BOOK REVIEW: *THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES*

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E W Thomas The Judicial Process (Cambridge University Press, Cambridge, 2005) (414 + xxvi pages) Hardback NZ$180.

In the belief that too many judges are simply "muddling along" without a sound conception of what their role entails,[1] Justice Thomas (a retired judge of the High Court and Court of Appeal of New Zealand) has written a book putting forward a theory of judicial decision-making whereby:[2]

> Judicial reasoning will be re-invigorated by being less entrammelled by unnecessary and outdated dogmas. It will be at once more realistic and pragmatic, it will be forward looking rather than oriented to the past, it will be more honest and transparent, and it will be more diligent and creative in meeting the particular needs of the society. The legal process will be no less, and even more, disciplined than at present, and no less, and again even more, beholden to a realistic and modern conception of the rule of law.

The book represents the development of Thomas' thinking since an earlier monograph on the subject, but the two pillars on which he bases his theory have remained unchanged:[3] that the demands of justice in the individual case, and the requirement that the law meet society's reasonable needs, be at the forefront of every judgment.

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1 E W Thomas *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, Cambridge, 2005) ch 2.

2 Thomas, above n 1, 270.

3 E W Thomas *A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy* (Monograph 5, VUWLR, Wellington, 1993) 74; Thomas, above n 1, 300.

This is not an "introduction to jurisprudence", but it is deliberately pitched at a level that people can read and enjoy. I must admit that I read most of *The Judicial Process* on the bus to and from work. While it is relatively engaging for a book on a weighty and serious topic, it is still a work of jurisprudence and is always going to struggle for a position on the bedside reading pile. This is not to suggest that Thomas has not kept his book light-hearted and amusing wherever possible. A number of colourful metaphors and examples are referred to throughout including Wagner's *Die Meistersinger von Nürnburg*,[4] Timur the Barbarian,[5] a hypothetical discussion between a judge and his clerks,[6] and a parable involving a drowning man.[7]

After introducing the scope of his book, and submitting that "only a grounding in jurisprudence provides, or is capable of providing, judges with a sound conception of the judicial role, and it is that conception that is basic to their judging",[8] Thomas discusses what he believes to be the current paucity of judicial thinking on a theoretical level.[9] The next six-and-a-half chapters are comprised of criticisms of various theories of judicial decision-making that have risen to prominence over the decades and which he perceives to be outdated, misguided and overly conservative. These include the declaratory theory of law, legal positivism, and natural law theory.[10] By far the most entertaining chapter is that containing Thomas's stinging remarks on "legal fundamentalism", aimed principally against those commentators who cry "judicial activism" at the drop of a gavel.[11]

Another angle of attack employed by Thomas is the critique of methods used by judges under the guise of the common law, but which in his view lead to unjust decisions. The example is given of courts using a strict approach to the doctrine of precedent or *stare decisis* to effectively wash their hands of a case, in situations where there is an arguable need to update and redirect the law. The Privy Council decision of *Lewis v Attorney-General of Jamaica*, in which five of its previous decisions relating to death-row prisoners in the Caribbean were overruled, is then used as an illustration of how precedent should be treated.[12] The dangers of an overly formalist approach to

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4 Thomas, above n 1, 27-29.

5 Thomas, above n 1, 54.

6 Thomas, above n 1, 108-114.

7 Thomas, above n 1, 87-91.

8 Thomas, above n 1, 12.

9 Thomas, above n 1, ch 2.

10 Thomas, above n 1, ch 2.

11 Thomas, above n 1, ch 4.

12 *Lewis v Attorney-General of Jamaica* [2001] 2 AC 50 (PC); see Thomas, above n 1, chs 6 and 7.

legal decision-making,[13] the inherent lack of certainty in the law,[14] and the lack of any mysterious "impersonal" law as distinct from that made by judges,[15] are also discussed at length.

Thomas begins to outline his own theories in chapter nine, which poses the question: "what is law?" However, it was the following chapter in which Thomas discusses the constraints on the judiciary that I found most interesting.[16] Every law student is reminded in their first year of study that the judiciary is not accountable to the public in the same way as the other branches of government, and yet judges, through the machinery of the common law, make law whether they like it or not. How then do we prevent the securely tenured judiciary from spinning out of control and acting like power-mad tyrants? Thomas approaches this question with a refreshingly practical set of arguments, canvassing such points as the supervision of the legal profession and judge's own colleagues through to the judge's sense of his or her relationship with Parliament. The need for a set of criteria for situations where an issue should be "left to Parliament" is also analysed.[17]

Going back to the two pillars mentioned earlier, the task of defining "justice", insofar as that is possible, is undertaken in chapter 11, and the New Zealand case of *Fletcher Challenge Energy Ltd v ECNZ Ltd* is used as an example of a case in which justice was clearly not done.[18] In that case a heads of agreement between two commercial entities was held to be a legally valid contract, but for the fact that the parties did not intend to be bound by it – a finding that flies in the face of common business practice.[19] As an aside, this is not a book worth reading if one's only interest is in the politics of the New Zealand judiciary. Although the subject is raised very briefly (and then only by way of an example),[20] the work is pitched at an "international" audience of readers and is not specific to New Zealand.

The chapters focussing on realism, pragmatism, and practical reasoning are more difficult to read, and summarise.[21] One interesting aspect is Thomas's approach to principles within the judicial process, namely that they are "the basic tools among the community of considerations to which the judge will have regard in arriving at a decision. By their very nature they warrant pre-eminence in

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13 Thomas, above n 1, ch 3.

14 Thomas, above n 1, ch 5.

15 Thomas, above n 1, ch 8.

16 Thomas, above n 1, ch 10.

17 Thomas, above n 1, 254-265.

18 *Fletcher Challenge Energy Ltd v ECNZ Ltd* [2002] 2 NZLR 433 (CA); Thomas, above n 1, 289-299.

19 See David McLauchlan "The FCE/ECNZ Heads of Agreement: Progress Report or Binding Contract?" (2002) 8 NZBLQ 192.

20 See Thomas, above n 1, 135.

21 Thomas, above n 1, chs 12 and 13.

the reasoning process."[22] But Thomas does not believe that they can be defined with the precision suggested by some other theorists, such as Dworkin.[23] In this area it is Cardozo who is most warmly referenced, as he is throughout the book.[24]

In chapter 14 Thomas makes some conclusions as to what difference the implementation of his theory would make in practice, and states that in many instances it would simply make overt the approach that many judges already follow – whether in whole or in part – in common law jurisdictions the world over. He also envisions a more realistic and pragmatic judiciary, prepared to make substantive changes to the law where necessary without being hindered by outdated, formalist thinking.

With his last chapter, Thomas embarks on a description of his "theory of ameliorative justice".[25] I found this to be the most difficult chapter: instead of a summary of the theory that had gone before it, and a tying up of loose ends, the reader is confronted with 40-odd pages of fresh ideas that do not follow on well from the rest of the book. This is not to suggest that the ideas are not valid or interesting, it is just that presented as an afterthought in this manner they require a separate consideration. The theory is essentially Thomas's reasoning for the emphasis on the second of his two pillars: that law should serve the needs of society by protecting the weaker and less powerful from the stronger and more powerful.[26]

On the whole this is a well written and engaging book by one of New Zealand's most distinctive judges. It was interesting to read a more practical account of how the judicial process should work, presented by a person who has sat as a judge for a number of years at both trial and appellate level. Even Thomas's most severe critic could not deny that he has a wealth of experience to draw on in writing on this topic. As a result his perspective is particularly interesting, especially when criticising a thinker who does not come from a judicial background. The book will be of interest to anyone who likes to think more deeply about the judicial process and the common law, but if time were of the essence, a good look at chapters 1, 2, 4, 10 and 11 would encompass, in my opinion, the pick of the bunch.

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22 Thomas, above n 1, 339.

23 Almost all of chapter 8 is spent in a detailed criticism of Dworkin's theories.

24 Thomas, above n 1, 340; see for further examples 115-116 and 365. Thomas also draws on the more recent work of Feely and Rubin in a number of chapters: Malcom M Feely and Edward L Rubin *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge University Press, Cambridge, 1998).

25 Thomas, above n 1, ch 15; an earlier discussion of this theory is: E W Thomas "The Conscience of the Law" (2000) 8 Waikato LR 1.

26 Thomas, above n 1, 394-395.