PHILOSOPHERS AND LAW

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SPINOZA AND LAW

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Spinoza and Law

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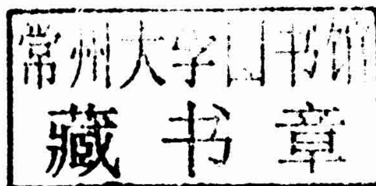
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Published by
Ashgate Publishing Limited
Wey Court East
Union Road
Farnham
Surrey GU9 7PT
England
www.ashgate.com

Ashgate Publishing Company
Suite 3-1
110 Cherry Street
Burlington
VT 05401-3818
USA

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library.

The Library of Congress has cataloged the printed edition as follows: 2014941545

ISBN: 9781472435965

Printed in the United Kingdom by Henry Ling Limited,
at the Dorset Press, Dorchester, DT1 1HD

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Series Editor: Tom Campbell

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Carocci editore for the essay: Roberto Ciccarelli (2003), 'Spinoza's Critique of Law', in *Potenza e beatitudine: Il diritto nel pensiero di Baruch Spinoza*, pp. 89–98. Translated for this volume.

Chatham House for the essay: H. Lauterpacht (1927), 'Spinoza and International Law', *British Year Book of International Law*, **8**, pp. 89–107.

Columbia Law Review Association for the essay: Huntington Cairns (1948), 'Spinoza's Theory of Law', *Columbia Law Review*, **48**, pp. 1032–48.

De Gruyter for the essay: Gail Belaief (1971), 'The Concept of Civil Law in Spinoza', in *Spinoza's Philosophy of Law*, The Hague: Mouton, pp. 13–33.

Editions Dalloz for the essay: Gérard Courtois (1980), 'Laws in Spinoza and Saint Thomas Aquinas', *Archives de philosophie du droit*, **25**, pp. 159–89. Translated for this volume.

Elsevier for the essays: Errol E. Harris (1984), 'Spinoza's Treatment of Natural Law', in C. De Deugd (ed.), *Spinoza's Political and Theological Thought*, Amsterdam: North-Holland Publishing Company, pp. 63–72. Copyright © 1984 by the Royal Netherlands Academy of

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Series Preface

The series *Philosophers and Law* selects and makes accessible the most important essays in English that deal with the application to law of the work of major philosophers for whom law was not a main concern. The series encompasses not only what these philosophers had to say about law but also brings together essays which consider those aspects of the work of major philosophers which bear on our interpretation and assessment of current law and legal theory. The essays are based on scholarly study of particular philosophers and deal with both the nature and role of law and the application of philosophy to specific areas of law.

Some philosophers, such as Hans Kelsen, Roscoe Pound and Herbert Hart are known principally as philosophers of law. Others, whose names are not primarily or immediately associated with law, such as Aristotle, Kant and Hegel, have, nevertheless, had a profound influence on legal thought. It is with the significance for law of this second group of philosophers that this series is concerned.

Each volume in the series deals with a major philosopher whose work has been taken up and applied to the study and critique of law and legal systems. The essays, which have all been previously published in law, philosophy and politics journals and books, are selected and introduced by an editor with a special interest in the philosopher in question and an engagement in contemporary legal studies. The essays chosen represent the most important and influential contributions to the interpretation of the philosophers concerned and the continuing relevance of their work to current legal issues.

TOM CAMPBELL
Series Editor
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Introduction

Spinoza as a Legal Theorist

Philosophy of law in its widest sense comprises all forms of inquiry into the nature, the value and the function of those norms governing human life in society, whether they aim at actualizing an ideal of justice or not. Within such a comprehensive frame of reference, philosophical considerations about the law are myriad. They can be found in arguments concerning the characteristics of nature, in reflections on the functioning of political structures, in attempts at applying elements of value theories to the realm of practical life or in investigations around conceptual analysis. They can be drawn out of works on metaphysics and ontology, on social and political theory, on ethics and philosophy of language. The study of philosophers such as Aristotle, Aquinas, Hobbes and Kant, whose names are not immediately or primarily associated with law, but who nevertheless have had a profound influence on legal thought, follows from these premises.

A more specific sense of philosophy of law is made up of those inquiries into the grounds and the instruments belonging to empirical experiences of the law. They do not follow simply from extra-legal considerations to be found in a complete system of philosophy, as if the law were simply one of the fruits hanging from the multidisciplinary tree of philosophical knowledge, in accordance with Descartes's famous metaphor. Rather, they direct their line of questioning towards a common-sense conception of the law without being committed necessarily to pre-established philosophical premises, whether they be metaphysical, anthropological, political or ethical. In other words, their focus on problems related to the nature and the functioning of the law is independent from systematic accounts of extra-legal philosophical issues. Philosophy of law acquires then disciplinary autonomy. The study of legal theorists such as John Austin, H.L.A. Hart, Hans Kelsen and Ronald Dworkin falls under this category.

In general terms, the difference between the wide and the specific senses of philosophy of law consists in the fact that the former (unlike the latter) admits implicit (in addition to explicit) references to the law inside an overall system of philosophy.[1] The specific sense of philosophy of law demarcates the object of inquiry in such a way as to produce the disciplinary autonomy of legal thought. Contrariwise, the widest sense of philosophy of law encompasses theories that wander around several different philosophical disciplines in search of an answer to problems not directly related to the traditional *quid jus*, but which somehow end up approaching it. Legal theory is then inherently philosophical (not merely jurisprudential) and finds its justification only in the law's openness to other disciplines.

[1] The distinction between 'Explicit Philosophy of Law' and 'Implicit Philosophy of Law' was established first by the Brazilian legal theorist Miguel Reale (2000, pp. 286–87).

The fact that Spinoza clearly did not dedicate many of his writings to law and that Spinoza studies and jurisprudence have paid little attention[2] to his considerations on the nature of law seems sufficient to consider him a legal philosopher only in the widest possible sense of philosophy of law. His major work, the *Ethics*, which explores topics pertaining to metaphysics, physics, philosophy of nature, epistemology, philosophy of mind, anthropology, ethics and politics, fails to include allusions to law; his earlier unpublished texts, such as the *Treatise on the Emendation of the Intellect*, the *Short Treatise on God, Man and His Well-Being*, the *Principles of Cartesian Philosophy*, as well as his correspondence, seldom contain references to law; his only explicit remarks on law appear in the political chapters of his *Theological-Political Treatise* and in the beginning of his *Political Treatise* (all included in Spinoza, 1972), and even then only as the groundwork of what he intends to discuss about politics.[3]

And yet, whenever he does mention law, Spinoza endows it with the capacity to express the power of Nature in the realm of human individuality. For someone who thinks of Nature as the all-inclusive substantive power in which exists all that is and is conceived, in an immanent causal process, such a mediating role seems to be rather important. Law constitutes the link between this natural power of existence and the norms governing human life in society. Spinoza does not seem to be able to brood about politics without establishing a basic concept of this sort – law is the basic elemental drive of all his discussions of life in society. That is why he presents definitions of law both in the *Theological-Political Treatise* and in the *Political Treatise*; and definitions, for Spinoza, open for the arguments exposing the 'order of knowledge' by accomplishing a double task, that of being nominal and real.[4] Spinoza's conception of law can be studied chiefly for its importance to his political theory, and understandably so. But it also seems to emerge out of his philosophical system as a somewhat pivotal element justifying an increasing awareness.

What is puzzling about Spinoza's references to the nature and the instruments of law is that he managed to tackle the problem of *quid jus* directly inside works belonging to other disciplines, instead of simply deriving an answer to it when dealing with specifically unrelated

[2] The vast majority of exceptions are to be found in this volume.

[3] The texts in this volume follow the standard abbreviations for Spinoza's works. For instance, citations of the *Theological-Political Treatise* [*TTP*] usually refer to the chapter, followed by page number; citations of the *Political Treatise* [*TP*] refer to the chapters and sections (for example, II/4 refers to chapter II, section 4); citations of the *Correspondence* [*Ep*] refer to the letter's number, usually followed by page number. The following abbreviations for the *Ethics* are usually adopted: numerals after an *E* refer to parts; 'P' to proposition; 'C' to corollary; 'D' to definition; 'dem.' to demonstration; 'S' to scholium; 'ax' to axiom (for example, '*E*4P34' refers to *Ethics*, part 4, proposition 34). Translations tend to derive from Edwin Curley's edition of Spinoza's works (Spinoza, 1985) or from Samuel Shirley's translations (Spinoza, 2002). References to the original Latin texts are to Carl Gebhardt's edition (Spinoza, 1972), by page number (included in most modern editions).

[4] According to Spinoza, every definition must be conceived by an intellect, and is hence a *nominal definition*; and it must be an expression of reality, that is, an affirmation of what things are in themselves at the outset and self-evidently, thus being also a *definition of a thing*. See *Ep* 9. On this distinction, see Gueroult (1968, pp. 20–26); Macherey (1998, pp. 28–54); for an alternative, albeit similar, distinction between *a priori* and *a posteriori* definitions, see Meshelski (2011).

philosophical problems. Consequently, he endangered the very distinction between implicit and explicit senses of philosophy of law.

On the one hand, if there is a philosophical tradition that takes law into account only inside discussions concerning metaphysics, politics and ethics, without the ambition to develop an intentional legal theory, it might be problematic to even conceive of a wide sense of philosophy of law. In fact, do such extra-legal derivations constitute an original philosophical thought about law or rather mere extrapolations feigned by interpreters from metaphysical, political and ethical grounds? If remarks about the law can be found only in, say, a moral theory in which they perform an important role, then they are more likely to be ethics in a wide sense (applied to law) rather than philosophy of law; if, however, they are implicit in such a moral theory albeit not performing a relevant role, then they are simply latent consequences of ethical presuppositions and do not constitute philosophy of law insofar as they could be reached regardless of whether the philosopher in question said anything about law or not.

On the other hand, the intent to generate a philosophy of law whose explicitness demarcates the object of study in such a way as to coexist peacefully with other philosophical disciplines is likely to be frustrated. Disciplinary autonomy seems to imply a conceptual neutrality (mostly with regard to metaphysics, political theory and ethics) of philosophical approaches to the nature, the value and the function of the law – or, at most, the absence of disciplinary heteronomy. However, the difficulties in providing a satisfactory legal definition of what the law is without falling into circular arguments prompt philosophical theories of law in the specific sense to accept being bequeathed with conceptual tools belonging to other disciplines. For instance, even a 'pure theory of law' cannot help being a general theory of law *and state*, thus incorporating elements typical of political theories. And it is hard to find a legal theory, whether committed to natural law or set in the camp of legal positivism, that does not trace the criteria for the validity of law back to fundamental assumptions established in ethics, in sociology, in linguistics or in political theory.

Spinoza overcomes these difficulties in an original way. He seems to develop an explicit philosophy of law that is interdisciplinary in nature and therefore also implicit elsewhere. This can be perceived very subtly, which is why it requires further explanation.

Systemic Interdisciplinary Philosophy of Law

The key to understanding Spinoza's philosophy of law is his association between law and Nature. Philosophy is for him a systematic thought focusing on what is and exists inside an infinite and immanently self-causing whole. This whole he calls 'God, or Nature' [*Deus sive Natura*]. A philosophical examination of any given concept will always be a quest for what is natural in it or for determining how much naturalness it actually expresses, regardless of the discipline to which that concept pertains. The search for what is real in a philosophical concept – such as the law – is intrinsically connected to an ontology of Nature or a systematic metaphysics.

Spinoza intends to provide a notion of law associated with his conception of Nature. However, he fails to do so in his writings on metaphysics and ontology. He only defines law when he attempts to supply ontological grounds to his political theory. From this perspective, it might seem that his references to law pertain exclusively to the political realm. But how can law be associated with Nature in such an instance?

The disciplinary indeterminacy of Spinoza's considerations on law is troubled with the same methodological indeterminacy that affected his political thought in Spinoza scholarship for years. Until the early twentieth century, Spinoza's political thought was generally regarded as a mere democratic version of Hobbesian politics, until authors such as Leo Strauss (1997 [1930]) and Gioele Solari (1949) endeavoured to bring down the curtain separating his political theory from its metaphysical bases. The subsequent reaction led Spinoza's political theory so astray from Hobbesian philosophy that it was entirely swallowed by his ontology of Nature. Whereas his political treatises were regarded previously as mere amendments to Hobbes's political theory, they were now absorbed entirely by the first parts of the *Ethics*.[5] A new middle stance, however, prompted mostly by French commentators in the 1960s influenced by Louis Althusser's studies, ended up establishing the presence of an original political thought in Spinoza's political treatises and in part IV of the *Ethics*, which were then considered actual relevant political texts rather than mere derivations making explicit what was already implicit in the metaphysical texts. This middle stance regarded Spinoza's philosophy as one incorporating an original political dimension in the history of modern political thought; at the same time, it focused on his political theory without necessarily depending upon a profound analysis of his metaphysics.

Nevertheless, the disciplinary autonomy of Spinoza's political thought remained difficult to determine. In fact, some commentators vindicated the exact opposite view of those who diluted his political thought into his ontology of Nature: they chose rather to claim that metaphysics and ontology were to be found in his political texts, not the other way round. Thus, if Spinoza's God were understood less as productive immanence and more as a rejection of transcendence, that would be a mere metaphysical instrument to politically subvert theocracy's God; if Spinoza's Nature were understood less as an overall inclusion of being and existence and more as a rejection of the creational idea of causality, that would be a mere metaphysical instrument to politically subvert the God of revealed religions; and if Spinoza's notion of the soul were understood less as the body's idea in action with an expressive eternity and more as a personal identity perishable with the body, that would be a mere metaphysical instrument to politically subvert the post mortem framework of rewards and punishments used by theologians (Stewart, 2006, pp. 156–82).

These extreme views that either undervalued or overvalued Spinoza's political thought seem to depend upon some misleading arguments, though. Those who confine politics to his metaphysics do not seem to understand how his political considerations resort to multidisciplinary concepts such as immanence and necessary causality in order to apply them to the political realm with the purpose of overcoming the gap between metaphysics and *praxis*. If Spinoza's political ideas were entirely in his metaphysical texts, then there would not be any political theory at all – only metaphysics applicable to politics. But if those same ideas are to be found first and foremost in his political writings, which in turn develop certain concepts established in the metaphysical texts, then political theory becomes an important element in an interconnected system of philosophy – a system that is not partitioned into several isolated shelves, but rather one in which several concepts traverse different philosophical disciplines.

On the other hand, those who confine his metaphysics to his political ideas do not seem to understand his method for philosophizing. For Spinoza, the beginning of all philosophy is

[5] In this sense, see Hampshire (1953, pp. 47–48, 177) and Curley (1988, pp. 4–6).

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not doubt but rather a true idea from which all knowledge unfolds. All his arguments begin with definitions that are affirmations of essences rather than negations of prejudices; also, his rejections of teleology and of a creational transcendent God are concluded *a contrario* from what he considers true premises, which is why they appear in the appendix to part I of the *Ethics* rather than in a preface or in demonstrations; and his notion of the soul derives from God's immanence rather than from the inadequacy of theology's normative system. If Spinoza's metaphysics were entirely in his political texts, then there would not be any metaphysics at all – only a political theory full of second intentions. In such a case, how could one explain his explicit defence of the political usefulness of certain instruments belonging to the theological tradition, such as normative systems, the minimal creed or the state's quasi-religious way of acquiring legitimacy?

In Spinoza's philosophy, metaphysics is not contained in politics any more than politics is not contained in metaphysics. Both are interdependent realms inside one common philosophical system. They neither reject nor absorb each other; but they do share certain key concepts that are validated inside each of those realms, either as metaphysical concepts or as political concepts.

The same occurs with his concept of law. It has one foot in systematic metaphysics and the other in philosophical political science. It is the bridge connecting ontology with politics and vice versa. It is comprehensible only inside and emerging from Nature; simultaneously, it renders politics comprehensible by explaining how Nature turns into expressions of constructive political processes. A study of the law can occur only through ontology, without losing its ability to become a constitutive concept within the horizon of politics. What the law actually is can only be known within the conceptual framework of 'God, or Nature'. Thus, there is politics in Spinoza's ontology and ontology in Spinoza's politics only from the standpoint of the law. If there is such a thing as a philosophy of law in Spinoza, it is a philosophy of Nature through law with politics within its horizon.

Still, it is a philosophy of law standing on its own rather than merely implicit in metaphysical, theological, moral or political considerations. It is a key element in Spinoza's entire philosophical system – its explicitness consists in a conceptual stroll through the system. His philosophy of law is intrinsically interdisciplinary not because his concept of law is hidden under other branches of the system, but because it reaches (and can only be conceived in) an ontology of Nature extending to ethical and political realms. And because his philosophy of law traverses different areas of his system, it involves an analysis of the nature of law inside a philosophy of Nature, and also an application of that analysis to life in society. In this sense, political theory appears to derive more from philosophy of law rather than the other way round. Spinoza's philosophy of law is then a continuous reconceptualization of the legal in the ontological realm of Nature – it is an ontological study of positive law. In other words, it is *ontology of the law*.

Natural Lawyer or Legal Positivist?

It is now commonplace for legal theorists to consider that concepts of law usually derive from the consideration of three elements: due enactment; social efficacy; and axiological correctness (Alexy, 1999, p. 23). All these elements function as criteria of legal validity, that is, as determinative yardsticks from which it is possible to identify the obligation to accept a

standard in legal reasoning and what rules are legally binding. Legal theories that concentrate exclusively on due enactment and social efficacy advocate a positivist concept of law, whereas those which accept axiological correctness as an important legal characteristic are usually called natural law theories. The jurisprudential dimension of natural law focuses on how morality can function as a validity test on positive law. It declares that what the law is on some subject depends on what the law ought to be. Its basic concern is to establish a necessary connection between morality and law and to make sure that positive law is intrinsically an expression of moral justice.

Within such a frame of reference, the traditional view of Spinoza on law holds that he is a legal positivist (Belaief, 1971, pp. 101–03; Walther, 1982; and, more subtly, Rocca, 2008, pp. 211–12). He defines justice as 'a set disposition to render to every man what is his in accordance with civil law' [*animi constantia tribuendi unicuique, quod ei ex jure civili competit*]; and injustice, by contrast, 'is to deprive a man, under the guise of legality, of what belongs to him by true interpretation of the law' [*est specie juris alicui detrahere, quod ei ex vera legum interpretatione competi*] (*Theological-Political Treatise*, ch. XVI) (Spinoza, 1972, vol. III, p. 196). The steadfast will to render to each his due is the same as the set disposition to obey what civil law establishes as rights and duties pending on each and every man. In this sense, Spinoza makes a legalist interpretation of Ulpian's classic definition of justice as *constans voluntas suum cuique tribuere*. For him, justice is obedience to valid positive law.

He uses different arguments to support this view.

In the *Theological-Political Treatise*, he presents the Argument from Politics. In his own words, justice receives 'the force of law and command from the authority of the state alone, that is, solely from the decree of those who have the right to rule' (*Theological-Political Treatise*, ch. XIX) (Spinoza, 1972, vol. III, p. 230). Spinoza identifies right [*jus*] with power [*potentia*]; in the state of nature, men are either isolated or in conflict with one another, which means there is no cooperation; and without cooperation, men can neither survive nor develop their productive powers; therefore, all that is not immediately natural depends upon the formation of a proactive locus of cooperation. Since justice involves human relations, it only makes sense the moment that cooperation comes about; and cooperation depends upon the adoption of a common standard of *dos* and *don'ts* by which all participants can undergo a process of empowerment without the uncertainty of being thrown back at any time to the condition of isolation. That common standard can only emerge from their common power, that is, from political power. Justice is the name given to a standard that applies to human conventions and is itself a human convention. Outside the boundaries of effective political institutions, justice and injustice are inconceivable.

The Argument from Politics, however, does not fit into the exact phrasing of Ulpian's definition of justice. Rather, it simply identifies justice with obedience in such a way as to describe obedience also as a *constans voluntas*, not to render to each his own but to follow what is established by law.

In the *Ethics* and in the *Political Treatise*, Spinoza tried to connect explicitly the Argument from Politics with the idea of 'rendering to each his own': he then introduced the Argument from Property. According to the *Ethics*,

> in the state of nature there is no one who by common consent is master of anything, nor is there anything in Nature which can be said to be this man's and not that man's. Instead, all things belong

> to all. So in the state of nature, there cannot be conceived any will to give to each his own, or to take away from someone what is his. That is, in the state of nature nothing is done which can be called just or unjust. (*Ethics* 4P37S2; Spinoza, 1985)

And, in the *Political Treatise*,

> just as sin and obedience, taken in the strict sense, can be conceived only in a state, the same is true of justice and injustice. For there is nothing in Nature that can rightly be said to belong to one man and not another; all things belong to all, that is, to all who have the power to gain possession of them. But in a state, where what belongs to one man and not to another is decided by common laws, a man is called just who has the constant will to render to every man his own; and he is called unjust who endeavours to appropriate to himself what belongs to another. (*Political Treatise*, ch. II, §23; Spinoza, 2002)

Justice consists in rendering to each his own, where 'own' is understood to be the object of a property right belonging exclusively to the 'owner'. In the state of nature, there are only *de facto* possessions but no *de jure* property rights, that is, individual claim-rights whose correlatives are duties *erga omnes* backed up by force to abstain from and respect the owner's use of possessions. Exclusive individual rights, and therefore also property, are created by civil law. Therefore, justice is the steadfast will to render to each his own, or rather to allocate available social goods in respect to those exclusive individual rights to property which are non-existent until introduced by civil law. Justice is obedience in the sense that it is respect for those civil laws establishing and regulating property relations.

Nevertheless, the claim that Spinoza is a legal positivist cannot rest solely on these arguments. On the one hand, Spinoza seems to express more a legalist conception of justice rather than legal positivism *per se*. If justice is *suum cuique tribuere*, then it is necessary to be able to determine what each man's own is if a vicious circle is to be avoided. By means of a legalist determination of what *suum cuique* is, it becomes possible to arrive at the conclusion that to be just means to accord to each person what the law entitles him to. This formula seems to admit of as many variants as there are different types of law; each system of law assumes a justice relative to that law. To be just is to apply the rules of a given legal system; to be unjust is to misapply them. In practice, this strictly legalist interpretation of Spinoza's concept of justice can easily be mistaken for legal positivism. However, legalist conceptions of justice are not necessarily the same as legal positivism. Legal positivism claims that morality and associated concepts such as justice cannot function as criteria for ascertaining the validity and obligatory force of law; moral judgements about law are morality, not law; only social efficacy and due enactment determine the existence of law. Contrariwise, legalist conceptions of justice state that valid positive law establishes the contents of justice; judgements about justice or injustice are necessarily legal, not moral; the requirements of justice and of civil law coincide. The fact that legal positivism and legalist conceptions of justice share the conclusion according to which positive law cannot be invalid because of injustice does not mean that they are the exact same thing.

On the other hand, once it is established that Spinoza's philosophy of law is a philosophy of Nature through law with politics within its horizon, how can it be possible to claim simply that there is no *natural law* in Spinoza? In fact, he never really seems to approach the subject of law outside the conceptual framework of what he calls *natural law*. One could claim that he

remains a natural lawyer, albeit not in the traditional sense of natural law as a theory of legal validity. However, this turns out to be the same as claiming that he is a legal positivist who is attentive to philosophy of nature. Can he be a natural lawyer and a legal positivist at the same time? If so, is he still a natural lawyer? And is he still a legal positivist?

Spinoza sets up a connection between his system's metaphysical grounds and his concept of law. Unlike most natural law theories, he does not intend to carry out a correspondence between values and law. Rather, he defines law by the concept of power [*potentia*] – that whose actuality is productive in the sense that it generates effects. Law is power as efficacy. However, power is understood solely in the light of a paradigm of causality: nature's self-causality. Consequently, efficacy as a determinant element of valid positive law depends upon the idea of 'naturalness'. In a revolutionary and complex way of making sense of law and justice, Spinoza somehow manages to subvert both traditions.

Natural Law as Power and Efficacy

In the *Political Treatise*, Spinoza says that: 'By natural law, then, I understand the laws or rules of Nature in accordance with which all things are made, that is, the very power [*potentia*] of Nature. So, the natural law of Nature as a whole, and consequently of each individual thing, is coextensive with its power' (*Political Treatise*, ch. II, §4; Spinoza, 2002). What attributes 'naturalness' to Spinoza's conception of law is the fact that it expresses natural power.

From the standpoint of individuals, power is neither a capacity for performing an action nor an abstract freedom (exercisable and not necessarily exercised), but only a measure of causality. Power extends as far as the direct effect which has that power for cause. An individual man, for instance, is powerful by achieving everything that results from his existence's actual productivity. He does not have a natural right to everything he can; he has a natural right to everything he does. The only limit to his natural power is the act of which he can no longer be considered a direct cause. When Spinoza says that individual natural law is coextensive with his power, this is what he means: that a right 'extends' as far as the effect in production; it is 'coextensive' with all the effects in production by the individual. This notion of power has nothing to do with Aristotle's views concerning potency. It is not identical with a present capacity for the performance of a future end; it is not a present thing affirming something for the future. There is no futurity, either logical or chronological, in Nature's power. An individual's power, and consequently his expression of natural law, is actually the measure of extension of his own causality, the scope of all his effects.

Unlike what some commentators seem to suggest (Yovel, 1992, p. 149), Spinoza's association of natural right with power is not a simple metaphorical exercise used in a Marrano-styled rhetoric. On the contrary, Spinoza can define individual expressions of natural law only through ontological power itself. Individual natural rights are the individual's actual causal power in accordance with the individual's natural laws. One has a right to do something if one does it. Possibilities have nothing to do with an individual natural right. And since Spinoza's conception of individuality is wider than the category of human individuals, comprising all singular things, then all individuals are expressions of this natural power. A man's right is as natural as a lion's or a fish's, which is why he says that lions and fish have a natural right to eat smaller animals precisely because they are naturally powerful (in the necessarily causal sense) to do so (*Theological-Political Treatise*, ch. XVI) (Spinoza, 1972, vol. III,

p. 195). Power is the measure of causality: all-necessary, neither contingent nor hypothetical. In addition, individual things do not simply have power; they are power. Spinoza's notion of endeavour, according to which 'each thing, insofar as it is in itself, endeavours to persevere in its own being' (*Ethics* 3P6; Spinoza, 1985), expresses the actual efficiency of causal power. In individual things, active power is equivalent to this endeavour – as Spinoza says, 'power or endeavour' [*potentia sive conatus*] (*Ethics* 3P7d; Spinoza, 1985).

From the standpoint of legal norms, natural law is power as efficacy in the sense that it expresses the political institutions' ability to preserve their own dynamic condition by being the most obeyed they can possibly be.

Efficacy depends upon two major factors.

The first factor is moderation. Spinoza's claim that freedom of thought and speech is advantageous to the sovereign entails two points: that freedom of thought and speech cannot be confused with licentiousness, that is, with an absolute ability to think of everything and of expressing any opinion whatsoever, since seditious opinions to the public peace are to remain inadmissible (*Theological-Political Treatise*, ch. XX) (Spinoza, 1972, vol. III, p. 242); and that what matters is not whether sovereigns have a right to compel subjects to follow certain opinions or not, but rather if doing so is beneficial or damaging to the sovereign (*Theological-Political Treatise*, ch. XX) (Spinoza, 1972, vol. III, p. 240). Absence of individual freedom is damaging in the long run to the sovereign, since tyranny intensifies the gap between ruler and subjects, which in turn furthers the subjects' resistance to commands, which in turn weakens the sovereign, which in turn produces social tensions and conflicts that are damaging to peace and political stability. The free state – the one which promotes individual freedom because that is beneficial to its power – is the one that stands in the middle of two contrary political regimes, namely absolute anarchy and absolute tyranny: it is the moderate government.

How can a state become moderate? Spinoza provides the answer by focusing on the Hebrew state. Moderation is achieved by limiting the power attributed to Hebrew leaders and by 'curbing the boundless licentiousness of princes' (*Theological-Political Treatise*, ch. XVII) (Spinoza, 1972, vol. III, p. 213). The idea lying behind this example is that unlimited power is worse and less powerful than limited power. Political power is more stable and prosperous the more it eliminates those conditions that allow arbitrariness of political decisions and the more it accepts the rule of law even though it is not bound by it. The free state is the one with a moderate government in which decision-making is predictable. The exact opposite of a moderate state is one in which people live their whole lives in a 'continual practice of obedience', where no one can desire what is forbidden but only what is prescribed, to the point that slavery is mistaken with freedom (*Theological-Political Treatise*, ch. XVII) (Spinoza, 1972, vol. III, p. 216). In the moderate state, subjects desire only what is prescribed because what is prescribed is only what they desire in the first place. The sovereign has no arbitrariness, since he is limited to prescribing only what subjects are expecting him to prescribe. That is what makes his decisions efficacious.

Efficacy's second factor is democracy. The fact that men abhor to be ruled by their equals entails that there is always a gap between rulers and subjects and an asymmetry between ruling and obeying except when citizens believe they are following their own volitions when obeying the laws. The more transcendent-like is the relation between the state and its subject, the more will men believe that they are conforming to another's will instead of their

own, which entails that they will obey laws less willingly. Efficacy depends mostly upon the generalized belief that subjects participate to some extent in the making of political decisions.

In fact, Spinoza distinguishes between mere factual obedience and the psychological acceptance of specific commandments. The distinction is between external obedience and internal obedience: the former is the mere observance through actions or omissions of that which is commanded by whomever might be in the position of authority, and is sufficient for obedience (*Theological-Political Treatise*, ch. XVII, 1972, vol. III); the latter is an 'internal action of the mind' through which one 'resolves to obey every word of another wholeheartedly' (*Theological-Political Treatise*, ch. XVII) (Spinoza, 1972, vol. III, p. 202), and measures the intensity of the externally observed obedience. In other words, external obedience is sufficient for obedience; internal obedience determines the reasons for actions or omissions. The more an individual 'resolves to obey every word of another wholeheartedly' because he understands the necessity of compliance with that which is commanded, the more wholeheartedly will he obey, since the command will reveal reasons for actions or omissions that are actively accepted as such by the individual. He thus might be said to participate intellectually in the normative strength of the commandment to which he obeys.

All this appears remarkably close to being a 300-year prelude to H.L.A. Hart's (1994, p. 89) famous distinction between the external and the internal points of view. Efficacy is determined mostly by this 'internal action of the mind' by which the addressees of legal rules and principles adhere to them 'wholeheartedly'. That is what constitutes valid positive law; it is also what makes up democracy as the most natural of regimes (*Theological-Political Treatise*, ch. XVI) (Spinoza, 1972, Vol. III, p. 195). As a result, Spinoza proposes to equate political efficacy with individual freedom. His first step is to eradicate the imaginary ontological gap between rulers and subjects by making each individual believe that when he obeys political decisions he is obeying no one but his own will. The most effective political decisions are those laws that become mandatory because individuals are willing to obey them and accept them *qua* obligatory. That is, those in which the law-making process is somehow politically immanent. And that can only be achieved when the subjects who will obey the laws are exactly the same individuals who constitute the law-making process in the first place. The more democratic-like the state is, the more efficacious it will be, since each individual subject will more actively believe in obeying the laws because it is advantageous for the public good and consequently also for himself.

Within this frame of reference, any content whatsoever can be law regardless of its substantive moral quality (Kelsen, 1992, p. 56), provided that it is efficacious – that is, powerful. Spinoza would agree with legal positivists when they claim that civil law is valid only when it is efficacious; but he goes one step further and adds that civil law is valid *because* it is efficacious. Moreover, he grounds this assertion on a metaphysical view of natural law. Civil laws are more efficacious the more they are charitable, rational, egalitarian and inclusive – all these different criteria help to determine cumulatively efficacious laws which, for that very reason, are also *the most just* laws in accordance with his legalist conception of justice. Conversely, injustice is powerlessness; actions, characters and states of affairs are unjust whenever they are powerless to become more powerful (productive or efficacious) than they actually are.

In some theories, justice functions as a *classifying* criterion for the validity of law: it is the pivotal test for classifying something as law. If a norm with some pretence to legality

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