

## REVIEWS

**LA SCIENCE DU DROIT POSITIF.** By Jean Defroidmont. (Paris : Desclée, Leclercq, Brouwer et Cie.)

This is a book which arouses much interest and enquiry. We are here presented with a new and most scholarly treatment of the philosophic theory of Positive Law and Right, and of the science of Jurisprudence. As the author indicates, although the approach necessarily abstracts from the contingent applications to particular cases, with which the casuist and legal practitioner are more familiar, it is always in the light of the principles laid down and presented that the everyday case must be resolved, 'et les questions les plus spéciales se résolvent à la lumière des principes les plus vastes,' and not merely by the juxtaposition of case with case, into which legal practice may too easily degenerate. The argument is frequently enlivened by practical illustrations which appeal to the imagination as well as to reason.

Man is declared to be by definition a juridical animal. The truth of this description is apparent though new in sound. It may, however, be readily admitted that the legal science and practice are not seldom brought into disrepute by becoming over-laden by a purely formal technique. But right, which is the object of the legal science, is a being and an offspring of man's very nature, and takes its rise in the human person. The primordial natural right of man is to persist in his own being and to multiply, and since to be is to act, the right to be involves the right to act, and thereby expand his personality by activity the human form of self-expression. This activity is not bound to its source, but generally passes over to external objects. Hence, whatever is demanded for the up-keep of elementary human rights, is but an extension of the inherent right to be, which is at the root of all others. Consequently, Right is a quality pertaining to man, inasmuch as he is endowed with intelligence and free-will, and a right is exercised by the operation of a faculty under the aegis of authority, 'le droit est un pouvoir, une faculté en action sous la protection du Prince' (p. 139). Man is essentially a social being, and authority supplies a natural need, as being the guide to and the guarantee of the common well-being of society. This quality is intrinsic to the social group, and an essential property of the human species, though but an accidental attribute of the ruler, carrying with it the right to command, and the right to be obeyed, which in fact are different aspects of the one right. For the self-preservation of his being, man is obliged to obey and bend to authority, since his unreliable and fallible nature demands

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a stable moderator of individual activity in favour of the common welfare. The investiture of any person or body of persons with sovereign power derives from the choice of the people, though the obligation to obey does not arise from this choice, since it is innate. The choice determines the obligation of submission to those who have been thus selected as the protectors of the common good, and are its guarantee. We are inclined to think that by an over-stressing of law in its subjective connotation, law as an extrinsic norm may be unduly minimised. Nor can the jurist confine the whole of his attention to the natural exigencies of man independent of his supernatural end. It does not seem that a full account of human rights can be given without regard to the supernatural end, or without consideration of an over-ruling law. There is only one *bien commun* of man which is beatitude, and for which provision must be made, within their allotted spheres, by Church and State, by Law and Ethics. (cfr. Summa Theol. Ia, IIae, I, VI ; 90, II, and ad 2 ; 92, I). Further, the divinely constituted hierarchy in creation implies a legal and a moral obligation in the subject to obey the ruler, whose power has been divinely bestowed. (cfr. Summa Theol. IIa, IIae, 104, I).

Space will not allow for more than a hint of the general topics under discussion in this book, together with a few personal impressions. There are points of theory upon which we would be prepared to disagree, such as the exclusion of intention as a subsidiary source of legal interpretation. The author is evidently aware of the danger to the jurist of making excursions into metaphysics, 'la science du droit positif, science de la terre, n'a pas d'ailes pour s'élancer dans le ciel de la métaphysique.' We think that the treatment of juridical entities as though they were metaphysical structures is equally to be avoided. Thus the description of law as a form in the mind of the lawgiver, the matter of which is the fact, does not appear quite accurate. In the ontological order law is not a kind of composite of these two elements. Similarly, in the true metaphysical sense, law is not the formal cause of juridical being (cfr. p. 47), for it is not one of its components or intrinsic to it, nor is it its prototype, 'Gardons-nous donc de traiter le droit, dit subjectif, comme le reflect d'une entité objective.'

The ambiguous word 'droit' would seem to demand an earlier definition than it receives. We should have been pleased to see more illuminating Latin tests, accompanied with references, and a fuller documentation and bibliography which would have given this already excellent study an additional scientific worth to those less acquainted with the subject than the author.

A.F.