Reviews

PRATIQUE DE DROIT ET CONSCIENCE CHRETIENNE, by N. Jacob, J.-M. Aubert, A. Dumas, M. Villey, J.-L. Gardies; Editions du Cerf; n.p.

That there is in our present society an increasingly open and diversified clash of values as between, to put it roughly, humanists and Christians, is almost a commonplace. That this conflict should however have been foreseen and acknowledged in that conservative arbiter and expression of society's values that is the judiciary as long ago as 1917 is perhaps surprising. Yet it was in that year that Lord Sumner said in *Bowman v. Secular Society:* ' . . . My Lords, with all respect for the great names of the lawyers who have used it, the phrase "Christianity is part of the law of England" is really not law; it is rhetoric . . . ' And it is this conflict of values, so far as it finds expression in the actual workings of the law, that the book under review proposes to study. Appropriately published in the series *Rencontres*, it issues from the legal section of the *Centre international de recherches et d'échanges culturels*, a body recently founded by a group of laymen and French Dominicans with the general purpose of testing the values of the contemporary world against the principles of the gospel; and within this general framework the particular object of the contributors to this work is to confront the respective views of a few lawyers, philosophers and theologians concerning the relationship between law and morality as concentrated in the problem of the natural law.

In pursuance of this aim, Canon Aubert—this comes very refreshingly from a canonist—outlines the traditional *theology* and philosophy of the natural law, and briefly traces the evolution of this doctrine in the Church, whilst a pastor of the French Protestant Church, Pastor Dumas, in a very clear, forceful but eirenic paper, explains how, starting from an opposition to the very possibility of the doctrine of the natural law as Catholics conceive it, Karl Barth was progressively brought, under the pressure of nazism, to reformulate the traditional Lutheran doctrine of the double government of God in the world, the spiritual and the temporal, and to elaborate a doctrine of the *analogy* between, or the concentricity of, the civil and the Christian communities that has most interesting affinities with the Catholic doctrine of the natural law. On the more strictly legal side, the director of studies on the general theory of law in the Centre and the editor of the present symposium, who is a practising barrister, seeks to determine the coincidence and disparity of law and morals in the light of Thomist conceptions of natural law and responsible human action. And in between, a professor of law and a philosopher seek to define and to rehabilitate respectively the notion of natural law rather from within the context of contemporary legal thought, largely positivist as it is, and still haunted by the old Humian problem of passing from an is to an ought (from *Sein* to *Sollen*) in the

terminology of Kelsen), whilst in the middle of the book there is a report of a short discussion between a few theologians and professors of law about the content of the natural law.

The task which the contributors set themselves is thus eminently worthwhile and their contributions are not without interest. Yet the book as a whole is disappointing. This is not merely a matter of the French intellectual idiom, in virtue of which even the most concrete and immediate issues tend to be discussed in rather more abstract terms that the Englishman would readily find congenial. And the unsatisfactoriness does not seem to be due to the fact that definitions and discussions of natural law are for the most part made merely by reference back to the terms and conclusions of St Thomas, and that the discussion seems rather remote from contemporary issues (with the exception of the paper by Pastor Dumas), nor yet to the fact that the lawyers are for the most part ill at ease in the theological and philosophical discussion, whilst the theologians, and even the canonist, seem to be unversed in the knowledge of any modern civil system, so that, as the editor in effect admits, there is no true meeting between the different spokesmen. These all seem rather to be the expressions of a more radical failure, which is essentially methodological. And here the contributors might have found inspiration in St Thomas at a deeper level than they have sought to find it. For it seems to me, with due respect to the symposiasts, that St Thomas not only established certain conclusions but was able in continuity with Aristotle, to arrive at them in virtue of a certain *method of investigation*, a method of resolution or reduction, and that adherence to such a method rather than to St Thomas's set conclusions would not only ensure a more profound fidelity to the mind of St Thomas but would compel an engagement first and foremost in contemporary legal systems. For, as Canon Auber has shown in another book, *Le droit romain dans l'oeuvre de St Thomas*, St Thomas besides his knowledge of the old Hebraic legal system, took considerable interest in the Roman law, in his time still a living system, and what I should suggest is that his method was the comparative adjustment of legal phenomenon to legal phenomenon—conflict, judgment, custom, statute, etc.—so as to disclose, progressively, from within some one or more actual legal systems, the more general features, and ultimately the basic purposes, presuppositions and principles of any legal system. This method therefore involves in the first place loyalty to the institutions and received customs of one's own profession, people and time, but not an unquestioning loyalty: one may start by listening to the voices of the elders, but one can question, probe and search back to first principles. This is another method of recovering an older tradition, it is the method of Picasso's rediscovery of the Velasquez of Las Meninas after a lifetime in the modern movement.

If this is true, then there is one more reason why it seems useful to try to say it here. For on the face of it this method of progressive analytical generalisation would seem to be quite alien to the temper of the English mind, let alone the English legal mind. And yet it seems to me that the essential principle of this

method has nowhere been more suggestively and succinctly indicated than in the key-sentence of perhaps the most celebrated case in English law, *Donoghue v. Stevenson*, the snail-in-the-bottle case. Lord Atkin there said: ' . . . And yet the duty which is common to all the cases where liability is established must logically be based upon some common element to the cases where it is found to exist . . . At present I content myself with pointing out that in English law *there must be, and is, some general conception* of relations giving rise to a duty of care, of which the *particular cases* found in the books are but *instances* . . .' (*italics mine*). Here is indicated the sort of starting-point for a reductive analysis which could then be continued along the lines laid down by the American so-called sociological school of jurisprudence. It is already over seventy-five years since O.W. Holmes stated the master-idea of this form of analysis: ' . . . The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life . . . ' (*The Common Law*, 1882, p. 35). And the application of this method seems particularly opportune at a time when comparative legal studies (especially perhaps in Africa) are progressing.

The chief merit of this book, then, is that in failing, on the whole, to achieve the task which it sets itself, it better defines one which a comparable group of English lawyers, philosophers and theologians should now attempt. The book ought not to be translated, but read by a few who might be stimulated to do better, from within the English tradition of law.

PASCAL LEFÉBURE, O.P.

LAW, LIBERTY AND MORALITY, by H. L. A. Hart, Oxford University Press; 15s.

Since the publication of the Wolfenden Report in 1957, its central contention that the private behaviour of consenting adults should not attract the notice of the criminal law has led to a vigorous discussion of the limits of a legal enforcement of morality. In particular, Lord Devlin, in his Maccabean Lecture, has given the weight of his authority to a severe criticism of the idea that morality can ever be 'private': for him, the preservation of a society's moral values is necessary for its very existence, and the countenancing of immorality (even when no harm to others is alleged) is analogous to treason and should be punished as such. Professor Hart's three lectures, given at Stamford University in 1962, are a reasoned rejection of Lord Devlin's thesis, and indeed of the whole tradition that sees the law as necessarily concerned with safeguarding, and, if need be, with vindicating the moral standards which the majority believe to be synonymous with society's health and very survival.

Professor Hart takes his stand with Mill and his unequivocal doctrine that 'the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others'. He finds