BOOK REVIEWS

INDIAN AND ENGLISH PRIVATE INTERNATIONAL LAWS: A COMPARATIVE STUDY. By Paras Diwan. 1977. N.M. Tripathi Private Limited, Bombay. Pp. xlvi+688. Rs. 75.

PROBABLY IT is the fact of virtual absence of any academic activity in the field of Indian private international law that seems to have stimulated the author most in undertaking this comparative treatise on the subject. Apart from a strange amalgam of stray statutory provisions[1] and a few, rather than many, judicial principles, generally on the analogy of the corresponding English rules of private international law, coupled with a random literary writings[2] there hardly seemed any stimulus in India in this area of study. The author of the work under review has rightly repined on this count in his preface:

> Despite its value as subject of academic interest, private international law is a curiously neglected subject in the legal education of this country. Abroad, on the continent of Europe, including the United Kingdom and the Soviet Union, in the United States and in the Old Commonwealth countries, it is a major subject of study at the Universities and law schools, but in India it cannot claim even a professorship of its own, and forms only an insignificant part of the curriculum of law examinations.[3]

The present reviewer as a member of the committee to review and recast the *syllabi* of LL.B. and LL.M. courses[4] in the light of the development in the various fields of law and the recommendations of the U.G.C. Regional Workshops on Legal Education,[5] and also to consider the

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1. We may particularly advert to s. 13 of the Code of Civil Procedure, 1908, and s. 41 of the Indian Evidence Act, 1872, dealing generally with the recognition and enforcement of foreign judgments, including certain judgments concerning status (these provisions are, however, procedural in nature); the Indian Succession Act, 1925, relating to the rules of domicile; and the Negotiable Instruments Act, 1881, dealing with some other relevant rules of private international law.

2. Besides a few learned articles on the subject, the only book published is that of Ram Jethmalani : *Lectures on Conflict of Laws* (1955).

3. Paras Diwan, *Indian and English Private International Laws : A Comparative Study* viii (1977). (Hereinafter cited as *Diwan.*)

4. The committee was appointed by the Board of Studies in Law of the Panjab University, Chandigarh, and held its preliminary meeting on 17 September 1978.

5. Held in Chandigarh from 12 to 14 March 1976. This was the second in the series with the following objectives : to modernise the *syllabi* in each subject and make them relevant to the needs of the society and students; to indicate the ways in which the study of each subject could be related to, and enriched by, a study of other broad disciplines;

advisability/feasibility of having a uniform curricula in the northern universities, found to his utmost dismay that though the subject of private international law has been listed by the Bar Council of India as one of the optional subjects [6] yet none of the zonal universities has been able to offer this option. One reason that seems to be cogent for this inability, apart from our own inertia, is the absence of a good standard text-book on the Indian rules of private international law.

The work under review legitimately meets this absence. It covers the whole scope of private international law into as many as eight parts entitled Introductory, Preliminary Topics, Family Law, Law of Persons, Law of Property, Law of Obligations, Procedure, and Foreign Judgments, each part covering one broad topic or relevant topics together. Parts are, however, further divided appropriately into chapters.[7]

The division into parts maintains the innate unity of the topic as a whole, and further parts into chapters helps in putting each part of the topic into its proper perspective. This arrangement should immensely help the teachers, students, and the practitioners alike in making use of this work effectively. A respectable, though meticulous, subject index bearing copious cross-references further enhances its manifold utility.

The task which the author had addressed to himself to accomplish through this work was certainly not an easy one, especially when it is realised that

> in some areas there is a total dearth of rules; in some areas rules are so few and scanty that no generalization is possible; in some areas the statutory rules and rules laid down by the courts are at variance and no symbiosis can be made; and a large part of private international law is based (rather mutated duplication of) on English law.[8]

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to formulate guidelines for prerarration of text-book, reading materials and other aids in each subject; 10+2+3 pattern of education and its relation to legal education; linking legal education with national service scheme and work experience of law students.

6. In its original scheme, the Bar Council of India had, however, suggested that private international law should be a compulsory subject for LL.B. students. But in the revised draft we find it merely as an optional subject.

7. In all there are twenty-five chapters with the following break-up: Part I—I Scope, Nature, Definition and Subject-matter of Private International Law; II Historical Development and Doctrines of Private International Law; III Characterization; IV Renvoi. Part II—V Application and Exclusion of Foreign Law; VI Domicile; VII Jurisdiction of Courts. Part III—VIII Marriage; IX Matrimonial Causes; X Legitimacy and Legitimation: XI Adoption; XII Guardianship and Custody of Minor Children. Part IV—XIII Corporations. Part V—XIV Introductory : Property and Its Characterization; XV Immovable Property and Its Assignment; XVI Transfer of Tangible Property; XVII Assignment of Intangible Property; XVIII Insolvency; XIX Succession. Part VI—XX Commercial Contracts; XXI Negotiable Instruments; XXII Torts. Part VII—XXIII Law of Procedure; XXIV Stay of Actions. Part VIII—XXV Foreign Judgments.

8. *Diwan* at ix.

Since, speaking historically, our rules of private international law, codified as well as otherwise, are essentially *mutatis mutandis* the corresponding English rules and that, because of the increasing sociability and social solidarity, the conflictual problems arising in India are similar to the ones arising in other Commonwealth countries and the countries with common law base, and also because of the new strides made in this field in England, especially during the last decade, "(n)o study of Indian Private International law can profitably be made in isolation of English Private International Law."[9] This is precisely the author's apology for resorting to the comparative study of the two systems.

Otherwise too, the English principles of private international law which were created initially by a series of judicial decisions and then extended and developed through legislative activity have now a respectable ancestry of about two hundred years. These rules are fully explored in the classical works of Story, Westlake, Foote, Wharton, and Nelson. We find a critical exposition of these principles in the successive editions of the celebrated works of Dicey, and then that of Cheshire. What Diwan has done now is to state those principles conjointly with the latest important judicial pronouncements such as in *Boys* v. *Chaplin*[10] (making a desired change in the law of torts), *Coast Lines Ltd. v. Huding and Veder Chartering N.V.*,[11] (rightly deprecating the hitherto prevailing tendency of placing too much reliance on the presumptions in favour of the *lex loci contractus* and *lex loci solutionis* in determining the proper law of contract, *Indyka* v. *Indyka*,[12] and *Mather* v. *Mahoney*.[13] (both liberalising the law of recognition of foreign divorces). In his *exposé* the author has also carefully considered and deliberated all the important changes wrought by statutory enactments up to date.[14] Some of these changes relate to merely as a sequel to the United Kingdom's acceding to international conventions,[15] some to make the direction of the developing law clear and certain,[16] while some others to

9. *Ibid.*

10. (1969) 3 W.L.R. 322.

11. (1972) 1 All E.R. 451.

12. [1969] 1 A C. 33.

13. (1968) 3 All E.R. 223.

14. The important statutes of which the author has taken note include: the Adoption Act, 1968, the Nuclear Installation Act, 1965, the Carriage of Goods by Sea Act, 1971, the Merchant Shipping (Oil Pollution) Act, 1971, the Maintenance Orders (Reciprocal Enforcement) Act, 1972, the Civil Evidence Act, 1972, the Carriage of Passengers by Road Act, 1974, and the Evidence (Proceedings in other Jurisdictions) Act, 1975. The two consolidating statutes, The Legitimacy Act, 1976, and the Adoption Act, 1976, have also been noticed.

15. The first historic step taken by the United Kingdom was the ratification of the Hague Convention on the Conflicts of Law Relating to the Forms of Testamentary Disposition.

16. The Recognition of Foreign Divorces and Legal Separations Act, 1971 furnishes a good example.

provide new bases by overruling the existing ones.[17]

The work under review in its entirety is indeed a successful attempt in bringing forth a coherent, nevertheless highly critical, comprehensive account of the entire field of private international law. Though the author has dedicated his work to the great English master G.C. Cheshire, yet he found it impossible to import English principles without serious scrutiny of their merits and without considering what the effect would be if they are applied to a case with slightly different either a fact situation or a social setting. He has, for instance, deprecated the tendency of the Indian courts to follow "blindly" English decisions on the unity of husband and wife:[18] first, because we are no longer bound to do so,[19] and all the more when there is every possibility of reaching a contrary view to meet the exigencies of the situation under the specific statutory provisions of the law of the land;[20] secondly, we must make use of the comparative literature available elsewhere too;[21] thirdly, the predominant consideration in every situation should be to arrive at "a socially just view."[22]

In sum, what Diwan seems to emphasize is that the Indian courts should follow decisions from other jurisdictions not simply by reason of authority, but by authority of reason. Instead of doggedly persuing the English authority in *Le Mesurier* v. *Le Mesurier*,[23] our courts in the

17. See, for example, the Domicile and Matrimonial Proceedings Act, 1973, overruling *Qureshi* v. *Qureshi*, (1971) 1 All E.R. 325.

18. *Diwan* at 138. Commenting upon *Teja* v. *Satya*, 72 P.L.R. 223 (1970) the author observes :

> It is a pity that the learned judge did not discuss the more recent English decisions, nor did he try to give any direction to Indian law. The judgment could have been rendered in any British Colony in the first decade of the twentieth century.

Id. at 272. Earlier also he drew our attention in his preface:

> Our love of English precedent is colossal, our dependence upon them total, and at times English precedents are discussed in a manner that one is apt to get a feeling that one is going through a judgment of a lower English court. At times our judges discuss English precedents for the sheer love of them.

Id. at viii.

19. The Abolition of Privy Council Jurisdiction Act, 1949, which was passed by the Constituent Assembly in anticipation of the new Constitution, abolished the jurisdiction of His Majesty-in-Council to entertain appeals and petitions from judgment, decree or order of any court or tribunal in India, including appeals and petition in criminal matters, whether the Privy Council exercised such jurisdiction by virtue of the royal prerogative or otherwise.

20. In *Teja* v. *Satya*, *supra* note 18, for example, instead of following *Le Mesurier* v. *Le Mesurier*, (1895) A.C. 517, blindly the court could have provided the requisite relief to the deserted wife had it looked to the explanation to s. 16 of the Indian Succession Act, 1925, providing that the wife's domicile does not follow that of the husband in all circumstances.

21. The author has made frequent references to the relevant law from other jurisdictions, including that of the Soviet Union.

22. *Diwan* at 139.

23. *Supra* note 20.

changed social context should have preferred the views of the U.S. Supreme Court in *William* v. *Osenton*[24] indicating that the fiction of identity of persons is now vanishing.[25] If proceeded in this manner, none could disagree with the author's estimation that the Indian courts still have ample opportunity to develop a coherent body of the Indian rules of private international law on modern lines even without the aid of legislation.[26]

The author takes note of the various projects of the Hague Conference of the private international law[27] and points out how we could resort to international unification of the private international law while at the same time improving the normative contents of the internal rules. Commenting upon a relatively recent Goa case on the recognition of foreign divorces,[28] the author observes that the court did not at all consider the question as to whether the decree of the foreign court was a decree of the competent court.[29] It seems to him that the court started on the assumption that the decree was valid but could not be recognized being contrary to public policy.[30]

"If one is permitted to put that construction on the judgment," he stipulates, "then it would mean that the court would recognize a decree on the basis of residence of the petitioner," and "(t) his will be welcome as this is near (*sic*) to one of the grounds laid down in the Hague Convention [31] on the basis of which a foreign divorce could be recognized."[32] Thus, it is submitted by the author that "there is ample scope for our courts to develop law on the lines of the Hague Convention on the Recognition of Divorces and Legal Separations."[33]

Diwan has an inimitable style of introducing the subject to his readers. For example, he broaches the difficult topic on foreign judgments :[34]

> A question often arises in the municipal courts :
> What effect can be given to foreign judgments, or can they be enforced? The question may assume various forms. For instance, P who had obtained a money decree against D from a court in country

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24. 232 U.S. 619.

25. *Diwan* at 139.

26. *Id.* at 272.

27. Though presently India is not a party to the Hague Convention, but it seems unlikely now that she would remain outside the mainstream of the comity of nations particularly in the area of private international law.

28. *Joao Gloria Pires* v. *Ana Joaquina Pires*, A.I.R. 1967 Goa 113.

29. *Diwan* at 271.

30. *Ibid.*

31. The Hague Convention though uses the expression "habitual residence" yet, Diwan has maintained very rightly, it implies more or less what "residence" means in the Indian law.

32. *Diwan* at 271.

33. *Id.* at 273.

34. *Id.* at 599 (the opening lines of Charter XXV).

X fails to get it satisfied there. On getting the information that D has assets in country Y, P files an application in a court of country Y for the enforcement of the decree. Can he do so? If so, in what manner? Or, P who had instituted a suit against D in the court of country X for damages for a breach of contract and whose suit had been dismissed there, files a fresh suit in a court of country of Y. Can D take the plea (of) *res judicata*? Or, a decree dissolving the marriage between P and D is passed by a court of competent jurisdiction of country X. P comes to country Y and marries again. P is prosecuted for bigamy there. Can he take the plea that his former marriage had already been dissolved by a court of competent jurisdiction of country X and therefore he cannot be held guilty of bigamy?[34]

By fabricating these seemingly innocent hypothetical questions, the author very aptly and skillfully focuses the attention of his readers on issues and decisions that have a direct bearing. Through this technique, even the most nascent reader becomes easily familiarised with the often conflicting conceptions of recognition prevailing in the countries of the Commonwealth, including India, and the United States, Continent and those of Europe. Likewise, the work under review should serve as an indispensable tool for classroom discussion ensuring a two-way participation in instruction—a fulfilment of the new emphasis on "guided self-study" through "real life issues", which the University Grants Commission has very recently conveyed in its guidelines to the universities for reorganisation of courses.[35]

The relevance of the work on Indian private international law increases all the more at the critical moment when there is unprecedented increase in the mobility of Indians,[36] and the Indian government is

35. See *The Tribune*, 16 October 1978, p 7 (Headnote : U.G.C. lays stress on practical work).

36. During 1976-77, in all 1,67,132 "P" form applications of Indians going abroad were approved. Of these 20,234 were for joining head of family as against 16,958 in the previous year, 1,829 for visits to relatives, 13,136 for immigration for permanent settlement, 1,234 for export promotion and 2,473 for student trainees. Miscellaneous applications granted totalled 22,695, see *Asian Recorder* 14026: INI: K (1977).

Unprecedented increase may be explained partly in terms of the liberalization of the passport rules and foreign travel restrictions by the Indian government, and partly in terms of the liberalization of the immigration laws by the foreign countries. Immigration to the United States of America from India, as from all of Asia, was "virtually nonexistent prior to the 1965 reform., (See *Span*, October 1978, p 13.) Until 1965, under the old law, adopted in 1924, immigration quotas were allotted to countries on the basis of the national origins of the U.S. population in 1920. According to this formula, Britain, Ireland and Germany had over 70 per cent of the total annual immigration quota of 158,561. Often the quotas for these countries were not filled, while the much smaller quotas for other countries were oversubscribed. Frequently, an immignant from a country cutside northern Europe had to wait for ten years to be admitted to the United States under his nation's quota. Obviously, such a law was discriminatory since it favoured the white, Anglo-Saxon area over all others.

already contemplating to deal *de novo* with some of the problems involving questions transcending the boundaries of one nation, that is the problems that arise because of the variety of legal systems which an individual may encounter by reason of his crossing the boundaries of his country. A special reference in this context may be made to the Law Commission's *Sixty-fifth Report on Recognition of Foreign Divorces in India.* At the very outset it must, however, be recognized that the commission's report as well as Diwan's work appeared almost simultaneously. Both were published in the beginning of the year 1977, but quite independently of each other. The draft of this report was never made public, as is the usual procedure of the commission, for inviting views or comments of interested persons and bodies,[37] and, therefore, Diwan could not be aware of how the things were being deliberated in the commission. And, secondly, that the Law Commission in its investigation was assisted by full-time four members[38] besides the chairman[39] and the member-secretary,[40] all of proven merit; whereas the work under review is single handed with all the limitations of research facilities as are available in India.[41] Never-

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The 1965 reformed law sets no quotas for individual nations, but provides that no more than 20,000 immigrants may be admitted annually from any one nation outside the Western Hemisphere. The limitations do not apply to husbands and wives, minor children, or parents of American citizens. Even this distinction in the U.S. immigration quotas between peoples from the Eastern and Western Hemispheres has been done away with by President Carter by signing a Bill on 5 October 1978. (See *The Tribune*, 7 October, 1978, Foreign Briefs, at p 1).

Now, under the reformed laws, immigration from India alone exceeds 15,000 per year, and their professional status is very high. In recent years, Indian immigrants in the "professional and technical" worker category have constituted three-fourths of all Indian immigrants who enter the labour market—a *percentage* exceeded by only a handful of other countries. (See *Span*, October, 1978, p. 13).

37. Since the government wanted the report of the commission expeditiously, the commission found it difficult to place the draft report before public. See *Sixty-fifth Report on Recognition of Foreign Divorces*, para. 1.2, p. 1 (1977) hereinafter simply cited as *Report*).

38. P.K. Tripathi, S.S. Dhavan, S.P. Sen-Verma, B.C. Mitra.

39. P.B. Gajendragadkar.

40. P.M. Bakshi.

41. The reviewer could obtain a copy of the Commission's *65th Report* in August 1978, *only* through the personal favour of his friend in Delhi. The law library of the Panjab University, Chandigarh still does not have one in spite of the several letters on record, and despite the commission's chairman's categorical suggestion in his forwarding letter appended to the *Report* itself that "it would be useful if, after the Report is printed, its copies are sent to the Law Faculties of different Universities in India." Underlying the importance of his suggestion, the chairman added in no mistakable terms : "I am making this suggestion because the Report deals with a matter of importance which is not covered by any statute, and on which material had to be collected from different sources," and hoped "that the academic institutions in this country would find the Report to be interesting, informative and instructive." (See *Report* at *ii*).

Perhaps, it was the acute awareness of the paucity of research facilities in India that the chairman had to say that his suggestion would apply to all the reports.

theless, it is indeed interesting to note that, to begin with, both recognize the paucity of statutory law in this area,[42] and whatever law is available, it is "essentially judge-made, and even so in India not many judicial decisions are available on the subject."[43] Having regard to the nature of the subject, on which not much *swadeshi* literature is available, it became necessary for the authors on both sides to have resort "to the study of the comparative materials in depth in order that the various aspects of the problems could be properly judged and formulation of recommendations made in a satisfactory manner."[44] Both allude to various aspects of the Hague Conventions on Private International Law.[45] For viewing the various principles of private international law in their proper perspective, so that their relevance could be assessed relative to the needs of our contemporary society, both deemed it logical to deal with their historical development.[46] (Diwan of course does in much greater detail as one would expect in a standard treatise on the subject). So much so on the points of similarity of approach.

Since the mode of enquiry and the use of the basic materials used are the same, and also the fact that the erudition of the person who headed the commission[47] and that of the person of the work under review [48] is

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that the Commission makes, because if, after our Reports are printed, they are circulated to the relevant academic and professional institutions, it may encourage a debate on the questions considered by the Commission, and that may assist the Government in coming to its own conclusions on the relevant recommendations made by the Commission in its respective Reports.

Report at *ii*.

42. See *Report* at i : "Our rules of private International Law have not been codified and in this branch, particulary in regard to domestic relations, there are few statutory provisions directly relevant." For the author's recognition on this count, see *supra* notes 1 and 8, and the accompanying text.

43. *Report* at i. For the author, see *supra* notes 2 and 8, and the accompanying text

44. *Report* at i. For the author, see *supra* note 9 and the accampanying text.

45. For the *Report*, see paras, 9.1 to 9.16 at 66-68. For the author, see *supra* notes 27. 31-33 and the accompanying text.

46. *Report*, in its very introductory chapter, for instance, deals with the history of recognition in England, see paras. 1.33 and 1.34, p. 13.

47. In the realm of family law the lore, learning, and the sustained interest of Justice P.B. Gajendragadkar, who hails from a family who for generations were known for their profound knowledge of Sanskrit, is clearly imprinted in his varied judgments throughout, and could be traced back to his earlier professional career when he launched the editing of the *Hindu Law Quarterly*, delivered lectures on the law of adoption in 1950 in Lalubhai Shah Lecture Series on Hindu Law, another series of lectures on the Hindu Code Bill in 1951 under the aegis of the Karnataka University, and brought out *Dattak Mimansa*.

48. Besides the clear two scores of learned articles in the realm of family law alone (and equal number in other branches of law), Paras Diwan has to his credit the following *four* scholarly works manning all the three major wings of family law, namely, Hindu Law, Muslim Law, and Customary Law : *Modern Hindu Law : Codified and Uncodified*, (3rd ed,. 1976); *Muslim Law in Modern India* (1977); *Law of Parental Control Guardianship and Costody of Minor Children* (1973); *Customary Law in India* (1978).

in the realm of same law, namely, family law, it is no wonder that in considering the questions about the recognition of foreign decrees of divorce and the ancillary orders passed therein very many conclusions reached and suggestions made are also likewise sometimes the same and often similar. However, the significant thing to note in this context is that the rationale supporting those conclusions in the two studies are different in very many instances. Herein lies the instant value of the work under review, because it adds new bearings on the point of view of justice and the broader consideration of social policy underlying the recommendations of the Law Commission—an opportunity which would have been available for so doing had the draft report been made public, or had the commission associated savants and scholars of Paras Diwan's eminence in the field.[49]

With this genuine appreciation of the order, substance, and the singular emphasis on the Indian context, the work of Paras Diwan may undoubtedly be acclaimed as the foremost and foundational study in the maiden field of Indian private international law.

*Virendra Kumar**

49. It is regretted that despite recognising the sparseness of Indian material in the field of private international law the Law Commission has not taken note of Diwan's pioneer work in Hindi, *Private International Law* (1975) a work, which was, curiously enough, taken under the aegis of the government, and published by the government itself ! (It was produced under a scheme of the Ministry of Law and Justice of the Government of India to promote and publish the original books of standard in Hindi language, and published by the Ministry of Law, Justice and Company Law). See also its review in *Indian Socio-Legal Journal* 101-107, 1977). Nor do we find in the *Report* any reference to Diwan's published papers on the very theme Law Commission had taken for its investigation. (Reference is made here to : Recognition and Enforcement of Foreign Judgments, 1957, *S.C.J.* 122-176; Domicile of Married Women, (1953) *Legal Studies* at 76-92; Choice of Law and Jurisdiction under the Special Marriage Act; (1961) *The Law Review* 71-101.

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