CORRESPONDENCE

Integrative Jurisprudence

To

The Editor

I have the following comments to make regarding Mr. K. Gupteswar's review of my article "A Case for Synthetic Jurisprudence in India" in *Essays in Law* edited by T. K. Tope (Book Review in April-June 1961 number of this Journal).

Regarding my definition of "crime", the reviewer says that it is unnecessary to say that a criminal act may be "sinful or sinless". I should say that in any comprehensive definition of a term, it is necessary to bring out all the connotations and denotations of that term. There is indeed a distinction between law and morality (though an intimate relation also), and indeed likewise there is a clear distinction between "crime" and "sin". All that is sinful is not necessarily criminal; nor is every crime a sin. An act may be perfectly sinless and still the law may have regarded it as a crime. And there are many sins and vices which go unpunished and are not regarded as crimes. It may be sinful; for example, to be ungrateful or to denounce or try to cut others out of sheer jealousy; but such acts are not criminal or punishable.

Secondly, the reviewer says that I should not have said that a "crime" is an *aggrievement of the State* (a view, according to him, of the recent trends in criminology). But the reviewer should understand that the recent trends in criminology or penology do not at all affect the fundamental idea and the undoubted fact that every infringement of the criminal law is an aggrievement of the State, in so far as the State is charged with the duty of maintaining law and order. In a tort, or a breach of contract, the aggrieved party is an individual, but in the case of a crime, the aggrieved party is the State rather than the individual victim of the crime. That is a fact of current and paramount importance, and that fact has in no way been shaken or modified by the changes in the trends of punishment and in the modern tendency of criminologists to turn from crime to the understanding of the criminal and in reforming him. That is absolutely a different matter. What I have said has been totally misunderstood by the reviewer.

Thirdly, the reviewer finds fault with my definition of "negligence". In the synthetic approach, I have defined "negligence" as a faulty *behaviour* arising out of the *lethargy of the mind* or out of *faulty thinking*. Salmond has attributed solely the mental element to negligence.

Pollock has attributed to negligence the external element of behaviour alone. Neither by itself is true; hence I have synthesised both the essentials and brought in my synthetic theory of negligence which I have termed as 'The mind-behaviour theory of negligence' also. I am surprised how one can attempt to throw out completely the mental factor or the subjective constituent of "negligence". Are we concerned here with the law of torts, or are we concerned with "negligence" as a jurisprudential concept, in the true light of its *essential ingredients*? There can be no act or default, unless there is the subjective or the mental element. The thought process, howsoever slight, comes first, and then alone can activity or passivity follow. The behaviouristic state is the product of the mental state. Behaviour is right if the mind works right. Negligence is the faulty working of the mind or the lethargy which results in the objective act of the failure to take the requisite care under the circumstances.

M. J. Sethna.

To

The Editor:

The reviewer is grateful to the editor of the Journal of the Indian Law Institute for affording him an opportunity to reply to the comments by Professor Sethna on his review of the Book *Essays in Law.*

It would be appropriate to begin with an acknowledgment of the difficulties that are sure to beset the path of a writer of the new integrative school of jurisprudence before examining the criticisms that may be offered on particular definitions. The leading exponent of this school, Prof. Jerome Hall himself acknowledges as follows:

> "In the present state of legal philosophy, the temptation to extol the significance of an integrative jurisprudence is considerable. But it is more important to terminate this essay by calling attention to the principal difficulty involved in the construction of an integrative jurisprudence. The moot question is whether any legal philosophy even though perseveringly directed toward integration, *i.e.*, presentation of the fused, interconnectedness of functioning, socio-legal complexes, can achieve more than a pluralism. At present, one can only contend that the possibility of creating a legal philosophy that is a true integration is certainly not theoretically excluded. In order to avoid confusing this objective with certain trends in contemporary thought, it must be emphasised that Integrative Jurisprudence disavows the ambitious

claims of "holism". Comprehension of the "totality" of anything can only be an ideal; no matter how detailed is the knowledge of even the simplest object, there is always something to experience regarding it.....There seems to be insurmountable barrier between insight and explanation, so that the full-blown vision of the imagination evades not only dissection by the intellect but, also, capture in a prosaic medium. What Integrative Jurisprudence seeks, therefore, is not the illusion of experiencing the whole world in legally significant categories but, rather the construction of a set of basic ideas which will provide a relatively adequate legal philosophy. If the choice is between a pellucid particularism that avoids the juridical actualities, and a much more adequate legal philosophy, which to some may seem marred by a degree of mysticism, it should hardly be necessary to recall that traditional conceptualism remains so firmly enthroned in jurisprudence that any doubt may well be resolved in favour of more venturesome endeavour." [1]

Again Prof. Hall states in a clear and analytical manner the essential characteristics of the integrative jurisprudence:

"Integrative jurisprudence has its immediate orientation in a persistent effort to correct the most serious fallacy in modern jurisprudence: the sophisticated separation of value, fact and idea (form). This fallacy is manifested in the particularism of prevailing legal philosophies, *i.e.*, in their restriction to, or concentration on, one of the above spheres of significance, with consequent exaggeration and error. The premise of this criticism is that the soundest measure of any legal philosophy is its 'adequacy'. 'Adequacy' requires of a legal philosophy: (1) ultimacy—that it be constructed on simple, irreducible ideas that are intellectually defensible; (2) comprehensiveness—that, so far as possible, it takes account of all significant aspects of legal problems (a corollary is that it be "necessary" in the sense of omitting the unimportant); and (3) consistency—that doctrines defended and results obtained in dealing with some problems be not contradicted by those maintained elsewhere—not only in a strictly formal sense, but also as regards the general coherence of jurisprudence." [2]

Professor Sethna says, "I am really surprised how a reviewer can attempt to throw out completely the mental factor or the subjective

1. Jerome Hall, *Studies in Jurisprudence and Criminal Theory*, Oceana Pub. Inc., New York, 1958, pp. 46-47
2. *Ibid.* p. 25.

constituent of 'negligence'." It is not true. The reviewer had nowhere suggested that the subjective element be excluded *completely*. While it is true that the author is concerned, in his essay, with negligence as a jurisprudential concept, and not with the law of torts, it would be highly surprising if the author could say that his definition need not stand the test of the law of torts *too*; be it noted that the author is herein dealing with 'jurisprudence' which, while transcending the limits of a tort law yet comprehends it within its fold, and be it also noted that the author is attempting to provide a comprehensive definition as an exponent of the school of integrative jurisprudence, not the jurisprudence of any particular school. The reviewer has not overlooked the author's statement: "Professor Jerome Hall is a staunch advocate of *integrative* jurisprudence, and what he has been doing in the United States of America, I am advocating and essaying in India today. We may not be in harmony in all matters, but so far as our methods are concerned, there is not much of a gulf to be bridged over." [3]

Let us take, for instance, the way in which the jurisprudential concept of negligence is dealt with in a standard treatise on jurisprudence. Glanville Williams, editor of *Salmond on Jurisprudence*, [4] deals with negligence in sections 142 to 146. Section 146 deals with the subjective theory of negligence (a view held by Salmond) and the objective theory of negligence (of which Pollock was a staunch exponent). In "Reconciliation of the two theories," Glanville Williams says: "The solution of the controversy here suggested is that the term negligence has two meanings, and that each theory represents one of these meanings. 'Negligence' is used to point one or other of two contrasts and its meaning depends upon the particular contrast that is being made." At page 430 he says: "To take care, therefore, is no more a mental attitude or state of mind than to take cold is. This view obtains powerful support from the law of tort, where it is clearly settled that negligence means a failure to achieve the objective standard of the reasonable man. If the defendant has failed to achieve this standard it is no defence for him to show that he was anxious to avoid doing harm and took the utmost care of which *he* was capable. The same seems to hold good in criminal law." Since Professor Sethna seems to concede that the modern tort of negligence has nothing to do with negligence as a mental state, it may not be necessary to make any detailed reference to the modern

3. *Essays in Law*, edited by Principal Tope, p. 34.
4. Eleventh ed., 1957.

tort of negligence. According to *Salmond*,[5] "That anxious consideration of consequences which is called care does not preclude negligence. The mental theory of negligence would leave society unprotected against deficiencies in foresight, will-control, moral qualities and intelligence," not to speak of "statutory negligence". The other important branch of liability in negligence is in the criminal law. Professor Jerome Hall recognises the part played by objective negligence even in criminal law.[6]

The reviewer fairly recognised the existence of negligence as a mental state when he stated that "Negligence as a mental state has become insignificant and the modern tort of negligence has nothing to do whatever with it." Is not the definition of negligence as "a *faulty behaviour* arising out of a *lethargy of the mind* or out of faulty thinking" a compromise fraught with mischief and would it not confuse a clear understanding of the law of negligence? An attempt at fusion of the view-points of the different schools of jurisprudence (or theories of negligence) should not lead to a confusion.

Professor Sethna proceeds to state, concerning negligence, that "there can be no act or default, unless there is the subjective or the mental element. The thought process, however slight, comes first, and then alone can activity or passivity follow. The behaviouristic state is the product of the mental state." This is true and is not inconsistent with the objective theory of negligence. This, however, does not *always* lead to the inevitable conclusion that "Negligence is the faulty working of the mind or the lethargy which results in the objective act of the failure to take the requisite care under the circumstances." As Professor H. L. A. Hart points out, "Crudely put, 'negligence' is not the name of 'a state of mind' while 'inadvertence' is."[7]

Now, turning to the definition of "crime", offered by Professor Sethna, it may be remarked that the idea of sin suggests the notion of moral wrong-doing and thereby raises the wider issue of law and morality. It is for this reason that it seems to be not of any particular significance in any definition of crime at the present day; it does not follow that the question of morality does not merit a detailed discussion in a treatise on jurisprudence. It does not find a place in familiar *definitions* of crime in treatises on criminal law. As for the other part of the definition, Professor Sethna appears to have "totally misunderstood" the reviewer's objection, while, curiously enough, Professor

5. Salmond on Torts, Eleventh ed., 1953, p. 493.
6. *Op. cit.* pp. 255–56.
7. Hart, "Negligence, Mens Rea And Criminal Responsibility" *Oxford Essays in Jurisprudence* (1961) 29, 41.

Sethna would like to say the same of the reviewer. The reviewer had no mind to deny the special interest of the State in dealing with crime nor its legal power to remit sentences or grant pardons. The reviewer's objection was to the employment of the word "aggrieved". Professor Sethna clearly seems to draw a perfect parallel between the aggrievement of the private individual in tort or breach of contract and the aggrievement of the State in crime. Kenny, discussing the characteristics of a crime, says:

> "Were only a rough description to be attempted, this public mischief ought undoubtedly to be made the salient feature. But can we accept it as sufficient foundation for the precise accuracy necessary in a formal definition? Such a definition must give us 'the whole thing and the sole thing'; telling us something that shall be true of every crime, and yet not true of any conceivable non-criminal breach of law. Clearly then we cannot define crimes by mere help of the vague fact that 'they usually injure the community'." [8]

Professor Hall concedes: "so great a scholar as Austin contended that there were no substantial differences between the two (tort and crime), perhaps least of all on the basis of the degree or importance of the public injury or interest. Nor is it easy to demonstrate that punishment characterizes the one, compensation the other. Punitive damages and penal actions are only the most salient of the difficulties in the way of this thesis. [9] In a recent discussion of the definition of crime Dr. Glanville Williams arrived at the definition that "As crime..... [is] an act that is capable of being followed by criminal proceedings, having one of the types of outcome (punishment etc.) known to follow these proceedings." [10]

If it was sought to be suggested by Prof. Sethna that the State would take measures to deal with or treat the criminal, there can be no objection. The true function of the integrative approach in formulating a definition of crime is thus stated by Professor Hall.[11]

> ". . . it is apparent that even when limited to law, 'crime' has such varied denotation as to suggest that the wisest course may turn out to be elimination of the word entirely from scientific discourse, and substitution of more precise terms. In any event, if we think that beyond emotive, prerogative, and loose

8. Kenny, *Outlines of Criminal Law*, 15th ed., 1954, p. 6.
9. *Op. cit.*, p. 201.
10. See his article "The Definition of Crime", *Current Legal Problems*, 1955, p. 107 at 123.
11. *Op cit.*, p. 201.

uses of the word there are facts and norms denoted by the term 'crime' which can be clearly described and understood, and that, proceeding thus, we can discover better answers to the relevant distressing social problems than any now known, our first bit of sophistication is to be on guard against the insidious ambiguity of the current language of both lawyers and laymen."

It all depends on what a definition *is*. Glanville Williams would say, "We already have the word 'description' to signify description and it seems an abuse of words to rob 'definition' its precision by extending it to this other meaning . . . a definition is not true or false except in so far as it is a statement of how a word is used." [12]

Professor Kenny thought that a definition "must give us 'the whole thing and the sole thing'."

The State no doubt resents that a crime has been committed by a member of the State and may proceed to take measures in relation to him, increasingly of a reformative character; but certainly we cannot regard the State as aggrieved—at any rate, that is not how the modern State looks upon the author of the crime.

In fine, it may be stated that in offering criticism on the thought expressed by Professor Sethna, the reviewer has not underestimated the difficult nature of the task undertaken by him nor has failed to appreciate the importance of the rising school of thought known as "integrative jurisprudence." The criticism has been undertaken by way of appreciation and helpful suggestion so as to stimulate further thinking on the subject.

K. Gupteswar.

12. Glanville Williams, "The Definition of Crime", *Current Legal Problems*, p. 109.