adherence by the learned author to his view expressed on pages 278-281 that the validity of a marriage both as to form and as to capacity is decided by the law of the place where that marriage is celebrated. This argument was raised before Mr. Justice Selby in the case of *Ungar* v. *Ungar*,[17] and was quite properly rejected by that learned Judge. Notwithstanding the rejection the learned author maintains his views in the present edition, and makes only a slight footnote reference to the decision in *Ungar* v. *Ungar* — which he dismisses on the ground that "the criticism of the text fails to notice that it states 'the general rule' ". I do not quite understand from the text what the author means by "the general rule", and what he means by any exception. From my reading of the text, it is quite clear that the learned author would have applied in a case such as occurred in *Ungar* v. *Ungar* the law of the place of celebration. The only grudging concession he is prepared to make is the possibility that where both parties are domiciled in a country which prohibits the marriage, the marriage should be treated as void. This, of course, was not the case in *Ungar* v. *Ungar*.

Of course, the author is entitled to present his views, however heretical they may appear to be. But it must be remembered that he is writing a textbook for practitioners and that his readers are entitled to have some statement of what the dominant view of the law is. It is an undisputed fact that the view which the author puts forward on these pages has not been the law in England or Australia for more than one hundred years. Nor does he put before his readers the orthodox view. He treats the leading case of *Sottomayor* v. *De Barros* (*No. 1*)[18] as an eccentric decision, which he implies might not be followed today. On the other hand he treats the case of *Sottomayor* v. *De Barros* (*No. 2*)[19] as representing the main rule. In fact, of course, as any student of the law of conflicts knows, the true position is the other way round. It was in fact the second decision which was eccentric and of which the High Court in the case of *Miller* v. *Teale*[20] expressed its disapproval.

The book is most certainly useless as a student textbook. It may have some value for the average practitioner, because undeniably it contains a great deal of useful information. But in glossing over uncertainties and in some cases in fact mis-stating the law, it does the practitioner a grave disservice.

P. E. NYGH*

Rechtsphilosophie, by René Marcic. Verlag Rombach, Freiburg im Breisgau, West Germany, 1969, 312 pp. (Price DM 25).

In a survey of recent developments of German legal philosophy by Karl Engisch (whose English version, prepared by me, was recently published in the *Ottawa Law Review*[1]) the corresponding developments in German speaking countries other than West Germany were not included. It has been my intention to bring some representative works in these areas to the attention of readers by way of book reviews. The present book, by one of the foremost Austrian legal scholars, offers an opportunity to start carrying out this intention.

In the golden years of Austrian legal philosophy, which began in 1910

[17] (1968) 10 F.L.R. 467.
[18] (1877) 3 P.D. 1.
[19] (1879) 5 P.D. 94.
[20] (1954) 92 C.L.R. 406, at 414.
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[1] (1968) 3 *Ottawa Law Review*, 47.

and ended with Hitler's *Anschluss*, there emerged the Vienna school of normativist legal theory under the leadership of Hans Kelsen. In the events preceding the Second World War most of its Austrian exponents became exiles, who with their unique learning graced universities in different parts of the free world. Very few of them returned to Austria to resume active academic life there after the end of the war. Thus Austrian legal theory and philosophy had to be started anew in essential respects; the suppression of thought in the rather long episode of totalitarian regime permitted only a rather limited continuation of the monumental prewar fundamental legal thought during this episode. Marcic has been one of the key workers in the restoration of this thought.

In the area of legal philosophy his present book is a landmark of the reconquest and reconstruction of the Austrian intellectual empire temporarily lost. Published as a collection of eleven lectures (on the history, contemporary status, analysis and synthesis of fundamental legal and political thought) delivered at the University of Salzburg (in whose re-establishment the author played the principal role) the book is written in a manner that is easy to follow, despite the formidable classical, mediaeval and contemporary learning rolled into it. It brings out very clearly the main features of Marcic's legal, political and philosophical thought, and is thus invaluable in its independent existence as well as in its role as an introduction to an ostensibly more ambitious (and foreseeably even more exciting) systematic treatise to be published later.

One of the intriguing features of Marcic's legal-philosophical views is a successful synthesis of essential aspects of Kelsen's normativism and Aquinas' iusnaturalism. This seemingly implausible feat has become possible due to the fact that Aquinas was a refined rationalist (and as such not hostile to formalism in appropriate domains of thought) and Kelsen is a refined humanitarian (and as such not hostile to the idea and aspiration of just law). As the chief exponent of contemporary legal positivism, Kelsen has, of course, categorically rejected iusnaturalism. However, this repudiation has affected only one major item of natural law thought, namely that justice (in a certain sense and with certain qualifications) is an indispensable element of law. Moreover, Kelsen's pure theory of law is not completely free from elements of natural law thought. Thus its assumptions, according to which law cannot require the doing of what is impossible and all legal systems are normatively closed (in the sense that whatever is legally not prohibited is legally permitted), can be sustained only by means of iusnaturalist arguments. Since these assumptions subsist in Kelsen's system, it is not so strange if some further assumptions of the same description are included as well in a legal-philosophical system incorporating a considerable portion of Kelsen's normativism.

In the course of the whole book here under review, the author displays a rare classical learning and perspicuous appreciation of contemporary social and political situations relevant to law and justice. Thus he draws striking and telling parallels between Greek sophism and contemporary intellectual movements toying with anarchist ideas. He rightly observes that both are characterised by a dearth of constructive ideas. Marcic's concepts of law, justice and legal validity have been framed with a view to the constructive role which these ideas are to play in the individual and social life of modern man. They are not framed just to capture the meaning of the ordinary professional usage of the corresponding words. In the following, I shall select from the wealth of other topics worthy of comment and reflection, the above three as focal points of some observations.

Law is defined by Professor Marcic as "the *permanent* order of norms and *of the acts of their execution*, which render the convivium of men possible and preserve it by preventing the collisions of the actions of the participants

in this order (*Ordungsgenossen*) and by settling and resolving the conflicts which arise".[2] This definition shows that Marcic, like Kelsen, conceives of law as a normative order composed not only of general norms but of both general norms and their individualisations through acts of their ultimate application. However, in contrast to Kelsen, Marcic's concept of law also contains as one of its essentials the purpose which law is to serve. Thus an important material element enters into this concept of law, an element of natural law. This appears further in the author's definition of positive law,[3] which contains the notion of human dignity as a defining characteristic of that law.

The concept of legal validity, alternatively called "legal force" and "legality" by the author,[4] is intimately linked with the above conception of law. He conceives of validity as a "relation of correspondence". However, again in contrast to Kelsen, a positive norm does not derive its legal force from its enactment or its correspondence with a higher level enacted norm, but "*solely*" from a norm of ontological description belonging to pre-positive law.[5] According to Marcic, positive law presupposes ontological suprapositive law (*Seinsrecht*); however, the latter being only an idea, it requires positivisation through enacted law to become efficacious.

The above conceptions of law and legal validity appear to be incompatible with the current conceptions of justice, according to which law and justice represent sets of ideas whose contents can coincide but between which there is always a tension (because what is a law need not always be just, even though it may be contended that law ought never to be unjust). And indeed Marcic declares that the problem of justice as ordinarily posed is a pseudo-problem.[6] By way of challenge to the traditional conception of justice, Marcic contends that "every justice, even that of God, presupposes law".[7] For him, "justice" is "a typically subjective category which refers to an objective category—to law conceived of as legal order".[8] He says that "a procedure, or an act as its result, is just when it agrees with law; thus justice is an intrasystemic state of affairs which is eminently legal; . . . it contains nothing that relegates to another, to an extraneous system of norms".[9]

Despite the fact that I do not share Marcic's concepts of law and justice, I am in sympathy with his legal-philosophical thought and find that strong arguments can be advanced in support of it. The fact that professional lawyers may find these concepts alien to them does not mean that they are not workable concepts even in the legal everyday. It is possible to say that ontologically and ethically well-founded law, even though it may be only an ideal to which it is possible merely to approximate, is *the* law. What we have by way of legal enactments is only an attempt to actualise this "asymptotic" law in the extant circumstances. These attempts can always be challenged in the name of an ideal standard, which as *the* law would necessarily coincide with justice. The practical implication of such a conception of law and justice is that the solution of any legal problem reached by recourse to enacted law is defeasible by recourse to further arguments of ethical or ontological character. To render this conception practicable in legal reality, the presumption is needed according to which what has been enacted as law expresses the law until reasons are produced for rejecting it as a materialisation of the law.

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[2] At 138.
[3] At 140.
[4] At 170.
[5] *Ibid.*
[6] At 175.
[7] *Ibid.*
[8] At 176.
[9] *Ibid.*

My unwillingness to join in this conception of Marcic is largely due to the consideration that its adoption would require a major reorientation and reconstruction of existing prevalent patterns of legal thought and reasoning on all levels, which is hard to accomplish in view of the prevailing inertia of juristic thought. Moreover, I think that the legal positivist conceptions favoured by professional lawyers and by what seems to be the majority of academic lawyers, at least in English speaking countries, are capable of refinement which would make their ethical and practical import indistinguishable from that of iusnaturalist conceptions. Reading the present thought-provoking and thought-alimenting book of René Marcic, I could not help feeling that the crisis in which our legal and political thought finds itself today due to multifarious factors of modern life may not be capable of resolution without resolute rethinking and reorganisation of the very foundations of legal and political thought along the lines drawn by the author of the present book. The signs of disintegration of our political and legal institutions are so unmistakable and so menacing that, before we can confidently demand respect for "law and order", we must be able to present both ideas in such a manner that no doubt is left that they are indeed deserving of respect.

ILMAR TAMMELO*

Puzzled Patriots: The Story of the Australia First Movement, by Bruce Muirden. Melbourne University Press, 1968, XV and 200 pp. ($6.75).

"WANTED 500,000 young Australians, must be physically fit, perfect in wind and limb for use in Europe as soil fertilizers. Apply, stating nitrate content of body, to No. 10 Downing Street, England."

This advertisement which appeared in the first issue of a Sydney journal, *The Publicist*, in 1936 might be regarded as no more than fair comment on the large Australian casualty figures in World War I. But in 1942 this and similar writings were seen as evidence of dangerous disaffection and helped to earn their author some three and a half years behind barbed wire. For in March 1942 it appeared that Australia faced the threat of a Japanese invasion. And on the night of 9-10 March, sixteen Australian-born men were interned in Sydney because it was believed that they would aid the Japanese invaders. Most of these men were members of the Australia First Movement led by Percy Reginald Stephensen, the author of the above advertisement.

Stephensen died almost penniless in 1965 collapsing dramatically after having delivered a literary address in Sydney. He was a flamboyant, turbulent, protean character who dominates this book about the Australia First Movement just as he dominated the Movement itself. In his student days Stephensen was a far Left radical. One of the first members of the Australian Communist Party, he was the subject of a leader in *The Times* in 1926, accusing him of being "palpably dishonest" in accepting a Rhodes scholarship for a "career of Communist organization". At this time Lord Birkenhead, the Secretary of State for India, attempted unsuccessfully to have him expelled from Oxford University for distributing Ghandian anti-imperialist leaflets to Indian students.

On leaving Oxford Stephensen engaged in a number of publishing ventures, including the publication of the first English edition to be printed in England of D. H. Lawrence's *Lady Chatterley's Lover*. But publishing proved

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