Review:
Judicial Ethics in Australia
by The Honourable Mr Justice Thomas

Reviewed by Judge McGuire

He is an intrepid mariner indeed who is so bold as to venture into uncharted waters. Recently, Mr Justice Thomas, a distinguished Judge of the Supreme Court of Queensland, sailed the good ship "Judicial Ethics in Australia" through such water without being shipwrecked. This must be rated a remarkable achievement indeed for he has dared to go where others have been loath to venture. The final product is a veritable vade-mecum for Australian Judges on the thorny question of judicial ethics.

Mr Justice Thomas says that he was prompted—nay provoked—to sally forth on this turbulent course because of his disquiet at the judiciary's loss of public esteem over the past few years. He attributes this loss of esteem to the adverse publicity generated by three cases which achieved public prominence involving members of the judiciary: a High Court Judge, a Chief Magistrate and a District Court Judge.

Australian Judges of Superior Courts can only be removed by Parliament for proved misbehaviour or incapacity. Mr Justice Thomas rejects the notion that "misbehaviour" in that sense must be so extreme as to invoke the criminal law. He adopts the traditional test for determining whether conduct is unprofessional. Conduct will amount to misbehaviour "if it violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency."

As Mr Justice Thomas is at pains to point out, the judiciary is an exposed profession. With rare exceptions, all hearings are public. The ipsissima verba of what passes from the Bench is recorded. The press are entitled to make a fair report of a case. Nearly all decisions at first instance are subject to review by an Appellate Court. A Judge will be careful to see that the trial is fairly and properly conducted if he realises that any unfairness or impropriety on his part will be noted by those in Court and may be reported in the press. As Lord Denning reminds us: "when a Judge sits on a case he himself is on trial. If there is any misconduct on his part, any bias or prejudice,
there is a reporter to keep an eye on him.” Lord Denning describes the press as “the watchdog of justice”.

But there are other checks on a Judge: the appeal’s system, the Chief Justice, fellow Judges and lack of professional esteem. Notwithstanding these inbuilt checks and balances, which traditionally have proved sufficient to remind and discipline an errant Judge, Mr Justice Thomas thinks that, in the light of recent disturbing happenings involving the judiciary, the time has come to investigate the conventions which govern the conduct of Judges on and off the Bench.

Mr Justice Thomas favours the articulation of judicial standards. Indeed, he is not opposed to codifying them. In his book he articulates the standards he thinks should apply to the judiciary lucidly and fearlessly and with palpable honesty of purpose. Nothing escapes his percipient mind. No stone is left unturned except one, namely the method of selection of Judges. He touches on such diverse topics as headline hunting, involvement in public causes, political activity, sexual misconduct, drinking in public bars, use of official letterheads for private purposes, punting, judicial activism, and Judges participating in commissions of inquiry. He even quotes, apparently approvingly, Sir Matthew Hale’s injunction to himself “to be short and sparing at meals that I may be fitter for business.”

For these reasons, amongst others, Mr Justice Thomas says that “the ethical standards required of our Judges call for perhaps the highest and most rigorous standards, sacrifices and disciplines of any profession”. A Judge must be circumspect in his behaviour both in Court and out of Court.

Mr Justice Thomas glosses over what, to my mind, is an important topic for discussion in such a work, namely the method of appointment of Judges. Whilst recognising that the maintenance of ethical standards and the preservation of public confidence in the judiciary are dependent on governments making appointments on merit only, and that if this policy is invariably adopted it is most unlikely that serious ethical problems will occur, he nevertheless asserts that the topic is “beyond the ambit of this book”. I should like to think that Mr Justice Thomas will return to this vital topic at some later time, for it seems to me, that if a broad consultative process is adopted in the appointment of Judges, serious flaws of temperament, personality and character of a prospective candidate will almost always surface thereby enabling a thorough examination of those defects before a final decision is made.

In 1986 the Lord Chancellor issued a policy statement on judicial appointments. In it he stated that the quality of justice is largely determined by the quality of the Judges who preside. He says: “I am always ready to consider suggestions from any quarter. Our
aspiration is to ensure that the methods of selection are as efficient, fair and open as they can be made, and to maintain the highest possible standards of ability and integrity on the Bench." A guiding principle of the Lord Chancellor’s approach is that, as far as possible, no one person’s view about a candidate, whether positive or negative, should be regarded as decisive in itself, however authoritative or eminent the person giving it. By contrast, the independent view of a spread of observers and colleagues in a position to assess the candidate’s work and personality over a sufficiently long time is treated as having great weight, especially if it reveals a consensus or a clear predominance of view.

If one were to attribute an appropriate moral to Mr Justice Thomas’ work, it is assuredly Lord Atkin’s aphorism: “Justice is not a cloistered virtue”.

Mr Justice Thomas has exposed hidden recesses where lurk judicial folly or the danger of it. The book offers the judiciary a timely warning of practices to eschew. The judiciary of Australia, and the legal profession generally, are in his debt for his outstanding contribution to a hitherto silent subject. It must not be thought, however, that the book is for Judges and lawyers alone. It is about a topic which arouses the thinking man’s curiosity. To boot, it lacks nothing in style and readability.

(Judicial Ethics in Australia by the Honourable Mr Justice Thomas, published by the Law Book Company Limited; price $25.00.)

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(Reviews of significant works are published in the journal as space permits. Intending reviewers are advised to communicate with the Editor first.)