A DIALOGUE ON NATURAL LAW.

D. We have been asked what place the concept of natural law has in modern jurisprudence, but what is meant by ' natural law ' ?

G. I should say that there are as many answers to that question as there are people in this group.

D. That may be true but it is not at all helpful. Surely we must attach some meaning to the expression before we can answer the question ?

G. Well, there were times when it had a reasonably clear meaning, as being fundamental law which was claimed to be the *a priori* basis, and the moral justification for all positive law, and also as the measure by which positive laws should be judged. There were differences at different times in the emphasis given to the various aspects of this concept ; and men differed also by placing their fundamental law, at one time in the word of God, at another in the ultimate achievements of man's reasoning faculty, and at yet other times in the common elements found among the laws of different peoples ; but there was a general agreement on the basic idea I have outlined.

D. You mean, then, that the natural law idea was in most cases something universal and absolute, to which all men and all systems should submit ?

G. Yes, I think so ; and it is worth noting that there was at least one period in Europe's history, at the time when all Christendom was united under one spiritual head, when the natural or fundamental law idea made some show of actually controlling all Europe.

D. Well, if that is what is meant by ' natural law,' recent political history should provide enough evidence to convince anyone that natural law has no place in the world today except as a dream. The Hitlers and the Mussolinis found no higher law to obstruct their passage ; and an English jurist would be surprised to be told that Parliament is supreme only within the limits imposed by natural law.

G. That may be ; but a number of well-known jurists is writing today about the recession of the 19th century's complacent belief in materialist and utilitarian sufficiency, and of the revival of natural law theories. If natural law has no meaning today, what are these people writing about ?

D. It is clear that they are not trying to describe an existing fundamental law. It would seem that they have translated the application of the expression from an objective and supreme body of rules to a subjective and relative ' ought ' concept. To the extent then that they have made their idea of natural law variable as to time and place, they have equated it merely to the general ethical level of any given community at any given time ; and are merely describing the influence of that community ethic upon the ever-changing positive law. To that extent, their natural law has no right by any definition to the name of law.

G. No ! These jurists have more basis to their arguments than that. They point to the continental systems where judges are empowered to fill gaps in the codes by drawing on general principles of justice, and to the many exercises of discretion by English judges and the rules by which such exercise is guided. They show that if judges have a pool of standards behind the list of positive rules upon which they can draw, then these

standards must be considered as something in the nature of natural law, which are being steadily and more accurately defined.

D. That sounds attractive enough, but it seems that each jurist builds his own pool and stocks it with his own differently coloured fish ; so that, unless we were to take one man's ideas as right to the derogation of all the others, we still would not have found any body of standards which we could call ' *natural law.*'

G. Wait a minute. Aren't we getting a little vague ? After all, many writers—mostly Continentals and Americans—are making much of the revival of natural law, and they are not all agreed as to the subject matter. Haines divides them into three broad groups : first, those who are arguing that there really is a higher moral or ethical law to which positive law systems must submit.

D. Regarding that one, though no doubt that is a desirable state to aim at, surely we have already agreed that there is not much sign of it in actual fact today.

G. I am not so sure that we should have agreed to that so easily. There are signs that a large number of people wants to set up a higher law which lays down fundamentals in the " these-things-we-hold-to-be-self-evident " method. There is evidence for that in the United Nations Charter ; and only last week the British Government drew up a draft for an international Bill of Human Rights. That draws its inspiration, after all, from ideas of *natural law.*

D. Yes, I suppose that lends some force to the argument, but in these days of jealously guarded national sovereignty, it is still an ' ought ' rather than an ' is.' What are Haines' other two groups ?

G. The second group is made up of those who demonstrate that no code and no system of positive law can expressly answer all difficulties and that behind them is always a reservoir of conventional or customary rules to fill the gaps. They call that reservoir natural law and they are at pains to show that as such it has a life of its own which moulds and changes positive law.

D. The question whether custom should be dignified by the name of law of course depends upon one's definition of law ; but, apart from that, it seems to me that those people are only confusing the issue by calling in the overworked notion of natural law. Aren't they really just admitting, circuitously, that positive law is a social weapon designed to serve society, and so far as it must serve the needs of society, so far must custom which directly expresses society's needs mould and change that positive law ?

G. Possibly so, but even if their use of the term natural law is confusing you must admit that these people are doing something to show the relation of positive law to the effective habits and ideas of society.

D. Of course, but after all the nexus is relative and unfixed in the extreme, isn't it ? The general idea cannot be particularised except in regard to some particular community at some particular time ; and that is far removed from all the old ideas of what ' natural law ' means. What is Haines' third group ?

G. The third group is that which expressly abandons any attempt to find the absolute or the universal, and purports to find a ' natural law ' which has a content liable to change with time and place. This content, they say, is made up of the ethical standards and the ideas of justice which

influence legislators and judges in their functions; and which intrude directly into the law in all those cases where a judge is faced with a question not covered by authority or proven custom. They show how continental justices are empowered to turn to such standards where their codes are silent; and they point to all the vague concepts even in our common law such as 'public policy,' 'the reasonable man,' 'without reasonable and probable cause' *et cetera*, which invite the intrusion of this natural law with its variable content.

D. There is a variable content all right! Consider the difference between the Judge's ideas of justice in *Priestley v. Fowler*[1] and the ideas in *Ribble's Case.*[2]

G. That is admitted; but it is argued that in each case the ideas of what was fair and right which guided the judges were '*natural law.*' The content had varied between the two cases.

D. Surely that brings us back to what I said earlier, that these people are merely equating natural law with the generally accepted ethical standards of any given community, and arguing that to some extent those generally accepted standards must determine the content of positive law? If that is so, then I say again it is confusing to use the name 'law' for a cloud of vague ideas which could not possibly come within any known definition of law.

G. But they do go further than that. They import into the discussion the 'ought' concept, holding that natural law is the ideal positive law. It is an idealistic, progressive and critical concept. When, as with Stammler, philosophy of law becomes the theory of propositions about law which have universal validity, one may be said to be in the field of natural law ideas.

D. But the search is not for universal legal rules but for fundamental principles and standards by which the reasonableness or justice of legal rules may be measured. No modern legal system however much it may claim to function in accordance with such standards, will admit subservience to any fixed body of ideals; therefore the work of these jurists is nothing more than another example of man the philosopher attempting his traditional task of finding the ideal state of things. They do mark the reaction from the analytical positivists, a new movement to settle the end of law, and to see law against a background of ideals of justice and morality. That must be admitted.

G. Well then, even if these modern jurists are really only following in the footsteps of the great philosophers of the past, with the difference that they cannot claim to find a supreme law in the real sense, and even if their use of the term natural law is confusing, nevertheless those things which they are pleased to call 'natural law' have a very real place in modern jurisprudence and must continue to have if juristic study is not to suffer from a Kelsenian sterility; for as Cardozo says:

> "The law of nature is no longer conceived of as something static and eternal. It does not override positive law. It is the stuff out of which positive law is to be woven when other sources fail."

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1. (1837) 3 M. & W. 1.
2. [1939] A.C. 215.