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## **RESTORING BALANCE TO OUR CRIPPLED JURISPRUDENCE – GUIDELINES FROM LEGAL HISTORY**

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### **1 Introduction**

For a period of many centuries, stretching from antiquity to the start of the nineteenth century, Western legal thought adopted, explicitly or otherwise, a notion of jurisprudence which was balanced and complete. This broad vision of legal wholeness embraced both human law and divine law.<sup>1</sup>

It was widely accepted throughout this long period, which I shall call the period of balanced jurisprudence, that no legal order could function properly in which human law and divine law operated independently of each other: a harmonious interaction between them was regarded as indispensable to a proper regulation of human affairs. Human law in isolation, cut off from the nourishment and inspiration of divine law, was seen as capable at most of providing a set of technically efficient, but morally and ethically deficient rules. These rules could never, on their own, constitute a foundation for a society free from moral confusion, vice, crime, violence, corruption, dishonesty and disease. More was required, so the consensus held, in order to lend moral direction and certainty to society. This additional and indispensable element was the divine law.

The notion of a balanced jurisprudence remained largely intact until the positivist doctrines of Bentham,<sup>2</sup> Austin<sup>3</sup> and Comte<sup>4</sup> initiated the secularisation of jurisprudence in the nineteenth century. This radical trend has dominated modern juristic thought and has endured to the present day. Without necessarily denying the existence of divine law, these thinkers drove a wedge between human law and divine law. Thus Austin and later jurists, as we shall see, defined jurisprudence in strictly secular terms: all mention of divine law has been eliminated. The concomitant secularisation of Western societies during the last two centuries, which I shall call the period of crippled jurisprudence, has brought with it not only the many fruits of modern science and technology, but also a moral vacuum in which corruption, dishonesty, disease and ignorance on a vast scale, have been left free to flourish.

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1 The meaning of the term “divine law” will emerge from the historical survey below. The specific sources of divine law will also be considered in the text.

2 1748–1832.

3 1790–1859.

4 1798–1857.

In this article, I shall firstly survey, in roughly chronological sequence, a number of landmarks in the long period of the hegemony of balanced jurisprudence. Our present age of crippled jurisprudence, the result of the mighty change that took place in the nineteenth century, will then be treated in similar fashion. On the strength of the legal-historical findings, I shall argue that this change, which inaugurates the closing of the Western legal mind over the past two hundred years, has been detrimental to the well-being of humanity and to our social fabric. My conclusion will be that only a radical reversal of the predominant direction of contemporary juridical thought will suffice to cure the ills which assail our modern legal systems and our societies in general. This reversal will entail the widespread re-adoption of a balanced notion of jurisprudence. It may seem at best utopian, at worst futile, in our increasingly secular Western culture, to call for a reunification of divine and human law. But in the absence of this reconciliation, our age will continue its slide into chaos, disorder, disease, crime and callousness.<sup>5</sup>

This article is therefore unashamedly polemical in character: Its central theme is that an exclusively secular jurisprudence is a maimed, unbalanced jurisprudence, one which is inherently incapable of providing a doctrinal foundation for a healthy and stable society. That goal is achievable only on the basis of legal doctrines which strike a proper balance between human and divine law. I argue, in short, for a particular jurisprudential model. I do *not* argue for a balancing of political power between the secular and ecclesiastical authorities in the state. In any case, such an argument would be nothing more than a futile attempt to revive an historical relic: the dynamic of the relationship between church and state dominated Western politics for many centuries, but is of little importance today. Reference will indeed be made to this political relationship in the historical survey below, but only for purposes of exploring or symbolising the true, conceptual concern of this article, namely the balance between divine law and secular law in a healthy legal order.

## 2 Historical survey: The period of balanced jurisprudence

A recurring theme in ancient texts of both the East and the West is the relationship between the ruler, as representative of the secular power in the state, and the priestly class, as representatives of divine authority. Texts in

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5 The first reading to be considered in the historical survey (s 2 below) will make it clear that this reconciliation need not be based on an appeal to specifically Christian values.

point are to be found in the Upanishads of ancient India.<sup>6</sup> Consider this passage:<sup>7</sup>

There is nothing higher than the temporal power of the ruler in a state. Therefore at a coronation, the priest sits below the king ... But the priesthood is nevertheless the source of temporal power. Therefore, even though the king attains supremacy at the end of the ceremony, he resorts to the priesthood as his source. Therefore he who injures the priesthood strikes at his own source. He becomes more evil because he injures one who is superior.

A text of this nature may be interpreted in more ways than one. It may be read, for instance, as a blueprint for the political relationship between government and church in the state. I prefer, for present purposes, to read it at a higher level of abstraction, that is to say, as an explication of the correct balance to be struck between the secular and divine elements in any legal system. So viewed, this text teaches that at an outward, formal level, human law must take precedence over the divine, for "the priest sits below the king". However, divine law is nothing less than the source and root of human law. Thus, at a deeper level, divine law always reigns supreme. The relationship between the two is plainly one of cause and effect. Any attempt by the secular authority to undermine, deny or ignore divine law is an injury to the very source of that authority and is therefore self-defeating. Harmful consequences must inevitably follow.

Implicit in this text is that the participation of *both* elements, divine and human, in the legal and political fabric of the state is the irreducible *sine qua non*. Thus irrespective of which of these elements holds the ascendancy in the state or in the legal order, both are indispensable.

Ancient Greek drama offers examples of the interplay of divine and human law in the workings of the state. Sophocles,<sup>8</sup> for example, refers in elevated language to the higher law: Antigone had violated one of the King's decrees by doing what she regarded as her duty under a law superior to his. Creon, the

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6 The Upanishads are Sanskrit writings, of indeterminate authorship, which underpin much of Hindu philosophy. They were reduced to writing between the eighth and fourth centuries BC. The Upanishadic texts abound in sublime statements of ultimate Truth.

7 *Brihadāraṇyaka Upanishad* 1 4 11 in Radhakrishnan (tr) *The Principal Upanishads* (1994) 169. I have paraphrased the translation. To dismiss a text or a principle on the ground that it derives from a "non-juridic source" and is therefore unworthy of serious scholarly consideration is positivist propaganda. For a striking example of this practice, see Thomas *The Institutes of Justinian* (1975) 3. The provenance of any argument put forward in this article has no bearing on the value or validity of that argument: It can be refuted only on the ground that it fails to conform to reason.

8 c 496–406 BC.

King, asks her: "And didst thou dare to disobey the law?" Antigone replies:

Nowise from Zeus, methought, this edict came,  
Nor Justice, that abides among the gods  
In Hades, who ordained these laws for men.  
Nor did I deem *thine* edicts of such force  
That they, a mortal's bidding, should o'erride  
Unwritten laws, eternal in the heavens.  
Not of today or yesterday are these;  
But live from everlasting, and from whence  
They sprang none knoweth. I would not, for the breach  
Of these, through fear of any human pride,  
To Heaven atone<sup>9</sup> (my emphasis).

There are striking differences between this passage and the preceding one: Sophocles, a little simplistically perhaps, treats the relationship between divine and human law as essentially antagonistic: He sees them as being continually in conflict with each other. The *Brihadāranyaka Upanishad*, by contrast, embodies the deeper principle of harmonious interaction between divine and human law, and affirms the vital necessity for both to participate in the legal order. What Sophocles does make clear, however, is the eternal, unchanging character of divine law, and that in the event of conflict between the dictates of divine and human law, the former must always prevail. He also shows, through the conduct of Antigone, that obedience to higher commandments in the face of tyrannical human laws calls for courage, and even, in extreme cases, for a willingness to lay down one's life.

Early Roman law<sup>10</sup> was founded on a clear recognition of the distinction between *ius* (the result of traditional, inveterate custom or of statute) and *fas* (the will of the gods – the laws given by heaven for men).<sup>11</sup> The abundant references in the literature to *fas* as distinct from *ius* bear testimony to the importance of the former in early Roman law.<sup>12</sup> Among a people that believed so profoundly – as did the early Romans – that in the gods they lived and moved and had their being, *fas* could not fail to be regarded with utmost consideration, and to exercise an influence more potent than any merely

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9 Pattee *The Essential Nature of Law* (1909) 5.

10 By early Roman law is meant the law of the Roman monarchy and the early to mid-Republic.

11 Muirhead *Historical Introduction to the Private Law of Rome* 2<sup>nd</sup> ed (1899) 15 19. Muirhead (at 15) quotes Isidorus Origines v 2: "Fas lex divina, ius lex humana est."

12 Muirhead (n 11) 15 holds that the extreme difficulty of defining the nature and limits of *fas* may in part be due to the fact that much of its original content came to be enforced by secular tribunals, and so acquired the sanction of human authority; once that had happened, *fas* was no longer distinguishable from *ius*.

human rules. *Fas* appears to have occupied a higher place and had a wider range than *ius*: Its commands, prohibitions and precepts were addressed to the whole of mankind, and not merely to the citizens of a particular state.<sup>13</sup>

Consider a few of these commands and prohibitions: *Fas* required that when a promise had been made under sanction of an oath, even if to an enemy, faith should be kept with him. It enjoined hospitality to foreigners. It punished murder, for this was the taking of a god-given life. It punished the sale of a wife by her husband, for she had become his partner in all things human and divine. It punished the lifting of a hand against a parent, for this was subversive of the first bond of society and religion, namely the reverence due by a child to those to whom he owed his existence. It punished incest, for it defiled the altar; the false oath and the broken vow, for they were an insult to the divinities invoked. To displace a boundary or a landmark was a most heinous offence against the *fas*, not so much because the act was provocative of feud, as because the stone itself, as the guarantee of a peaceful neighbourhood, was under the special protection of the gods.<sup>14</sup> This list is given merely to show that the early Romans recognised divine law and assigned to it a definite practical content; it is not meant to suggest that every system of divine law would necessarily uphold all the specific precepts in the list.<sup>15</sup>

In the late Roman Republic, Stoic philosophy which had originated in Greece, came to exert a powerful formative influence on the thinking of the jurists. The Stoic teachings on natural law were to provide a powerful impetus and a doctrinal foundation for the development of Roman law from the classical period to the age of Justinian. Thus Stoicism gave to later Roman law the philosophical underpinning which the early law had lacked.

Chrysippus,<sup>16</sup> the third head of the Stoic school, spoke of "the common law, which is the right reason, moving through things, identical with Zeus, the Supreme Administrator of the Universe".<sup>17</sup> Here, for the first time in this historical survey of jurisprudence, we encounter not merely a connection between law and reason, but a threefold identification of law, reason and divine

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13 Muirhead (n 11) 15–16.

14 Muirhead (n 11) 16.

15 Thus many legal systems would subsume some or all of these rules under the heading of human law, in the form of custom or legislation.

16 c 280–208 BC.

17 Diogenes Laertius 7 88, quoted in Pattee (n 9) 6.

intelligence. This identification, characteristic of Stoic thought, is fully realised in the writings of Cicero,<sup>18</sup> whose views I discuss below.

The practical importance of this identification can hardly be exaggerated. The implication is clear: If these three elements, namely law, the faculty of reason in every human being and divine intelligence are one and the same, it must follow that the faculty of reason is in every one of us the most immediately accessible repository of the precepts of divine law. Moreover, the existence of this faculty in every human being cannot be denied, even by atheists and agnostics who may reject the authority of external repositories of divine law, like scripture and key works of spiritual philosophy. This point is significant for our present age in which many people do not hold religious beliefs. It is, of course, true that while all human beings possess the faculty of reason, not all are able to make use of it, for our reason is often clouded over by accumulated layers of greed, lust, anger, hatred, prejudice, envy, sloth and other negative character traits. These impediments, which will naturally vary in their strength and number from one person to another, have to be rooted out before reason can operate clearly and continuously.<sup>19</sup>

Here is Cicero's description of divine law.<sup>20</sup>

[L]aw [in general] was neither a thing contrived by the genius of man, nor established by any decree of the people, but a certain eternal principle which governs the entire Universe, wisely commanding what is right and prohibiting what is wrong. Therefore they called that aboriginal and supreme law the Mind of God, enjoining or forbidding each separate thing in accordance with reason.<sup>21</sup>

In his famous definition of natural law,<sup>22</sup> which was to provide the philosophical foundation of developed Roman law, Cicero declares that God is the author of

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18 106–43 BC. Cicero, who for too long has been dismissed as a mere popularizer of Greek philosophy, as a “non-juristic” writer (see the comment on “non-juristic” sources in n 7), as little more than an accomplished orator and Latin stylist, is currently receiving a belated scholarly re-evaluation. As a result, there is a growing recognition of the originality of much of Cicero’s thought. Thus Philip J Thomas “*Bona fides, Roman values and legal science*” 2004 *Fundamina* 190–193, following Honoré *Ulpian* (1982), cogently argues that Cicero’s *De Officiis* is the source of Ulpian’s three precepts (*honeste vivere, alterum non laedere, suum cuique tribuere*) which provide the philosophical underpinning of Justinian’s *Digest* and *Institutes*. These precepts are enshrined in D 1 1 10 and I 1 1 3. I shall return to them later on.

19 Thus Cicero (*De Legibus* 1 22 (tr) Rudd) says: “What is there, I will not say in man, but in the whole of heaven and earth, more divine than reason (a faculty which, when it has developed and become complete, is rightly called wisdom)?”

20 *De Legibus* 2 4 quoted in Pattee (n 9) 6.

21 Cicero adds (*De Legibus* 1 24–25) that mind is a divine gift, implanted in every human being by God. Therefore, there is no human tribe so civilised or so savage as not to know that it ought to believe in a god, even if it is mistaken about the *kind* of god it should believe in.

22 *De Republica* 3 33.

natural law, its promulgator, and its enforcing judge. This identification of divine authority as the source of natural law was later to exert a powerful influence on developed Roman law.<sup>23</sup>

I turn now to consider Justinian's *Corpus Iuris Civilis*<sup>24</sup> which enshrined and transmitted to posterity Roman law in its fully developed form. That the work is founded on an indissoluble bond between divine and human law is manifest in both the *Digest* and the *Institutes*. I shall examine a few texts in point.

Often overlooked or discounted in our secular age is Justinian's dedication of his great work of codification to the Divinity. In the case of the *Institutes* the placement of this dedication in the opening line of the *Praeoomium* amply proclaims its importance. Contrary to the dismissive views of modern positivist commentators, a dedication such as this cannot help but determine the character of a work.

The opening title of the *Institutes* contains a definition which lies at the heart of this article: "Jurisprudence is the knowledge of things divine and human, the science of the just and the unjust."<sup>25</sup>

This is the balanced notion which underpinned Western legal thought from the sixth century (at the latest) to the nineteenth, when jurisprudence was plunged into its present state of darkness and uncertainty by the poisonous influence of positivist doctrine. More of that anon.<sup>26</sup> Again, the prominent placement of this definition is decisive of its importance in the eyes of Justinian's compilers.

The opening title of the *Institutes* also contains Ulpian's three famous precepts: "The precepts of the law are these: to live honestly, to injure no one, and to give every man his due."<sup>27</sup>

No rule in the *Corpus Iuris Civilis* has exerted a greater influence than these precepts upon the evolution of Western law during the period of balanced jurisprudence. Thus Thomas<sup>28</sup> speaks of the "unquestioned acceptance of the

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23 See, eg, I 1 2 11, arguably the foundational text of Justinian's *Institutes*. This text is considered in depth below.

24 Justinian's work of codification began in 528 and was completed in 534. The heart of the codification was the *Digest* (a collection of texts culled, and in some cases adapted, from the writings of the classical Roman jurists), the *Institutes* (an official elementary textbook for students), and the *Code* (a collection of imperial constitutions).

25 I 1 1 1 (tr) Moyle. The identical wording occurs in D 1 1 10 2.

26 In the historical survey of the age of crippled jurisprudence (see s 3 below), I will show how twentieth century English positivist writers on Roman law have distorted our picture of the subject by their dismissal of the opening titles of the *Digest* and the *Institutes* as containing mainly "banal generalities" and "rhetorical flourishes".

27 I 1 1 3 (tr) Moyle. According to Thomas (n 18) 190–193, following Honoré, Ulpian in turn derived his three precepts from Cicero's *De Officiis*.

28 n 18.

Ulpianic precepts from the eleventh to the nineteenth century". Even English law felt the impact of the precepts through their adoption by Blackstone.<sup>29</sup>

*Institutes* 1 2 11, a text which is vital for present purposes, is overlooked as often as it is dismissed. Its importance lies in its elucidation of the relationship between divine law, natural law and human law. It reads as follows:<sup>30</sup>

Now, natural laws which are followed by all nations alike, deriving from divine providence, remain always constant and immutable; but those which each state establishes for itself are liable to frequent change whether by the tacit consent of the people or by subsequent legislation.

This text decisively affirms the Ciceronian teaching discussed earlier, that natural law has its cause and origin in divine law.<sup>31</sup> The implications are far-reaching, for it must follow that all rules of Justinianic Roman law which are rooted in natural law derive ultimately, albeit indirectly, from divine law. Thus, for example, the rules governing the natural modes of acquisition of property, consensual contracts, unjustified enrichment, *negotiorum gestio* and, in general, all transactions founded on *bona fides*, must in terms of *Institutes* 1 2 11, originate in the higher law. Moreover, Ulpian's three precepts of natural law, discussed above, must likewise be treated as emanations of divine law. It now becomes apparent that modern positivist doctrine, by excising divine law from the notion of jurisprudence, effectively mutilates a substantial part of Roman law and of all legal systems derived from it. And it is futile for positivists to argue that it is possible to treat the man-made rules of, say, Roman law of sale independently of their philosophical underpinning, namely divine law in the guise of *bona fides*. The practice, so typical of our age, of treating effects and ignoring causes, is entirely indefensible: in this regard, medical science, for example, is as guilty as jurisprudence. But this is to anticipate.

The *Digest*, like the *Institutes*, proclaims Justinian's allegiance to the indissoluble union of divine law and human law. At the very outset we find these weighty words of Ulpian:

[L]aw is the art of goodness and fairness ... Of that art we [jurists] are deservedly called the priests. For we cultivate the virtue of justice and claim awareness of what is good and fair, discriminating between fair

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29 Blackstone "Introduction" in his *Commentaries on the Laws of England* (1809) 2 40. I shall return to Blackstone's views later on.

30 (Tr) Thomas.

31 Stoic influence is clearly at work here, irrespectively of whether or not 1 2 11 can be directly traced to Cicero.

and unfair, distinguishing lawful from unlawful, aiming to make men good ...<sup>32</sup>

This description of the nature of law and the function of the jurist is formulated entirely in terms of natural law, which ultimately derives, as we have seen, from divine law. The striking use here of the word “priest” to describe the function of the jurist often arouses the ire of positivist commentators who dismiss the device as a “mere analogy”. Their argument cannot stand: Ulpian, I believe, chose this term carefully to denote and underline the union of divine law and human law. As we have seen,<sup>33</sup> there are good grounds for believing that Ulpian derived his three precepts of natural law from the Stoic philosophy of Cicero. He was not alone among the great classical jurists in his allegiance to that philosophy. His deployment of the term “priest” here in the sense I have indicated is therefore entirely consistent and plausible.<sup>34</sup>

If modern positivist writers are to be believed, these opening statements in the *Digest* and the *Institutes* are merely Justinianic window-dressing and rhetoric: The “real” Roman law, so they hold, is to be found rather in the titles which set forth the positive rules of the Roman law of persons, property and so on. A cursory browse through those titles, however, will suffice to expose the fallacy of this view: Numerous rules of the Roman law of property, contract, delict and succession are founded, expressly or otherwise, on natural law in one of its guises, of which *bona fides* is, of course, the most common. The conclusion is that the greatness of Justinianic Roman law resides less in its technical rules than in its underlying values and principles. These derive, not from human law, but from divine law and its offspring, natural law. Indeed, the Roman *ius civile* is largely, though not exclusively, the working out in practice of these values and principles.<sup>35</sup> Thus the relationship between divine law and the human *ius civile* may, accurately for the most part, be categorised as one of cause and effect.

This picture of Justinianic Roman law finds an echo in the vision of St Augustine,<sup>36</sup> the early Christian philosopher. Augustine held that laws of the

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32 D 1 1 1pr-1 (tr) Watson. See also D 1 1 11.

33 See n 18.

34 This view is supported by the powerful authority of Johannes Voet (*Commentarius ad Pandectas* 1 1 4 (tr) Gane) who declares: “Who would deny that jurisconsults are concerned with divine matters, when he bears in mind that according to Ulpian the rights of the state were in old times identical with the observances of the priesthood.” See further text to n 71 below.

35 There are exceptions, which are acknowledged in the relevant texts: The Roman-law rules of slavery and *patriapotes*, eg, do not originate in natural law. Slavery is admitted to be an outright violation of natural law, and thus of divine law: I 1 3 2.

36 354–430 AD.

secular state, like all human or temporal laws, have their ultimate justification in the *lex aeterna* or in the *lex naturalis*, provided they do not conflict with them. The ultimate function of the secular state is to unify a multitude into one single and uniform legal-political order so that peace may prevail in society. Insofar as the legal order is in conformity with the *lex aeterna* and the *lex naturalis*, this secular state is founded upon divine ordination.<sup>37</sup> We should, according to Augustine, reject or ignore all these human, temporal or positive laws which do not flow directly from the *lex aeterna*, that is, from the eternal “fountainhead of all justice and lawfulness”.<sup>38</sup>

In the twelfth century the English ecclesiastical scholar John of Salisbury<sup>39</sup> reasserted the primacy of divine law:

Every censure imposed by law is vain if it does not bear the stamp of the divine law; and a statute or ordinance of the prince is nothing if it is not in conformity with the teaching of the church.<sup>40</sup>

A jurisprudential landmark of the thirteenth century was the long treatise *On the Laws and Customs of England*, written by an English judge, Henry Bracton.<sup>41</sup> This remarkable work, the first systematic statement of the English law, was described by Maitland as “the crown and flower of English jurisprudence”.<sup>42</sup> The significance of Bracton for present purposes is that his treatise is founded squarely on the natural-law values of the *Corpus Iuris Civilis*, and on the dichotomy between divine law and human law. Thus he adopts verbatim, as part of English law, Ulpian's three precepts of law together with Justinian's

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37        *De Civitate* 19.14 quoted in Chroust "The fundamental ideas in St Augustine's philosophy of law" 1973 *American Journal of Jurisprudence* 75.

38        *Quaestiones in Heptateuchum* 2.67; *De Vera Religione* 31.58 quoted in Chroust (n 37) 75. Later in the fifth century, Pope Gelasius I tried to establish clear boundaries between the legitimate sphere of authority of the state and that of the church. In a letter written to Emperor Anastasius in 494 AD, Gelasius established what was to become known as the Doctrine of the Two Swords (*imperium et sacerdotium*), the church's statement of its theoretical ground rules for future church-state relations. This doctrine, operating as it did in the field of government and politics rather than of jurisprudence, is only of marginal relevance to this study, but one or two remarks made by Gelasius in his letter are worth noting (Perry, Peden & Van Laue *Sources of the Western Tradition* 3<sup>rd</sup> ed vol 1 (1955) 195–196): "[T]here are two powers, august Emperor, by which this world is chiefly ruled, the sacred authority (*auctoritas*) of the priesthood and the royal power (*potestas*). The things which are established by divine judgment can be assailed by human presumption; they cannot be overthrown by anyone's power." These early Christian assertions of the predominance of divine authority over human find an echo in other religions. Thus the Islamic view is that "sovereignty belongs to God alone, and law is his decree and command" (Blake *Sovereignty: Power beyond Politics* (1988) 13).

39        1115–1180 AD.

40        *Policraticus* 4.6, quoted in Markland *John of Salisbury: Policraticus. The Statesman's Book* (1979) 53.

41        c 1210–1268.

42        For the full text of the treatise in both the Latin original and an English translation, see Bracton "De Legibus et Consuetudinibus Angliae" at <http://www.law.wits.ac.za/school/virtualib.htm> [Foundations of SAL] (18 August 1999).

definition of jurisprudence.<sup>43</sup> Bracton is at his most acute when he draws fundamental distinctions, for example between equity and justice, or between justice and jurisprudence. On the latter topic he says:

Jurisprudence ... differs in many ways from justice. For jurisprudence discerns, justice awards to each his due. Justice is a virtue, jurisprudence a science. Justice is a certain *summum bonum*; jurisprudence a *medium*.<sup>44</sup>

The primary aim of this article is to trace the historical evolution of a particular jurisprudential model or construct, namely the dichotomy between divine law and human law, and to base an argument on the findings. The primary aim is *not* to examine examples of the practical operation of this model. Nevertheless, I shall now proceed to examine one, and only one such example, in order to demonstrate that the model is not a purely theoretical one, but is capable of being successfully applied in practice. The example chosen for this purpose is the reign of the illustrious thirteenth century French monarch Louis IX,<sup>45</sup> or St Louis, a contemporary of Bracton. Louis' reign may well have been a failure in military, and even in political terms. Yet his famous Ordinances of Justice ensured that he would be remembered as a great medieval King. One day, a friar came to visit the King and told him that the sole cause of the ruin of a kingdom is the failure to administer justice properly. He enjoined Louis to govern his realm loyally according to divine law, and to take care that strict and legal justice be administered to all his people.<sup>46</sup>

Louis took the advice to heart, and when in due course he came to compose his Ordinances of Justice, he founded them on principles of divine law, including Ulpian's three precepts. Thus every bailiff, provost, mayor, judge and other official was ordered to make oath that during his term of office he would do strict justice to everyone, without exception, as well to the poor as to the rich, to the stranger as well as to the resident. Punishment in body and estate was prescribed for violation of this oath. Treasurers, receivers, provosts, auditors of accounts and other financial officers were required to swear that they would not themselves accept any gift, nor permit persons under them to do so, nor consent to any presents being made to their wives or children in order to gain their favour. Any such gift already made had to be instantly returned. These oaths and others had to be taken before the King, and

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43 Bracton (n 42) 25. See also text to n 25 and n 27 above.

44 *Ibid.*

45 1214–1270.

46 Joinville "Memoirs of St Louis IX" in *Chronicles of the Crusades* (1848) 362–363.

afterwards proclaimed in public before knights, lords and the commonality. Louis sought to ensure by means of these provisions that those who had taken the oaths would be afraid of committing the sin of perjury, not only for the punishment that might be inflicted by the King, but for fear of public disgrace and divine judgment thereafter.<sup>47</sup> In this sample from the Ordinances, the interplay of human and divine law is evident.

A central figure in thirteenth-century jurisprudence was St Thomas Aquinas.<sup>48</sup> He held that the rules of enacted law or human positive law, if they were to be enforceable, must be derived from natural law. Thus the force of the human positive law depended upon its correspondence with natural law, which Aquinas termed the first rule of reason.<sup>49</sup> He regarded the laws of the state as the channels through which the natural law found articulate expression. The ultimate source of all law was the eternal law of God, which he conceived to be divine reason and intellect governing the universe.<sup>50</sup> Every living creature had the "impression of the divine light".

In the sixteenth and seventeenth centuries it would have required considerable audacity on the part of any lawyer to deny that the only ultimate, supreme authority resides in a law higher than any man-made law, in the eternal dictates of natural justice, reason or equity, or, in its theological aspect, the law of God.

The seventeenth century French jurist, Jean Domat,<sup>51</sup> was a major figure in the civil-law tradition and a champion of balanced jurisprudence. Domat's masterpiece *The Civil Law in its Natural Order*<sup>52</sup> reflects throughout his aim of integrating natural law and secular justice. It is worth considering at some length.

All natural laws, according to Domat, are necessary consequences of, and derive their force and authority from two fundamental divine laws, which he terms respectively the first and second law of man. The first law, which is the spirit of man's religion, enjoins man to search after and love the sovereign good. Man ought to engage all the strength of his mind and heart in this pursuit, for these faculties are given to him for that very purpose. A necessary

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47 Joinville (n 46) 520–521.

48 1226–1274.

49 D'Entréves (ed) *Aquinas: Selected Political Writings* (1954) 129.

50 Ullmann *A History of Political Thought: The Middle Ages* (1965) 180. Aquinas' view of divine law as the parent of natural law is consonant with 1.2.11, discussed earlier: see text to n 30.

51 1625–1696.

52 1689–1694. See Cushing (ed) *Jean Domat: The Civil Law in its Natural Order* (tr) Strahan vol 1 (1850). Domat's fundamental legal values are set forth in the *Treatise of Laws* which precedes the main body of his work. See also Domanski "Domat's distinction between immutable and arbitrary laws" 2005 *THRHR* 11–19.

implication of this first law of man is the second, which obliges men to strive for unity among themselves, and to love one another. Thus, while the first law governs man's destination to the sovereign good, the second governs his destination to society. These two divine laws, which are essential to the nature of man, are beyond change. All the laws which govern society are nothing other than consequences of these first two fundamental laws.<sup>53</sup>

Like the Stoics and others before him,<sup>54</sup> Domat held that religious belief is not a prerequisite for acceptance of his first and second laws of man. The same principles which religion teaches are pointed out to us in our very nature with such clarity that, if we remain somehow ignorant of them, the blame must be laid, not on our lack of religion, but on our lack of self-knowledge. Thus the first and second laws of man, upon which Domat founded all natural laws, are also inherent in the deepest nature of every human being. The key to discovering them is self-knowledge, and not adherence to any religious creed. The tool we all have in common for this purpose is the faculty of reason.<sup>55</sup>

As a practical example of the harmonious interplay of divine and human law, Domat cites the divine institution of marriage, which he calls the foundation of civil society.<sup>56</sup> He gives examples of the practical operation of the second divine law of man, which obliges men to unity among themselves, and to mutual love.<sup>57</sup> Domat draws these examples from the field of "involuntary engagements", that is, those engagements which bind us even without our choice or consent.<sup>58</sup> Thus, in general, those rules which command us to render to every man his due, to wrong no man, to live honestly, and others of like nature, enjoin only the effects of that mutual love which the second law requires of us.<sup>59</sup> More particularly, he who is appointed guardian to an infant is obliged, independently of his will, to take the place of the father to the orphan who is committed to his charge. The rules which oblige the guardian to take care of the person and estate of the ward command him only the effects of the mutual love which ought to exist between them.<sup>60</sup> Again, those who are appointed to municipal offices, such as those of mayor, sheriff and consul, are obliged to execute them, and cannot avoid their obligation, unless they have reasonable excuses. Their duties require of them nothing more than what the

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53       *Treatise* (n 52) 11 1, 1 6, 1 3, 1 7, 1 8. See also Domanski (n 52) 13.

54       See text to n 19 above.

55       *Treatise* (n 52) 9 5.

56       *Treatise* (n 52) 3 2 following *Matthew* 19 9.

57       *Treatise* (n 52) 1 7.

58       *Treatise* (n 52) 4 4.

59       *Treatise* (n 52) 4 5.

60       *Treatise* (n 52) 4 4 & 4 5.

second law demands.<sup>61</sup> Domat also gives the interesting example of *negotiorum gestio*: He whose affair has been managed in his absence and without his knowledge by another, is under an obligation to reimburse that other for expenses reasonably incurred, and to ratify what he has well transacted. This obligation is simply the dictate of the second law.<sup>62</sup> Domat's final example is of particular relevance to present-day South Africa: The condition of those members of society who are destitute, lack the means of subsistence, and are unable to work for their livelihood, lays an obligation on all other members of that society to exercise towards them mutual love by giving them a share of the basic necessities of life.<sup>63</sup>

I turn now to consider two towering figures of seventeenth and eighteenth-century jurisprudence, namely Johannes Voet,<sup>64</sup> the greatest institutional writer of Roman-Dutch law, and his English counterpart, Sir William Blackstone.<sup>65</sup> The seventeenth century was the golden age of Roman-Dutch law, the animating force of which was the philosophy of natural law. Voet's magisterial work, *Commentarius ad Pandectas*<sup>66</sup> has exercised a vast influence on the development of the South African common law; it remains the most frequently quoted work of Roman-Dutch law in our courts.

In the opening title of the first book, Voet sets forth his philosophy of law: He holds that, notwithstanding the fall of man, certain rules of justice and equity remained divinely engraved on men's hearts and inborn, dictating to each one what is lawful or unlawful, what things to do and what to avoid.<sup>67</sup> His point of departure is that any law worthy of the name is inseparable from the good and the just (*bonum et aequum*).<sup>68</sup> Voet's definition of jurisprudence merits close study. It runs as follows:<sup>69</sup>

We learn from Ulpian and from the *Institutes*, and learn rightly that the jurisprudence dealt with in this volume of the *Pandects* is an acquaintance with things both human and divine, a science of justice and injustice, an art of doing what is good and fair, a true and not a feigned philosophy.<sup>70</sup> Who would deny the name of philosophy to that art, which is a training in all the virtues, which shines out at the same

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61       *Ibid.*

62       *Treatise* (n 52) 4 4.

63       *Ibid.*

64       1647–1713.

65       1723–1780.

66       This work has been translated, in eight volumes, by Percival Gane as *Commentary on the Pandects* (1955).

67       Voet 1 1 1.

68       Voet 1 1 5.

69       Voet 1 1 4.

time in duties both public and private, which causes a state, if nothing stands in the way, to be governed steadfastly, bravely and skilfully, and in virtue of which those states are denominated happy in which either kings are philosophers, or philosophers are kings? Who would deny that jurisconsults are concerned with divine matters, when he bears in mind that according to Ulpian the rights of the state were in old times identical with the observances of the priesthood ...<sup>71</sup>

Of the many striking features of this description, only a few may be noted here. First, the opening sentence of Voet's definition confirms that the balanced Western notion of jurisprudence remained intact and unchanged from the 6<sup>th</sup> century, when the *Corpus Iuris Civilis* was compiled, to the pinnacle of the Roman-Dutch law in the seventeenth and eighteenth centuries. The remarkable stability of this notion during the period of balanced jurisprudence provided a firm foundation for the evolution of Western law.

Secondly, Voet, following the Roman classical jurist Celsus, describes jurisprudence as both an art and a science. Thus, jurisprudence embraces both the technical precision of a science and the sympathetic understanding intrinsic to an art. Therefore the scope of Voet's notion is considerably wider than that of disciplines which are exclusively arts or exclusively sciences: Jurisprudence unites the human and the divine, the measurable and the immeasurable, the concrete and the abstract.

Thirdly, an important function of jurisprudence, according to Voet, is to teach ethics in the form of the virtues, which would include at least the four cardinal virtues of justice, temperance, wisdom and courage. Jurisprudence, therefore, cannot be divorced from ethics; it is not a morally neutral discipline. This point has been almost entirely forgotten in our present age of crippled jurisprudence.

Fourthly, jurisprudence, as Voet conceives it, has a vital, although indirect, contribution to make towards the good governance of the state: The formative influence of the study of true jurisprudence is evident in the lives of many great statesmen throughout history. Thus this discipline, according to Voet, has an intensely practical function to perform, one which is now altogether lost. Jurisprudence today, in its crippled condition, is a strictly theoretical discipline: its arcane secrets are practiced by its devotees far from the public eye, in the common rooms and libraries of the universities; it is far removed from the day-to-day business of government and the practicalities of the law.

Blackstone's masterful work, *Commentaries on the Laws of England*, is fully grounded on precepts of divine law and natural law.<sup>72</sup> All human laws are based on these two foundations. Human law may never contradict divine law or natural law. Divine law, also termed the revealed law, is to be found only in the scriptures. Revealed law, according to Blackstone, is of infinitely greater authenticity than natural law, because the former is expressly declared by God himself to be the law of nature, whereas the latter is only what, by the assistance of human reason, we imagine to be the law of nature.<sup>73</sup>

Why ought we to obey divine law? Here is Blackstone's answer:

Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct: not indeed in every particular, but in all those points wherein his dependence consists ... And consequently, as man depends absolutely upon his maker for every thing, it is necessary that he should in all points conform to his maker's will. This will of his maker is called the law of nature.<sup>74</sup>

Blackstone, like Bracton, adopts Ulpian's three precepts of the law, adding that Justinian had reduced the whole doctrine of law to these three general precepts.<sup>75</sup> Like Voet, Blackstone emphasises the ethical aspect of jurisprudence:

Aristotle himself has said, speaking of the laws of his own country, that jurisprudence, or the knowledge of these laws, is the principal and most perfect branch of ethics.<sup>76</sup>

At the close of this period of balanced jurisprudence, the statesman Edmund Burke<sup>77</sup> gives this magnificent description of divine law:

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71 Cf D 1 1 1 2; see text to n 34 above.

72 Blackstone's student and detractor, Bentham (1748–1832) made little effort to understand the great conception of natural law. His poisonous rantings, however, were unable to prevent the *Commentaries* from exerting a vast and enduring influence on American legal thought. Bentham is considered more fully in s 3 below.

73 Blackstone (n 29) 2 43.

74 (n 29) 2 39.

75 The precepts are that we should live honestly, should hurt nobody and should render to each his due: 1 1 3, and see text to n 27.

76 (n 29) 1 27.

77 1729–1797.

We are all born in subjection, all born equally, high and low, governors and governed, in subjection to one great, immutable pre-existent law, prior to all our devices and prior to all our contrivances, paramount to all our ideas, and all our sensations, antecedent to our very existence, by which we are knit and connected in the eternal frame of the Universe, out of which we cannot stir. This great law does not arise from our conventions or compacts; on the contrary, it gives to our compacts all the force and sanction they can have.<sup>78</sup>

The conclusion to be drawn from this historical survey is that until the end of the eighteenth century, both the civilian tradition derived from Roman law and English law consistently adhered to a balanced notion of jurisprudence founded on the dichotomy between divine law and human law. But this remarkably long period of stability and balance in Western legal doctrine was now drawing to a close, with the approach of the dark clouds of legal positivism at the start of the nineteenth century.

### **3      Historical survey: The age of crippled jurisprudence**

The secularisation of Western thought over the past two centuries cannot be blamed on jurisprudence. On the contrary, developments in jurisprudence during this period merely kept pace with the secularisation of philosophy, political theory, science and other fields of human enquiry. Jeremy Bentham, who may be said to have initiated the school of legal positivism, was, like Herbert Spencer, Marx and Darwin, no more than the product of his age. All that can be said with certainty is that around the start of the nineteenth century, a radical change occurred in the direction of Western thought, and that this change was felt as strongly in jurisprudence as in other fields.<sup>79</sup>

Bentham,<sup>80</sup> philosopher, economist and jurist, is best remembered for his influential theory of utilitarianism. In the field of jurisprudence, he vehemently attacked Blackstone, and viewed laws as man-made commands issued by a sovereign. He denied the existence of a necessary connection between law and morality. The age of crippled jurisprudence, in which divine law no longer plays a part, was at hand.

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78      *Speech on the Trial of Warren Hastings*, quoted in Pattee (n 9) 7.

79      It is beyond the scope of this article to investigate the historical causes of this significant change in the Western mindset, though a finger is often pointed at the French Revolution of 1789. See, eg, Del Vecchio *Philosophy of Law* (tr) Martin (1953) 247.

80      1748–1832.

Bentham expressed his rejection and criticism of natural law in these notorious words:

A great multitude of people are continually talking of the law of nature; and then they go on giving you their sentiments about what is right and what is wrong; and these sentiments, you are to understand, are so many chapters and sections of the law of nature.<sup>81</sup>

This foolish criticism, according to Brierly, merely showed a contempt for a great conception which Bentham had not taken the trouble to understand: when medieval writers spoke of natural law as being discoverable by reason, they meant that the *best* human reasoning could discover it, and not, of course, that the results to which any and every individual's reasoning led him was natural law.<sup>82</sup>

But it was the jurist John Austin<sup>83</sup> who, taking his cue from Bentham, established the doctrine of legal positivism as a recognised school of juristic thought. The powerful influence of this school was to endure until the middle of the 20<sup>th</sup> century. Austin defines jurisprudence as follows:

The science of jurisprudence ... is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness ...<sup>84</sup> or [with] laws set by political superiors to political inferiors.<sup>85</sup>

This definition epitomises the closing of the Western legal mind over the past two hundred years. A notion of jurisprudence founded on the bedrock of broad, universal principle has given way to a narrow, blinkered and fragmented outlook which refuses to look beyond the material world of human affairs. Austin, of course, did not reject God or divine law: he merely excluded them rigorously from his notion of jurisprudence. But in the process, incalculable damage was caused to the moral fabric of Western societies.

Many a modern academic teacher, confronted with Voet's and Austin's definitions of jurisprudence, so close in history, so different in content, will be content to adopt a morally neutral stance: having labelled Voet a natural lawyer and Austin a legal positivist, she may add that both represent legitimate

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81 Quoted in Brierly *The Law of Nations* 5<sup>th</sup> ed (1955) 21.

82 Brierly (n 81) 20. See n 19 and text thereto above. Even more scathing is Seagle's criticism of Bentham's methodical ignorance: *The Quest For Law* (1941) 24.

83 1790–1859.

84 Campbell (ed) *Austin on Jurisprudence* vol 1 (1885) 172.

85 Campbell (n 84) 95.

schools of juristic thought, leaving her students free to choose between them. But such an abdication of moral responsibility ignores the empirical reality of the historical decline which we have observed in the field of jurisprudence, a decline from the broad, universal vision of Justinian and Voet to the narrow, fragmented view of Austin. At stake here is far more than the cursory trade-off of one juristic theory against another: The issue is nothing less than the accelerating decline of a civilisation, and what, if anything, can be done, at least in the field of jurisprudence, to arrest that decline.

The influence of Bentham and Austin in jurisprudence endured until the mid-1950s. Later jurists have done little to enlarge the scope of the notion of jurisprudence to anything resembling the broad sweep of the definitions of Justinian and Voet. These modern jurists include Hart, Dworkin, Rawls, Nozick, Unger, Posner and Devlin. Their views remain confined within the narrow limits of human law. Even “modern natural-law” thinkers like Radbruch, Maritain, Fuller and Finnis do not come close to advocating the simple reintegration of human law with divine law as embodied in scripture or in right reason.<sup>86</sup>

The insidious influence of positivist and later juridical doctrines has been felt in almost every field of modern thought.<sup>87</sup> I shall cite but one, well-documented instance drawn from the field of academic scholarship. During the nineteenth and twentieth centuries, a number of distinguished English scholars chose to deploy their formidable intellects, and their industry in the study of Roman law. Among them were WW Buckland, JB Moyle, RW Lee and JAC Thomas. While their acute analytical and linguistic skills made them ideally suited to the task of elucidating Roman legal texts, replete with manifold technicalities,<sup>88</sup> their positivist mindset almost entirely negated the value of their work. Their meticulous attention to detail and mastery of the letter of Roman law were sadly offset by their unwillingness (like Bentham's) to comprehend the spirit of natural law which informs and upholds Justinian's mighty edifice. Their unwillingness was perhaps inevitable, for a positivist outlook can do no more than breed highly accomplished legal technicians of essentially narrow vision. And a narrow vision can never encompass the broad sweep of a balanced jurisprudence.

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86 See Kelly *A Short History of Western Legal Theory* (1992) 402f.

87 The common feature of these doctrines is their denial of the unbreakable unity of human and divine law.

88 According to Nicholas *An Introduction to Roman Law* (1962) 271, Buckland had an extraordinary mastery of the texts.

Consider, against this background, a few typical comments culled from the writings of these English Romanists. Buckland dismisses *ius naturale* as a notion “of small importance in legal discussion”, adding that “the fact that *ius naturale* was not law is brought out by the gradual and incomplete development of this idea”.<sup>89</sup> Lee brushes aside Justinian’s definition of justice<sup>90</sup> as a “commonplace of the schools of philosophy”.<sup>91</sup> Of Justinian’s balanced notion of jurisprudence,<sup>92</sup> Lee flippantly remarks: “[I]f it is to be regarded as anything more than a rhetorical flourish, [it] may be a tradition from a time when the sanctions of Law and religion were not sharply distinguished.”<sup>93</sup> He then proceeds to fly his positivist colours: “Jurisprudence is the science of justice in the legal sense of the word. Ulpian’s definition<sup>94</sup> is too comprehensive, for it seems to merge into a single formula, law, morality and religion.”<sup>95</sup> But such a merger, which legal positivism abhors, is precisely what a balanced jurisprudence seeks to achieve! Thomas, perhaps the most scathing of these positivist commentators, discards the all-important opening title of Justinian’s *Institutes* in astonishing fashion: “In the main, this brief title is devoted to generalities of a banal character.”<sup>96</sup>

These examples, and especially the last, show that acuity of intellect and a mastery of technical detail do not, without more, qualify a scholar to elucidate the Roman legal texts. Of prime importance as a qualification is an intuitive sympathy with the philosophy and the values which infuse the *Corpus Iuris*.<sup>97</sup>

It would be misleading and simplistic, however, to suggest that there have been no advocates and exponents of a balanced jurisprudence in our present age; but they have been comparatively few in number, and their voices are too often drowned out by positivists and postmodernists. One who brought light and clear direction to bear on the dark moral ambiguity of this age was Lord Denning,<sup>98</sup> arguably the greatest common-law judge of the twentieth<sup>th</sup> century. His judgments were invariably illuminated by a jurisprudence in which human law was never allowed to silence the higher law, and justice was never sacrificed on the altar of legal technicalities. Small wonder that his judgments

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89 Buckland *A Text-Book of Roman Law from Augustus to Justinian* 3<sup>rd</sup> ed (1963) 54–55.

90 *I* 1 1pr.

91 Lee *The Elements of Roman Law* 4<sup>th</sup> ed (1956) 34.

92 *I* 1 1 1.

93 Lee (n 91) 34.

94 *Ibid.*

95 See Lee (n 91) 33–34.

96 Thomas (n 7) 3.

97 Biondi and Sohm are two eminently qualified Romanists whose names leap to mind. The choice of the example given in the text does not, of course, exonerate positivist commentators on Roman law who write in languages other than English.

98 1899–1999.

were so often reversed on appeal by judges whose vision was narrower than his own. His is the sane voice of a balanced jurisprudence:

I have said and I think it is right: without religion there can be no morality, and without morality there can be no law. That's how I understand the Hebrew Ten Commandments. They are a mixture of religious principle, moral precepts and legal precepts ... [T]hey all come down to us from the past, and I am sure they help tremendously in our own upbringing and in our outlook. They are the foundation of a good and proper life.<sup>99</sup>

It is Lord Denning's clear voice that shows the way forward for our jurisprudence. But can we hear it?

#### 4 Conclusion

The Western notion of jurisprudence, unchanged in its essence from the age of Justinian to that of Voet, has undergone a radical and remarkable change during the last two hundred years. A discipline whose function it was throughout Western history to inculcate clear ethical norms, to define legal duties, to provide direction both for the legal profession and for society at large, has been rapidly transformed into a bewildering maze of conflicting juristic theories, hair-splitting academic controversies, and an almost total absence of the fixed values and principles that characterised Roman and Roman-Dutch law. Jurisprudence has forgotten its function and lost its way. Is it any wonder, then, that our age is floundering aimlessly in a moral and ethical vacuum in which crime, corruption and violence hold sway? And this descent into disorder and ignorance has been the ineluctable result of the act of divorcing the human law from the higher law.

This process of degeneration can, I believe, be arrested and reversed, if we so choose. That will require us to revive the notion of divine or higher law, to re-introduce it into our notion of jurisprudence, into our teaching of law, and eventually into legal practice. And how will that come about? Only by a collective act of remembering the historical roots of our jurisprudence. The reconciliation of human and higher law has now become an urgent necessity. What is required is nothing less and nothing more than a willingness on the part of the community of jurists, law teachers, legislators, judges and legal practitioners to acknowledge a higher legal authority, the main repositories of

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99 Yahuda "An Interview with Lord Denning" 1985 *Justice of the Peace* 152.

which are scripture and reason. Such recognition would at least entail that in cases of conflict or uncertainty, human positive law must bend the knee to the higher law.

Suppose that in every case that comes before a court, a strictly secular jurisprudence which recognises only positive rules of human law would yield the same just result as a balanced jurisprudence which recognises both human and divine law. Would this justify a decision to exclude the higher law and to opt for a strictly secular jurisprudence, of the kind which prevails everywhere today? The answer, I suggest, is an emphatic “no” To jump to the opposite conclusion would be to miss the point entirely. The point is that we ought never to focus exclusively on what happens in a court of law. Our vision needs to be far wider than that. We need to look at the effect of the adoption of a particular jurisprudential model on society at large. We will recall that according to Voet's wide definition of jurisprudence:

Who would deny the name of philosophy to that art, which is a training in all the virtues, which shines out at the same time in duties both public and private, which causes a state, if nothing stands in the way, to be governed steadfastly, bravely and skilfully ...?<sup>100</sup>

Thus jurisprudence, wisely conceived, has an extra-legal impact which can extend even to the government of a state and to the nation as a whole. Ought not our jurisprudence, in other words, to exert a formative influence on the very fabric of society? If we *do* see our discipline as an agency or instrument for the nurture and guidance of the nation, the divine or higher dimension of law becomes an indispensable element. And only a balanced, inclusive model of jurisprudence is capable of confronting our current social ills; a secular model cannot suffice.

For how much longer are we going to persist in our blinkered ignorance, in our self-satisfied conviction that we have nothing to learn from the jurisprudence of the ancients?<sup>101</sup> Our return to a balanced jurisprudence would not entail the introduction of new or alien ideas: It would be no more than the revival of a model which served our civilisation so well for so long. This is not to suggest that the shift would be easily or quickly effected.

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100 Voet 1 1 4, and see text to n 69.

101 The clearest evidence of this conviction is the alarming decline in recent years in the number of courses in Roman law and cognate disciplines offered by universities in Western Europe, South Africa and elsewhere.

The keynote in South Africa today is transformation. The thrust of this article is that what most needs to be transformed is our notion of law: Our exclusively secular idea of law must be transformed into a balanced notion which marries the secular to the divine.<sup>102</sup> Except our legal systems embrace this union as they once did, we will not bring justice, peace and stability to our troubled societies. This reunion is the only transformation worth having.

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102 It may be argued that divine law (through the intermediation of natural law: see nn 30–31 above) has already been subsumed into South African law by the inclusion of certain values in the Constitution (see s 1 of the Constitution of the Republic of South Africa, 1996). This argument fails to convince: only express recognition of the dyarchy of human and higher law, both in our juridical thought and in the Constitution, will suffice.