BOOK REVIEW

THE POLITICS OF THE COMMON LAW: PERSPECTIVES, RIGHTS, PROCESSES, INSTITUTIONS

By Adam Gearey, Wayne Morrison and Robert Jago, Routledge, London, 2013, 362 pages

Richard J Scragg*

In 2009 Gearey, Morrison and Jago published a remarkable book, *The Politics of the Common Law*. This year they have published a second edition, in which they have refined their ideas further. This is a book of interest to common lawyers throughout the world.

The new edition is shorter than the first, 362 pages compared with 416 originally, although at 17 chapters it contains one more than the original. In terms of the authors refining their ideas, there has been much rewriting and restructuring of material with chapters renamed accordingly, where appropriate: chapter 6 in the original, 'Racism and Law: "No Dogs, No Blacks, No Irish"' has become chapter 5 in the second edition, 'The postcolonial, the visible and the invisible: the normal and the exceptional'.

The book is of particular interest to New Zealand lawyers because New Zealand figures prominently in it. In addition, although it is an "English" book it is about the common law and what it says about the common law applies wherever the common law exists around the world. This reflects the experience of the authors. Professor Gearey of Birkbeck College, University of London, has also had visiting professorships in Uganda, South Africa and Costa Rica and been a visiting fellow at the University of California, Berkeley. Robert Jago is Deputy Head of Law at the University of Surrey and teaches Public Law at Hong Kong University's School of Professional and Continuing Education. Wayne Morrison provides the New Zealand connection. A University of Canterbury graduate, he is a Professor of Law at Queen Mary, University of London and for many years was the Director of the University of London's International Programmes for Law, a position which gave him teaching experience throughout the common law world. Chapter 3 of the book, "As a system…the common law is a thing merely imaginary" begins in a lecture theatre at the University of Canterbury in Christchurch in the 1970s.

The book is constructed around three themes. The first is a concern with legal culture in a context of a post-colonial world. The second concerns the politics of the judiciary and the legitimacy of the common law. The third "confronts the material realities of civil and criminal procedure".

* Teaching Fellow, School of Law, University of Auckland

The overarching theme is found in the title of the book, "The Politics of the Common Law". The authors quote Sir Stephen Sedley, writing extra-judicially:

> … the subsequent reassertion of judicial oversight of government which has been the achievement of the 1970s and 1980s in this country has been replicated all over the common law world as judiciaries have moved to fill the lacunae of legitimacy in the functioning of democratic polities.

This goes to the heart of the book. Parliament, democratically elected, is dominated by the will of the Executive, even in New Zealand under MMP. This can place human rights under threat, something which has become acute in Britain since 9/11 and the London bombings of 7/7, where terrorism has become manifest and government has adopted measures to combat it. In this environment it has fallen to the judiciary – appointed officers, not elected representatives of the people - to uphold the Rule of Law to protect the rights of the individual. This has given rise to a tension between the Executive and the courts, the politicians and the judiciary. As the authors put it, "The re-assertion of the judicial scrutiny of the executive represents an important reinvention of democratic politics".

As Lord Steyn has said, in reality, our political system gives us "an elected dictatorship".

The book's theme concerning legal culture focuses on legal pluralism in the post-colonial common law world and in this context the authors discuss *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72 and make the point that the denial of Māori laws and practices in that decision was extremely convenient for the Crown: "native title matters involving the Crown now fell entirely within the jurisdiction of the Crown's prerogative powers, and so were outside the jurisdiction of the municipal courts". This meant the Crown became sole arbiter of its own justice on native title matters. Here the politics of the common law denied legal pluralism but in a post-colonial world, "[T]he common law … must talk polyglot; differently accented as it addresses us as people in our various circumstances". The common law, by its very nature, has the capacity to be a broad Church.

The book's final chapters are concerned with civil and criminal procedure. They are about access to justice, the composition of the judiciary, the creation of a legal system where an ability to seek resolution of disputes reflects the human rights of the citizens.

Throughout the book the authors repeat a technique found in the original edition: the use of "images". These are not merely illustrations, they are included to provoke thinking about the law. One of these images is from the Illustrated London News in 1870 and depicts a "New Zealand war dance of the past". The significance lies in the words "of the past", as discussed in the book.

In terms of "images", a useful addition to the book is an explanation of the photos by Peter Finnemore on the cover of the original and second editions. The image on the original cover is one where, "Against the backdrop of a rural family cottage, two men hold between them the garment of a deceased relative".

On the cover of the second edition there is, "A figure of a man against a grey sky with plastic animals dangling from his hands".

As the authors tell us, this second image contrasts with that of Abraham Bosse's imposing frontispiece of Thomas Hobbes's *Leviathan*: Finnemore's image is "just that of a man", an image that "articulates in a striking way the informing arguments of the politics of the common law".

It must be said that there are a number of typographical errors in the text. On page 112 there appears this sentence: "These statutes income pass and pervade our entire law". Presumably "income pass" should read "encompass". Fortunately the errors do not undermine the very compelling substance of the text, although they are distracting.

How should this book be classified? It is not a Legal System book in any conventional sense of the term. The aim of the authors is to give Legal System and Legal Method, as courses, "coherence, foundations and provocations to creative and critical thinking", recognising the links of these subjects with jurisprudence and public law. It is certainly a stimulating book and deserves a wide audience. Not just law students but anyone with an interest in the common law will find this book thought-provoking.