

FUNDAMENTAL PRINCIPLES OF LAW AND JUSTICE IN THE OPENING TITLE OF JOHANNES VOET'S *COMMENTARIUS AD PANDECTAS*

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1 Introduction

The work of Johannes Voet (1647-1713), arguably the foremost institutional writer of Roman-Dutch law, has exerted an influence on the South African courts which is without parallel. In 1955, Percival Gane wrote:¹ “After a lapse of more than two centuries, his *Commentary*² is still the legal groundwork of a country which has grown since his day from an insignificant settlement to a Union of some worldwide importance.” To put Voet’s mighty achievement into proper perspective, we must turn to his later counterpart in English law, Sir William Blackstone (1723-1780) whose institutional masterpiece, *Commentaries on the Laws of England*, was published between 1765 and 1770. The formative influence which this work has had on the law of the United States prompts comparison with the formative influence of Voet’s *Commentarius* on South African law. Both of these magisterial works were, remarkably, founded on natural law, a philosophy which lies at the heart of this article.

In South Africa’s new constitutional era, Voet’s *Commentarius* has been unjustly neglected, if not largely forgotten. The time has now come for this treasure of our jurisprudence to be rediscovered and revived by a country which, for all the constitutional advances it has made over the last two decades, has lost its moral compass. The universal values and principles that underpin the *Commentarius* are, so I argue in this article, eminently capable of providing the impetus and direction which South African law in its present circumstances so urgently needs.

1 Johannes Voet *Commentarius ad Pandectas* (tr Percival Gane *The Selective Voet being the Commentary on the Pandects* vol 1 Durban, 1955) “Introduction” at xvii. See also *Trustees of Wright v Executors of Wright* (1873) 3 Buch Cape SC 10 at 12; *Lint, Curator of Doman v Zipp* (1876) 6 Buch Cape SC 181 at 184; J Wessels *History of the Roman-Dutch Law* (Grahamstown, 1908) at 328.

2 Published 1698-1704.

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Voet was held in high esteem by his peers and his translators alike. The French jurist Merlin bestowed on him the title “The Geometer of Jurisprudence” for the clarity and logic of his writing.³ James Buchanan, on whose translation of Voet this article is largely based, describes him as “this great Master in the Law, to whom the practitioner has never, as far as I have observed, had recourse in vain, whether he seek the principles of the law or the points which occur in daily practice”.⁴

Despite Voet’s status as the most frequently cited authority on Roman-Dutch law in our courts, there is a glaring anomaly in the judicial treatment of the *Commentarius*: while our judges readily rely on the high authority of Voet’s exposition of the positive rules of Roman-Dutch law, they have seldom had recourse to the mighty philosophy of natural law which gives life, form and substance to those rules.⁵ This was especially so under apartheid.

Who was Johannes Voet? In a nutshell, he was for thirty-three years a professor of law at the University of Leiden, where he gave his lectures in Latin to students from all parts of Europe. He came of a family highly distinguished in theology and in law. Voet was an exceptional scholar with an intimate knowledge of the Greek and Latin classics. His greatest work, the *Commentarius ad Pandectas*, was eighteen years in the making.⁶ This work consists of a comprehensive commentary on Justinian’s Digest, coupled with an exposition of the Dutch law of Voet’s own time.

To what extent are Voet’s writings the product of his own original thought? The early Natal judge, Sir Henry Conner, believed that Voet was valuable chiefly as a compiler of other men’s views rather than by virtue of his own merit.⁷ There may be substance in this view, but it fails completely to comprehend the function of a great institutional legal writer such as Gaius or Voet: that function is not to display originality or profound insight, but to encompass the whole of the law in its full sweep and extent; to take a bird’s eye view of a legal system; to draw the map of the law by showing the interrelationship

3 *Questions de Droit Confession* (1827-1828) s 2 n 1. Not all commentators, however, have found geometrical precision and symmetry in Voet’s writing. There are those, of whom I am not one, who find Voet’s writing prolix, crabbed and labyrinthine. In comparing Grotius with Voet, Wessels (n 1) at 323ff finds Voet’s writing disjointed and unsystematic, although he does also recognise his strengths. Be that as it may, it is submitted that Wessels, like other writers, misses the essence of Voet’s contribution: see text to n 8 *infra*.

4 Johannes Voet *Commentarius ad Pandectas* (tr J Buchanan *Johannes Voet His Commentary on the Pandects* vol 1 book 1 Cape Town, 1880) at iii. Buchanan’s translation of the *Commentarius ad Pandectas*, though incomplete and seventy-five years older than Gane’s, is often more faithful to the spirit of Voet than the latter.

5 Our judges are no less remiss in dealing with the treatises of other Roman-Dutch jurists who share Voet’s philosophy of law.

6 Voet (n 1) at xi. Voet’s life and works are described more fully in Wessels (n 1) at 320-330; AA Roberts *A Guide to Voet* (Pretoria, 1933) at 15-17; RW Lee *An Introduction to Roman-Dutch Law* 3 ed (Oxford, 1931) at 18; JC de Wet *Die Ou Skrywers in Perspektief* (Durban, 1988) at 154-158; and DH van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (Durban, 1983) at 362-365.

7 *Wheeler v Adler Bros and Thompson & Co* (1880) 1 NLR 152 at 154. See, also, Voet (n 1) at xvi-xvii.

and cohesion of its various branches: in short, to relate the parts to the whole. Apart from Stair and Blackstone, has any Western jurist fulfilled this function as well as Voet during the last thousand years? Has any institutional writer besides Blackstone exerted so great an influence beyond the borders of his own country as has Voet?⁸ The answers to questions such as these will give us the true measure of the man.

2 Voet's opening statement

I turn now to address the main concern of this article, namely a close reading of Voet's opening title in Book 1 of the *Commentarius*. In this abundantly rich title, Voet sets out his philosophy of natural law, and expounds fundamental principles of law and justice. It is a title which our jurisprudence has unwisely and unjustly neglected, on the implicit but false assumption that our new constitutional dispensation founded on international human rights doctrine has no need of the legal wisdom enshrined in it. The purpose of the following examination of its contents is to dispel this myth, and to invite those in a position to influence the legal development of this country to look at the title afresh.⁹

Here is Voet's opening statement, from which everything else in the *Commentarius* flows:¹⁰

[Historical study of the human race invariably shows that] in no place, and in no time, did it exist without laws regulating the right and the honourable (*bonum et aequum*) ... [Even after the fall,] there remained in the hearts of men some remnants of an imprinted, inborn divinity: some rules of justice and equity, divinely engraved and inborn: dictating unto each one what was lawful and what was unlawful, what to do, and what to avoid. Each one, discussing these rules within himself, with a sedate mind, and cogitating them by himself, could not fail to recall them, though by strength not his own, since not merely did the sacred writings point them out to him, but also the teachings of the best and most learned of mankind ...

From this statement, a number of conclusions follow: Mankind has never at any time or in any place been without law. The original source of law is within us, not outside us. Thus any model of law which does not consider its source within our human nature, but treats it only as a construct external to man, is defective and incomplete. Any outer expression of law in the form of speech or writing is, without exception, the *ex post facto* product or offspring of an internal precursor, which is inherent in our human nature. From the first creation of mankind, this inborn, inherent law has always regulated, from

8 For a good account of the exceptional skill and mastery deployed by Voet in weaving together the various strands that make up the *Commentarius ad Pandectas*, see Wessels (n 1) at 321-322. See, also, De Wet (n 6) at 154-155. Wessels (n 1) at 324 holds that the writings of Grotius are more concise, methodical and systematic than those of Voet.

9 I have chosen to rely mainly on the translation of this title by James Buchanan, for the reasons given in n 4 *supra*. Where, however, that translation was found to be unclear, I have not hesitated to call in aid Gane's more modern and familiar translation.

10 (n 1) I I I.

within us, what is right and honourable (*bonum et aequum*), what is just and equitable, what is lawful, what to do and what to avoid. Thus no-one may plead ignorance of these inner dictates of justice and equity.

But what if these inner dictates in a particular situation are not obvious or clear to us? In the quoted passage, Voet holds that reflection on these inner regulations with a quiet mind, free from agitation or distraction, will always show us what to do or not to do. Of course, it is no easy task to quieten the mind: sustained, disciplined practice is called for. Calm reflection on these rules would obviate recourse to external resources, such as books, websites and legal advisers, and unveil the dictates of our inborn law.¹¹

3 The divine source of natural law within man

What exactly is the source of these rules of law within our human nature? According to Voet, as we have seen, our true, essential nature is divine. Even after the fall of man, the residue of an imprinted, inborn divinity remained in every human heart. Thus the rules of justice and equity are divinely engraved within our being.¹² As we shall see later, this inborn divinity turns out to be identical with the faculty of reason within us.

Voet, however, is not content to leave it at that. He proceeds to address directly the question of the foundation of natural law. In so doing, he reviews a number of answers and opinions proposed by other writers, only to find these lacking in some respect.¹³ After conceding that scholarly positions differ greatly on this question, Voet proceeds firstly to dismiss as unsound the views of Grotius and Pufendorf. He then states his own carefully considered view that “the source and wellhead of the whole of natural law, from which every principle of justice will have to be derived like streams from a source, or boughs

11 Cf Cicero *De Republica* 3 33.

12 Voet (n 1) 1 1 1. Thus already, in the very opening of the *Commentarius*, Voet has rejected any positivist account of the origin of law. The divinity of which Voet speaks is not to be understood in terms of some dualistic notion of man and God, whose existence we are free to deny. No, this divinity lies at the very core of our being. This residual divine essence of which Voet speaks is common to, and shared by, every human being: it is our true identity. It is the truth that unites all human beings. No-one is without it. That being the case, why are we so seldom, if ever, aware of our essential divinity? Only once our accumulated overlays of ignorance in the form of greed, lust, anger, hatred, prejudice, envy, desire etc have been removed by means of the inner work of self-purification, will it be possible for us to discover and gain access to the essential divinity which lies at our core. Until that work is completed, we will have no more than inklings and glimpses of our inner divinity. These overlays of ignorance also explain why, despite having the knowledge of right and wrong engraved in our hearts, we do not act accordingly. Instead, as Voet puts it, “seeing and approving the better course, we follow the worse” ((n 1) 1 1 1). Arguably the clearest expression of Voet’s view of the inborn divinity of mankind is to be found in the non-dualistic *advaita vedanta* philosophy of ancient India. That philosophy, in my view, provides the surest and most authoritative foundation for the natural law doctrine espoused by Voet and by many other thinkers. The essence of this philosophy is well expressed in *Srimad Bhagavata (The Holy Book of God)* vol 1 (tr Swami Tapasyananda, Madras, India (1980)) 2 2 6: “In one’s own heart He resides, the all-perfect and infinite Being, who is Truth and Love unalloyed. Seek Him with abiding faith in His truth, abandoning all worldly values. By that will ignorance ... be destroyed.”

13 (n 1) 1 1 15.

from a tree, is nothing but the law of God the creator”¹⁴ powerful but at the same time benign towards his creatures. This divine source, to repeat, is not to be sought externally to man, for it is inborn in us.¹⁵ Thus we must seek it within ourselves before we look anywhere else. This point is of paramount importance, for if the divine source were to be located entirely outside man, it would be open to anyone, particularly in an age such as ours, where secularism, materialism and atheism hold sway, to deny its existence. Such a person would then be free to claim exemption from the dictates of natural law on the ground that it lacks an authoritative source, and therefore lacks also the power to bind. Given, however, that the divine source of natural law resides within us, as our very being, any denial of the divinity is tantamount to a denial of our own existence. That would be an absurdity and a gross violation of reason.

4 The characteristic features of natural law

Having determined the foundation and origin of natural law, Voet proceeds to consider its essential characteristics. He begins with the question: What is natural law? Voet starts by considering the timeworn definition of Ulpian and Justinian, namely that natural law is that which nature has taught to all animals.¹⁶ Voet quite correctly criticises this definition¹⁷ which has caused a great deal of controversy and confusion in juristic thought over the centuries, and which reduces natural law to the crude level of animal instinct. His formulation of natural law is refined, deep, and predicated on the human realm: it calls for close consideration, and to this I now proceed.

According to Voet:¹⁸

The natural law of mankind is nothing other than what right reason dictates to those who possess true understanding, either without any previous searching of the mind, or by necessary and obvious inferences to which they readily assent without elaborate argument and without embarrassment or difficulty in their conclusions. The only subject for this right reason, then, is a human being having the use of intelligence and reason – sharing instinct indeed with brutes as far as his body is concerned, but sharing as it were with God an indwelling right reason.

Voet gives this definition without comment or elaboration. However, it does require elucidation in certain respects. The two essential elements of natural law, as Voet conceives it, are right reason and true understanding, working in close conjunction with each other. How do these elements co-operate in an individual? Right reason proclaims the rule of natural law applicable in a particular situation, and true understanding, without

14 *Ibid.*

15 *Idem* 1 1 1: See n 12 *supra* and text thereto.

16 (n 1) 1 1 2*pr.*

17 *Idem* 1 1 12-13. See, also, Hugo Grotius *De Jure Belli ac Pacis Libri Tres* vol 2 (tr Francis W Kelsey, Oxford, (1925)) at 11-12; TC Sanders *The Institutes of Justinian* (London, 1927) 7 *in fine*; B Nicholas *An Introduction to Roman Law* (Oxford, 1962) at 55-56.

18 Voet (n 1) 1 1 13.

any accompanying mental analysis, argument, doubt, hesitation or objection, immediately assents to that rule and allows it to operate. This process is free to unfold only in a mind which is quiet and free from agitation and movement. Our ordinary mental state of chatter and incessant activity is not amenable to the operation of natural law, for in that state we cannot hear and obey the still, small voice of reason within us.¹⁹

What of the common objection that, for want of a clearly identifiable lawgiver and of a manifest sanction for its transgression, natural law must be denied the status of law?²⁰ The legislator demanded by those who advance this objection is one in human form. Similarly, the penalty alleged to be lacking in the event of a transgression is one imposed by human agency. In the case of natural law, the lawgiver is God, who resides within us as our very being, and whose dictates are expressed, not *a priori* as in the case of man-made legislation, but in the present moment of experience through the agency of reason. The penalty for violations of natural law by individuals includes, at the very least, our all too familiar attacks of conscience, guilt and remorse. This is to say nothing of actual retribution in the form of punishment, the severity of which is proportional to the gravity of the offence committed.²¹ Voet himself is keenly aware of the nature of both lawgiver and penalty in the case of natural law.²²

The law of nature, originating as it does in divine providence, remains ever fixed and immutable.²³ For this principle Voet relies on Lactantius,²⁴ who adds that neither senate nor people can release us from the duties imposed by natural law.²⁵ Thus a rule of man-made law, be it legislation, judicial precedent, custom or juristic writing must invariably yield whenever it is in conflict with a dictate of natural law. Consider, for example, a rule of human positive law which exonerates from all liability a person who though able to do so without danger to himself, does not try to rescue a drowning child. This rule violates the natural-law precept, founded on scriptural authority, that one must love one's neighbour as oneself. The rule is therefore invalid and has no binding force.²⁶

19 In considering Voet's definition of natural law, care must be taken not to confuse reason with reasoning. These are not good bed-fellows! Reasoning is an activity that goes on in the mind. Reason is as swift as greased lightning: It just presents whatever it has to present, brilliantly lit, clear, beyond any shadow of a doubt.

20 Voet (n 1) 1 1 14.

21 *Idem* 1 1 1 *pr.* Here one is reminded of the carefully elaborated doctrines of *sanskāra* or *karma* (reward and punishment for one's actions) in Hinduism, Buddhism, and other systems of religious law.

22 *Idem* 1 1 14.

23 *Idem* 1 1 16. However, as we shall later see, Voet controversially qualifies this core tenet by holding that natural law "though unchangeable in principle, is yet hypothetically (as they say) changeable" (Voet (n 1) 1 1 17).

24 *Divine Institutes* ch 8, a text which is taken almost *verbatim* from Cicero's famous earlier definition of natural law (n 11) 3 33.

25 Voet (n 1) 1 1 16.

26 This is the position in reason and in principle, but it is certainly not the position adopted by Voet ((n 1) 1 2). There he holds that "natural equity and sound reason" constitute no more than the ultimate subsidiary law of Holland: natural law may therefore be invoked only after municipal law, custom, Roman law and canon law, as well as the just laws and customs of neighbouring countries, have failed to provide an answer to a legal problem.

Lactantius, in the abovementioned passage,²⁷ forges an identity between natural law and right reason. Right reason, according to Voet, is in turn “the image of divine law and a method of expression of it”.²⁸ It follows then that natural law and divine law are indistinguishable.²⁹ And this is no more than we would expect in view of Voet’s earlier assertion that natural law has its origin in man’s inborn divine essence.³⁰ The identity of natural law and divine law is well illustrated by the scriptural injunction to love one’s neighbour as oneself, which underlies the example just given.

5 Natural law and the *bonum et aequum*

Having dealt with Voet’s account of the character and the qualities of natural law, I turn now to examine its relationship with the *bonum et aequum*. Voet, following Ulpian, defines jurisprudence as the knowledge of things divine and human, the science of the just and the unjust, the art of the good and fair.³¹ In this definition, the term “good and fair” is Gane’s translation of Voet’s original *bonum et aequum*.³² Nothing could be further removed from the modern, strictly secular meaning we attribute to jurisprudence, as that term is used today in juristic thought and in academic law courses. For Voet, as for Justinian, jurisprudence was understood in its entirety, as a unity, with no separation between the human and the divine realms. So indisputably was this so, that in ancient times, as Voet points out, the administration of justice and authority over religious matters were vested in the same hands: the king was also the priest.³³

On the strength of his definition of jurisprudence, Voet imposes a duty on jurists to distinguish and separate the just from the unjust, the lawful from the unlawful. But neither the civil law nor natural reason allows us to separate or distinguish the *bonum* from the *aequum*, the good from the fair. These terms, like the just and the unjust, are juxtaposed in Voet’s definition of jurisprudence.³⁴ While the juxtaposed terms “just” and “unjust” are opposed to each other and must be sharply separated, the other juxtaposed terms “good” and “fair” are *not* opposed to each other: these terms are inseparably conjoined so that the *bonum* is everywhere joined to the *aequum*, and the *aequum* to the *bonum*.³⁵

What then is the relationship between natural law and the *bonum et aequum*? Are the good and the fair the standards a judge must invariably apply when seeking to decide a case according to natural law? Voet does not answer this question, which I shall pursue

27 See n 24 *supra* and text thereto.

28 Voet (n 1) 1 1 16.

29 There are, however, writers such as Thomas Aquinas who do seek to distinguish them.

30 Voet (n 1) 1 1 15, 1 1 1. See nn 12 and 13, and text thereto.

31 Voet (n 1) 1 1 4.

32 Buchanan, less convincingly, translates *bonum et aequum* as “good and just”. I therefore follow Gane.

33 Voet (n 1) 1 1 4. One example that comes to mind is the semi-historical early Roman king, Numa Pompilius (whom Voet mentions by name in 1 1 1). See also Plato *Laws* 624a-625a.

34 Voet (n 1) 1 1 5.

35 *Ibid.*

below. What he does is equate the law of Holland of his time with the art of the good and the fair. He says:³⁶

It is surely more than plain from many passages in our law that law is the art of the good and the fair; that its ministers profess an acquaintance with the good and the fair; that on the basis of the good and the fair, judges decide, pronounce judgment, assess and interpret; that exceptions are grounded on the good and the fair; that restitution is so made; and that thus everywhere the good is united with the fair, and the fair with the good.

The question, however, remains: Can the art of the good and fair be identified with *natural* law, as Voet has defined it? Voet holds that the law of nature, being established by divine providence, remains ever firm and immutable, for if we admit its mutability, we must admit also mutability in its divine source.³⁷ Thus, in order to establish an equation between natural law on the one hand, and what is good and fair on the other, it must be shown that the latter, like the former, does not admit of change. Voet, however, expressly asserts that what is fair may, under “certain accidental circumstances”, become unfair, and therefore that what is good may similarly become no longer good.³⁸ We are therefore driven to the surprising conclusion that natural law, as Voet conceives it, *cannot* in every case be identified with the *bonum et aequum*.

6 Voet’s notions of equity and justice

Closely associated with natural law is the notion of equity, which Voet addresses directly in his opening title.³⁹ His point of departure is the famous maxim in Justinian’s Code:⁴⁰ “It has been decided that, in all things, the principles of justice and equity, rather than the strict rules of law, should be observed.” From this it follows that laws require change whenever a manifest inequity is apparent in them.⁴¹ According to Voet, the quoted maxim finds particular application in the field of judicial interpretation. As he puts it, to know the law certainly does not mean to follow its words, but its force and power.⁴²

Justice, like equity, is closely linked to natural law. Voet describes justice as “the most perfect of all the virtues, and as it were their conjoiner”.⁴³ Following Justinian,⁴⁴ he

36 *Ibid.* Voet bases his views here on Justinian’s Digest and Institutes.

37 *Idem* 1 1 16. Voet elaborates: “[I]f you admit its mutability, we must also admit a variation in God, and a real repentance from his former plan, and thus either a confession of his prior error, or his change for the worse of what had been rightly determined.” Voet, however, would doubtless agree that while the tenets and dictates of natural law are immutable, their practical application must be adapted to the needs of a particular time, place and society. More of that below.

38 *Idem* 1 1 5. The two examples which Voet gives to illustrate this transformation are, in my view, unconvincing.

39 *Idem* 1 1 6.

40 C 3 1 8, *The Emperors Constantine and Licinius to Dionysius* (tr SP Scott).

41 C 1 14 9, *The Emperors Valentinian and Martian to Palladius, Praetorian Prefect*.

42 Voet (n 1) 1 1 6.

43 *Idem* 1 1 7.

44 Inst 1 1pr.

defines justice as “the constant and perpetual desire to render unto everyone his own”.⁴⁵ He penetratingly observes that actions must be classified as just or unjust by virtue of the *desire* to render what is due to anyone, not by the rendering itself. Thus a debtor who fails to repay a debt as a result of circumstances beyond his control – for example, he loses all he has in a fire or a shipwreck – but whose intention is always to pay at the earliest opportunity, is not lacking the merit of true justice, even though his failure to pay amounts to an unjust omission. Conversely, a thief who restores what he has stolen, not because he desires to render his own to the owner, but pursuant to a judgment of a court, lacks the merit of true justice even though his action is a just one.⁴⁶

Our state of human frailty prevents us from having this desire constantly and perpetually, as the definition of justice requires. Be that as it may, whenever the desire to render to all persons their own is manifestly absent, the absence of justice also becomes immediately apparent.⁴⁷

Although human laws change and many things which were once unlawful are now allowed, it does not necessarily follow that justice changes accordingly.⁴⁸ In a vivid image, Voet invites us to reflect on the fact that human laws, which change frequently with changing times, men and manners, are no more than the clothes that cover justice. People do not change with frequent changes of clothing, and frequent changes in the law similarly leave justice unaltered. For throughout the flux of changing laws, the just man tenaciously preserves the constant and perpetual wish to render everyone his due. A more graphic illustration of the relationship between justice and law would be hard to find.

7 Substantive rules of natural law and justice

I turn now to consider a few substantive dictates of natural law and justice, as Voet expounds them in this title.⁴⁹ The “first foundation” of justice is to acknowledge God as a parent. We are next bound, in return for the benefit of our birth, to show our biological parents marks of piety and respect, to the limit of our ability.⁵⁰ The view that these precepts of natural law are outdated and inappropriate to our age is specious, for the social evils attendant upon the disintegration of the family are constantly before our eyes. Our age is sorely in need of the immutable natural-law values which Voet proclaims in this title, and the more we deviate from them, the more our political and social ills are bound to intensify. Those ills are the penalty imposed upon society for its violations of natural law.

45 Voet (n 1) 1 1 7.

46 The distinction which Voet draws in this section between a “just action” and “acting justly” is far from clear.

47 Voet (n 1) 1 1 8.

48 *Ibid.*

49 *Idem* 1 1 15-19.

50 *Idem* 1 1 15.

In proclaiming these values, Voet relies on the authority of Pomponius, who holds⁵¹ that our reverence towards God goes together with our obligation to obey our parents and our country as a holy mother.⁵² Pomponius's view, if not directly quoted from, is entirely consonant with the teaching of Plato in the *Crito*.⁵³

A key precept of natural law is that people should not do to others what they would not wish to be done to themselves. In addition, they should give to others what they would desire from them for themselves.⁵⁴ Voet finds support for these precepts in the words of Seneca:⁵⁵ "Man was born for mutual assistance, for human life consists in benefits and concord, nor is common help worked into a bond by terror but by mutual love." These precepts are the glue which holds together the fabric of society in every age and place: their cogency is manifest, for reason and common sense abundantly dictate that a community in which individuals consider only their own interests will be destroyed.⁵⁶

Natural law, according to Voet, provides ample justification for the measures we take to protect ourselves against the threat of injury or loss caused by others. We should, he says, deploy beams, walls and ditches against thieves, robbers and enemies. Today, Voet might have added electric fences, security patrols and armed responses to this list. He goes further: not only should we defend ourselves against the violence of others, repelling force by force and arms with arms, but we are even justified in taking the lives of aggressors if we cannot otherwise protect life or chastity.⁵⁷

This last principle is treated by Voet as an exception to natural law, which totally forbids the killing of another. Exceptions such as this are none the less founded on natural reason: they do not subvert its universal precepts, but rather confirm them in accordance with the maxim that exceptions prove the rule in non-expected cases.⁵⁸

In many cases, the law of nature offers counsel, but does not command or forbid. It follows that for "just and urgent causes", a departure from the suasion of natural law may be justified. Such cases include liberty and communal ownership. Thus through natural inclination the first people accepted the concept of human freedom, but afterwards rejected it, and started enslaving those who had been captured in war. This change was, according to Voet, justifiable⁵⁹ but his condonation of slavery is controversial and appears to be based on expediency: human liberty, far from being merely a matter of inclination, is a core precept of natural law.⁶⁰

51 D 1 1 2, *Pomponius libro singulari enchiridii*.

52 Voet (n 1) 1 1 15.

53 *Crito* 50a-52a.

54 Voet (n 1) 1 1 15.

55 *On Anger* 1 5.

56 Voet (n 1) 1 1 15.

57 *Ibid.*

58 *Idem* 1 1 17.

59 *Ibid.*

60 Inst 1 3 2.

8 Two questions regarding Voet's treatment of natural law

Firstly, why does Voet require natural law to be reduced to writing, when he maintains that our inborn divinity reveals to us its commands and dictates, and in particular what is right and what is wrong? Secondly, is Voet's opening title a genuine expression of his own legal philosophy, born of personal conviction, or is it merely a standard, conventional, pro-forma statement which pays lip-service to natural law, such as we find in almost every treatise on the Roman-Dutch law? Is this opening title, in other words, little more than window dressing, as many positivist thinkers would have us believe? Briefly, the answer to the latter question is in the negative. Natural law is indisputably the life-blood of the *Commentarius*, as it is of the *Corpus iuris civilis* upon which it is based. The ubiquity of natural law is certainly most manifest in Voet's opening title, but its influence runs like a golden thread throughout the work, as even a cursory perusal of its contents will confirm.

To the first question posed above, Voet gives two cogent answers.⁶¹ Firstly he argues that natural law should be reduced to writing because of our collective historical forgetfulness. Lacking the capacity to remember the rules of natural law, we need reminders in the form of scripture and philosophy, the "teachings of the best and most learned of mankind". Voet is here entirely consonant with Plato, who holds that the only useful function of the written word is to remind us of what we have already known, but have forgotten.⁶²

The second reason Voet gives is that, our inborn divinity notwithstanding, in our conduct we are inclined to see and approve the better course, but to follow the worse. External coercion is therefore necessary to counter our transgressions of the dictates of right reason. He says:⁶³

[I]t was necessary not merely to confirm the ... inborn rules of right and wrong, the universal dictates of the natural law, by having written laws for each nation's use, but more especially to accommodate them to the moral actions of men in common life, so that the more certain and uniform principle of justice pervading the community might exist also in the individual, rewards being added to incite virtue, and penalties to deter vice.

In South Africa, the authentic and authoritative written expression of natural law is to be found primarily in the works of the leading Roman-Dutch jurists (including, of course, Voet himself), and in the Constitution of the Republic of South Africa, 1996, which enshrines the fundamental values of unity, justice, freedom, dignity and equality.⁶⁴ These values are all vital elements of natural law.

So much for Voet's treatment of natural law. It is also necessary to consider his equally penetrating accounts of the law of nations and of the civil law.⁶⁵

61 Voet (n 1) 111.

62 Plato *Phaedrus* 275c9-d2.

63 Voet (n 1) 111.

64 Constitution of the Republic of South Africa, 1996. See esp the Preamble and s 1.

65 Voet (n 1) 1118-20.

9 Voet's account of the law of nations (*ius gentium*)

The law of nations is defined as the law uniformly observed among most, if not all, established nations. Voet, however, goes beyond Roman law by recognising two distinct species of the *ius gentium*.⁶⁶ These he terms primeval and secondary. The former type comprises those dictates of natural reason which are observed by many nations, for example, reverence towards God and obedience to parents and to one's country. The secondary law of nations is what derives not so much from the light of reason (in other words, from principle) as from practical human necessity and utility: it is what the nations have made applicable to themselves as use and human necessity required.⁶⁷

In giving examples that illustrate this secondary law of nations, Voet clearly and simply explains the practical needs which gave rise to certain important contracts. Individuals are not provided with everything they need, nor does every plot of land produce all it needs, so necessity and utility together persuade them that commerce will be promoted by means of contracts.

The oldest and simplest of these was exchange (*permutatio*). The weakness of this contract eventually led to the emergence of sale. For those, however, who did not have enough money to buy things, letting (*locatio*) was introduced, so that for a little money they might have the temporary use of the articles they needed. What of those who did not even have enough money to pay the rental? They had to rely on the generosity of others and use the article without paying for it. At that point, the loan for use (*commodatum*) and the revocable grant (*precarium*) were created. When money was obtained elsewhere in order to pay the price in a contract of sale or hire, the contract of *mutuum* arose. And since a creditor meanwhile ran the risk of default by the debtor, it was thought fair that the debtor should give him possession of something as security, for as long as the debt remained unpaid. Thus was the intervening contract of pledge (*pignus*) devised. In the interests of those who were not capable of managing their own affairs, the custom developed of placing those affairs in the charge of another, by way of mandate or deposit. For those who flinched at the prospect of running a business on their own, assistants were called in. This was the origin of partnership, where business was conducted by the division of labour.⁶⁸

I have chosen to discuss this example at some length, so that the informed reader may compare the simplicity and clarity of Voet's account with the complexity and prolixity which bedevil the treatment of such topics in most modern legal primers. Is it any wonder that so many first-year students, certainly in my experience, are soon overcome by the discouragement and despondency which Justinian understood only too well, and warned against at the beginning of his Institutes?⁶⁹ Would the needs of these students, many of them from disadvantaged backgrounds, not be better served by the earliest possible exposure to selected texts from the Institutes of Justinian and the *Commentarius* of

66 *Idem* 1 1 18. Voet does not cite authority for this distinction: To what extent then, is it his own original conception? I leave the question open.

67 *Ibid.*

68 *Ibid.*

69 Inst 1 1 2.

Johannes Voet? To me, looking back on many years of teaching law courses, the answer is obvious.

The examples which Voet gives to illustrate the secondary law of nations are not confined to the field of private law. In the public sphere, he points to the laws governing the immunity of ambassadors, declarations of war, and the safety of hostages.⁷⁰ In the course of this discussion, Voet touches on a vital precept of natural law, namely that a promise once given must be kept.

In the English common law, this principle is expressed by the maxim “a man’s word is his bond”. It is not hard to see that this principle, if generally applied, would by itself transform *inter alia* our public discourse, our private relationships and our commercial dealings. It is a principle which would not find universal favour in the legal profession, for it would obviate the need for many written contracts.

10 Voet’s account of civil law (*ius civile*)

Turning finally to the civil law, Voet again departs from Roman law by identifying two distinct types of it.⁷¹ The civil law is that which every state establishes for itself. This may happen in one of two ways. Firstly, a state may approve and adopt particular dictates of the law of nature, or rules of the law of nations. Voet calls this civil law by approval: it is the law acknowledged by a state as being equitable and good, because it is established among other nations by natural reason or by just inference. Thus, for example, both the law of nature and the law of nations strongly condemn murder, adultery, theft and other misdeeds. Where the authority of the state lends its support to the prohibition of these acts, civil law by approval comes into existence.

Secondly, a state may at its discretion add to its body of civil law of this kind, such rules as evolve from its own customs and usages. These rules constitute civil law by origin: it is established in a state without any particular foundation of natural law. To this branch of civil law belong wills and many other provisions of Roman law which have remained in force. The hallmark of all rules of civil law is that the command and wish of the ruler stand in place of the dictates of reason.⁷²

11 The claim of Voet’s natural law philosophy to pre-eminence in contemporary South Africa

Voet’s natural law doctrines, which underpin and illuminate the *Commentarius*, are as much part of South African common law as the positive rules of black-letter law set out in that work. Thus natural law precepts, as we find them in Voet (and in other Roman-

70 Voet (n 1) 1 1 18.

71 *Idem* 1 1 20.

72 *Ibid.* Voet is not postulating here any conflict between civil law and natural law: his point is simply that certain rules, although in accordance with natural law, derive their force and authority primarily from the will of the sovereign, rather than from the dictates of reason.

Dutch legal writers) can legitimately claim a position of pre-eminence in shaping our jurisprudence.

Newer claimants to such pre-eminence in post-apartheid South Africa have noticeably failed up to now to deliver on their initial promise. The most important of these rivals to natural law is *ubuntu*, which, although it manifestly lacks the deep-rooted historical credentials of the classical natural-law doctrine as presented by Voet, does base its claim on the fact that it is an indigenous product of African culture. The limited success which *ubuntu* has had in entrenching itself in South African jurisprudence has been well documented by Roederer and Moellendorf⁷³ and also by Frank Diedrich.⁷⁴

The far stronger claim of classical natural law to recognition as the central and foundational legal philosophy in South Africa is supported by distinguished and influential jurists. These include John Dugard,⁷⁵ Etienne Mureinik⁷⁶ and Judge Friedman.⁷⁷

12 Conclusion

A pressing need in our confused and divided age is to have before us a model of law in its entirety and unity. Law, whether national or international, as it is taught, applied and practised everywhere today, consists in the main of an incoherent mass of fragmented rules and arcane technicalities. This is the pattern in legal theory, in education and in practice alike. How then are we to find a way out of this dark morass, and rediscover clarity, certainty and direction in our legal thinking and practice? Only, I suggest, by the close study and the wholehearted adoption of a model of law which is universal in its scope and vision. The opening title of Voet's *Commentarius* – like the opening title of Justinian's Institutes, and the opening title of Blackstone's *Commentaries* – expresses precisely such a model, fully capable, if adopted, of healing and unifying our fractured legal reality. Moreover, *Commentarius* 1 1 will, if properly presented, serve as a standalone text of exceptional value for teaching purposes. For how much longer will we continue to ignore such a priceless resource, which lies so readily to hand?

73 C Roederer & D Moellendorf *Jurisprudence* (Cape Town, 2004) at 441-449.

74 F Diedrich (ed) *Ubuntu, Good Faith & Equity Flexible Legal Principles in Developing a Contemporary Jurisprudence* (Cape Town, 2011) *passim*. See, especially, the contributions by TW Bennett, I Keevy, SF Khunou & S Nthai. See, also, A Shutte *Philosophy for Africa* (Cape Town, 1993); R English "Ubuntu: The quest for an indigenous jurisprudence" (1996) 12 *SAJHR* 641-648 at 641. The Constitutional Court has considered *Ubuntu* in the specific context of the death penalty: *S v Makwanyane* 1995 (3) SA 391 (CC) par 225 (per Langa J); pars 241-243 (per Madala J); par 311 (per Mokgoro J). See, further, Roederer & Moellendorf (n 73) at 445-446.

75 "The judicial process, positivism and civil liberty" (1971) 88 *SALJ* 181-200 at 188-189, 197; *Human Rights and the South African Legal Order* (Princeton, New Jersey, 1978) *passim*; "Should judges resign? (And lawyers participate?)" in H Corder (ed) *Democracy and the Judiciary* (Cape Town, 1989) 58-66 at 64.

76 "Dworkin and Apartheid" in H Corder (ed) *Essays on Law and Social Practice in South Africa* (Cape Town, 1988) 181-271 at 207-208.

77 *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 (B) at 561I, 575F. See, also, *S v Zuma* 1995 (2) SA 642 (CC).

Abstract

Johannes Voet's *Commentarius ad Pandectas*, the leading institutional work in Roman-Dutch law, is also the most frequently quoted exposition of that legal system in the South African courts. The opening title of that magisterial work, however, has for the most part been unjustly neglected by our judges, scholars and law teachers alike. Apart from providing an exceptionally fine introduction to the elements of law and justice, this title reveals the imposing range of Voet's scholarship, which sweeps within its compass many ancient writings. I argue that South Africa's constitutional jurisprudence in its present state is solely in need of the nourishment and healing which the fundamental principles of natural law and justice expounded by Voet are amply capable of providing. In this article, I attempt a close reading of *Commentarius* 1 1, in order to shed light on these key principles. In conclusion, I submit that this rich repository of principle merits far closer judicial and juristic attention than it has received in this country until now.