

## Book review

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*The Vantage of Law: Its role on thinking about law, judging and bills of rights,*  
J Allan (Aldershot: Ashgate 2010), hardback (with index) 202pp

This original and imaginatively well-written book addresses three interrelated topics. These are: the separation of law and morality; judges and judging; and bills of rights. These topics are viewed through the prism of jurisprudence and legal philosophy, with particular emphasis on how a shift of vantage can influence one's views on all three issues. Approaching these jurisprudential and constitutional polemics in this nuanced way, the book will be an invaluable contribution and will add to the nascent literature on legal philosophy and constitutional law.

The first two chapters deal with the perennial debate between separating law and morality. Allan questions: "Is it good or desirable to keep separate law and morality, law as it happens to be and law as it ought to be?" After critically discussing eminent legal philosophers' views on this question (such as Bentham, Hart and Dworkin), the remainder of the first chapter addresses the question by looking at the different vantages in the different legal systems he outlines in the "Introduction". Allan sets out three primary vantages. The first is that of the "Concerned Citizen" – he/she is an "average" citizen who has a stake in the legal system. The second is the judge's vantage. The judge is from an appeal court or from one of the highest courts in the land, whose role is to interpret statutes and/or constitutional provisions. The last vantage is through the eyes of the "Holmesian Bad Man". This is the "amoral actor" whose decisions are unaffected by morality but for whom law and legal rules are important factors in deciding how to act. The author does refer to other vantages, such as the "Visiting Martian": described by Allan as "the Descriptive Sociologist", "the Outside Observer" who has no concern in what is being observed apart from seeking clarification and accuracy. Another is the vantage of the "Legislator" or "Law-Maker" – the person who turns policies into law/legislation. Others are "the Omniscient Being, the Moral Philosopher, the Sanctimonious Man and the Law Professor". The author makes a valid point that all vantages need to be placed in context: a concerned citizen living in a democratic and stable society will have different views on a bill of rights or whether law and morality should be separate from those of a concerned citizen who comes from an autocratic and authoritarian regime. In this regard, the author chooses to locate the discussion in what he describes as a "nice, benevolent, liberal democracy". However, for the purposes of making certain claims more widely applicable, he also talks

about three other legal systems – they are the “Wicked Legal System”, the “Theocratic Legal System” and the “So-So Legal System”. The first refers to a Hitler or Stalin-style dictatorship where millions are massacred; the second is concerned with God as the law-maker; and, under the third system, life is relatively “pretty good” but is not as good as in the benevolent legal system. In describing these legal systems, the author acknowledges that the list is not exhaustive.

For the concerned citizen’s vantage, separating law and morality is relatively easy. However, from the judge’s vantage, it is more difficult to keep separate “law as it is” and “law as it ought to be”. This is in stark contrast to the bad man’s vantage where separation is necessary. That said, Allan continues to argue that even from the judicial vantage, there are times where it is possible, indeed preferable, to separate law and morality. A “clear cut and obvious” example is where a dissenting judge outlines his or her reasoning from the majority judgment. In so doing, the judge is making a distinction between what the majority thinks the law is and what he/she thinks it should be. When discussing the judge’s vantage, chapter 1 also briefly touches upon what Allan describes as “the central and most important issue”, namely: who should decide contentious social and moral issues, the legislature or the judiciary? One of the canonical points of reference in this debate are Jeremy Waldron’s writings. It is therefore not surprising that some of the discussion in chapter 2 covers Waldron’s thinking. However, Allan puts his own mark on the debate by discussing the question and the consequences through the lenses of the different vantages in the different legal systems. From the judge’s vantage, in a benevolent legal system where law and morality are blended, there is greater scope for judges to have the last and final say on contentious issues. While this is beneficial for judges, Allan argues it is less attractive from the concerned citizen and the legislator’s vantage.

This chapter also briefly raises the much-discussed and important issue of judicial appointments. Allan argues, rightly or wrongly, that the judicial appointment process in America for the Supreme Court is more than likely to result in a broader spectrum of moral ideas or sensibilities. However, judges who are appointed by a judicial appointment committee may hold narrower moral views than society at large. The issue of judges is continued into the following two chapters as they examine topics related to judges and judging. In keeping with the theme of the book, the issues are examined from the different vantages but with the primary focus based in the context of the benevolent legal system. That focus raises a set of further tangential issues such as how to best understand the amorphous concept of democracy, the appointment of judges, the merits and shortcomings of the use of foreign law, and how the rule of law and common law constitutionalism differs from rule by judges.

In his quintessentially quirky style, Allan discusses the problems judges face when interpreting bills of rights by creating a fictitious judge, Judge Waldron. How should Judge Waldron deal with the issues raised in the bill of rights and the cognate problem of who should have the “last-word moral input”? Allan provides possible solutions. For Judge Waldron, he could adopt the Holmesian or Posnerite or Frankfurterite or John-Ely-type approach. Another possibility mooted is the Dworkin approach. However, given Waldron’s thinking on the importance of the right to participate and his views about courts in having the last word, it is not surprising Judge Waldron does not lean towards the Dworkinian approach. In this respect, Allan also raises an interesting question: should Professor Waldron accept the job in a top court? Again Allan offers two options: he could take up the post and try to lessen the so-called illegitimacy of the legal system or he could decline the job. That is as far as Allan is prepared to go, and he acknowledges that there may not be a

right answer to the question.

Following the same approach as the previous chapters, the theme of vantage is pervasive in the next two chapters. Here Allan addresses how vantage affects a person's views on the strengths and weaknesses of bills of rights. The first of these chapters, dealing with bills of rights, lays the foundations for the following chapter as it sets out the jurisprudential debate on why rights matter. In that respect, Allan offers two sets of theories in defence of rights. The first concerns the "weak-rights theories" and the second are "strong-rights theories". The former view rights as necessary evils, the latter state that each human being has basic rights. Discussing these different theories, Allan refers to well-known and eminent scholars such as Hume, Hobbes, Bentham, Rawls, Kant, Gewirth and Dworkin. The author then continues to put down the next layer of the foundations by addressing the relationship between paternalism, rights and bills of rights. The last section of chapter 5 provides the "last stop" in laying down the foundational work. This section provides an interesting, albeit controversial, discussion on how statutory bills of rights, such as the Human Rights Act 1998, can result in a strong form of judicial review, something akin to the judicial review of the constitutionalised bill of rights of the USA.

Chapter 6, the second of the bill of rights chapters, considers the pros and cons of a bill of rights from the law professor's vantage and is limited to the benevolent legal system. The reason for this limitation is straightforward and sensible. There are more serious problems in non-benevolent legal systems than discussing the merits or otherwise of bills of rights. Allan makes an interesting observation: if one counts the number of articles favouring bills of rights in any top English language legal journal, and then tallies those who oppose such instruments, it is doubtful if the latter outnumbers the former. This is an interesting challenge that the author of this book review is keen to further explore. After revisiting the Waldronian counter-argument against handing too much power to the judiciary, Allan puts forward his own view in distinctive style by studying Waldron's arguments, not from one vantage, as Waldron does, but from different ones. In so doing, he aptly illustrates the underlying argument of his thesis, that is, how vantage can shape and determine one's views vis-à-vis bills of rights. Take, for example, the law professor who will be inclined to support bills of rights for several reasons, some of which are egotistically based. Allan argues that having a bill of rights in place will make the law professor's adjudication-centred theory stronger and more convincing. Furthermore, in terms of "raw professional self-interest", bills of rights generate books, blogs, conferences and so on for law professors. It is doubtful if any academic, be it a professor, reader, senior or junior lecturer disagrees with this point!

The book concludes with the perennial call for legal education to be less judge-centric. To this end, Allan is echoing the voices of O W Holmes and W Twining. On reading this book, it is clear that vantages really do matter because the choice of vantage one adopts will influence one's views on the question of law's relationship to morality or about bills of rights. In the final chapter, Allan emphasises that there is no reason why one cannot oscillate across the different vantages when considering the issues discussed in this book. Such oscillation allows for a more fluid and open discussion about the issues discussed in this book and beyond.

All in all, this is an entertaining as well as an erudite book, suitable for the "well-informed jurist" and scholars and students alike, especially those studying or teaching courses in legal philosophy and constitutional law.

