

Review of J.B. Thomas, *Judicial Ethics in Australia*, Sydney: Law Book Co., 1988. pp. i-xxxii, 1-125. \$25.00.

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Every cosmology has its ethic. In its primary meaning the word relates to morals. In that sense ethical conduct is conduct which is consistent with and which advances values which are thought antecedently to exist. Hence, Christian ethics, or for that matter, the ethics of any of the established religions when reflected in conduct call for honesty, charity, compassion and so on. Those moral values if held will produce an ethic which is of universal application and which will be reflected in all human conduct.

When the word is used with an epithet such as the word 'judicial', it takes on a more restricted and a more extensive meaning as it is then being used to describe conduct which is to be expected of each member of the class of persons holding judicial office. And in that way the word is commonly used to mark out the dos and don'ts of every member of the group engaged in an identifiable occupation or calling.

When so used the word may lose much and in certain cases all moral meaning. Its use may indicate no more than conduct which is seen best to advance the purposes to be achieved by the group to which it is applied. Ethical rules in such a case may become little more than trade practices which best serve the interests of all who are engaged in the trade. Whenever that happens it leads directly to the conclusion that what is and what is not ethical conduct is a question which can be finally decided by the elders within the group. That is a test which is, or which is very close to the Allison test.

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That cannot be right when applied to Judges. Judicial ethics cannot be amoral.

Each Judge has pledged himself by his oath to "Do right to all manner of people according to law without fear or favour, affection or ill-will". Any conduct which in any way reduces his capacity to be true to that oath is in the relevant sense unethical. And all judicial conduct is to be judged by that yardstick. It is a judgment which can be passed upon Judges by any member of the community.

Furthermore, a Judge when appointed, becomes a member of a group which together constitutes his court and as a member of that court he also becomes a member of a larger group collectively known as the judiciary. Any conduct of a Judge which lessens the capacity of his brother to do which he has pledged himself to do, is unethical. And any conduct of a Judge which lessens the capacity of the extended group — the judiciary — to do right to all manner of people according to law without fear or favour, affection or ill-will is likewise unethical. The test of unethical conduct is a single one, it being the impact of the conduct upon function.

And justice is very much in the eye of the beholder. Not only must it be done, but it must also be seen to be done. And it must be seen to be done not only by the persons who are immediately affected but by the community as well. And it will not be seen to be done unless the Judge is, and importantly, unless through the eyes of the beholder he is seen to be a person who can decide a case without fear, favour, affection or ill-will. Any conduct of a Judge which muddies that perception can be said to be unethical.

So it can be seen that the perfect Judge is an abstraction. He will never exist in fact. But if we can give some definition to that abstraction we will be better able to say in a particular case what a Judge may or may not do.

The key to the search for definition is, I think, the idea of "non-attachment" which is identified and explained by Aldous Huxley in *Ends and Means*. "The ideal man", he says:

Is the non-attached man. Non-attached to his bodily sensations and lusts. Non-attached to his craving for power and possessions. Non-attached to the objects of these various desires. Non-attached to his anger and hatred; non-attached to his exclusive loves. Non-attached to wealth, fame, social position.

That idea as is explained is negative only in name. The practice of non-attachment entails the practice of all the virtues.

It entails the cultivation of intelligence; for insensitive stupidity is a main root of all the other vices. It entails the practice of generosity and disinterestedness; for avarice and the love of possessions constrain their victim to equate themselves with mere things.

It imposes upon those who practice it an entirely positive attitude towards the world. The non-attached man is monkish, but he is not monastic. What makes him different from others is that he is free and being free he is able to exercise a balanced non-biased judgment. And if non-attachment is the badge of the perfect Judge, we can readily identify conduct which denies perfection. Particular instances of such conduct are discussed by the author. Many of them relate to the manner in which a Judge conducts himself in court. Those instances are, with respect, self evident. Their identification does not depend upon the opinion of the Judge's "professional brethren of good repute and competency" — the Allison test. By way of example, a Judge has no licence to be rude or in any other way to misuse his position of authority. Cases of that kind can be identified immediately they arise.

It is the conduct of the Judge off the bench which is, I think, equally important and it is in this area that more difficulties arise.

Surely there can be no doubt but that the quality of justice as perceived by litigants and by the public depends to a very significant degree upon the reputation and standing of the person who dispenses it. If that is accepted then it must follow that a Judge should not drink *too much*; he must not gamble *too much*. To do either of these things *too much*, and they are but examples, lessens the respect for the man and in that way lessens his capacity to do justice. It must follow that such conduct is unethical. It is very much a matter of degree — what is "too much".

A far more difficult problem to handle is what the author calls "issue bias". This I think has everything to do with non-attachment but it has little, if anything, to do with judicial ethics. One can immediately say that to reduce the possibility of such bias being perceived a Judge must not by his out of court activities become too closely identified with any sectional interest within the community. Should he do so he will reduce his capacity, or at least his perceived capacity to do justice to *all* manner of people. Again, this is a matter of degree. This is only to emphasise the truth that a Judge has pledged himself to do justice to all manner of people according to law.

“Issue bias” may lurk in the mind and a Judge’s insight may not be sufficiently sensitive to perceive it. This falling from grace is beyond the reach of ethics controlling behaviour. It may on the other hand be a belief honestly held and to give weight to that belief in judgment may be judicial misconduct of the highest order. This is so because the only yardstick of the Judge’s justice is the law and nothing distorts justice more than the application to particular cases of inarticulated preconceived and idiosyncratic notions. A Judge who allows himself that luxury is simply false to his oath. He should not sit on any bench. But how we should rid ourselves of such a Judge is another question.
