geoff LINDSAY, "Vale Professor Peter Birks" (2004) 25 *Australian Bar Review* 99; Eric DESCHEEMAEKER, "In Memoriam Peter Brian Herrenden Birks" (2004) 56 *R.I.D.C.* 961 (in French); Lionel SMITH, "In Memoriam: Peter Birks, 1941-2004" (2005) 41 *C.B.L.J.* 161; and, the most detailed of these accounts, Alan RODGER and Andrew BURROWS, "Peter Brian Herrenden Birks 1941-2004" (2007) 150 *Proceedings of the British Academy* 3. Written in a somewhat different style is the very perceptive article by Gerard McMEEL, "What Kind of Jurist was Peter Birks?" [2011] *Restitution Law Review* 15. McMeel studies a number of intellectual influences on Birks, and identifies phases in his writing, before assessing the extent to which Birks could be described as partaking of different schools of thought. Interestingly for my own project, McMeel concludes (p. 36): "... in seeking to understand Birks's intellectual underpinnings, more attention should be focused on his Milsom-inspired philosophy of legal history and his love of Roman law and comparative law."

Gaius and Pomponius were one jurist, will conclude that Honoré was three or four.<sup>2</sup>

This could equally have been said, albeit in relation to different fields, of Birks himself, who succeeded Honoré in Oxford's Regius Chair of Civil Law.

The goal of this paper is to examine Birks's attitudes to comparative law, Roman law, legal scholarship and legal education, and to see what lessons we may draw, particularly for legal education, from this study.

## II. Peter Birks and Comparative Law

Birks had a somewhat tentative attitude towards the ambitions of comparative law. Thanks to Eric Descheemaeker, we have a full list of Birks's publications.<sup>3</sup> In all of them, which make a list taking up over ten printed pages, there is only one case in which Birks's title declares the project to have comparative ambitions<sup>4</sup>. This is his paper "Comparative Unjust Enrichment" in the volume of essays that Birks co-edited with Arianna Pretto in honour of Bernard Rudden, who was for many years the Professor of Comparative Law in Oxford<sup>5</sup>. Rudden was also greatly admired

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2. Peter BIRKS, "Roman Law in Twentieth-century Britain" in Jack BEATSON and Reinhard ZIMMERMANN (eds.), *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain*, Oxford, Oxford University Press, 2004, p. 249, at page 257.
  3. Eric DESCHEEMAEKER, "The Publications of Peter Birks 1969-2005" in Andrew BURROWS and Lord RODGER OF EARLSFERRY (eds.), *Mapping the Law: Essays in Memory of Peter Birks*, Oxford, Oxford University Press, 2006, p. 641.
  4. I note, however, that the titles do not always reflect the content. For example, Peter BIRKS, "At the Expense of the Claimant: Direct and Indirect Enrichment in English Law" in David JOHNSTON and Reinhard ZIMMERMANN (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge University Press, 2002, p. 493 is a text which makes frequent reference to German solutions.
  5. Peter BIRKS, "Comparative Unjust Enrichment" in Peter BIRKS and Arianna PRETTO (eds.), *Themes in Comparative Law In Honour of Bernard Rudden*, Oxford, Oxford University Press, 2002, p. 137.

by Birks, who said, “For most of us his example is utterly intimidating.”<sup>6</sup> He went on:

This chapter is therefore offered with respect and affection, but not without considerable trepidation. Yet Bernard Rudden himself would be the first to assert that it is important not to be intimidated. Comparative law must not be a mystery shared by the very learned or kept within a closed circle of professional comparative lawyers. The value of their work is only realized when it trickles down to the rest of us. It has to be integrated into the teaching of domestic law and thence into the thinking of all lawyers. Openness to lessons to be learned from other systems need not entail constant comparison of matters of fine detail; nor need it involve doubling the length of every book or course. The benefits of a comparative approach begin to flow as soon as we begin to tap into the corpus of specialist comparative learning.<sup>7</sup>

This passage says a lot. Referring to “professional comparative lawyers” and “their work”, as against “the rest of us”, it clearly seems to say that Birks did not consider himself to be a comparative lawyer. However, it plainly states a view that such work is of great value to all jurists; and the reference to “every book or course” shows that he viewed comparative perspectives as valuable, not only in research but also in teaching. Towards the end of this text, Birks said something about the goals of comparison:

The aim is not to borrow. It cannot be too much emphasized that the goal of comparison is not transplantation. Its utility is merely that it deepens analysis and accelerates understanding. Practical development of the law occurs, not through borrowing, but through the clearer vision that comes with better understanding.<sup>8</sup>

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6. *Id.*, 137.

7. *Id.*, 137.

8. *Id.*, 151.

The concern here is that each tradition must develop according to its own genius, albeit it can learn from others; “transplantation” and “borrowing” are denounced as being contrary to this kind of development. The same concerns can be seen in a powerful passage from his last book, whose second edition was published after his death:

One point important to emphasise is the Englishness of what follows. Nationalism is always out of place in legal thought and argument. When it does push in, it always strikes a note which is either absurd or repulsive or both. The assertion of Englishness is not an outburst of chauvinism. It is merely a warning that, although the no basis approach is very civilian and although there is now guidance to be obtained from civilian jurisdictions, what has happened is not a passive reception of German or French law to fill a vacuum.<sup>9</sup>

For Birks, comparative law was useful and important. It can help jurists to improve their own legal systems, by providing new ideas and new ways of looking at difficulties. In the same way, the study of another system may help the jurist to see that a proposed solution or approach has already been tried, and has perhaps revealed difficulties of its own. However, transplantation or passive reception of another system’s solutions is to be rejected, as contrary to the whole tradition of the incremental development of a legal system, according to its own way of solving problems with its own intellectual resources.

### **III. Peter Birks and Roman law**

I begin this section with two quotations. One is a recollection of Andrew Burrows, who was Birks’s student and later his colleague. In this passage, which forms part of his address to the memorial service for Birks, Burrows recalls being interviewed for a place to study law as an undergraduate at Brasenose College, Oxford. The

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9. Peter BIRKS, *Unjust Enrichment*, 2<sup>nd</sup> ed., Oxford, Oxford University Press, 2005, p. 128.

interview was conducted by Birks and his colleague, Paul Davies. Burrows recalls that Davies began the interview with some general questions, and goes on:

Peter said nothing during those first ten minutes but I was very conscious of him sitting restlessly on the settee. Then suddenly, pushing his hand back through the mop of hair that he then had, he said this. "I am a Roman barber. I have set up stall in an open square. As I am shaving the beard of a customer, my hand is knocked by a ball kicked by boys playing nearby and I slash the face of my customer. Should I, the barber, have to pay compensation to the injured customer?" I cannot recall what answer I gave but I vividly remember the feeling of nervous excitement as whatever I said and whichever way I turned Peter was there firing another variation at me as we explored aspects of negligence and causation and volenti.<sup>10</sup>

The second quotation is a passage from the jurist Ulpian, found in the *Digest* of Justinian:

Further, Mela writes that, when some people were playing with a ball, one of them hit it hard and it knocked the hands of a barber, with the result that the throat of the slave, whom the barber was shaving, was cut by the jerking of the razor. In which of the parties does the fault lie? — for it is he who is liable under the Lex Aquilia. Proculus says the blame is the barber's, and surely, if he was doing the shaving in a place where people customarily played games or where there was much going to and fro, the blame will be imputed to him; but it is no bad point in reply that if someone entrusts himself to a barber who has his chair in a dangerous place he has only himself to blame for his own misfortune.<sup>11</sup>

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10. "Addresses" in A. BURROWS AND LORD RODGER, prec., note 3, p. vii.

11. Theodor MOMMSEN, Paul KRUEGER, and Alan WATSON (eds.), *The Digest of Justinian*, 4 vols., Philadelphia, University of Pennsylvania Press, 1985, vol. 1, 9.2.11. In the *Digest* text it is a slave who is injured, because the Lex Aquilia, which was the subject of this discussion, provided recourse for damage to property.



Why was Roman law so important to Birks? Why was he, in a sense, teaching Roman law to a young man who had not even yet been offered a place in law school? There are other ways to discuss, and to teach, issues like negligence, causation, and the voluntary assumption of risk.

There are several places to look for answers to these questions. One of the most fruitful is Birks's account of Roman law scholarship in Britain during the 20<sup>th</sup> century, which was his last published contribution to a collective work<sup>12</sup>. In that text, he tells what he describes as two stories, one of which is happy, the other not. The happy story is of the flourishing of research and scholarship in Roman law. The unhappy story is of the teaching of Roman law. In telling the unhappy story, Birks explained why he thought it was important even for common lawyers to study Roman law in law school. First, it provided a map of all the law, and allowed the student to understand how its different parts fit together<sup>13</sup>. Second, it represented, and therefore inculcated, a commitment to a high standard of rationality<sup>14</sup>. In Birks's view, the way that the Roman jurists reasoned was, and still is, a model for us all. He identified other benefits to studying Roman law, but these two were chief among them.<sup>15</sup>

No one would deny that it is important for the student jurist to have a map of the law, and to understand the importance of legal reasoning. But one could fairly say that there are other ways to

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12. P. BIRKS, prec., note 2.

13. *Id.*, 261-2.

14. *Id.*

15. *Id.*, 262-3: "There were other by-products of the *Institutes* course. It kept alive a sense of the great sweep of Western legal history. It ensured that wheels were not constantly reinvented. And ... it gave easy access to the vocabulary and methodology of European private law. To these benefits can be added the fact that the professors of Roman law had a ready-made pan-European network. Long before Erasmus and Socrates [European programs facilitating scholarly mobility] systematized the industry of European exchange, in Tony Thomas's lectures there would appear without warning four or five times a year speakers from universities across the Continent, from Hamburg to Catania and Lisbon to Belgrade. In that network the unity of the Western legal tradition, splintered by codes and damaged by wars, evidently lived on."

reach these goals. A map can be presented and defended on its own terms, in any kind of introductory context; the student does not need to learn the substance of a whole system of ancient law to understand the importance of having a map of the law<sup>16</sup>. As for the high standard of reasoning that is revealed in the Roman sources, it is of course admirable, but Birks would certainly have agreed that the best of modern law, whether in textbooks or in the judgments of courts, also reveals an exemplary standard of rationality. Indeed, one of his preferred rhetorical devices for bridging the centuries between the best of Roman law and the best of the modern law was to say that “Ulpian could sit in the House of Lords tomorrow, without a moment’s preparation...”<sup>17</sup>

Although he did not say it in this particular text, we do not need to look very far to see that Birks viewed the edifice of classical Roman law, particularly as Gaius organized it in his *Institutes*, as a magnificent intellectual achievement that deserved to be studied in its own right. He once said that Gaius’s *Institutes* constituted “the most influential secular book ever written before the modern age”<sup>18</sup>. And when he co-authored a translation of Justinian’s *Institutes*, Roman law was described as “...the greatest manifestation of legal genius in the Western tradition.”<sup>19</sup> He was willing to acknowledge

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16. Birks himself presented and defended the Institutional map (so called because it is based on the *Institutes* of Gaius that were taken up in the *Institutes* of Justinian) in a few pages in Peter BIRKS, “Introduction” in Peter BIRKS (ed.), *English Private Law*, Oxford, Oxford University Press, 2000, p. xxxv; see now Andrew BURROWS (ed.), *English Private Law*, 3<sup>rd</sup> ed., Oxford, Oxford University Press, 2013.

17. P. BIRKS, prec., note 2, p. 267. He made a similar comment 20 years earlier in Peter BIRKS, “English and Roman Learning in *Moses v. Macferlan*” (1984) 37 *Current Legal Problems* 1, p. 1-2: “... the Roman jurists were, by the standards of all times and places, great lawyers. If you could put Ulpian in the House of Lords tomorrow, he could begin again where he left off. And all we would notice, what seemed impossible, would be that Lord Wilberforce’s place could indeed be filled.”

18. P. BIRKS, prec., note 16, p. xlv.

19. Peter BIRKS, Grant MCLEOD, Paul KRUEGER (eds.), *Justinian’s Institutes*, London, Duckworth, 1987, p. 28. This introduction to the translation goes on to express concern about the downgrading of research and teaching of

that modern law could be as good as Roman law, but not better: “In law the Romans did achieve an excellence which we may equal but do not surpass.”<sup>20</sup> This helps us to understand the relationship between what he told as two separate stories of the destiny of Roman law in 20<sup>th</sup> century Britain, one the story of research, the other the story of teaching<sup>21</sup>. When a body of knowledge constitutes an achievement of that order, it deserves to be studied, and rewards those who study it carefully; and it deserves to be taught, so that the next generation can also benefit<sup>22</sup>. Birks believed in an irrefragable link between research and teaching, which is one reason that he was saddened by the state of Roman law teaching in Britain. In his view, writing in 2004, the tradition of scholarly

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Roman law, which, as we will see, became much more acute for Birks as the years passed.

20. P. BIRKS, “English and Roman Learning in *Moses v. Macferlan*”, prec., note 17, p. 2.
21. P. BIRKS, prec., note 2.
22. Birks never explicitly addressed civilian legal education, but he thought that every student of a Western legal system should benefit from the study of Roman law. P. BIRKS, prec., note 2, p. 263: “The *Institutes* course is still the best possible foundation for the study of the law, for the common lawyer and the civilian alike.” Most modern civilian systems are structured by a civil code, which itself usually reflects the Institutional structure, but as we have seen, it was not only because of its map of the law that Birks favoured the study of Roman law. Indeed he might have thought that the study of classical, uncodified Roman law, frequently characterized in the *Digest* fragments by casuistic reasoning, would give the civilian student an insight into the common law. Birks was very interested in the achievements of S.F.C. Milsom, the great historian of the common law, and in Milsom’s observation that Roman law and the common law represent the only two examples in Western history of the creation of a sophisticated legal system out of custom. See P. BIRKS, prec., note 2, p. 258–60, arguing that English legal historians have goals in common with one strand of Roman law scholarship, namely that which addresses how and why the law’s library of solutions evolved. A careful statement of the preoccupations of this kind of Roman law scholarship can be found in the book review Peter BIRKS, “The Rise of the Roman Jurists” (1987) 7 *Oxford J. of Legal Studies* 444 (reviewing Bruce W. FRIER, *The Rise of the Roman Jurists: Studies in Cicero’s pro Caecina*, Princeton, Princeton University Press, 1985). On Milsom’s influence on Birks, see also G. MCMEEEL, prec., note 1, p. 18–20.

attention to Roman law was imperilled by the steady erosion of its place in the undergraduate curriculum<sup>23</sup>.

Things have not improved since then, and they may have become worse. Roman law remains an obligatory part of first-year legal education at Oxford University and at the University of Cambridge. Elsewhere in Britain, and in other common law jurisdictions, Roman law has a much lower profile. It has not been a mandatory subject for decades, and is not even available as a specialized option in most places. Even in some civilian jurisdictions, such as Quebec, the subject is not a mandatory part of the undergraduate curriculum.

#### **IV. Comparative Law as Roman Law?**

In this section, I will address one possible reaction to the decline of Roman law in legal education. Can the better integration of comparative law into the study of law help us to achieve some of the objectives that Birks thought could be achieved through Roman law? Let me be clear about one thing: Peter Birks did not think of the study of Roman law as a kind of comparative law, and conversely I do not seek to argue that the study of comparative law could take the place that the study of Roman law held, for him, in the curriculum<sup>24</sup>. Anyone who reads his published work will agree that for him, nothing could have taken its place.

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23. P. BIRKS, prec., note 2, p. 260-6.

24. Writing of Barry Nicholas, a scholar of Roman law, Birks said: "... he was a great scholar and of perfect integrity. Everything he wrote endures. When [he was appointed to Oxford's Chair of Comparative Law], comparative law was enriched at Roman law's expense." P. BIRKS, prec., note 2, p. 257. See, however, John Anthony JOLOWICZ, "Comparative Law in Twentieth-century England" in Jack BEATSON and Reinhard ZIMMERMANN (eds.), *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain*, Oxford, Oxford University Press, 2004, p. 345, at page 362: "This is not the place for detailed analysis of the syllabuses of university law faculties, but formerly such comparative law teaching as there was — and there was none at all in many universities — used Roman law as the principal comparator with English, and was commonly restricted to post-graduate, taught degree courses."

But whether comparative law can contribute, in a similar way, to legal education is a different question. H.G. Hanbury also believed that the study of Roman law was an important and preliminary part of a common law education<sup>25</sup>. Writing in the early 1930's, he was able also to argue also that Roman law should be studied in Latin, which Birks thought was not necessary<sup>26</sup>. Hanbury's contemporary reviewer in the United States, Zechariah Chafee Jr., had this to say:

From these ideas [i.e., the possibility of studying in Latin] we are divided by three thousand miles of stormy ocean traversed by our illiterate forefathers. Problems of law teaching are not solved merely by a demonstration that a proposed subject of compulsory study is useful. Even so, it inevitably prevents the student from learning something else. There is only so much time. The decisive test is whether the proposed course, *e.g.*, Roman law, has greater value than that it would displace. In an American law school there are a few brilliant men who, after mastering their own legal system, would profit by learning something of Roman law for the purpose of comparing its doctrines with those they already know. For the bulk of the class, however, Roman law would mean only a smattering of information, learned reluctantly and soon forgotten. ... It seems possible that a good many English law students would be better off if the time required to learn the closed legal system of ancient Rome were devoted, after they had a good knowledge of English law, to a specific portion of some other living law, for instance, that of France or Germany. Even our own law, fallible as it is, might sometimes provide more helpful ideas than the Digest.<sup>27</sup>

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25. Harold Greville HANBURY, "The Place of Roman Law in the Teaching of Law To-day" in Harold Greville HANBURY, *Essays in Equity*, Oxford, Clarendon Press, 1934, p. 141. The text was originally published in [1931] *J. of the Society of Public Teachers of Law* 14, which has the advantage of summarizing (p. 23-5) the discussion that followed the giving of the paper to the annual meeting of the S.P.T.L.
26. P. BIRKS, *prec.*, note 2, p. 265.
27. Zechariah CHAFEE, Jr., Review (1935) 48 *Harvard L. Rev.* 523, p. 531-2. Birks also used the tactic of arguing that just because a mode of legal education was beneficial to the most brilliant, it did not follow that it was beneficial to

Long may live and thrive the study and teaching of Roman law, but Birks, in trying to find the reasons for its decline, arrived at one inescapable truth: “Both styles of Romanist research are nowadays essentially forms of legal history.”<sup>28</sup> He did not accept that this touched its pedagogical functions, but teaching Roman law must always, in a very real sense, be teaching legal history. I firmly believe that nothing, inside or outside the law, can be properly understood without understanding its history<sup>29</sup>. Moreover, the study of legal history, even of one’s own system, can be a kind of comparative law; in comparing the old law to the modern law, the student will see the modern law in a different way. However, this pushes us to ask whether the teaching of the substance of the Roman law is necessary for the achievement of the pedagogical goals that Birks assigned to it.

It may be that he would have accepted that other approaches to legal education could go some way towards alleviating the loss of Roman law<sup>30</sup>. We have already observed that he was positive about the ways in which comparative perspectives could contribute to legal scholarship and legal education<sup>31</sup>. One way of describing why the teaching of Roman law was so important to Birks is that he wanted common lawyers to be able to see the unsystematic common law with the systematic eyes of Gaius<sup>32</sup>. He also wanted them to be

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all students. See for example P. BIRKS, “The Academic and the Practitioner” (1998) 18 *Legal Studies* 397, p. 404: “It is easy to forget that the system cannot be designed only for those geniuses who are proof against every disadvantage.”

28. P. BIRKS, *prec.*, note 2, p. 266.

29. For a profound elaboration of the importance of understanding legal history for understanding the modern law, see Reinhard ZIMMERMANN, “Roman and Comparative Law: The European Perspective” (1995) 16 *Journal of Legal History* 21.

30. There is a telling sentence in P. BIRKS, *prec.*, note 2, p. 260, speaking of those in the academic and professional branches of the profession who brought about the decline of Roman law in the curriculum: “Scarcely surprisingly, since they failed to grasp the role of Roman law in the curriculum, they took no pains to put something in its place to do the same work.”

31. *Prec.*, note 7.

32. This, indeed, was the project in P. BIRKS, *prec.*, note 13: all of English private law, arranged on a scheme derived from the *Institutes*. See the review in

ready to analyze the common law, or any law, with the rationality that was represented by the writings of Gaius, Ulpian, Papinian and the other Roman jurists. There is an argument to be made that one of Birks's most lasting achievements will be the school of thought that he fostered, through his postgraduate teaching and the example of his own scholarship. This is precisely a school of thought that turns a civilian systematizing rationalism onto the raw materials of the common law tradition.

But if we focus on the undergraduate curriculum, we recall that Birks wanted students to have an early exposure to these habits of thought; he wanted undergraduates to study the Roman scheme at the start of their legal education, so that they would be able to see the common law with civilian eyes throughout their legal education.

Let us imagine that every law teacher looked at the discipline of law as one that transcended national boundaries. Let us imagine that students were taught law in this way, from the beginning of their legal education. Let us imagine that they were exposed to the common law and the civil law traditions, not through upper-year optional courses studied by a small minority, but as two equal and equally important contributions to legal thought. The *range* of systems is not an essential consideration; no one who studies the common law thinks that it is necessary to know the differences between and among the laws of British Columbia, Florida, and the Republic of Ireland on a given point. In the same way, an exposure to the modern civilian tradition does not require any detailed understanding of the differences between and among the laws of Japan, Brazil and Italy. Two things, however, are essential to achieve the objectives that Birks had in mind.

One is *plurality*: the student needs to learn, before legal chauvinism has a chance to set in, that there is a multiplicity of legal traditions, even in Western society, to say nothing of the rest

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Nicholas KASIRER, "English Private Law, Outside-in" (2003) 3 *Oxford U. Commonwealth L. J.* 249.

of the world. To achieve this, it is not necessary to study five or even three legal systems. Two is enough to show that the world contains more than one. And, if the teaching be done well, two is enough to exclude the arising of the habit of thought that one system has all the answers, all the flexibility, all the creativity, with other systems being always second best, if not worse.

The other is a degree of *depth* in relation to legal traditions and legal cultures. It is this that allows the student to avoid the kind of unsophisticated borrowing against which Birks warned. It is also necessary if students are to have a chance to realize that each tradition has different but comparably powerful resources for evolution and development. Accomplished comparative lawyers might usefully study the approaches of a whole range of systems to some particular issue, such as liability for pure economic loss caused by poor professional advice. For first year students, a narrow focus of this kind could be worse than useless, because it does not allow them to understand that a legal tradition involves a way of looking at law and legal problems. Reading a few articles from a civil code can be as misleading for a common lawyer as reading a common law case or two can be for a civilian. The requirement of depth is exactly why Birks thought students should study the substantive Roman law in what he called the *Institutes* course. Every legal tradition has a system of thought and a legal culture<sup>33</sup>.

Robert Warden Lee was an Englishman who was the Dean of McGill's Faculty of Law from 1915 to 1921. During this time, he implemented a number of curricular innovations, particularly in relation to the teaching of common law and civil law together, and strove to promote the role of the university in legal education, at a

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33. There are, of course, linguistic challenges in such an endeavour; but they are probably less than those involved in the study of Roman law. A great deal of excellent material is available in translation. For those who teach and learn in English, it should also not be forgotten that there are places where the civil law is studied and practised in English, meaning that original source materials are in English.



time when the professions dominated the process<sup>34</sup>. He left to take up the position of Rhodes Professor of Roman-Dutch Law in the University of Oxford, which he held for 36 years. My argument in this section, that the study of comparative law can be as valuable a part of legal education as the study of Roman law, can be summarized in a sentence uttered by Lee in 1931, at a meeting of the Society of Public Teachers of Law: “No human being was so narrow in his outlook as the lawyer who knew nothing of any system but his own.”<sup>35</sup>

## V. Conclusion

It may be, as Peter Birks feared, that the teaching of Roman law as part of undergraduate legal education is in decline. It need not be the case that what Birks valued about the teaching of Roman law needs to go with it.

“The word ‘academic’ stands for taking things seriously, getting to the bottom of them and finding out the truth.”<sup>36</sup> The academic study of law must involve the study of law as a just and fitting way of regulating human interaction. The jurist’s contribution to the human world transcends time, place and language, and this is why a legal education that addresses only a single legal system is not complete.

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34. See Roderick A. MACDONALD, “The National Law Programme at McGill: Origins, Establishment, Prospects” (1990) 13 *Dalhousie L.J.* 211, p. 248-56.

35. H. HANBURY, *prec.*, note 25, p. 25. See also Robert Warden LEE, “The Place of Roman Law in Legal Education” (1923) 1 *Can. Bar Rev.* 132.

36. P. BIRKS, *prec.*, note 27, p. 406.