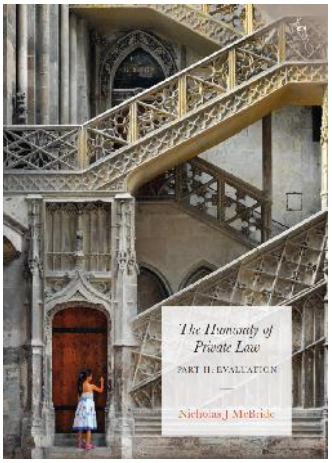
The Humanity of Private Law Part II: Evaluation



Nicholas J McBride

PREFACE

Part I of *The Humanity of Private Law* began by quoting Richard O'Sullivan KC as saying in 1950 that 'The Common Law of England is one of the great civilising forces in the world.'[1] Writing 45 years later, and after listing a long series of moral disasters that afflicted British society in the second half of the 20th century, Anne Glyn-Jones concluded that we live in a civilisation 'which has run its course, which is morally, aesthetically and spiritually bankrupt.'[2] Both views cannot be right. If they were, then it would have to be the case that the common law was one of the great civilising forces in the world *and* the inheritance of the common law's civilising effect was completely squandered in less than half a century. This seems too implausible to be true. Either O'Sullivan was wrong and the common law was not as beneficial as he supposed; or Glyn-Jones was wrong and our civilisation is not in as bad shape as she feared.

As between O'Sullivan and Glyn-Jones, I think Glyn-Jones is closer to the truth and would, in correction of O'Sullivan, say that 'The Common Law of England *sought* to be one of the great civilising forces in the world.' It did so by seeking to promote the flourishing of its subjects (while maintaining the conditions of its own legitimacy). However, the common law's attempt to carry out this project was fundamentally flawed because – as I will attempt to show in the following pages – it adopted a flawed view of what human flourishing entails.

In Part I, I called this view, the 'RP': the *p*icture of human flourishing that most *r*eflective people in modern Western liberal societies would endorse, not least because it is the *p*icture that they *r*eceive from the culture in which they live. According to the RP, someone (S) is flourishing if S: (1) is in good health; (2) is well-educated; (3) is practically reasonable; (4) identifies with the way S's life is going; (5) has friends and a life partner that S cares about, and those friends and life partner are flourishing as well; (6) cares about S's own flourishing; (7) has at least one 'desire of the heart' to pursue some meaningful cause or project; (8) has mastered at least one trade and game that involves some degree of skill; (9) has opportunities to be

[1] O'Sullivan, *The Inheritance of the Common Law* (Hamlyn, 1950), 3.
[2] Glyn-Jones, *Holding Up a Mirror: How Civilisations Decline* (Imprint Academic, 1996), 506.

creative; (10) is free of anxieties about S's future flourishing being impaired; (11) lives in a 'caring society' that seeks to foster the flourishing of all its members; and (12) does not depend on the suffering of others in order to flourish. If (1)-(12) are true of S we can say that S is flourishing according to the picture of human flourishing provided us by the RP – or, more succinctly, that S is RP-flourishing.

Part I claimed that English private law seeks to help us live an RP-flourishing life, a life characterised by the enjoyment of goods (1) – (12). Part II will argue, however, that the idea that human flourishing consists in the enjoyment of this combination of goods is illusory. Moreover, the fact that our civilisation is founded – via institutions like private law – on a false picture of the nature of the human flourishing is the root cause of the legions of chickens coming home to roost that Glyn-Jones catalogued so exhaustively. The first three chapters of Part II seek to make out this argument.

Chapter 8[3] measures the RP against four postulates about human flourishing – propositions about human flourishing which I cannot prove to be true, but which I think we have good reason to accept – and finds it wanting. Instead, Chapter 8 sets out a quite different understanding of what human flourishing involves, based not on what you *have* in your life but on the *direction* in which your life is heading. I will argue that this 'journey model' of human flourishing has a much greater chance of satisfying our four postulates about human flourishing than any other model. Chapters 9 and 10 will flesh out the alternative vision of what human flourishing entails that was sketched in Chapter 8. Chapter 9 argues that human flourishing involves *someone's being engaged in a quest to lead a truthful life* (what I will call, more succinctly, 'QTL-ing'). Chapter 10 vindicates Chapter 9's claim that human flourishing consists in QTL-ing by testing it against the view of human nature that was introduced at the end of Part I: that we are the beings that are aware (or are capable of being aware) that we participate in Being.[4]

Chapter 11 turns back to private law and asks what would private law look like if it were based on the view that human flourishing consists in QTL-ing? The unsurprising answer is: very different. The most obvious difference will be over what kind of harms private law seeks to protect its subjects from suffering. A private law that seeks to foster RP-flourishing will seek to protect people from suffering the loss of goods such as health, wealth, and property. A private law that identifies human flourishing with QTL-ing will be far more concerned with protecting people's ability to interact properly with reality, and will as a result seek to protect people's attention capacities, self-image, and attitudes towards other people from being damaged or distorted. A private law that is concerned to promote QTL-ing will also be far more concerned to protect people's freedom of speech than our RP-flourishing-centric private law has proved to be.

Chapter 12 concludes by asking – Should the rules and doctrines of private law be altered so that they give effect to the more authentic vision of human flourishing set out in this book? Unlike many other private law

[3] The chapter numbers follow on sequentially from those in Part I.

[4] McBride. *The Humanity of Private Law, Part I: Explanation* (Hart Publishing, 2019), 262-65.

scholars, who would like to see their vision of private law implemented today, if not yesterday, I will answer this question in the negative, for the time being. The reason for my reticence is rooted in the fact that you can only be *helped*, and not *made*, to flourish as a human being – flourishing as a human being is like reading, sleeping or eating: it is ultimately something you have to do *yourself*. In the same way, you cannot be helped to flourish as a human being according to a vision of human flourishing that you do not yourself accept. This creates a fundamental democratic limit on what vision of human flourishing private law can base itself on: it can only base itself on the vision that is accepted by a large majority of its subjects. And it is obviously the case that the vast majority of the subjects of English private law do *not* identify human flourishing with QTL-ing, but instead identify it with the RP.

It follows that a renewal of private law along the lines proposed in this book must await a more fundamental renewal of people's views as to what human flourishing involves. If we are to avoid proving Glyn-Jones right, the need for us to think again as to what it means to live a good life is urgent, and our only hope of being part of the first civilisation in history that took itself to the precipice of ruin and turned back, rather than throwing itself over the edge. This book will have achieved its purpose if it improves the odds of our undergoing such a revolution in the head, as well as providing readers a glimpse of what English private law might look like in future should we find our way out of the dark woods in which we have lost ourselves.