When the High Court of their own motion or at the instance of a private party issues a rule of this kind, it is anticipated that a notice will be served on the Legal Remembrancer to enable him, if necessary, to make arrangements for the defence of the accused.

References under section 374, Criminal Procedure Code

12. In regard to cases where a sentence of death is referred by a Court of Sessions to the High Court for confirmaiton under the provisions of section 374, Criminal Procedure Code, or a reference under section 307, Criminal Procedure Code, is made in a case in which an accused is charged with an offence punishable with death, procedure similar to that described in paragraph 11 above will be followed. The Court of Sessions will, when submitting the case to the High Court send intimation to the District Magistrate, who will inform the Legal Remembrancer whether the accused has means to defend himself at the reference.

Accused person to be informed

13. In all the above cases the accused persons should be informed of the arrangements made in their behalf.

When charge of an offence punishable with death is withdrawn in favour of a lesser offence

14. If in the course of a trial of a pauper accused charged with an offence punishable with death, the charge is withdrawn in favour of an offence punishable with a lesser sentence, the arrangement previously made for the defence of the pauper accused may continue till the end of the trial.

If however the case is tried afresh under a minor charge before a separate Sessions, the accused will not be defended by the Crown at re-trial.

7. MEMORANDUM ON

FOREIGNERS' ENJOYMENT OF FREE LEGAL AID

Presented by the United Arab Republic Delegation

Foreigners, under the present international law, are undoubtedly entitled to resort to the courts of the country from which they would seek judiciary protection. This recourse to justice is a necessary accompaniment of the recognition of their entitlement to the different rights, otherwise there would be no point in a foreigner's enjoyment of a right for which the State does not provide means of protection through recourse to courts, no matter

whether the right be disputed between a foreigner and a national of the country, or between foreigners only. It is the general rule that foreigners should resort to the same courts as nationals, but there would be no objection to special courts being provided for the examination of foreigners' disputes as is the case in countries where foreign capitulations are observed. It is also the rule that foreigners should observe the same rules of procedure as followed by nationals, but this would not prevent special rules being especially worked out for foreigners such as the payment by a foreigner of a "caution judicatum solvi", and his deprival from free legal aid "L'assistance judiciaire".

It should first be pointed out that there is no necessary association between a foreigner being required or not required to pay a "caution judicatum solvi" and his non-eligibility or otherwise for free legal aid. This is because each question is based on different grounds. The payment of "caution judicatum solvi" is designed to provide some guarantees for compensating a national of the country for the harm done to him by being dragged by a foreigner before the courts on a groundless or vexatious charge. The security so provided by the "caution judicatum solvi" would therefore spare a national the trouble of seeking to put into effect the compensation judgment passed in his favour against the foreigner, by operating a seizure on the latter's property in a foreign country—a trouble the national would have to suffer if the system of "caution judicatum solvi" were not in force. The system would further spare a national the trouble of seeking to sue a foreigner in his country in the event of his being unable to carry out in a foreign country the judgment passed by national courts awarding him damages against that foreigner.

On the other hand, free legal aid is based on the idea of exempting whoever is in need of judiciary protection from the cost of justice, either temporarily or permanently, if his inability to provide such cost be established. The difference between the above two conceptions gives rise to the possibility of a foreigner enjoying free legal aid while being required to pay "caution judicatum solvi". This possibility, however, rarely occurs in practice; it is also illogical.

The system whereby foreigners are required to pay "caution judicatum solvi" is undoubtedly on the wane consequent upon the growing confidence in foreigners; such confidence having been lacking in ancient and mediaeval times. This system is still found in the legislation of certain countries such as France, but its

annulment by international agreements has much belittled its importance.

As regards free legal aid, it is the common trend in "conventional laws", namely the rules derived from international agreements, to assure foreigners of similar treatment as nationals. The most outstanding example of this is the Hague Agreement, on Procedures of November 24, 1896 (Arts. 14 & 15) and of July 17, 1905 (Arts. 20 & 23). The former agreement was replaced by the latter. Both agreements are collective agreements to which many European countries were parties. This is apart from several bilateral treaties.

Foreigners' enjoyment of free legal aid has not, however, reached the standard of recognition within the scope of the rules of the present positive international law. Nevertheless, the recognition of foreigners' right to enjoy such privilege falls at least within the scope of the rule of the natural international law that has already passed from its field to that of "conventional laws" which have now become so common in many countries of the civilized world consequent upon their concluding bilateral and collective treaties.

In the circumstances, it could be suggested to Committee to approve a recommendation calling on Member States' governments to recognise the right of foreign residents in their territories to the enjoyment of free legal aid, within the same limits as accorded by their national laws to their own subjects.

ACT NO. 96 OF 1957 RELATING TO THE PRACTICE AT THE BAR PROFESSION AT COURTS IN THE EGYPTIAN REGION

Article 37

A barrister commissioned to plead on behalf of a poor person in the civil or criminal courts will do this free of charge. Nevertheless he can estimate his fee from the litigant who was cast in expense of the procedure. In any case he can refer to the person whom he pleaded for if this person's poverty is removed. This should be done in accordance with Article 376 of Criminal Code.

He must carry out his designation from the Legal Aid Committee or from the court, and he cannot cede except for reasons acceptable to the said Committee or the court which is hearing the case.

Barristers accepted to plead at the Court of Cassation, and the High Administrative Court or those who have been registered

for over twenty years, can be exempt from commission in criminal and civil cases.

This exemption, however, does not apply to civil cases heard by Court of Cassation.

Article 38

The council of the Bar may charge any barrister to plead for a litigant who does not find anyone to plead for him.

ACT RELATING TO THE PRACTICE AT THE BAR IN THE SYRIAN REGION

Article 23

(1) A barrister can have the choice to accept or refuse cases except in such cases commissioned by the President of the Bar. Those cases are:

(a) If there is a decision by the Committee of Legal Aid or at the demand of the criminal court or a examining magistrate or Juvenile Delinquents Court.

(b) If none of the litigants accepts his attorneyship.

(c) If the attorney cannot practice and until the litigant finds another barrister within a period fixed by the President of the Bar.

(2) In places where there is no President or a representative of the Bar, then the barrister must directly accept the application of the courts or of examining magistrate in cases mentioned in the above paragraph.

(3) The Commission of the Legal Authorities, the President or the representative of the Bar may replace the commission of the litigant concerned.

(4) A barrister cannot refuse the commission under the above-mentioned conditions except for reasons accepted by the Legal Authorities, the President or representative of the Bar.

EGYPTIAN CODE OF CRIMINAL PROCEDURE

No. 150 for 1950

Article 188

The Prosecution Chamber **ipso facto** appoints a lawyer for any person charged with criminal court, unless he chooses his counsel for defence.

If the defending counsel appointed by the Prosecution Chamber has any excuses or upholds any objections, he should express them without delay. If these reasons occur unexpectedly after dispatching the case file to the President of the court of appeal but prior to the opening of the session, then he must submit them to the President of the Criminal Court. If the reasons are accepted, another defending counsel will be appointed.

Article 350

In criminal matters an accused person referred to the Juvenile Delinquents Court should have counsel for defence. If he has not chosen a barrister, then the examining magistrate, or the public prosecuter's chamber, or the prosecution or the court can appoint a defending barrister, following the procedure practised at the criminal courts.

Article 375

Except in the case of proven excuse or objection, the barrister whether appointed by the prosecution chamber or the President of the court, or commissioned by the accused himself, must plead for the accused in the session or delegate a representative, otherwise the criminal court may order him to pay a fine not exceeding fifty pounds. This fine does not include the disciplinary trial if there is need for it.

The court may exempt him from paying the fine if he proves that it was impossible for him to attend the session in person or by representative.

Article 376

The barrister appointed by the prosecution chamber or the President of the Court can ask for his fees from the Public Treasure if the accused is poor. The court should estimate these fees in its decree of the suit, and this shall not be refuted in any fees in its decree of the suit, and this shall not be refuted in any way.

The Public Treasure can, when the state of poverty of the accused is eliminated reclaim the fees from him by an order from the estimator.

Syrian Code of Criminal Procedure

Article 61

The claimant can be exempt from paying in advance the fees and expenses if he receives legal aid in accordance with its law.

Article 274

The President or the judge who represents him should ask the accused if he has selected his defence barrister. If he has not, then the President of the court or his representative should immediately select a barrister. Otherwise all proceedings that follow shall be void even if during the proceedings the court appoints a lawyer.

RULES OF EXEMPTION FROM JUDICIAL FEES IN EGYPTIAN LAW

Relevant Articles of Law No. 90/1944 issued on 19-7-1944 concerning Judicial Authentication fees in civil matters.

Article 23

. . . is exempted from paying whole or part of judicial fees whoever proves his inability to pay such fees. Exemption before bringing of law suit may be granted on condition there is a probability of the success of the suit.

This exemption includes fees charged for copies, certificates, summaries and any other such fees necessary for judicial and administrative acts, execution fees, charges for judicial notices and other expenses incurred by the parties.

Article 24

Petitions for the exemption from judicial fees are to be submitted, as the case may be, to a committee composed of two Justices of the Supreme Court or the Court of Appeal or of two Judges of the court of first instance, or one judge of the summary tribunals and of a member of the Public Prosecution Department.

The clerk will, upon presentation of the petition, notify the other party of the day fixed for the hearing; and will do so before the said day.

Article 25

The afore-mentioned committee will render its decision regarding the petition after examination of the documents and after granting a hearing to the representative of the clerk's office and to those of the parties who were notified and who might be present.

Article 26

Exemption from the fees is personal and does not extend to the exempted's heirs or successors, who must obtain a new deci-

sion of exemption, and that unless the court sees it fit to extend such exemption to the heirs.

Article 27

If, during the hearing of the case or the execution of the judgment rendered, the exempted party ceases to be unable to pay the fees, the other party or the clerk's office may apply to the committee mentioned in article 24 for the withdrawal of the exemption.

Article 28

If the exempted party wins his case, the other party will be charged for the fees. Where such recovery is impossible, the said fees may be recovered from the exempted party, if his state of inability ceases.

Article 29

The copy of the judgment of the sale of non-movable property by auction to the final bidder who has previously been exempted from the fees will not be delivered to him unless he pays the expenses of the sale and the fees of the judgment of the auction sale.

Reciprocal Enforcement of Judgments Agreement between the States of the Arab League

Article 7

"In any of the States of the League, nationals of the requesting State shall not be asked to pay any fees, furnish any deposit or produce any securities, which they are not required to do in their own country, nor is it permitted to deprive them of legal aid or exemptions from legal fees."

8. INTERNATIONAL ASPECTS OF LEGAL AID

Paper Read

By M. S. ALIF

Adviser, Ceylon Delegation to the First Session

"EQUALITY before the law" has been a sacredly accepted concept in all modern societies, irrespective of their diverse political, social, and economic structures. Constitutions ranging from that of the Soviet Union of Russia to that of the United States of America appear to be proudly conscious of this ideal. The unwritten British Constitution is no exception. This equality is undoubtedly one of the human rights of the individual recognised by all covilised peoples. The trend of events since the second

World War has laid greater emphasis on the aspect of men being the "ultimate members" of the society of States and international law the protector of human rights and fundamental freedoms. And it has been very rightly said that "individuals are the ultimate objects of international law, as they are, indeed of all law." (Lauchterpacht—Openheim's International Law 1955, page 636). The formulation of the Universal Declaration of Human Rights in 1948, the coming into force of the European Convention for the protection of human rights in a number of other international instruments all unmistakably point that international guarantees of human rights must be regarded as one of the main substantive divisions of international law as well as of constitutional law.

However, glorious a principle may be, it becomes meaningless without practice. The courts may be fair, the laws administered may be just but until the machinery of justice is equally accessible to all, equality will never be a reality. Unequal justice would be a most shameful contradiction in terms. "It is idle to speak of the blessings of liberty unless the poor enjoy the equal protection of the laws" were the words of Mr. Chief Justice Hughes (Growth of Legal Aid Work in U.S.A.—Reginald Heber Smith and Bradway). Layman Abbot in his address at the 25th Anniversary Dinner of the Legal Aid Society in New York said: "If ever a time shall come when in this city only the rich man can enjoy law as a doubtful luxury, when the poor who need it most cannot have it, when only a golden key will unlock the door to the court room, the seeds of revolution will be sown, the firebrand of revolution will be lighted and put into the hands of men, and they will almost be justified in the revolution which will follow." Though the realisation of perfect and absolute equality in the administration of justice will for ever, remain an ideal, yet it sounds most incongruous to say that an individual cannot enjoy his basic right because he has no money.

The laws of all lands have steadily grown with social progress and have become more and more complicated and intricate so that the average layman who is not equipped with adequate knowledge of the law to be able to fend for himself is consequently obliged to avail himself of the assistance of those learned in the law. This assistance though easily available to those who can afford to pay for it may be denied to the less fortunate. But if "equality before the law" should have any significance in a civilised democratic society it could not be thought of as a luxury. It is the well-known Marxist view that law is a class weapon used by the rich to oppress the poor through the simple device of making justice too

expensive. To make justice a right it should be available to all people irrespective of economic status or any other condition. That is the objective of legal aid. The general principle cannot be illustrated in better terms than the words of J. P. Coldstream in a paper read to the International Law Association in 1901: (1) All courts of every country should be open to all persons notwithstanding their poverty or nationality. (2) Where lack of means prevents litigation on the usual conditions these should be relaxed and the way provided whereby a poor person can prosecute or defend a claim and obtain justice. (3) In every populous place or seat of a court of justice free legal advice from properly qualified lawyers should be obtainable by persons unable to pay for it.

In short, legal aid would mainly mean the providing of lawyers to persons who cannot afford to pay for legal services. Legal aid is often confused as a form of charity, grace, or favour. This would imply a sense of inferiority which is diametrically opposed to the very conception of legal aid as a matter of right. It is a social obligation that the community as a whole owes the individual to ensure the realisation of a human right "Equality before the Law." The Charter of the little man to the British Courts of Justice was the description given to the English Legal Aid and Advice Act by Sir Hartley Shawcross, Attorney General, when he introduced the Bill to the House of Commons. The words in bold characters "To broaden the meaning of justice 443, 864 people helped" across an American pamphlet issued last year to publicise the record of legal work done gives an insight into the American concept.

A comprehensive and organised form of legal aid has to provide not only for appearance of lawyers before a court but for court fees, and other out-of-pocket incidental disbursements, and the most important of all, facilities to obtain legal advice and counsel, which may aptly be phrased as "preventive legal aid". Availability of legal advice is undoubtedly the basis of any satisfactory system. It helps to ascertain a persons' legal position and to obtain assistance short of court proceedings. And if legal advice is to succeed in its object it must be good and it must be thorough. An efficient system of legal aid should not only help to litigate wherever really necessary but also to avoid litigation wherever reasonably possible. The 1956 report of the American National Legal Aid Association has correctly summed up that "many cases were completed with one or two interviews, telephone calls and letters."

It must be said in fairness, that the seeds of the principle that "justice should be denied to no man" have been sown among the

peoples of both the West and the East. The growth has begun, but how far and how fast they have grown with different nations show marked variations. A full and thorough comparative study and survey of the systems of legal aid obtaining in different parts of the world has yet to be made. "Legal Aid for the Poor" published by the League of Nations on the reports made to it in 1924 and 1925 gives an outline, though unvouched for accuracy, of whatever facilities that were available in certain countries. Egerton in his work "Legal Aid" published in 1945 though he had attempted to use the information of the League of Nations as the basis to bring up-to-date the provisions existing in 45 nations, had met with little success as he admits due to lack of time and war conditions. However, his comment that "on the whole it is surprising how little the provisions have altered in the past, even when territory has changed hands" is of concern. Though further attempts have been made even in subsequent years for a comparative survey of legal aid in different countries, the degree of success achieved has not been remarkable and it is still open to the student of comparative study to make a contribution in this direction. At the Hague Conference of the International Bar Association in 1948 each member-organisation though requested to submit statements as to the legal aid facilities in its country to the London Conference of 1950, the number of replies received was disappointingly small in that only 9 countries responded. And in the 1952 Conference held in Madrid, Sir Sydney Littlewood was appointed Chairman of the Legal Aid Committee and he had taken great pains with the hope of presenting an elaborate survey of the systems of the different nations in the world. Sir Sydney must be highly commended for his enterprise in his preparation of his extensive, detailed, and most exhaustive questionnaire on practically all aspects of legal aid. Perhaps, this appears to be the only genuine effort made in recent years. He had sent the questionnaire to lawyers and Law Associations in all parts of the world. Only 30 countries replied and he presented the answers in a tabulated form to the Monte Carlo Conference in 1954. We could have doubtlessly had the ready chart and guide of the world facilities for legal aid at a glance, but unfortunately not all of the recipients of this questionnaire appear to have had the courtesy to reply Sir Sydney. And even among the replies a number of sweeping statements, inaccurate information and irrelevant answers seem to have been submitted, and these had "crept" into the report. It is most disappointing that Sir Sydney's efforts which should have produced a masterpiece could not reach that level due to no fault of his. The fact that perhaps Sir Sydney had the English system of law and

legal aid at the back of his mind while formulating the questionnaire might have also contributed to the incorrect replies received from foreign countries where entirely different systems of law obtain. However, the usefulness of the report in many respects cannot be underestimated. At the Commonwealth and Empire Law Conference held in London in 1955 the subject on "Legal Aid" was taken up for discussion, where only the English, Canadian, and South Australian schemes were discussed. I presume that this is the first occasion that this subject will be discussed at an international level in a Legal Conference in the East.

However, taking Sir Sydney's survey as a broad guide and on the data supplied to me by lawyers and Bar Associations from different parts of the world we may examine how it has been endeavoured to eliminate poverty as a bar to equal justice and thus ensure a human right. Circumstances appear to be widely divergent. I had the good fortune to receive a very enviable report from the Secretary of the New Zealand Law Society that "Although provision was made by statute to enable a Legal Aid Scheme to be formulated it has not yet been found necessary to provide rules for such a scheme. It is thought that no person in New Zealand is known to have suffered hardship due to the lack of such a scheme, for if any genuine case is known of, the matter is dealt with by the Local District Law Society." On the other hand, an extract of the contents of the information received by me from a leading lawyer from another country, Asian at that, is equally interesting. But I am sure I will be pardoned for not divulging the identity. It reads "Though poverty is rampant here and countless families have been rendered destitute by litigation, no genuine effort had ever been made by the State or by the Bar to provide for any form of organised legal assistance, except for counsel assigned in murder cases. But these assigned counsel are of such "extraoridnary eminence" that it would be the greatest service to the accused if he was left unrepresented. Occasionally from among the abler side of the Bar a lawyer might be willing to give his services free but to find him might be to look for a needle in a hay-stack". I have also heard from another country in reply "Please let me know what you mean by Free Legal Aid Schemes." Therefore it would be impossible to make a general statement as to the percentage of population which needs legal aid as this differs from place to place, though in America 7½ out of 1,000 people a year are unable to pay for their legal needs.

It is not intended to discuss here the details of any system in particular. Of all systems it must be said that the State-aided

English and Scottish systems and the largely community aided system of the United States undoubtedly stand conspicious in the most advanced ranks. However, both systems are administered by the profession itself.

It appears that generally some provision or other however slender is made in practically all countries for providing counsel for persons accused of murder or crimes punishable with death. There are not very many systems that provide aid for lesser crimes. Crimes appear to have gained priority because liberty of the person is concerned. Aid of any appreciable standard in civil cases is granted in just a few countries. And legal advice or preventive legal aid facilities exist in yet smaller number of States. There are a few countries where aid is restricted to only remission of court fees. A serious defect appears to be that in some countries in criminal cases and in most countries in civil cases aid is given only to "paupers". Under this class fall very few people who will be qualified, as a result justice is denied to a large number of deserving persons, so that legal aid in those circumstances would be as good as non-existent. Yet, however, under certain systems reasonable financial limits have been fixed whereby aid is available not only to the utterly destitute but to all those who cannot afford to pay for legal services.

It is apparent that from day to day all States are becoming more and more conscious, in their own way, of removing poverty as an impediment in the path of equal justice. It must be said at this point that it is the responsibility of the Bar to take charge of this process in the interest of the individual, the State, and not the least to say, of the profession itself. If the Bar does not interest itself in this direction, the Governments sooner or later are bound to take this machinery into their hands, the consequences of which though unintended will not be favourable, if not detrimental, to a free profession. Besides criminal and tax cases, with the increasing "socialisation" and "nationalisation" in many fields the State often has to appear as a party in litigation. In his classic and inspiring work on **"Legal Aid in the United States"** Emery A. Brownell, Executive Director of the National Legal Aid Association, said "Perhaps the greatest contribution of the Anglo-American law to a maturing society and to the well-being of its members is the concept that every individual has rights, even as against the State, which should be equally enforced and protected. This is the essence of freedom". But, if lawyers both for the State and the individual are directly paid, appointed and controlled by the State itself, it is a matter of grave doubt whether the individual can

expect the unfettered representation by his counsel. Though the State-sponsored Public Defender Organisations have thrived in the United States there have been levelled both in America and elsewhere very serious criticisms against this system and generally any system directly controlled by the State, as against one controlled by the legal profession. Judge E. J. Dimock of New York in a well-thought-out contribution to the American Bar Journal last year goes so far as to say "The adoption of the Public Defender system would bring our Government so close to the police State that we ought to shun it like a plague." The dangers of this system could be averted by making State funds available to specially assigned efficient counsel. The experience in America appears to be that very often the Public Defenders enter "guilty" pleas without giving their best attention to the poor accused. It is also an anomalous state when the Government which prosecutes a man should also purport to defend him. It has been argued that if State paid and appointed judges could be impartial there is no reason why a State lawyer should not be. But it must not be ignored that his duty is very much more than being impartial and his interest has necessarily in practice to be partisan for the accused. On the other hand the moves of a specially assigned counsel though paid by State, will not be controlled by the State, and will not be influenced by the doubt of infringing the loyalty to his master or by the fear of losing his job. A government should not throw a challenge to the legal profession by taking up the administration of legal aid schemes, for if a subsequent government chooses to raise the financial limits of those qualified for aid, the danger of treading on the rights of the profession are imminent, and a gradual destruction of the whole legal profession will follow. The most alarming of all, the valuable relationship between lawyer and client is lost by the substitution of a government official with whom it is difficult to create a personal relationship as opposed to an official relationship. Far from equalising the position of the two parties in litigation, this will impose an additional disadvantage on the poorer litigant while the more affluent party has the choice of his own lawyer with whom he is in a state of confidential and privileged relationship.

"Equality before the law" in a criminal case can hardly be achieved where on one side is an experienced and able prosecuting counsel with all the facilities provided by the State inclusive of police investigators while on the other is the poor accused after helpless days inside the cell being unrepresented or represented by a young and inefficient lawyer. It will be conceded that if an

accused appears in court without counsel it should be the duty of the court to advise him of his right to counsel and if he is unable to provide one for himself, facilities should be made available to him to be represented by a counsel. And in doing so equality of justice will become a misnomer if he does not have his option to choose his own counsel, for the State itself will not entrust a complicated case to a fledgling but will have its own choice from its array of hard-boiled prosecutors. If service must be true it must be equal in quality. The sounder view for meting out justice seems to be that in serious offences whether an accused pleads guilty or not or whether he calls for counsel or not it is the bounden duty of the court to see that he is represented and represented efficiently unless a refusal is made with full understanding. Another handicap of the accused is that in most countries even where counsel are provided they are not provided sufficiently early. The poor accused person who cannot be bailed out is kept under strict police custody cut off from the outside world while the State which is prosecuting him is taking elaborate steps investigating into all factors against him. And very often under pressure or under a feeling that he is stranded he pleads guilty. It is only those who withstand all pressures and suggestions plead "not guilty" and ask for assigned counsel. It is from then on that the poor accused's case starts while the prosecution has gone far ahead.

Though a rigid eligibility line based on the financial circumstances of the individual is necessary in civil cases lest the facilities afforded by legal aid are abused, one has to bear in mind that economic and living conditions and standards widely differ from capitals and cities to villages and hamlets. The eligibility line also becomes abortive when the cost of living changes with the times. The English and Scottish systems have been often criticised in this respect. A more elastic test would be "such persons who cannot afford to pay the costs without suffering hardships for themselves or their dependents". This basis is adopted in countries such as Norway, Germany, Israel, and Turkey, and appear to be the most reasonable. However, under the English, Scottish and certain other systems besides full aid, those who can afford to pay something toward the costs are given partial aid.

It has been the practice under many systems not to grant aid in certain types of cases, because if unrestricted, the financial implication will be uncontrollable, but it cannot be denied that there would be a number of applicants, who cannot genuinely afford to employ lawyers, will be refused aid purely because of the nature of the case however good their case may be. Though it is true

that if the flood-gates are open indiscriminately legal aid organisations will not be able to cope with the rush and cases of more important nature will suffer, yet in a strict sense, any test other than financial inability to secure the services of a lawyer and that the grounds of the case are not frivolous, would be a negation of the principle of "equality before law" and would result in an incomplete legal aid scheme which will not serve the purpose of equalising the rich and the poor before the law.

Even many advanced countries do not appear to have realised that the freedom to choose one's own counsel is the very essence of legal aid and that the saddling of any lawyer on a poor litigant does by no means give him equality with his rich opponent or with the powerful State. The denial of choice would cut right across the root of the concept of legal aid as an "equaliser." England, Scotland, Germany, Norway, Sweden, Switzerland, and Tangier are among the nations that respect the right of the applicant for aid to make his choice.

It may be that a full and effective system cannot be built up overnight. As a matter of fact even under the English scheme which is described as "the world's unique scheme", the Act was extended to the county courts only last year after the scheme has operated for five years. And certain parts of the Act like the Advice Scheme have not yet been implemented. The delay has been attributed to the financial state of the country.

Though individual service by a benevolent lawyer to a poor litigant will for ever continue in all countries where no legal aid system can be evolved unless that sense of collective service of the profession is harnessed and canalised into an organised form. Systems based on voluntary service have not proved successful in many parts of the world. It was said in a paper read at the International Conference on Legal Aid Work held at Geneva in 1924 by Silvio Longhi: "However high the bar's standard may be—and it is very high—it has not moral strength to struggle for any length of time against the law of recompense for human activity; and if, taken all together, the system of free help does not measure up to those special exigencies to which one would wish to apply it, this is not to be laid to the attorneys, but exclusively to the illusion of the legislator who believes he can solve a serious problem with fine words: as by announcing that this free help is an 'honourable activity of the legal profession.' Lawyers who volunteer with gratuitous service do so with a sense of charity and they legitimately withdraw if paid work takes more of their time. Consequently

this work is left to the less successful lawyers and inefficiency results. But remuneration for services even though on a reduced scale, well-planned out as in England will not only remove the feeling of charity but will also create a sense of duty and obligation. It must be remembered that other charities too look forward to a lawyer as any other citizen. Therefore, the community placing any additional burden without some form of remuneration would be to take advantage of a noble profession. Para 2 of the English White Paper 7563 (November, 1948) is very much in point. It reads "The task of acting gratuitously for poor persons placed a very considerable burden on both branches of the legal profession and the Government considered it no longer fitting that this burden should be borne by one section of the community."

The responsibility of financing such a scheme is, beyond doubt, on the State. When a State has the right to make its laws and administer them it also takes upon itself a corresponding duty to place all individuals equally before those laws and give equal protection. In England, the State have taken over the financial "burden" though the administration of the scheme is left to the profession. In America though tax funds contribute only to about 10 per cent of the cost of legal aid the rest is privately supplemented by the community. However, both systems recognise in two different ways, the common principle that legal aid is an obligation of the society as a whole and not of the legal profession alone.

Legal aid, obviously, is not an end in itself, but a means to an end—the achievement of a human right. We have heard that in ancient Greece and Rome it was not man, the human being or the individual, but it was only man the citizen, a member of the State who enjoyed the protection of the law or anything akin to a human right. Society has since passed thruogh hundreds of years. Let us examine whether the non-citizen or non-national stands today before the eye of the law as an equal and whether he is entitled on the same footing as the citizen or national to all the means available in a State to achieve that equality.

Lively international trade relations, intensive tourist traffic and a large migration from the time before the World War II all account for a very vigorous international legal intercourse today. "The reception of aliens is a matter of discretion and every State is by reason of its territorial supremacy competent to exclude aliens from the whole or any part of its territory." [Lauterpacht—Oppenheim's International Law, 1955 p. 676.] "Although aliens fall at once under the territorial supremacy of the State they enter, they

remain nevertheless under the protection of the home State by a universally recognised customary rule of international law. Every State holds a right of protection over its citizens abroad, to which there corresponds the duty of every State to treat foreigners on its territory in accordance with certain legal rules and principles. [Lauterpacht-Oppenheim's International Law, 1955 p. 686.] "The home State of the alien has, but its right of protection, a claim upon such State as allows him to enter its territory that such protection shall be afforded, and it is no excuse that such State does not provide any protection whatever for its own subjects."

In consequence thereof, every State is by the Law of Nations compelled to grant to aliens, at least equality before the law with its citizens, so far as safety of person or property is concerned." [Lauterpacht-Oppenheim's International Law, 1955 p.687.]

The same principle has been reiterated by Brierly in Law of Nations 5th edition, pages 219, 220—"In general a person who voluntarily enters the territory of a State not his own must accept the intitutions of the State as he finds them. He is not entitled to demand equality of treatment in all respects with the citizens of the State; for example, he is almost always debarred from the political rights of a citizen; he is commonly not allowed to engage in the coasting trade, or to fish in territorial waters; he is sometimes not allowed to hold land. These and many other discriminations against him are not forbidden by international law. On the other hand, if a State has a low standard of justice towards its own nationals, an alien's position is in a sense a privileged one, for the standard of treatment for which international law entitles him is an objective one, and he need not even though nationals must, submit to unjust treatment."

If by these principles is meant that the alien cannot be denied the human right—"equality before the law" at a level which conforms at least to the minimum standard of civilisation then it follows as a necessary corollary that all machinery and aids incidental to attaining that equality must be placed at his disposal in par with country's own nationals.

However, a distinction appears to be drawn even among aliens. "But apart from jurisdiction and mere local administrative arrangements which concern all aliens alike, a distinction must be made between such aliens as are merely travelling and such as take up their residence there either permanently or for some length of time. A State has wide powers over aliens of the latter kind". [Lauterpacht—Oppenheim's International Law, 1955 page

680.] It is difficult to understand whether this distinction will hold in connection with the grant of legal aid. Such alien might become involved in litigation which falls within the jurisdiction of the local court or might require assistance incidental to some migration problem.

In considering the position of the non-citizen, the Stateless person cannot be lost sight of. "In practice, Stateless individuals are in most States treated more or less as though they were subjects of foreign States. If they are maltreated, apart from the provisions of the Charter of the United Nations in the matter of the human rights and fundamental freedoms, international law as at present constituted cannot aid them unless their position is made the subject of express regulation of treaties [Lauterpacht-Oppenheim's International Law, 1955 p. 668.]

The days when a local lawyer had to summon extraordinary courage to defend a foreigner against a national are no more. John Adams, the Boston lawyer who in 1770, against an enraged mob defended before an American jury, a group of British soldiers who fired on a crowd of American inhabitants, will today no more be a greater hero than an average American attorney. However, it had always been on second thought that different peoples have appreciated that justice knows no discrimination. In the United States the first Legal Aid Organisation was formed in 1876 by the German Society of New York and its purpose was to render legal aid only to those of German birth. This service could hardly justify its name as its clientele was restricted only to a special group. But by 1890 it was finally established that legal assistance should be given to all persons regardless of nationality, race or sex.

Legal aid service to the foreign nationals and in an international plane has been engaging the attention of various international organisations from time to time. In 1924, the League of Nations considered this question in order to inaugurate an international system whereby it would be possible for poor persons involved in litigation in one country to follow defenders, to secure evidence and to enforce decrees in foreign courts. The information received from 40 countries were published in 1927 under the title "Legal Aid for the Poor". As mentioned earlier this merely provided a basis for further pursuit of the subject and no further. The United Nations and some of its associate organisations have discussed this subject at various times in relation to the problem of migration. The demand and the means for setting up an organisation to cater for this need have been considered in all its aspects.

These matters also came up before the 5th International Conference of Non-Governmental Organisations interested in Migration held in New York in May, 1955. At the London Conference of the International Bar Association of 1950 Dr. Raphael Agababian of Iran had submitted a paper on "International Legal Assistance" strongly urging that legal assistance should be available to aliens through the offices of the Red Cross. At the same conference Proof. Bradway of the U.S.A. had presented a very long and learned paper on "Proposal for an International Legal Aid Programme." He advocated the adoption of a legal aid charter containing a set of basic principles and fundamental concepts and suggested that a long term programme should be embarked upon to implement the contents of the charter in each country. At the Madrid Conference of 1952 it was resolved "that all member associations are urged to assist the Committee of the International Red Cross in the attempt to see that legal aid and advice to be provided for foreigners and Stateless persons, such assistance to be provided through existing organisations". While the resolution is indicative of genuine enthusiasm which is laudable, a suggestion to associate any other organisation with the legal profession in this cause does not appear feasible. It would have been a better proposition to moot the idea of an International Legal Aid Organisation managed and controlled by the profession itself rather than to bring in any strange blood. I say this with due respect to all the excellent work done by the Red Cross. Though the report of Sir Sydney Littlewood to the Monte Carlo Conference of 1954 has been handicapped in certain respects some of which were already observed, the author categorically analyses whatever information was available to him to show the aid facilities available to non-nationals. The answers to his questions as to provisions for (1) nationals of other States where there is an agreement for reciprocity, (2) nationals of other States where there is no agreement for reciprocity, (3) Stateless persons resident in the country, and (4) Stateless persons who are non-resident, throw some light on the comparative outlook of different countries. At the Oslo Conference of 1956 Orison S. Marden of U.S.A. in his paper adopts a very practical and rational approach to the subject of "Ways and Means of Improving Legal Aid Facilities for Foreign Nationals, whether Resident or Non-Resident."

Though some are of opinion that legal aid for non-nationals should be restricted only to cases of grave crimes any such discrimination will yet place the poor alien only on a second class footing before the law and will be a retrograde step in a nation's progress, as the civil rights of a man deserve equal protection. The

Littlewood Report shows that practically no difference exists between nationals and non-nationals as regards legal aid but that in quite a number of countries reciprocity in the following foreign country is essential. It is most doubtful whether the ground of absence of reciprocity could justfiy the refusal for aid as a means to the enjoyment of a human right, to which the alien is equally entitled as the citizen. However, even for observation of reciprocity there should be organisations in the different countries providing adequate facilities. Due to the lack of such bodies various voluntary social and religious agencies have taken upon themselves to aid foreign nationals as a part of social service. Marden very correctly feels that though it may be logical for such organisations to provide legal assistance connected with migration difficulties of a quasi-legal nature regarding passports, permits, proof of birth and marriage, etc., eventually it would seem preferable to have all legal aid matters handled by legal aid offices. Reciprocity of aid facilities was also discussed at the Commonwealth and Empire Law Conference of 1955 held in London where Roma Mitchell, the South Australian representative said: "It seems that it will be difficult for South Australia to establish any complete scheme of reciprocity except in States and countries which has some scheme similar to that pertaining in this State." And it has been summed up by Thomas Young, the Chairman of the Legal Aid Committee at the Conference that "the question of whether it was possible to provide reciprocal arrangements was considered by the meeting to be premature. Under the English and Scottish schemes any person from any country can apply for legal aid so long as the action which is to be the subject of legal aid is one which can be entertained by the English or Scottish courts respectively. The situation, however, in the Commonwealth countries is vastly different and with schemes varying so much both in their scope and in the eligibility for assistance it was felt that any question of discussing reciprocal arrangements should be left until the existing schemes within the Commonwealth had been further developed." England and Scotland, for instance, where fairly advanced and developed systems prevail, have established liaison with each other and a joint consultative committee has been formed which regularly meets to discuss problems arising out of the legal aid schemes that are common to both Scotland and England.

In England legal aid is made available not only to those resident in England and Wales irrespective of nationality but also to non-residents who require aid in the English courts. Similarly in Scotland legal aid is available in proceedings in a Scottish Court

to any person resident outside Scotland. This principle received judicial recognition in a 1954 English case **Ammar** vs. **Ammar [(1954) A.E.R. 365]** where in a divorce action the husband who lived in Cyprus had obtained a legal aid certificate and Sachs J. held that the legal aid machinery is available by which means his attendance in a court in England could be adequately provided. At the Edinburgh Conference of the International Law Association held in 1954, it was pointed out by Evald Rygh of Norway while discussing the Draft Convention of the United Nations that "the Committee seems to have overlooked that even the defendant may be a poor man, and that he, even if he is able to pay maintenance in monthly instalments on a moderate basis, will not be able to pay the often heavy costs incurred in being represented at hearings of evidence in the court of the claimant. As cross-examination is of the greatest importance in these cases, it is desirable that provisions should be made for giving legal aid also to the defendants in such circumstances on the same footing as residents".

The main problem affecting the foreign litigants is the question of security for costs. Ordinarily a foreign plaintiff will be ordered to lodge security for costs with the court, for the reason of the inability of the successful defendant to reach the plaintiff or his property. The effect of legal aid on this principle gives rise to an anomalous situation. The fact that the plaintiff is legally assisted does not affect the rule as to security for costs, as a successful defendant may obtain order for costs notwithstanding a legal aid certificate. On the other hand security for costs will not usually be made against an assisted person if resident in the same country. The problem becomes more difficult by the practice of the courts when awarding costs against an assisted person, to consider his means, the financial position of the other party and their conduct in relation to the dispute. The question as to how far should these factors affect the decision of courts as whether to order security, and what amount, if so ordered, and where security has been lodged and the foreign aided person fails in the proceedings whether the presence of security should affect the decision on the amount of costs awarded, or whether it should be ignored, have yet to be satisfactorily answered. In some countries, for example, Yugoslavia, the foreign plaintiff will be exempt from paying security for costs only if there is reciprocity for such exemption in the foreign country.

However, in two cases **Jack** vs. **John Dikinson & Co.** (Bolton), Ltd. (1952 A.E.R. 104) and Friedmann vs. Austay (London), (1954, **I A.E.R. 594)** the Courts have held that a foreign assisted plaintiff can be made to deposit security for costs and fairly substantial

amounts were ordered. Two facts emerged from these decisions, viz. that an order for security sometimes may preclude an assisted person from continuing his action due to his inability to pay; and that a successful defendant would press for an order for costs up to the amount lodged in court and is thus better placed than opposing a plaintiff resident in England. In a 1955 English case **Bezzi** vs. **Bezzi,** the husband sued in England the wife resident in Italy for divorce. Both wife and husband were assisted by the Legal Aid Scheme. Though application was made for security of costs of the wife, no order for security was made.

The Littlewood Report has, however, strangely overlooked the question of availability of aid facilities in different countries for their non-resident nationals and non-resident foreign nationals, though the position of the non-resident Stateless person is dealt with. In the case of non-residents seeking assistance problems also arise as to the mode of assessment of a person's income and assets in considering eligibility for aid, more so when some or all of his dependents are outside where living standards differ, and as to so much of his income, his capital and liabilities that are abroad. The procedure for recovery for any loss sustained by the legal aid fund by reason of a failure to comply with any regulation is also not easy. It may also not be possible to enforce any punitive provisions of a scheme when such occasions arise, for example, for false declarations. Most of these difficulties might well be present where the person resides in the country but his dependents, income capital or liabilities are outside. Some of these difficulties might be solved if the application of the non-resident comes through a legal aid organisation in the country of the applicant's residence. The case of the applicant also might be presented in a better form by an organisation of lawyers than by the lay applicant himself, especially in view of the case being considered in a foreign country.

Marden feels that the principles of inter-State referrals existing in the United States could be applied on an international scale to solve the problems of rendering legal aid to foreign nationals, but in view of the varying customs, laws, procedures, and the stages of development in legal aid facilities in different countries, it is very doubtful whether it would be a success. The fact has also to be taken into account that certain smaller and underdeveloped countries which might have a large foreign population might be called up to render more aid at very much greater expense than they expect in return. In such cases unless a plan is evolved for equalising the cost proportionately, it would create an undue financial strain on the smaller countries. Countries except those that insist

on reciprocity do not draw a distinction as regards Stateless persons and it is undoubtedly the correct attitude if justice should be a human right. However the position of the smaller countries where there is a considerable number of Stateless persons, has to be reviewed in the light of financial implications. In this connection, it is interesting to note the provisions in Belgium, as reflected in the Littlewood Report, where a Stateless person is entitled to aid if reciprocal agreement is made with the State from which he or his ascendants up to the second degree came. If the underlying principle of this provision can be grafted to any scheme that may be formulated for proportionately equalising the cost of aid as regards foreign nationals, a satisfactory solution might perhaps be reached without causing hardship to smaller nations.

It is needless to emphasize the imminent need for an International Legal Aid Organisation. This body will not merely be a central referral organisation linking the aid schemes in different parts of the world but will also promote the improvement of existing facilities and will endeavour to ensure that citizen and alien receive aid alike in every country. A move of this nature should enlist the support and co-operation of all governments. But for any such international organisation to fully succeed in its mission it must be granted that the firm foundations must be first laid in every consistent country by establishing institutions that would render efficient and comprehensive service. Those in power in all lands cannot be better reminded of their duty than by what Elihu Root said in his foreword to **Justice and the Poor**, the celebrated work of Reginald Heber Smith—"It is the proper function of government to secure justice. In a broad sense that is the chief thing for which government is organised. Nor can anyone question that the highest obligation of government is to secure justice for those who, because they are poor and weak and friendless, find it hard to maintain their own rights."

In view of the nature of work that will be undertaken by this Asian Legal Consultative Conference, I suggest a joint Legal Aid Committee of the different nations that are represented here be forthwith formed (with power to co-opt any other country that may join subsequently) as an exploratory body to study the present existing conditions and facilities available in the different Asian States and make further proposals and recommendations on this subject, to the next meeting of this Conference. It is hoped that all governments and this Secretariat will adequately co-operative in this direction.

APPENDIX III

DRAFT CONVENTION TO GRANT MUTUAL LEGAL AID TO THE NATIONALS OF THE MEMBER STATES OF THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

WHEREAS it has become expedient that legal aid should be given to deserving nationals of one of the Member States of the Asian-African Legal Consultative Committee who seek such aid in another Member State of this Committee, it is mutually agreed between the Governments of the Countries who are signatories of this Covenant as follows:

(a) The Signatories to this Covenant agree to grant legal aid in their country to the nationals of the other Signatories as they grant to their own nationals, and subject to the rules and nationals governing the grant of legal aid to foreign nationals in their country, if any.

(b) The Signatories to this Covenant agree to grant legal aid in their respective countries to the nationals of other Member States who cannot afford to retain lawyers to defend themselves in all criminal cases which are punishable with imprisonment without an option of a fine.

(c) The Signatories to this Covenant agree to give all assistance and help by furnishing information incidental to the granting of legal aid in cases where such help or information is required by another Member State which is a party to this Covenant.

RECOGNITION AND ENFORCEMENT OF FOREIGN DECREES IN MATRIMONIAL MATTERS

Introductory Note

The subject of Recognition of Foreign Decrees in Matrimonial Matters was referred to the Committee by the Government of Ceylon under the provisions of Article 3(c) of the Statutes of the Committee as being a matter on which exchange of views and information between the Patricipating Countries was desirable. At the First Session held in New Delhi, the Committee appointed the Member for Ceylon as Rapporteur to prepare and present a Report on the subject. At the Second Session held in Cairo the Rapporteur presented his Report on the subject but the delegations present at the Session were of the opinion that the Report needed further consideration before the Committee would be in a position to discuss the subject fully. The Delegation of the United Arab Republic also presented a Draft Convention on the subject. At the Third Session held in Colombo in January 1960 the Committee did not have adequate time to consider the subject in detail and it was decided that the subject should be placed on the Agenda of the Fourth Session. The Committee decided to request the Governments of the Participating Countries to express their views on the provisions of the Draft Convention as suggested by the Rapporteur in his Report and the Draft Convention presented by the Delegation of the United Arab Republic. The Committee considered the subject at its Fourth Session held in Tokyo and, on the recommendations of a Sub-Committee, decided to publish the Report of the Rapporteur together with all other materials contained in the Brief of Documents and to present the same to the Governments of the Participating Countries.

RAPPORTEUR'S REPORT ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN DECREES IN MATRIMONIAL MATTERS

By Mr. Justice H. W. Thambiah, (Rapporteur)

At the last Session of the Asian Legal Consultative Committee I was asked to send a report on the above subject. I have the honour to submit my report.

This subject involves three distinct but connected topics. Firstly, the question has to be considered as to how the courts of a particular country are prepared to recognise declaratory decrees such as divorce, nullity of marriage and separation **a mensa et thoro**

entered into by the courts of another country. Secondly, the question arises as to how far the courts are prepared to enforce the mandatory parts of such decrees. Both matters can be settled by legislation of any country. The third question is whether States cannot come to any agreement to give matrimonial reliefs to one spouse who is in one country when the other spouse is within the jurisdiction of another country by the enforcement of mandatory orders. It is the last aspect that has to be considered at an international assembly.

An attempt is made to give a historical account of the efforts made by governmental and non-governmental bodies to solve this question and certain tentative proposals are made on all three questions referred to.

In Appendix I, a short resume of the law on the subject in the Asian countries is given. I am indebted to the contributions made by various members of the Assembly. In Appendix II the English Law and the laws in certain Dominions are discussed. In Appendix III is given the draft convention prepared by the Committee of Legal Experts, knwon as Annex. 1. Appendix IV contains a draft convention discussed at the 47th Conference of the International Law Association held at Dubrovnik (1958), on the custody of infants.

DIVORCE JURISDICTION: Spouses who wish to bring matrimonial actions or who wish to obtain maintenance orders, in cases where the other spouse is resident in another country, are forced with several problems. In view of the insistence of the laws of many countries that only the court where the husband is domiciled is competent to hear matrimonial actions, a wife who has been deserted by her husband is confronted with many difficulties if she wishes to bring an action for a decree dissolving the marriage or declaring it a nullity. If she wishes to enforce any order for alimony, either for herself or her children, if the husband's domicile happens to be a foreign country, she has to embark upon an expedition to his country in order to obtain any relief. In her penurious condition, she may not be able to find the assistance to go to a foreign country and initiate litigation. Even if she succeeds in obtaining such a decree, when she comes back to her own country she will encounter various difficulties in enforcing the order. Procedural difficulties as well as the exchange control regulations would make it almost impossible for her to obtain the fruits of her litigation. Many international institutions have taken up this question with a view to securing an early solution, as the various

problems that have been created by deserted wives and children during the period after the cessation of World War I and more and more governmental and voluntary bodies studied these problems and made renewed efforts to solve them as the problem of deserted wives and children became serious after World War I, and it became a world problem by the end of World War II. During the period of the War, military personnel stationed in foreign countries contracted matrimonial alliance in these countries and on the cessation of hostilities returned to their countries, leaving the wives and children behind. The numbers of such cases assumed such proportions that not only international institutions and bodies but also governments of various countries have appointed commissions to go into this matter. Further, there is no uniformity in the recognition of foreign divorce decrees. Under the existing systems of law, divorce valid in one country may not be valid in another country.

Even in the countries which recognise decrees entered by a foreign court, there is no uniformity on the question whether the mandatory part of a decree ordering maintenance could be enforced. An attempt is made to place before the Committee various efforts made to tackle these problems.

Earlier efforts made in other countries

Attempts were made by a number of governments to ensure reciprocity of matrimonial decrees by the Hague Convention of June 1902, but this has been almost a dead letter. The Bustamante Code of 1928 which dealt with this matter was ratified by most of the South and Central American States. In Europe, except for the Scandinavian Convention of 1931 and two or three bilateral Agreements on this topic between two or three central European States, the conflicting situation still remains. Mr. Jaffe, sometime the Secretary-General of the International Law Association failed to move the International Law Commission of the United Nations to consider this Convention.

The Draft Convention of the International Law Association

A draft convention for the mutual recognition of judgments in divorce and nullity of marriage was adopted by the International Law Association at the Conference at Prague in 1947. This project was intended to mitigate the rigours and hardships which involved a number of people who were free from the legal tie of marriage in one State but were legally bound in marriage according to the law of the State to which they belonged. Such marriages have been called "limping marriages", a term of art adopted by the

Royal Commission on Marriage and Divorce of Britain. The purpose was that this Draft Convention should form the basis of a treaty or convention between one State and another. The scheme received the blessing of the American branch. It was drafted by a Committee of Experts on which one of the leading English authorities on the law of divorce, Mr. William Latey, Q.C. was a member. Its terms were first adopted at the Oxford Conference in 1932. It was later amended at the Cambridge Conference in 1946, and was finally put into the shape in which it was received at the International Law Association in 1947. The plan, however, received no support from any of the governments in Europe. It is an attempt to get rid, as far as it is practicable of the anomaly by which a person divorced in one country may yet remain lawfully married in another country. It was the result of work of experts on the principal systems of law for a period of over 20 years. The Draft Convention got round the conflicts of jurisdiction by providing for alternative bases of jurisdiction i.e. (1) domicile (2) nationality (3) eighteen months continuous residence. The main features of the plan adopted at Prague may be outlined as follows:

(1) By an International convention, each contracting State will legislate that any final decree of divorce, a **vinculo matrimonii** pronounced by a competent court in such State, shall at the request of either party to the suit, be recorded in the competent court of any other contracting State, which shall hold such decree valid.

(2) Such decree must be a final one, pronounced by a competent court of the State (a) in which the spouse is domiciled when the suit is instituted; or (b) of which, according to the **lex fori**, either party is a national when the suit is commenced; or (c) in which either party has resided for at least a year of the eighteen months immediately preceding the institution of the suit.

(3) When the **lex fori** so requires but not otherwise, the domicile of a married woman shall be the same as that of the husband.

The lack of uniformity in regard to jurisdiction in divorce arises from different principles applied in different States. Some States adopt domicile as the basis of divorce jurisdiction as in the British courts (subject to some amendments) and Ceylon courts. Others accept nationality as the basis (as in certain European States). Still other States adopt residence as in certain European countries and in the United States of America.

The Prague Draft Convention proposed certain safeguards against the abuse of the system by any State setting up a sort of

divorce where a divorce may be had for the asking, whatever the merits of the matrimonial difference. The safeguards include (a) a minimum period of actual residence, and (b) a provision by which mutually contracting States will specify which courts are competent courts.

The views of the Royal Commission on marriage divorce in England

The British Royal Commission on Marriage and Divorce has been considering the whole problem of the conflicts of divorce jurisdiction including the Prague Convention of 1947, and its main recommendations, summarised by William Latey, Q.C. appeared in an article entitled "Jurisdiction in Divorce and Nullity", (see the International and Comparative Law (Quarterly) October, 1956, p. I et seq) The Commission's proposals may be set out briefly as follows:

So far as jurisdiction in divorce suits is concerned, (1) the Court shall have jurisdiction if at the commencement of the suit (a) the petitioner is domiciled in England; (b) the petitioner is in England and the last joint matrimonial residence was in the same place; and (c) the parties to the marriage are both resident in England. Provided that no decree will be granted under (b) and (c) unless the personal law or laws of both parties recognise a ground sufficient for a divorce or nullity—a ground substantially similar to that on which a divorce is sought in England. (2) Personal law or laws of both parties would in the circumstances of the case permit the petitioner to obtain a divorce on some other grounds. In this context, the word "England" must also include Scotland.

In addition to the jurisdiction referred to, courts in England and Scotland may also hear cases of divorce if the petitioner is a citizen of the United Kingdom and Colonies within the meaning of the British Nationality Act, 1948 and is domiciled in a country the law of which requires questions of personal status to be determined by the law of the country of which the petitioner is a national and not on the basis of the petitioner's domicile or residence. In such cases the issues are to be determined by the domestic laws of England and Scotland as if the petitioner was domiciled in these countries when the suit is commenced.

The recommendation, if accepted, will enable the courts in England and Scotland to hear a suit for presumption of death coupled with the dissolution of marriage if, when the suit is commenced, the petitioner is domiciled or resident in these countries.

The Commission also dealt with the vexed question of wives being allowed, under the laws of the United Kingdom, a separate domicile. It decided that the wife's separate domicile should be recognised only for the single purpose of divorce jurisdiction. Thus, the right of the wife to bring an action for divorce on the ground of residence was recognised. The Commission, however, generally refused to recognise the separate domicile of the wife for other purposes as such a course would be inconsistent with the pirnciple of life-long partnership.

THE VIEWS OF THE ROYAL COMMISSION ON FOREIGN DECREES

The Commission also went into the question of foreign decrees. It recommended that the courts in England and Scotland should recognise the validity of a divorce decree obtained by judicial process or otherwise:

(a) According to the law of (i) the domicile of both spouses or (ii) the domicile of either spouse or

(b) If it is such that it would be recognised by the law of the country of the either spouse; (Armitage v. A.G. (1906) p. 135). (In such cases the European conception of domicile as approximating to habitual residence would be accepted).

(c) According to the law of the country of which one spouse was a national or both were nationals or would be recognised by the law of such a country.

(d) In circumstances substantially similar to those in which the courts in England exercise divorce jurisdiction in respect of persons not domiciled in either England or Scotland.

(e) Before the coming into operation of any statute altering the basis of divorce jurisdiction in England or Scotland, in circumstances substantially similar to those in which the courts in those countries exercise jurisdiction on the date of the divorce; or

(f) In any other Commonwealth country within a period of three years after the coming into operation of any statute altering the basis of divorce jurisdiction as obtained in England and Scotland in circumstances substantially similar to those in which the courts in England and Scotland exercise divorce jurisdiction before the alteration of the jurisdiction took place; or

(g) Any country designated in the Order-in-Council.

The Commission also considered the question of religious divorce. Many European women of the Christian faith were married to men who belonged to other religions. In such cases the question that arises is whether the husband could obtain a valid divorce if it is one recognised by his religious law. The Commission took the view that in some cases the spouses would be subjected to personal laws—one imposed on them by their religion and the other by their domicile or their nationality, and took the view that the latter should prevail without creating hardships for English or Scot women who so marry.

Under the head the "nullity of marriage" the Commission reviewed the anomalous state of the law governing jurisdiction in England arising out of decisions which seem largely to have ignored the principles and procedure of the old ecclesiastical codes that have been perpetuated by statutes. In these courts jurisdiction and nullity were based on the residence of the applicant in any particular diocese. The domicile did not enter into such a matter. Under the common law, unaltered in that respect, there was no distinction between void and voidable marriages. The Commission, however, distinguished between void and voidable marriages and recommended it as the basis of jurisdiction and recognised this distinction when they discussed the basis of jurisdiction. In the case of void marriages, they proposed that either putative spouse may apply for a declaration of status if he or she was domiciled in England or Scotland when the suit is commenced. If the marriage is alleged to be void on any ground other than the lack of formalities, the issue will be determined according to the personal law of one or other or both the parties. But if the marriage is celebrated outside England or Scotland, it will not be declared void if valid according to the law of the country in which the parties intended to make their matrimonial home. The Commission also considered the problem of marriages which were declared null and void as a result of colour bar in certain States such as the Union of South Africa and some States of the United States of America. Such cases were not, however, regarded by the Royal Commission as raising a valid objection to their proposal inasmuch as the court decree is merely declaratory of the position under the personal laws of the party. In the case of voidable marriages, they recommended that the court in England and Scotland be deemed to have jurisdiction if at the commencement of the suit (a) the petitioner is domiciled in these countries (b) the petitioner is resident in these countries, provided the place where the parties last resided was in these countries and (c) the spouses are resident in these

countries when the place where the parties last resided was in these countries and (d) the spouses resided in England. There is also the important proviso that the courts will not grant a decree unless the personal law of one or other or both at the time of the marriage recognises as sufficient a ground for nullity of marriage substantially similar to one on which annulment is sought for in England or in Scotland. The Commission also considered the question of foreign decrees of nullity and the proposed basis of jurisdiction in nullity suits in the draft code which is substantially the same as that of divorce. To facilitate the proofs of foreign law, they proposed that in any matrimonial proceedings, the certificate in writing of an accredited embassy or legation official, duly authenticated by seal, shall be admissible as evidence of the law of that country and the fact that a ceremony of marriage has taken place in another country may be proved by evidence of one of the parties to the marriage by a local marriage certificate.

A HISTORY OF THE DRAFT CONVENTION ON THE RECOGNITION AN DENFORCEMENT ABROAD OF MAINTENANCE OBLIGATIONS

By its resolution 390 H (XIII), the Economic and Social Council requested the Secretary General to convene a Committee of Experts in order to frame the text of a model convention or model reciprocal law, or both, on the enforcement abroad of maintenance obligations. The resolutions of this Committee were to be submitted to this Council not later than at its sixteenth session for its consideration and recommendations to governments.

It was also agreed that members of each branch should urge upon their respective governments to give instructions to their delegates at the United Nations to press their adaption.

The draft convention was approved by the United Nations on 20th June, 1955 in New York by 41 States and actually signed by 17 including the Scandinavian countries and other countries in Europe (See speech of Mr. Latey, Q.C. at the Dubrovnik Conference—1956 p. 386).

The Secretary General appointed a committee of seven members consisting of:

1. Mrs. Marcelle Kraemer-Bach, Member of the Bar Paris, France.

2. Professor Kurt Lipstein, Trinity College, Cambridge, United Kingdom, replacing Professor Harold Cooke Gutteridge, University of Cambridge, United Kingdom, who was unable to attend.

3. Mr. Maris Matteucci, Secretary General of the International Institute for the Unification of Private Law, Rome.

4. Mr. Anis Aaleh, Director General at the Ministry of Justicem Beirut, Lebanon.

5. Professor Edward Marrits Meijers, Leyden, Netherlands.

6. Professor Francisco Clementino de Santiago Dantas, Member of the Bar, Rio de Janeiro, Brazil.

7. Professor Hessel Edward Yntema, University of Michigan, Ann Arbor, Michigan, United States of America.

The Committee met at Geneva from the 18th to the 28th August 1952, and prepared a report (E/AC. 39/1) which contains very valuable information regarding the background of the Committee's work, its composition and organisation and the result of its deliberations. Two draft conventions were drawn up by the Committee, namely:

(1) draft convention on the recovery abroad on the claims for maintenance;

(2) draft of a model convention on enforcement abroad of maintenance orders.

These draft conventions were intended to ameliorate the conditions of women and children deserted without means of subsistence by those who were responsible for their support and who have gone to another country. Before the 2nd World War, the largest group of this category consisted of the wives and children of immigrants who established themselves in a new country and failed to support their dependents. After the war, the number of abandoned women and children has greatly increased in view of the mass displacement of military personnel who returned to their homeland and who were married while they were stationed outside their home country. A claimant who seeks to enforce her right against a man who lives in another country is faced with considerable legal difficulties and expense. On the initiative of various benevolent societies, several attempts were made in the past two and half decades to find legal means which would alleviate their sufferings and make it easier for them to obtain support from

the defaulter abroad. The preparatory work on this subject before the War was done by the Internaitonal Institute for the Unification of Private Law under the auspices of the League of Nations. But this commendable effort was interrupted by the War. After the War it was taken up by the United Nations.

At the instance of the Social Commission, the Institute prepared a draft convention which was submitted by the Secretary General to States for their comments. This draft was considered at the th Session of the Council in August 1951. More States, such as Argentina, Belgium, Italy and the Philippines have indicated their general approval of the Institute's draft (E/CN. 5/236). Other governments such as the United States (E/CN-5/236, p. 33) and the United Kingdom (E/CN.236), struck a dissentient note and stated that the Institute's draft cannot be used as a working basis for an international convention because it was not considered suitable to the legal system of their countries. Subsequently the Council by resolution 390 (XIII) requested the Secretary General to prepare one or two working drafts and to convene a Committee of Experts, using the Secretary's draft as the basis when reporting the text of one or more model conventions to be submitted to the Council. A Committee of Experts from seven countries met in Geneva in August 1952 and considered the two draft conventions submitted to them by the Secretary General.

The Committee also had before it a number of documents which had beep prepared when the Special Commission and the Economic and Social Council had considered the question on enforcement abroad of maintenance obligations in 1952. Among these documents were Secretary General's report, the draft convention and explanatory report of the International Institute for the Unification of Private Law and the comments of the Governments of Argentina, Belgium, Burma, Canada, Chile, Denmark, Egypt, India, the Netherlands, Norway, Pakistan, the Philippines, Sweden, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, the comments of specialised agencies, namely, the International Labour Organisation and the International Refugee Organisation, the comments of the Parliamentary Non-Governmental Organisation, the International Committee of Red Cross, the International Federation of Free Trade Unions, the Canadian Welfare Council, the Family Welfare Association, the International Law Association, the Catholic Union for Special Services, the Inter-Parliamentary Union of the United States for New Americans.

The Committee also had before it a resolution adopted by the 2nd Conference of non-governmental organisations interested in immigration and the documents of some of the records of relevant discussions held in the Economic and Social Council. It also had a resolution adopted by the 3rd conference of non-governmental organisations interested in immigration, a communication from the International Union for Child Welfare relating to illegitimate children whose fathers belong or belonged to troops stationed outside their home countries and a note from the International Labour Office in connection with the transfer of funds.

After a careful and exhaustive study of the two preliminary drafts sent by the Secretary General, the Committee took the view that a new solution to the problem could not be effected by trying to achieve any degree of uniformity in the laws of different countries as regards the enforcement of foreign judgments. For these reasons, the Committee thought it advisable to develop the system contained in the Secretary General's 2nd draft which envisaged the establishment of judicial and administrative co-operation between States and provide for effective legal assistance to claimants for maintenance. It was thought that many States would enter into the convention on the basis of this system. It also suggested that States should examine the possibility of making further progress by concluding bilateral or multilateral treaties or by adopting a uniform set of laws aimed at achieving uniformity in the procedure on enforcement of foreign maintenance orders.

Therefore it decided to try separately the question of the enforcement of orders of foreign courts from the distinct question of assistance to claimants for maintenance and to deal with the latter under what they call the draft multilateral convention.

In drafting the multilateral convention, the Committee departed from the system of the United States Uniformity Laws in not adopting the procedure whereby an action commenced in one court should continue in another. It also made an effort to reduce to the absolute minimum the provisions involving change in the procedure of the various countries. States were free to make their own choice of establishing agencies responsible for carrying out the functions provided in the convention and to employ methods of judicial co-operation already in vogue in international practice such as letters and requests. The procedure adumbrated by the draft multilateral convention (Annexure 1) prepared by the Committee may be succinctly stated as follows:

(a) a preliminary and summary hearing in the country where the claimant resides, the findings of which could be used by the court where the action is commenced;

(b) immediate and direct transmission of documents and conveyance to the agency in another country so as to avoid loss of time which is inevitable when the usual red-tapism is followed by sending the papers through the usual diplomatic or consular channels;

(c) the prosecution by the receiving agency of maintenance actions on behalf of the claimants and in the courts of the respondent's country;

(d) all possible facilities with regard to legal aid and, if funds are realised, as a result of the enforcement of the decree, for the sending of the funds to the claimants by relaxing the Exchange Control Regulations.

The draft convention prepared by the Committee is set out in Appendix III of this report.

The Draft on the Enforcement Aabroad of Maintenance obligations

In preparing the draft on the enforcement abroad of maintenance obligations, the Committee substantially followed the text prepared by the Secretary General, which was based on the draft of the International Institute for the Unification of Private Law. Having stated that this draft was not appropriate for use as a model for a multilateral convention the Committee recommended to the Governments that this draft may be used as a model bilateral treaty or uniform law.

ADOPTION OF THE DRAFT CONVENTION OF THE COMMITTEE OF LEGAL EXPERTS

At the 1954 Edinburgh Conference of the International Law Association the proposals contained in the Draft Convention known as Annex I of the report of the Committee of Legal Experts, appointed under the United Nations for recovery and enforcement of maintenance orders, were adopted but emphasis was laid on the necessity for introducing therein a specific article whereby a maintenance order would be mutually enforceable as between the contracting States, notwithstanding the fact that such order may be subject to variation by the court that makes it. The Conference further recommended that Article 9 of the Convention (Annex I) should be amended to read as follows:

"The provisions of this Convention apply to maintenance orders as originally made or as made from time to time."

The members of the Association through the intermediary of each branch were requested to urge upon their respective governments to give instruction to their delegates at the United Nations to press for the adoption of this Convention (Annex 1) without delay (See Report of the 46th Conference of the Intrenational Law Association, 1954, p. 357).

Mr. J. H. C. Morris in his article "The Recognition of American Divorces in England" (See the British Year Book of International Law (1952)) has ably shown that, if one adopts the draft Convention of the Committee of Legal Experts, the special defences available in England for attacking a decree of divorce such as that it is against public policy or that it is defective as a result of procedural errors or fraud has been practised to obtain the decree or that there has been want of notice or that the foreign court lacked internal competence, or that, in practice such a court is ineffective in dealing with foreign decrees, will not be available.

Recommendations

It is suggested that the Committee should adopt the Annexure 1 set out in the report of the International Legal Experts which is set out in Schedule III as a basis on which legislation could be introduced in the countries of the Asian Legal Consultative Committee as it is the best solution so far offered on a difficult subject. It is also recommended that bilateral agreements be entered into between States on the lines suggested by th Royal Commission on foreign decrees subject to necessary changes or to adopt the draft conventions for the mutual recognition of judgments on divorce and nullity of marriage adopted at the Prague Conference in 1944.

The difficulties of the Draft Convention of Internal Experts

At the Sessions of the International Law Association, held on the 12th August 1954, Mr. W. Percy Grieve of the United Kingdom summarised the proposals of the draft convention prepared by the Committee of Experts of the United Nations and also set out the difficulties of administering this scheme. He said (See the Report of the 46th Conference held at Edinburgh in 1954, p. 350)—"The proposal of the draft convention, if I have properly understood it, appears to be as follows:

A wife deserted by her husband may go to an organisation in her own country, which if it is satisfied that she is married to the man in question and that she has a **prima facie** case, would then

transmit the dossier to country of the husband. There the husband could be summoned before a court or a judge and asked if he admitted deserting his wife. No difficulty of a practical kind would arise if he did admit it. On the other hand, it is plain that his answer might raise issues of a very complex kind. He might, for instance, say that far from having deserted his wife, she had turned him out or that she was living in adultery and for that reason he had left her. Such issues would have to be tried before the husband could be compelled to maintain his wife. Madame Kraemar Bach suggested that the draft Convention provides for the evidence of the husband in such a case to be taken by means of a Commission Regatoire. That would mean, I presume, that the husband (and his witnesses) would have to testify before a judge or court or magistrate and have their depositions taken. In the same way, presumably, the evidence of the complaining wife would have been taken (or would be taken) in her own country. This method of hearing the parties would appear to give rise to the following difficulties:

"(a) How is the evidence of the respective parties to be tested? Unless it were tested by cross-examination or, at any rate, by a close interrogation by the presiding magistrate (a method which is alien to English law) such testimony would be of little value. Clearly, therefore, the draft Convention is defective to that extent, if no provision is made for the parties to be represented by counsel or advocate.

(b) If such provision is made it will entail, as well indeed the whole scheme, very considerable expense. Has attention been drawn to this matter, and is it thought that the governments of the respective countries concerned will be prepared to bear the expenses involved? In the United Kingdom, such expenses might be provided for under the Legal Aid Scheme, but not all countries have such a scheme.

(c) In which country is the final decision on the merits of the issues between the parties to be decided: in that of the husband or in that of the wife? Justice would seem to require that the final decision of establishing her case must clearly be on the wife.

(d) Has attention been paid to the dangers which will arise if the final decision on the issues between the parties is to be given by a judge who has been one of the parties (and his or her witnesses) in person and has not seen the other, but only his or her deposition? There would seem to be at least some likelihood of such a judge being sympathetic towards the party whom he has seen, if that party

is a good witness." Hence Mr. Grieve tentatively suggested for the consideration of the meeting that justice might better be done if the final decision between the parties were given by a third judge who has seen neither of them, after the study of the depositions.

At the Edinburgh Conference (1954) the International Law Association approved the draft Convention known as Annex 1 of the Committee of Experts appointed under the United Nations for the recovery and enforcement of maintenance orders, but emphasised the necessity of introducing therein a specific article whereby a maintenance order should be mutually enforceable as between the contracting States, notwithstanding the fact that such order may be subject to variation by the Council which makes it. The Conference recommended that the Article 9 of Annex 1 shall be amended to read as follows: "The provisions of this Convention apply to maintenance orders originally made or arranged from time to time".

Guardianship and Custody of Infants

Closely connected with decrees for divorce is the subject of guardianship and custody of infants. A distinction should be drawn between guardianship and custody. A distinction is drawn between guardianship and custody both made in English common law and systems based on the civil law. Custody concerns the rights of parents or one of the parents to determine the upbringing of the child. The rights and actual care and control and of access form the totality of rights covered by custody. Guardianship connotes the care and control of children who are alone in the world, either because these parents are dead or cannot be traced or because they are unable to look after these children.

International Conventions

International conventions deal only with the broader aspect of guardianship. Reference may be made to the following treaties and conventions on this matter:

The Hague Convention Concerning Guardianship of Infants of 12th June, 1902, Treaties of Montevideo of 12th February 1889, Second Montevideo Treaty on International Civil Law of 19th March 1940, Bustamante Code of 13th March 1928. These conventions combine provisions regarding jurisdiction to appoint guardians and to frame rules governing choice of law. The Hague Convention emphasises the pre-eminent jurisdiction of the courts of the country whose nationality the prospective ward possesses (Art. 2) but also recognises the supplementary jurisdiction of the

courts of the prospective ward's residence (Art. 2). It allows even a cumulation of guardians (Art. 4). The **lex patriae** is to apply uniformity (Arts. 1 to 5) and the guardian who is so appointed is to be recognised by all contracting States except where the **lex situs** of property exclude it (Art. 6). The local authorities here also could act in accordance with these laws. (See Makarov Quellendes Internationalen Privatrechts (1929) p. 352, Martens Recueil 2nd Ser. XXXI, p. 724). The Treaties of Montevideo of 12th February 1889 combine in principle jurisdiction and choice of law by concentrating the proceedings in the courts of the residence of the prospective wards (Arts. 19-20). (See Treaties of Montevideo of 12th February, 1889, Makarov, p. 269, Martens Recueil 2nd Ser. XVIII—pp. 443-53).

The second Treaty of Montevideo of 19th March 1940 follows in practice the previous convention. Jurisdiction to appoint a guardian is concentrated in the courts of the domicile of the prospective ward (Art. 26). The law of the ward's domicile determines the rights and duties of the guardian (Art. 27). There is a proviso that where the ward has property abroad, the law of domicile of the ward is to be applied in conjunction with the **lex sitae** (Art. 28). (For the text the Second Montevideo Treaty on International Civil law of 19th March 1940 vide 1943, 37 American Journal of International Law, Supplement 141). The Bustamante code of 13th February 1928, (See Makarov, p. 397) lays emphasis upon the regulation of the Choice of law (Arts. 84, 86, 87, 88, 93 and 94). The right of authorities to intervene is governed by the **lex fori** (Art. 91). Thus the courts of the prospective ward's national State or domicile do not enjoy a pre-eminent jurisdiction.

Custody of Infants

Custody of infants presents a more complex problem. Questions of custody often arise between husband and wife who live separately and is often embodied in decrees for divorce.

Several jurisdictions may be concerned especially if one of the parents has taken the child abroad. Further custody orders are variable and may require revision. The problem of choice of law may be complex as to nationality, domicile or residence of the respecitve parents and possibly of the child differ from each other.

In English private international law, the distinction between guardianship of infants proper on the one hand and the custody (including access) of infants on the other hand, is not clear. At common law the father is the guardian and the proper remedy