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BOOK REVIEW

The Humanity of Private Law – Part II: Evaluation

by Nicholas J McBride. Oxford: Hart Publishing, 2020, 200pp (£70 hardback). ISBN: 978-1-50-991199-8.

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In *The Humanity of Private Law – Part I: Explanation*,[1] Nicholas McBride argued that underlying the rules of English private law is a vision of human flourishing, which he calls the RP (because it is both the 'received picture' and the 'reflective picture' of human flourishing in the West). McBride tabulates the RP in *Humanity of Private Law I* at p 107. The RP, he claims, includes not only John Finnis's basic goods but also a wide range of secondary and tertiary goods. Such goods include goods which are fragile (eg a rewarding occupation) and competitive (eg private property) but the RP asserts that flourishing includes not only possessing these goods but being secure in one's possession of them.

In my review of that book,[2] I examined McBride's success in his Herculean task of seeking to demonstrate that such a picture can be discerned in the reasoning and assumptions of common law judgments.

In *The Humanity of Private Law – Part II: Evaluation* (2020), McBride seeks to defend two further claims: first, that the vision of human flourishing the RP proposes is false; and, secondly, that private law could look quite different were it to promote instead the alternative vision of human flourishing he puts forward. McBride the Herculean interpreter of the common law now takes up the mantle of Moses: both Moses the law-giver but first Moses Maimonides the philosopher.

In chapter 8 (the first chapter of Part II, as the numbering is continuous between the two Parts), McBride contends that a vision of human flourishing must satisfy four postulates: (P1) human flourishing must be within reach of any human being not only a privileged elite; (P2) human flourishing is vulnerable to harm by external events; (P3) human flourishing is, in and of itself, a good thing; and (P4) human flourishing must be capable, in most circumstances, of being self-sustaining over time and across persons. McBride offers the postulates for our intuitive assent (p 6), accepting that 'there is no way … to *prove* that everyone *should* accept that *all* of these propositions are correct' (original emphasis).

McBride is convinced the RP must be wrong because the external circumstances it requires are such that only a privileged elite will enjoy a flourishing life and they will necessarily do so at the expense of others (violating his first postulate) and because it is not self-sustaining (breaching his fourth postulate) – if the West continues to pursue its current vision of the good life, the planet will be destroyed.

In the latter part of chapter 11, McBride suggests reasons why the RP has come to be so widely accepted, notwithstanding its severe defects. He observes how recent developments in the cost of litigation and cuts to legal aid have exacerbated the inherent bias of precedent-based legal systems towards the interests of their repeat players. The result, already evident in Hazel Genn's 2008 *Paths to Justice* survey, and far worse in the aftermath of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, is that 'private law exists for the benefit of the interests of companies and the comfortably off, and not for the benefit of ordinary people' (p 162). The RP is in fact a vision of human

[1](Oxford: Hart Publishing, 2019).
[2]At (2020) 40 Legal Studies 527.

flourishing sustained by those companies who wish to sell us products which either promise us security or distract us from the reality of existence.

In chapter 9, McBride argues against the RP that human flourishing consists not in the possession of certain goods but in the quest for the truthful life (QTL for short – and set out in tabular form at p 107). For McBride, the quest for a truthful life is about something far richer and more challenging than simply aiming to be true to oneself. A truthful life is, in McBride's view, one which is committed to making as deep a connection as possible with reality. In philosophical terms, McBride argues in chapter 10, it means discovering that we are beings participating in Being. A human being flourishes if their life is going in the right direction, if they are making progress on a quest towards living a life connected to reality.

By the mid-point of Part II, McBride therefore wants his readers to see that the QTL offers a quite different account of human flourishing from the RP. Whereas the RP says that flourishing requires the secure possession of an extensive range of goods only a privileged minority can acquire, the QTL regards life as a journey of discovering connectedness and reality in principle open to all. If the contemporary shape of private law promotes the RP, one would therefore expect McBride's proposals for private law founded on the QTL to be quite radical.

In the first half of chapter 11, McBride sets out a series of additions to private law including rules against being placed in an attention well (being distracted by technology and other addictions from connecting to reality), being induced into a false view of reality (eg gas-lighting or the belief that one is worthless), being made vulnerable to hatred (because of wrongs causing severe emotional harm such as being betrayed, suffering the death or rape of a close relative or breach of a promise to marry), and being forced to work in ways that inhibit the development of truth-seeking virtues (including as an academic subject to managerialism). Such changes to the law emerge, McBride argues, from asking two questions: (1) what sorts of events get in the way of someone's QTL-flourishing? and (2) how should the law respond to those events? (p 164).

McBride's proposals are tentative, as he acknowledges that he has 'found it very difficult to break free of the categories and habits of thought' generated by '30 years thinking … about a private law that is concerned to foster RP-flourishing' (p 109). What struck the present reviewer was how little of existing private law McBride would abolish even if QTL-flourishing were to be the objective private law pursued.

Given the limited nature of the reforms McBride puts forward, it is therefore a considerable surprise to find him arguing, in the final chapter of *Part II*, that judges must, for the time being, continue to decide cases with a view to the RP rather than QTL.

In the final chapter, entitled 'The Limits of Democracy', McBride argues that although QTL flourishing is obviously superior to, and offers the possibility of flourishing to far more people than RP does, so long as the majority of people envision flourishing in RP terms, judges should continue to take decisions with a view to promoting RP rather than QTL flourishing. Although he argues that judges should aim to develop the common law in ways that 'would make things go best' (p 169), McBride nonetheless contends that decisions promoting QTL flourishing will be futile or alienating 'until there is a general change in social views as to the nature of human flourishing' (p 170). McBride's reason for this surprising admission is his conviction that human flourishing, 'like eating or sleeping or reading' is something you have to do for yourself (p 187). People must identify with their ideal of human flourishing; it is no use the courts trying to impose a different ideal upon them.

McBride's trepidation is surprising given the limited nature of the reforms he has put forward. Although McBride contends that private law currently seeks to foster RP-flourishing, it does not render a person's possession of its chosen goods secure against all disaster. Negligence, rather than no-fault liability, is the usual standard before any compensation over and above the limited social security payments is available to the victim of an accident. Such a standard would also continue to apply were private law to pursue QTL flourishing instead (see McBride's comments at p 117). From a QTL perspective, admitting that one has failed to take reasonable care may be an important means of connecting with the reality of one's actions.

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It would seem to be strongly arguable that large parts of private law (and the law of negligence is undoubtedly one of its most significant contemporary features) are underdetermined – compatible to a significant extent with both the RP and the QTL. This raises the prospect that what has gone wrong with English private law is not so much that its rules are only compatible with the RP but rather that it is operating within a culture in which people mistakenly assume: (1) that to flourish as a human it is necessary to possess the exhaustive list of goods the RP identifies; (2) that consequently there is an ex ante entitlement to those goods; and (3) that our enjoyment of those goods ought to be permanently protected.

Moreover, there are reasons to believe that McBride is wrong in his claim that subjects have to begin to identify with QTL-flourishing before private law can assist them to realise it. In the context of the crucial discussion on p 187, he correctly observes that 'no government can *make* its subjects flourish as human beings; all it can do is *assist* them to flourish by creating the right conditions within which people can do what they need to do to flourish as human beings' (original emphasis). What McBride fails to do is to give sufficient weight to the way in which governments can assist their subjects to flourish as human beings by sending signals through law and through the legal system about what sorts of human flourishing are recognised and what approaches to human flourishing are mistaken. It may be that radical signals such as updating pre-1925 patterns of English land law which demonstrated what intergenerational solidarity entailed, adopting the French concept of *patrimoine*, or even emphasising the temporary nature of our possessions through regular debt-forgiveness and land re-distribution are best left to governments rather than judges. That is, however, a point about the respective parts governments and courts have to play in a democratic constitution; it is not a demonstration that law's signals are impotent.

Having said all that, there are reasons to doubt the extent to which private law could ever depart from its preoccupations with temporal goods. A person who is on the quest for a truthful life will recognise that safety and security are only ever temporary and relative. To keep moving on a journey necessarily involves risk, with the possibility of tragedy the price of discovery. But for that journey to be viable, as McBride accepts, there have to be safeguards against being robbed along the way. Whereas public law seeks to provide conditions in which flourishing is a possibility, private law compensates if one person's enjoyment of goods (understood in the broadest sense) is interfered with by another. That focus on goods cannot be replaced by a focus on truth without remainder. It therefore seems likely that even in a system of private law designed to promote QTL flourishing, there would be some, possibly many, who would fixate on RP flourishing instead.

All this notwithstanding, *The Humanity of Private Law* is a tour de force. It illuminates the vision of human flourishing which has been promoted in our neo-liberal, consumerist economy, argues that this ideal has infused private law, and presents the outline of a challenging alternative. It is an indispensable text for any private law scholar prepared to hold up to the light the intuitions which judges and the wider community have about what makes for a good life and how it should be promoted and protected.

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