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DATE 10 / 11 / 2014

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COURSE NUMBER LAW 1216

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No. of  
QUESTION

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Natural Law Theory is a theory that states that a law is legitimate or valid in virtue of bearing the right relation to something outside the law. The thing varies according to different versions of natural law theory. It could be according to God, according to objective morality, according to an objective principle such as justice or fairness, or according to a ruler such as a King. It could be according to rationality or a principle of objective empathy (eg complete or absolute impartiality). As different versions of natural law theory can focus on different things that the law must be related to in order to be legitimate, different versions of natural law theory can also focus on different relations (eg gravity, logical deduction or equivalence, supervenience).

Positivism is a theory that states that a law is legitimate or valid in virtue of bearing the right relation to something inside the law. It has to do with logical consistency within the legal framework. A good way of understanding positivism about law is to consider the analogous positivistic theory of what makes a sentence a legitimate sentence of English. A positivist about language would say that a sentence is a legitimate sentence of English when it obeys the principles of English grammar. Similarly, a legal positivist would say that what makes a law legitimate or valid as a law is that it obeys or follows the principles of what makes a law valid. This is to say (often) that the appropriate procedures were followed with respect to (for example) the introduction and passing of a Bill. Or of the rightness in a judge in deciding what cases constitute relevant precedent or what statutes are or are not relevant.

### Private Property & Criminal Law

#### Naturalism

One way of being a natural law theorist about private property is to maintain (for example) that God appointed the King, the King appointed the land-holders, and that land-holders claims to <sup>exclusive use of</sup> land (and the laws protecting those claims) are legitimate in virtue of being appropriately related to the dictates of God. That is a very clear

A hypothetical syllogism  
of legitimacy

case of naturalism about private property. While it has been historically important it is perhaps less relevant today as people are less likely to accept that God has done this or even that there is a God. <sup>There might be many Maori gods</sup>

With respect to criminal law it is interesting that some of the earlier British criminal laws were very focused on protecting the private and exclusive rights of the gentry to land. Punishment for poaches and for burglaries and the like. Again, a natural law theorist would maintain that criminal laws (and perhaps criminal punishments) are legitimate only insofar as they bear the right relation to the extra-legal principle (of fact, or state of affairs) that grounds law in the natural world (or in some ideal principle such as rationality)

### Positivism

Positivist theories would need to look at whether the laws that protect private property (and the laws that criminalise those who violate the former) cohere with the law more broadly. Aspects of coherence include whether the laws were legitimately introduced. If we consider the arrival of British settlers (with British views on private property) compared to Maori views on private property we have an interesting case for positivist theory about property. On the one hand, the Crown could legitimately take law (perhaps) and give deeds of ownership as it saw fit. <sup>perhaps British common law</sup> Such a thing was anti-positivist with respect to Tikunga Maori views of land, however. The notion of exclusive use (ownership) of land does not cohere with Tikunga Maori. Positivist theory (from a Tikunga Maori point of view) would reject the crown's granting exclusive property rights (and preventing customary usage) to be illegitimate from a positivist point of view.

### Discussion

Of course there might be many Maori gods and a Naturalist case can be made for the God of the forest (for example)

and criminalising those who chop down trees in reserves.  
legitimising various laws of conservation, protection, etc of New Zealand lands. Such a position would be naturalist insofar as it appeals to a principle (Tare' - God of the forests dictates) about what should be done with the forest.

What I have tried to convey with the discussion is that there are many different versions of both positivism and naturalism that can be developed in a number of different (also differently plausible) ways. It is too easy to set up straw-man theories that are easily defeasible. It is much harder to develop a coherent view that retains the good features of all while overcoming the various problems / potential objections of simpler versions of each.

My personal favorite position is one that appeals to rationalism as the objective principle. Rationalism (on most understandings) has a principle of non-contradiction built in and thus we inherit many of the benefits of positivism / coherentism for free. This position is attractive in appealing to "ideal rationality" and "complete impartiality". Not with respect to what makes a law legitimate within present frameworks but more with respect to what the law should be.\*

\* There are problems with this view. Most notably there may be a mathematical proof that there isn't any one "ideal rationality" but many different "ideal rationalities". It is possible that this will result in a collapse back to positivism / coherentism. There is also a potential problem with respect to 3 valued logics that I must be covered with here.

### Women as property

Natural law theory seems appealing here insofar as we think that there are objective principles regarding (for example) the status of women as persons or the irrelevance of gender for personhood. One can claim that once upon a time when people thought that women weren't persons solely because they were women the people had

gender discrimination  
in the military

There are natural facts, but could be  
appealed to about women being weaker etc.  
but often accept those arguments with respect to  
the (for example) present of

made an error. Just like how when the people thought the earth was flat the people were wrong. Of course other naturalists could appeal to a different principle about paternalism and protection - much as US slave-owners attempted to argue (some of them) that women were far better off as a group for being looked after. On Natural law theory there are objective facts (outside the law) with respect to which position is correct with respect to what the law should be.

### Positivism

Positivist views would require us to look at how the laws were introduced and also at coherence with other laws/legal principles. One could argue on positivist grounds that the laws regarding women as "property" are illegitimate insofar as most people wouldn't regard that as acceptable AND that people regarding a law as acceptable is required for a law to be legitimate. One could counter positivistically that women aren't people so their denial of the legitimacy of the law doesn't count, however.

### Discussion

One might want to distinguish coherence within present legal frameworks from coherence within ideal legal frameworks. It might be consistent within Nazi regime to shoot that person solely for being Jewish or intellectually handicapped or whatever - but that doesn't necessarily make that action legally acceptable from within a positivist legal theory. We do sometimes change laws retrospectively. There is precedent for that. Suppose this might be a bit of a stretch but it seems to me that a positivist could argue that coherence within a 'later' legal theory trumps all. Perhaps because we are believers in legal progress. That is to say that while



Sometimes we might take a few steps back generally speaking humans are developing more legal (perhaps also moral) knowledge just as we are learning more about the natural world, mathematics, and rationality over time.

I think that there is no rationally acceptable reason to think that gender (sexuality) disability, race etc make a difference to personhood. I would think that any non-staunch (ie any plausible) legal theory would reflect that. My preference is to appeal to ideal rationality for no reasons I outlined in this essay.

Coherece within ideal rationality is the objective extra-legal principle that grounds the legitimacy of the laws

Despite what you think. (ie- we could all be wrong about it because it is an objective principle)

Is what I believe.

Whether we call it "positivist" or "naturalist" doesn't matter to me. Hopefully it transcends both.

No. of  
QUESTION

I.D. \_\_\_\_\_

Q2 I remember being at dinner with an academic lawyer in Australia and she was talking about the constitutional documents of Australia and the US and she said that NZ didn't have a founding document as a country. I remember feeling very surprised to hear that and I replied that the Treaty of Waitangi was the founding document of the country. She laughed and said that a Treaty isn't the right sort of thing to be a founding (constitutional) document. I remember feeling very puzzled about that and about why she thought that to be so. I have been very interested to hear over the course of the semester what a constitutional document is supposed to be such that the Treaty doesn't count.

As such, my first thought on NZ adopting a written Constitution is to think that we have decided to entrench the Treaty so that it is recognised under international law as the founding document of New Zealand. For me, the issue could never be "Should the Treaty be in or out?" or "what is the status of the treaty now that we have a constitutional document" the issue can only be one of what version of the Treaty gets to be part of the constitution, or what form the Treaty will take.

I really like the idea of the "Principles of the Treaty". I do understand that this is a notion that has been abused by governments often when they are not living up to the principles of the Treaty under any half way plausible interpretation of its meaning. I think the notion of the Principles of the Treaty needs to be rehabilitated. It has to do with intention. Partnership. Good faith. <sup>Not just in words.</sup> I think we need to pull in some principles of ideal rationality or an impartial view or the view from nowhere in order to move forwards as a unitary country. Rather than being so quick to think that people would have voluntarily given up things that on any

half-way plausible view of Maori Tikong (naturalist or positivist versions) has <sup>been</sup> thereto (exclusively owned) to give <sup>it</sup> <sup>some</sup>

This does bring us to a problem insofar as the Treaty might be thought to be more of a living document rather than an historical artifact. Maori language (for example) needs to (and is) evolving and morphing through being used as those who participate in it alter the nature of the thing. Our decisions as to how to interpret the treaty, how to interpret the principles of the treaty, how to judge similarity & dissimilarity of other cases, how to judge relevance or irrelevance of statute, how to promote and retain public acceptance of this or that interpretation and this or that outcome. How are <sup>these</sup> things to be reconciled with the idea of a constitution as an entrenched (thus hard to change) legal document? One might say that at least it is an actual legal document whereas a treaty (my friend seemed to be saying) wasn't a document that had any <sup>real</sup> clout or bite in the face of things going differently. It seems to me that we presently have many laws that have no legal bite because we choose not to enforce them (eg <sup>crimes by rich or powerful people</sup> marijuana for personal use, tax evasion). Perhaps entrenched laws may be expected to be more consistently enforced? Discrimination in the US has a long way to go even though that is expressly in the constitution, so entrenchment doesn't seem to guarantee follow-through with respect to action.

During times of peace we focus on individual rights. During times of war or upheaval we seem to focus on taking away those same rights (usually in the name of protecting them). So, for example, when we are sufficiently hysterical about terrorism or Ebola we think it is justified to hold potential terrorists or healthcare workers in detention facilities. In the name of fighting the fight against terrorism or Ebola, of course.

There simply can't be absolute freedoms in a working society <sup>properly</sup>. Life would be nasty brutish and short without contract laws and the like. Though we alternatively might <sup>have to</sup> <sup>consider</sup>

<sup>entrenched</sup>  
The social mores preventing tragedy of common exploitation in small hunter gatherer groups as being "law" (like) restrictions on behavioural conduct with built in sanctions (eg like how we consider Tikvira Maqos to be a legal theory).

Sometimes we need to limit individual liberties for the good of the group / the good of greater society. One isn't allowed to yell "fire" in a movie theatre or "bomb" on a plane. One might not be allowed to carry a loaded fire-arm due to the perceived risk that others might be shot and generally speaking people have the right to not be shot. People have the right to smoke themselves to death or to eat their way to diabetes, however. There are tricky issues around balancing individual liberty & the good of the group. Free access to healthcare, gun law restrictions, the right of free association etc.

My point is that we need to make trade-offs. Social order is important. Institution of law and government. <sup>the economy</sup> On the other hand individual liberty is important. <sup>the accumulation of</sup> <sup>expensive rights to "stuff"</sup> and people of justice / fairness / equity. Through time our decisions about where the trade-off point should be are affected by what is going on in society. Whether there is a war on and people need to be reassured about safety of flying or going to work in high rise buildings. Not having a constitution may allow us to be more responsive to changing times. Precisely because of the lack of entrenchment we can be more responsive to current climate.

On the other hand, one might think that a constitutional document would afford us protection for individual rights & liberties. Perhaps because a constitution is more likely to be agreed upon / accepted during a time of peace. This doesn't seem to be the case, however. It has been the perception of crisis & the threat of something deeply entrenched within the public's way of life being threatened that

has resulted in the drive for entrenchment. The extra oomph that gets people sitting around quibbles in order to agree to a document as the lesser of evils. Usually something significant needs to happen to get the momentum for a change to the status quo.

I think that the issue is only likely to be resolved (ultimately) by crisis. I think that there is a lot of non-crisis work to be done in really entrenching the spirit of the Treaty into New Zealand Society. It does need to be living and evolving for that to happen especially in the face of increasing multi-culturalism. It is hard because one can appeal to the Treaty <sup>or make a reasonably convincing case for</sup> or the spirit of the Treaty in order to justify competing courses of action, sometimes. Principles can be responsive to changing social environments - which is why I'm attracted to them. Eg - Utilitarianism - the theory that one should do that which results in the greatest good for the greatest number of people. What action is prescribed varies as a function of the different people involved & the particular circumstances. My point is that the principles of the Treaty could do similar for New Zealanders to protect against foreign exploitation in particular. Eg - we can't sell land to foreign investors because we don't accept you can own land. But this is controversial. Perhaps this Country will have to get in a very bad way indeed in order for it to happen. There is too much controversy and indeed diversity in what the Treaty means to different people.

Some Iwi want to sell land and claim they have a right under the Treaty.

I.D.





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