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## WHAT IS LAW? REFLECTIONS ON SURYA P. SINHA'S MONOGRAPH

The latest book written by Surya Prakash Sinha is the first book on the theory of law<sup>1</sup> which represents the new era, the new world order, understood not as a political slogan but as a new reality in human social evolution. In recent years dramatic developments have accelerated the long process of social unification. It has become more clear than ever that our contemporary culture and civilization are indivisible, that every continent and nation has contributed to the present globalism. It has also become obvious that despite previous independent paths of development, many diverse movements are converging and the new patterns of evolution of our culture are becoming more cosmopolitan and universalistic than ever.

S. Prakash Sinha is superbly fitted to fulfill one of the most difficult and important tasks in the juridical scholarship of our era: to show how close the various world philosophies of law are, how peoples on all continents and in times have been endeavoring to answer similar questions and why in different circumstances and environments the results are converging.

Professor S. P. Sinha was born in India, but was educated both in the Orient and in the West. He has lectured in Canada and in the United States and is familiar with contemporary Europe and Asia. Both cultures are his cultures, both histories are his histories. The famous maxim of the old humanist: *homo sum nihil humani a me alienum esse puto* (I am a man I think that nothing human is alien to me) is even better applicable to him than to the classic European sages of previous centuries.

Notwithstanding my reservations about many of Professor Sinha's theses, I am sure that with his study, a new chapter in the theory of law and of political and juridical doctrines has been opened. Globalism in the philosophy of law has become a

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<sup>1</sup> 1 SURYA PRAKASH SINHA, WHAT IS LAW? THE DIFFERING THEORIES OF JURISPRUDENCE (1989).

fact and its consequences will be manifold. Today no serious author writing about legal theory can afford wholly to neglect Sinha's example: the global approach with comparisons between juridical cultures and solutions has become a scholarly necessity.

I would like to explore further two questions which were posed by Professor Sinha but, I believe, not answered fully by him:

What is the nature of law and what is the nature and meaning of juridical positivism?

Should Marxism be totally rejected and dismissed?

### 1. *Juridical Positivism*

The fundamental question of the author of *What is Law* has indeed been answered by him, although he underestimates his own success and therefore he concludes:

The enterprise of defining law, undertaken by the various theories about law, has attempted to make a universal statement about law in the manner of defining a physical phenomenon of nature. It has not been possible to define law satisfactorily in this manner. . .<sup>2</sup>

Professor Prakash Sinha rejects juridical positivism and presents against it many valid and correct arguments, yet he fails to deliver a coup de grace to this theory. On the contrary, whenever he criticizes other theories he does it from the positivist viewpoint.

Indeed, Professor Sinha has very ably answered the question posed by the title of his book. I feel impelled to defend Professor Sinha against unjustified criticism by Sinha. His "self-criticism" goes too far.

The main source of Sinha's objections against juridical positivism in my opinion derives from his narrow interpretation of this theory. One should not rely on certain definitions originated by Thrasymachos and ratified by Thomas Hobbes, Jeremy Bentham, John Stuart Mill, and finally, by the "pure theory" (Reine Rechtslehre) of Hans Kelsen. One should rather regard *juridical positivism* at the end of our century as a huge philosophical tent under which various positivistic, realistic, and even materialistic concepts of law can meet, influence, each other, and elaborate new social and political concepts and norms (including perma-

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<sup>2</sup> *Id.* at 220.

nently developing ideas and norms of human rights). Whatever are the historical differences in legal experience in the West or East, North or South, whatever are the philosophical interpretations and answers (beginning with the most primitive) to "what is law," a couple of unshakeable determinations remain:

Certain norms of behavior exist in every political society and they are enforced by the "public force" or "political authority"; whatever their names are they constitute juridical norms and their totality is "law" or "system of law";

Those norms are either sanctioned or instituted by various forms of political authority;

Every social and political order requires the existence of certain juridical norms, whose observation is enforced by governments.

The more developed the society is, the more diversified the functions of its government are and the greater are the requirements of social policy. Sophisticated systems of law must be developed on national and international scales. The convergence between Western and Eastern, capitalist and communist ideas and attitudes toward law, so well presented by Professor Sinha, testify to the existence of a generally accepted (apart from ideological, philosophical, and religious anathemas) concept of law as rules or norms sanctioned and/or established by governments; they are coercively enforced by the authorities, albeit never consistently, because of contradictory political and economic interests and because of inevitable bureaucratic inefficiency.

Professor Sinha insists that such a definition or understanding of law is not sufficient, it is too vague and sterile. Do we have any basic, general social ideas better defined? Are they more concrete? In comparison with definitions of justice, equity, equality, social responsibility, morality, and love of neighbor the positivistic concept of law is wonderfully elaborated, meaningful, precise and concrete. And the rest is not silence, but the "eternal green tree of life" (Faust).

The advantages of juridical positivism are well understood and used by Professor Sinha wherever he criticizes other thinkers. Let me give three examples:

1. Professor Sinha rightly attacks Maine's claim to the cultural superiority of European societies over the rest of humanity because of the role played by law in the social organization of European societies.

The primitive societies do in fact possess a phenomenon which can be called law, if by law is meant the function per-

formed by it and the attitude of people toward it. It can be said, as it is by many anthropologists, that law is found in such features, evident in primitive societies, as rules of behavior regulating relations of individuals and groups, reciprocity of services characterized by their obligatory character, obedience, machinery for dispute resolution, such as reconciliation, compensation, sanctioned vengeance on the part of the person wronged, and so on.<sup>3</sup>

In his attempts to show that Maine is wrong, Professor Sinha employs the correct positivistic approach which Maine either deliberately misinterpreted or never understood.

2. In the evaluation of the Free Law School (Freie Rechtslehre) Professor Sinha writes:

The free law argument gives too much power to the judges with practically no restraints. Thereby, it paves an easy path to judicial despotism. To say, as Ehrlich does, that judicial decision is not arbitrary because it is characterized by the principles of judicial tradition that heeds the past legal records, statutes, judicial decisions, and legal literature, is to ignore the fact that all of these have to be interpreted and applied as the judge sees fit.

To shift the concern altogether from the substance of law to the proper selection of judges unduly minimizes the role that law plays in expressing the collective and dominant values of the society.<sup>4</sup>

Once more Professor Sinha asserts that without reasonable, humanistic, decent, democratic legal provisions neither certainty, the rule of law, legality, freedom, nor democracy can exist. This is one of the fundamental tenets of juridical positivism which Professor Sinha correctly uses against Free Law theories.

3. About the American "school of realism" Professor Sinha writes:

The American realists identify the field of law as exclusively judicial. In doing so they expunge rules and principles. This, however, is an exaggeration of the unimportance of rules and principles. As pointed out below, they do have a role to play.<sup>5</sup>

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<sup>3</sup> *Id.* at 153.

<sup>4</sup> *Id.* at 170.

<sup>5</sup> *Id.* at 184.

By reducing law to the fact of judicial behavior, American realism has eliminated any distinction between facts and law. However, such a distinction does exist both in the legal profession and in the ordinary usage of language. The distinction needs to be clarified, not eliminated.<sup>6</sup>

And here Professor Sinha is also right. Any endeavors to diminish or eliminate legal "rules and principles" or to mix up "facts and law" must lead to bad social and political results. Using a truly realistic positivistic approach, Professor Sinha has convincingly attacked "American realism."

The conclusions which one could draw from the review of these cases are these:

Whenever Professor Sinha criticizes juridical positivism his criticism is incomplete and he disesteems the role and value of his own philosophy. Whenever he criticizes other theories of law he shows how acute and penetrating his mind is. Using positivistic arguments, he convincingly attacks all other doctrines. He really does a very good job and sometimes he sounds more positivistic than the positivists themselves.

Professor Sinha tries to explore one of the crucial jurisprudential questions: to what extent can law be a center or an axis if not a creative force or the glue holding civilized societies together? How did various people, nations, and cultures in the past and present assess the specific importance of law? His analyses and comparisons between Chinese, Indian, African and European legal experiences in this respect are impressive and stimulating. I am not so sure that the institution of law was so central at any period in Western societies or that such a role was ever attributed to law in any influential theories of law. It seems that in the last two centuries there were periods when *Der Kampf ums Recht*—the struggle for Law—was an especially hot issue, usually after every defeat of despotism and its lawlessness. After Stalin's death and Beria's execution even the Soviet communists proclaimed the rule of law and the return to true socialist legality (whatever that meant).

Many social movements and political parties regarded law as a medicine sure to cure all past or existing ills in periods of

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<sup>6</sup> *Id.* at 185.

crisis, despair, and downfall. But their exaggerated expectations diminished in a relatively short time.

The liberal bourgeois concept of the "Rechtstaat," or the typical American versions incorporated in the ideal of The Rule of Law as against the rule of governments or individuals over people, is as ludicrous and as utopian as the famous prophecy of Engels that in the future communist society management and control over things instead of rule over human beings will prevail.

The liberal communists revived this ideal in their struggle against real or bureaucratic communism, yet they too were disappointed. They found how right their mentor, Karl Marx, was when he argued that law can not grow above the economic and political system and that ultimately law is an instrument in the hands of the ruling class.

In this way we have approached the question of the Marxian theory of law.

## 2. *Is the Marxist theory of law entirely wrong and obsolete?*

In Sinha's discussion of the Marxist theory two elements are missing:

(a) He fails to present and analyze the Marxian (not Marxist!) concept of law as the will of the ruling class.

(b) Official Soviet and the neo-liberal or revisionist version of the philosophy of law.

One should always remember that even during his lifetime Marx categorically stated: "One thing is sure, I am not a marxist." In a similar spirit many contemporary theologians argue: "About Jesus, one thing is sure: He was not a Christian."

Marx and Engels regarded law not merely as product of the "basis," the economic relations, or the type of property, prevailing in a given society. They also connected the content of law with many forms of the "superstructure," including forms of state, political institutions, level of popular social consciousness, prevailing ideology, religion, customs, historical experience, kinds of professional occupations, urbanization, and finally the will of the ruling class. In the *Communist Manifesto* Marx and Engels wrote the famous words: your law is only the "will of your class" dignified with the word "law"! This journalistic sentence was elevated by the Soviet ideologues to be the keystone

of the Marxist theory of law.

It is not the intention of the reviewer to analyze what Marx and Engels really meant by the expression "the will of your class." It is obvious that they were under the influence of Jean Jacques Rousseau's terminology, of the "will of all," and the "general will." It is clear, however, that they sought to define the social *essence* of existing legal systems. According to them every *corpus juris* is just one of the tools for securing the privileges of the stronger (expression of Plato-Thrasymachos), of the master, but not of the employee (Adam Smith). The Hegelian *essence* was never identified by Marx with the wholeness or sum total of the given concept or institution. Essence should be interpreted as containing or portraying the most important, basic and indispensable features of a particular phenomenon.

One can state without any exaggeration or simplification that every system of law, taken in its totality, apart from particular provisions and even wholly accidental legal acts, is a necessary means for preserving the existing economic structure and social relations. In this sense law is a powerful conservative force, although sometimes it can help to reform a social and political system in order to make that system more modern, flexible, and progressive. The main political aspect of every system of law remains unchangeable: the preservation and enforcement of the existing social and economic status quo.

From the broadest social and political viewpoint that fact does not mean that a legal system or part of it cannot be a progressive force in the life of a nation. Unfortunately, communist Marxists all over the world, under the direct influence and pressure of Stalinism, did not understand the complicated dialectics of social evolution: What is conservative can be a source of progress, what is reformist can be used to strangle new forms of life, what is irrational can promote a rational awakening, what is rational can be used by dogmatists.

The general ignorance of the dialectics of contradictions was one of the powerful sources of misunderstanding and misevaluation by both Marxists and anti-Marxists of the nature and real functions of capitalist and socialist law. Both systems have been conservative and both have also been undermining in an insidious and treacherous way their own basis and existence.

We see how the transformation of one sentence from the

*Communist Manifesto* into a lifeless dogma became one of the ideological gravestones of communism. On the other hand, a reasonable interpretation of the Marxian observation concerning law combined with the empirical observations can be fruitful and become one more instrument in the understanding of our complicated society, full of contradictions and prejudices.

The liberals and revisionists in the communist countries started their attacks against the official theory of socialist state and law from two points:

The fact that a law may essentially be progressive does not by itself mean that every legal provision and institution must be humanistic, reasonable, and progressive;

Every individual, constitutional, and social right, including human rights, must be secured by various legal, social and institutional guarantees in order to be really observed and realized.

It seems that these concepts can still serve in the contemporary post-communist world.

#### CONCLUSION

The book of Surya Prakash Sinha is a great contribution to political and legal philosophy. It is a convincing presentation of anti-racism in scholarly practice. His global approach is a meaningful rejection of all types of nationalistic exclusiveness and megalomania. Without mentioning nazi and bolshevik, white and black nationalism, it is a textbook on how to avoid the poison ivy of racism.

Sinha's book has elevated the eternal discussion: what is law?

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† The latest books of M. Maneli: JURIDICAL POSITIVISM AND HUMAN RIGHTS (1981), FREEDOM AND TOLERANCE (1984), PERELMAN'S NEW RHETORIC - PHILOSOPHY FOR THIS NEXT CENTURY. (in print)