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Friedrich: The Philosophy of Law in Historical Perspective

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RECENT BOOKS

THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE. By *C. J. Friedrich*. Chicago: University of Chicago Press. 1958. Pp. x, 253. \$4.75.

This excellent book is an English version of the author's *Die Philosophie des Rechts in Historischer Perspektive*, which appeared in Germany in 1955 as a part of an encyclopedia of law and political science. In keeping with the purpose of the original publication, the volume presents a broad-gauged analysis of some central problems of legal philosophy—first and primarily from a historical, subsequently from a systematic viewpoint—rather than a detailed introduction to the history and present status of the general theory of law. To the novice in the field who wishes to obtain a full view of jurisprudential thought in its historical setting, this volume, because of the compactness of its exposition and the selectivity of its approach, does not afford an easy tool of learning. But those who have already acquired a general familiarity with the thinkers and subjects covered by the book will find it filled with suggestive ideas and original interpretations.

The selective method chosen by Professor Friedrich in surveying the Western heritage of legal-philosophical doctrine is evidenced by the preferential treatment given to Greek and Roman legal thought, medieval legal philosophy, and the classical law-of-nature movement of the 17th and 18th centuries; more than one-half of the book is devoted to a discussion of these subjects. There are also brief but penetrating chapters on Hegel and the Historical School, Marx and Engels, Jhering and Stammer. The various strands of twentieth-century positivism, relativism, and legal realism are dealt with on 12 pages under the heading "The Decline of Legal Philosophy." This chapter is followed by a general and illuminating discussion of the revival of natural law in Europe and America which includes an account of the legal philosophy of Leonard Nelson, a European legal thinker largely unknown in the Anglo-American world.

Professor Friedrich contributes a number of fresh insights to the history of jurisprudential ideas. This reviewer found particularly suggestive the author's analysis of the impact made by the Old Testament on Western man's attitude toward law; his exposition of the similarities as well as the differences between the Platonic-Aristotelian and the Stoic doctrines of law; his account of the legal philosophy of the 16th-century humanists, a topic often neglected in traditional histories of legal and political thought; his correction of some misconceptions current with respect to Hegel's ideas about law and the state; and his interesting reappraisal of the Marxian theory of law.

There is room for dissent on some of the comments and observations made by Professor Friedrich. This reviewer is inclined to hold that the

relativistic strain in Greek sophist doctrine was more pronounced than Professor Friedrich seems to intimate, and that Protagoras' apothegm "Man is the measure of all things" refers to individual man rather than to universal man. It may also be questioned whether the statement "justice is subordinated to order and thus to the will of him who possesses the authority to make the laws" applies without qualifications to the legal philosophy of Hugo Grotius. Furthermore, issue might be taken with Professor Friedrich's comment that Hobbes' attitude toward law was "radically positivist." As the author himself subsequently recognizes, Hobbes still believed in an objective philosophy of values; and though he denied that a law could be "unjust" in a legally relevant sense, he admitted the possibility of "iniquitous" laws. Hobbes' conspicuous leanings toward positivism are clearly indicated by his general refusal to recognize other than supranatural sanctions for a violation of natural laws by the sovereign; but he recognized a right of resistance in one situation, i.e., when the sovereign had lost the power of preserving the peace in society and protecting the safety of the citizens. Finally, this reviewer has some question as to whether it is justified to pair Jhering and Stammler as legal philosophers, notwithstanding a certain similarity in the liberally-oriented political attitude of these writers.

The small space allotted by Professor Friedrich to positivism and modern legal realism (and also to sociological jurisprudence) can be fully defended from the point of view of an analysis which is interested primarily in broad philosophical issues and the elaboration of standards for the evaluation of the positive legal system. The brief systematic part following the historical chapters shows clearly that in Professor Friedrich's contemplation a philosophy of values is a necessary and integral part of a sound theory of law. He identifies order and justice as the principal values which must be served by the law. Although one might disagree with Professor Friedrich's sweeping statement that "a doctrine of justice is equivalent to a law of nature whether taken formally or substantively," it is certainly true that there exists a close link between these two time-honored notions of legal philosophy, and that a balanced theory of justice must pay close attention to whatever common elements there may be found in the nature and characteristic traits of human beings.

The author also discusses the role which the common man should play in the fashioning of a legal system rooted in justice. Although he rejects the propositions that the common man must decide *everything* in a well-ordered community and that he must be presupposed to be "collectively infallible," Professor Friedrich's philosophy is strongly imbued with democratic values. This is very evident from his definition of just law as "a system of reasonable rules which are grounded in the common experience of man, which seek to realize justice, which are created with the participation of all the members of the legal community on the basis

of a constitution, and which rest upon the continuous common effort of these members." After offering his thoughts on the relationship between justice, equality, and democratic action, the author presents us, in the last four chapters of the book, with reflections on the difference between legality and legitimacy, the problem of the breach of the law, the role of constitutions in the building of legal orders, and the prospects of creating a world community based on law.

A reader interested in a succinct but incisive treatment of some of the most challenging problems of social control through law will draw much intellectual nourishment from Professor Friedrich's volume.

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