Book Review

EVOLUTION AND THE COMMON LAW by Allan C. Hutchinson (Author), Cambridge University Press, 2005, x, 294 pp, recommended retail price $79.95 (paperback), $175.00 (hardback).

Who would have thought? A book about the essence of the common law that is both compelling and exciting. When looking over the books available for review, I chose a couple of titles that looked interesting. I mistakenly read the title for Hutchinson's book as 'The Evolution of the Common Law,' and thought that it might be interesting and that at the very least it would be a handy reference with a swath of historical turning points and important cases. I was both right and wrong.

Imagine my dismay when the book arrived and, upon thumbing through it, I saw chapters on Darwinian and Creationist theories. Oh no! I'd chosen a tome that was another kitschy attempt to cast law in the framework of either widely familiar or currently 'hot' themes of physical science. Having a physics background makes the lack of rigour or data or *anything* remotely resembling science in such attempts perhaps more annoying to me than they are to others, but I think the reader will recognize my sinking feeling. I had been suckered into another 'Botany and the Law' product. Then I saw that Gadamer figured in as well. Oh yes, Allan Hutchinson. Isn't he one of those Law and Literature deconstructionist types? Okay, so this would be another earnest (yawn) discourse on how language and law's so-called 'neutrality' operate as modalities of hegemonic oppression.

However, I could not resist just a bit of a read to see exactly how wacky this attempt to be clever would be. I am so grateful I did that. This book is a very serious (and I think successful) attempt to examine the dynamic and evolution of the common law, as the common law, and the normative mind-set of legal practitioners steeped in the methodology and values of the common law which allows that to happen in a sometimes, but not always, functional and socially valuable way. His broader enterprise is to explore the appropriate role of the common law, as he considers it to be properly understood, in a constitutional democracy. As the recently created Supreme Court of New Zealand begins to develop its own nascent and unique common law jurisprudence, this book will be of particular interest for both judges and practitioners.

To 'recast' the common law, the author examines the extant jurisprudential schools of thought relating to it, both those that embrace the common law and those that criticize its coherency as a legal enterprise. He uses both Darwin and Gadamer to elucidate and support his thesis that the common law is indeed the 'work in progress' that we commonly acknowledge it to be. It is, however, neither a noble or rational teleological enterprise progressing towards a good end, as its most avid supporters would claim, nor a systemically oppressive or arbitrary imposition of ideological values as its detractors would claim.

The author engages with current and past scholars and critics of the common law, both in terms of individual jurisprudes and in terms of schools of thought. Approaches to understanding the common law ranging from formalism, positivism, pragmatism, moral realism and naturalism,

and the views of scholars ranging from Bentham and Austin through to Dworkin, Rorty, Posner and Epstein are considered in an integrated fashion as the book progresses.

To present his thesis, Hutchinson first explores what he considers to be a correct understanding of Darwin's theory. There is interesting history here, showcasing the tendency to misuse Darwin's ideas, in law and in other fields, as ultimately teleological (evolving towards perfection) rather than as historic (explanatory of how we got to here, but with no predictive value of what either will or *should* come next). The point is not that things are evolving towards anything better than the last thing, but that evolution is a series of random mutations, some of which persist because they are a better fit for their situational context. Hutchinson likewise uses Gadamer to remind us that language, meaning, and knowledge are situationally contextual. From here, the author argues that any development of the common law is and can only be guided by the situation at hand, rather than by any sort of adjudicative or jurisprudential theory, when judges and practitioners are faced with the problem of doing 'the best thing', all things considered. This is where the common law differs profoundly from evolution, for the changes to the common law are not random and intrinsically amoral, but reflective of considered judgment about what is 'the best thing', morally, politically, and within the particular legal tradition, and for those judgments we have responsibility.

Hutchinson is arguing for the common law to be considered as understandable and theorizable only in a historicized fashion. In the common law, just as with evolution or with meaning, it is only looking back that we can organize in any theoretical fashion what has happened or transpired to bring us to this point. Once at the present, we accept that the common law is not static and is a 'work in progress', and we ought to accept that it is a work that progresses in ways unpredictable by any theories of jurisprudence or adjudication. This, he argues, is not to advocate or embrace the 'anything goes' or post-modernist nightmare. Unpredictable is not synonymous with inexplicable either in nature or in law. In the common law, change is not driven by random chance, but by considered reflection at the margins. Its path is influenced by the very tradition of respecting and understanding the reasons for past wisdom, but is in no way confined by that wisdom, even as it values that past simply for *being* the past and the roots of the present, and as the source of both its meaning and its legitimacy.

He differentiates both Dworkin and Posner, one who sees 'the logical as expedient' and the other who sees 'the expedient as logical', from his own understanding of the common law, and criticizes many scholars' tendency to transpose the 'is' of the common law into an 'ought', without acknowledging that one cannot go from an is to an ought without one's own informed view of the 'ought'. The common law alone does not provide an 'ought', it can only provide an explanation of the past, a source of wisdom and tradition, a potential guide, but never an 'ought'. The 'ought' comes from the situation at hand and from the players' sense of social justice and of 'the best thing' in this political and moral context. This he labels a 'Darwinian-informed pragmatism' or a 'jurisprudence of doubt'.

In a sense, Hutchinson's view (although he would probably disagree) could be considered as a recasting of the legal realists, but in a more constructive fashion. He acknowledges the implicit power dynamics, ideological conservatism, and unpredictable outcomes of the common law, but denies that those outcomes are arbitrary. He uses Gadamer to anchor his quasi-Dworkinesque explication of the common law as an ongoing social and political conversation 'within, over, and across time', and as a tradition that must be respected and understood as a prerequisite for meaningfulness itself, but as one with no predictable 'right' result. It provides people with a

crucial 'sense of what is feasible, what is possible, what is correct, here and now'. That people exist and thrive in tradition does not detract from the fact that 'it is still in the nature of people to be able to break with tradition, to criticise and dissolve it'. He finds the common law's institutional capacity for reflective yet unpredictable change and evolution in response to local circumstances a legitimating dynamic for both itself and for the constitutional democracy in which it is situated.

Constitutional democracies depend not only on procedural bases for their legitimacy but also on substantive bases. It is their substantive actions that ultimately differentiate them from tyranny and oppression. The common law provides an arena for substantive justice to be done, even if tradition dictates otherwise, in an incremental and pragmatic fashion. If the common law is to serve a legitimate role in a constitutional democracy, it is as an arena where protagonists of different ideological viewpoints present their preferences for what best promotes social justice in *this* particular discrete controversy in this particular social and historical context, and for judges to openly to use past and present wisdom and the present social, ideological and economic context to do 'the best thing' for this case. The constitutional democracy provides the background against which the 'evolutionary' change can either thrive and be embraced as a substantively 'better' approach to justice or wither away, as many cases do. The very possibility of achieving incremental social justice through common law adjudication is an important interstitial legitimator of constitutional democracy. This view echoes Dicey's casting of common law as the source of the 'unwritten' English constitution itself, making the book particularly interesting for practitioners and adjudicators operating in the New Zealand constitutional context.

The author, due to his context, examines the dynamics of common law adjudication in the context of constitutional higher law that cannot be easily amended by the democratic legislature due to the provisions of a written constitution. However, whether a constitution is written or not is not the only reason that some court decisions are difficult for democratically elected legislatures to change. While we don't have the added dimension of a formally written, entrenched, and superior law constitution in New Zealand, we certainly have a constitution and a political morality that limits what the democratically elected legislature can realistically do. Those limitations combined with the recent siting of our final court of appeal in our local context and the added legitimacy that brings to their decisions, make those chapters essential reading for us all.

Gay Morgan*

* Senior Lecturer in Law, University of Waikato.