

CONTRIBUTIONS
TO
SYNTHETIC JURISPRUDENCE

The seeking of *integrated* truth is the watchword of the Indian School of Synthetic Jurisprudence. The world is a cosmos, and the student sees truth in *s y n t h e s i s*.

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CONTRIBUTIONS
TO
SYNTHETIC JURISPRUDENCE

Being
RESEARCH PAPERS

Edited by
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OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW

For
THE INDIAN SCHOOL OF SYNTHETIC JURISPRUDENCE



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PREFACE

This is a Work showing what the Founder and other members of the INDIAN SCHOOL OF SYNTHETIC JURISPRUDENCE have done by way of research in *Synthetic* Jurisprudence. In the United States of America, Professor Jerome Hall is the leader of Integrative Jurisprudence. And in England, Professor Dennis Lloyd has advocated the need for a synthetic approach in the study of Jurisprudence. In India, it has been, since its inception in July, 1955, the idea borne by my School of Synthetic Jurisprudence, that Jurisprudence is a *synthetic* study. I have advocated that in all the Literature relating to my School of Thought, and also in my essay entitled: "Case for Synthetic Jurisprudence in India", in the work : *Essays in Law*, published by Principal T. K. Tope, of the Government Law College, Bombay, on the occasion of the Centenary of its affiliation with the University of Bombay, in 1960.

The Contents to this Work reveal the writers and their Papers; and the reader would, I trust, appreciate the nature and quality of this Work during its perusal.

I should here draw the attention of the reader, and particularly of the critic, to the fact that the research papers contained in these Contributions are on just one or two aspects only of synthetic jurisprudence. My paper entitled: *Nature, Scope and Fruits of Synthetic Jurisprudence*, is based on Synthetic Jurisprudence, *in the sense that we synthesise and harmonise conflicting ideas*, taking the *moderate* or the *mid-way* view, avoiding the extremes, by compromises. By analysis, we understand the meaning and significance of the legal concepts, taking cognisance of the components that make those concepts; in Sociological Jurisprudence, we examine the law and the legal system in the light of human needs and social wants; in Philosophical Jurisprudence we enter into a discussion of the normative aspects of law; in Historical Jurisprudence we trace the historical bases, the origin and growth of law and legal concepts and ideas; in Synthetic Jurisprudence we *amalgamate all these methods* of the different types of jurisprudence, and, above all, we find *connecting links, and compro-*

mises or reconciliations. Through *amalgam* and *synthesis* of the conflicting ideas we get the correct view — the *synthetic* view and the proper solution. My paper: *Nature, Scope and Fruits of Synthetic Jurisprudence*, is an attempt at such a *synthesis*, and the new theories I have formulated are the *results of such synthesis*. This can be perceived by my definitions of 'law', 'civil law', 'international law' and of 'State' and 'crime'. My *Mind-Behaviour Theory of Negligence*, or the *Synthetic Theory of Negligence*, is another illustration of the employment of the synthetic method which harmonises conflicting ideas, and works, so to say, on a compromise, discovering a mid-way view. So also in the *theories of punishment*, the synthetic jurist realises that the various theories relating to punishment are not in conflict with one another but are in harmony and *are inter-dependent*. So also, on the question of 'insanity in law' and 'abnormality in the psychiatric sense', I have *steered the middle course* and attempted to bring about a compromise between the conservative obstinacy of the law and lawyers, on the one hand, and the progressive realisation of science and scientists, on the other hand. Between the two extreme views (that is to say, of law and science) I have found out a mid-way view and expressed it in my said Paper, showing also a practical issue derivable from the compromise theory. So also I have taken, midst the two extremes (of the Fiction Theory and the Realist Theory of the Personality of Corporations), the mid-way view, and by moderation, or by synthesis, I have explained my Theory of the Quasi Real Personality of Corporations.

So far as the other research papers, in this Work, are concerned, these papers are a contribution to *Synthetic Jurisprudence*, in the sense that it is a significant aspect of *Synthetic Jurisprudence* that it includes, within its scope, any *critical review of any concrete law, or any critical review of any existing legal material*. The *Residuary Jurisprudence* is also a significant part of *Jurisprudence*; and, *a fortiori* so, of *Synthetic Jurisprudence*. So any critical study of law is also in the purview of *Synthetic Jurisprudence*. And, by criticism, we mean *sensible*, and not *malicious*, criticism. The criticism should not be that of a *malicious cynic* who sees no good in a good

work but finds only faults which exist in his little-mindedness or his narrow and dark imagination; it should be *constructive*, *genuine* and *benevolent* criticism by a *genuine* scholar who realises that mere differences of opinion do not signify ignorance or faults. Otherwise the critic is like a fly that buzzes round the elephant, i.e., the author. At times, a critic, going superficially through a book or Work, and failing even to understand what the author has stated, misinterprets the Work. Such critics are not only most undesirable, but dangerous as they belittle that great art of literary criticism. The synthetic jurist should take care that he passes *constructive* criticism and suggests new and healthy ideas for the improvement of the legal system.

In so far as Synthetic Jurisprudence deals *also* with topics in *all* their jurisprudential aspects (that is to say, combines *all the types* of jurisprudence) *at one and the same* place, fully considered at all angles, that is to say, historically, philosophically, analytically, comparatively, sociologically and teleologically, this Work is not a contribution. It is a contribution only in the other senses in which the expression 'Synthetic Jurisprudence' is used, namely, in the sense (a) that Synthetic Jurisprudence seeks compromises midst rival extremes, thus giving the healthy truth, and the *whole* truth (preventing the dividing of knowledge into unhealthy and meaningless water-tight compartments), and (b) that Synthetic Jurisprudence includes, in its scope, healthy and constructive criticism and review of existing legal material and institutions, including legal theories and expositions as also socio-legal and psycho-legal material and expositions. Synthetic Jurisprudence even accepts that law and literature go together, as could be seen from the brilliant Paper contributed to this Work by Dr. Stephen Schafer. Medical Jurisprudence, or Forensic Medicine, is also within the scope of Synthetic Jurisprudence; and we have, therefore, the learned Paper by Dr. Homi Mehta.

As regards the other aspect of Synthetic Jurisprudence, mentioned above, but not dealt with under any of the Papers contributed to this Work, I crave leave to say that in some subsequent work we shall bring out that aspect also. At any rate, in the new edition of my text book on Jurisprudence, whenever the new edition may come out, I am definitely going

to touch *all* the topics in *Jurisprudence*, *completely*, *at all the different angles*, *at one and the same place*, that is to say, analytically, historically, comparatively, philosophically, sociologically, and teleologically. That will be in the third (the next) edition of my JURISPRUDENCE.

Now I shall mention a few words about the Indian School of Synthetic Jurisprudence.

I have great pleasure and supreme pride in stating that Dean Roscoe Pound is an Honorary Member of the Indian School of Synthetic Jurisprudence. Among the other celebrated personalities who consented to be the Honorary Members of this School and whom the School is so proud to claim as such, are Dr. Quincy Wright, of Chicago University, Dr. G. C. Cheshire, of London, Chief Justice Earl Warren, of the United States of America, Dr. P. N. Bannerji, of the University of Calcutta.

The Indian School of Synthetic Jurisprudence was, on the 21st day of July, 1955, registered and incorporated as a Society, under the Societies Registration Act, with very useful and beneficial objectives. Before I make mention here of these objects, I crave leave to say that ours is, to my knowledge, the First Society of its type in the whole of India. There have been various types of Schools of Thought in this most fascinating subject, called Jurisprudence which has been differently understood by scholars with regard to its scope. In the Greek age, there was no separate study of Jurisprudence as such. Jurisprudence was a part of Philosophy, and the philosophers were the wisest, the most precious ornaments of their country. Hence we have the saying that Kings ought to be philosophers, or philosophers alone should be made kings. Jurisprudence has been described by the Roman jurist Ulpian as "the knowledge of things, human and divine, the science of the just and the unjust." He said: "*Jurisprudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.*"

We have in Jurisprudence (1) the Philosophical School; (2) the Historical School; (3) the Historical-Comparative School; (4) the Sociological School, including the American School of the Functional Attitude; (5) the Realist School; (6) the Teleological School; and (7) the English School of Analytical Jurisprudence. But nowhere have we heard of the

Synthetic School. One day, while lecturing to my students at the Government Law College, the thought came to my mind spontaneously of having a School by the name: The School of Synthetic Jurisprudence, and I thought that we should call it the Indian School of Synthetic Jurisprudence; we should have that to India's credit. India is a land of poets, men of letters, philosophers, musicians, artists, and great lawyers too. But after what the great law-givers had given by way of Jurisprudence, we had neither any School nor any Society dealing with the improvement of the fundamental principles on which the law is based. We have Philosophical, Anthropological, Sociological, Medical, Scientific and Technical, Literary, Artistic and Musical Societies; but we had no society so far to sing on the harp of Jurisprudence to the melodious music of law. Now we are so glad that a much-needed Society has at last come into existence to complete the synthetic harmony of the huge Scheme of Knowledge. I hope and trust that this School will further contribute to the glory of this glorious and dear soil of ours — Bharat — and will also figure prominently, *particularly through these Contributions* (the present Work), in the *international* field.

The aims and objects for which the Indian School of Synthetic Jurisprudence has been established are:—

(1) The pursuit and promotion of the study of Jurisprudence of all types and in all the problems that this social study presents, and thus the enriching of the fundamental principles (provided and produced by Jurisprudence) on which the rules of law are based and built;

(2) The promotion, encouragement, development and fortification of the study of Jurisprudence in a synthetic style;

(3) The originating and development of new ideas and the spreading of the doctrines of this Synthetic School of Jurisprudence;

(4) The dissemination of knowledge through lectures, publications, seminars, discourses and debates and such other means on the humanities which are at the basis of the study of Synthetic Jurisprudence;

(5) The publication of journals, brochures, books, essays, papers, and such other publications, as may, from time to time, be decided upon by the Society; and

(6) The holding of conferences in furtherance of the above objects.

Now I shall explain what *Synthetic Jurisprudence exactly means*. I shall illustrate, by concrete examples, the force of Synthetic Jurisprudence as an instrumentality of achieving the truth — the truth which Analytical Jurisprudence sometimes fails to reach.

No knowledge can be divided into water-tight compartments. Knowledge should, in the cosmos of our existence and all things in life, be taken as an organic, constructive and synthetic whole, so as to enable a clear idea of the truth of our pursuit. It is no use regarding Jurisprudence as merely analytical or merely historical. Jurisprudence should, at the same time, be analytical, historical, comparative, philosophical (especially teleological), sociological and psychological. There should be an *amalgam of the principles* derived from the social studies; and Jurisprudence should suggest changes for the better, with the march of time and the onward progress of society. We ask therefore for more and more of synthetic jurists who are prepared and eager to seek the truth. This School deals with expounding the fundamental principles and the legal concepts based thereon, not merely in the form of logical analysis but in the light of philosophy and sociology, with the method of constructive criticism. The utility of the law should be considered, an enquiry into its purpose should be made, and we should satisfy ourselves as to the extent to which these purposes are satisfied.

In the *synthetic Jurisprudence* of my idea, there is no place for discussing the various topics in the different types of jurisprudence under *distinctive* chapters. I would advocate and deal with topics in *all their jurisprudential aspects* (that is to say, combining all the types of jurisprudence) *at one and the same place*. Each topic should be *fully* considered *at all angles*, that is to say, historically, philosophically, analytically, comparatively and sociologically, for then only could a *true* idea be *fully* available. Thus if I am dealing with a topic, such as that of property, proprietary rights and personal rights, or legal and equitable rights, I should make a comparative study in connection with the concept and examine the concept historically and critically; I should examine how proprietary

rights, for example, have been recognised and protected in different societies and on what grounds, and how such interests have promoted, or tend to promote, social interests or social good. In each chapter, under each topic heading, I would consider *all the jurisprudential aspects* involved in the topic. I would not make a separate chapter on analytical jurisprudence, a separate chapter on philosophical jurisprudence, a separate chapter on sociological jurisprudence. I would combine *all the types*, giving thus a synthetic discussion under each topic heading.

This Work is divided into three parts. Part I deals with *Legal Theory and the Uses of Law*. Part II covers Papers on *International Law and Jurisprudence* concerning international problems. Part III has been relegated to *Psycho-legal, Medico-legal and Criminological Jurisprudence*. This Work, it will be realised, covers both the abstract and the concrete aspects of legal thought. Besides, as could be seen through the Contents, there are subjects covering a good variety of interests and of great current importance. This book is expected to provide very useful and interesting reading.

This Society, that is to say, the Indian School of Synthetic Jurisprudence, and its Founder and members, are deeply obliged and thankful to all those who have contributed research Papers and thus enabled this Work. We are deeply grateful to Dean Roscoe Pound for his kind appreciation of my Synthetic Jurisprudence, through his Paper which we have published in this Work. An appreciation of my Synthetic Jurisprudence, by the greatest Jurist in the world today, gives us gratification. We are highly indebted to Dr. Quincy Wright, Dr. G. C. Cheshire, Professor Jerome Hall, Professor Harold Laswell, Dr. Alonzo Moron, Dr. Stephen Schafer, and Dr. Homi Mehta, for their very kind co-operation by contribution of research papers to this Work. We are thankful to Mrs. Khorshed M. J. Sethna, M.A., B.T., L.T., J.P., a member of this School, for checking up the proofs of this work and for making a few valuable suggestions; and we are grateful to Jehangir M. J. Sethna, Esq., B.A., for preparing the Index as also for useful suggestions, particularly concerning Part III of this Work. We acknowledge our thanks to the Publishers for their kind co-operation, and to the Bombay Chronicle Press for affording facilities in the printing of this Book.

December, 1961.

M. J. Sethna

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PART I

LEGAL THEORY

AND

THE USES OF LAW

Synthetic Jurisprudence

ROSCOE POUND *

Sometime ago I chanced to look at a text book on Jurisprudence by Dr. M. J. Sethna, a barrister of the Middle Temple, Professor of Jurisprudence in the Government Law College in Bombay. I expected to find a conventional text of analytical or of analytical historical jurisprudence and perhaps some reference to a problem of a formative law of independent India, which might well be beginning after a decade of independence. I did see in form what I was prepared to see. But in addition I found something which may give food for thought: A project for a new type of science of law, with a method of its own which conceivably may be a significant result of India's independence—a feature of consciousness of a formative law of India in a world in which movement is going on in the law everywhere.

In the generation in which I grew up (I came to the bar in 1890) there was much to justify the gibe of Kantorowicz: *Rechtswissenschaft ist Wortwissenschaft*. There was at best a severe logical precision in definition and application of rules of law. How thoroughly it was believed at that time that a law book was to be made to the model of a statute book was brought out by instructions issued to me in connection with a report on some proposition of common law. I was to define carefully the exact meaning of each term employed (in a statement of the law of liability for negligence) and see to it that the term was used consistently with that exact meaning throughout the report.

* Ph. D., LL.D., D.C.L., J.U.D., L.H.D. etc. University Professor Emeritus; Former Dean of Harvard Law School; Former Judge of the Supreme Court of Nebraska; Tagore Professor of Law, University of Calcutta, 1953; Author of "Jurisprudence" (five volumes), "Law and Morals", "The Spirit of the Common Law", "Interpretations of Legal History", "Criminal Justice in America", "The Formative Era Of American Law", "The Lawyer from Antiquity to Modern Times", "The Development of Constitutional Guarantees to Liberty", "The Ideal Element in Law" (Tagore Law Lectures, at Calcutta, 1958 edn.), and an amazingly large number of books on Jurisprudence and Legal Philosophy. Honorary Member of the Indian School of Synthetic Jurisprudence.

In one way or another juristic science in the English-speaking world is sought to be fitted to an analytical or historical or metaphysical straitjacket. Law is thought of as the policing of a rural agricultural society — as a body of rules prescribing or proscribing details of conduct with provision of exact penal or constraining consequences, on the simple plan of the Code of Hammurabi or the laws of Ethelbert.

Accordingly law is an aggregate of laws, of commands of the political sovereign, requiring or prohibiting specific items of conduct, sanctioned by imposing painful (or what the person subjected thereto would regard as painful) consequences upon items of socially undesired conduct. Or it has been thought of as authoritatively stated custom of popular and individual conduct or as authoritatively formulated custom or decision of disputes. Or, in another way of putting it, law may be thought of as authoritatively declared or recognized precepts of right conduct or of right determination of disputes. Another group in the nineteenth century held law to be a body of reasoned precepts of conduct expressing reasoned ideals of justice in human conduct and relations with others. Or, if the jurist is thinking in terms or for purposes of the social sciences of today, he may regard the phenomena of the legal order as operations of social forces and put his juristic formula in terms of social psychology or of a social economic interpretation. He may think in terms of logic or of history or of metaphysics or of social psychology or of a sociology on the analogy of the physical sciences. In any of these ways his thinking may proceed in a scientific straitjacket.

But the apparatus of administering justice in the complex, mechanically operated society of today, as compared with the simple, rural, agricultural village of the beginnings, calls for more than a simple apparatus of policing of Main Street. We have to think of more than rules. We must think of law as well as of laws; of precepts, principles, standards, of norms which defy treatment on the analogy of Ethelbert's "for every nail a shilling."

There has to be a quest of a more inclusive order. There comes to be a question whether all the phenomena of the legal order can be reduced to one or included in one narrowly bounded field of learning or one science or treated by one exclusive