THE PRINCIPLES OF THE LAW OF CRIMES IN BRITISH INDIA (Tagore Law Lectures) (1902) (reprint 1982 with a supplementary chapter by O.P. Srivastava). By Syed Shamshul Huda. Eastern Book Company, 34, Lalbagh, Lucknow-226 001. Pp. xxxv+455. Price Rs. 75.

SHAMSHUL HUDA'S Tagore Law Lectures are the first schematic presentation of the principles of criminal law almost half a century after the Indian Penal Code 1860 came into operation. The decisions of the High Courts interpreting the code available in the law reports were analyzed and presented by him in the form of a consistent theory. It can be said that these lectures represent the first attempt at *elegantia juris* in the criminal law of India. The judges manning the High Courts during the period were largely Englishmen, having both their education and training in England. To them the decisions of English courts and the development of English common law of crimes were familiar, but research into the suitability or otherwise of the principles of criminal law for Indian society and in Indian conditions was not easy. For this rather original task the provisions of the Penal Code had to be understood and comprehended in the context of the prevailing mores, beliefs and habits of the people of India, who constituted a society adhering to their respective personal laws rooted in religion. It was also a period which Benthamite proposals for reform of English law were being put into operation in England with their emphasis on individualism and utilitarianism. These trends were not only unknown to the Indian society but called for a pattern of social behaviour in many ways contrary to the prevailing modes of behaviour and values. The interpretation of the principles of criminal law in India during this period, was therefore, largely an exercise in mechanistic interpretation—logical and analytical to the core. Shamshul Huda's lectures fully represent these trends. An appraisal of the lectures has to take note of the conditions and approaches referred to above.

The chapter scheme of the lectures is modelled on the scheme generally adopted in English text books on criminal law of the contemporary period. After the introductory chapter dealing with essentials of crime, the second chapter is devoted to the problem of capacity to commit crimes concerned largely with human will and also to the liability of corporations. Chapters III and IV deal with the problem of inchoate crimes, chapters V and VI with the doctrine of mens rea in England and in India, and chapters VII, VIII and IX with the conditions of non-imputability generally classified in the Penal Code as exemptions from criminal liability. In chapter X the notions of consent, compulsion and trivial acts have been examined. Chapter XI discusses the topic of possession in criminal law, particularly with regard to offences against property. Chapter XII deals with the right

of private defence and chapter XIII, the final chapter, describes the principles on which the criminal trial is based, noting the impact of relevant rules of evidence and criminal procedure. The whole of this analytical study is presented in 455 pages.

In the work under review the author has presented the principles and illustrated them by judicial decisions. There is a large degree of reliance placed on the decisions of the English courts, and naturally so. A special quality of the work is the clarity of perception of the principle and its elucidation with highly apt illustrations. It is clear that only a master of the subject, both in its theory and practice of the times, could have presented the material in such a form. The era in which Shamshul Huda wrote was not an era of social evaluation of legal principles; sociology had yet to come up as a discipline of serious concern to scholars and its relevance to law was still a later concern. During his times the principles on which the criminal law was based were considered to be universally applicable and the impact of social interaction of criminal justice administration had yet to emerge as an exercise in criminology. The book is therefore devoid of any socio-legal approach.

A reprint of such a book in 1982 imposed certain conditions on the publisher. The lectures could have been reprinted as such in order to make them available to advanced students of law in universities. But if the attempt was to present the lectures and trace the impact of changes that had since occurred in criminal law in India, the task would have been different and much more strenuous. In that case such an effort could have been made on the following lines. The chapter scheme of Shamshul Huda should have been maintained and in each chapter the new material should have been put in the form of italicized footnotes. Another way of doing this could have been to place at the end of each chapter an appendix containing an evaluative account of later developments in the area and pointing out their impact on the views presented by the author in the original text. An introductory chapter would still have been needed discussing the changes in the theories or bases of criminal liability over practically a century. The relevance of changes in criminal theory to the present day practice of utilization of penal sanctions for regulatory and public welfare offences would have called for special mention. Only such an exercise would have done justice to the classic which had been sought to be reprinted.

The publisher has, however, been satisfied by publishing a reprint alongwith a supplementary chapter by O.P. Srivastava. The supplementary chapter runs into 35 pages seeking to present the entire gamut of complex changes over almost a century. The opening para of this chapter is indicative of the lack of concern which his task demanded. According to Srivastava, "[s]ince then numerous changes have taken place which are indicated in this supplementary chapter." But even this coverage should have been fuller and comprehensive, which it is not. The changes have

also not been noted in their completeness. The supplementary chapter at best represents a digest-like summary of some decided cases relevant to the theme without pointing out how Shamshul Huda's views are either substantiated or altered by these decisions. While dealing with mens rea, *Nathulal* v. *State of Madhya Pradesh*[1] has been brushed aside in a single sentence at page VII. No critique of the case has been undertaken. An expert in criminal law should have noted in greater detail the impact of the Supreme Court decision in this case and commented that the court ought to have treated this case as a case of mistake, rather than a case involving the doctrine of mens rea. It is common knowledge that extended interpretations of mens rea in cases which cover "mistake" leads to confusion rather than to clarity. It is not for the reviewer to point out here how the House of Lords in England is grappling with this problem.

It is not necessary to go into the details of the lapses of the supplementary chapter in view of the points made earlier as to how the classic should have been reprinted. Illustratively however, some lapses may be mentioned. In his discussion of criminal liability of corporations, Srivastava has not mentioned recent cases on the topic, nor has he pointed out recent efforts to make the directions specifically liable in certain cases. Discussion relating to mens rea in the supplement is too meagre, as also the discussion on strict liability and non-moral objective liability. Recent attempts to consider mens rea only at the stage of sentencing and not at the stage of conviction have been totally omitted. These new indications should have been discussed in the supplement in order to enable serious students of law to comprehend the true significance of the principle of mens rea as now applied. In the discussion on attempt, the topic of impossible attempts has not been explained and no mention has been made of *Reg.* v. *Smith*[2] and *Partington* v. *Williams*.[3] These cases have reversed the "empty pocket" illustration under section 511 of the Penal Code. According to these decisions, a person can be guilty of attempting the impossible if the impossibility resides only in the means he has chosen. The old rationale that if the accused had the required mens rea, the remaining question concerning his conduct in relation to preparation-attempt distinction with the premise that the external situation was what the accused believed it to be, was not accepted. *Partington* decided that a person would not be guilty of attempting to steal if he opened the empty wallet of another. Similarly, in the discussion on mistake of fact, no mention has been made of the famous case *Regina* v. *Morgan*[4] regarding the reasonableness of belief in a decision which has a great theoretical importance because of its possible application to other offences (other than rape) requiring mens rea.

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1. A.I.R. 1966 S. C. 43.
2. [1975] A.C. 476.
3. 62 Cr. App. R. 220 (1976).
4. [1976] A.C. 182.

A discussion of penal theory is needed to bring out the real significance of the theory presented by Shamshul Huda's classic and the degree of its applicability or otherwise in the context of present day criminal law administration where the exigencies of imposing penal liability, in a vast set of areas of wrongful conduct, appear to have displaced the traditional theory almost completely.

A theory of criminal law is constructed out of a set of ideas by reference to which every penal law can be significantly placed and thus explained. The most important functions of a theory of criminal law are to elucidate certain basic ideas and to organize the criminal law, thereby greatly increasing the significance of criminal law and its application. A theory of criminal law, therefore, should be tested by the significance of its explanation of existing penal laws. Thus any exercise in elucidating the theory embraces a single minded goal of explaining the existing penal laws—asking only, which theory will maximize our understanding of the penal laws.

The current theory of our traditional criminal law (Indian Penal Code) is based on seven fundamental notions, *viz.*, the principle of legality, mens rea, conduct, concurrence of mens rea and conduct, harm, causation and punishment. The refinements of these ideas or notions have produced well known doctrines of criminal law. The principle of legality has given rise to such doctrines as non-retroactivity of penal law, no punishment without law, procedural guarantees and strict construction of penal statutes. The principle of mens rea concretized the doctrines relating to mistake, accident, infancy, insanity, intoxication, necessity, compulsion, consent, benevolence and self-defence, etc. The notion of criminal conduct has given shape to the doctrines relating to attempt, solicitation, conspiracy and joint liability, etc. The notion of harm or a "proscribed disvalue" is significant in a theoretical discussion of the principle of mens rea. The principle of causation highlights the doctrines relating to intervening causes or events and harms resulting directly from the criminal conduct. These doctrines of criminal law derived from the seven fundamental ideas actually control the application of criminal law and guide its administration and enforcement. What are generally known as principles of criminal law thus comprise these seven fundamental notions and the doctrines of criminal law derived from them. Shamshul Huda's lectures on the principles of criminal law stand as a lamp-post from which many students and scholars have drawn inspiration since the beginning of this century. A reprint of such a classic embodying a supplementary chapter should have presented the text of the classic in the context of these principles and doctrines and mapped out the various phases they have passed through, at least in India if not elsewhere in the common law world, over the vast expanse of a century.

During the last three decades the body of criminal law has undergone a sea change and now there are many penal statutes which cannot be satisfactorily explained by our traditional penal law theory based on the seven fundamental notions. The question faced by a scholar is whether

the liability imposed by these statutes is criminal liability or some other sort of liability. By identifying a liability as criminal liability certain well received ideas come immediately to the mind, owing to our familiarity with the traditional theory. Our law needs a theoretical classification of several powers or matters, for example, whether conferring by the parent Act on the executive authority a power to declare or to add to the category of offences any act in its discretion contradicts the principle of legality; or whether disregarding strict construction of a penal provision on the ground of frustration of the purpose of a public welfare penal legislation can be defended under that principle, or whether the decision in *Lady Chatterley's Lover* declaring retrospectively the common law offence of attempting to corrupt public morals is justified within the principle of legality. Similar is the case with crimes of strict liability—how to justify punishment of a person who acts innocently and with care, or is there any theoretical basis of identifying certain economic laws or administrative regulations with penal law. The notion of conduct or some identifiable act or omission is apparently contradicted by status offences where a person has not committed any act or omission and yet is penalised for his status. Victimless crimes also require examination. The complete replacement of punishment by recent rehabilitative measures for certain categories of offenders is likewise a modern trend. These trends contradict the traditionally accepted penal theory which insists on identifiable mens rea, identifiable conduct, identifiable harm and identifiable victim.

This amply shows that the area of criminal liability faces the problem of theory change or at least the area where theoretical pluralism needs an acceptance. Any effort to supplement Shamshul Huda's famous lectures should have taken care of these theoretical aspects so that the present day significance of those lectures is evaluated and their time context properly annotated. A reader's curiosity needs to be satisfied whether the famous classic covers the entire body of criminal law or the principles under the Penal Code. The writer of the supplement has nowhere indicated the bases of criminal liability in the modern context. It is in this context that this reviewer has stated that an introductory chapter would have been an additional necessity, even after the changes are footnoted or appended alongwith the text. It is felt that this book has only a reprint value. The supplementary chapter is neither explanatory nor adequate and could easily have been dispensed with.

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