

DIVORCING POWER AND REASON: SPINOZA AND THE FOUNDING OF MODERN LAW*

*Benoit Frydman***

I. THE HIDDEN TRADITION

Western culture is often said to be the product of two ancient and venerable traditions: classical Greco-Roman civilization and the Judeo-Christian biblical heritage. This may also be true for the legal culture of the Western world. However, while the classical background has been much emphasized, especially Roman Law (which is still sometimes taught at universities), the biblical roots of our legal system have almost been forgotten or have at least been overlooked for a very long time. Nevertheless, the biblical tradition shaped many of the tools used in contemporary legal practice. In fact, scholars first applied several techniques used by judges for interpreting major legal texts, like the Constitution, to the Bible and its commentaries.¹ In addition, some modern studies have convincingly shown how the Talmud could give us a better understanding of the American rule of law.² In spite of that, unlike Justinian's *Corpus*, neither the Bible nor any of its numerous commentaries are regarded as parts of the Western legal heritage. Similarly, Jewish thinkers who discussed and sometimes revolutionized the application and construction of legal texts are for the most part

* This article is the result of a fruitful dialogue with Professor Arthur Jacobson. I am grateful to him as well as to the Benjamin N. Cardozo School of Law and the Jacob Burns Institute for inviting me to participate in Spinoza's Law. I also want to thank for their support and their most valuable help: Professor Monroe Price, Professor Christian Sandwig, Professor Isabelle Rorive, Mrs. Sarah Hardman and the editors of the *Cardozo Law Review*.

** Professor of Law and Director of the Centre for Legal Philosophy, Free University of Brussels. (www.philodroit.be). E-mail address: bfrydman@ulb.ac.be.

¹ Detailed accounts of these techniques can be found *inter alia* in: Paolo Feltrin & Marco Rossini, *Verità in questione. Il problema del metodo in diritto e teologia nel XII secolo*, Bergamo, 1992; Bernardo C. Bazàn et. al, *Les questions disputées et les questions quodlibétiques dans les Facultés de théologie, de droit et de médecine, in Typologie des sources du Moyen Age occidental* (1985); *Dictionnaire de droit canonique*, dir. Raoul Naz, v^o *Quaestiones*, par Gérard Franssen et Ch. Lefèbvre, t.7, col. 407-18.

² See Suzanne Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV L. REV. 813 (1993); Itzhak England, *Majority Decision vs. Individual Truth: The Interpretation of the 'Oven of Achnay' Aggada*, *Jewish Law and Legal Theory*, 15 TRADITION 37 (1975).

ignored by the handbooks of jurisprudence. They belong to a "hidden tradition"³ which has deeply affected the course of Western legal thought over time, but always secretly or from the outside. The story of this tradition has yet to be written.⁴ Such a history should certainly include the great figures of Philo of Alexandria, Maimonides and Spinoza, as well as more recent scholars such as Leo Strauss and Chaim Perelman. Among them, Spinoza's contribution is of paramount importance.

This article explains how Spinoza contributed to turning our conception of the law and the methods of its interpretation upside down. His contribution has been essential and twofold: (1) Spinoza was partly responsible for the destruction of the "legal model of thought" (*ratio more juridico*), which prevailed until the sixteenth century (and sometimes later) not only in legal matters but in most areas of scientific knowledge; (2) Spinoza also played a major role in the shaping of modern law, which rests upon the *summa divisio* between, on one hand, natural law, embedded in natural reason and discovered *more geometrico*, and, on the other hand, positive law, which expresses the will of the sovereign power and rests upon its sole authority. This division, I will argue, is neither eternal nor self-evident, but an effect of the strategy followed by Spinoza and a few others in their arduous struggle against traditional powers and religious authorities.

This analysis focuses on the *Theologico-Political Treatise*,⁵ which is largely recognized as the origin of biblical critical studies.⁶ In this book, Spinoza fiercely attacks the conventional techniques of interpreting traditional authorities, especially the Bible. He suggests replacing them with a "scientific method" of interpretation, which is still taught today within law faculties. In addition, I occasionally refer to Thomas Hobbes' *Leviathan*, which was published a few years before the *Treatise*.⁷ The *Leviathan* deals with topics similar to those in the *Treatise*, often sharing the same premises and providing some hints for a better understanding of Spinoza's work. Before turning to these texts, it is first necessary to get an overview of the regime of traditional knowledge that prevailed until the modern scientific revolution or which

³ This "hidden tradition" is named after Hannah Arendt's collection of essays: *Die verborgene Tradition: acht Essays* (1976).

⁴ But see SAMUEL KURINSKY, *THE EIGHTH DAY: THE HIDDEN HISTORY OF THE JEWISH CONTRIBUTION TO CIVILIZATION* (Jason Aronson ed., 1994).

⁵ BENEDICT DE SPINOZA, *A THEOLOGICO-POLITICAL TREATISE AND A POLITICAL TREATISE* (R.H.M. Elwes trans., Dover Publ'ns 1951) (1883).

⁶ LEO STRAUSS, *PERSECUTION AND THE ART OF WRITING* ch. 5 (1952); ERNST CASSIRER, *THE PHILOSOPHY OF ENLIGHTENMENT* 197 (1968); TZVETAN TODOROV, *SYMBOLISME ET INTERPRÉTATION* 137 (1978).

⁷ THOMAS HOBBS, *LEVIATHAN OR THE MATTER, FORME & POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL* (1651). *Leviathan* was first published in 1651, nineteen years before *Theologico-Political Treatise*.

was supported by Hobbes and Spinoza.

II. THE LOGIC OF PRE-MODERN AUTHORITIES

Nowadays, "authority" means power. It means the right to command and to make final decisions, as well as the persons and institutions exerting such prerogatives. Modern political philosophers, like Hobbes and Spinoza, emphasized this meaning. In pre-Modern thought, however, "authority" had a different sense, which did not exclude power but mainly referred to knowledge. Contemporary English has kept track of this ancient definition. When calling, for instance, Paul Volcker "an authority" in financial matters, one does not refer to his former position as head of the Federal Reserve System, which he left many years ago, but to his acknowledged expertise in financial issues and to the credibility he enjoys among the financial community. Lawyers also label "authority" a court decision that states the law on a certain topic and influences further rulings, which defer to it as a "precedent." This legal meaning is not far from the original concept of authority.

The word "authority" originally derives from "author," which at first was not mainly a literary but a legal concept. In Roman law, the "*auctor*" designated the person from whom another person held his rights. A deceased father was his children's author and the vendor of a property, the buyer's author, for instance. Technically, the "authority" (lat. *auctoritas*) was the warranty given by the vendor to the buyer in order to protect the latter from a possible eviction by a third party. When the vendor's personal credit was not good enough, a second author would secure the transaction by adding his own authority. The scope of the word later extended to designate the quality of a man (a judge, a priest, a witness or a writer), who could be trusted. By metonymic lapses, it later denoted the man himself and finally the writing where his opinion or testimony was delivered.⁸

Medieval scholars used the word in this sense. More precisely, they called ancient texts of high value that were officially regarded as genuine testimonies of the truth "authorities." Church Fathers' writings were preeminent authorities in Theology, as were Aristotle's in Philosophy and Justinian's *Corpus* in Civil Law. These texts were said to be "authentic" (lat. *authenticus*), which meant that they could be used as pieces of evidence in order to assert the truth of a statement. Authorities were the very source of knowledge and the necessary starting point of any valuable research and teaching. They were the

⁸ MARIE DOMINIQUE, LA THÉOLOGIE AU DOUZIÈME SIÈCLE 353 (1957).

cornerstones of the scholastic pattern of thought which developed in European Universities from the twelfth century.

During the morning "lectures" (lat. *lectio*: reading), professors had to read and comment on authorities. Students would have to copy them or learn them by heart.⁹ Afternoons and sometimes evenings were dedicated to more interactive exercises, especially the *quaestio disputata* and the *disputatio*.¹⁰ A hard case or an issue was then discussed *pro et contra* by the students and settled by an academic judge. Students had to find and develop arguments in favor of either thesis. Each argument had to be based upon one or several authorities, which were referred to or quoted directly. Finally, the professor ruled in favor of the most convincing demonstration. In his ruling, he would often try to reconcile the contradictory authorities by interpreting them. He would also interpret the authorities so as to give the correct answer to the issue at hand, according to his own judgment.

These exercises, carried out mainly for scientific and pedagogical purposes, looked more or less like modern trials.¹¹ The law faculties made the most of them for the training of would-be lawyers. Nevertheless, the *quaestio* and the *disputatio* were by no means restricted to the legal field, but applied to every discipline taught at the University, including theology, philosophy, grammar and medicine.¹² Moreover, major scholastic writings, like Thomas Aquinas' *Summa Theologica*, were designed on a pattern rather similar to the *quaestio*. The *Summa* raises and organizes a collection of questions. For each of these questions, Aquinas lists, discusses and interprets the main authorities *pro et contra*, before settling the case by a comprehensive answer, while trying to reconcile the apparent contradictions. Although based upon a handful of ancient texts, the scholastic culture was thus in a way dynamic and creative. The technique of the *quaestio disputata* allowed, within a limited scope, to raise new issues and to solve them by discussing and interpreting the established authorities creatively.

In the Christian world, the Bible was of course the supreme authority. As Aquinas stated at the beginning of his *Summa Theologica*, God is the author of the Sacred Scriptures.¹³ This does not mean that God actually wrote all the books included in the Holy Writ, but that

⁹ JACQUES LE GOFF, *LES INTELLECTUELS AU MOYEN AGE* (Col. Points, 2d ed.1985) (1957).

¹⁰ For additional discussion about *quaestio disputata*, see HERMANN KANTOROWICZ, *THE QAESTIONES DISPUTATAE OF THE GLOSSATORS*, in *REVUE D'HISTOIRE DU DROIT* 1-67 (1939); G. Chevrier, *Sur l'art de l'argumentation chez quelques Romanistes médiévaux au XIIème et au XIIIème siècles*, in *LA LOGIQUE DU DROIT, ARCHIVES DE PHILOSOPHIE DU DROIT* (1966).

¹¹ Medieval trials were carried out in a completely different way. Medieval sentences were generally without motives. See Philippe Godding, *La Jurisprudence*, in *TYPLOGIE DES SOURCES DU MOYEN AGE OCCIDENTAL* 20-23 (1973).

¹² See Bernardo Bazán, *supra* note 1.

¹³ SAINT THOMAS AQUINAS, *Summa Theologica*, Ia Pars qu. 1, in *THE TREATISE ON LAW* (R.J. Henle Ed., trans, Notre Dame 1993) (1269).

divine authority guarantees the truth and the perfection of these writings. As a consequence, biblical verses were used as ultimate pieces of evidence in order to make a point, to settle an issue or to put an end to a controversy. The superior authority of the Bible prevailed not only in theology, but also in law and philosophy, as well as in astronomy and physics.

Theology ranked first among all sciences because of its greater certitude "derived from the light of divine knowledge, which cannot be misled."¹⁴ Doctors in theology did not restrict their opinions and judgments to divine matters, but often intervened in inferior spheres, like law and philosophy, claiming jurisdiction outside the borders of their own discipline. Church doctors relied upon the authority of the Bible and its commentaries to impose their own views and to control the profane sources of knowledge. This hierarchy was openly professed in medieval universities and reflected by well-known adages such as "*theologia regina scientiarum*" and "*philosophia ancilla theologiae*."

III. SPINOZA'S PURPOSE

Chapter XV of the *Theologico-Political Treatise* is especially dedicated to the refutation of this latest proverb. It argued that theology "is not to be subservient to reason nor reason to theology,"¹⁵ but that each of them has its own "province" and should be regarded as entirely independent from each other.¹⁶ The main purpose of the entire Treatise is to promote freedom of thought and to free the new philosophy from the traditional authorities and the influence of the Church. Spinoza was indeed deeply concerned about the violent reactions of religious authorities against the new scientific method, its supporters and some of its achievements. He had been shocked, like all the new philosophers, by the injurious treatment inflicted by the Catholic Church upon Galileo after the publication of the *Dialogue Concerning the Two Chief World Systems* in 1632. In this book, Galileo promoted Copernicanism against the authority of Aristotle and the more equivocal authority of the Bible. The great scientist was summoned to Rome, vehemently accused of heresy, condemned to house arrest for life and forbidden to publish. Analogously, Spinoza himself felt the burden of religious authority. At the age of twenty-two, he was expelled from the Jewish community of Amsterdam because of the "evil opinions" and "the abominable heresies

¹⁴ *Id.* at Ia Pars, qu. 1, art. 5. Theology also ranks first among the sciences because of the superiority of its object and of its purpose (i.e. "eternal bliss").

¹⁵ See SPINOZA, *supra* note 5, at 190.

¹⁶ See *id.* at 10 ("[E]ach has its separate province; neither can be called the handmaid of the other.").

which he practiced and taught."¹⁷ This *cherem* (excommunication) was never rescinded.

Spinoza was absolutely convinced of the urgent necessity to undermine the power of the theologians in order to allow the survival and the development of modern science and rational philosophy. In the *Theologico-Political Treatise*, he bitterly attacks those "theologians anxious to learn how to wring their inventions and sayings out of the sacred text, and to fortify them with Divine authority."¹⁸ In the long run, the most effective way to get rid of them, or at least to lessen their influence, would be to refute the system of traditional authorities upon which they had established their leadership. Above all, the interpretation of the Bible was of vital importance. The theologians relied mainly upon its authority to deny freedom of thought and to label as heresy the most promising findings and opinions of modern science and philosophy. Moreover, the Bible was the cornerstone of the scholastic system of knowledge, enjoying the highest and ultimate authority. To undermine its authority would eventually provoke the fall of the system as a whole.

This task was to be performed by a philosopher, who had primarily committed himself to the shaping of a new method of knowledge based on the convincing power of natural reason alone. According to this method, interpretation itself, which necessarily relies upon prejudice and authority, was undoubtedly not the right way to proceed. Spinoza was certainly not very convinced that the interpretation of the Bible, even performed according to the "true method" he recommended in the *Theologico-Political Treatise*, would substantially increase the amount of human knowledge. Even the words "method of interpretation" sound like a contradiction in terms since the rationalist method would precisely exclude interpretation as inappropriate. As a child, Spinoza must have studied the Torah, the Prophets and the Talmud at the rabbinic school of the Amsterdam Sephardim community, but he had since left this community forever and applied his mind to entirely different books, such as the works of René Descartes. When he exposed his own philosophy, as for instance in the *Ethics*, Spinoza would not use interpretation or commentaries at all but preferably the *ratio more geometrico*. As Leo Strauss put it, the method of interpreting the Bible was for Spinoza only a *cura posterior*.¹⁹ His interest in the Holy Scriptures was not genuine but mainly strategic and primarily for defensive purposes. In other words, the main goal of the *Treatise* is less to suggest a new method than to destroy the scholastic

¹⁷ *Cherem*, in S. NADLER, SPINOZA, A LIFE 120 (1999). The *Cherem* has no known author; it consists of the text of the ruling expelling Spinoza from the Jewish community of Amsterdam.

¹⁸ SPINOZA, *supra* note 5, at 98.

¹⁹ STRAUSS, *supra* note 6.

regime of authorities and the traditional pattern of thinking altogether.

IV. DIVORCING AUTHORITY AND REASON: SPINOZA V. MAIMONIDES

Right from the start, the *Theologico-Political Treatise* questions the authority of the Bible. Speaking of scholastic theologians, Spinoza writes in his preface:

The very vehemence of their admiration for the mysteries plainly attests, that their belief in the Bible is a formal assent rather than a living faith: and the fact is made still more apparent by their laying down beforehand, as a foundation for the study and true interpretation of Scripture, the principle that it is in every passage true and divine. Such a doctrine should be reached only after strict scrutiny and thorough comprehension of the Sacred Books . . . , and not to be set up on the threshold, as it were, of inquiry.²⁰

The statement that the Bible "is in every passage true and divine" is the very core of the traditional concept of authority. To call it into question is not only sacrilegious, it also weakens the foundations of the scholastic pattern of knowledge. Spinoza suggests a totally different approach to the text, free from any prejudice regarding its divine origin and the value of its teachings. According to him, the right method should not confound the meaning of the text and its truth but, on the contrary, make a clear distinction between them.²¹ The proper task of the interpreter is to discover by all relevant means the "true meaning" of the text, without regard to the truth or falsity of its statements. This principle may appear obvious to a modern reader and is indeed the starting point of the modern theory of interpretation. However, it flatly contradicts the system and the main techniques of traditional hermeneutics, such as the *expositio reverenter*. In this famous scholastic technique, the interpreter slightly corrects the meaning of an authentic text so as to lead it toward the truth, like a gardener straightens up the curved trunk of a young tree with the help of a support. For Spinoza, such methods are unscientific and lead to harmful and misleading results.

In his critique of the traditional method of interpretation, Spinoza's main target is Maimonides. Maimonides was not, of course, a scholastic himself, but his works, as well as those of his Muslim contemporary, the great Averroes (Ibn Rushd), were well known and carefully read by Christian scholars. Thomas of Aquinas, for instance, had studied them and extensively discussed their merits in his own

²⁰ SPINOZA, *supra* note 5, at 108.

²¹ *See id.* at 101.

books.²² Both Averroes and Maimonides attempted to conciliate the interpretation of Sacred Scriptures with the teachings of Aristotle's philosophy. In his extremely elegant *Decisive Treatise, Determining the Nature of the Connection Between Religion and Philosophy*, Averroes tries to demonstrate the absence of any real contradiction between the Koran and philosophical reasoning.

Now since this religion is true and summons to the study which leads to knowledge of the Truth, we the Muslim community know definitely that demonstrative study does not lead to [conclusions] conflicting with what Scripture has given us; for truth does not oppose truth but accords with it and bears witness to it.²³

When the literal meaning of Scripture apparently contradicts Aristotle's doctrine, the interpreter will make use of rhetorical techniques of interpretation—similar to those used by lawyers—to obtain a metaphorical meaning consistent with the teaching of reason. Maimonides' own thesis is more cautious, especially regarding the ultimate superiority of religious mysteries. His *More Nebukim* seems to have effectively influenced Thomas Aquinas' synthesis of religion and philosophy, which eventually became—and partly remains—the official doctrine of the Catholic Church.²⁴ Quoting the proverb "Like apples of gold in settings of silver, so is a word skillfully spoken,"²⁵ Maimonides teaches that the Bible may be understood on two different and separate levels.²⁶ Biblical verses have both an open meaning (the "settings of silver") and a secret meaning (the "apples of gold"): the open or literal meaning tells a story or states a command that must be obeyed; the secret meaning provides the interpreter with some valuable knowledge, consistent with the teachings of philosophy, or alludes to a mystery, which lies beyond the reach of natural reason. While the legal meaning is for everyone to obey, the metaphysical one, which sometimes contradicts the literal sense, is restricted to the happy few who are learned in both Talmudic and philosophical studies.

Spinoza dismisses Maimonides' theory as "harmful, useless and absurd."²⁷ He clearly opposed any attempt to conciliate religion and philosophy. For him, each of these disciplines has its own domain and its own methodology. It is a dangerous mistake to mix them up by

²² See *id.*

²³ AVERROES, THE DECISIVE TREATISE, DETERMINING THE NATURE OF THE CONNECTION BETWEEN RELIGION AND PHILOSOPHY § 18. English translation, available at <http://www.wise.virginia.edu/philosophy/phil205/Averroes.html>.

²⁴ For a discussion of the reception of *More Nebukim* in the thirteenth century Christian world and the references made by scholastics to this book, see GILBERT DAHAN, L'EXÈGÈSE CHRÉTIENNE DE LA BIBLE EN OCCIDENT MÉDIEVAL 296-97 (1999).

²⁵ *Proverbs* 25:11.

²⁶ Schlomo Pines, *Introduction*, to MOSES MAIMONIDES, THE GUIDE OF THE PERPLEXED (Shlomo Pines trans., 1963).

²⁷ SPINOZA, *supra* note 5, at 118.

trying to corroborate the free findings of natural reason with the authority of divine revelation. According to the Treatise, "the Bible must not be accommodated to reason, nor reason to the Bible."²⁸ Scripture does not teach philosophy—neither openly nor secretly—but merely obedience.²⁹ The Sacred Books do not explain anything; they command. They do not ask for understanding, but for compliance. The proper sphere of theology is piety and obedience, while the sphere of philosophy is truth and wisdom.³⁰ The investigation of Nature is the province of philosophy, which uses mathematical reasoning (*ratio more geometrico*) to understand the laws of the world. The investigation of revelation is the province of theology, which uses interpretation to discover the true meaning of the biblical commands.

V. A NEW METHOD FOR INTERPRETING TEXTS

Spinoza's "true method" of interpreting Scripture only requires the help of natural reason.³¹ This method "does not widely differ from the method of interpreting nature—in fact, it is almost the same."³² As Cassirer explained, the *Theologico-Political Treatise* entirely changes the ontological status of the Bible. The revelation used to be the divine key that allowed human beings to understand the world. Now, Spinoza treats it as another item of this world, whose very nature does not much differ from the others and which should be examined almost in the same way as deer, plants or stones.³³ This method, called "natural history," consists of a systematic collection, description, analysis and ordering of the various species that could be found in Nature.³⁴ Similarly, Spinoza wants to carry out an "historical" examination of the Sacred text: to collect and to confront the different versions of the Holy Books, to understand each word and each sentence according to the rules and uses of Ancient Hebrew, and then to group biblical verses in several categories, according to their topic, so as to find, on each subject, what

²⁸ *Id.* at 195.

²⁹ *Id.* at 190.

³⁰ *Id.* at 194.

³¹ *Id.* at 113.

³² SPINOZA, *supra* note 5, at 99.

³³ Spinoza "entend interpréter, non l'être, la 'nature des choses', à partir de la Bible, mais la Bible elle-même comme une partie de l'être, soumise en tant que telle à ses lois universelles. Elle n'est pas la clé de la nature, elle en est un élément; aussi, doit-elle être traitée selon les mêmes règles qui valent pour toutes les espèces de la connaissance empirique." CASSIRER, *supra* note 6.

³⁴ About the classical meaning of the word "history," see MICHEL FOUCAULT, *LES MOTS ET LES CHOSES* 69 (1966). See also Laurent Jaffro, *Spinoza: La Question Théologico-Politique et la Rhétorique de la Philosophie*, in *FIGURES DU THÉOLOGICO-POLITIQUE* 91 (E. Cattin et. al eds., 1999).

Scripture actually teaches us, clearly and without any contradiction.³⁵ Spinoza insists that the interpretation of Scripture should be based on Scripture alone.³⁶ The philosopher does not hesitate to endorse the Talmudic precept: one must interpret the Torah by the Torah itself,³⁷ although his method has nothing in common with the subtle intertextual interpretive games performed by the Rabbis and pursues an entirely different purpose.

The nature and efficacy of natural reason consists of "deducing and proving the unknown from the known."³⁸ So, the scientific interpretation of the Bible "proceeds by the examination of Scripture, and infer[s] the intention of its authors as a legitimate conclusion from its fundamental principles."³⁹ Biblical verses are like fossils. They bear testimony to the former existence of prehistoric species, which have by now entirely disappeared from the surface of the earth but have left some "tracks" for natural historians to study. Similarly, Holy books are signs pointing back to a remote period of the past. These signs are evidence of the fact that some people wrote these books many centuries ago in order to convey a message to some readers. The main task of the interpreter is to discover what these writers meant and intended to communicate to their audience. This—and nothing else—is the "true meaning" of the text, according to Spinoza and his followers.⁴⁰ According to Schleiermacher, for instance, the fact that the Holy Books were not sent miraculously from Heaven but transmitted through human intermediaries is a compelling reason to relate their meaning to the actual intention of their authors. This is the only suitable method.⁴¹ For this reason, the internal critique of the text has to be supplemented by an external critique, which aims at relating the text to its actual author and to the circumstances of its drafting and its publication.⁴² Such an enquiry, as Spinoza states it, should include "the life, the conduct and the studies of the author of each book, who he was, what was the occasion, and the epoch of his writing, whom he did write for, and in

³⁵ For a detailed account of the historical method, see SPINOZA, *supra* note 5, at 101.

³⁶ *See id.* at 99.

³⁷ TALMUD, *Megillah*, attributed to Noah.

³⁸ SPINOZA, *supra* note 5, at 113.

³⁹ *Id.* at 99.

⁴⁰ TZVETAN TODOROV, *SYMBOLISME ET INTERPRÉTATION* 140 (1978).

⁴¹ FRIEDRICH DANIEL ERNST SCHLEIERMACHER, *HERMÉNEUTIQUE* 120 (Charles Bruer trans., 1987) (1819); "Si on demande en outre pourquoi l'Écriture n'est pas née de façon tout à fait miraculeuse sans faire appel à des hommes, alors il faut répondre que l'Esprit divin ne peut avoir choisi cette méthode qu'afin que nous reportions tout aux auteurs mentionnés. Voilà pourquoi cette interprétation peut seule être la bonne." However, this rule is problematic for the interpretation of the New Testament and should be adjusted according to Schleiermacher.

⁴² The words "internal critique" and "external critique" appeared later in philological terminology. Although Spinoza does not use them, they provide an accurate description of the Spinozist methodology. SYLVAIN ZAC, *SPINOZA ET L'INTERPRÉTATION DES ÉCRITURES* (1965).

what language."⁴³

Therefore, Spinoza thoroughly investigates the identities of the "true authors"⁴⁴ of the books that are included in the Old Testament.⁴⁵ Three chapters of the *Treatise* are dedicated to this enquiry,⁴⁶ which sometimes leads to surprising or scandalous results. Spinoza demonstrates that, contrary to the almost universally accepted opinion, Moses was not himself the author of the Pentateuch. The *Treatise* provides the reader with an impressive series of arguments, drawn from the text itself, proving that these books were written long after Moses' death,⁴⁷ by a single historian (probably Ezra, according to Spinoza's own opinion), "who wished to relate the antiquities of the Jews from their first beginning down to the first destruction of the city."⁴⁸ Spinoza also disputes the traditional opinion regarding the *Book of Job*, which the Talmud and Maimonides also attribute to Moses. He suspects that this book was written by a Gentile before being translated into Hebrew and canonized among the Prophetic Books.⁴⁹

In addition, the external critique must also investigate the fate of each book: "how it was first received, into whose hands it fell, how many different versions there were of it, by whose advice it was received into the Bible, and, lastly, how all the books now universally accepted as sacred, were united into a single whole."⁵⁰ This examination leads to the conclusion that the Biblical texts were compiled, modified and altered, either involuntarily or maliciously, in such a way that the "devouring tooth of time"⁵¹ profoundly corrupted the original text.

By the end of this examination, the Bible has become fully "historical" in a twofold sense. First, Spinoza's method transforms the Bible into an historical document. The Holy Books provide us with interesting information about their authors and indirectly about the events that these authors report, namely the lives and laws of the ancient Hebrews and the early Christians. Nevertheless, it says very little, if anything, that may be used for the present. For instance, when Christ says: "But if a man strikes you on the right cheek, turn to him the left

⁴³ SPINOZA, *supra* note 5, at 103.

⁴⁴ *Id.* at 120.

⁴⁵ Although the same examination should be made for the New Testament, Spinoza declines this undertaking for the reason that the task has already been performed by highly skilled scholars and that his own knowledge of the Greek language is not sufficient. *See id.* at 156.

⁴⁶ *Id.* at 120-56. Hobbes performs a similar task in *LEVIATHAN*. *See HOBBS*, *supra* note 7, at 415.

⁴⁷ SPINOZA, *supra* note 5, at 120.

⁴⁸ *Id.* at 129-30.

⁴⁹ *Id.* at 149-50.

⁵⁰ *Id.* at 103.

⁵¹ *See id.* at 108.

also,"⁵² he does not act as a lawgiver but as a teacher. Moreover, his precept applies only in times of oppression, but does not hold in a well-ordered State, where everyone is entitled to demand penalties before the judge in order to defend justice and his country's laws.⁵³ In other words, the Bible is no longer a living source of valuable knowledge, guaranteed by divine authority, but a "dead letter" to which reason, the greatest of gifts, should not be submitted.⁵⁴

Second, the Bible itself has now acquired a history of its own. Scripture is not anymore the eternal word of God, but a series of fragments, subject to profound alterations over time. According to the new method, the task of the interpreter is to go back in time, in order to restore, if possible, the authentic version of the text. In the meantime, the meaning of the word "authentic" has changed. "Authentic" no longer means "true" but "original," i.e., actually written by the author to whom it is attributed and never altered since. As a result, the admitted authenticity of a text is no longer a guarantee of its truth. An authentic text, in the modern sense, is not an unquestionable authority, but only a testimony that must be examined without prejudice. Moreover, the antiquity of the text is no longer regarded as evidence of its superior value. On the contrary, the reliability of testimony decreases over time.

Ultimately, the *Theologico-Political Treatise* brings a complete change to the theory of interpretation and more broadly to the logic of scientific knowledge as a whole. The substitution of the modern notion of "authorship" for the traditional concept of "authority" produces major consequences. It completely modifies the status of texts, which are no longer regarded as the necessary starting points and references for any valuable knowledge, but only as past documents, mainly of historical interest, which provide the contemporary reader with some insight about the Ancients' outdated way of thinking.⁵⁵ Moreover, Spinoza's method for interpreting the Bible would generate major changes in the concept and the structure of law. The impact of these changes on modern law could hardly be exaggerated.

VI. FROM THEOLOGY TO POLITICS

The effect of this new methodology of Biblical interpretation on legal matters was inevitable. As Hobbes wrote in the *Leviathan*: "the question of the Scripture, is the question of what is Law throughout all

⁵² 2 *Corinthians* 11:20.

⁵³ *See id.* at 105-06.

⁵⁴ *Id.* at 192.

⁵⁵ Gadamer and Strauss both called "historicism" this modern way of considering the past. *See* need to provide support here.

Christendome, both Naturall and Civill.”⁵⁶ Spinoza admits and even stresses the normative character of divine revelation. Nevertheless, his historical method of interpreting the sacred books reduces their importance as sources of positive law to almost negligible. To begin with, a large number of biblical commands are regarded as outdated and no longer valid. Next, the rejection of every contradictory or obscure statement drastically reduces the useful content of the Bible. According to Spinoza, the teaching of revelation as a whole can be summed up in one single normative statement: “to love God above all things, and one’s neighbour as one’s self.”⁵⁷ This is indeed simple and unambiguous, but neither too specific nor very useful to lawyers. Finally, contrary to the scholastic system, the new method of interpretation prevents theologians from creating new mandatory rules on the basis of the ancient text. Modern interpretation equates the true meaning of the text with the original intent of the writer. Consequently, it paralyzes the meaning at the time of the first publication and considers any addition to be illegitimate. As a result, the Bible is wholly paralyzed as an effective source of law.

This is, of course, a deliberate achievement. Spinoza, as well as Hobbes, wanted to get rid of religious laws and religious powers altogether. They both refused to separate sacred law from civil law and to place the former under the control of the Church.⁵⁸ Like Hobbes, Spinoza declares: “religion . . . receives the force of a command solely through the decrees of the holders of sovereign power.”⁵⁹ Consequently, “the holders of sovereign power are the depositaries and interpreters of religious no less than of civil ordinances, and . . . they alone have the right to decide what is just or unjust, pious or impious.”⁶⁰ According to Hobbes, the power of the civil sovereign in religious affairs is unlimited. He is the head of the Church in his own dominion.⁶¹ He may appoint pastors, who will officiate under his authority.⁶² He has the right to uphold or to forbid prophecies, to approve or to disavow prophets, and even the right to prophesy himself. Finally, he might go as far as to oblige his subjects to renounce God.⁶³ Spinoza has a different opinion. He believes that religious rules, even those held by civil hands, should confine themselves to the observance of external rites, but that religious beliefs should escape any regulation whatsoever. Hobbes considers religion a matter of public interest which

⁵⁶ HOBBS, *supra* note 7, at 415.

⁵⁷ SPINOZA, *supra* note 5, at 172.

⁵⁸ *Id.* at 251. According to the *Treatise*, such opinion is both frivolous and seditious. See *id.*

⁵⁹ *Id.* at 248.

⁶⁰ Preface to SPINOZA, *supra* note 5, at 10-11; see also HOBBS, *supra* note 7, at 426.

⁶¹ See HOBBS, *supra* note 7, at 575.

⁶² See *id.* at 567.

⁶³ See *id.* at 527-29.

must be ruled by civil law to secure public peace; Spinoza handles it, for the same reason, as a private matter, which should not be regulated at all. For him, "laws dealing with speculative problems are entirely useless."⁶⁴ They are even harmful since "many schisms have arisen in the Church from the attempt of the authorities to decide by law the intricacies of theological controversies."⁶⁵

According to Spinoza, the right to think and to feel freely is a natural right that no one can abdicate,⁶⁶ as no one can transfer to another, even to the supreme power, his power and his rights so as to cease to be a man.⁶⁷ Moreover, the sovereign power should protect, through the institutions of law, freedom of thought as well as the rights to free speech and to free teaching. "Such freedom is absolutely necessary for progress in science and the liberal arts."⁶⁸ It is also necessary "so that men could live together in harmony, however diverse, or even openly contradictory their opinions may be."⁶⁹ In a democracy, which Spinoza claims to be the natural form of government,⁷⁰ "not only may such liberty be granted without prejudice to the public peace, to loyalty, and to the rights of rulers, but . . . it is even necessary for their preservation."⁷¹

In the *Theologico-Political Treatise*, it is obvious that Spinoza's "theological" examination of the Bible leads to substantial political conclusions in favor of democracy and the protection of basic human rights, especially freedom of speech and of religious beliefs. These conclusions differ widely from Hobbes' political doctrine, despite the fact that the two philosophers agree on similar premises. Beyond this divergence and apart from Spinoza's speculative views about the ideal political regime, which he strongly emphasizes in the conclusion of the *Treatise*, as well as Hobbes' *Leviathan*, makes a major contribution to the shaping of modern law. What is modern law? How should it be applied and interpreted? What is the relationship between modern law and scientific reason? Spinoza's teachings on all of these issues are less apparent in the *Treatise* than his political ideals are. They have nonetheless turned out to be essential to the understanding of modern legal philosophy.

⁶⁴ *Id.* at 265.

⁶⁵ *Id.* at 262.

⁶⁶ See HOBBS, *supra* note 7, at 258.

⁶⁷ See *id.* at 214.

⁶⁸ *Id.* at 261.

⁶⁹ *Id.* at 263.

⁷⁰ See *id.* at 207; see also SPINOZA, *POLITICAL TREATISE* (Abraham Wolf trans., 1910) (1610).

⁷¹ SPINOZA, *supra* note 5, at 265.

VII. THE NEW PARADIGM: POSITIVE LAW V. NATURAL LAW

The new method of interpretation espoused in the *Treatise* applies not only to the Bible but to any legal text. Moreover, the separation between authority and reason imposed by Spinoza's method can be exported to the legal field. These represent both the very roots of modern law and the cause of much inconvenience.

God is the sovereign of the sovereigns and His will is the supreme command. Consequently, "God should be obeyed before all else, when we have a certain and undisputable revelation of His will."⁷² As Hobbes clearly puts it: "the question is not of obedience to God, but of *when* and *what* God hath said."⁷³ Now, Spinoza's careful examination of Scripture has proven that it is impossible to discover God's will, apart from the golden rule of loving God and one's neighbor. Scripture collects the generally outdated, sometimes corrupted and often contradictory statements of various human authors, who can be regarded neither as valuable witnesses of God's will nor as legislators for the present time. In a modern Commonwealth, the only legislator is the actual sovereign power. The sovereign power has the exclusive right to establish new statutes, as well as to endorse or to adapt old ones. There is no law except the rights and rules established by the sovereign's authority.⁷⁴

The "historical" method teaches us that the true meaning of a text is synonymous with the real intent of its author. Regarding law in particular, the true meaning of a statute is the sovereign's will. In other words, a statute is the external sign of the sovereign's will, and nothing else.⁷⁵ He who has the power to propound rules also has the authority to interpret them.⁷⁶ Indeed, no one can state the author's will better than the author himself. Such an interpretation is technically called "authentic" (in the modern sense) since it refers the meaning directly to the author of the text. The sovereign may also delegate to subordinate judges the power to apply and to interpret statutes.⁷⁷ When confronted with a hard case, these judges will suspend the decision and ask the sovereign for a more ample "authority."⁷⁸ In any case, legal interpretation can have no other legitimate purpose than to find out and enforce the will of the sovereign.⁷⁹

⁷² *Id.* at 211; see also HOBBS, *supra* note 7, at 415.

⁷³ HOBBS, *supra* note 7, at 415.

⁷⁴ SPINOZA, *supra* note 5, at 206, 207; see also HOBBS, *supra* note 7, at 313.

⁷⁵ See HOBBS, *supra* note 7, at 312.

⁷⁶ See *id.* at 321. Hobbes uses the French spelling "authentique." *Id.* at 321.

⁷⁷ *Id.* at 323.

⁷⁸ See *id.* at 326.

⁷⁹ See *id.* at 321-22.

As a result, legal interpretation, like biblical interpretation, should not confuse authority and reason. The interpreter will not try to accommodate the sovereign's commands to reason. Spinoza makes perfectly clear that these commands must be fulfilled however *absurd* they might appear to be.⁸⁰ As for Hobbes, his attacks against the scholastic method for interpreting statutes are similar to those addressed by Spinoza regarding Maimonides. Hobbes mainly targets the Common Lawyers and their champion at the time, Sir Edward Coke:

That Law can never be against Reason, our Lawyers are agreed . . . but the doubt is, of whose reason it is, that shall be received for Law. It is not meant of any private Reason; for then there would be as much contradictions in the Lawes, as there is in the Schooles; nor yet (as Sr. Ed. Coke makes it) an *Artificiall perfection of Reason, gotten by long study, observation, and experience*, (as his was.) For it is possible long study may increase, and confirm erroneous Sentences: and where men build on false grounds, the more they build, the greater is the ruine: and of those that study, and observe with equall time, and diligence, the reasons and resolutions are, and must remain discordant: and therefore it is not that *Juris prudential*, or wisdom of subordinate Judges; but the Reason of this our Artificiall Man the Common-wealth, and his Command, that maketh Law . . .⁸¹

The modern theory of interpretation fully discredits the traditional jurisprudence as a method of interpreting statutes and developing legal science. According to Hobbes, "it is not wisdom but authority that makes a law." There is no reason involved in the study of positive law, except the "reason of the strongest,"⁸² the King's reason, which means nothing other than his arbitrary will.⁸³

As a result, the divorce pronounced by Spinoza between reason and authority must be extended to legal matters. Modernity divides the legal field into two separate provinces. On the one hand, positive law means the commands of the sovereign, and one determines their true meaning by accurately interpreting the sovereign's will, under the sovereign authority and without any interference of speculative reason. On the other hand, natural law abstractly deduces the system of legal rules, *more geometrico*, on the sole basis of speculative reasoning, without any reference to actual statutes. In this new landscape, the words "natural law" do not primarily refer to the laws of nature. It is, rather, a convenient abbreviation for "the law discovered by means of

⁸⁰ See *id.* at 205.

⁸¹ See *id.* at 316-17.

⁸² "La raison du plus fort est toujours la meilleure" ("The strong are always best at proving they're right"). Jean de la Fontaine, *Le Loup et l'Agneau*, in *FABLES*, (M. Fumaroli ed., Imprimerie Nationale 2d ed. 1985).

⁸³ See the reference to the "King's reason" in THOMAS HOBBS, *DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* (Joseph Cropsey ed., Univ. of Chicago Press 1971) (1681).

natural reason alone.”

According to the new paradigm, modern legal science does not deal with specific texts and real cases. It becomes a branch of philosophy, which speculates about what the law should be rather than examines the established rules and the ways of their enforcement. On the other hand, jurisprudence (in its traditional meaning) is no longer a science, but mainly a technique that aims to enforce the positive rules according to the will of the authorities, without any critical perspective whatsoever.

VIII. THE FATE OF SPINOZA'S THEORY

At first, the dichotomy between authority and reason opened the way for new kinds of legal work directed at building the new science of law. Among them, the systems of natural and rational law published during the seventeenth and eighteenth centuries by legal scholars such as Grotius,⁸⁴ Pufendorf⁸⁵ and Vattel⁸⁶ are especially characteristic of the new paradigm. Later on, major treatises of legal philosophy, such as Kant's⁸⁷ and Fichte's,⁸⁸ similarly attempted to deduce the principles of any possible legal system from the concept of justice itself. However, from the early nineteenth century, the concept of natural law was generally disregarded and even ridiculed. Positive law progressively became the only master of the legal field.

At about the same time, Lessing and the Romantics rehabilitated and adapted Spinoza's theory of interpretation,⁸⁹ which had been heavily criticized,⁹⁰ rejected, silenced and finally forgotten for many decades. The “historical method” became the official doctrine of the new fashionable science, Philology.⁹¹ Schleiermacher codified its principles in his *Hermeneutics*.⁹² Ironically, theologians and lawyers adopted this method, which had first threatened to subvert their

⁸⁴ See HUGO GROTIUS, *DE JURE BELLI AC PACIS* (1625).

⁸⁵ See SAMUEL FREIHERR VON PUFENDORF, *DE JURE NATURAE ET GENTIUM* (1672).

⁸⁶ See EMER DE VATTEL, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE* (1775).

⁸⁷ IMMANUEL KANT, *DIE METAPHYSIK DER SITTEN* (1797).

⁸⁸ JOHANN GOTTLIEB FICHTE, *GRUNDLAGE DES NATURRECHTS NACH PRINZIPIEN DER WISSENSCHAFTSLEHRE* (Felix Meiner, ed., 1960) (1796).

⁸⁹ CASSIRER, *supra* note 6, at 200-01.

⁹⁰ Bayle, for instance, states that, “mieux vaut rejeter le témoignage de la critique et de la grammaire que celui de la raison,” and that, “tout sens littéral qui contient l'obligation de faire des crimes est faux.” PIERRE BAYLE, *COMMENTAIRE PHILOSOPHIQUE SUR CES PAROLES DE L'EVANGILE: CONTRAINSLES D'ENTRER*, quoted by CASSIRER, *supra* note 6.

⁹¹ Benoît Frydman, *Philologie et Exégèse: Un Cas d'Herméneutique Comparée*, 33 *REVUE INTERDISCIPLINAIRE D'ETUDES JURIDIQUES* 59, 59-83 (1994).

⁹² FRIEDRICH SCHLEIERMACHER, *HERMENEUTIK. NACH DEN HANDSCHRIFTEN NEU HERAUSGEGEBEN UND EINGELEITET VON HEINZ KIMMERLE* (C. Winter ed., 2d ed. 1974).

influence. Under the leadership of Savigny, the historical school of law took control over legal thinking. It later extended its influence all over Europe⁹³ and even to the United States of America.⁹⁴

The complete dissociation between authority and reason opened the doors for the proliferation of legal positivism. It made it almost impossible to criticize the accuracy and the fairness of the existing laws on a legitimate scientific basis, giving *carte blanche* to the established powers. Governments, civil services and even judges were entitled to decide, apply and interpret the rules according to their own discretion, free from any control except from their superiors within the courts and the State's bureaucracy. Ironically, the method designed by Spinoza to prevent the old authorities from intruding into the area of science was used to immunize the new authorities against the critical power of reason.

Nonetheless, the legitimacy of such conception has cast serious doubts. Since the horrors and the crimes of World War II, new generations of legal philosophers, Chaim Perelman⁹⁵ and Jürgen Habermas⁹⁶ among others, have tried to restore the critical power of reason within the scope of positive law. They have sought *something* that would allow the distinction between genuine rules and criminal enterprises, such as the statutes of Nuremberg; something that would prevent those statutes from being voted, implemented and interpreted just like another genuine legal rule. However, this quest was difficult because of the barrier erected between the province of critical reason and the province of effective authority. It took a long time and many controversies before scholars returned to an "interpretive paradigm" of law and committed themselves to a new theory of interpreting statutes that combines the authority of texts and precedents with the critical power of rational principles.⁹⁷

Until now, the natural law / positive law dichotomy has remained the *summa divisio* of legal philosophy. This division still restrains the progress of contemporary legal thought. In order to overcome this problem, I would suggest a careful rereading of the *Theologico-Political Treatise*. Such a reading would help to convey that the *modern* distinction between natural law and positive law, induced by Spinoza's

⁹³ See Frydman, *supra* note 91.

⁹⁴ Francis Lieber adapted the principle of the historical and philological method to the Common Law and the American political and legal culture. FRANCOIS LIEBER, LEGAL AND POLITICAL HERMENETICS OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS (William G. Hammond ed., 3d ed. 1880).

⁹⁵ See CHAIM PERELMAN, LOGIQUE JURIDIQUE (2d ed. 1979); CHAIM PERELMAN, ETHIQUE ET DROIT 21 (1990).

⁹⁶ For a comprehensive synthesis of Habermas' legal philosophy, see JURGEN HABERMAS, BETWEEN FACTS AND NORMS (William Rehg trans., 1996) (need date of original publication).

⁹⁷ See, e.g., RONALD DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

divorce of authority and reason, was never meant to be an ontological one. In other words, it does not create two different kinds of law. As I have shown in this paper, this distinction mainly served strategic and defensive purposes. It was set up as a brilliant way to counter the influence of the scholastics and to create a sanctuary for the sake of the new science's development. It was a methodological tool and somehow a trick, designed by a genius, in a highly specific context, to be used for a limited period in history. At least, this is the conclusion we would reach if we applied Spinoza's method of interpretation to his own work.

L'AUTORITÉ DES INTERPRÉTATIONS DE LA COUR (1)

PAR

BENOÎT FRYDMAN

CHARGÉ DE COURS À L'U.L.B.

1. — En 1982, l'effondrement du puits de mine Mavy IV dans la commune de Grâce-Hollogne causa des dégâts importants dans plusieurs immeubles voisins, dont les propriétaires et locataires poursuivent depuis lors réparation auprès du concessionnaire de la mine, les charbonnages du Bonnier. Le tribunal de Liège en première instance et la Cour en appel écartèrent leur action en tant qu'elle se fondait sur l'article 58 des lois coordonnées sur les mines, minières et carrières (2). Cette disposition, qui établit la responsabilité objective de l'exploitant, exonère toutefois celui-ci en cas de mutation de propriété (3). Or, il s'agissait en l'espèce d'un puits ancien, creusé au XVIII^e siècle, qui n'était plus exploité et déjà remblayé, lors de l'octroi de la concession au Bonnier en 1840. Les juridictions liégeoises accueillirent par contre les demandes sur la base de l'article 1386 du Code civil, aux termes duquel le propriétaire du bâtiment est tenu de réparer les dommages causés par sa ruine, lorsque celle-ci est la conséquence d'un

(1) Je remercie tout particulièrement Paul Martens pour les indications et les sources précieuses qu'il m'a communiquées en vue de la rédaction de cet article. Je remercie également les membres du groupe de travail, coordonné par Hakim Boularbah, au sein du Centre de droit privé de la Faculté de droit de l'U.L.B., pour les réflexions qu'ils ont permis d'échanger aux cours des différentes réunions de travail. Merci encore à Michel Leroy pour les données communiquées sur la pratique de l'interprétation conciliante au sein du Conseil d'Etat et à Isabelle Rorive pour les observations que lui a inspirées la lecture attentive de ce texte. Il va de soi qu'aucune de ces personnes n'assume la moindre responsabilité relativement aux prises de position et aux erreurs éventuelles contenues dans cet article, dont l'auteur est l'unique responsable.

(2) Le sommaire de l'arrêt de la Cour d'appel de Liège du 10 novembre 1992 a été publié au *J.L.M.B.*, 1992, p. 71, avec les observations approbatrices d'André DAL.

(3) Article 58 des lois des 21 avril 1810, 2 mai 1837 et 5 juin 1911, coordonnées par l'arrêté royal du 15 septembre 1919, abrogé en ce qui concerne les mines par l'article 70 du décret de la Région wallonne du 7 juillet 1988.