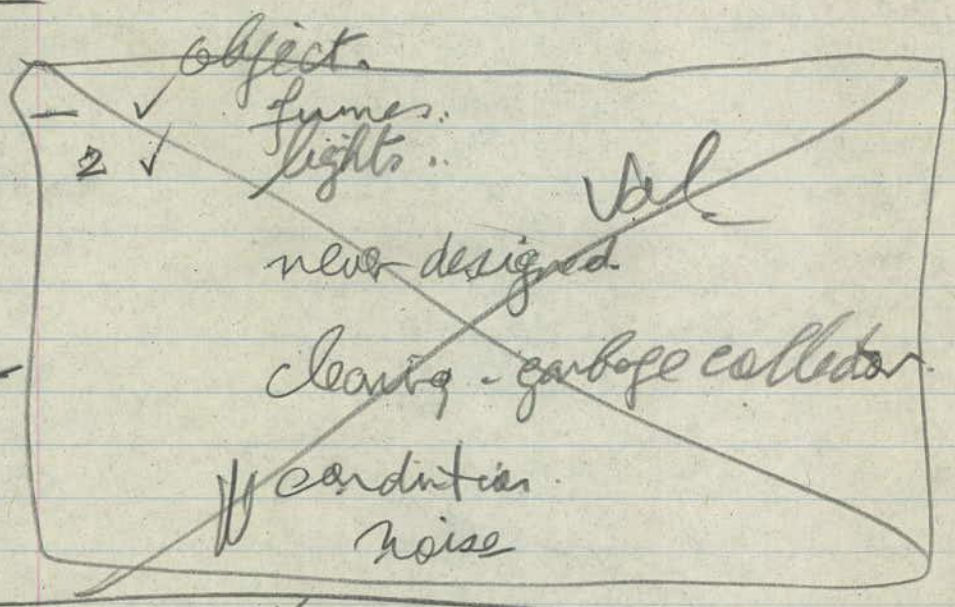
(1)

9/9/93

Did not attend meeting
Mike Dismukes "got up"

Eddie



Did attend meeting
Amnesty - No ~~issue~~ amnesty for everyone.

Dropped Adversary

Leigh Knight
End of month - target for amended findings not yet sent out.

Beth Meaker leaving 3 wks. Who taking over.

~~Loan~~ cost of rural housing - Brief Copy-post

Watch out for statement in DOP letter re 2C3 as applying ~~equally~~ being used as ground for changes / DEPP-15

(2)

9.3.93 Di re Council Meeting - Decision

Amnesty to regularise the sit f— to enter into neg with MO
if not — to take a policy role.

anyone can neg without [illegible]
1/ [illegible] amnesty for all.
2/ targetted to MO.

all dev.. Abatoirs
Frank — if amnesty them.

Harold away. Spoken against ~~MO Ren~~ [illegible]
Warehouse.

Rec 1 Di's motion to restrict ~~Planning Dept proposal~~ was argued against by Nick on the ground the Env Planning Dept - had no views on the matter!

Di agrees that this leaves the situation that it is Council ~~Policy~~ is to stay with the CEPP & have a DCP.

Rec 2 Approved

Rec 3 & 4. Amnesty proposed for whole of Council area.
Argued against a) by Frank Switzer re the illegal abattoir (which Council has [illegible] trouble with for > 12 mths - NO DA. on grounds of their claim of employment generating.)

b) by Nick that Council did not have the funds to do the whole area, & this should be seen as something ~~a~~ favouring MO to meet or negotiate a, full approval.

I see this a discriminating against the abattoir situation

Nick it seems has some nasty picture of how he can manipulate the process — by getting a carte blanch agreement to do what he likes, any time he likes.

It also leaves open the situation of "abuse" or "use" at election times!

The resolution leaves it open for a "mo to enter into negotiation with Council with a view to 'regularising' non compliance".

Nick Any one can come to Council & so negotiate "without prejudice" the situation & it is not intended that it relates to the abattoir.

Harold was away. It is he & Reg Baxter who have been most vocal against mo's. She views that South may now be let off the hook as he has helped bring about the Review & nobody (ie the Ratepayers have not pursued this or presented a case why the report & rec's. are inadequate

All motions passed unanimously

Di says debate got totally confused & ever she did not know what to press. She did feel that if she pressed would have faced defeat.

Rec 5. As stated by Nick + Di's. mail survey with random case studies.

Advisory Panel to be formed & public comment sought on its structure & composition

File PANCOM03
Copy

LISMORE CITY COUNCIL,
ADVISE FROM COUNCIL'S SOLICITOR (Bondfield, Riley & Fiford)
in respect to the Aims of SEPP-15,

"... that Council after proper consideration of the material supplied to it should form an opinion as to whether <u>all</u> the objectives comprised in SEPP-15 Clause 2 are able to be met. If Council is of the opinion that the aims and objectives comprised in Clause 2 of SEPP-15 can be met then Council may approve the development application so far as it satisfies the aims and objectives. Council's decision with respect to this aspect can only be set aside on appeal."

Extract from the Chief Planner's Report on DA 93/112 to Council Meeting 15 June 1993.

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Environment & Development Services

NJ:CW:S/285

Mr Juradowitch

June 16, 1993

The Secretary
NSW Department of Planning
PO Box 6
GRAFTON NSW 2460

FILE COPY

Dear Sir,

STATE ENVIRONMENTAL PLANNING POLICY NO 15
MULTIPLE OCCUPANCY AIMS & OBJECTIVES

During the recent processing of a Multiple Occupancy Development Application, Council received a number of submissions raising the issue of compliance with the aims and objectives of State Environmental Planning Policy 15. A copy of these aims and objectives is attached.

It is Council's view that Multiple Occupancies should generally comply with the aims and objectors of the State Policy. Objectors have argued that Multiple Occupancy applications should meet all the aims and objectives of the Policy. Council is reviewing it's position and would appreciate receiving the Department's views on this matter.

The Department may wish to particularly consider Objective (c) (iii) which would appear to restrict Multiple Occupancies to areas in which they may create opportunities for an increase in the rural population, in areas which are suffering or are likely to suffer from a decline in services due to rural population loss. Very few localities in Lismore could be defined as static or in decline.

Yours faithfully

P T Muldoon
General Manager/Town Clerk

New South Wales Government

Department of Planning

NORTHERN REGIONAL OFFICE

N.S.W. Government Offices
49 Victoria Street,
Grafton 2460
P.O. Box 6, Grafton 2460

Telephone :(066) 42 0622 Ext:

Fax No. :(066) 42 0640

The General Manager
Lismore City Council
PO Box 23A
LISMORE NSW 2480

Contact : Claire Aman

Our Reference : G93/00130 CA:DT

15 JUL 1993

Your Reference : NJ:CW: S/285

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2. The aims and objectives contained in clause 2 of the policy should be read conjunctively, as indicated by the penultimate use of "and". Multiple occupancy developments should therefore be consistent with all of the aims and objectives of the policy.

3. With regard to the Council's assessment of objective (c)(iii), the Department concurs with the view that such an objective is not highly applicable in the Lismore area.

4. The Council may find after further analysis of the capacity of SEPP 15 to address multiple occupancy needs in Lismore, that those needs are best accommodated through an amendment to Lismore LEP 1992. Such an amendment could reflect Lismore's particular land capabilities and servicing capacities.

5. I hope this information is of assistance.

Yours faithfully,

Malcolm Imrie
Deputy Manager
(Northern Regions)

Environment & Development Services

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NORTHERN REGIONAL OFFICE

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RECEIVED
16 JUL 1993
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LETTER NO. ALLOC.

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LISMORE, N.S.W. 2480

TELEPHONE (066) 21 9000

FAXED 3/6/93 mmc.

MS

OUR REF. MR:MU

YOUR REF Attention: Mr. Scott

LISMORE CITY COUNCIL
RECEIVED
- 7 JUN 1993
D 93/112
93-4764 EDS

3 June, 1993

The General Manager/Town Clerk,
Lismore City Council,
DX 7761 LISMORE

EDS

Dear Sir,

RE: MULTIPLE OCCUPANCY DEVELOPMENT - LOT 41 D.P. 802597 - 136 DAVIS ROAD, WIGGI

D 93/112.

We refer to your letter of 18th instant and the writer's subsequent telephone discussions with your Mr. Scott.

We advise we have perused the material you have supplied to us including material received from the applicant after lodging the development application.

The writer has also discussed the matter with Mr. Newport of Counsel.

We advise that Council after proper consideration of the material supplied to it should form an opinion as to whether all the objectives comprised in SEPP 15 Clause 2 are able to be met. If Council is of the opinion that the aims and objectives comprised in Clause 2 of SEPP 15 can be met then Council may approve the development application so far as it satisfies the aims and objectives. Council's decision with respect to this aspect can only be set aside on appeal.

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We enclose copies of the relevant Certificates of Title which indicates that both parcels of land are currently owned by the same proprietors as tenants-in-common. From perusing these Certificates of Title alone we do not suggest that any inference can be drawn to indicate that the applicant is unable to comply with the provisions of Clause 2(b)(i) of SEPP 15.

Council should note that it is not strictly necessary to place every reason for refusal of the development application in its Notice of Ground of Refusal to the applicant. If the applicant appeals, the hearing is a de novo hearing in which Council can raise further issues. Council should however be aware that if it believes that it does not have sufficient information in proper form before it to enable it to properly consider the application pursuant to the provisions of Environmental Planning and Assessment Act it should expressly indicate this fact as one of the reasons for refusal of the application. If Council does not expressly indicate this ground as a ground for refusal then on appeal Council may be precluded from arguing that it did not have sufficient information before it at the time it considered the application.

Council is also probably aware that it cannot grant a development consent subject to certain aspects being clarified at a later time. We refer Council to the case of Jungar Holdings Pty. Limited -v- Eurobodalla Shire Council and Ors. 70 LGRA at 79.

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Per:
Encl.

2335/1-2/mu

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Per:
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2335/1-2/mu

Call for freeze on multiple occupancy

Chairman of the Nimbin Ratepayers' and Progress Association Mr Don Johnston has called for a freeze on new multiple occupancy developments in the Lismore City Council area.

Mr Johnston said many multiple occupancies, some dating back to the early 1970s, still had not met council conditions and this needed to be rectified before new developments were approved.

Other residents also are concerned about the entrepreneurial push into multiple occupancy development, with agents advertising and selling land-shares, which the residents say abandons the original intent of the communities.

Multiple occupancy developments emerged after the Nimbin Aquarius festival of 1973. They were later authorised under legislation proposed by former Labour State Minister for Planning, Paul Landa, prior to the Environmental Planning and Assessment Act of 1980. They were seen as a viable way of providing accommodation for low-income earners who lived on shared land with like-minded people.

A former Lismore Alderman, Mr Johnston believes there is a place for multiple occupancy style development but is worried by the encroachment onto prime farm land.

He was a vocal objector to a recent development application at Nimbin Rocks which he had claimed exceeded the 25 percent prime agricultural land limit. It was later determined that the limit was not exceeded.

"I'm not against multiple occupancies but I am against them not abiding by the conditions set down," Mr Johnston said.

"There are up to 60 in the Lismore area and some the council probably doesn't know about."

A shareholder on the Dingo Ridge community north of Nimbin, Ms Robyn Scott, agrees there should be a halt to new developments until all those already established have attempted to meet council conditions.

She also is concerned by the way many shares are sold to outsiders who do not hold the community vision of original settlers and who are incompatible with the isolated lifestyle.

"We had to change our constitution to stop the constant selling of shares which often led to abuses of the rights of existing owners," Ms Scott said.

"There must be a strong level of commitment between share holders or problems will occur."

Lismore chief planner Mr Nick Juradowitch said the council this year aimed to draw up a development control plan with stricter guidelines for multiple occupancies.

Mr Juradowitch said the plan would reflect local circumstances and community standards and the council would seek community input.

Mr Juradowitch said there was concern that once the communities were established some did not abide by development conditions and the council did not have the resources to fully monitor the situation.

He said three to four new multiple occupancies were approved each year.

N.S. 13-1-93

NORTHERN STAR, SATURDAY, AUGUST 7, 1993. p62

Ratepayers' Corner

● A column by the Lismore and District United Ratepayers' Association

Some time ago, the Lismore City Council decided to undertake a multiple occupancy review.

As a result, submissions were invited from any interested parties.

The council then invited those who had made submissions to a workshop on July 22.

Between 40 and 50 people attended, including councillors, staff and representatives of the Department of Planning, Agriculture Department, Water Resources and CALM.

The workshop was split into seven discussion groups and all aspects of existing multiple occupancy policies were debated.

This workshop and subsequent council decisions and regulations will shape the future for rural development.

This organisation believes all multiple occupancies in their present form have run their course.

It was disappointing the workshop did not debate the other forms of rural development, including dual occupancy, strata title, villages and rural residential.

Surely it is time to closely examine the situation of rural development, to investigate all forms of land tenure in an endeavour to achieve a rural development policy that will serve ALL rural industry and residents.

If this means pressuring State and Federal governments for change then so be it.

It would seem a number of aspects of multiple occupancy policy are creating considerable concern for rural residents.

These include the provision of adequate water supply, inequitable rating and charges, the inability to secure individual land title, with the resultant difficulty in financing or selling a multiple occupancy share.

However the greatest problem, as we see it, is on-site effluent disposal, and this applies to rural villages and rural properties, as well as multiple occupancies.

Until septic or alternate systems can be upgraded and/or monitored to the point where the dangers of river and catchment pollution have passed, the council should be loath to even consider any further expansion of the problem.

The Beard report certainly indicates there are major problems with septics and our water systems.

The workshop gave council planners many suggestions and we hope these are incorporated in a list of options that will be presented to the community for further comment.

The council should not take the easy way out of just trying to relax regulations.

This may be tempting but it would not alter the present invidious situation where the council is faced with a no-win situation every time a multiple occupancy development application is lodged.

The council has the chance to achieve a fair and workable rural development policy, and should make the best of the opportunity.

The next meeting and the Lismore and District United Ratepayers' Association is August 25 at the Lismore Workers Club at 7.30pm. For more information contact Wayne Gregory or John Bertoli.

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She also is concerned by the way many shares are sold to outsiders who do not hold the community vision of original settlers and who are incompatible with the isolated lifestyle.

"We had to change our constitution to stop the constant selling of shares which often led to abuses of the rights of existing owners," Ms Scott said.

"There must be a strong level of commitment between share holders or problems will occur."

Lismore chief planner Mr Nick Juradowitch said the council this year aimed to draw up a development control plan with stricter guidelines for multiple occupancies.

Mr Juradowitch said the plan would reflect local circumstances and community standards and the council would seek community input.

Mr Juradowitch said there was concern that once the communities were established some did not abide by development conditions and the council did not have the resources to fully monitor the situation.

He said three to four new multiple occupancies were approved each year.

NS. 13-1-93

NORTHERN STAR, SATURDAY, AUGUST 7, 1993. P62

Photocopy 3

Ratepayers' Corner

● A column by the Lismore and District United Ratepayers' Association

Some time ago, the Lismore City Council decided to undertake a multiple occupancy review.

As a result, submissions were invited from any interested parties.

The council then invited those who had made submissions to a workshop on July 22.

Between 40 and 50 people attended, including councillors, staff and representatives of the Department of Planning, Agriculture Department, Water Resources and CALM.

The workshop was split into seven discussion groups and all aspects of existing multiple occupancy policies were debated.

This workshop and subsequent council decisions and regulations will shape the future for rural development.

This organisation believes all multiple occupancies in their present form have run their course.

It was disappointing the workshop did not debate the other forms of rural development, including dual occupancy, strata title, villages and rural residential.

Surely it is time to closely examine the situation of rural development, to investigate all forms of land tenure in an endeavour to achieve a rural development policy that will serve ALL rural industry and residents.

If this means pressuring State and Federal governments for change then so be it.

It would seem a number of aspects of multiple occupancy policy are creating considerable concern for rural residents.

These include the provision of adequate water supply, inequitable rating and charges, the inability to secure individual land title, with the resultant difficulty in financing or selling a multiple occupancy share.

However the greatest problem, as we see it, is on-site effluent disposal, and this applies to rural villages and rural properties, as well as multiple occupancies.

Until septic or alternate systems can be upgraded and/or monitored to the point where the dangers of river and catchment pollution have passed, the council should be loath to even consider any further expansion of the problem.

The Beard report certainly indicates there are major problems with septics and our water systems.

The workshop gave council planners many suggestions and we hope these are incorporated in a list of options that will be presented to the community for further comment.

The council should not take the easy way out of just trying to relax regulations.

This may be tempting but it would not alter the present invidious situation where the council is faced with a no-win situation every time a multiple occupancy development application is lodged.

The council has the chance to achieve a fair and wor[kable rural] development policy, [and] make the best of the op[portunity].

The next meeting a[t] more and District Unit[ed] ers' Association is Aug[ust] Lismore Workers Club[.] For more informati[on] Wayne Gregory or Joh[n]

PHIL DENNISTON
AH: 63 5306

David Holmes
REAL ESTATE

Ph 218600

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✓ Eddie?

See file 16.7.93

NATURAL LAW

Introductory

Speaking broadly, the Western intellectual tradition evolved out of the ancient Hebrew & Greek cultures. The doctrine of Natural Law, which dominated jurisprudence for 2000 years, grew out of Judaic monotheism. This vision of a single omnipotent & omniscient God greatly enhanced the concept of a unified divine will & intelligence, inexorably established by decree, ordering all creation, including human behaviour. This approach, conceiving of ubiquitously-applicable fixed principles, also had wide implications for the development of Western scientific thought. Both religion and science treated Nature as central, since it was God-given. No distinction was drawn between the laws of planetary motion, or of thermodynamics, or of human behaviour. No differentiation was made between divine & secular law.

Thus, Natural Law is particularly concerned with that stream of law which it sees as springing from divine intelligence or nature, as distinct from human authority. Indeed, Natural Law goes so far as to say that human law, to be legitimate, valid & binding in conscience, must conform to certain "higher" universal & immutable principles of conduct, which are ascertainable by reason and apply at all times and in all places. In this way, Natural Law crowns itself with a halo of moral certainty and says that only a *reasonable* or *just* law can count as law: if it ain't *just* it ain't *law*. From the Natural Law point if view, anyone who thinks its principles are in fact bad or unjust, is wrong: their reasoning processes have become corrupted and their opposition is irrelevant.

This approach dominated until the late 18th century and has shaped modern jurisprudence, but after the influence of the Positivists is now unsustainable. However the modern advocate or draftsman may be aided by natural law arguments.

Natural Law Terminology

Certain specialised words & concepts are integral to the Natural Law debate:

"Epistemology" means "theory of knowledge" -- there are two varieties, Empiricism [know by the senses] and Rationalism [know by reason]..

"Teleology" is the study of *purposes*. In the natural world, things were seen as functioning purposively: e.g. the purpose of the acorn is to grow into a tree. The Natural Lawyer also ascribes purposes to people (such as, by reasoning & reflection, to attain excellence of mind & character), their bodily parts and their institutions.

"Non-cognitivism in Ethics" is a construct in the philosophy of David Hume, who takes the view that we cannot *objectively* know what is right or wrong, that is, we cannot deduce what *ought* to be from what *is*. Norms cannot be derived from facts. Thus, says Hume, the Natural Lawyer is basically deluded in his method of concluding that the law should take a particular form simply because a certain state exists in nature.

The "Laws of Nature" guide the regular movement & timing of the heavenly bodies, the operation of gravity & thermodynamics, the interaction of chemicals etc. They are *descriptive*, and are not to be confused with Natural Law, which is *prescriptive*. If a descriptive law is broken, it was wrongly formulated as a law. If

a *prescriptive* law is broken, it remains a law. A metaphysical Natural Lawyer might argue that God ordered the laws guiding the planets in an identical way to ordering the Ten Commandments, and it is only freewill which trips up human obedience.

Law & Morality

Natural Law stands in the tension between "is" and "ought": it provides an intersection between positive law and morality. It argues that what naturally and factually *is* the case, or what accords with *reason, ought* to be. From this arose the opinion of many ancient and classical thinkers that positive or municipal law was automatically invalid if it did not accord with Natural Law.

No doubt moral argument has shaped law, but (as the Positivists have shown) it does not follow that to be valid a law ["expository jurisprudence"] must fit some test of morality ["censorial jurisprudence"]. An unjust positive law may still be admitted to amount to a *law*, but the question of its decency, or whether to comply with it or conscientiously refuse, left in contention.

History of Natural Law Thinking

Until the late 18th century, Natural Law dominated jurisprudence. There is a vast literature stretching from Plato until today, dedicated to asserting, with varying emphases, that the ways in which men ought to behave are discoverable by reason. This history falls into three divisions, ancient, mediaeval and classical.

A. Ancient.

The Ancient Greek Pre-Socratic Philosophers were concerned to explore the world of Nature in order to isolate universal principles which explained its structure & functioning. Whilst this exploration was as much speculative as scientific, its uniqueness lay in its reliance upon reason guided by observation. However, observation of Nature proved much simpler and more stable than observation of human behaviour. For instance, in Nature the strong prevailed: should, therefore, strong humans be allowed to exploit & enslave weak ones, to kill the old and to indulge powerful sexual instincts? Or did civilization and mutual security require the curbing of such power?

In the fifth century BC **Socrates** has his character Antigone appeal from the orders of King Kreon to the "unwritten and steadfast custom of the Gods"[1].

Plato, a student of Socrates, was a mystical idealist who saw the experience of the human senses, indeed all physical and moral phenomena, as a pale shadow of the realities, the pure ideas, which lay beyond. He believed that only in a totalitarian state ruled by a benign & enlightened philosopher-king was it possible to elicit an integrated (albeit static & inflexible) set of human laws which even approximated the ideal.

In the 4th century BC **Aristotle**, a student of Plato, came to rely upon scientific, empirical observation and to reject this speculative idealism. He saw Nature as dynamic, with all phenomena (moral & physical) in a dynamic flux towards a destined end. This is called teleology. In sharp distinction to Plato, to him a law

was natural if it was a widespread fact, not an ideal conceived by intuition or reason. If, upon empirical observation, a rule was found to be common to all mankind, then it must be based upon the fundamental purpose of humanity as a social being and hence "natural". "All humanity" for Aristotle, however, tended to mean the local Greek City-States. This produced a warp: for instance, slavery was ubiquitous amongst them therefore Aristotle concluded that some men were slaves by nature.

At **Rome**, Natural Law was far more part of the nuts-and-bolts of actual advocacy than a speculation of the philosophers, as in Greece. The power and complexity of the Roman Empire made an effective legal system essential. Roman culture was much affected by **the Stoic philosophy**, which first appeared about 300 BC. It stressed the brotherhood of man and grew as the Greek City-States declined after the conquests of Alexander the Great. It stressed the universality of reason as an essential element of human character. Thus the superior, or natural, law came to be equated with that law which was discernible by reason. In order to ascertain whether certain behaviour accords with natural law, various normative criteria -- such as what maximizes health, welfare or harmony -- must be applied. An eminent Stoic was:

Cicero, who said[2] "Law is the highest reason, implanted in nature, which commands those things which ought to be done and prohibits the reverse".And again: "True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting. ... It is a sin to try to alter this law, nor is it allowable to repeal any part of it, and it is impossible to repeal it entirely. ... [God] is the author of this law, its promulgator and its enforcing judge"[3].

B. Mediaeval.

The Stoic emphasis upon universal reason combined forces with Christianity and spread throughout the civilized world under the Roman *Imperium*. Stoic philosophy, Christian theology and Roman law shaped the mediaeval concept of Natural Law, which spanned from St. Augustine in the 4th Century through to St Thomas Aquinas (whose philosophy is termed Thomism) in the 13th.

St. Augustine (354-430 AD) was very Platonic in his approach, in that he saw any human law as only necessitated by the fall of humanity from God's grace and the Eternal law. Human positivist law was allowable only as a pragmatic necessity enabling disgraced humanity to stumble on. The Roman *Imperium* was thus tacitly supported: not for long, however, since by the 5th century Rome was over-run by barbarians and law was dispensed by local chieftains. As these became Christianized, feudalism became established.

St. Thomas Aquinas was heavily influenced by Aristotle, whose philosophy had surfaced again out of Arabic texts, after being lost. Aquinas assimilated Aristotle into Christian theology so as to produce scholasticism. He endorsed Aristotle's teleological view of humanity as naturally a social & political creature, saw the State as directly necessitated so as to fulfill the social character of humankind. He therefore rejected the notion that human government was based in sin, and rehabilitated human law from St. Augustine's disdain. Aquinas thus built a delicate compromise which quietened the struggle between the advocates of divine will and human law, but he placed heavy emphasis upon the role of reason. He envisioned a Hierarchy of Law:

(i) **Eternal Law:** God-given rules governing all Creation and not knowable by humans except through revelation.

(ii) **Divine Law:** Spelt out in scripture.

(iii) **Natural Law:** That portion of the Eternal Law which can be discerned by human logic and deductive reasoning in the context of humanity as a social creature.

(iv) **Human Law:** Municipal rules and edicts: necessary in order to implement the general guide afforded by Natural Law, coerce deviants and regulate matters which were morally indifferent. For Aquinas, municipal rules were invalid if they did not conform with reason, but he did not advocate open revolt, rather compliance and letting God remedy the situation.

Aquinas thus emphasised conformity and rational deduction in a context of premisses which were based not in reason but in the assertions of theological belief: a recipe which led straight to the Spanish Inquisition.

C. Classical.

In the 15th century a new humanism evaded theological dogmas, emphasised objective scientific method, and, spreading from Italy, inspired a secular revolution: the Renaissance. This was accompanied by the Reformation, wherein Churches became national and were controlled by the State.

This era did not end Natural Law, but rather led to its Golden Age as a secular and political force. Complete emphasis was laid upon human reason, even to the extent of saying that God did not enter the equation. In some nations, especially France, this led to massive codification of the law. In England, the Common Law was regarded as embodying reason, leading **Coke C.J.** to say[4]:

> [T]he Common Law will control Acts of Parliament and sometimes adjudge them utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void.

However, this was never a practicable course, and the most the Natural Law spirit could do (and did, especially with the development of Equity) was to gradually forge law in the fire of changing social & economic reality as feudalism declined and science, technology & democracy ascended. In America and France this process was revolutionary rather than gradual.

During these centuries, Natural Law ceased to involve metaphysical speculations and became secularized and a tool of daily politics. In a time of religious conflict, with no international positivist institutions capable of enforcement, **Grotius** (1583-1645) relied upon Natural Law arguments -- that is, right reason in the context of social humanity -- to advocate an International law constraining the use of violence.

Hobbes (1588-1679) was also concerned with human nature, but not in the ideal sense of Plato's affable conclusions from the social nature of humanity. Hobbes saw humanity as naturally selfish and vicious, such that only the surrender of political control to the Commonwealth could preserve order. Hobbes thus rejected any external, universal or necessary Natural Law and endorsed administration of law by a trustworthy sovereign who would naturally be reasonable. This rather touching faith in the decency of sovereigns helped lay a foundation for the tremendous increase in legislation during the 19th & 20th centuries and for Austinian positivism.

Blackstone, in his *Commentaries* (1765) represented the law as enforcing natural rights, that is, what accorded with reason & morality: he held that human laws were to be of no validity if contrary to this -- no mere rhetoric when one observes how Equity amended the Common Law.

Democracy and Natural Law

After the Renaissance the idea of the "social compact" gained currency, especially as articulated by **John Locke** (1632-1704), who conceived each human being as being completely free in primeval nature but, as small bands of wandering *homo sapiens* combined into society and practiced agriculture for their own protection, they surrendered that freedom on trust to human government. Any breach of that trust was said to justify revolt since positive law was only justified when promulgated by a social compact valid in Natural Law. Thus Natural Law became the basis of fundamental civil rights.

Rousseau (1712-88) endorsed the "general will" of the people as being the embodied expression of their natural freedom and hence paramount. However, in reality this "general will" could not be ascertained and its imposition crushed minorities. His idealism led, ironically, to totalitarian injustice, and, in the ensuing reaction, to a general association of Natural Law with radicalism. This, together with the perceived unscientific basis of Natural Law and the growing belief in another form of rationalism -- human progress through applied science -- weakened it for the assault of Positivism.

The writings of Locke and Rousseau led directly to the American and French revolutions, both of which were saturated with Natural Law language and ideals. In 1776 the American colonies, revolting against the British Crown, asserted a host of Natural Law rights in the Declaration of Independence, stating that it was "self evident" that all men had the right to "life, liberty and the pursuit of happiness". Ironically, within 100 years Natural Law was being invoked by Conservatives to oppose collectivist social reform. Natural Law ideals were enshrined in, and guaranteed by, the United States Constitution as prevailing over municipal law. It is worth noting, however, that even such "Bill of Rights" guarantees must be interpreted by judges with regard to the constitution and social/economic reality: not with regard to their own assertions of Natural Law.

In 1789 the French National Assembly, at the commencement of the revolution, declared that "liberty, security and resistance to oppression" were indisputable principles, evident to reasoned reflection upon the nature of humanity.

Teleology and Natural Law

Teleology is the study of the purpose of things, humanity and institutions. Teleologically, at a minimum, the purpose of human existence is usually seen as survival (something striven for even in extreme situations), the attaining of excellence in mind & character, and (Aquinas would say) attaining knowledge of God.

The effect of teleological thinking can be quite far-reaching and mundane. For instance, from the 18th century teleologically the anus was seen as being for excretion, the penis for procreation. As a result of this influence we still have legislation, s.208 of the *Criminal Code*, against [note the wording] "unnatural offences".

Minimum Content of Natural Law

If survival is accepted as the minimal human purpose or aim, then certain rules respecting persons, property and promises are necessitated to enable life in a social community, whether organized or spontaneous. Thus, there is an urgent need to restrict violence, recognise approximate equality, practice limited altruism, share limited resources, respect private property and honour promises. The ubiquity of these rules disclose the core of good sense in Natural Law, and help put the Positivists in their place by substantially explaining *why* formal rules tend to be respected and obeyed. Application of these truisms in different cultures and municipal systems can necessitate a very diverse range of specific "nuts & bolts" provisions. However, their ubiquity tends to constrict the realistic ability of Positivists to say that law can have *any* unrestricted content: to some extent, law, as a human construct, must be saturated by, and must reflect, the basic identity of humanity as a social creature.

Natural Law and Survival

US v Holmes[5]: In 1841 the *William Brown*, one of the numerous immigrant sailing ships crossing from Liverpool to America, struck an iceberg. The captain and some officers escaped in the jolly boat, leaving 42 people, half passengers and half seamen under the command of the mate, to do as best they could in a rickety longboat. Another 30 passengers were abandoned with the sinking ship. The longboat was dangerously low in the water and efforts at bailing her dry became unsustainable. The sailors then began throwing the passengers, both men and women, overboard into the icy water, despite their pleas. No lots were cast. The survivors were later spotted by another vessel, saved and taken to France. On the eastern seaboard of America there was a public outcry against the sailors, whose action was seen as shameful to the national flag and endangering the immigrant trade, but only Holmes, the leader of the sailors, came within the jurisdiction and was charged with murder, later reduced to manslaughter (of just one of the passengers thrown overboard, one Charlie Holmes, who had offered five sovereigns if he was allowed until dawn to prepare himself). Interestingly, the judge was openly addicted to opium smoking, which was then quite legal. Holmes pleaded that in the compelling circumstances, under the pressure of necessity, he had been thrown into a state of primitive self-preservation: "natural law" took over and conventional law ceased to apply. This plea appeared to hit home: although convicted, his sentence was a mere 6 months imprisonment.

R. v Dudley & Stephens: In 1884 a private yacht, the *Mignonette*, sailing from England to Sydney, sank in a squall in the Atlantic Ocean. The four men on board took to the dinghy. They were the two defendants, a chap named Brooks and Parker, the cabin boy. On the 19th day adrift, with the death of all four from hunger & thirst imminent, without drawing lots the defendants cut the cabin boy's throat, drank his blood and ate his flesh over the next four days. After being rescued, the survivors were repatriated to England and the defendants were charged. "The cannibals" were immensely popular and, in a highly unorthodox procedure, the jury were not allowed to render a verdict, but only to find the facts. A tribunal of five judges rejected the plea of self-preservation in a situation of extreme danger wherein the ordinary law became suspended and natural law took over. The defendants were sentenced to death, but this was in reality a charade, they immediately received a royal pardon: again, the Natural Law plea hit home. Dudley emigrated to Sydney: he also became an opium addict and died as the first victim of the 1900 bubonic plague.

Criticism of Natural Law

Except for some religious fanatics, most folk endorse moral subjectivity (also called moral relativism): each individual should determine for himself what is good. Nowadays there is little belief in objective goods, and a widespread doubt that, even if they exist, we could know them [this is called "moral scepticism"]. These attitudes are prevalent in modern culture, and make it easy to accuse Natural Lawyers of dreaming up their assertions. The Natural Lawyer tends to reply that the critic has ignored profounder truths.

The conclusions asserted by Natural Law teleology are far from obvious. Maybe Creation equally designed the acorn just as much to feed pigs & squirrels as to grow into oak trees, or the penis & anus for homosexual satisfaction just as much as to procreate and excrete. For most Natural Lawyers, freedom & equality are basic laws -- but from ancient times up to and including Aquinas, slavery was a valid imposition of positive law and was not even deemed inconsistent with Natural Law so long as it was "rationally conceived" as being for the common good. This is why the Scandinavian Realist Alf Ross said[6] "Like a harlot, Natural Law is at the disposal of everyone".

How correct was the judgment of Orberon J. in *Corbett v Corbett*[7] that a mans's non-fraudulent marriage with a transsexual was void? Is marriage naturally and of necessity biological in essence or for procreative purposes? If so, are all marriages between aged or sterile heterosexual persons void? Or is marriage a contract for which trust, companionship and sharing are the core, such that a transsexual male with an artificial vagina (usually manufactured from the skin of the penis in an operation costing $2500) is not realistically distinguishable?

Natural Lawyers propounding teleology and "Self-Evidence" can be accused of elitism for their assertion, their "invincible diktat", that they alone have "done the thinking" and reached the right answers.

The Positivists, from Jeremy Bentham & Austin to Hart, debilitated the classical Natural Law theory by pointing out that the a protester asserting that a black-letter law was unjust & ineffective would know his error when the noose tightened, or (as the Duke of Marlborough/ Muirheads recently found) when the police arrested them for contempt of court and the receivers liquidated their property. This is why Bentham described Natural Law as fanciful "nonsense on stilts", and Blackstone's assertion that laws inconsistent therewith were invalid as "stark nonsense".

Natural Law attacks on Positivism!

Positivism began as an attack on Natural Law, but can itself be attacked. Unless positive law can be criticized & censored from an ethical framework supported by arguments of reason, nature & common usage, it may soon degenerate into naked despotism. This has in fact eventuated, in modern history, as witness the slavery endorsed by the American South, the genocide of the Nazis and the apartheid of South Africa.

There is a terrible danger in a democracy where power is controlled by partisan politicians (concerned to perpetuate their own careers and allied with bureaucrats having similar intent), aided by media manipulation and the votes of welfare dependants milking the productive classes. That danger, I submit, has in fact resulted in the terrible incubus of our national revenue laws, which lay burdensome imposts upon the very efforts and transactions (including employment) which are so desperately needed to spark our moribund economy. Our revenue laws stand up very poorly to Natural Law scrutiny.

The law should not be, and in fact is not, value-free and formalistic. Law has an internal morality containing desiderata such as societal harmonization, clarity and non-retrospectivity. It is a purposive exercise dependent on conscientiousness.

Predicating validity on "sovereignty" fails to explain the deep-seated cultural values which allow the "sovereign" body its very effectiveness. Nor can any judicial authority be antiseptically neutral: there are inevitable gaps where morality creeps in, as both Hart (with his "judicial discretion") and Dworkin (with his "justice & fairness") recognize occurs in "hard cases".

Modern Revival of Natural Law

In modern times irrational & immoral regimes, even in the most civilized countries, have engendered (amongst other things) two horrendous world wars, the barbarity of Nazi genocide and the brutality of Japanese imperialism. These savage abuses awakened widespread distrust of human institutions and positive law. Folk hankered for the idealism, reason and superiority of Natural Law, which in this sense can always be called in aid against the excesses of anarchy or despotism.

At the Nuremberg trials following World War II, certain Nazi officials were convicted of crimes against humanity, and were punished (even by death) although what they had done was strictly in accordance with their municipal law at the time. The decisions were based in International Law, but Natural Law language (such as "crimes against humanity") was used.

This shocking cultural recidivism has led, especially in Europe, to a resurgence of Kant's general, unspecific imperative: "we should always act so that our norm of conduct might be translated into a universal law". Neo Kantians such as Stammler & del Vecchio have tried to reason with logic and flesh out this skeleton with actual laws. Common Law countries prefer to potter on empirically dealing with cases on a piecemeal basis as they arise.

This modern recourse to Natural Law as an ideal or yardstick has continued in the Charter of the United Nations, the Universal Declaration of Human Rights, and similar idealistic documents.

Modern science, psychology and sociology have enabled empirical research into human behaviour and hence armed Natural Lawyers with some of the weapons of Positivism itself.

The Catholic Church still endorses Aquinas (this is called Neo-Thomism) and supports what it asserts are the dictates of Natural Law, e.g. against abortion or contraception Paul VI[8]. John Finnis is a Neo-Thomist and a modern scholar who deserves special attention.

Finnis

Finnis asserts that there are certain principles which are inevitably and invariably part of human nature, however much they are ignored or misapplied. These principles are, he says, "self evident": people assent to them without requiring proof and they are not ethical norms derived from facts e.g. about human behaviour, or from teleological suppositions about what human purpose is. Finnis recognizes that folk can hold a wide & chaotic variety of notions about what is morally right, however he maintains that certain forms of *good* will be perceived by any sane person as worth having. There are some rules of behaviour which arise from elementary truths about human beings and which any community must observe to be viable. These principles, he says, provide the only rational basis for moral judgment. Whatever is contrary to the nature of human beings as such is contrary to reason. These goods *are* Natural Law.

For Hart the only indisputable human end is survival. For John Rawls the irreducible primary goods, essential whatever else is desired or planned in life, are liberty, opportunity, wealth and self-respect. For Finnis the basic, undeniable prerequisites for human flourishing are life [meaning vitality generally, including health, safety etc.], knowledge, play, sociability, practicable reasonableness [meaning application of ones own intelligence to shaping one's life] and religion [in the sense of thinking about the reason for existence]. Some critics say this list does not cover the right to *work*.

Usefulness of Natural Law to the Modern Practitioner

According to the theories of both Hart and Dworkin, there is room for Natural Law reasoning in hard, or "ultra-hard" cases, since in both these cases the judge is guided by "discretion" or such abstractions as "fairness and justice". Some train of criteria must be used to focus a grey area. Riggs v Palmer; He Kaw Teh and Broadcasting afford examples. In the Broadcasting case the HCA invalidated clear legislation by asserting an "implied freedom of political speech" -- much to the disgust of the Federal Attorney-General.

The modern advocate may find Natural Law arguments especially useful and successful where decisions must be made free of black-letter constraints, e.g. where judicial discretion applies e.g. as regards award of costs. Ever since the Roman Empire, that which was *most natural* was supposed to settle cases not covered by authority.

Law and Existence

There is a bewildering variety of contradictory views & customs prevalent amongst nations, and amongst the tribes or classes of common interest among and between them. There is a bewildering variety of outcomes available flowing from reasoning upon the basis of premisses which are by no means universally accepted. All of this may be just a transient phase, a frenetic doddering on the periphery of reality, amongst the breaking waves and rocks, whereas the deep truth lies in a still ocean where these contradictions are transcended.

Certain it is that, amongst this turmoil and under the "treason-felony of the modern barons of positivism"[9] (to use a phrase of Professor Julius Stone), the spell of a common human intuition has been broken, so the concept of Natural Law seems to hang in mid-air without firm support. Perhaps this modern Tower of Babel is only temporary.

Probably the best and least dogmatic intellectual model of existence is provided by the ancient Indian Sankhya philosophy, which envisages Being as pure Spiritual Intelligence which is continually reaching a most-finite conception of itself and thereupon flinging a spark of the divine fire into its surrounding sevenfold planes of increasingly dense matter. In order to return to the divine fire, that spark must cohere in orbit around it adequately refined physical, emotional and mental atoms to build a soul body with which to cross into the inner planes. Thus does the "dew drop slip into the shining sea".

The path each spark must follow is unique and cannot be told, let alone in advance, in words or earned by works. It is attractive, but superficial, to invoke and assert some "superior authority" as providing the one-and-only "right" way to go. Given the range of genuinely-held premisses and the varied inconsistency of reasonings therefrom, human freewill and the distortions induced by pain, and it is clear that there is no way any "higher law" can be credibly dictated and imposed as constituting an ultimate truth bound to solve human problems quickly & painlessly. The path, and the truth for each being, is spun upon that being's experienced tension between Spirit and matter: a tension which each being very properly experiences differently, otherwise all most-finite conceptions which the Spirit has of itself would be identical!

The only way forward is for each being to be free and responsible to the in-leadings of its own reason & spirit, and for positive laws to respect that freedom and always be justifiable in the crucible of reasoned debate. Insofar as this approach coheres (as it probably will) the voluntary (rather than the externally-imposed) sharing of premisses and of reasoned outcomes, so much the better.

Conclusion

The very existence, let alone the content, of Natural Law is subject to the gravest doubts. The only "natural law" which exists is that effects remorselessly follow causes. However, if material and spiritual progress follows from attention to right reason, then in this is to be found the enduring and invaluable core of Natural Law doctrine: the only positive laws worthy of respect are those which stand unscathed when subjected to right reason in the context of humanity as a social creature responsible for shepherding life upon a fragile planet.

David Spain, July 1993.

NOTES

1. Antigone verse 454. I am indebted to T.E.Holland *Jurisprudence* 1882, 13th ed. 1924 p.32. for this phrase & translation.
2. *De Re Publica* Bk 3 Ch.22 s.33:pp
3. *De Legib.* i. 6; ab.i. 15.
4. Dr. Bonham's case (1610) 8 Rep.114, 118.
5. 226 Fed. Cases 360.
6. *On Law and Justice* trans. Dutton, London: Stevens & Sons, 1958 p.261.
7. [1971] L.R.[P]. 83
8. *Humanae Vitae* 11-12, 1967.
9. Julius Stone *Human Law and Human Justice*, Maitland 1968 p.36.