STUDY

OF

DISCRIMINATION AGAINST PERSONS BORN OUT OF WEDLOCK

UNITED NATIONS

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All references to countries are made for illustration purposes. They are, by no means, intended to be an exhaustive listing of the countries where the specific situations described are prevailing.

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NOTE

The *Study of Discrimination against Persons Born out of Wedlock* is the fifth of a series of studies undertaken by the Sub-Commission on Prevention of Discrimination and Protection of Minorities with the authorization of the Commission on Human Rights and the Economic and Social Council. A *Study of Discrimination in Education*, the first of the series, was published in 1957 (Sales No. : 57.XIV.3), the *Study of Discrimination in the Matter of Religious Rights and Practices*, the second, was published in 1960 (Sales No. : 60.XIV.2), the *Study of Discrimination in the Matter of Political Rights*, the third, was published in 1963 (Sales No. : 63.XIV.2), and the *Study of Discrimination in Respect of the Right of Everyone to Leave any Country, Including His Own, and to Return to His Country*, the fourth of the series, was published in 1964 (Sales No. : 64.XIV.2). The Sub-Commission is now preparing studies on equality in the administration of justice and on racial discrimination in the political, economic, social and cultural spheres.

The views expressed in this study are those of the author.

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INTRODUCTION

I. Historical background

Discrimination against persons born outside the accepted family structure dates many centuries back in the history of mankind. Such persons, because of the nature of their birth, were placed in a category which was inferior to that enjoyed by persons born within the framework of the prevailing family pattern.

It would be far too ambitious and perhaps impossible to give a complete picture of the historical evolution of the problem under study within all the various family systems which have existed. The purpose of the paragraphs which follow is much more modest; they are aimed at casting some light on the general approach to the subject in certain of the important systems of law or societies through the centuries, or in recent decades only.

Before the end of the Roman Empire, proceedings to establish paternity were unknown. The rights and obligations attached to the " *Patria Potestas* " belonged to the father of the legal family, and as the aim was to secure its continuity, the problem of persons born out of wedlock did not arise. Under Germanic laws the situation was different. With their insistence on monogamous marriage, persons who were born outside the established family pattern were placed at a considerable disadvantage, legally as well as socially. The concept of the family introduced by the Christian Church completely transformed the legal and social position of persons born outside the family structure. According to Christian teachings, the family was based on the sacramental character of a single indissoluble marriage. Paternity and maternity were the result of the procreation in wedlock. The category of persons born in wedlock was therefore limited. As a result, later, in the Roman Empire, concubinage was disavowed and, in order to bring about its disappearance, the emperors introduced various restrictive measures preventing persons born out of wedlock from being placed on the same footing with those born in wedlock. Thus, the former were made to suffer the consequences of the extra-marital relationship of their parents. One of these measures was to place persons born out of wedlock under certain legal disabilities and in a position inferior to that of persons born in wedlock. Gradually, however, a tendency developed towards the elimination of at least some of the various disabilities suffered by persons born out of wedlock. Emperor Justinian was the first to grant persons *nati concubinatu*, the right to maintenance and certain limited rights of inheritance, as for instance in cases when the father died intestate or when there were no direct heirs born in wedlock. However, persons born of adulterous or incestuous relations vere denied even the right to maintenance.

With a view to improving the legal and social position of persons born out of wedlock, some of the Roman emperors introduced various forms of legitimation. Thus, Emperor Constantine introduced legitimation by subsequent marriage of the parents, and Emperor Justinian made it a permanent institution subject to a few conditions. This method of legitimation gave persons born out of wedlock the same legal status as those born in wedlock, but without retroactive effect. For cases in which the legitimation by subsequent marriage of the parents was rendered impossible, Emperor Justinian introduced legitimation by imperial rescript.

Canon law recognized the principle of legitimation of persons born out of wedlock by subsequent marriage of the parents. In the case of persons born of adulterous or incestuous relations, legitimation by a a papal rescript was in some instances practised until the end of the sixteenth century, in order to enable a person born out of wedlock to accede to an ecclesiastical office. The Germanic customs and laws in many respects followed the rules adopted by canon law.

Despite these efforts the social position of persons born out of wedlock among the common people remained inferior to that of persons born in wedlock, as was evidenced by the use of a designation such as " bastards ". Quite often these persons were serfs of the feudal lords and the only result of the establishment of paternity was usually the right to maintenance.

Towards the end of the Middle Ages, Roman law was introduced in a great many countries. This development brought about a more favourable attitude towards persons born out of wedlock. The principle that every child was a legitimate child of his mother was gradually recognized in many countries and the establishment of paternity was generally permitted, though its effects were still limited to the right to maintenance.[1]

In pre-Islamic times a rigid form of patriarchal system, quite similar to that practised by the Romans with the " manus " and by the Franks with the " mundium " was predominant among the Arabs.[2] It is probable that prior to the patriarchal system, pre-Islamic Arabia had had a different family system, in which kinship existed only through women and the family was constituted and continued only in the female line. At that time, such a family régime was consistent with a stage of civilization in which maternal origin was considered to be the only basis on which filiation could be established with certainty. Many centuries were to elapse before the bond between father and child could be deemed to be solidly established, the presumption being that under the patriarchal system, the institutions of marriage and of concubinage with a female slave ensured a monopoly of sexual relations.

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[1] The summary appearing in the preceding paragraphs is based upon information appearing in *The Study on the Legal Position of the Illegitimate Child* (League of Nations publication, C.70.M.24.1939.IV), pp. 6-10.

[2] The description contained in this and the three following paragraphs is drawn from M. L. Milliot's *Introduction à l'étude du droit musulman* (Sirey, 1953), pp. 268-270.

The patriarchal system was current throughout Arabia even before the seventh century. On the eve of the Hegira (Mohammed's departure from Mecca in 622 A.D.), marriage by purchase was practised. Woman was henceforth physically dependent on one man alone, and the resulting monopoly of sexual relations gave the greatest possible certainty of paternity. In this way, the patriarchal family remained in existence and prospered.

Mohammed introduced substantial reforms in the organization of the family. Many verses of the Koran and an even greater number of " hadiths " are devoted to this theme. Together, these make up a complete set of rules governing marriage, which is carefully distinguished from concubinage. As a whole, these reforms were very progressive. But they were far too advanced for the primitive customs of most of the societies that were to become part of the Moslem community as a result of the rapid spread of Islam. Reactions were therefore to be expected. First, judicial practice succeeded in whittling down the legal advantages granted to women by the Prophet; secondly, whole regions refused to accept any change whatever in the patriarchal family status and continued to follow their old legal customs; finally, for many centuries Moslem society progressed but little or not at all, so that there was no opportunity for the patriarchal régime to become more flexible.

It is only in modern times that a change, brought about by altered living conditions, but still in accordance with the principles of the Koran, has taken place in the family law governing Moslems.

In early Hindu society, an individual had no existence apart from the group to which he belonged, that is, the patriarchal family. The concerns of that group were the responsibility of its head, usually the eldest living ascendant and the group was guided by him.[3] Society was very much unsettled in those times and sexual relationship between man and woman was very loose. Therefore all kinds of sons, some of whom were not the sons of the father and others not even born to his wife, were recognized for the protection of the house and land of the head of the group, which, in the absence of men superior in strength and number, were often threatened with deprivation by his neighbours.[4] Several categories of persons born out of wedlock used to be recognized: (*a*) illegitimate sons of a Hindu belonging to one of the three higher classes by a *Dasi*, that is a Hindu concubine in the continuous and exclusive keeping of their putative father; (*b*) illegitimate sons of a *Sudra* (a lower caste) by a *Dasi*; (*c*) illegitimate sons of a Hindu by a Hindu woman who is not a *Dasi*; (*d*) illegitimate sons of a Hindu by a non-Hindu woman.[5] But with the settling down of society to peace and order, the idea of family relationship received a better definition, and only the *Aurasa* or legitimate son, the *Dattaka* or adopted son, and the *Dasiputra* or son by a permanently and exclusively kept concubine were accepted.[6]

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[3] Drawn from N. R. Raghavaghariar *Hindu Law, Principles and Precedents*, The Madras Law Journal Office, Madras, 1947, p. 251, para. 232.

[4] *Ibid.*, p. 78, para. 69.

[5] *Ibid.*, p. 635, para. 551.

[6] *Ibid.*, p. 78, para. 69.

The rule has been and still is that a person born out of wedlock is related to his mother for all purposes and is related to this father for limited purposes only.

The old common law of England denied rights to a child born out of wedlock. Such a child was called a " bastard " or *filius nullius* — nobody's child — a term that accurately described his legal status. Common law recognized no legal relationship between a father and his child born out of wedlock, nor, indeed, between the mother and her offspring. Unlike the legal systems of Europe, English law refused to allow a " bastard " child to be legitimated by the marriage of his parents after the birth, although canon law recognized such legitimation. A person born out of wedlock could not acquire the status of a person born in wedlock except through a special Act of Parliament, this procedure was very rarely used because it was costly. The most famous example was that of the legitimation of the children of John of Gaunt, by a Statute of Richard II (1377-1399).

Because no legal relationship was held to exist between a " bastard " and his parents, a child born out of wedlock had no legal guardian, not even his mother, although she was regarded as having the natural right to the custody of such a child. The parents of such a child were under no civil obligation to maintain it, and the child had no right to inherit from either father or mother. In 1576, however, during the reign of Queen Elizabeth, a law was enacted compelling the father to contribute to the support of his child born out of wedlock if his identity could be established. No important change was made in England's illegitimacy laws until recent times. In 1918, the old Elizabethan law requiring support of the child by the father was amended and improved, but no fundamental change was made in it. In 1926, however, a Legitimacy Act was passed which reflected a marked alteration in popular sentiment regarding the child born out of wedlock and his rights of inheritance. More recent laws have confirmed this trend.

The French Civil Code of 1804, generally known as the *Code Napoléon*, was directly influenced by Napoleon's own views on the family and society. The Emperor wished to make the family an indestructible cell in a rigidly disciplined society. The *Code Napoléon* exercised considerable influence in large parts of the world. It was adopted by the legislation of various countries, particularly in Europe and Latin America. Most countries have now broken with it completely and have enacted new Family Codes, others have amended their legislation in the course of 150 years of social, economic and political upheaval, while retaining some important provisions of the 1804 Civil Code, or have adopted a system derived from it.

In France, whereas eighteenth-century philosophy had opposed the idea that children born out of wedlock should have an inferior standing in society — considering that it would be inhuman to impose the consequences of his parents' " sin " upon a child — and whereas under the Revolution, an Act dated 12 Brumaire of the Year II guaranteed to such children equality of rights with children born in wedlock the framers

of the Civil Code reacted sharply against such liberal tendencies. They considered that the family had to be protected against the intrusion of children born out of wedlock and that society must cease to concern itself with such children. As a result, the latter's rights were reduced and any tendency to assimilate them as children born in wedlock disappeared [7].

The reactionary position adopted by the Civil Code has not been maintained. A study of the relevant laws enacted and the legal decisions taken since the middle of the nineteenth century, which have been extremely numerous, leads to the conclusion that these laws and decisions, inspired by an almost unanimous trend of opinion, have, as a whole, brought about a very substantial improvement in the status of children born out of wedlock.

Regarding Spain and the Hispanic American countries,[8] legal discrimination against persons born out of wedlock has been eliminated or nearly eliminated in only a few American republics but, in the last one hundred years, definite improvement has taken place in this respect in all the countries included in this group.

The main statutes existing in Spain and particularly in Castile at the time when the Spanish state was being formed, (Fuero Juzgo (671), Fuero Viejo de Castilla (1212), Fuero Real (1255) and the Siete Partidas (1265)), outlined a system which was to remain basically the same for many centuries and which may be succinctly enunciated as follows: Illegitimate children were divided into " natural " and " non-natural " children, on the basis of whether the parents did or did not have legal impediments to marry each other at the time of conception. Children born as a result of adulterous, incestuous and sacrilegious relations had inheritance rights from their father intestate as well as in intestate succession. Legitimation required the acknowledgement of the child by the father and granted the legitimated child full rights as from the date of the legitimating act which *inter alia* could be the subsequent marriage of the parents to each other, an imperial or royal rescript, a testament, a handwritten or notorial document. Guardianship was granted to the father, the mother only having custody of her children in specified circumstances. The Laws of Toro (1505) liberalized these rules by referring considerations for the classification of children to the time of conception, and improved the inheritance rights of natural children in the succession of their father, although it extended this arrangement to succession from their mother.

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[7] Drawn from Planiol et Ripert, *Traité pratique de droit civil français* vol. II, Nos. 721 and 722 (1952).

[8] The summary appearing on this and the following page, was prepared on the basis of information contained in one or more of the following publications: *Enciclopedia Universal Ilustrade Europeo-Americana Espasa Calpe*, Espasa Calpe, S.A., Madrid 1920 (especially volumes XXIV and XLII); *Códigos Antiguos de España, . . .*, publicados por Marcelo Martínez Alcubilla. Administración. Madrid, 1885; Ots Capdequí, José María. *Manual de historia del derecho español en las indias y del derecho propiamente indiano*. Editorial Losada. Buenos Aires, 1945; Gómez Morán, Luis. *La posición del menor en el derecho comparado*. Madrid, 1941. In drafting this summary, the content of annex IV of this report, as well as that of Conference Room Papers Nos. 12, 22, 31, 43, 44, 69, 70 and 71 has been taken into account.

This was the system (basically Castilian) which the Spanish conquerors brought with them to the New World and which was made to prevail over pre-columbian institutions (Aztec, Inca, Maya etc.). It remained in force throughout the Spanish colonial epoch, both in Spain and in the then Spanish America, since no basic change was introduced in such a system by any of the major compilations of Spanish law of that period,[9] nor by the compilation of the Laws of the Indies.[10]

In the nineteenth century, civil codes were adopted in the Hispanic American countries which had attained independence from Spain, as well as in Spain itself, (the Spanish Code was later extended to the remaining Spanish colonies). In spite of the reactionary impact of the *Code Napoléon* felt in varying degrees in the initial codification efforts, these codes, and particularly their amendments as well as new codes adopted later, show a clearly discernible trend toward liberalization of the status of persons born out of wedlock. This trend has been greatly accentuated since the 1930s and today the status of persons born out of wedlock has definitely improved in all these legal systems. The constitutions of several of these countries contain provisions regarding the status of persons born out of wedlock (either an improved status for them, or their full equality with persons born in wedlock), and while in certain of these countries such principles have not been fully developed in ordinary laws, in others the necessary changes have been made, and in one of them the evolution in ordinary law preceded its constitutional enshrinement as a fundamental principle of the legal system, and thus the constitutional provisions have only come to confirm and enhance such a development. It should be pointed out, finally, that in their respective liberalization processes some countries have remained close to the traditional system as outlined here, while others have taken a more decisive path and have markedly reduced the differences, in status between persons born in wedlock and those born out of wedlock. In still another, the avowed goal of full legal equality in all respects — including inheritance rights — has been attained and is recognized in the laws presently in force.

Since the first decade of this century, the Scandinavian countries and Finland have been co-operating closely in the field of family law and in so doing have tended to improve, in various degrees, the position of persons born out of wedlock. In 1909 they started to work together in order to elaborate a more modern legal system in matters concerning family law; this close collaboration still continues. The co-operation among these countries is also very close with regard to social policy. In the matter of parental authority and inheritance, their legislation presents similarities as well as some differences, among others, in the field of inheritance rights of persons born out of wedlock.

The radical change which has come about in the economic basis and the social structure of the European States with socialist systems has

[9] The *Nueva Recopilación de las Leyes de Castilla* (1567) and the *Novísima Recopilación de las Leyes de España* (1805), although the latter no longer included provisions on the " barraganías " (*de facto* marriages) and introduced some changes in the field of inheritance rights.

[10] The *Recopilación de las Leyes de Indias* (1680): *ibid.*

made it necessary to recast the codification and to reconsider the very principles of the legal systems affecting the family. The various Codes and laws which have been enacted in the past decades have several principles in common. With respect to the position of persons born out of wedlock, the legislation in socialist countries proclaimed the abolition of any discrimination against persons born out of wedlock and granted them when their filiation was established in respect of the mother, the father, or both, the same rights as those enjoyed by persons born in wedlock.[11]

II. Scope of discrimination against persons born out of wedlock

A. *General observations on the ratio of persons born out of wedlock*

The statistical information available on the ratio of persons born out of wedlock in the countries surveyed (see annex VI) does not allow an accurate comparative analysis because of the radically different basis and methods used for the compilation of statistics in the various countries. There are, moreover, many essential elements lacking in the data collected. For example, when statistics are supplied, they very often concern the existing situation at the time of birth and do not take into consideration the changes which may have occurred afterwards, such as disavowal, annulment of the parents' marriage, legitimation or adoption. Also, for a number of countries, there is no indication of the date of compilation of the statistical data or, when that date is mentioned, the year of reference varies from country to country. In addition, there is no homogeneity in the data gathered as in many cases the data do not cover the same question. In some countries the figures refer to live births, while in others they refer to total births, including still, births. It even happens on some occasions that the information is supplied with reservations on its value.[12] It should be finally noted that there are countries in which the rules on registration of births do not cover the totality of the population. In one country,[13] these rules are not compulsory and the people may or may not formally register the birth of their children, while in another,[14] the figures available relate to only one ethnic group of the population.

However, although no sound basis for a valid comparative analysis exists, the available statistical data indicate that the type of discrimination under consideration significantly affects a large number of individuals in many areas of the world. With respect to Latin America, the Inter-American Children's Institute noted that:

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[11] Based on information contained in background document D prepared by Mrs. F. P. Andrei, Judge at the Bucharest Court, for the United Nations seminar on the status of women in family law held at Bucharest in 1961.

[12] Brazil.

[13] Nepal.

[14] New Zealand.

" Illegitimate unions and illegitimate children constitute a very serious problem in Latin America, where, in some areas, 65 to 90 per cent of the total child population is illegitimate." [15]

While the proportion of births out of wedlock to the total births varies from 0.1 per cent to 4 per cent [16] in some countries and from 4 to 10 per cent [17] in some others, the ratio is much higher in a number of cases. It exceeds 70 per cent in one country,[18] 64 per cent in two countries,[19] 56.3 per cent in another one [20] and 40 per cent in two others.[21]

No definite trend seems to exist in recent years, whether towards an increase or a decrease of the number of persons born out of wedlock. In many countries, the annual rate of births out of wedlock has remained fairly steady [22] or has declined,[23] while a trend towards an increase has been observed in some other countries.[24] This trend has been attributed in one country [25] to the fact that the fertility rate for all women of child-bearing age rose from 86 births per 1,000 women aged fifteen to forty-four years in 1945 to 120 births per 1,000 in 1960. During the same period the rate of births out of wedlock rose from 10 to 22 per 1,000. In another country [26] where the ratio rose from 2.6 per cent in 1926 to 4.3 per cent in 1960, it has been noted that part of the increase was the result of more complete registration of births out of wedlock brought about by the co-operation of registration officials and welfare agencies.

Data concerning one country [27] show that there were 91,700 births out of wedlock to teen-age girls in 1960 compared with 51,700 in 1945. In 1960, of the 91,700 teen-age unmarried mothers, 43,400 had reached the age of eighteen years, but 48,300, a little more than one fifth of all women who became unmarried mothers in 1960, were girls of school age. The rate of births out of wedlock was, however, highest for the period 1945-1960, not among teen-agers but among women between twenty and thirty years of age. It has also increased the most in this older age group. Among the girls from fifteen to nineteen years of age, the rate of births out of wedlock showed no increase between 1956 and 1960 but a slight

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[15] United Nations Economic and Social Council, UNICEF, " Survey of the Needs of Children ", E/ICEF/410 (4 May 1961), annex II, p. 5.

[16] China, Ireland, Israel, Italy, Luxembourg, Malta, Netherlands, Norway, Switzerland, Syria, United Arab Republic.

[17] Canada, Denmark, Federal Republic of Germany, Finland, France, United Kingdom, United States of America.

[18] Jamaica.

[19] El Salvador, Honduras.

[20] Venezuela.

[21] Peru, Trinidad and Tobago.

[22] Finland, Ireland, Netherlands, Peru, Venezuela.

[23] Albania, Federal Republic of Germany, Poland, Spain, Trinidad and Tobago.

[24] Australia, Canada, Denmark, Jamaica, New Zealand, Sweden, Switzerland, United Kingdom, United States of America.

[25] United States of America.

[26] Canada.

[27] United States of America.

downward trend. At present the annual illegitimacy rate is about 15 per 1,000 among teen-agers and about 40 per 1,000 among unmarried women of twenty to thirty years. Moreover, the proportion of all unmarried mothers who are teen-agers has remained practically the same since 1955. The percentage of all unmarried mothers who were under twenty years of age was 44 per cent in 1945 compared with 41 per cent in 1960.

In some countries, statistical investigation reveals a striking difference in the number of persons born out of wedlock between their poorest and richest areas or between their metropolitan and non-metropolitan regions: 16 per cent and 43 per cent in one country,[28] 7 per cent and 52 per cent in the other country.[29] In one country [30] the rate of births out of wedlock is reported to have always been higher in rural areas. In another one,[31] the data also show that about 40 per cent of all the children born out of wedlock were born in the capital city.

A few countries have provided data on the number of persons born out of wedlock who were subsequently legitimated or acknowledged. In one country,[32] it is noted that most legitimations of children born out of wedlock take place during the year of their birth or the following year. About 35 per cent of the children born out of wedlock are legitimated through the marriage of their parents during the first four years after birth. Since roughly 90 per cent of all legitimations take place within the first four years, it may be assumed that approximately 40 per cent of all children born out of wedlock are later legitimated. In another country,[33] 22 per cent of the children born out of wedlock in the capital city every year have been legitimated by the subsequent marriage of their parents. As regards acknowledgement, in one country [34] 16.2 per cent of persons born out of wedlock in 1962 and 17.2 per cent in 1963 have been acknowledged. In another country [35] the ratio in 1961 was 23.7 per cent. In one country [36] where in 1961 births out of wedlock represented 6 per cent of the total births, the Courts pronounced decrees of paternity in 124 cases during that year.

B. *Factors leading to birth out of wedlock*

This question of factors leading to birth out of wedlock goes beyond the legal status of persons born out of wedlock; it involves rather the study of matters of another nature, much wider in scope and closely related to the general circumstances under which a particular society is developing. This observation may help explain why information on the subject is of unequal value and precludes a comprehensive comparative analysis.

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[28] Argentina.

[29] France.

[30] United Kingdom.

[31] Spain.

[32] Federal Republic of Germany.

[33] Finland.

[34] Venezuela.

[35] China.

[36] United Kingdom.

In some cases no information at all has been given. Concerning one country,[37] for example, it is stated that it was impossible to answer the question. For many others [38] the absence of sociological investigations on the matter is reported and it is concluded that the reasons for the high ratio of birth out of wedlock cannot be indicated with scientific accuracy. Concerning one country,[39] it is noted that its family organization is so structured that birth out of wedlock is an unknown concept. Indeed, in that country, any woman who gives birth to a child is considered to have been married to the man with whom she had sexual relations which resulted in the birth of the child. The only problem which could arise is the identification of that man. Moreover, all procedures relating to family matters are carried out without formalities. In such a country, therefore, no list of factors leading to birth out of wedlock can possibly be drawn up.

The factors conducive to birth out of wedlock may be divided into five main groups: economic, social, legal, historical and demographic. There are other factors which do not fit into any of the above categories and whenever mention has been made of such factors in the countries studied, this will be indicated. It should also be noted that while in some countries [40] the competent authorities hold the view that no concrete factor can be mentioned as having a direct influence on births out of wedlock, the prevailing opinion in numerous countries is to stress that the different categories of factors listed above have a fluctuating significance and contribute in greater or lesser measure to the pattern of " illegitimacy ".

Economic and social factors

The over-all effects of economic conditions and social change have been described in a study prepared by the United Nations Children's Fund : [41]

> " The development of social conditions throughout the world causes profound changes in the structure and composition of society which may lead to grave disturbances in the life of the child. This is especially true of the urban environment, particularly for rural populations transplanted from a traditional setting. This transition gives rise to problems of adaptation for the entire family to a different society . . . The needs change on contact with new cultural patterns, and other needs, frequently false or artificial in nature, arise.
>
> " These new cultural patterns are not, as a rule, acquired smoothly or easily. In many cases, the community spirit disappears. Immigrants often find it impossible to maintain their previous status, and their level of living falls. The consequent acceptance or rejection of new

[37] Romania.

[38] Austria, Italy, Norway, United Republic of Tanzania.

[39] Nepal.

[40] Israel, Italy, Norway, United Kingdom, United States of America.

[41] " Survey on the Needs of Children ", (E/ICEF/410), pp. 66-67.

forms of life are equally dangerous, for adaptation is sometimes accompanied by the loss of traditional morality.

" The disruption of the family unit, so frequent in the modern world, greatly handicaps the child from its very birth. At best, the woman may be compelled to work, leaving the children to the chance supervision of a neighbour. If only the father goes to the city to work, he often sets up a second household and may desert mother and child. The consequences for the mother may range from concubinage to prostitution, with all their disastrous effects on the child. Closely associated with this problem is the problem of illegitimacy, which is very serious in some countries (Central and South America), on account of its high incidence, if not of its social gravity. Figures given by the Inter-American Children's Institute are most striking. In some cities, and even in some countries, more than half of all the babies born are born out of wedlock."

While for a few countries [42] doubt is expressed as to whether economic factors should be considered as being significant or any direct link between them and births out of wedlock is excluded, a substantial number of them [43] adopt the opposite stand and attribute births out of wedlock to interrelated economic and social factors.

In some of these countries [44] economic conditions are considered the primary factor of birth out of wedlock but as regards only certain specified social classes of the population: the lower and middle classes. In others,[45] births out of wedlock are described as the result, among other causes, of intense industrialization which provokes the migration of rural population and the increased employment of women. Industrialization is also said to engender economic pressure which, by encouraging men to seek work in the cities, results in long periods of separation from their wives and families.[46] On the contrary, in one country,[47] the decrease in the number of births out of wedlock has been linked to the favourable trends in the economic and social development in the country, while in another,[48] legislation of irregular unions and a rise in economic and social status are commonly associated.

Economic factors are frequently linked to social ills which may account for births out of wedlock. Lack of employment and the concomitant poor conditions of living are often mentioned. Such situations, it is argued, lead to promiscuity and prostitution. Hence, births out of wedlock are said to be imputable to the expenses involved in marriage,

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[42] Australia, Federal Republic of Germany, Israel, New Zealand, United Kingdom.

[43] China, Cuba, El Salvador, Ghana, Honduras, India, Jamaica, Jordan, Peru, Republic of Viet-Nam, South Africa, Spain, Trinidad and Tobago, Uganda, United Arab Republic.

[44] Brazil, Israel, Peru, South Africa, Trinidad and Tobago.

[45] Ceylon, Kenya, Spain, United Kingdom, Yugoslavia.

[46] China, India, Jordan, South Africa, United Arab Republic.

[47] Finland.

[48] Trinidad and Tobago.

since young people cannot afford them and marriage opportunities are thereby reduced.

With regard to a country with a multiracial population,[49] a high incidence of family break-down is seen in groups that are socially and economically disadvantaged. While births to white unmarried mothers are probably not all reported, the reported number of non-white unmarried mothers is high.

In a number of countries,[50] the potential role of social attitude and behaviour in relation to births out of wedlock has been examined and while, in some cases, the view has been expressed that they do not play a significant part, they are often listed as basic causes. Several countries consider, as elements which may account for birth out of wedlock, discrimination based on religious beliefs or social standing [51] and also what has been called the prevailing " moral stand ". The more sympathetic attitude of the community towards the unmarried mother and her child,[52] the fact that extra-marital relations between unmarried persons are perhaps no longer regarded as morally wrong by a substantial proportion of people,[53] the effect of mass media, television and radio in stimulating an early interest in sex,[54] the slackening of family discipline,[55] and the degree of awareness by people of the responsibility which must be assumed by the parents,[56] are all factors which may be mentioned as leading to birth out of wedlock. Some countries also cite social maladjustment of psychopathological nature in the mother,[57] adolescent instability,[58] or a false conception of masculinity [59] among the possible causes of birth out of wedlock.

In addition, births out of wedlock are believed to be at least partly due to a new social attitude towards the traditional elements of family law,[60] to the shift in the pattern of family life from a patriarchal to a " companionship " unit,[61] to the lack of integration of family and individuals into the generally accepted culture of the society in which they live [62] and

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[49] United States of America.

[50] Australia, Canada, Ceylon, Federal Republic of Germany, India, Israel, Jamaica, Nigeria, South Africa, Sudan, Thailand, Trinidad and Tobago, United Kingdom, United States of America, Venezuela.

[51] Ceylon.

[52] Australia.

[53] Canada, Federal Republic of Germany, Jamaica, New Zealand.

[54] Canada, United States of America.

[55] Niger, United Kingdom, United States of America.

[56] France.

[57] Switzerland.

[58] Israel, New Zealand.

[59] Uganda, Venezuela.

[60] Mali.

[61] United States of America.

[62] Israel, United States of America, Venezuela.

also, in one instance,[63] to the break-down of old tribal societies and the restraints which such societies imposed on social behaviour.

In a few countries,[64] custom is cited as a likely factor, either when it becomes less strict or when it accords the same respect to all established families, whether or not the mother and father have legally contracted marriage. Concerning one country,[65] the view has been expressed that while a stable legal marriage is the ideal to which everyone aspires, the great majority of the people (with the exception of the middle and upper classes which comprise about 8 per cent of the population) do not regard marriage as a necessary prelude to child bearing, but as a state which should be attained after a measurable degree of economic security has been achieved. With respect to another country,[66] it is stated that pre-marital sexual relations on a " trial " basis are a very ancient tradition and are still a significant factor in some areas. The proportion of births out of wedlock is consequently high, but for this very reason, the proportion of children subsequently legitimated is also higher than elsewhere. Moreover, in the other areas, about 30 per cent of all first-born children are conceived before marriage. In one country,[67] however, the rate of births out of wedlock is insignificant in localities where superstition or religious beliefs forbid extra-marital relations.

In the context of social factors leading to births out of wedlock, special mention should be made of the lack of education as a contributing one. Several countries [68] report that lack of education or differences in social and educational attainment between betrothed parties which lead to parents' intervention and to the impossibility of legal marriages are among the many factors leading to births out of wedlock. In one country [69] deficiency of educational opportunities is considered as one of the main causes of births out of wedlock in the lower classes, while in others,[70] lack of sex education, ignorance of contraceptive methods or ignorance of the laws on registration of marriages are listed among the various factors.

Legal factors

Although doubt has been expressed as to the role of legal factors in births out of wedlock,[71] some laws on family matters and particularly the laws on divorce, are however regarded in several countries [72] as more

[63] Kenya.

[64] San Marino, Yugoslavia.

[65] Jamaica.

[66] Federal Republic of Germany.

[67] Sudan.

[68] Ceylon, Finland, Ghana, Philippines, South Africa, Thailand, Trinidad and Tobago, United States of America.

[69] Brazil.

[70] Australia, Finland, South Africa, Thailand.

[71] Hungary, Israel, Italy, Spain.

[72] Brazil, Canada, El Salvador, France, Ghana, Honduras, Nigeria, Peru, Philippines, San Marino, United Arab Republic, United States of America.

or less important, and the absence of divorce laws, the ease or difficulty with which divorce is granted is often linked to the increase or decrease of the rate of births out of wedlock. In one country,[73] the number of children born out of wedlock was reduced once the law prohibiting divorce had been repealed. The small responsibility that the law imposes on the father of a person born out of wedlock,[74] the exhorbitant privileges granted to women in case of divorce or separation,[75] and the non-existence of a proper codification of a country's customary marriage law,[76] have also been listed as factors leading to births out of wedlock.

Historical factors

A number of countries [77] mention historical factors among the probable causes of birth out of wedlock. One country,[78] states that the problem could be traced to the fact of colonization, which led to the breakdown of the family organization and, subsequently, to the weakening of parental authority. This situation has created conditions leading to births out of wedlock. In two countries [79] the practice of slavery during the colonial era is considered the basic cause of the slow realization by the population of what a stable family unit entails. Slaves were not permitted to marry, nor were they in many instances permitted to enjoy the normal form of family structure. Thus today their descendants suffer, generally speaking, from a casual regard for the normal relationship between the father and his children. The practice is common for the mother to be the head of the home in which her children by different fathers live together as a family unit. In two other countries [80] the concept of legal marriage through registration was introduced only recently in their legislation so that there are still a large number of people who do not yet realize its significance and its meaning.

Demographic factors

Demography has been listed as a factor leading to birth out of wedlock. In some countries [81] the fact that the number of women is in excess of that of men is considered as one reason for birth out of wedlock, but not the most important, while in another,[82] this fact is listed as a main factor. In that country, indeed, the excess in the number of women over men approached, as of December 1962, the one million mark, while in

[73] France.

[74] El Salvador.

[75] Peru.

[76] Nigeria.

[77] Jamaica, Mali, Republic of Viet-Nam, Thailand, Trinidad and Tobago, Western Samoa.

[78] Mali.

[79] Jamaica, Trinidad and Tobago.

[80] Republic of Viet-Nam, Thailand.

[81] Finland, Niger, Spain, Thailand.

[82] Poland.

two other countries,[83] the difference between the number of men and women, as of 1961, was respectively about 200,000 and 35,000. This situation, it is said, has a bearing on the opportunities for contracting marriages and on the number of children born out of wedlock. In one country [84] the rate of birth out of wedlock is reported to be relatively high wherever the migratory population includes a large number of young men, for example in garrison towns, mining and industrial areas. In one instance [85] the distribution of the rural population is so widespread that it has proved difficult to establish an efficient local administration for registration of marriages everywhere. As a consequence, more and more people have entered into common-law unions resulting in a greater number of persons born out of wedlock. In another country [86] it is reported that family planning education is being applied to the general problem of population containment and it is very probable that the high rate of birth out of wedlock will incidentally decline.

Miscellaneous

Some other factors which do not readily fit into any of the categories discussed above have been regarded in some countries as having an effect upon birth out of wedlock.

(*a*) *War.* In one country [87] war and the resulting stationing of foreign troops in many parts of the territory have been considered as factors leading to births out of wedlock.

(*b*) *Foreign labour.* In one country [88] the introduction *en masse* of foreign labour is said to be one of the causes of birth out of wedlock.

III. Basis of the study

The decision of the Sub-Commission " to undertake a study on the matter of discrimination against persons born out of wedlock " was based upon the realization that discrimination against persons who have had the misfortune to be born out of wedlock persists in many parts of the world. The label " illegitimate " is certainly a heavy burden to bear, and in many societies it places a stigma upon a person for something which is not his fault.

The laws of various countries have been amended gradually so as to relieve this category of persons of the inferior status to which they have been relegated, legally as well as socially. However far those reforms may have gone, the legislators have been faced with a serious obstacle to the recognition of full equality of rights : fear that the elimination of any difference in status and rights as between persons born in and

[83] Denmark, Yugoslavia.

[84] Federal Republic of Germany.

[85] Venezuela.

[86] Trinidad and Tobago.

[87] Philippines.

[88] Switzerland.

out of wedlock may be detrimental or even fatal to the institution of the family and its sanctity, and to morality in general.

A. *The principle of equality of rights as between persons born in wedlock and those born out of wedlock*

The principle of equality of rights for all without discrimination is set forth in the Preamble, in Article 1, paragraph 3, and Articles 13, paragraph 1 (b), 55c, 62 and 76c of the Charter of the United Nations. It is reaffirmed in article 1 of the Universal Declaration of Human Rights and elaborated in articles 2, 7, 8, 25, paragraph 2, (which refers specifically to persons born out of wedlock), 29 and 30. Furthermore, several articles of the Universal Declaration have an important bearing on the matter, in particular article 15 on the right to a nationality, article 16 on marriage and the protection of the family, as well as articles relating to a number of closely associated economic, social and cultural rights including the right to an adequate standard of living (article 25, paragraph 1), the right to education (article 26), and the right freely to participate in the cultural life of the community (article 27).

Article 1 of the Universal Declaration of Human Rights provides :

> " All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

This provision is a categorical affirmation of the essential qualities and rights of man. It proclaims, *inter alia*, that freedom and equality are essential attributes of human beings, which are theirs from birth, regardless of whether or not they are recognized in law. The article states a basic principle applying to all the rights of the Universal Declaration.

Article 2 provides:

> " Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> " Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

This article elaborates in detail the principle of non-discrimination. The fact that the grounds of discrimination enumerated in paragraph 1 of the article are only illustrative and not exhaustive is made clear by the use of the expressions " such as " and " or other status ". The prohibition of discrimination is a twofold one. It covers not only prohibition of discriminatory distinctions, exclusions or limitations directed against any individual or group of individuals based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, but also the prohibition of any preferential treatment accorded to such individuals or groups.

Article 7 provides:

"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

This article transforms the principle of equality into reality. It prohibits the introduction of any form of discrimination by law and places an obligation upon the State not only to protect the individual against any discrimination in violation of the Universal Declaration, but also to protect him against any incitement to such discrimination.

Article 8 provides:

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Undoubtedly, a fundamental guarantee for the effective enjoyment of any right is its recognition in constitutions and other legislation, and the existence of independent and impartial tribunals which would be seized of violations of such right and would correct them.

Article 25, paragraph 2 provides:

"Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock shall enjoy the same social protection."

This is the only article of the Declaration where persons born out of wedlock are mentioned specifically.[89]

Other important texts which must be given due weight are principle 1 of the Declaration of the Rights of the Child, and articles 2 and 10 of the International Covenant on Economic, Social and Cultural Rights.

Principle 1 of the Declaration of the Rights of the Child provides:[90]

"The child shall enjoy all rights set forth in this Declaration. All children, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family."

Paragraph 2 of article 2 of the International Covenant on Economic, Social and Cultural Rights, provides:

"The States Parties hereto undertake to guarantee that the rights enunciated in this Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

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[89] The legislative history of article 25, para. 2 of the Universal Declaration of Human Rights is summarized in annex III of the present report.

[90] The legislative history of principle 1 of the Declaration of the Rights of the Child is summarized in annex III of the present report.

Paragraph 3 of article 10 of the same Covenant provides:

" 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development, should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by laws."

B. *Arguments in favour of limitations to the enjoyment of equality of rights between persons born in and out of wedlock*

Article 16, paragraph 3, of the Universal Declaration of Human Rights provides:

" The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

The traditional argument put forward by those who have and still oppose the principle of equality of rights between persons born in wedlock and out of wedlock is that a distinction, in particular in the field of inheritance, is necessary in order to safeguard the family. The invalidity of this argument is evident, particularly in view of the fact that no corresponding increase of the rate of illegitimacy and/or of the number of irregular unions has been noted in those countries where discrimination against persons born out of wedlock has been abolished and where the principle of equality of rights between the two categories of persons has been proclaimed. Moreover, since neither the Universal Declaration of Human Rights nor any other pronouncement of the United Nations establishes a priority of one right over another, the necessity of protecting the family should not lead to the denial of the principles of equality and non-discrimination set forth in articles 1 and 2 of the Universal Declaration of Human Rights, or to any preferential treatment for persons born in wedlock. The problem which is faced by the Sub-Commission now is, as far as the subject-matter is concerned, the implement the principles of equality and non-discrimination without violating the concept of the family as the natural and fundamental group unit of society which also is entitled to protection by society and the State. Such efforts will undoubtedly be in line with articles 29 and 30 of the Universal Declaration of Human Rights.

Article 29 provides:

" (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

" (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."

These paragraphs of article 29 establish the only reasonable limitations upon the exercise of rights and freedoms.

Article 30 provides:

" Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

This article is precisely designed to forestall the destruction of any right, including the right to equality between persons born in and out of wedlock, implied in articles 1 and 2 of the Universal Declaration of Human Rights, under the guise of ensuring the enjoyment of other rights guaranteed by the Universal Declaration of Human Rights. As has been said, the Declaration establishes no hierarchy or priority among the rights which it proclaims as a common standard of achievement for all peoples and all nations.

C. *Forms of discrimination against persons born out of wedlock*

Discrimination against persons born out of wedlock may originate either in law or in practice. In either case, it may be direct or indirect in nature.

In a great number of countries today specific provisions of the law provide for different rights or status depending on whether a person is born in or out of wedlock. As a result, the former enjoys preferential treatment and the latter is relegated to an inferior position. In such countries, violation of the principle of equality of rights and non-discrimination embodied in articles 1, 2 and 25, paragraph 2 of the Universal Declaration of Human Rights is formal and direct; furthermore, the laws are in flagrant contravention of article 7 of the Declaration.

This does not mean that all differences between the status of persons born in and out of wedlock are of a discriminatory nature. Some differences exist, will have to remain, and may not be improved upon because of the fundamental difference of the situations of the two categories of persons stemming from the fact that their parents were married in one case and were not in the other. For example, in the field of parental rights and duties there will always be a fundamental difference (but not a discriminatory one) between the person born out of wedlock whose parental family relationship is established as regards his mother only, and the person born in wedlock whose family relationship exists as regards both parents. In the first case, the mother will exercise the rights and duties attached to parental authority; in the second case, both parents jointly, or the father alone, will normally do so.

Most other differences between the status of persons born in and out of wedlock are discriminatory in nature. For example, in the matter of maintenance and inheritance rights, the study reveals that in many coun-

tries persons born out of wedlock enjoy rights which are inferior to those enjoyed by persons born in wedlock, and sometimes absolutely no rights of inheritance; thus, persons born out of wedlock who, because of the very nature of their birth are deprived of a normal family life, are also denied the possibility of being raised and of living according to the same standards as those enjoyed by persons born in wedlock. Such differences, which are discriminatory in nature, may be eliminated or at least greatly improved upon.

Perhaps the most serious form of direct legal discrimination against persons born out of wedlock occurs when such persons are denied by law the possibility of establishing their parental relationship, either maternal or paternal. The study indicates that in some countries the establishment of the paternal filiation of a person born out of wedlock is either prohibited altogether, or left to the goodwill of the father, or has such limited effects that it cannot be considered as a family relationship in the full sense of the word, or is denied to special categories of children. It should also be pointed out that the establishment of maternal filiation is similarly denied to such categories of children.

Legal discrimination can also take an indirect form. For example, when the law prohibits marriages of persons within a certain degree of consanguinity and affinity (such as ascendants and descendants, uncle and niece, aunt and nephew etc.), it implicitly prevents children born to such persons to be legitimated by the subsequent marriage of their parents.

It is obvious that the core of the matter is the question of the legal consequences attached to birth out of wedlock, since laws constitute generally the main basis of discriminatory treatment against persons born out of wedlock. Consequently, this report will be primarily legal in nature.

However, the consequences of birth out of wedlock are not reflected exclusively in the legal field. They may be also felt, in various ways, in other aspects of the life of the individual concerned, in particular in relation to the community where he lives, whether or not equality of treatment has been embodied in the law. This report accordingly also deals with the social aspect of discrimination, but to a much lesser extent since the *de facto* information on which this aspect of the study is based is quite scarce in spite of the contribution of thirteen non-gouvernmental organizations. While there are examples of direct social discrimination, such as the prohibition of admission to convents of girls born out of wedlock, many forms of discrimination in this field are indirect in character and sometimes quite intangible; for example, a person born out of wedlock may encounter difficulties in climbing the social ladder in his community because he will not be accepted as equal to others; he may likewise experience difficulties in getting married.

Where discrimination against persons born out of wedlock is prohibited by law, or equality of treatment is prescribed in general terms, this fact alone does not solve the problem, although it might be regarded as a step towards its solution. Outmoded concepts might still be vigorous and social ostracism persistent, as evidenced by the efforts made in several countries, where equality of rights has been embodied in law, to conceal

the fact of birth out of wedlock in birth registrations by inserting a fictitious father's name when paternal relationship has not been established.

IV. Questions of designation and status

In the context of the present study the term " designation " is intended to refer to the terminological expression used in the texts of laws of the countries surveyed with reference to persons born in wedlock and out of wedlock. The term " status " may be defined as the set of rights and obligations between parents and their children established by law, however limited this set may be. It may be used when only a few rights and duties are specifically provided for, or when a full set of rights and duties, constituting a true family relationship, is established, whether it is inferior, or equal to the set enjoyed by persons born in wedlock.

The present section deals with the question of the different designations (if any) attached by law to persons born in and out of wedlock, and with the general question of whether or not a different status is attached to each category of persons. In other words, if and when a dichotomy exists in the formal designation of persons born in wedlock and out of wedlock, is there a corresponding differentiation in the status of such persons ? If and when there is no dichotomy in the designation applied, is there still a differentiation in their status ? The answers to such questions are indeed quite important from two points of view : (*a*) the area of greatest discrimination against persons born out of wedlock is that of the status attached to such persons as compared with the status enjoyed by persons born in wedlock; (*b*) differences in designations, even when they do not correspond to differences in status, may constitute by themselves a source of discrimination, particularly when a pejorative connotation is attached to the designation used with reference to persons born out of wedlock.

A. *Designations*

Various points of view on the question of designation have been adopted in the countries studied. The approach to the matter is not uniform, and appears to have been determined by different social concepts.

Although, as a rule, marriage is a regulated institution, the concept of birth out of wedlock is not always admitted and the fact of birth out of wedlock is not necessarily taken into consideration by every system of law.

In the great majority of cases the concept of birth out of wedlock is admitted and incorporated in the law. This is done either directly, when the law refers specifically to persons born out of wedlock, or implicitly, when the law defines the circumstances under which a person should be considered as being born in wedlock, or provides for means — such as legitimation — whereby persons born out of wedlock may acquire the status of persons born in wedlock.

Although the fact of birth out of wedlock is taken into account, the manner in which the question of designation is actually dealt with differs depending on the country.

Usually the law designates in a specific way those persons whose parents were united in lawful wedlock at the time of their conception or birth, and in a different way those whose parents were not so united. In a large number of countries persons born in wedlock are said to be " legitimate " while those born out of wedlock are called " illegitimate ". However, in many instances the designations used are respectively " persons born in wedlock " and " persons born out of wedlock ",[91] or matrimonial children, *hijos matrimoniales*, and extra-matrimonial children, *hijos extra-matrimoniales*[92] or legitimate and natural children, *hijos legítimos*, *hijos naturales*,[93] or persons born of a registered marriage and persons born of an unregistered marriage or of an unmarried mother;[94] or sons of a union which is permissible, *ibn halal*, and sons of sin, *ibn haram*.[95]

The laws of a substantial number of countries[96] which use different designations for persons born in wedlock and out of wedlock, establish categories among the latter. They generally distinguish between: (1) " Natural children ", born of parents who, though not married to each other, were nevertheless free to marry at the time of conception or birth since there existed no impediment to their marriage; (2) " adulterous children " or " children born as a result of the adulterous relations of their parents " born of parents either or both of whom were married to third parties at the time of conception or birth; and (3) " incestuous children " or " children born as a result of the incestuous relations of their parents ", born of parents who could not marry at the time of conception or birth because of their close kinship.

In a few countries[97] all persons born out of wedlock are also labelled " bastards ". In others, categories (2) and (3) mentioned above are grouped under the designation of either *espurios*[98] or *spurios*, which also refers to (*a*) *manceres*, or children conceived in an act of prostitution, and (*b*) " sacrilegious children ", whose parents have taken a religious vow to remain chaste or virginal;[99] categories (2) and (3) may also be grouped under the designation of " illegitimate children who do not fulfil the legal requirements in order to be considered as natural children."[100]

[91] Canada (except Quebec), Finland, Jamaica, Korea, Norway, Sierra Leone, Sweden, Trinidad and Tobago, United Kingdom, Western Samoa.

[92] Argentina.

[93] El Salvador, Honduras, Peru.

[94] Union of Soviet Socialist Republics.

[95] Usually in countries where Moslem law is applied.

[96] Austria, Brazil, Canada (Quebec), Cuba (Civil Code), France, El Salvador, Ivory Coast, Luxembourg, Italy, Mali, Philippines, Republic of Viet-Nam, Romania, San Marino, Sweden, South Africa, Switzerland, Turkey, Yugoslavia.

[97] Australia, Ceylon (General Law), United Kingdom.

[98] Brazil.

[99] Philippines.

[100] Cuba (with a wording which is slightly different), Spain.

In a few countries, while marriage is a regulated institution, the concept of birth out of wedlock is still excluded from the law. In one such country [101] all persons are considered as born in wedlock and are designated accordingly since the fact that the child was conceived proves by itself that his parents were husband and wife as far as the child is concerned. In another country [102] where filiation is established in the same manner for all children and entails the same effects, no designation is used for either group of persons. In still another country [103] filiation is established differently for persons born of a regular marriage, of a *de facto* marriage registered in accordance with the provisions of the law, and of the legally established union of a man and a woman on the one hand, and for all other persons born out of wedlock on the other. However, the establishment of filiation produces the same effects and no special designations are used to refer to the two categories of persons.

B. *Status*

Whether the status enjoyed by persons born out of wedlock is inferior or equal to that of persons born in wedlock depends on the legal system prevailing in a particular country. Two major trends are discernible in the information gathered, and the countries surveyed could easily be divided into two large groups.

The first group would consist of a great number of countries [104] where the law provides for more than one status: one to be enjoyed by persons born in wedlock, which, by definition, constitutes the fullest set of rights and duties established by the law and which is held vis-à-vis both parents; and another to be enjoyed by persons born out of wedlock, which constitutes a set of rights and duties inferior, in various degrees depending on the country, to the status of persons born in wedlock. The status of a person born out of wedlock is held vis-à-vis the parent with whom filiation has been established. If filiation has been established as regards both parents, it is held vis-à-vis both of them. However, in various instances, the status of a person born out of wedlock is different according to whether it is enjoyed as regards the mother or as regards the father. As regards his mother, the status of a person born out of wedlock may be that of a person born in wedlock [105] whether he is considered as the legitimate child of his mother or he enjoys rights which are similar to that

[101] Nepal.

[102] Hungary.

[103] Guatemala.

[104] For example, Argentina, Australia, Austria, Brazil, Canada, Ceylon (General Law), Cuba, El Salvador, Federal Republic of Germany, France, Honduras, India (Hindu Law), Ireland, Italy, Jamaica, Japan, Kenya, Laos, Luxembourg, Malta, Malaysia, Netherlands, New Zealand, Peru, Philippines, Republic of Viet-Nam, San Marino, Sierra Leone, South Africa (Common Law), Spain, Sweden, Switzerland, Trinidad and Tobago, Turkey, United Kingdom, United States of America (most states), Venezuela, Western Samoa.

[105] For example in: Austria, Canada (except Quebec, Newfoundland, Nova Scotia), Ceylon (General Law), Federal Republic of Germany, India (Hindu Law), Ivory Coast, New Zealand, San Marino, South Africa (Common Law), Sweden, Switzerland, Turkey, United States of America (most States), Venezuela.

of a person born in wedlock. On the other hand, the status of a person born out of wedlock as regards his mother may be inferior to that of a person born in wedlock, whether it is superior [106] or equal [107] to that enjoyed by him as regards his father. It should be noted that the status of a person born out of wedlock as regards his mother is never inferior to that enjoyed by him as regards his father.

In this first group of countries, which will be referred to in the present study as " countries where the law provides for more than one status ", the laws of many of them [108] do not establish any categories of status within the general inferior status enjoyed by persons born out of wedlock. Therefore, all persons born out of wedlock, whether there exist various categories of designations or not, enjoy the same status, the status of a person born out of wedlock. In many other countries [109] within the general group of persons born out of wedlock, subgroups are established holding various categories of status which are inferior to the status of a person born in wedlock in different ways or degrees. Usually children born to parents who could have married at the time of conception or birth seem to enjoy the highest status among persons born out of wedlock, while persons born from adulterous, incestuous and sacrilegious relations hold a status inferior to the former in various ways or degrees. Such persons may also encounter a greater difficulty, if not an absolute impediment, to the establishment of their filiation or to the acquisition of the status of the person born in wedlock.

The laws of some countries, irrespective of whether they do or do not establish the categories of status mentioned above, provide for another differentiation among the status enjoyed by persons born out of wedlock. For example, in one instance,[110] persons born out of wedlock whose paternal filiation is established by acknowledgement or by judicial decision based on certain specific grounds enjoy a higher status, while a much lower status is enjoyed by those whose paternity is established by the court on other grounds. In another instance,[111] persons conceived during the betrothal of their parents or whose parents were betrothed after the time of conception, enjoy a status similar to that of persons born in wedlock, while other persons born out of wedlock enjoy a lower status. In still another case,[112] the law places persons born out of wedlock whose

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[106] For example in: Australia, Ireland, Jamaica, Malaysia, Netherlands, Sierra Leone, Trinidad and Tobago, United Kingdom, United States of America (some States).

[107] For example in: Argentina, Canada (Quebec), Cuba, El Salvador, France, Honduras, Italy, Japan, Laos, Luxembourg, Malta, Peru, Philippines, Republic of Viet-Nam, Spain.

[108] Canada, Ceylon (General Law), Federal Republic of Germany, Honduras, India (Hindu Law), Ireland, Jamaica, Japan, Laos, Malaysia, Malta, Peru, Sierra Leone, South Africa (Common Law), Trinidad and Tobago, United Kingdom, United States of America (most States), Western Samoa.

[109] Brazil, Cuba, France, Italy, Luxembourg, Netherlands, Philippines, San Marino, Spain, Sweden, Switzerland, Republic of Viet-Nam, Turkey.

[110] Turkey.

[111] Sweden.

[112] Brazil.

parents were free to marry at the time of conception or birth, and who were acknowledged before the birth of legitimate or legitimated children, on an equal footing with the latter, while persons born out of wedlock enjoy a status which is inferior in various ways or degrees to that of persons born in wedlock.

The laws of all countries of this group generally provide for the possibility for a person born out of wedlock to acquire the status of a person born in wedlock through various procedures, in particular through the subsequent marriage of his parents. On the other hand, under some circumstances, a person actually born in wedlock may lose his status and become a person born out of wedlock.

The differences existing between persons born in wedlock and those born out of wedlock (and as between various categories if any) in their status, as well as in the possibility of establishing their filiation (which is usually the prerequisite for the enjoyment of any status at all) and also in the possibility of acquiring the status of a person born in wedlock, deserve careful examination since they constitute sources of discrimination against persons born out of wedlock.

The second group consists of various countries [113] where the legal system provides for a single status enjoyed by all persons. While a person born in wedlock enjoys this status as regards both parents, a person born out of wedlock enjoys the same status as regards the parent in relation to whom filiation is established according to the provisions of the law. If filiation is established as regards both parents he enjoys status as regards both of them. Then, he is qualitatively and quantitatively in the same position as a person born in wedlock. Several types of systems are included in this group:

(*a*) In some systems, a single status is applicable to all persons irrespective of descent, whether different designations for each category of persons are in existence [114] or not.[115] It should be noted, however, that there may exist differences on certain minor points between the status of a person born in wedlock and that of a person born out of wedlock. Such differences will be examined under the appropriate chapters of this study.

(*b*) In other systems, paternal filiation outside marriage is not recognized. According to the law of one country [116] acknowledgement by the father as well as the judicial establishment of paternal filiation are prohibited. Therefore, the single status provided for by the law is enjoyed by persons born in wedlock as regards both parents and by

[113] For example: Afghanistan, Albania, Bulgaria, Ceylon (Kandyan Law), China, Denmark, Finland, Guatemala, Hungary, India (Moslem Law), Iraq, Ivory Coast, Jordan, Lebanon (Moslem Law), Mali, Nepal, Niger, Norway, Pakistan, Poland, Republic of Korea, Romania, Sudan, Thailand, United Arab Republic, United States of America (Arizona), Yugoslavia.

[114] For example in: Albania, Bulgaria, China, Ceylon (Kandyan Law), Finland, Ivory Coast, Korea, Norway, Romania, Thailand, Yugoslavia.

[115] For example in: Denmark, Guatemala, Hungary.

[116] Union of Soviet Socialist Republics.

persons born out of wedlock as regards their mother only. According to a certain system of law,[117] although paternal filiation outside marriage is not recognized, paternity may be voluntarily acknowledged inasmuch as the possibility of a marriage of the father at the time of conception of the child could be reasonably assumed (see page 69 *infra*). Therefore, a person born in wedlock, that is a person born of the actual marriage of his parents, and a person acknowledged by his father, both enjoy the status of a person born in wedlock, as regards both parents. A person born out of wedlock who has not been acknowledged by his father enjoys the status of a person born in wedlock only as regards his mother.

(*c*) In another country,[118] although paternal filiation outside marriage is recognized, it can result only from a voluntary acknowledgement by the father.

(*d*) In still another country,[119] the concept of birth out of wedlock is unknown since all persons, whether they are offspring of the formal marriage of the parents or of a less formal relationship are considered as having been born in wedlock and enjoy the status of a person born in wedlock which is the only status provided for by the law.

In this second group of countries, which will be referred to in the present study as " countries where the law provides for a single status ", by definition, there are no differences between the status of persons born in wedlock and those born out of wedlock provided filiation is established. In those countries, the importance of the distinction that can be drawn between persons born in and out of wedlock rests in the manner of establishing filiation and in the right to establish it — some legal systems[120] making it difficult or even impossible for persons born out of wedlock (particularly for certain categories) to establish maternity and/or paternity and therefore to enjoy status vis-à-vis one parent or both. Again, such differences deserve careful consideration since they are sources of discrimination against persons born out of wedlock.

Although by definition, in this group of countries, there is only one status applicable to all persons, the laws of all such countries except for a few[121] designates differently persons born in wedlock and those born out of wedlock. They rarely[122] distinguish among various categories of designations of persons born out of wedlock. The concept of the acquisition of the status of a person born in wedlock by a person born out of wedlock has no place in this group of countries. However, in some of them,[123] it is possible for a person born out of wedlock to establish his

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[117] Afghanistan, India (Moslem Law), Iraq, Jordan, Lebanon (Moslem Law), Mali, Niger, Pakistan, Sudan, United Arab Republic.

[118] Finland.

[119] Nepal.

[120] Reference to such systems is made, when appropriate, in Part One of the present report.

[121] For example, Guatemala, Hungary, Nepal.

[122] Ivory Coast, Mali.

[123] See chapter IV, *infra*.

filiation as regards both parents and/or to acquire the designation of a person born in wedlock through various procedures, among others, the subsequent marriage of his parents. It is also possible for a person born in wedlock to lose his filiation as regards his father or both parents and be then left either with one set of rights and duties, as regards his mother only or with no status at all. In this group of countries, a person born in wedlock may also lose his designation in certain circumstances and be referred to as a person born out of wedlock.

Part One

DISCRIMINATION AGAINST PERSONS BORN OUT OF WEDLOCK IN THE ESTABLISHMENT OF THEIR FILIATION

In general, in order that a person may enjoy any status at all as regards his parents, his filiation has to be established in accordance with the provisions of the law. In the context of the present study, it is of primary importance to determine whether the differences in the establishment of filiation concerning persons born out of wedlock and those born in wedlock are of a discriminatory nature. Furthermore, it is essential to draw attention to legal obstacles which may exist, whether they are of an absolute character or not, in the establishment of filiation concerning persons born out of wedlock, since such obstacles constitute the most severe form of discrimination in that they may result in the denial of any status at all. Such discriminatory differences and obstacles may be found in both groups of countries, that is to say, in countries where the law provides for more than one status and those where the law provides for one status (see foot-note 104, p. 23, and foot-note 113, p. 25, *supra*). These differences and obstacles will be best revealed by describing the situations obtaining both when the parents are married and when they are not.

CHAPTER I

ESTABLISHMENT OF MATERNAL FILIATION

A. THE PARENTS ARE MARRIED TO EACH OTHER

1. *General*[1]

In order to establish the filiation of a person born in wedlock, the following facts must be proven: the existence of the marriage, the fact that the person concerned is born to a married woman, and the fact that he is born of sexual relations which took place between that woman and her husband. Traditionally, there is a fundamental difference between the establishment of the maternal and paternal filiation of a person born in wedlock. Maternity is the result of the birth, a fact which can be proved

[1] The two following paragraphs are a synthesis from Colin, *Traité de droit civil*, vol. I (Paris, Librairie Dalloz, 1953), p. 518.

by ordinary means of evidence. Since paternity used to be considered as being impossible to prove, it has been accepted that proof of paternity could only result from certain legal presumptions. Because the marriage exists, the husband is presumed to recognize in advance, as his own, the children born to his wife. Such is the meaning of the long-standing rule "*pater is est quem nuptiae demonstrant*". Thus, in order to establish the paternal filiation it will be enough to prove the maternal one; then automatically the mother's husband will be considered the father unless and until there is an adjudication to the contrary.

Filiation through marriage is therefore indivisible: one cannot be born in wedlock as regards one's mother if one is not at the same time the offspring of her husband.

2. *Establishment of maternal filiation and its effects on the designation and status of a person born in wedlock*

Because of the great importance of filiation through marriage, and because such filiation is generally the normal or prevailing situation, laws have usually made easy the proof of filiation vis-à-vis the married mother. In the great majority of cases, a birth certificate is sufficient proof of filiation. Where such proof is lacking, the fact that the person has been continually and openly treated as the issue of his parents is normally considered as conclusive. Where neither condition is fulfilled, the person concerned may prove his filiation by circumstantial evidence.[2]

The possibility exists for initiating proceedings to establish that a person has been born to a married woman. This type of procedure is resorted to where the person is either a foundling or has been registered under a false name. Generally, only the person concerned (or his heirs) may bring such action.

Since filiation through marriage is indivisible, once maternity is established, paternity is also established by operation of the presumption of paternity. Therefore in all countries surveyed, the establishment of maternal filiation entails the attribution to the person concerned, *ipso facto*, from the date of birth and as regards both his mother and his father, of the specific designation (if any) attributed to persons born in wedlock and also of a status. Such status, in the group of countries where the law provides for more than one status, carries with it the fullest set of rights and obligations provided for by the law and is, by definition, always superior to that held by persons born out of wedlock. In the group of countries where the law provides for a single status applicable to all persons irrespective of whether they are born in or out of wedlock, the status attributed is the only status provided for by family law. By definition such status, in that group of countries, is also the one enjoyed by persons born out of wedlock vis-à-vis either parent. Therefore, concerning that group of

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[2] This paragraph is a very short synthesis from Planiol, *Traité élémentaire de droit civil*, 3rd ed., vol. I, p. 467.

countries, it could be said that the status of a person born in wedlock is identical with that of a person born out of wedlock whose filiation has been established as regards *both* parents.

3. *Loss of maternal filiation and its effects on the designation and status of a person born in wedlock*

In exceptional cases, proceedings may be initiated by any interested party for the purpose of contesting maternity by challenging the evidence on which it was established. When maternity is successfully challenged, the filiation as regards both parents is lost since paternity is based on the presumption that the husband is the father of all children born to his wife. Therefore, the person concerned will lose his designation as a " person born in wedlock ", if any, and the status attached to it. He will enjoy no status at all, since no relationship as regards either parent will become a foundling.

B. The parents are not married to each other

The indivisible character of filiation, as described above, is no longer the rule when the parents are not married to each other. The filiation of a person born out of wedlock is established separately as regards each parent; therefore, it entails separate consequences as regards each parent.

1. *Establishment of maternal filiation*

Within many of the legal systems surveyed,[3] the mother-child relationship exists in law as a consequence of birth. In some other systems,[4] maternity must be voluntarily acknowledged.

(a) *Voluntary acknowledgement*

A person born out of wedlock may be acknowledged on his birth certificate.[5] Acknowledgement may be made also in a statement before a public official [6] (sometimes the presence of two witnesses is required),[7]

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[3] Afghanistan, Australia, Austria, Bulgaria, Cameroon (East Cameroon), Canada (British Provinces), Ceylon (General Law and Kandyan Law), China, Denmark, El Salvador, Finland, Guatemala, Hungary, India (Moslem Law and Hindu Law), Iraq, Israel, Ivory Coast, Jamaica, Jordan, Kenya, Lebanon (Moslem Law), Malaysia, Mali, Nepal, Netherlands, New Zealand, Niger, Norway, Pakistan, Peru, Poland, Sweden, Switzerland, Sudan, Thailand, Trinidad and Tobago, Turkey, United Arab Republic, United Kingdom, United States of America (except for Louisiana).

[4] Albania, Argentina, Brazil, Canada (Quebec), France, Honduras, Italy, Japan (although in judicial practice, the fact of birth establishes maternal filiation), Laos, Luxembourg, Malta, Peru, Philippines, Republic of Korea (implicit), Republic of Viet-Nam, Romania, San Marino, Spain, United States of America (Louisiana), Union of Soviet Socialist Republics, Venezuela, Yugoslavia.

[5] Albania, Argentina, Cuba, France, Italy, Luxembourg, Malta, Peru, Republic of Viet-Nam, Spain, Union of Soviet Socialist Republics, Venezuela, Yugoslavia.

[6] Cuba, Italy, Japan, Laos, San Marino, Spain.

[7] Laos.

in any authentic document,[8] in a will,[9] (whatever its form according to the information concerning one country),[10] or even in a private document.[11] In one instance,[12] the declaration to the effect of acknowledgement may be made before the Director of the public institution where the child was born. Such declaration must be signed by the declarant as well as by the Director and transmitted to the proper authorities for registration in the birth register. In one country [13] acknowledgement may be made in whatever form since it entails only limited rights of maintenance.

Acknowledgement operates in regard to the parent making it and does not confer any status on the person so acknowledged vis-à-vis the other parent. In view of this, regulations concerning the registration of births either forbid altogether the indication of the identity of the other parent when one parent alone acknowledges the child,[14] or prohibit it when as a result of this indication the incestuous, adulterous or other special character of the filiation will be disclosed [15] or make it optional for the declarant.[16] Therefore, the question arises as to whether the mere indication of the identity of the mother constitutes an acknowledgement by her in countries where her formal acknowledgement is necessary in order to establish a legal maternal filiation. This question seems to be solved in different ways. For example, the mention of the name of the mother in the birth registration is considered as an acknowledgement if it is ratified by her, and if it is included at the request of the person born out of wedlock, who must be at least eighteen years old;[17] or if it is corroborated by the information received by the Registrar from the persons who are under a legal obligation to notify him of the birth, such as doctors or midwives who have attended the mother.[18] In such a case, the registrar notifies the mother or her heirs that her name has been included in the birth registration. If no opposition to such inclusion is expressed within a short period of time (fifteen days) this will be considered as a formal acknowledgement. On the other hand, acknowledgement may result from the indication of the name of the mother on the birth registration, even in the absence of her signature.[19]

A person born out of wedlock can always be acknowledged during his lifetime. Acknowledgement may also be permitted before birth, once

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[8] Albania, Argentina, Cuba, France, Italy, Luxembourg, Malta, Peru, Spain, Venezuela, Yugoslavia.

[9] Cuba, Italy, Japan, Peru, Spain.

[10] Italy.

[11] Argentina, Bulgaria.

[12] Venezuela.

[13] Canada (Quebec).

[14] Cuba, Philippines.

[15] Spain.

[16] Honduras.

[17] Cuba.

[18] Spain.

[19] Brazil, Venezuela.

conception has taken place.[20] In certain countries the acknowledgement of a deceased person is allowed whether he has left issue,[21] or not.[22]

In some countries, special requisites are to be met when acknowledgement occurs after the birth has been registered. For example, the declaration of acknowledgement before the Civil Registrar must be made in the presence of two witnesses [23] or a judicial approval to enter it in the birth register will be necessary,[24] unless it is made in a will,[25] or the consent of the guardian will have to be given if the person to be acknowledged is a minor.[26]

If a person born out of wedlock is of age at the time of his acknowledgement, his acceptance must be given in some countries in order that the acknowledgement be effective.[27] In one country,[28] such consent is necessary only to entitle the mother to maintenance and inheritance rights from the acknowledged person. In another one,[29] the approval of the person to be acknowledged is not required.

In connexion with the question of voluntary acknowledgement, it should also be mentioned that the legislation of most countries recognizes the tacit acknowledgement of a person born out of wedlock who has been constantly and openly treated as the offspring of the mother and has always been known as such, whether the mother-child relationship exists in law as a consequence of birth, or whether an acknowledgement by the mother is necessary.

Very limited information has been forwarded concerning the character of the acknowledgement, which according to the laws of some countries is irrevocable [30] and cannot be conditional.[31]

Finally, mention should be made of the possibility for the maternal grandparents, in case of death or incapacity of their daughter, to acknowledge their grandchild.[32]

(b) *Judicial and other forms of establishment*

As a general rule maternal filiation can be established by decision of a competent court following proceedings to that end. In some countries,[33] however, there are no statutory provisions to establish a maternal filiation as such. In these cases, the maternal filiation will have to be established

[20] Italy, Japan, Malta.

[21] Brazil, Japan, Republic of Korea.

[22] San Marino.

[23] Peru, Republic of Viet-Nam.

[24] Cuba, Spain.

[25] Cuba.

[26] Honduras.

[27] Cuba, Honduras, Japan, Spain, Venezuela.

[28] Peru.

[29] Argentina.

[30] Italy, Peru.

[31] *Ibid.*

[32] Peru.

[33] Australia, Finland, Israel, Kenya, New Zealand.

if it is contested, as a prerequisite for any claim for which the determination of maternal filiation is at issue. On the other hand, in one instance [34] the judicial establishment of the maternal filiation of a person born out wedlock is forbidden.

In certain countries [35] the maternal filiation is established following an avow (judicial or otherwise) by the person born out of wedlock that a given woman is his mother and a confirmation by the latter or a corroboration by two witnesses. Then, if the person concerned has no known mother already and if the difference of age between himself and the alleged mother as well as other factors make it possible to believe that they could be respectively child and mother, the maternal filiation will be considered established.

In order to establish maternal filiation, both the facts that the mother has given birth to the person born out of wedlock and that the latter is the person concerned must be proven. The legislation of some countries [36] stresses that maternal filiation may also be established in all cases where paternal filiation may be judicially declared. Those cases are fully described on page 51, *infra*.

Usually all types of evidence admissable to prove a fact may be introduced to the effect of establishing maternal filiation. However, in some countries there exist restrictions as to evidence, particularly regarding the requirement of written proof.

The person born out of wedlock is usually entitled to initiate proceedings to establish maternal relationship. If he is not of age, his legal representative may do so in his behalf whether he be his father, or his guardian,[37] or the Director of the Institution of Public Assistance [38] or of the voluntary organization who is in charge of him,[39] or the person who cared for him.[40] If the person born out of wedlock is deceased, his lineal descendants may pursue the action initiated by him, or may be entitled to introduce proceedings,[41] sometimes only in certain circumstances.[42] In one case [43] only legitimate descendants may do so, if the person born out of wedlock died during his minority or within five years after his coming of age.

Proceedings are directed against the mother, and if she is deceased, her heirs.[44] In one instance,[45] if she is dead, the action is directed against

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[34] Niger.

[35] Iraq, Lebanon (Moslem Law), United Arab Republic.

[36] Cuba, Guatemala, Honduras, Italy, Spain.

[37] Republic of Viet-Nam.

[38] *Ibid.*

[39] *Ibid.*

[40] Honduras.

[41] Hungary, Japan, Poland, Republic of Korea.

[42] Guatemala.

[43] Italy.

[44] Honduras, Japan, Republic of Viet-Nam.

[45] Republic of Korea.

the Public Prosecutor. In other instances, proceedings must be initiated during the lifetime of the alleged mother unless she is deceased during the minority of the child,[46] or when the circumstances are those referred to in connexion with the judicial establishment of paternity (see page 52, *infra*).

The laws of several countries refer not only to the right of the child to establish maternal filiation judicially but also to the right of his mother to do so [47] or her heirs,[48] or any interested party.[49]

Time-limits are usually set for initiating proceedings to the effect of establishing maternal filiation. For example,[50] in one country the action should be brought in court within two years of the date of birth. In others in case of discovery of new evidence establishing maternal filiation, proceedings should be initiated within six months from the day of discovery.[51] In one instance,[52] if the legal representative of the person born out of wedlock did not exercise the action within the prescribed time-limits, the person born out of wedlock may exercise it within one year after his coming of age. In case of death of the mother, the person born out of wedlock or his legal representative may initiate proceedings within one [53] or three years after her death.[54] In certain countries,[55] if the death of the mother occurred during the minority of the person born out of wedlock, action should be brought in court within four years following the attainment of his majority.

(c) *Persons born out of wedlock who can be acknowledged by their mother or whose maternal filiation can be judicially established*

In countries [56] where a legal mother-child relationship is recognized as a consequence of birth usually such relationship exists irrespective as to whether the person concerned is born to parents who were free to marry each other at the time of his conception or birth, or not.

The laws of all countries where the acknowledgement by the mother is necessary in order to establish a legally recognized relationship, allow the acknowledgement of persons born to parents who were free to marry each other at the time of their child's conception or birth. While some countries [57] allow it also in the case of persons born as a result of adul-

[46] Cuba.

[47] Bulgaria, Hungary.

[48] Bulgaria.

[49] *Ibid.*

[50] Republic of Viet-Nam.

[51] Cuba, Honduras, Spain.

[52] Republic of Viet-Nam.

[53] Republic of Korea.

[54] Japan.

[55] Cuba, Honduras, Spain.

[56] See page 31 *supra*.

[57] Albania, Argentina, Cuba, Honduras, Laos, Philippines, Romania, Venezuela, Yugoslavia.

terous and incestuous relations, others [58] prohibit altogether the acknowledgement of such persons when the nature of the filiation will be disclosed as a result of it. In such cases, acknowledgement by the mother is possible if she, alone, acknowledges her child and if she was free to marry at the time of his conception.

On the other hand, various restrictions concerning the possibility for the mother to acknowledge her child born as a result of adulterous or incestuous relations may exist. For example, a person born as a result of the adulterous relations of his mother may be acknowledged by her once the legal conjugal partnership has been dissolved;[59] or only in case of dissolution of her marriage by death of her husband [60] (however, if there exist any legitimate or legitimated issue from the marriage so dissolved, the acknowledgement will be effective once a decree of the Chief of State is rendered after the appropriate authority has been consulted);[61] or the acknowledgement by his mother of a person born as a result of incestuous relations is permitted only in case of her good faith, that is her ignorance at the time of conception of her incestuous relationship with the father,[62] or the acknowledgement of a person born as a result of adulterous or incestuous relations is allowed only in connexion with legitimation by the subsequent marriage of the parents.[63] It is evident that, in case of incestuous relations, the subsequent marriage of the parents must have been authorized.

As for the judicial establishment of maternal filiation, it is usually allowed in the case of persons born to parents who were free to marry each other at the time of conception or birth. While the laws of various countries [64] seem to provide also for the judicial establishment of maternal filiation in the case of persons born as a result of adulterous or incestuous relations, the laws of some countries [65] prohibit altogether the judicial establishment of maternal filiation for such persons. The laws of other countries establish certain limitations. For example, the judicial establishment is permitted for persons born as a result of adulterous relations of the father once the legal conjugal partnership has been dissolved and is prohibited for persons born as a result of incestuous relations;[66] or it is forbidden for persons born as a result of incestuous relations while it is permitted for persons born as a result of adulterous relations of the father as well as for persons born as a result of adulterous relations of the mother once her marriage is dissolved by the death of her husband

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[58] Canada (Quebec), Italy, Luxembourg, Republic of Viet-Nam, San Marino, Spain.

[59] Brazil.

[60] Italy.

[61] *Ibid.*

[62] *Ibid.*

[63] Ivory Coast, France.

[64] For example: Albania, Bulgaria, Hungary, Philippines, Romania, San Marino, Venezuela.

[65] Canada (Quebec), France, Luxembourg, Republic of Viet-Nam, Spain.

[66] Brazil.

unless there is legitimate or legitimated issue of such marriage;[67] or it is permitted for persons born as a result of adulterous relations.[68]

(d) *Extension of the relationship to the members of the family of the mother*

In all countries surveyed, maternal filiation, even when it is not recognized in law, is sufficient to bring parties within the prohibited degrees of consanguinity and affinity for marriage. However, in one instance,[69] persons born to parents who were not free to marry at the time of conception are ignored even for such purposes.

In various countries [70] where the law provides for more than one status, the relationship with the mother extends to her relatives. However, in some cases, this recognition is said to be very slight,[71] or is limited to members of the family by blood,[72] or extends only to maternal grandparents by specific statutory provision.[73] In many other countries,[74] the relationship is recognized as regards the mother only.

In countries where the law provides for a single status applicable to all persons irrespective of descent, as a rule, the maternal filiation extends to all the members of the family of the mother by blood or affinity.[75] However, in some of these countries,[76] according to a certain school of law, a person born out of wedlock is not considered as the uterine brother of a person born in wedlock to the same mother.

(e) *Effects of the establishment of maternal filiation on the designation and status of a person born out of wedlock* [77]

In countries where the law provides for more than one status, the establishment of maternal filiation attributes to a person born out of wedlock, from the date of birth, a specific designation different from that attributed to a person born in wedlock (see pages 21 to 23, *supra*). Whatever the designation used, a person born out of wedlock will be designated

[67] Italy.

[68] Cuba.

[69] Spain.

[70] Argentina, Austria, Brazil, Cameroon (East Cameroon), Canada (British Provinces), Ceylon (General Law), Chile, El Salvador, Federal Republic of Germany, Honduras, India (Hindu Law), Japan, Peru, Philippines, South Africa (Common Law), Sweden, Switzerland, Turkey, United States of America (some States), Venezuela.

[71] Trinidad and Tobago, United Kingdom.

[72] Venezuela.

[73] Australia, Kenya, New Zealand.

[74] Canada (Quebec), Cuba, France, Ireland, Italy, Jamaica, Laos, Luxembourg, Netherlands, Republic of Viet-Nam, San Marino, Sierra Leone, Spain.

[75] Afghanistan, Ceylon (Kandyan Law), China, Finland, Guatemala, India (Moslem Law), Iraq, Jordan, Lebanon (Moslem Law), Norway, Pakistan, Republic of Korea, Sudan, Thailand, Union of Soviet Socialist Republics, United Arab Republic.

[76] Afghanistan (Moslem Law-Sunni faith), Iraq (Moslem Law-Sunni faith), Jordan (Moslem Law-Sunni faith).

[77] The effects on designation are described in greater detail in section IV of the Introduction. The effects on status are analysed mainly in chapter VI, *infra*, under the appropriate headings.

in contradistinction to a person born in wedlock. When various subgroups of persons born out of wedlock are established by law, a person born out of wedlock may fall into one of the subgroups and be designated accordingly.

In a number of countries of this group, the establishment of maternal filiation, whether by voluntary acknowledgement or by judicial decision, entails the attribution from the date of birth, and as regards the mother, of a status which is inferior to the status of a person born in wedlock vis-à-vis his mother in various ways and/or degrees, depending on the country. In several of these countries, there may exist various types of status corresponding to the various categories of designations established among the general group of persons born out of wedlock. The person concerned will then enjoy the status which is attributed to the category in which he falls. In other countries the status of a person born out of wedlock may be identical with that of a person born in wedlock as regards the mother, or a privileged group of persons born out of wedlock may enjoy the same status as a person born in wedlock as regards the mother, while other persons born out of wedlock (or categories if any) may enjoy a status inferior to the status of persons born in wedlock as regards the mother.

In countries where the law provides for a single status applicable to all persons, the establishment of maternal filiation attributes to a person born out of wedlock, from the date of birth, either a specific designation different from that attributed to a person born in wedlock (in countries where there exists one designation for persons born in wedlock and another for persons born out of wedlock, with perhaps various subgroups) or the same designation as that attributed to persons born in wedlock, or no designation at all when filiation, whether in wedlock or out of wedlock, and whether maternal or paternal, is not given any designation.

In this group of countries, the establishment of maternal filiation entails the attribution, from the date of birth, and as regards the mother, of a status identical to that of a person born in wedlock as regards either parent. If the paternal filiation is also established the person will enjoy two sets of rights and duties, one as regards each parent and will be then in exactly the same position as a person born in wedlock who enjoys status as regards both parents.

2. *Loss of maternal filiation and its effects on the designation and status of a person born out of wedlock*

Maternal filiation may be challenged. The grounds on which such challenge may be based are the fact that the woman concerned is not the real mother of the person born out of wedlock,[78] or that the legal formalities of acknowledgement have not been fulfilled,[79] or that the person acknowledged is born as a result of adulterous, incestuous or sacrilegious relations,[80] or as a result of either of the two latter types of rela-

[78] Guatemala, Italy.

[79] For example: Cuba, Spain.

[80] Spain.

tions [81] or because of any fact adverse to the acknowledgement.[82] The person born out of wedlock is usually entitled to challenge acknowledgement [83] as also any person having a legitimate interest,[84] including the father,[85] generally within certain time-limits.[86] However, in one instance, the right to challenge an acknowledgement is imprescriptible and may be exercised even after legitimation by subsequent marriage of the parents.[87] In some countries [88] reference is also made to the possibility for the mother of contesting an acknowledgement attributed to her by proving the falsehood of the record or that her consent was vitiated, also within short time-limits.

Whatever designation (if any) and status were attributed to the person born out of wedlock as regards his mother as a result of the establishment of maternal filiation will disappear with the loss of such filiation.

[81] Cuba.

[82] Japan.

[83] Argentina, Brazil, Guatemala, Honduras, Italy, Japan, Peru, Philippines, Republic of Korea, Spain, Venezuela.

[84] Brazil, Cuba, El Salvador, Guatemala, Honduras, Italy, Ivory Coast, Japan, Peru, Republic of Korea, Thailand, Venezuela.

[85] Guatemala.

[86] Argentina, Brazil, Guatemala, Honduras, Peru, Philippines, Republic of Korea, Spain, Venezuela.

[87] Italy.

[88] Brazil, Italy, Philippines.

CHAPTER II

ESTABLISHMENT OF PATERNAL FILIATION

A. THE PARENTS ARE MARRIED TO EACH OTHER

1. *Establishment of paternal filiation*

(a) *The presumption of paternity and its scope of application*

The laws of all countries surveyed are based on the famous presumption "*pater is est quem nuptiae demonstrant*" (see page 29, *supra*).

In one group of countries,[1] children, whether conceived or born during the course of the marriage, are considered born in wedlock. There-

[1] Albania, Australia, Austria, Bulgaria, Canada (except for Quebec), Cameroon (East Cameroon), Ceylon (Kandyan Law and General Law), Cuba, Denmark, Federal Republic of Germany, Finland, France, Guatemala, Hungary, India (Hindu Law and Moslem Law), Ireland, Israel, Jamaica, Laos, Malaysia, Netherlands, New Zealand, Norway, Pakistan, Peru, Poland, Republic of Viet-Nam, Romania, South Africa (Common Law), Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkey, Union of Soviet Socialist Republics, United Kingdom, United States of America, Western Samoa, Yugoslavia.

fore, in such countries, children conceived before but born during the marriage, children conceived and born in the course of the marriage, and children conceived during the marriage but born after its dissolution, are considered born in wedlock and their mother's husband is presumed to be their father.

In another group of countries,[2] only children who were conceived during the marriage are considered born in wedlock. In such countries, children conceived and born during the marriage and children conceived during the marriage but born after its dissolution are considered born in wedlock. Depending on the country, children conceived before the celebration of the marriage and born during the marriage are either presumed to be born out of wedlock unless the mother's husband acknowledges them,[3] or either parent registers them as being born in wedlock,[4] or are presumed to be born in wedlock unless the mother's husband denies his paternity, sometimes [5] by a mere declaration to that end.

(b) *Legal period of gestation*

The laws of most countries provide for a predetermined period of gestation. Usually such period varies from a minimum of about 180 days to a maximum of about 300 days. The minimum indicated may sometimes be as low as 174 days [6] and as high as 200 days [7] or seven months.[8] The maximum period of gestation may be sometimes as low as 280 days [9] and as high as 349 days [10] or 12 months [11] or even two years.[12] In the last case in order for a person born two years after the dissolution of the marriage to be considered as being born in wedlock, the mother must make a declaration of pregnancy within a certain period of time after the dissolution of the marriage, during which she cannot remarry.[13] In another instance,[14] although a specific legal period of gestation of 270 days is provided for a fully developed child, the possibility of corrections for deviations from the normal degree of development of the child at

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[2] Afghanistan, Argentina, Brazil, Canada (Quebec), China, El Salvador, Honduras, Iraq, Italy, Ivory Coast, Japan, Jordan, Lebanon (Moslem Law), Luxembourg, Mali, Nepal, Niger, Philippines, Republic of Korea, San Marino, Spain, Sudan, Syria, United Arab Republic, Venezuela.

[3] Afghanistan, Iraq, Jordan, Lebanon (Moslem Law), Sudan, Syria, United Arab Republic.

[4] Japan.

[5] Canada (Quebec), El Salvador, Honduras, Italy, Spain.

[6] Jamaica.

[7] Japan, Republic of Korea.

[8] Mali.

[9] Ceylon (Kandyan Law and General Law), India (Moslem Law), Malaysia, Pakistan.

[10] India (Hindu Law), Jamaica.

[11] Israel.

[12] Afghanistan, Iraq, Jordan, Mali, Sudan.

[13] Mali.

[14] Denmark.

birth is envisaged; the determination of the date of conception is made by the Public Health Officer or in case of doubt by the Medical-Legal Counsel. On the other hand, in a few countries, the law does not provide at all for any specific period of gestation and refers either to the time when conception was possible,[15] or to a period of gestation which might be considered normal,[16] or rely on expert medical evidence.[17]

(c) *Effects of the establishment of paternal filiation on the designation and status of a person born in wedlock*

The information contained on page 30, *supra* on the effects of the establishment of maternal filiation on the designation and status of a person born in wedlock, are also relevant here.

2. *Loss of paternal filiation*

Except for a few countries [18] where the presumption of paternity of the husband cannot be challenged, in all the countries surveyed the presumption that the husband is the father of the children born to his wife is susceptible of rebuttal by the procedure of disavowal of paternity. On the other hand, the paternal filiation may be lost as a result of proceedings to the effect of challenging maternity (see page 31, *supra*).

(a) *Disavowal of paternity*

(i) *Countries* [19] *where the presumption of paternity of the husband applies to children conceived during marriage*

In all these countries, the presumption applies to children conceived and born during the marriage, and to children born after the dissolution of the marriage but conceived during the marriage. Children conceived before the celebration of the marriage and born during the marriage are not protected by the presumption.

a. Case of children conceived during marriage

Except for one,[20] all countries of this group allow for the possibility of rebuttal of the presumption of paternity. This procedure is admitted only on very serious and limited grounds resulting in the impossibility for the mother's husband to be the father of the child born to her. A ground which is almost commonly accepted is the *de facto* impossibility of access to the wife during the period when conception was possible due, for example, to the absence or imprisonment of the husband, or any other

[15] Australia, Ireland, New Zealand, United Kingdom.

[16] United States (except for Louisiana).

[17] South Africa (Common Law).

[18] Niger, Western Samoa.

[19] See foot-note 2, p. 40, *supra*.

[20] Niger.

fact or accident rendering access impossible.[21] In this connexion, the laws of some countries [22] refer to a longer period of no access such as the full time of pregnancy of the wife. However, it should be noted that, in one instance,[23] there cannot be any rebuttal of the presumption of paternity on the ground of non-access, the only ground admitted being adultery.

Another ground which is also to be found in the legislation of various countries is the evident,[24] manifest [25] or absolute [26] physical impotence of the husband. In one instance [27] reference is made also to the impossibility of procreating on the part of the husband during the period of conception. Natural impotence, that is impotence due to a temporary weakness, seems to be excluded although sometimes such a ground is admissible under certain conditions, as for example when the birth of the child was concealed.[28] The laws of some countries also refer to the grave illness of the husband [29] or to any other serious ground.[30]

As for the adultery of the wife, while in some countries [31] it is admitted as a ground for rebuttal of the presumption of paternity, and may perhaps constitute the only ground,[32] in others [33] it does not constitute a ground for disavowal. However, it will be admitted if it is coupled with other factors, such as concealment of the birth [34] or concealment of the birth [35] (and also the pregnancy [36]) together with circumstancial evidence establishing the non-paternity of the husband, or the impossibility of cohabitation,[37] or only circumstantial evidence of non-paternity,[38] or the dissolution of the marriage based on the adultery which resulted in the birth of the child.[39]

The legislation of some countries [40] refers to the case of the child conceived during the legal separation of the parents pending divorce or

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[21] Argentina, Brazil, Canada (Quebec), China, El Salvador, Honduras, Italy, Luxembourg, Lebanon (Moslem Law), Malta, Philippines, Spain, Venezuela.

[22] Syria, United Arab Republic.

[23] Sudan.

[24] Venezuela.

[25] Malta.

[26] Brazil.

[27] Italy.

[28] Luxembourg.

[29] Philippines.

[30] San Marino.

[31] San Marino, Sudan.

[32] Sudan.

[33] Argentina, Brazil, Venezuela.

[34] Argentina, Canada (Quebec), Malta.

[35] Ivory Coast.

[36] Italy.

[37] El Salvador, Honduras.

[38] Iraq.

[39] Syria, United Arab Republic.

[40] Italy, Malta, Venezuela.

judicial separation proceedings. In such case, there is no presumption of paternity unless it is established that the parents were reunited at the time of conception.

b. Case of children conceived before the celebration of the marriage and born during the marriage

According to the laws of various countries,[41] there is only a *prima facie* presumption that children conceived before the celebration of the marriage and born within the minimum period of gestation after the celebration of the marriage are born in wedlock. Such laws permit the husband to deny his paternity, sometimes by a declaration to that effect.[42] He may not do so, however, if he knew of the pregnancy of his wife before marriage [43] or if he has acknowledged the child expressly or tacitly. The laws of some countries [44] refer to the circumstances which may be considered as an acknowledgement by the father: the father may have signed the birth register or been present at the registration of the birth without contesting his paternity, or consented to the mention of his name in the register. In a few countries the father is not permitted to deny paternity when it is established that the child is not expected to live.[45]

According to the laws of other countries,[46] children conceived before the celebration of the marriage and born within the minimum period of gestation after the celebration of marriage are considered as born out of wedlock unless the mother's husband acknowledges them as his legitimate children, or either parent registered them as born in wedlock.[47]

(ii) *Countries* [48] *where the presumption applies to children born or conceived during marriage*

Except for one country,[49] all others of this group, allow for the possibility of rebuttal of the presumption of paternity of the husband. They generally [50] refer to evidence of circumstances establishing that sexual relations between the spouses did not take place during the period of conception, or to circumstances which would render it impossible for the wife to have conceived the child by the husband. Such grounds include

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[41] Argentina, Brazil, Canada (Quebec), El Salvador, Honduras, Ivory Coast, Italy, Luxembourg, Malta, Philippines, San Marino, Spain, Venezuela.

[42] Argentina, Brazil, El Salvador, Honduras, Philippines, Venezuela.

[43] Canada (Quebec), El Salvador, Honduras, Italy, Malta, Spain.

[44] Brazil, El Salvador, Honduras, Italy, Luxembourg, Malta, Philippines, Spain.

[45] Canada (Quebec), Ivory Coast, Malta.

[46] Afghanistan, Iraq, Jordan, Lebanon (Moslem Law), Sudan, Syria, United Arab Republic.

[47] Japan.

[48] See foot-note 1, p. 39, *supra.*

[49] Western Samoa.

[50] Australia, Austria, Ceylon (Kandyan Law and General Law), Cuba, Denmark, Federal Republic of Germany, Hungary, India (Hindu Law), Ireland, Israel, Jamaica, Malaysia, Netherlands, New Zealand, Norway, Pakistan, Peru, Republic of Viet-Nam, Romania, Thailand, Trinidad and Tobago, Turkey, United Kingdom, United States of America.

those already described on pages 41 to 43, *supra*. Again the impossibility of access to the wife because of the absence of the husband, or because of their living separately without any possibility of cohabitation, is the most widely accepted ground.

The impotence of the husband is sometimes expressly referred to.[51] In one instance,[52] it is required that the impotence be absolute and have lasted through the first 120 days of the period of gestation. However, it should be mentioned that in one case [53] this ground is formally excluded.

The laws of some countries consider adultery as a ground for disavowal if it is corroborated by evidence that the husband is not the father of the child [54] (reference has been made in this connexion to the blood groupings of the husband and the child which may exclude the possibility of paternity of the husband [55]) or if it is proved that the adultery resulted in the birth.[56] In the latter case, according to the laws of certain countries,[57] the rebuttal of the presumption of paternity must be coupled with an action of dissolution of the marriage. Sometimes,[58] adultery is admitted as ground for rebuttal only in the case of a child born within 120 days after the dissolution of the marriage and whose birth has been concealed. In one instance,[59] the ground of adultery is accepted when the pregnancy and birth were both concealed and all circumstances justifying a disavowal are established.

The information gathered refers also to the case of the child conceived during the period of legal separation pending divorce or judicial separation proceedings. The husband may deny his paternity unless there was a reunion of the spouses at the time of conception.[60] In two such instances,[61] the husband may do so by a simple declaration of non-paternity.

In all countries surveyed, the evidence submitted to the effect of destroying the presumption of paternity should be clear and convincing. In one instance,[62] the presumption holds good even when there is a strong physiological improbability that the husband is the father of the child.[63] Sometimes, it is expressly indicated that the evidence put forward should exclude all reasonable doubts [64] or that the presumption should hold good if there is still a scintilla of doubt concerning the possible paternity of the

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[51] Ceylon (Kandyan Law), Guatemala, India (Hindu Law), United Kingdom.

[52] Peru.

[53] Netherlands.

[54] Denmark, Norway, Peru, Republic of Viet-Nam, South Africa (Common Law).

[55] Denmark, Norway.

[56] Jamaica, Norway, Sweden, Trinidad and Tobago.

[57] Jamaica, Trinidad and Tobago.

[58] Netherlands, Norway.

[59] Guatemala.

[60] Peru, Sweden, Switzerland.

[61] Sweden, Switzerland.

[62] United Kingdom.

[63] Austria.

[64] Netherlands, Norway.

husband.[65] On the other hand, the existence of hereditary dispositions indicating that the husband cannot be the father may be admitted as evidence of non-paternity.[66] Depending on the country, evidence may [67] or may not [68] be received from either spouse, as to the non-access to the other.

In some instances,[69] the disavowal of children conceived before the celebration of the marriage is easier than that of children whose conception took place during marriage. Lesser grounds may suffice and sometimes the procedure is simpler. However, the husband cannot disavow these children if he has implicitly or explicitly recognized the child as his own. Such will be the case in the following circumstances: he knew of the pregnancy of his wife before the celebration of the marriage, or he signed the birth registration, or he was present at the registration of the birth, or the birth registration contains his declaration that he cannot sign,[70] or he agreed that his name be indicated in the birth registration.[71] Disavowal is prohibited also in the case of a child who is declared to be unable to live,[72] or who is deceased.[73] Concerning the form of the disavowal of children conceived before the celebration of the marriage and born during the existence of the marriage, certain laws [74] allow the husband to make a statement to the effect that he does not recognize the child as his own and does not require further evidence. In two of these instances,[75] this is so unless the future spouses cohabitated before the celebration of the marriage, in which case the husband is not entitled to make such a statement.

(b) *Procedure*

As a rule, the presumption of paternity is destroyed as a result of judicial proceedings. While in many cases such proceedings are introduced before a court, as a principal action, in other instances [76] the rebuttal takes place in connexion with legal proceedings whereby the enforcement of a legal right, or the establishment of a claim to property or to a dignity where such exist or the making of an order for the custody and maintenance of a " child of the marriage ", depends on the legitimacy of a particular person. This attack on the presumption may be made at

[65] India (Hindu Law).

[66] Norway, Sweden.

[67] South Africa (Common Law).

[68] United States of America.

[69] Cuba, Guatemala, Netherlands, Norway, Peru, Sweden, Switzerland, Thailand, Turkey.

[70] Guatemala, Republic of Viet-Nam.

[71] Cuba, Guatemala.

[72] Netherlands.

[73] Peru.

[74] Peru, Sweden, Switzerland, Thailand, Turkey.

[75] Sweden, Switzerland.

[76] Australia, India (Hindu Law), New Zealand, United Kingdom, United States of America (most States).

any time, by any person whose interest is affected. It should be recalled that in certain circumstances (see pages 43 and 45, *supra*) the legislation of some countries permits the husband to destroy the presumption of paternity by a declaration of non-paternity made in the appropriate manner, and the legislation of another country [77] refers to the disavowal of paternity resulting from an Act of Parliament.

The husband may initiate proceedings of disavowal of paternity, usually within a limited period of time, the length of which varies from one month to three years depending on the country, and which begins either from the birth or from the time when the husband had knowledge of the birth or became aware of the nature of the birth. Sometimes, however, although no time-limit is set, it is necessary that the husband act as soon as possible either at birth or immediately following it [78] or also at the time when the necessaries of the child are being bought [79] or as soon as he has knowledge of the birth in case of his return after an absence.[80] On the other hand, the legislation of other countries [81] does not provide for special time-limits for initiating proceedings of disavowal, or has no regard for them if there is a legitimate reason for failure to institute proceedings.[82]

While, in a few countries,[83] the husband alone is entitled to initiate such proceedings, various other laws [84] also entitle his heirs to do so if he dies without having exercised his right within the given time-limits, or if his faculty of judgement becomes impaired, or if his whereabouts are unknown, or if he is unaware of the birth.[85] The laws of other countries refer expressly to his descendants or ascendants,[86] or, lacking them, his brothers and sisters,[87] or to his next of kin,[88] or only to his lineal descendants,[89] to the heirs who are prejudiced in their rights by the existence of the child.[90] Usually such proceedings must be initiated also within short time-limits, which are generally similar to those imposed on the husband, starting either from the death of the husband [91] or from the

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[77] Sierra Leone.

[78] El Salvador, Honduras, Spain, all countries where Moslem Law is applied.

[79] Iraq, Sudan.

[80] Lebanon (Moslem Law).

[81] Jamaica, San Marino, South Africa (Common Law), Union of Soviet Socialist Republics.

[82] Turkey.

[83] Jamaica, Japan, Malta, Peru.

[84] Cuba, France, India (Moslem Law), Iraq, Netherlands, Philippines, Sweden, Switzerland, Turkey, Venezuela.

[85] Turkey.

[86] Italy, Republic of Korea.

[87] Norway.

[88] Finland.

[89] Republic of Korea.

[90] China, Republic of Korea, Thailand.

[91] Italy.

birth of the child if he is born posthumously,[92] or from the time the birth is known [93] or registered,[94] or from the time the child is legally in possession of the estate [95] or the heirs are disturbed in the peaceful enjoyment of the estate.[96] In one case,[97] the right to initiate proceedings is granted to the heirs of the husband only if the person concerned was conceived during the marriage, although the heirs may continue the proceedings initiated by their father in the case of a person conceived before marriage. In another case,[98] the heirs of the husband are denied the right to initiate proceedings although they may continue the action begun by their father.

The laws of a number of countries [99] entitle the mother to contest paternity usually within the same time-limits as for the husband beginning from the birth of the child. In some countries,[100] the competent public authority (in one instance, only at the request of the mother [101]) has the right to initiate proceedings of disavowal or to challenge paternity if the husband fails to do so. Usually this is done in the interest of the child or of his descendants. Sometimes, the action can be initiated only under special circumstances, as for example, when there cannot exist any presumption of paternity because there was no cohabitation at all between the spouses,[102] or if the child was conceived before the marriage, even if the husband acknowledged him.[103] In a few cases,[104] any person who has a legitimate interest may initiate proceedings of disavowal of paternity.

In several countries,[105] the child is entitled to contest the paternity of the mother's husband, but in one instance,[106] only if it is for his immediate advantage. In a few of them,[107] such action must be initiated within a certain period of time (one to three years) after his coming of age. In other countries [108] no time-limits are set. Sometimes,[109] special reference has been made to the right of the heirs of the child to pursue proceedings already initiated by him under certain conditions, or to initiate proceedings.[110]

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[92] *Ibid.*

[93] Republic of Viet-Nam.

[94] Cuba.

[95] Netherlands.

[96] *Ibid.*

[97] Argentina.

[98] Brazil.

[99] Bulgaria, Hungary, Poland, Yugoslavia.

[100] Austria, Federal Republic of Germany, Switzerland.

[101] Norway (if proceedings are based on non-cohabitation of the spouses during the period of conception of the child).

[102] *Ibid.*

[103] Turkey.

[104] El Salvador, Honduras.

[105] Albania, Denmark, Finland, Hungary, Norway, Poland, Sweden, Yugoslavia.

[106] Turkey.

[107] Hungary, Poland.

[108] Albania, Finland.

[109] Hungary, Yugoslavia.

[110] Hungary.

3. *Effects of the loss of paternal filiation on the designation and status of a person born in wedlock*

As a result of the disavowal or contestation of paternity, the person concerned will lose whatever designation (if any) was attributed to him and will be designated as a person born out of wedlock in countries where there exists a special designation for such persons, different from that used for persons born in wedlock. Moreover, in countries where there exist various categories of designations for the offspring of various types of extra-marital relations, the person may be designated as " adulterous " since the disavowal or successful challenge of paternity will result in establishing that his mother's husband is not his father. In countries where filiation is not designated at all or where all persons are designated as born in wedlock, the loss of paternal filiation will not entail any loss of designation.

In countries where the law provides for more than one status, the status previously enjoyed by a person born in wedlock as regards both parents, which carries with it the fullest set of rights and obligations provided for by law, is lost. The paternal filiation having disappeared, the person will have no status at all as regards a father. His maternal filiation will hold good, but, as regards his mother, the person will enjoy the status of a person born out of wedlock, which is generally inferior to that of a person born in wedlock as regards his mother.

In countries where the law provides for one status irrespective of whether a person is born in or out of wedlock, the loss of paternal filiation will entail the loss of status as regards the father. As regards the mother, the person will retain his status. Such status is the same as the status of a person born in wedlock as regards either parent.

In both groups of countries, when paternal filiation has been lost as a result of proceedings to the effect of challenging maternity, the person concerned will be left with no filiation, and therefore no status at all. He will become a foundling.

B. The parents are not married to each other

1. *Establishment of paternal filiation*

(a) *General*

According to the laws of most countries, the paternal filiation of a person born out of wedlock may be established either by acknowledgement or judicially. This establishment entails, depending on the country, a variety of status ranging from the status of a person born in wedlock to one which can hardly be considered as a status and consists of very limited rights and obligations.

On the other hand, paternal filiation may also result from the *de facto* existence of a father-child relationship and, therefore, is recognized without necessity of any act of acknowledgement by the father. Thus, in two instances,[111] a presumption of paternity exists with regard to the

[111] Federal Republic of Germany, Nepal.

man who had relations with the mother at the time of conception: in one case,[112] it entails a status of legitimacy since all persons are considered as born in wedlock whether they have been conceived in the course of a regular marriage of the parents or as a result of their casual relations; in the other case,[113] the presumption hardly entails a status and consists of a right to maintenance. In another instance,[114] the existence of a *de facto* marriage may be declared by one or both parties to the competent authorities and be registered, if it lasted for a least three years and the parties lived publicly and constantly as husband and wife (*union de hecho registrada*). In such case, the man is presumed to be the father of the children born to the woman after 180 days following the start of their relationship and less than 300 days after its termination. The same presumption operates when it is legally established that the parents have been living publicly as husband and wife (*vida maridable legalmente comprobada*) at the time of conception or birth.

In some other countries, no legal relationship is recognized as between a father and his child born out of wedlock. Acknowledgement by the father is therefore prohibited. However, in one instance,[115] it can take place in connexion with the subsequent marriage of the parents, and under another system of law,[116] the father may acknowledge his child inasmuch as acknowledgement implies that a marriage could have existed between the parents as the time of conception of the child (see page 69, *infra*).

(b) *Voluntary acknowledgement*

Concerning the various ways of acknowledging a person born out of wedlock, reference is made on page 31 *supra* which deals with the forms of voluntary acknowledgement by the mother.

Usually the will of the father to acknowledge his child must clearly result from the act of acknowledgement. Therefore, acknowledgement could not be deduced from the mere mention of the name of the father in the birth registration of the child: his signature, or his formal consent to the inclusion of his name is required,[117] or his ratification, when such mention was made at the request of the person born out of wedlock who should be at least eighteen years old.[118]

Acknowledgement may also result from the admission of paternity made by the father when a paternity agreement is entered into as a consequence of the action taken by the appropriate authority in order to determine paternity,[119] (see page 54 *infra*).

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[112] Nepal.

[113] Federal Republic of Germany.

[114] Guatemala.

[115] Union of Soviet Socialist Republics.

[116] Moslem Law.

[117] El Salvador, Honduras, Ivory Coast.

[118] Cuba.

[119] Canada (except for Quebec).

In connexion with the part played by administrative or other authorities in the investigation and determination of paternity, it should be indicated that such authorities help in various ways in obtaining a statement of acknowledgement by the father, and are under a legal obligation to do the utmost in that respect,[120] regardless of the mother's standpoint.[121] Because of the large facilities they are given to that end, and perhaps because the law imposes upon the unmarried mother the duty to disclose to the authorities the name of the father, it is said, in one instance,[122] that the problem of determining paternity has been solved in the great majority of cases.

According to the laws of certain countries, the father may acknowledge the child only with the consent of the mother. Thus, the acknowledgement will be effective only if both parents sign the birth register,[123] or if the mother gives her approval,[124] unless she is incapacitated or dead in which case permission should be given by the competent authorities.[125] In one case,[126] the acknowledgement of the father must be approved by the mother as well as by the child in order to be valid. If they do not object to it within one month after they have been notified of the application made by the father to the Registrar, their consent is considered as given. In one instance,[127] the voluntary acknowledgement of the father is effective only when it has been approved by the Court, following full judicial proceedings, the mother being present.

Sometimes,[128] the acknowledgement does not have to be made in any particular form. It may be made orally,[129] or may result from the fact that the father has maintained the child,[130] or from the fact that the child has been constantly and openly treated as his own.[131]

Although, as a rule, only the natural father may acknowledge the paternity of his child, in some countries the law refers also to other persons. For example, the paternal grandfather may acknowledge the child if the father is incapacitated [132] or either incapacitated or dead.[133] Reference has been made [134] also to the possibility for any man to acknowledge a child even if it is not his own, if he was free to marry the mother at the

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[120] Denmark, Norway.

[121] Norway.

[122] *Ibid.*

[123] Ceylon (General Law), Ireland, Jamaica, Malaysia, Sierra Leone, South Africa (Common Law), Trinidad and Tobago, United Kingdom.

[124] Hungary, Netherlands, Poland, Sweden.

[125] Hungary, Poland, Sweden.

[126] Thailand.

[127] Cameroon (East Cameroon).

[128] Canada (Quebec), China, Israel.

[129] United States of America (some States).

[130] China.

[131] Israel.

[132] Switzerland.

[133] Guatemala, Peru, Turkey.

[134] Netherlands.

time of conception of the child, if he is at least eighteen years old and if the difference of age between himself and the person to acknowledge makes it plausible that he could be the father. Such acknowledgement must be approved by the mother.

When the person to be acknowledged is of age,[135] or is over sixteen years,[136] his approval to the acknowledgement must be given.

While usually acknowledgement takes place during the life-time of the person to be acknowledged, sometimes it may be made before birth once conception has taken place [137] or after the death of the person to be acknowledged if he leaves issue.[138]

(c) *Judicial establishment*

The great majority of the countries surveyed provides for the judicial establishment of paternal filiation. The laws of a few countries,[139] however, do not seem to provide for it although they recognize a legal relationship between a person born out of wedlock and his father through acknowledgement of the latter. In certain countries,[140] where no legal relationship is recognized as between a person born out of wedlock and his father, the judicial establishment of paternal filiation is prohibited, as is also acknowledgement.

Depending on the country, the judicial establishment of paternal filiation may either entail a status, that is a set of rights and obligations as between father and child creating a real parental relationship, or very limited rights, usually restricted to maintenance, which cannot be considered as constituting a status in the full meaning of the word. In the first case, generally, the establishment of paternal filiation is admitted as a principal action and is subject to various specific requirements of substance and procedure, while, in the second case, it is usually linked to other proceedings for which the question of issue is relevant. In one instance,[141] the establishment of paternal filiation entails status when it is based on certain determined grounds and only a right of maintenance when it is established on other grounds.

(i) *Countries where the establishment of paternal filiation entails status*

The judicial establishment of paternity through court proceedings is admitted in case of:

(*a*) Evidence of sexual relations during the period of conception which can be proved by any satisfactory means; [142]

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[135] Cuba, Honduras, Spain.

[136] Hungary.

[137] Cameroon (East Cameroon).

[138] Italy, Japan, Republic of Korea.

[139] Israel, Finland.

[140] Union of Soviet Socialist Republics, countries where Moslem Law is applied.

[141] Turkey. See (i) (*f*), (*g*) and (*h*) of the following para.

[142] Argentina, Denmark, Hungary, Norway.

(*b*) Evidence of sexual relations during the period of conception which can be proved by any satisfactory means, if the person born out of wedlock has been commonly treated by the father as his offspring or if there is a beginning of written proof;[143]

(*c*) Notorious cohabitation during the period of conception;[144]

(*d*) When the person born out of wedlock has been publicly and constantly treated by the father as his offspring;[145]

(*e*) Existence of a document in writing by the father proving his paternity beyond all reasonable doubt;[146]

(*f*) Seduction by means of guile, abuse of authority, promise of betrothal or marriage, whether there is a beginning of written proof,[147] or not.[148]

(*g*) Rape or abduction during the period of conception;[149]

(*h*) Immoral acts on a minor, as a result of abuse of authority.[150]

According to the laws of some countries,[151] proceedings for establishing paternal filiation are not admitted when the mother has been guilty of notorious misconduct or has had sexual relations with another man during the period of conception. In one country,[152] such is the case when paternal filiation is established in circumstances described in (*g*), (*h*) and (*i*) above. In one instance,[153] if there is doubt as between several possible fathers, the court must institute proceedings against all of them in order to determine who is the father. In another instance,[154] even though several men can be suspected of being the father, it can be established by court verdict that one of them is the father if the burden of evidence preponderably points to one of them as the most probable father. In this connexion, the court can rule that investigations shall be made into the blood type and other hereditary traits of the mother, child, defendant or defendants and in certain cases also other men.

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[143] Venezuela.

[144] Guatemala, Ivory Coast, Italy, Peru, Republic of Viet-Nam, Switzerland, Thailand.

[145] Cuba, El Salvador, Guatemala, Honduras, Italy, Ivory Coast, Peru, Philippines, Republic of Viet-Nam, Spain, Thailand.

[146] China, Cuba, El Salvador, France, Guatemala, Honduras, Italy, Ivory Coast, Luxembourg, Peru, Republic of Viet-Nam, Thailand.

[147] El Salvador (only concerning the promise of betrothal), France, Luxembourg, Peru, Republic of Viet-Nam.

[148] China, El Salvador, Ivory Coast, Peru, Switzerland, Turkey, Republic of Viet-Nam.

[149] Cuba, France, Guatemala, Ivory Coast, Italy, Luxembourg, Netherlands, Republic of Viet-Nam, Thailand (with a beginning of written proof), Turkey, Venezuela.

[150] Cuba, El Salvador, Guatemala, Honduras, Netherlands, Peru, Spain, Turkey.

[151] China, France, Norway, Republic of Viet-Nam, Peru (only if the action is based on notorious cohabitation), Switzerland, Thailand, Venezuela.

[152] Guatemala.

[153] Yugoslavia.

[154] Norway.

As a general rule, paternal filiation is established through full court proceedings. Such proceedings, it is reported in one instance,[155] must be preceded by an application for conciliation before the competent court. If a decree of agreement is reached, its effects are those of a judicial establishment of paternal filiation. In another instance,[156] the matter is decided by the court when the summons served upon the alleged father has failed to bring about an explicit admission of paternity, in the presence of a magistrate. If the alleged father does not take the matter to the court within the time-limit stipulated in the summons, paternity is established without court decision. In two other countries,[157] this last type of procedure does not seem to constitute a necessary preliminary to court proceedings.

As to the persons who may initiate proceedings for the purpose of establishing paternal filiation entailing status, the child (and if he is a minor his legal guardian) is always entitled to do so.[158] He may be the only one having such right.[159] In some instances the public or voluntary organization which has been taking care of him,[160] or the comptent authority [161] regardless of the mother's standpoint,[162] enjoy that right. In various instances,[163] reference is also made to the heirs or descendants of the child, or the mother,[164] who if she is a minor should be represented by a guardian *ad litem*.[165]

Time-limits are usually set for initiating these proceedings. They vary from six months to five years, beginning generally from the time of birth, or from the time when the person reaches majority. Situations described on page 35 *supra*, on time-limits concerning the judicial establishment of maternal filiation apply here *mutatis mutandis*.

In case of death of the father, proceedings may be instituted against his heirs.[166] However, sometimes,[167] it is specifically indicated that the action must be initiated while the father is alive, unless his death occurred during the minority of the child or before his birth,[168] or unless a new document containing an acknowledgement of paternity is found.[169] Refe-

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[155] Japan.

[156] Norway.

[157] El Salvador, Honduras.

[158] Albania, Bulgaria, El Salvador, Guatemala, Hungary, Italy, Ivory Coast, Japan, Korea, Poland, Republic of Viet-Nam, Thailand, Yugoslavia.

[159] El Salvador.

[160] Republic of Viet-Nam.

[161] Denmark, Norway, United States of America (some States).

[162] Norway.

[163] Guatemala, Hungary, Italy, Japan, Korea, Thailand.

[164] Turkey, United States of America.

[165] United States of America.

[166] El Salvador, Italy, Turkey, Republic of Viet-Nam.

[167] Guatemala, Honduras, Japan, Spain, Thailand.

[168] Cuba, Guatemala.

[169] Cuba.

rence was also made to the possibility of establishing paternal filiation judicially, before birth, once conception has taken place.[170]

(ii) *Countries*[171] *where the establishment of paternal filiation entails very limited rights*

Where paternal filiation entails only very limited rights, it is usually established as a result of a court decree (affiliation order) secured by the mother or sometimes, failing her, by the appropriate public authority adjudging a man to be the putative father and obligating him for maintenance.

As a rule, the evidence furnished by the mother must be corroborated by other evidence to the satisfaction of the court.[172] Once the physical relations at the time of conception are proved or admitted, the alleged father can escape liability only by showing, again to the satisfaction of the court, that it was impossible for him to have fathered the child.

In one instance,[173] it is reported that for the purposes of an affiliation order obligating a putative father for maintenance, judicial proceedings are resorted to only when the administrative action has failed. This action is started once the mother, or either of her parents or the appropriate welfare authority, or any person who paid for the expenses of the birth or is taking care of the child, or even the doctor, has laid information before an authority having jurisdiction, stating, *inter alia*, that she is pregnant or has given birth to a child, as the case may be, and the name of the father of the child. On the basis of such information, an attempt is made to arrange an interview with the putative father, and a warrant may be issued for the apprehension of the person charged. If the man admits paternity or possible paternity, an agreement may be reached as to the payment of expenses and maintenance. If such is not the case, a complaint may be laid before the competent judge or court, who has discretionary power to determine paternity. The affiliation order may be made only if the complaint has been laid while the putative father is alive, and generally, not more than one year after either the birth or any formal acknowledgement of paternity, or the return of the putative father in the province. An affiliation order may be made in default and the decision may be appealed. In one known instance,[174] where there is more than one possible father, the same administrative action is taken against each of them in order to make agreements with each possible father and proceedings may be taken in court against them.

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[170] Turkey.

[171] Canada, Ceylon (General Law), Germany, Ireland, Jamaica, Malaysia, Sierra Leone, South Africa (Common Law), Trinidad and Tobago, Turkey (in cases where paternity does not entail status), United Kingdom, United States of America (many States).

[172] Ceylon (General Law), Federal Republic of Germany, South Africa (Common Law).

[173] Canada (except for Quebec).

[174] Canada (Alberta).

(d) *Persons born out of wedlock who can be acknowledged by their father or whose paternal filiation can be judicially established*

In countries where the establishment of paternal affiliation entails only limited rights,[175] there does not seem to exist any distinctions as between various categories of persons born out of wedlock concerning the possibility of having their paternity established. However, in one instance,[176] persons born to parents who were not free to marry at the time of conception cannot be acknowledged by their father nor can their paternal filiation be judicially established.

In countries where the law recognizes a relationship between a father and his child born out of wedlock, persons born to parents who were free to marry at the time of conception or birth can be acknowledged by the father, and paternal filiation can usually be judicially established. However, differences may exist among the various categories of persons born out of wedlock as to their right to have their filiation established by acknowledgement or judicially.

While in many such countries [177] the paternal filiation of persons born as a result of the adulterous relations of their parents may also be established by acknowledgement or judicially, in a few of them,[178] acknowledgement as well as judicial establishment is prohibited altogether. In various other countries, certain limitations exist as to acknowledgement or judicial establishment or both, which, it should be pointed out, are usually possible if the adulterous character of the birth is not disclosed as a result. Such limitations may be as follows: children born as a result of the adulterous relations of their parents may be acknowledged only in connexion with their legitimation by subsequent marriage of the parents,[179] provided there is no conflict of paternity, or once the legal impediment has disappeared,[180] or after the mother's husband has disavowed the child,[181] or the acknowledgement as well as the judicial establishment of paternal filiation of children born as a result of the adulterous relations of their father may be authorized while it is forbidden for children so born *a matre*; [182] the acknowledgement of a child so born *a patre* is permitted only with the approval of the wife while the judicial establishment is forbidden; [183] the acknowledgement as well as the judicial establishment of paternity of a child so born *a patre* is authorized as well as that of a child so born *a matre*, in this last case only if the husband's paternity has been denied in judicial proceedings,[184] and the legal con-

[175] See foot-note 171, p. 54, *supra*.

[176] Canada (Quebec).

[177] Albania, Argentina, Bulgaria, China, Cuba, El Salvador, Honduras, Japan, Nepal, Norway, Philippines, Republic of Korea, Romania, Sweden, Thailand.

[178] Austria, Luxembourg, Spain, Switzerland, Republic of Viet-Nam.

[179] France.

[180] Venezuela.

[181] Guatemala.

[182] San Marino.

[183] Ivory Coast.

[184] Hungary, Poland.

jugal partnership has been dissolved;[185] the acknowledgement as well as the judicial establishment of paternity of a child born as a result of the adulterous relations of his mother is permitted while that of a child so born *a patre* is allowed only after the marriage has been dissolved by death; if there exist issue from such marriage the acknowledgement must be authorized by executive decree.[186]

In various countries for which information is available,[187] persons born as a result of the incestuous relations of their parents may have their paternal filiation established by acknowledgement or judicially. In a few other countries,[188] such persons are debarred altogether from the benefit of acknowledgement and judicial establishment of paternal filiation. In various other countries certain limitations exist as to the acknowledgement or judicial establishment of paternity or both: for example, the acknowledgement by the father is permitted when the incestuous character of filiation is not disclosed as a result of it, but the judicial establishment is forbidden;[189] both acknowledgement and judicial establishment are authorized when such disclosure does not occur,[190] or once the legal impediment to the marriage of the parents has disappeared;[191] the acknowledgement by the father is permitted, but not the judicial establishment of paternal filiation;[192] the acknowledgement is permitted only in the case of legitimation by subsequent marriage of the parents;[193] the acknowledgement is permitted only if the father was of good faith at the time of conception of the child, but the judicial establishment of filiation is forbidden.[194]

(e) *Extension of the relationship to the members of the family of the father*

In all countries where a legal relationship as between a child and his father is recognized, paternal filiation, even when it is not established according to the provisions of the law, is sufficient to bring parties within the prohibited degrees of consanguinity and affinity for marriage. However, in one instance [195] this does not apply to persons born to parents who were not free to marry at the time of conception.

In various countries [196] where the law provides for more than one status, the relationship established as regards the father extends to his

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[185] Brazil.

[186] Italy.

[187] Albania, Argentina, Bulgaria, Guatemala, Hungary, Japan, Philippines, Poland, Sweden, Yugoslavia.

[188] Austria, Cuba, Luxembourg, Nepal, Turkey.

[189] Ivory Coast.

[190] Brazil, Republic of Viet-Nam.

[191] Venezuela.

[192] San Marino.

[193] France.

[194] Italy.

[195] Spain.

[196] Argentina, Austria, Honduras, Japan, Philippines, Peru, Switzerland, United States of America, Venezuela.

entire family. However, such extension may be limited to the members of the family of the father by blood; [197] or this will apply only to persons born to parents who were free to marry at the time of conception or birth; [198] or it may be so only for " betrothal children "; [199] or the extension to the other members of the family is limited to the obligation of maintenance only,[200] or the extension of the relationship to the entire family may occur only in the case of acknowledgement or judicial establishment on certain specific grounds.[201] On the other hand, in a great number [202] of countries of this group the relationship is recognized as regards the father only. In one of them,[203] this is the case for persons born to parents who were not free to marry at the time of their conception or birth; in another,[204] this is so for persons born to parents who were free to marry each other at the time of conception or birth. In certain countries [205] of this group, where a legal relationship with the father is recognized only within the framework of some specific statutes, such relationship may extend to the paternal grandparents for the particular purposes indicated in the statutes.

In all countries where the law provides for a single status and for which information is available,[206] once the relationship is established as regards the father in accordance with the provisions of the law, this relationship extends to his entire family. However, in one country,[207] the relationship is limited to the relatives by blood.

(f) *Effects of the establishment of paternal filiation on the designation and status of a person born out of wedlock* [208]

In countries where the law provides for more than one status, the establishment of paternal filiation attributes to a person born out of wedlock, from the date of birth, a specific designation different from that attributed to a person born in wedlock. Whatever the designation used, a person born out of wedlock will be designated in contradistinction to a person born in wedlock. When various subgroups of persons born

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[197] Venezuela.

[198] El Salvador.

[199] Sweden.

[200] Western Samoa.

[201] Turkey.

[202] Canada, Ceylon (General Law), Cuba, France, Germany, Ireland, Italy, Jamaica, Laos, Luxembourg, Malaysia, Malta, San Marino, Netherlands, Republic of Viet-Nam, Sierra Leone, South Africa, Sweden.

[203] El Salvador.

[204] Spain.

[205] Australia, Kenya, New Zealand.

[206] China, Guatemala, Israel, Norway, Republic of Korea, Thailand, countries where Moslem Law is applied.

[207] Finland.

[208] The effects on designation are described in greater detail in section IV of the Introduction. The effects on status are analysed mainly in chapter VI *infra*, under the appropriate headings.

out of wedlock are established by law, a person born out of wedlock may fall into one of the subgroups and be designated accordingly.

In many countries of this group, the establishment of paternal filiation entails the attribution, from the date of birth, of a status inferior in various ways and/or degrees, depending on the country, to the status of a person born in wedlock vis-à-vis his father. When the law provides for various types of status, the person concerned has only such status as is attributable to the particuarr subgroup of persons born out of wedlock into which he falls. When the law provides for a uniform status to be attributed to all categories of persons born out of wedlock, the person concerned, whatever his category, will enjoy that status which, by definition, is inferior to that of a person born in wedlock. In some countries,[209] one privileged group of persons born out of wedlock is entitled to the same status as a person born in wedlock as regards the father, while other persons born out of wedlock (or subgroups if any of persons born out of wedlock), are given a status which is inferior to the status of a person born in wedlock.

In countries where the law provides for a single status, the establishment of paternal filiation attributes to a person born out of wedlock, from the date of birth, either a specific designation different from that attributed to a person born in wedlock, or the same designation, or no designation at all if the nature of filiation is not designated. It also attributes, from the date of birth, and as regards the father, a status identical to that of a person born in wedlock as regards either parent. If the maternal filiation is also established, the person will enjoy two sets of rights and duties, one vis-à-vis each parent, and will be then exactly in the same position as a person born in wedlock who enjoys status vis-à-vis both parents.

2. *Loss of paternal filiation and its effects on the designation and status of a person born out of wedlock*

Paternal filiation may be challenged. The main grounds on which such challenge may be based are the fact the man concerned is not the real father of the person born out of wedlock,[210] or his grandfather, [211] or that the legal formalities of acknowledgement have not been fulfilled [212] or that the person acknowledged is born as a result of adulterous or incestuous relations and as such could not be acknowledged,[213] or that acknowledgement is detrimental to the child.[214] The person born out of wedlock is usually entitled to challenge acknowledgement.[215] This right may be

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[209] See p. 24 *supra.*

[210] El Salvador, Italy, Thailand, Turkey.

[211] Turkey.

[212] Cuba, El Salvador, Spain.

[213] Cuba, Spain, Turkey.

[214] Turkey.

[215] Guatemala, Honduras, Italy, Japan, Peru, Spain, Republic of Korea, Turkey.

extended to his descendants;[216] his mother may also exercise such right;[217] in some countries [218] the heirs of the man to whom acknowledgement is attributed may do so and sometimes,[219] any person having a legitimate interest, or the competent authority.[220] Proceedings must be initiated within short time-limits.[221] Sometimes,[222] it is also possible for the father to contest the acknowledgement made by him because it is vitiated, for example, if he had acknowledged under duress or if he had no legal capacity to acknowledge. However, in one instance,[223] the right to challenge an acknowledgement is imprescriptible and may be exercised even after legitimation by subsequent marriage of the parents.

As a result of the loss of paternal filiation, whatever effects had resulted from the establishment of the relationship concerning designation, if any, and status disappear.

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[216] Switzerland, Turkey.

[217] *Ibid.*, Guatemala.

[218] Argentina, Cuba, Philippines.

[219] Brazil, El Salvador, Honduras, Italy, Japan, Peru, Republic of Korea, Thailand, Turkey, Venezuela.

[220] Turkey.

[221] Argentina, Brazil, Honduras, Philippines, Peru, Republic of Korea, Spain, Venezuela.

[222] Italy, Philippines.

[223] Italy.

CHAPTER III

ACQUISITION AND LOSS OF THE STATUS OF A PERSON BORN IN WEDLOCK IN COUNTRIES WHERE THE LAW PROVIDES FOR MORE THAN ONE STATUS

In countries where the law provides for more than one status, that is the status of a person born in wedlock and the status of a person born out of wedlock, with perhaps various categories within this latter group, it is possible for a person who holds the status of a person born out of wedlock to acquire the status of a person born in wedlock, and also for a person holding the status of a person born in wedlock to lose such status without necessarily losing his relationship as regards his parents. However, in one instance,[1] there is no possibility for a person born out of wedlock to acquire the status of a person born in wedlock, the rule being: "Once illegitimate, always illegitimate."

A. ACQUISITION OF THE STATUS OF A PERSON BORN IN WEDLOCK

Legitimation is the legal procedure whereby a person born out of wedlock acquires the designation (if any) and the status of a person born

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[1] India (Hindu Law).

in wedlock. This result may be obtained by the subsequent marriage of the father and mother, by an executive decree, by judicial decision, by a temporary act of the Legislature, or by will.

1. *Legitimation by the subsequent marriage of the father and mother*

A procedure to be found in the legislation of most countries which provides for more than one status, and which could be traced far back in the centuries of various systems of law, is that of legitimation by the subsequent marriage of the parents. Such a method could be considered as a premium offered in favour of marriage.

(a) *Conditions*

This method of legitimation is based on the regular marriage of the father and the mother, that is to say a marriage celebrated according to the formalities prescribed by law. As to the question whether the subsequent marriage of the parents must be valid, the approach is different depending on the legislation concerned. While in some instances [2] the information gathered refers to the necessity of a valid marriage, usually a distinction is drawn between a putative marriage, that is a marriage entered into in good faith by one or both spouses, and a marriage entered into in bad faith by both spouses irrespective of whether it is a void or a voidable marriage.[3] In cases of a putative marriage, children remain legitimated according to the laws of some countries.[4] In other countries,[5] this is also the case when the marriage was contracted in bad faith by both spouses. In a few instances,[6] information was provided of a legally non-existent marriage [7] which, as such, has no legitimating effect.

(b) *Other requirements to be fulfilled*

In most countries,[8] legitimation of a person born out of wedlock by the subsequent marriage of his parents takes place once maternal and paternal filiation are established according to the provisions of the law,

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[2] Philippines, United States of America.

[3] The main distinctions between a voidable and a void marriage, apart from the causes of nullity are, *inter alia*, the following: a voidable marriage is susceptible of ratification by cohabitation of the spouses under certain conditions and is valid until annulled by a judicial decision to that effect. A void marriage is not susceptible of ratification; it is void from the beginning, and depending on each country, may or may not need judicial declaration that it is void.

[4] Argentina, El Salvador, Jamaica, Peru, Venezuela.

[5] Cuba, Honduras, Federal Republic of Germany.

[6] Argentina, Brazil.

[7] A legally non-existent marriage is a marriage which was celebrated without the consent of the spouses or which was not actually celebrated, and for which there is no need for a judicial declaration that it is non-existent.

[8] Argentina, El Salvador, France, Honduras, Italy, Japan, Luxembourg, Malta, Philippines, Netherlands, Republic of Viet-Nam, San Marino, Spain, United States of America (at least in eighteen states).

usually by means of an acknowledgement which may occur before marriage, at the time of the celebration of the marriage, or after the celebration of the marriage.

Often,[9] the legitimation of a person born out of wedlock results automatically from the subsequent marriage of his parents, no formal statement of the will of legitimating the person being required. Sometimes the marriage produces these effects even against the will of the parents.[10] In certain instances,[11] legitimation *ipso jure* occurs when filiation is established before or at the time of the marriage. If filiation is established after the marriage, a declaration must be made by the parents expressing their will to legitimate the person.

In a few countries, legitimation by subsequent marriage of the parents is possible only if the father at the time of the marriage was domiciled in the country [12] or in a country where such procedure was admitted.[13]

When acknowledgement occurs after the celebration of the marriage, the legislation of some countries [14] requires that it take place within a certain time-limit in order to produce legitimating effects. Other laws do not set any time-limit.[15] Sometimes,[16] legitimation *post-nuptias* is possible only by court decision.

(c) *Time*

Normally, legitimation takes place during the life of the person concerned. However, the legislation of many countries [17] provides also for the legitimation of a deceased person, usually when he has left issue. In a few of these countries it is specified that legitimation may benefit only the legitimate and legitimated issue of the legitimated person.[18]

(d) *Persons who may be legitimated*

As a rule, persons born to parents who were free to marry at the time of conception or birth can always be legitimated. The question whether persons born to parents who were not free to marry each other at the time of conception or birth may also benefit from such procedure depends on the particular legislation.

Concerning persons born as a result of the adulterous relations of their parents, several solutions are applied: they may be excluded alto-

[9] Australia, Argentina, Brazil, Cuba, Italy, Malta, New Zealand, Spain, Switzerland, Turkey, United States of America (at least in twenty-seven states).

[10] Argentina, Brazil.

[11] El Salvador, Honduras, Netherlands, Republic of Viet-Nam.

[12] Malaysia, Trinidad and Tobago, United Kingdom.

[13] United Kingdom.

[14] Argentina, Brazil.

[15] El Salvador, Honduras, Netherlands, Republic of Viet-Nam.

[16] France, Republic of Viet-Nam.

[17] Argentina, Brazil, Cuba, El Salvador, Federal Republic of Germany, Honduras, Italy, Malta, Peru, Philippines, Spain, Turkey, Venezuela.

[18] Honduras, Italy, Malta.

gether from the benefit of legitimation,[19] or they may be legitimated once the previous marriage [20] or the legal conjugal partnership [21] of the adulterous parent is dissolved and, in one instance,[22] only if there is no issue of the previous marriage. However, in the case of a person born of the adulterous relations of his mother, an added requirement must be met which is the destruction of the presumption of paternity existing on her former husband and in one instance,[23] legitimation is possible only if the marriage of the mother was dissolved by the death of her husband or by annulment.

As a rule,[24] persons born as a result of incestuous relations cannot be legitimated by the subsequent marriage of their parents because such marriage is prohibited by reason of consanguinity or affinity, and therefore cannot take place. However, the general rule of prohibition has been whittled away to some extent. The legitimation of such persons is permitted once the impediment has been removed by dispensation,[25] or if the parents could have married with dispensation at the time of conception,[26] or in case of a favourable medical opinion.[27] It should be noted that the concept of incest is becoming more restricted, so that generally the only persons who cannot be legitimated are those born of parents who are brother and sister or who are direct ascendant and descendant. The laws of many countries provide for a wide range of cases of dispensations for marriages.

(e) *Retroactivity of legitimation*

While the laws of some countries [28] provide for legitimation to be made retroactive from the date of birth of the person concerned, in many others [29] legitimation takes effect from the date of marriage. However, in a few [30] of the latter group of countries, legitimation is effective from the date of acknowledgement if the acknowledgement is subsequent to the marriage.

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[19] Canada (Quebec), Ceylon (General Law), El Salvador, Ireland, Italy, Luxembourg, Malta, Philippines, Spain.

[20] Australia, Cuba, Federal Republic of Germany, France, Jamaica, New Zealand, South Africa (Common Law), Turkey, United Kingdom, Venezuela.

[21] Brazil.

[22] Peru.

[23] San Marino.

[24] Canada (Quebec), Ceylon, El Salvador, Italy, Ireland, Jamaica, Malta, Peru, Spain, Turkey, United States of America (Louisiana).

[25] Brazil, San Marino.

[26] Argentina.

[27] Brazil.

[28] Austria, Australia, Canada (except Quebec), New Zealand, Philippines, South Africa (Common Law), Turkey, United States of America (in most states).

[29] Argentina, Brazil, Cuba, El Salvador, Honduras, Italy, Jamaica, Kenya, Japan, Malta, Spain, United Kingdom, United States of America (in some states), Venezuela.

[30] Italy, Japan, Malta, Venezuela.

(f) *Effects of legitimation*

Generally a person legitimated by the subsequent marriage of his parents is granted the same status as a person born in wedlock. However, some limitations to this rule exist. For example, the legitimated person may not dispute the right of primogeniture and other acquired rights of persons born in wedlock conceived in a marriage entered into the meantime,[31] or the effects of legitimation may not extend to nobility rights,[32] or legitimation may not prejudice rights acquired by certain persons before the marriage.[33]

2. *Other forms of legitimation*

(a) *Legitimation by executive act or decree*

This method of legitimation takes the form of an act or decree by the chief of the executive [34] or by the legislative body [35] or the competent minister.[36] After the applicant has made a request for such legitimation, a procedure follows which ends with the approval or refusal of the request.

The conditions required for the grant of such act or decree are generally as follows: the application must be made by one or both parents,[37] although in one case [38] reference is made only to the father and in another [39] legitimation may be requested by the legitimate ascendant of the deceased parent if the person has already been acknowledged and no contrary wish has been expressed by the deceased parent; the applicant must not have legitimate or legitimated issue;[40] legitimation by subsequent marriage must be impossible or very difficult;[41] the consent of the other spouse must be given if the parent applying for legitimation is married.[42] Certain laws [43] debar from the benefit of this method of legitimation some categories of persons born out of wedlock, sometimes under certain conditions.[44]

This form of legitimation appears to have limited effects. It confers on the person born out of wedlock the status of a person born in wedlock only vis-à-vis the parent who applied for legitimation, not as regards his family.[45] However, it extends to the descendants of the person so

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[31] Austria.
[32] Spain.
[33] Canada (except Quebec).
[34] Austria, Netherlands, San Marino.
[35] Brazil, Venezuela.
[36] Italy, Spain.
[37] Cuba, Italy, Netherlands, Spain.
[38] Federal Republic of Germany.
[39] Italy.
[40] Cuba, Italy, Spain.
[41] Cuba, Italy, Netherlands.
[42] Cuba, Italy, Spain.
[43] Brazil, Italy, Spain, Venezuela.
[44] Venezuela.
[45] Austria, Federal Republic of Germany, Netherlands.

legitimated.[46] The status acquired by such method cannot prejudice the rights of persons born in wedlock before the date of the act of decree.[47] In one instance [48] the effect of such legitimation consists strictly in conferring the designation of a person born in wedlock since the status remains the same as that enjoyed previously by the person concerned.

(b) *Legitimation by judicial decision*

In a few instances [49] the information gathered refers to legitimation by judicial decision. Usually the requirements to be fulfilled are the same as those indicated for the legitimation by executive act or decree (see page 63 *supra*). However, in one instance [50] it is specified that the father cannot apply for legitimation by judicial decision if he already has issue from the same woman, and in another [51] it is stated that children born as a result of incestuous relations cannot be so legitimated.

Generally this method of legitimation is used when legitimation by the subsequent marriage of the parents is impossible. In this connexion, sometimes,[52] it is specified that it is resorted to when the marriage could not be celebrated on account of the death of one of the parties or the loss of the requested capacity to contract marriage, and there was an officially confirmed betrothal, or a promise of marriage.

The effects of legitimation by judicial decision are limited to the person concerned and the parent who applied for it.[53] Proceedings may be brought before a court of voluntary jurisdiction,[54] or before the court in plenary meeting.[55]

In one instance,[56] reference was made to legitimation in connexion with a decision of the court assimilating a lasting *de facto* union to a regular marriage on grounds of equity. In order to be effective, the decision has to provide specifically for the legitimation of children born of such union.

(c) *Legitimation by a temporary act of the Legislature*

In one country [57] information was reported of the legitimation, by a temporary act of the Legislature, of children born to parents living or having lived as husband and wife and to whose marriage there is no legal impediment. This measure benefits also children born as a result of the adulterous relations of the father, if the parents have been living

[46] Federal Republic of Germany.
[47] Netherlands.
[48] Spain.
[49] Malta, Peru, Switzerland, Turkey, United States of America (some states).
[50] Peru.
[51] Malta.
[52] Switzerland, Turkey.
[53] Malta, Peru.
[54] Malta.
[55] Peru.
[56] Cuba.
[57] Turkey.

together as husband and wife. Parents or heirs are notified of the appropriate entry made in the birth registration. If no objection is made within a short period of time, the registration procedure is carried out. If an objection is interposed, the matter is settled by a final decision of the Justice of the Peace Court.

(d) *Legitimation by will*

The laws of certain countries [58] refer to the possibility of legitimation by will or by a public document where the wish to legitimate the person born out of wedlock has been expressed by the deceased parent. In one instance [59] it is stated that all requirements for legitimation by executive act or decree must be fulfilled, while in another [60] it is prohibited only in the case of existence of legitimate or legitimated issue. Usually an application, based on the will or document, is made by the person born out of wedlock to the competent authority whether it be an executive body or a court. It is stated in one instance [61] that the request shall be communicated to the nearest relatives. If the competent authority approves of it, legitimation takes place in conformity with the will or document.

B. Loss of the status of a person born in wedlock

The circumstances under which the legal presumption of paternity may be rebutted and, as a consequence, a person previously enjoying the status of one born in wedlock may lose such status and become a person born out of wedlock have been already described (see pages 39 and 48 *supra*). Depending on the country, a person born in wedlock may also lose his status in the case of a voidable, void or legally non-existent marriage of his parents. A person considered as being born in wedlock may also lose the status that he was enjoying wrongfully and be re-established in his true status of a person born out of wedlock, as a result of a successful challenge of his legitimacy only (his filiation not being affected), or as a result of a successful challenge of his legitimation.

Void and voidable marriages [62]

In many instances [63] persons born of a voidable marriage do not lose the status of persons born in wedlock. However, in various cases,[64]

[58] Cuba, Italy, Malta, Peru, San Marino, Spain.

[59] Italy.

[60] Cuba.

[61] *Ibid.*

[62] For the main distinctions between a voidable and a void marriage see footnote 3, p. 60, *supra.*

[63] Australia, Austria (except for nominal marriages), Ceylon (General Law), Cuba, El Salvador, Federal Republic of Germany, Honduras, Japan, New Zealand, Philippines, South Africa (Common Law), Spain, Sweden, Switzerland, Turkey, United States of America (in many states), Venezuela, Western Samoa.

[64] Canada (except Quebec), India (Hindu Law), Jamaica, Sierra Leone, Trinidad and Tobago, United Kingdom.

this will be so only if they would have retained their status had the marriage been dissolved by divorce, or if the marriage was entered in good faith by one or both spouses,[65] with the added requisite, in one instance,[66] that the retention of such status be in the interest of the person concerned. Sometimes [67] a voidable marriage entails loss of status irrespective of whether it is a putative marriage or not.

In several instances [68] persons born of a void marriage do not lose their status. In others [69] they lose it and become persons born out of wedlock unless the marriage had been entered into in good faith by one or both spouses (putative marriage), with the added requisite, in one instance,[70] that the retention of their status be in their interest. In a few instances,[71] the annulment of the marriage of the parents will not affect the status of the children if they would have retained their status in case of a dissolution of the marriage by divorce. In certain countries [72] a void marriage entails loss of status for the children born of it, irrespective of whether it is a putative marriage or not.

Non-existent marriages [73]

Very few countries [74] have referred specifically to what is called a legally non-existent marriage, while various others [75] have referred instead to a marriage which was not celebrated in conformity with the provisions of the law. Persons born of such marriages are considered as born out of wedlock.

Successful challenge of legitimacy

A number of countries [76] have referred to judicial proceedings contesting legitimacy. Such action may be initiated by any interested person and is not aimed at disproving paternity but at denying the legitimate

[65] Argentina, Brazil, Cameroon (East Cameroon), Canada (Quebec), Italy, Luxembourg, Netherlands, Peru, Republic of Viet-Nam, San Marino.

[66] San Marino.

[67] Kenya, United States of America (in some states).

[68] Cuba, El Salvador, Federal Republic of Germany, Honduras, Spain, Turkey, United States of America (in many states), Western Samoa.

[69] Australia, Argentina, Brazil, Canada, Cameroon (East Cameroon), Jamaica, Luxembourg, New Zealand, Netherlands, Peru, Republic of Viet-Nam, San Marino, South Africa (Common Law), Sudan, United Kingdom.

[70] San Marino.

[71] Austria, India (Hindu Law).

[72] Brazil, Ceylon (General Law), Kenya, Philippines, Trinidad and Tobago, United States of America (some states).

[73] For a clarification of the concept of a non-existent marriage, see foot-note 7, p. 60, *supra*.

[74] Argentina, Brazil, Spain.

[75] Canada (except for Quebec), Jamaica, United Kingdom.

[76] Argentina, Brazil, El Salvador, France, Honduras, Italy, Peru, Republic of Viet-Nam, San Marino, Venezuela.

character of the birth. Such character may be denied by establishing: (*a*) that the parents were never married or were not married at the time of conception or birth, depending on the country; or (*b*) that the parents were legally separated pending proceedings for divorce or judicial separation. Therefore, when an action contesting legitimacy is successful, if the person concerned was already registered in the birth register, as born in wedlock, the necessary change will be made in the birth register, so that he will be registered in conformity with the regulations applying to persons born out of wedlock. The person will no longer enjoy the status of a person born in wedlock which he held wrongfully, and will enjoy the status of a person born out of wedlock.

Successful challenge of legitimation

A person who has been legitimated through any of the procedures referred to in the present chapter may lose his acquired status of a person born in wedlock and fall back to his previous status of a person born out of wedlock as a result of proceedings to challenge his legitimation.

Proceedings may be initiated by the heirs of either parent,[77] the legitimated person [78] or his legitimate descendants on certain circumstances,[79] or his ascendants,[80] or the public prosecutor [81] or any person who is prejudiced in his rights [82] as a result of the legitimation. Evidence must be submitted to the effect of establishing that the legitimated person is not the child of the parents concerned,[83] or that the legal requirements for the legitimation were not fulfilled,[84] or that the subsequent marriage of the parents could not have produced legitimation [85] or that the person so legitimated belonged to a category of persons born out of wedlock who could not benefit of this procedure.[86]

While usually short time-limits are set within which the right to challenge legitimation should be exercised, it is stated in one instance [87] that such right is imprescriptible.

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[77] Peru, Turkey.

[78] El Salvador, Honduras, Peru.

[79] El Salvador, Honduras.

[80] *Ibid.*, also Peru (the father only).

[81] Turkey.

[82] Cuba, El Salvador, Honduras, Spain.

[83] El Salvador, Honduras, Peru, Turkey.

[84] Cuba, Peru, Spain.

[85] El Salvador, Peru.

[86] Spain.

[87] Peru.

CHAPTER IV

SPECIAL PROCEDURES CONCERNING FILIATION AND/OR DESIGNATION IN COUNTRIES WHERE THE LAW PROVIDES FOR A SINGLE STATUS

A. ESTABLISHMENT OF FILIATION AND/OR ACQUISITION OF THE DESIGNATION OF A PERSON BORN IN WEDLOCK

1. *Marriage of the parents subsequent to the birth of a person born out of wedlock*

As has already been indicated (see page 25, *supra*), there exist various systems among the group of countries where the law provides for a single status applicable to all persons irrespective of descent, whether different designations for persons born in and out of wedlock are used or not. According to one system [1] the subsequent marriage of the parents, as such, has no effect on the filiation and/or designation of a person born out of wedlock, although perhaps it could be considered as an acknowledgement of legitimate paternal filiation. According to the legislation of various other countries,[2] the marriage of the parents subsequent to the birth of a person born out of wedlock entails effects as far as the filiation and/or designation of such a person is concerned. It does not result, as in countries where the law provides for more than one status, in the acquisition of the designation (if any) and status of a person born in wedlock as distinct from the designation and status of a person born out of wedlock. In other words it does not embody a different set of rights and duties as between parents and child. It entails one or both of the following results: the establishment of the maternal and paternal filiation entitling the child to enjoy two sets of rights and duties — one as regards each parent; the acquisition of the designation attached to persons born in wedlock when such designation is provided for by the law.

Sometimes the subsequent marriage of the parents entails only the acquisition of the designation of a person born in wedlock because the acknowledgement of the child must also take place whether necessarily before the marriage,[3] or either before the marriage or at the celebration of the marriage or after.[4] In one instance [5] where the acknowledgement by the father of the person born out of wedlock is permitted only in connexion with the subsequent marriage of the parents, the subsequent mar-

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[1] Moslem Law.

[2] Albania, Ceylon (Kandyan Law), China, Denmark, Finland, Hungary, Ivory Coast, Mali, Nepal, Norway, Republic of Korea, Thailand, Union of Soviet Socialist Republics, Yugoslavia.

[3] Denmark.

[4] Finland, Norway.

[5] Union of Soviet Socialist Republics.

riage, if it is accompanied by the declaration by the father that the child is his own, entails the acquisition of the designation of a person born in wedlock and the establishment of filiation as regards the father. As a result of it, the person born out of wedlock who previously enjoyed one set of rights and duties, as regards his mother only, will enjoy two sets, one as regards each parent.

In certain countries [6] the marriage constitutes a simplified form of acknowledgement. It establishes filiation and, therefore, attributes status as regards both parents whether a declaration to that effect by the parents at the time of the celebration of the marriage is necessary or not and may [7] or may not,[8] depending on the country, entail the acquisition of the specific designation attached to persons born in wedlock. In one case [9] it is indicated that the subsequent marriage of the mother establishes paternal filiation provided that filiation as regards another man is not already established, that the future husband is at least sixteen years older than the child and that he has not denied formally his paternity before or at the time of the marriage. Depending on the country, the effects of the subsequent marriage of the parents may be either retroactive from birth [10] or recognized as of the date of marriage.[11]

Most of the countries which have forwarded information state that no differences are made among various categories of persons born out of wedlock as far as the effects of the subsequent marriage of the parents are concerned. It should be added, however, that the subsequent marriage of the parents of persons born as a result of incestuous relations is possible only when the legal impediment to the marriage has been the object of a dispensation by the competent authorities.

2. *Acknowledgement by the father*

Under a certain system of law,[12] paternity — but only legitimate paternity since the law does not recognize any relationship as between a father and his child born out of wedlock — may result from the acknowledgement by the father. Such acknowledgment implies, by a fiction of the law, that the father of the child was married at the time of conception of the latter. Acknowledgement is possible inasmuch as the man who makes the declaration of paternity could be physically and legally the father. The conditions to be fulfilled are the existence of a difference of age making paternity plausible (the required minimum of the difference of age being twelve and a half years),[13] the person to be acknowledged

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[6] Albania, Ceylon (Kandyan Law), China, Hungary, Ivory Coast, Mali, Republic of Korea, Thailand.

[7] *Ibid.*, except for Hungary.

[8] Hungary.

[9] *Ibid.*

[10] China.

[11] Ceylon (Kandyan Law), Republic of Korea, Thailand.

[12] Moslem Law.

[13] Pakistan, United Arab Republic.

must not be known as having another father, and the non-existence at the time of conception of the child of a legal impediment to the possible marriage of the father. Therefore, persons born as a result of adulterous or incestuous relations or, more broadly, of unapproved relations, are debarred from the benefit of a declaration of paternity.

Acknowledgement need not be formal. The fact that the person concerned has been openly and constantly treated as a person born in wedlock is considered as an acknowledgment.[14] If the child is of age, the acknowledgement, in order to be effective, should be accepted by him. On the other hand, acknowledgement is irrevocable.

Acknowledgement may take place not only on the initiative of the father, but also following an avowal of the person concerned that he is the child of the alleged father, supported by evidence, and subsequently confirmed by the father.[15]

In one case,[16] information was provided of an indirect acknowledgement, such as the acknowledgement of a brother or of a nephew, which has limited effects as far as inheritance rights are concerned. It can be resorted to if the relationship so established is not the expression of reality and only in favour of a person whose filiation is unknown. It may result from any act demonstrating the will of acknowledging. The fact that the person concerned was openly and constantly treated as a relative is considered an acknowledgement.

3. *Judicial declaration that a person is born in wedlock*

Information relating to two countries [17] referred to the case of a person born to parents who were engaged to marry and who could not do so because of the death of one of them or because of a legal impediment which arose after the conception (such as the unsoundness of mind of one parent). In such case, the other parent, or the child, may initiate *ex parte* proceedings for the purpose of having the parental filiation established and designated appropriately.

4. *Recognition of* de facto *marriages*

In one instance,[18] the law provides for the recognition, in court, of *de facto* marriage relations in case one of the parents died or was missing at war. If the mother of the child is declared as being the " wife " of the deceased or missing person, the paternal filiation of the children born of such marriage will be also judicially established. The relevant designation will be attributed to the children and the latter will enjoy status on the paternal side also.

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[14] India (Moslem Law), Iraq, Pakistan, Syria.

[15] Iraq, United Arab Republic.

[16] United Arab Republic.

[17] Albania, Yugoslavia.

[18] Union of Soviet Socialist Republics.

In another instance [19] either or both parties to a *de facto* marriage which has lasted at least three years during which the man and the woman lived publicly and constantly as husband and wife may declare the existence of such " marriage " before the competent authority. This declaration is then registered and the union is assimilated to a regular marriage in many respects. As a result, the " husband " is presumed to be the father of the children born to his " wife " as in the case of a regular marriage. If children were born before the union is registered, their paternal filiation is then legally established and entails status as regards the father also.

B. Loss of filiation and/or designation of a person born in wedlock

The circumstances under which the legal presumption of paternity may be rebutted have already been described (see pages 39 to 48, *supra*). As a consequence of the successful challenge of paternity, a person previously enjoying two identical sets of rights and duties — one as regards each parent — may be left with only one set of rights and duties, that is, as regards his mother, and may lose his previous designation, if any (see page 48, *supra*). It has also been stated that, if filiation as regards a married mother is successfully challenged, the person concerned will lose both sets of rights and duties established as regards his two parents, and may also lose his previous designation if any (see page 48, *supra*).

A person born in wedlock may also lose his filiation, and/or his designation if any, in the case of a voidable or void or legally non-existent marriage of his parents, or as a result of a successful challenge of his legitimacy, that is, of his being born in wedlock.

Void and voidable marriages [20]

In many countries [21] a voidable marriage destroys neither the filiation of persons born of the marriage nor their designation, if any. In one instance,[22] filiation will hold good only in the case of a putative marriage, that is, a marriage entered into in good faith by either or both parties, and in another,[23] only the designation will be lost.

In various countries [24] a void marriage does not destroy the filiation between persons born of it and their parents nor the designation attached

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[19] Guatemala.

[20] For the main distinctions between a void and a voidable marriage, (see footnote 3, p. 60, *supra*).

[21] Afghanistan, Bulgaria, China, Denmark, Finland, Hungary, India (Moslem Law), Iraq, Ivory Coast, Jordan, Lebanon (Moslem Law), Norway, Pakistan, Poland, Romania, Syria, Thailand, Union of Soviet Socialist Republics, United Arab Republic, Yugoslavia.

[22] Mali.

[23] Republic of Korea.

[24] China, Denmark, Finland, Hungary, Ivory Coast, Norway, Poland, Romania, Syria, Thailand, Union of Soviet Socialist Republics, Yugoslavia.

to these persons. In one known instance,[25] however, the relationship will hold good only in the case of a putative marriage entered into in good faith by either or both parties, and in another,[26] only in the case of a putative marriage entered into in good faith by both spouses. In some countries,[27] filiation disappears and with it the designation attached to it, if any, and in one case,[28] this is so when the celebration of the marriage was not performed according to the law.

Non-existent marriages

Information has been provided [29] of what is called a legally non-existent marriage, that is, a marriage lacking the consent of the spouses, or one which was not celebrated by the competent authority, and for which there is no need for a judicial declaration that it is non-existent. Such marriage has no effect whatsoever. Therefore, paternal filiation is considered as having never been established.

Successful challenge of legitimacy

Depending on the country, proceedings to challenge legitimacy may entail one or both of the following results: the loss of filiation and, as a consequence, of the status and designation attached to it, or only the loss of designation.

Under a certain system of law,[30] the legitimacy of a person may be challenged not only by contesting the existence of the marriage of his parents, from which legitimacy was presumed, but also by contesting the presumption of a marriage of the parents stemming from an acknowledgement by the father. This is a presumption of fact which can be set aside by contrary proof.

In a few countries,[31] where the law provides for different designations for persons born in and out of wedlock, a person may be denied his designation as a person born in wedlock while his filiation is not challenged. The designation of a person born in wedlock will be denied either by establishing that the parents were never married, or were not married at the time of conception or birth depending on the country, or were separated at the time of conception under a court order pending a procedure of divorce or separation, or that the marriage of the parents could not have attributed any designation to the child born of it because it was voidable or void if such is the case. Such action may be initiated by anyone having a legitimate interest.[32]

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[25] Mali.

[26] Sudan.

[27] Afghanistan, Bulgaria, India (Moslem Law), Iraq, Jordan, Niger, Pakistan, United Arab Republic.

[28] Norway.

[29] Hungary.

[30] Moslem Law as applied in Afghanistan, India, Iraq, Jordan, Pakistan.

[31] Ivory Coast, Romania.

[32] Ivory Coast.

CHAPTER V

CONCLUSIONS CONCERNING THE ESTABLISHMENT OF FILIATION AND SUGGESTIONS AS TO MEASURES IN FAVOUR OF PERSONS BORN OUT OF WEDLOCK

The following conclusions are concerned with the establishment of filiation only. Conclusions on the effects of the establishment of filiation on various specific aspects of status are presented in appropriate parts of the present report.

Since the establishment of maternal and/or paternal relationship is usually a prerequisite to the attribution of any family status at all to a person born out of wedlock, conditions permitting and facilitating the establishment of such relationship are vital. The general legislative trend today as revealed by the analysis of the data presented in Part One of the present report, appears to be towards a greater flexibility in the methods available for establishing filiation, although serious restrictions still exist in the legislation of a number of countries. One of the purposes of the present study is to reveal the discriminatory effects of this type of legislation and to propose effective methods for the elimination of such discrimination.

A. MATERNAL FILIATION

1. *Establishment of maternal filiation*

In a large number of countries, the very fact that a woman has given birth to a child results in *de jure* recognition of the maternal relationship. This rule appears to be most beneficial to persons born out of wedlock who can thus, as a consequence of birth, automatically enjoy status as regards their mother.

A variety of methods of acknowledgement, including tacit acknowledgement resulting from the fact that the mother has openly and constantly treated her child as her own, can be discerned in those systems of law requiring express acknowledgement by the mother. The same purpose is fulfilled where the acknowledgement is effected by the mere mention of the mother's name in the birth record if she does not oppose it, or, as is the case in at least one country, where the director of the public institution where the birth took place has the authority to record officially the declaration of acknowledgement made by the mother. Where the mother is incapacitated or dead, and therefore cannot herself acknowledge the child, the maternal grandparents are, in some instances, permitted to acknowledge him.

In a number of countries where the law requires express acknowledgement by the mother, such acknowledgement may occur at any time during the life of the person born out of wedlock, sometimes before the

birth, once conception has taken place, or even after his death. However, some special conditions are to be met when acknowledgement occurs after the birth has been registered. In any case, where a system of express acknowledgement is maintained, the procedure should be made as simple and informal as possible.

Analysis of the available data reveals that while the laws of most countries provide for the judicial establishment of the maternal filiation of a person born out of wedlock, in some countries the law does not provide for its establishment as such, the question being solved for each particular case if and when filiation is challenged. In a few instances, the judicial establishment of maternal filiation is not provided for at all. It goes without saying that the right to establish maternal filiation judicially should be embodied in the law of all countries.

As regards the evidence admissible in the proof of maternal filiation, there may sometimes be differences in the admissibility of evidence in cases of births in wedlock and births out of wedlock. It seems of primary importance that every type of evidence to the effect of establishing the respective identities of the mother and the child, as well as the fact of birth, should be admitted in both situations. As is the case in various countries, any party having a legitimate interest should have the right to establish maternal filiation judicially.

2. *Persons who can be acknowledged or whose maternal filiation can be judicially established*

In many countries, whether the maternal filiation is recognized in law as an automatic consequence of birth or as a result of an express acknowledgement by the mother or of a decision of a competent court, no distinction is made among the various categories of persons born out of wedlock: they all have the right to have their maternal filiation established. In some countries, however, prohibitions and restrictions exist either as to the acknowledgement or as to the judicial establishment — or both — of the maternal filiation of persons born of adulterous, incestuous or sacrilegious relations. Such persons are therefore denied the right to have a legally recognized relationship as regards their mother. This kind of serious discrimination, which is tantamount to denying such persons any status at all, should be eliminated. In any case where such restrictions upon the establishment of maternal filiation do exist, whether because of adultery, incest, prostitution or other causes, dispensation or authorization for the establishment of maternal filiation should be allowed in the widest range of instances. In many countries, the concept of incest is now restricted to ascendants and descendants and collaterals of the first degree. This trend should be encouraged.

3. *Extension of the relationship to the members of the family of the mother*

While in many countries the establishment of maternal filiation creates a legal relationship with all members of the mother's family, in

some countries this legal relationship is extended only to the maternal grandparents and in others it is strictly limited to the mother herself. Ideally, the establishment of maternal filiation should integrate the person born out of wedlock into his mother's family, as completely as a person born in wedlock.

4. *Loss of maternal filiation*

From the relatively little data which has been gathered on this point, it would appear that usually the right to impugn maternity is subject to strict requirements of time and evidence. This trend is certainly to be welcomed.

B. PATERNAL FILIATION

1. *Establishment of paternal filiation when the parents are married to each other*

Analysis of the available data reveals that the rule "*pater is est quem nuptiae demonstrant*" is incorporated in the legislation of all countries surveyed. This principle is interpreted, in one group of countries, to mean that the husband is presumed to be the father of the children conceived by his wife during the subsistence of the marriage, while in some other countries the presumption is extended to children either conceived or born during the existence of the marriage. According to this wider interpretation, children conceived before the marriage but born during it, children conceived and born during the marriage, and children conceived during the marriage but born after its dissolution are all presumed to be the offspring of the husband and wife. It is evident that this wider interpretation of the rule is preferable, because it establishes paternal filiation within marriage with all its consequences, in all situations mentioned above.

The legislation of most countries provides for a predetermined period of gestation which usually varies from a minimum of 180 days to a maximum of 302 days. A certain flexibility in this regard would certainly seem to be in accordance with present-day medical knowledge. When no specific period of gestation is provided for, reliance on expert medical evidence should be the rule.

2. *Loss of paternal filiation*

In nearly all countries the law recognizes the right of the husband to disavow paternity, mostly through court proceedings, whether as a principal cause of action or in connexion with other proceedings whereby the enforcement of a legal right depends on the legitimacy of the person concerned. Sometimes, however, children conceived before the celebration of the marriage may be disavowed by a mere declaration of non-paternity made in the appropriate manner. Except for the latter case the presumption of paternity is usually destroyed only upon evidence of cir-

cumstances establishing that sexual relations did not take place during the period of conception and that paternity of the husband is impossible. Such a trend should be encouraged and the grounds admitted should be always very serious and strictly limited.

The right to disavow or to challenge paternity is usually granted to the husband, sometimes also to the person concerned as well as to their respective heirs. In a few instances, such right is enjoyed by the wife and by any person having a legitimate interest. In some countries the competent public authority may *ex efficio* initiate proceedings and this is usually the case when the interest of the child or of his descendants so requires. Generally, the action has to be exercised within short time-limits. It is evident that the opportunities of initiating proceedings to disavow or challenge paternity should be as limited as possible, in order not to upset the prevailing family situation.

It should be recalled here that the disavowal or challenge of paternity, when it is admitted in connexion with other proceedings where the issue is relevant, can be made usually at any time and by any person whose interest is affected.

3. *Establishment of paternal filiation when the parents of the child are not married to each other*

The legislation of most countries provides for the establishment of the paternal filiation of a person born out of wedlock whether it entails a status that is a set of rights and duties, equal or inferior to that of a person born in wedlock or hardly any status at all, but only very limited rights. In some countries the law does not recognize any relationship between a person born out of wedlock and his father. No doubt the child has a fundamental right to have a father and to enjoy status in relation to him. It is, therefore, essential that the paternal filiation of a person born out of wedlock be recognized in law and that provisions to this effect be accordingly made.

The legislation of a great number of countries requires that the acknowledgement of the father be made according to strictly determined forms. The law of various other countries provides for a wide range of forms including, among others, tacit acknowledgement, operation of the presumption of paternity under specific circumstances, the recording of the acknowledgement by the director of the institution where the birth took place. Undoubtedy, this last approach secures paternal filiation in the largest number of cases of birth out of wedlock.

The information gathered for this study reveals that sometimes the approval of the mother is necessary in order for the acknowledgement made by the father to be effective. This requirement constitutes an infringement upon the right of the child to have his paternal filiation established. Because this right should not be denied, the approval of the mother should never constitute a prerequisite to the acknowledgement by the father.

The legislation of a few countries allows the paternal grandfather to acknowledge the child when the natural father is incapacitated or dead. This right should be extended to either paternal grandparent.

In many countries, the judicial establishment of paternal filiation is possible only in a limited number of cases, and in a few instances it is not provided for by law. This is a serious obstacle to securing paternal filiation and status. In order to improve the situation in this regard, the judicial establishment of paternity should be allowed whenever the court is satisfied that sexual relations took place during the time of conception which resulted in the birth. The possibility of establishing paternal relationship should not be denied in case of misconduct of the mother or relations with another man during the legal period of conception, as seems to be the situation in a few countries. If the court is satisfied that the man alleged to be the father is the natural father of the child, paternal filiation should be established.

Paternal filiation is established through court proceedings. However, mention has been made of a simpler form of establishment consisting in a summons to a man to declare before a judge that he believes he is the natural father. In case of default, acknowledgement is considered made. Such procedure permits establishment of paternal filiation in a quick, easy and inexpensive way.

The right to initiate proceedings for the establishment of paternal filiation should be granted to all persons who have a legal interest in doing so, including the competent guardianship or other authorities. As is sometimes the case, these authorities should play an active role in determining paternity by making the necessary investigations and encouraging voluntary acknowledgements of paternity whenever the father of a child born out of wedlock has been identified. In this connexion, the duty to disclose the identity of the father to the competent authorities should be imposed upon all persons having such knowledge as well as direct knowledge of the pregnancy or birth. Such disclosure should be subject to the rules of professional secrecy.

4. *Persons who can be acknowledged by their father or whose paternal filiation can be judicially established*

In various countries prohibitions and restrictions exist either as to the acknowledgement or as to the judicial establishment, or both, of the paternal filiation of persons born as a result of adulterous, incestuous or sacrilegious relations. In others, all persons born out of wedlock whether their parents were free or not to marry each other at the time of conception or birth, are entitled to have their paternal filiation established. This last trend should be followed and in so far as possible all existing prohibitions and restrictions should be eliminated so that these categories of persons born out of wedlock may not be denied the right to have a legally recognized paternal filiation.

5. *Extension of the relationship to the members of the family of the father*

In many countries, the establishment of paternal filiation creates a legal relationship with all the members of the father's family. In other

countries, this legal relationship is extended to the paternal grandparents only, and still in others, it is limited to the father. It would, of course, be most desirable that once paternal filiation is established, the person born out of wedlock should be integrated in his father's family as completely as a person born in wedlock.

6. *Loss of paternal filiation*

Paternity may be challenged in court by a restricted number of persons, within strict time limitations and sometimes on a variety of grounds. In some countries, however, anyone who has a sufficient legal interest may contest paternal filiation. Taking into consideration that the loss of paternal filiation entails loss of status as regards the father, the right to challenge it should be limited to persons directly concerned with the question of issue, exercised within short time-limits, and based only on absolute evidence of non-paternity.

C. Acquisition and loss of the status of a person born in wedlock in countries where the law provides for more than one status

1. *Acquisition of the status of a person born in wedlock*

(a) *Legitimation by the subsequent marriage of the parents*

In all countries where more than one status is provided for by law, a person born out of wedlock is legitimated by the subsequent marriage of his parents and therefore acquires the designation (if any) and status of a person born in wedlock. Such procedure does not require any further comments since its merits are obvious. Its interpretation, however, may give rise to some questions in certain cases.

First of all, the question arises as to whether the marriage must be valid. In fact, this seems to be the case in most countries belonging to this group provided that at least one of the spouses was of good faith at the celebration of marriage. In some countries, the marriage has a legitimating effect even when both spouses were of bad faith at the time of the marriage.

Another question is whether the subsequent marriage of the parents of a child born out of wedlock should have the automatic effect of legitimation, or whether some other formalities should be required in addition, such as an acknowledgement by the parents or the decision of a competent court. It is obvious that the former procedure should be given preference, since additional requirements would only delay the legitimation, and in the case of non-fufilment, prevent it altogether.

Analysis of the available data indicates that the trend varies widely as to whether persons born of adulterous or incestuous relations may or may not benefit from such procedure. The approach of various countries should be followed towards permitting the legitimation of children born

of adulterous relations, once the impediment to the marriage of the parents has been removed, and no conflict of paternity exists. As for children born of incestuous relations, the trend towards a restricted concept of incest should be encouraged and dispensations authorizing marriage should be granted in as many instances as possible.

(b) *Other forms of legitimation*

Various other forms of legitimation are provided for in cases where the subsequent marriage of the parents of the person born out of wedlock is not possible, or has not taken place for some specific reason. These forms include legitimation by executive act or decree, by decision of a competent court, and by will. These or similar procedures should be as simple as possible and should be made available in all countries. Their importance becomes particularly evident in the case of conception during the betrothal of the parents not followed by marriage because of the death or loss of capacity of one of the parents. Also in cases where a person is born as a result of adulterous or incestuous relations and the subsequent marriage of the parents may not be possible because no dispensation can be given, these procedures are of great importance.

The example set in one instance of legitimation by a temporary act of Legislature should be followed when, because of the social context in a given country, this method would benefit a large number of persons.

(c) *Time factors and effects of legitimation*

Usually legitimation takes place during the lifetime of the person concerned. In some countries, it is also permitted before the birth or after the death of the person, a trend which should be followed. In any case, it is important to give legitimation legal force as from the date of birth of the person concerned in order to facilitate his assimilation in his family and in society. This, indeed, seems to be the case in many countries.

2. *Loss of the status and designation (if any) of a person born in wedlock*

Conclusions have already been made (see pages 75 and 76, *supra*) in connexion with the rebuttal of the legal presumption of paternity.

A person born in wedlock may also lose his status and designation, if any, as a person born in wedlock in the case of a void, voidable or legally non-existent marriage of the parents. (Conclusions contained on page 78 *supra* on the validity of the subsequent marriage of the parents for the purpose of legitimation are equally relevant here.) Also, the status and designation of a person born in wedlock may be lost as a result of a successful challenge of his legitimacy, or of his legitimation. Such procedures should be available only to persons directly concerned with the question of issue, in limited cases only, and should be exercised within short time-limits.

D. Special procedures concerning filiation and/or designation in countries where the law provides for a single status

1. *Marriage of the parents subsequent to the birth of a person born out of wedlock*

In many countries where the law provides for a single status applicable to all persons irrespective of descent, there is a possibility of establishing filiation through the subsequent marriage of the parents. This method should be encouraged since status depends on the establishment of parental relationship. In a few countries, the subsequent marriage of the parents only confers on the person concerned the specific designation of a person born in wedlock. This trend should also be encouraged since the attribution of such designation could be of importance in the social context of the country. Additional requirements which are imposed by some laws should be eliminated as far as possible in order to permit the largest number of persons to benefit from the effects of the subsequent marriage of their parents.

2. *Acknowledgement of legitimate paternity*

Under a system of law, paternity — but only legitimate paternity since the law does not recognize any relationship as between a father and his child born out of wedlock — results from the acknowledgement by the father. Reference is made here to the conclusion already drawn that paternal filiation of persons born out of wedlock should be recognized and should entail status. In any event, under that system, acknowledgement of legitimate paternity as well as its judicial establishment, should be as simple as possible and the latter should be made available in all cases where acknowledgement is admitted, at the initiative of all persons directly concerned.

3. *Judicial declaration that a person is born in wedlock*

In cases where conception has taken place during the betrothal of the parents which was not followed by marriage because of the death or loss of capacity of one of the parents or because of some other legal impediment to the marriage arising after the conception, it is possible in a few countries, for the person born to such parents to have his paternal relationship established and to be designated accordingly by the court. This procedure meets an urgent need and, therefore, should be made available in all countries.

4. *Recognition of* de facto *marriages*

The information gathered has revealed that the legislation of some countries provides for the recognition of *de facto* marriages in certain special circumstances. As a result, children born of these unions have

their filiation legally established as regards both parents. Inasmuch as such recognition does not jeopardize the institution of marriage, the law should provide for it.

5. *Loss of filiation and/or designation of a person born in wedlock*

In the majority of countries where the law provides for a single status, a voidable marriage, whether putative or not, does not destroy filiation. As to the children born of a void marriage, the situation varies in different countries. It would seem to be justified that filiation should not be affected, despite the invalidity of the marriage, whether it is or is not a putative one.

In countries where the law provides for different designations for persons born in wedlock and out of wedlock, the invalidity of the marriage should not affect the designation attached to persons born of it.

Part Two

THE VARIOUS FIELDS OF DISCRIMINATION AGAINST PERSONS BORN OUT OF WEDLOCK

CHAPTER VI

LEGAL STATUS OF PERSONS BORN OUT OF WEDLOCK AS COMPARED WITH THAT OF PERSONS BORN IN WEDLOCK AS REGARDS PARENTS AND RELATIVES

A. NAME

The legal nature of the name of a person has been explained in several ways. Some authorities consider it as means of identification for civil policy purposes, others as an outward sign of filiation distinguishing a person from others, and still others as one of the attributes of legal personality or one of the " proprietary rights ". Whatever may be the legal nature of the name of a person in different legal systems, the name normally serves to identify the person in his community and refers, at least in most instances, to the family to which the person belongs.

The right to a name has been expressly recognized as one of the fundamental rights of a child. Principle 3 of the Declaration of the Rights of the Child provides: " The child shall be entitled from his birth to a name . . . ". Article 22 *bis*, paragraph 2 of the draft Covenant on Civil and Political Rights provides: " Every child . . . shall have a name."

In the absence of any definition of the term " name " in these texts, it may be assumed that it refers to both the proper name (given name) and the surname (family name), but with emphasis on the latter. The proper name, also called " given name ", is generally selected for the child with a large measure of freedom by persons entitled to do so (parents, guardians, public authorities etc.), within limitations which are common to all children alike. In most systems of law considered in this report, the surname, also called " family name ", is shared by members of the same family. In contrast to the given name, the family name is not selected freely, but is normally determined by law or by custom as a consequence of the establishment of filiation or by application

of special rules which, at most, grant a much more restricted margin for selection. In general, children are given their parents' surnames, and most particularly their father's surname.

In the context of the present study it is important to determine whether the surname to be borne by the child is that of the father, that of the mother, or those of the father and mother combined in one way or another. It is even more important to examine whether the rules for the determination of surnames are the same in all comparable cases. Attention will be focused on situations in which filiation has been established as regards both parents, since it is here that discrimination may be more readily encountered. In addition, a brief reference will be made to situations where filiation has been established only in regard to one parent, as well as to cases where such relationship has not been established as regards either of the parents.

When no relationship has been established between the child and his parents, the child's surname usually has to be determined by an administrative or judicial act.[1] In two countries,[2] the names of fictitious parents are entered in the birth registration — since the birth of all persons must be registered with an indication of the names of a father and a mother — and the child's surname is determined on the basis of these fictitious parents' surnames.

When filiation has been established only as regards one parent, the surname of the child is normally that of the legally-established parent. In systems in which surnames are composed of paternal and maternal elements [3] the person will take both elements from his father's surname or from his mother's surname as the case may be. It should be pointed out that in some countries following this system,[4] in cases where the mother is the only legally-established parent there is provision for placing the elements in the mother's surname in reverse order with the express purpose of avoiding disclosure of the fact of birth out of wedlock.

In certain countries,[5] the surname of the child is that of the father if he is the only legally-established parent, but in cases where it is the mother who is the only legally-established parent, the child does not bear her surname. In one of these countries,[6] the child's surname is the given name of the maternal uncle. In the other two countries,[7] the surname of a fictitious father is registered, and the child is given the fictitious father's surname. In one of these countries,[8] the surname of this

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[1] As for example in Cuba, El Salvador, Guatemala, Iraq, Lebanon, Republic of Korea, Spain.

[2] Hungary, Spain.

[3] Argentina,* Brazil,* Cuba, Guatemala, Peru, Spain, Venezuela * (* implied).

[4] Cuba, Spain.

[5] Hungary, Nepal, Niger.

[6] Niger.

[7] Hungary, Nepal.

[8] Hungary.

fictitious father is that of the mother's next kinsman in the ascending line whenever there is one, unless the mother demands that the child bear her own surname.

Before examining cases in which filiation has been established as regards both parents, mention should be made of a system of law [9] in which persons born of adulterous or incestuous relations can never legally establish their paternal filiation and therefore may only take the mother's surname upon establishment of maternal filiation. On the other hand persons whose parents could have married each other at the time of conception have the right to bear their father's surname upon acknowledgement by the latter, which is considered as an acknowledgement of legitimacy since, through a fiction of the law, a marriage is presumed to have existed between the parents at the time of conception.

In another system [10] the paternal filiation of a person born out of wedlock may de established by acknowledgement only in connexion with the marriage of the parents subsequent to the birth. So, a person born out of wedlock will bear his mother's surname and the patronymic [11] indicated by her, unless his parents marry after his birth, in which case, upon acknowledgement of the father he will be given the patronymic of the latter, and, with the mutual consent of the parents he may be given the father's surname. Persons born in wedlock have a right to their father's patronymic, and may take as their surname either their father's surname, the parents' common surname or a surname on which the parents agree; if there is no such agreement, the Bureau of Trusteeship and Guardianship gives these children a surname.

When filiation has been established as regards both parents, in some countries, children always take their father's surname or the surnames of both parents upon the establishment of filiation vis-à-vis both parents, while in other countries, differences may be made on the basis of whether paternal filiation was established by operation of legal presumptions based on the marriage of the mother, by acknowledgement, or by act of authority, or whether the establishment of filiation was simultaneous or successive as regards the parents. Special problems are posed in case of successive establishment of filiation, especially when paternal filiation is established later than maternal filiation because according to certain systems, a change of surname may be either mandatory or optional.

The question of surnames is generally linked to problems of establishment and loss of filiation, rather than to any special status enjoyed by children. The existence of the status of persons born in wedlock, as differentiated from the status of persons born out of wedlock, does not necessarily mean that differences are established in this regard; and *vice versa*, the inexistence of such special status does not necessarily mean that no such differences are made.

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[9] Afghanistan, India (Moslem Law), Iraq, Jordan, Lebanon (Moslem Law), Malaysia (Moslem Law), Pakistan (Moslem Law), Sudan, Syria, United Arab Republic, United Republic of Tanzania.

[10] Union of Soviet Socialist Republics.

[11] Element derived from the father's given name, borne by all persons.

The surname to be taken legally by persons whose filiation has been established as regards both parents is determined, in the various countries studied, in different ways:

(*a*) In many countries the father's surname [12] is always taken by all persons, whether they have been born in wedlock or not, and irrespective of whether maternal and paternal filiations were established simultaneously or successively. When paternal filiation is established after maternal filiation, the surname originally registered (usually that of the mother) must always be changed to the father's surname. This change in the registered surname is mandatory.[13]

(*b*) In several countries in which the surname is generally composed of two elements, paternal and maternal,[14] the person takes the paternal element of the father's surname and the paternal element of the mother's surname. In some countries of this group, this is an alternative to taking only the paternal element of the father's surname or the father's full surname. These rules apply in cases of persons born in and out of wedlock. Therefore, when maternal filiation has been established before paternal filiation, the registered surname may be changed into the father's surname or it may be altered so as to include the paternal element of the father's surname in addition to the paternal element of the mother's surname which is kept.[15]

(*c*) In several other countries,[16] whether as a matter of law or as one of custom, persons born in wedlock take the father's surname, and persons born out of wedlock may choose between the father's and the mother's surname. If paternal filiation has been established after maternal filiation the person may change the registered surname to the father's surname. In one country,[17] the possibility of a choice between the father's and the mother's surname exists only when paternal filiation has been established after maternal filiation. Then the father's surname may either be substituted for the mother's or be added to it.

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[12] In one of the countries in this group (Bulgaria), the child takes both the given and the family names of the father. The child's name is then formed as follows: child's given name, father's given name, father's surname. In another country (Nigeria), the child's name is formed by the child's given name and the father's given name.

[13] Bulgaria, Finland, Italy, Ivory Coast, Luxembourg, Mali, Netherlands, Nepal, Niger, Philippines (as regards " natural " and " natural by fiction of the law " children), Republic of Korea, Republic of Viet-Nam, San Marino, Switzerland, Venezuela.

[14] In most systems of this group (Argentina, Cuba, Guatemala, Peru, Spain), the paternal element of the father's surname precedes that of the mother. In the one remaining system in the group (Brazil), the paternal element of the mother's surname precedes that of the father's. In all systems the most important part of the surname is always the paternal element of the father's surname.

[15] Argentina, Brazil, Cuba, Guatemala, Peru, Spain.

[16] Albania, Australia, Canada, Ceylon, China, France, Hungary, Ireland, Israel, Jamaica, Japan, Kenya, New Zealand, Nigeria, Norway, Sierra Leone, Thailand, Trinidad and Tobago, United Kingdom, United Republic of Tanzania, United States of America, Yugoslavia.

[17] France.

(*d*) In one country,[18] persons born in wedlock take the parents' common surname. In the absence of such common surname, they take the surname of either parent or both parents' surnames together, as determined by common accord of the parents or by decision of the guardianship authority. The same rules apply for persons born out of wedlock, whose filiation has been established as regards both parents simultaneously. When paternal filiation has been established after maternal filiation, the competent judicial authority may authorize the child to bear the father's surname.

(*e*) In one country,[19] persons born in wedlock, as well as persons born out of wedlock, whose maternal and paternal filiations are established simultaneously, take the father's surname. When, in the case of persons born out of wedlock, paternal filiation is established after maternal filiation, the registered surname (that of the mother) must be changed to that of the father's when paternity is acknowledged. However, when paternal relationship is established by judicial decision, this change to the father's surname may be made only at the mother's request.

(*f*) In one country,[20] persons born in wedlock always take the father's surname, but may always change it to the mother's surname, while persons born out of wedlock always take the mother's surname, but may always change it to the father's surname.

(*g*) In a few countries,[21] persons born in wedlock take the father's surname while persons born out of wedlock take the mother's surname. In one of these countries,[22] it is expressly provided that a person born out of wedlock " even though acknowledged by the father, may not assume the surname of the father though he may assume the surname of the mother ".[23]

(*h*) In certain countries [24] following in general the system contemplated in (*a*), there are, however, special provisions concerning persons born to parents who could not have married each other at the time of conception and/or birth, as follows:

(i) Persons born of adulterous, incestuous or sacrilegious relations may not take their father's surname, but they may always take their mother's surname; [25]

(ii) Persons born of incestuous or adulterous relations whose filiation may not be legally established as regards their father,

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[18] Romania.

[19] Poland.

[20] Denmark.

[21] Austria, Federal Republic of Germany, Malta, South Africa.

[22] Malta.

[23] These persons have the right to bear their father's surname only in case of " legitimation " — that is of the acquisition of the status of a person born in wedlock (Austria, Malta). See p. 88, *infra*.

[24] Philippines, Republic of Viet-Nam, Turkey.

[25] Philippines.

may not bear the father's surname, but they may always bear their mother's surname; [26]

(iii) Persons born of adulterous relations, whose filiation may only be established as regards the unmarried parent may bear his/her surname and not the other parent's surname; in case both parents were married to other persons at the time of conception and/or birth, filiation may not be established as regards any of the parents, and therefore, such persons may not bear the surname of either parent.[27]

1. *Effects of the loss of parental filiation on the surname*

In all countries for which information is available on this subject, when a person loses his parental filiation, he also loses the surname given to him on the basis of that filiation. It is reported in a few instances, that the interested parties would ordinarily not object to the continued use of their surnames by these persons.

2. *Effects of the acquisition and of the loss of the status of a person born in wedlock in countries where the law provides for more than one status*

In countries where the law provides for more than one status, the acquisition or loss of the status of a person born in wedlock has no effect on the surname generally, since it is the establishment of paternal filiation which normally precedes such acquisition or loss of status that entitles such a person to use the father's surname. In two countries,[28] however, only the acquisition of the status of a person born in wedlock brings about the right to change to the father's surname and the loss of such status would result in the change from the father's surname to the mother's.

3. *Conclusions*

The analysis of the data gathered reveals that, except for some rare instances, when filiation is established as regards one parent only, the person born out of wedlock has the right to bear his parent's surname. This is a satisfactory trend.

When filiation is established as regards both parents, discrimination would arise if the person born out of wedlock is entitled only to bear his mother's surname while a person born in wedlock would have the right to bear his father's surname, the surname of either parent, both parents' surnames or elements of both parents' surnames. In order to avoid such discrimination, when filiation is established as regards both parents, the same rules which are applied for the determination of surnames of persons

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[26] Turkey.

[27] Republic of Viet-Nam.

[28] Austria, Malta. In these countries (dealt with, among other countries, on p. 87, *supra*), establishment of paternity does not entail a right to bear the father's surname, but legitimation by subsequent marriage does.

born in wedlock (whether they imply the use of the father's surname, the use of the mother's surname or the use of a combination of the father's and the mother's surnames) should apply for the determination of surnames of persons born out of wedlock.

It should be stressed that the question of name is closely linked to that of disclosure of the fact of birth out of wedlock and also to the social position of persons born out of wedlock. Indeed, situations may exist where, because of the strong social attitudes prevailing against persons born out of wedlock, it might be contrary to the interest of such persons to enforce rules on surnames which might disclose the nature of their birth. Therefore, in such circumstances, it would be important to avoid disclosure of the fact of birth out of wedlock through the use of surnames.

Disclosure of the fact of birth out of wedlock occurs: (*a*) where upon the establishment of paternal relationship, a change to the father's surname is made mandatory after the mother's surname had been used for a number of years; (*b*) under some systems and in certain situations, by the mere use of only the mother's surname, a result which is avoided in systems in which surnames are composed of paternal and maternal elements by allowing the person to take both elements of the mother's surname.

Thus, it would appear, that in cases of successive establishment of paternal and maternal filiation, any change of surname that the second establishment of parental filiation may bring about, should be left to the option of the interested parties. This optional character should not depend on the manner in which paternal and/or maternal filiation have been established (whether by acknowledgement or by judicial or administrative decision). When filiation is established as regards one parent only, in systems in which surnames are composed of paternal and maternal elements, the person born out of wedlock should be allowed to bear both elements of this parent's surname; if this parent is the mother, the possibility of inverting the order of such elements should be provided for.

B. Parental authority

The manner in which parental authority is exercised varies from country to country, and even within a country, depending on whether the law provides for different categories of minors. Theoretically, in the case of persons born in wedlock, parental authority could be granted to the father only or to both parents jointly, while in the case of persons born out of wedlock, depending on whether the minor has been acknowledged by one or by both of his parents, it may be granted to the mother only, to the father only, or to both of them jointly.

In countries where the law provides for one single status applicable to all persons, irrespective of descent, parental authority is governed by provisions which apply to all children whose filiation has been established. When, however, the law distinguishes between persons born in wedlock and those born out of wedlock, such a distinction may lead to different

sets of regulations for the two categories. Thus, a problem of discrimination could arise in regard to their respective status, firstly in determining which parent is entitled by law to exercise parental authority and secondly, in regard to the content of the parental powers granted.

1. *Discrimination in determining which parent is called upon to exercise parental authority*

(a) *Position of parents of persons born in wedlock*

Parental authority belongs to the father. The father plays a prominent role, particularly in countries where he is considered to be the head of the family. In such countries,[29] preference is given to the father over the mother in determining which parent is entitled to exercise parental authority. The privileged position of the father is expressed in various ways. He is said to have the natural right, or the primary right, or the exclusive right or the *prima facie* custodial right. In some instances,[30] although it is stipulated that the rights belong to both parents, they are exclusively exercised by the father. In one country,[31] the law specifies that legal separation does not affect the primacy of the father, but such a rule is far from general.

Parental authority belongs to the mother. None of the laws the countries surveyed gives to the mother exclusive rights to exercise parental authority as long as the father is alive and has not been declared unfit to fulfil the duties stemming from such authority. The cases where parental authority is exercised by the mother alone are generally specified by the law. In principle the parental authority is automatically transferred to the mother when the father dies, is absent or incapacitated. There are however exceptions to this rule. In countries governed by Moslem law, guardianship goes to the father's relatives.

Certain countries [32] allow the mother to share some of the father's legal powers such as consent to the marriage of the minor child, or to challenge his authority by bringing an action to that effect. The court could then curtail the father's rights, or remove and transfer them to the mother.

Parental authority belongs jointly to both. In a number of countries,[33] the rights of the parents are virtually equal and the father and the mother jointly exercise parental authority over their children. In case of disagree-

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[29] Australia, Cameroon (East Cameroon), El Salvador, France, Honduras, India, Italy, Jamaica, Jordan, Kenya, Laos, Lebanon (Moslem Law), Luxembourg, Malaysia (Common Law), Nigeria, Pakistan, Republic of Korea, San Marino, Sierra Leone, South Africa (Common Law) (reservations on consent to marriage), Spain, Syria, Thailand, Trinidad and Tobago, United Arab Republic, United Kingdom, Venezuela.

[30] Italy, Lebanon (Christian communities), South Africa (Common Law).

[31] Brazil.

[32] South Africa (Common Law), United Kingdom.

[33] China, Cuba, Denmark, Federal Republic of Germany, Finland, Guatemala, Ireland, Israel, Japan, Netherlands, New Zealand, Norway, Peru, Philippines, Sudan, Western Samoa.

ment, the law usually stipulates that the father's decision prevails unless there is a court order to the contrary. One country,[34] for example, empowers the courts to entrust the mother with the right to decide on a single matter or on a particular kind of matter whenever the conduct of the father may endanger the welfare of the child.

Generally, upon the death of one parent, the surviving spouse alone exercises parental authority, although the transfer may not always be automatic.

In various countries [35] where parental authority is exercised by both parents the father or either parent is allowed to appoint a guardian by will, in which case the surviving parent exercises joint parental authority with the guardian. In one country,[36] however, any interference by the mother against the testamentary guardian is forbidden. In another country,[37] it is stipulated that while the father may appoint by will a guardian in respect of the minor's person or property, such appointment has no effect if the father predeceases the mother. However, it will be revived if the mother dies without appointing a guardian. Furthermore, appointment of a guardian by the court is, in some instances mandatory when the father [38] or either one of the parents [39] dies. Custody, although exercised by the mother, falls under the indirect supervision of the guardian.

There are cases where guardianship and custody are regulated by different rules. In one country,[40] custody is the joint responsibility of both spouses, while guardianship belongs to the father only. Moslem law [41] often grants to the mother the custody of her male child until he has completed the age of seven and of her female child until the age of puberty, but states that her right is subject to the supervision of the father who is the primary and natural guardian.

It should be finally observed that the courts can always supersede the rights of parents and guardians and intervene whenever the welfare of the child is endangered. Various laws [42] grant them wide powers in all matters pertaining to custody and guardianship. Furthermore, in allocating parental authority, in case of divorce or legal separation, the courts generally hold that the father has no better claim than the mother. The interests and the welfare of the child must be the main consideration.

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[34] Federal Republic of Germany.

[35] Australia, Ceylon (General Law), India (Hindu Law), Ireland, Jordan, New Zealand, Pakistan, Republic of Korea, South Africa (Common Law), United Kingdom.

[36] Ceylon (General Law).

[37] India (Hindu Law).

[38] Austria.

[39] Netherlands.

[40] Austria.

[41] India (Moslem Law), Iraq, Jordan, Pakistan.

[42] Ceylon (General Law), Ireland, Malaysia, South Africa (Common Law), Thailand, United Kingdom.

(b) *Position of parents of persons born out of wedlock*

Generally, in the case of persons born out of wedlock, parental authority is organized on a different basis. The most striking difference is in the position of the father, which in a large number of countries is not as privileged as in the case of a child born in wedlock.

In several countries,[43] the status of the mother is comparable to that of the father of a person born in wedlock. Their laws reflect a widely accepted dostrine: a mother is a natural guardian of her child born out of wedlock, and as such, has a *prima facie* legal right to his custody, care and control, superior to the right of the father or any other person. In some instances,[44] the law has gone further and parental authority has been exclusively vested in the mother even though the father may be in a better position to exercise it. In several countries,[45] it is specifically provided by law that the mother's right can be enforced by a writ of *habeas corpus*.

In some countries, while the mother is still regarded as better fit to exercise parental authority over her child born out of wedlock, she is, however, placed in a position somewhat inferior to that of the father of a person born in wedlock. This happens, for example,[46] when custody is granted to her, but guardianship is exercised by a special guardian appointed by the court. In one country [47] the right of the mother does not derive, as in the case of persons born in wedlock from the mere fact of birth, but is established by decision of a court. In another country,[48] however, the intervention of the court is required only for children born of adulterous or incestuous relations. Also, the exclusive right of the other may be limited to certain categories of persons born out of wedlock: " spurious children " [49] or children whose paternal filiation has been established against the wishes of the putative father.[50]

As regards the father, there is no differentiation stemming from the manner in which paternity has been established. Except in a very few countries,[51] the effect is usually the same whether it is the result of a voluntary acknowledgement or of a court decision.

A number of countries [52] completely exclude the father from any role in the exercise of parental authority — including the right to apply

[43] Afghanistan, Australia, Canada, Ceylon (General Law), El Salvador, Finland, India (Hindu Law, Moslem Law), Iraq, Ireland, Jamaica, Jordan, Netherlands, Nigeria, Norway, Pakistan, South Africa (Common Law), Trinidad and Tobago, United Kingdom, United Republic of Tanzania, United States of America, Western Samoa.

[44] Canada, Denmark, Finland, Ireland, Kenya, Malaysia (Common Law), Norway, United Kingdom, United Republic of Tanzania.

[45] Jamaica, Pakistan, Trinidad and Tobago, United Kingdom.

[46] Austria, Federal Republic of Germany.

[47] Turkey.

[48] Netherlands.

[49] Philippines.

[50] Peru.

[51] Argentina, Peru.

[52] Canada, Denmark, Finland, Kenya, New Zealand.

to court — even though he has acknowledged the child. He is also denied paternal authority after the death of the mother, but, in one case,[53] he may substitute for the mother on the basis of a natural right. Under a system of law [54] which does not recognize any relationship between a father and his child born out of wedlock, parental authority is vested exclusively in the mother, and the father is not entitled to it unless he has acknowledged the child, in which case it is implied that the child was conceived in lawful wedlock and as a result enjoys the corresponding status.[55]

In certain others,[56] however, the father has a subsidiary right, as in the case of the mother of a person born in wedlock. Paternal authority is automatically transferred to him when the mother dies, is absent or unable to fulfil her duties, but sometimes,[57] this transfer requires the intervention of the court, or of the competent authority. In three countries,[58] parental authority is determined by mutual agreement or by the court, when the father acknowledges the child. The mother's legal title to the exercise of parental authority is generally not considered absolute and may be overriden. Consequently, the laws of many countries [59] allow the father to apply to a court. In such a case, parental authority is usually given to the mother as against the father unless she is found unfit. The best interests of the child are the main consideration of any court which must decide on parental authority. However, as between the competing interest of the father and other relatives, courts generally prefer the father. The father has thus only a virtual right of custody when the welfare of the child is jeopardized by the mother.

Contrary to what has been observed in the case of the child born in wedlock, the courts are often free to choose the person to exercise parental authority over the person born out of wedlock. The law does not take into consideration the fact of acknowledgement, nor does it indirectly designate the parent; the power to grant parental authority is vested in the competent court, which decides which parent is best fit to exercise it. In such cases, the interest of the child is usually the main criterion. The judge has wide discretionary powers with respect to this matter. In exercising them he must act in accordance with equity and take into account, in so far as possible, the wishes of the parents. Only when the interests of the child clearly so require should the judge withhold custody from the mother and appoint a guardian.

In one country,[60] the law provides for the appointment of a guardian by the competent authority as soon as it has been informed of the mother's pregnancy. After the birth, the court is empowered to grant

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[53] Kenya.

[54] Moslem law.

[55] See p. 69, *supra.*

[56] El Salvador, Norway, United States of America.

[57] Netherlands, Norway.

[58] Japan, Nigeria, Norway.

[59] Jamaica, South Africa (Common Law), Trinidad and Tobago, United Kingdom.

[60] Switzerland.

parental authority to either one of the parents or to someone else. In another one,[61] children who have attained ten years of age may themselves decide which parent will exercise parental authority. In one country,[62] neither parent of a child born out of wedlock is entitled to exercise guardianship rights, which are vested in the competent authority. In one instance,[63] while the parents have no legal right to the exercise of parental authority, the courts, in appointing a guardian, recognize generally the natural relationship and give primary consideration to the mother, the putative father and the mother's relatives.

Several countries [64] have adopted separate but similar rules for both categories of persons when both parents acknowledge the child. Depending on the legal systems in force, parental authority over persons born out of wedlock may be vested either exclusively in the father, regardless of prior establishment of maternity, or in both parents acting jointly. Sometimes,[65] particularly in countries where the mother must formally acknowledge her child born out of wedlock, neither parent is directly designated as having parental authority. It is vested in the parent who first acknowledges the child. Upon the death of this parent, or if there is an impediment, parental authority will then be transferred to the other parent. But when the mother and the father acknowledge simultaneously, the rules are the same for both categories of children. In one country,[66] the order of preference is as follows: (*a*) when the child is simultaneously acknowledged by both parents and they live together, the father has priority; (*b*) when the acknowledgement is not simultaneous, the parent who has recognized first has priority; (*c*) the parent who has voluntarily acknowledged, instead of the parent whose relationship has been established by court order, has priority.

Finally a number of countries [67] disregard the fact of birth out of wedlock. The same law covers all minor children, whether they are born in or out of wedlock. In those countries, parental authority over persons born out of wedlock is generally governed by the following rules:

(*a*) The father, by acknowledgement, acquires all rights and duties involved in parental authority and exercises them jointly with the mother in the same manner as in the case of parents of children born in wedlock. Normally establishment of paternity by a court decision has the same effect. In one country,[68] which is an exception to the general rule, a distinction is made between the establishment of paternity by a voluntary acknowledgement and by a court decision. In the latter case, the father does not automatically acquire parental authority over the child, but

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[61] Philippines.

[62] Austria.

[63] Sierra Leone.

[64] Brazil, Honduras, Ivory Coast, Malta, Peru, San Marino, Thailand.

[65] Argentina, Cuba, France, Italy, Philippines, Spain.

[66] Argentina.

[67] Albania, Bulgaria, Guatemala, Hungary, Israel, Poland, Romania, Yugoslavia.

[68] Poland.

the court is empowered to decide whether it should be vested in him. In this case the father has only a potential, not an actual, right to exercise parental authority over his child.

(*b*) As in the case of children born in wedlock whose parents are divorced, the rule of joint exercise of parental authority by the parents is altered when they are not living together. In most countries where this is the case, parental authority is exercised by the parent to whom custody has been granted by the court. However, the law may provide that he must consult the other parent before taking action on important matters concerning the child.

(*c*) When filiation has been established as regards one parent only, the parental authority over the minor is normally exercised by that parent alone, in the same manner as in the case of a child born in wedlock when one of the parents is dead.

(*d*) Parental authority is exercised by one parent exclusively, as in the case of children born in wedlock, when parents are not in agreement and the other parent has been prevented by the competent authority from exercising it, or when the other parent is dead or absent.

Thus, in these countries, both categories of persons have, in general, identical rights once filiation has been legally established. However, there are cases where this principle is not applied and where the fact of birth our of wedlock leads to the enactment of special rules; for example, in one country,[69] children whose parents are not united in wedlock and are not allowed to exercise parental authority because they have not attained full age are placed under guardianship. There is no such provision concerning children born in wedlock.

Finally, a special situation should be reported: in one country,[70] the competent guardianship authority exercises supervision over all parents whether or not they are united in wedlock, since all minors are under the special protection of the State.

There is little information on the eventual role of the other members of the family when parents are unable to fulfil their duties. In two countries [71] differentiation is made between the categories of persons involved, in the case of persons born in wedlock, parental authority is transferred to the Family Council, while in the case of persons born out of wedlock the Guardianship Authority takes the parent's place.

2. *Discrimination as regards the contents of the rights attached to parental authority*

Generally, parental authority over a child consists, in the first place, of formal rights, duties and obligations which appear to be a logical consequence of the natural relationship between a child and his parents, such

[69] Hungary.

[70] Yugoslavia.

[71] Republic of Viet-Nam, San Marino.

as the duty to support the child, to care for him, to bring him up, to educate him, to decide on his religion and to consent to his marriage, and secondly, rights and obligations relating to matters involving the legal interests and property of the child.

With the exception of the duty to support the child, which is discussed in detail in section D of this chapter, only a few of the countries surveyed have furnished meaningful data on the contents of the rights attached to parental authority. Information concerning the administration of the child's property is particularly scanty. Nevertheless, these data reveal some of the fundamental rules applied in various countries, which will permit a useful comparison between the status of persons born in wedlock and that of persons born out of wedlock.

In the countries for which information is available, identical rights are usually granted to the parent invested with parental authority in both situations. Thus the rights, duties and obligations are exactly the same, whether exercised by the parent of a minor born out of wedlock or by the spouses in respect of their children born of the marriage. In several countries,[72] it is, for example, specified that the mother of a child, born out of wedlock, unless deprived of custody by the court, is entitled to appoint a guardian, by will or by deed, as the parents of persons born in wedlock. In these countries, this applies also in respect of consent to marriage. While in the case of persons born in wedlock such consent is given by both parents, in the case of a minor born out of wedlock, this right is exercised by the mother only. Moreover, whenever the father of a minor born out of wedlock is entrusted with parental authority, the fact that paternity has been established by voluntary acknowledgement or by a court decision is generally not taken into account.

However, parental authority over the property of the child born out of wedlock, is often not as extensive or of the same nature as parental authority stemming from birth in wedlock. Therefore, the administration of the minor's property is the field in which inequality of status between persons born in wedlock and persons born out of wedlock is usually discernible. In some countries,[73] while in the case of birth in wedlock the father or mother exercises parental authority over the child's property by virtue of the fact that he is the parent, in the case of birth out of wedlock, the parent entrusted with parental authority exercises it not as a parent but as a legal guardian under the control of the competent guardianship authority. It is also provided that in the case of birth in wedlock many functions relating to the administration of the minor's property are assumed by the Family Council, while in the case of birth out of wedlock, the same functions are entrusted to the Guardianship Authority. In some others,[74] the court, when deciding in which parent the parental authority should be vested, decides also the extent of the power this parent may have over the child's property. Thus, depend-

[72] Australia, India (Hindu Law), New Zealand, South Africa (Common Law), United Kingdom.

[73] France, Republic of Viet-Nam.

[74] Italy, Switzerland, Turkey.

ing on the merits of the case, the court can set limits and grant rights inferior to those possessed by parents united in wedlock. In one country,[75] where children born of adulterous or incestuous relations enjoy a status which is inferior to that enjoyed by those born to parents who were free to marry at the time of conception, parental authority is nevertheless exercised in the same manner for all persons born out of wedlock.

In countries where the law provides for one status to be enjoyed by all persons irrespective of descent, no distinction is generally made between minors born in wedlock and those born out of wedlock in respect of parental authority. Therefore, in practically all matters, the same set of rights, duties and obligations govern all persons when filiation has been legally ascertained. When filiation has been established in respect of both parents, the status of the child, as regards parental authority, is said to be identical to that of a person born in wedlock. If the child has been acknowledged by only one parent, parental authority over him is exercised in the same manner as in the case of a child born in wedlock when one of the parents is dead.

3. *Effect of a change of status on parental authority*

As a rule, a change of status affects the organization of parental authority. Generally, legitimation, adoption, or acknowledgement by the father, in countries where acknowledgement implies marriage, place the parents, in respect of parental authority, in a position similar to that of the parents of a minor born in wedlock. The principle seems to be that once the parents marry each other, the child acquires the status of a person born in wedlock. Therefore, the special or different norms to which his parents where subjected before marriage are no longer applicable. In all countries, even in those where all rights of parental authority are denied to the father of children born out of wedlock, legitimation will result in the application of rules governing children born in wedlock.

In countries where the law provides for one single status to be enjoyed by all persons irrespective of descent, such change is unimportant for reasons already stated.

4. *Customary Law*

Information on the rules of customary law is scant. As regards persons born in wedlock in one country [76] it is provided that the right of a father is absolute, and may not be taken away from him merely because the children might do better if left in the care of another of his relatives. Being the highest authority on guardianship matters as stipulated by customary law, the court may deprive a father of the custody of his children, where it is shown that he is not a fit and proper person to have the care of them by reason of his ill-treatment or neglect; in the case of very young children whose mother and father are living apart and cannot be

[75] France.

[76] South Africa (Customary Law).

reconciled, the court may place them in the custody of their mother until they can live away from her without harmful results. It is contrary to customary law to give the custody of a child to his mother's people; if neither the father nor the mother is suitable, it is proper to award custody to a relative of the father who is willing to take the responsibility.

As regards persons born out of wedlock, while in one country [77] the father is denied all rights, in another one [78] it is generally understood by custom that the putative father is entitled to enjoy them. In another country,[79] children born out of wedlock belong to the maternal grandfather or his heir. As a general rule, he is entitled to claim a fine from the natural father, and, in some tribes, parental authority is vested in the natural father upon the payment of such fine. In all tribes, however, the subsequent customary union of the child's parents legitimates him and places him under the guardianship of his father.

5. *Conclusions*

In respect of parental authority, three aspects of the question have been examined: the determination of the person in whom parental authority is vested; the contents of rights granted to parents over their children born out of wedlock; and the effects of a change of status on the organization of parental authority. While information on the third aspect does not seem to require any special comment, an analysis of the laws governing the first two aspects reveals clearly that in a number of countries the situation of a child born out wedlock is conspicuously different from that of a person born in wedlock. In one case, such differences are due to the circumstances connected with the birth out of wedlock itself rather than to outright discriminatory practices. However, in other instances discrimination against persons born out of wedlock exists, which could be eliminated without jeopardizing the fundamental principles of the sanctity of the family. Such a situation exists when filiation of the person born out of wedlock has been legally established and yet his status is inferior to that of a person born in wedlock.

Certain legal steps could be envisaged in order to eradicate the discriminatory practices observed in the course of the above analysis. The following conclusions could thus be drawn, taking into consideration that the social and moral progress of the minor can best be achieved when he grows up in a family atmosphere, under the supervision and direction of his parents:

(*a*) Whenever filiation of a child may be legally established, neither parent should, in principle, be excluded from the exercise of parental authority, provided that the enjoyment of such authority does not adversely affect the interests of the child. For example, exception to the rule may be necessary when paternity is established by court decision over the objections of the father.

[77] United Republic of Tanzania.

[78] Uganda.

[79] South Africa (Customary Law).

(*b*) In case of successive establishment of parental relationship, the first parent should be given preference as to the custody of the child, unless such parent is unfit, in order to avoid detrimental changes for the child.

(*c*) In view of the heavy responsibilities attached to parental authority, the mother of a person born out of wedlock, when exercising such authority, should have a position equal to that of the father of a person born in wedlock.

(*d*) The parent of the minor should normally be given preference over other persons or a public agency.

(*e*) As regards the rights and obligations attached to parental authority over persons born in and those born out of wedlock, the trend towards equality should be encouraged and the differences in the administration of the child's property should be eliminated, so long as the right of the parents to serve as legal guardians is not successfully challenged.

C. Domicile

In most legal systems, domicile may be defined as the place where a person has his fixed and permanent home and principal establishment and to which, whenever absent, he intends to return. It is his habitual residence, as distinguished from a temporary place of abode. Some other systems, however, apply a strict concept of domicile which places great stress on the domicile of origin, while in a few, the concept of domicile is unknown.

Domicile may be of two sorts: domicile by choice and domicile determined by law. Domicile by choice is voluntarily acquired by a person who is *sui juris*, that is, who possesses full social and civil rights. Domicile determined by law is imposed upon, among others, persons who are *alieni juris*, that is, who are subject to the authority of another person, such as a minor who is under the authority of either parent or both, or a guardian. The domicile of a minor is either the domicile of his parents or parent at the time of birth, otherwise called his domicile of origin, or the subsequent domicile of his parents or parent, if a new domicile has been acquired, or of the person or authority exercising parental authority. When the minor comes of age or is emancipated, he normally has the right to choose his own domicile.

We are concerned here only with the domicile of a minor born out of wedlock, and not with that of a person who is *sui juris* and who may voluntarily choose his domicile whether born in or out of wedlock. According to the information gathered, in all countries where the concept of domicile is known, no distinction is made between children born in wedlock and out of wedlock; the domicile of a child is that of the person or authority exercising parental authority over him. The legal domicile of a child born out of wedlock, whose paternal filiation is not established is generally that of the mother. Whether the establishment of paternal filiation affects his legal domicile depends on the legal consequences

attached to such establishment. However, upon legitimation, the child assumes, in most cases, the legal domicile of the father.

As regards the special situation of the child born out of wedlock and acknowledged by only one parent, the laws of some countries [80] emphasize that he cannot reside with that parent, if the latter is married, without the consent of the spouse.

Conclusions

The data gathered reveals that in countries where the concept of domicile is known, no distinction is made between children born in wedlock and out of wedlock. The domicile of a child is always that of the person or authority who exercises parental authority over him.

D. Maintenance

In general, the obligation of maintenance refers to the duty of a person to furnish to another, for his support, the means of living, including food, clothing, shelter and, in the case of a minor, education.

Maintenance obligations may be freely created, for example, by means of contracts, gifts or bequests, and may not result from any obligations embodied in law. Usually, however, they are imposed by law and stem from the basic need for mutual help which exists among different persons within family groups.

For the most part, the maintenance obligations which exist in law are those imposed upon various members of a family towards one another. Among the duties that human beings have towards their offspring, none is more fundamental than that of maintaining them until they become self-sustaining. This generally means that a child must be supported until he reaches a specified age. The obligation may continue for a longer period of time, depending upon the situation of the parents and the aptitude of the child. It may be prolonged if the child is, for any reason, unable to provide for himself, or until the child has acquired a "reasonably adequate education", without a maximum age limit being set. On the other hand, maintenance obligations may end at an earlier time, as for example when the child, especially a daughter, marries.

Normally, maintenance obligations are legally binding once filiation has been established with full legal effects. However, a legal obligation of maintenance may also stem from a clear determination of paternal and/or maternal filiation (whether voluntarily or by court decision) despite the fact that such determination may have only limited effects and may not entail the recognition in law of a full family relationship. For example, children born of adulterous or incestuous relations may have only a right of maintenance from either parent or from both parents but they may be denied the family relationship that other persons born out of wedlock enjoy. The law may not recognize such family relationship

[80] Italy, Peru, El Salvador.

between a father and his child born out of wedlock although it may, nevertheless, provide for the issuance, by the competent magistrate or court, of affiliation orders against the putative father for some specific purposes, such as maintenance or custody.

The obligation of maintenance may extend to all or only to certain members of the family of the mother and/or the father whether in the direct or in the collateral line (ascending or descending) or it may be restricted to the parents only.

The obligation of maintenance is one of the legal duties to which particular protection is accorded by the law. In many instances, penal sanctions are provided in the case of deliberate non-fulfilment of the obligation.

Usually, the obligation of maintenance ceases upon the death of the obligated person, since it is a personal duty based on family relationship. There are, however, exceptions to this principle.

The fulfilment of the obligation of maintenance is not always possible. Often the help of the State, in one way or another, is needed, in particular in the fields of public assistance and of social welfare.

In order to determine whether any discrimination exists against persons born out of wedlock as regards maintenance obligations, it is necessary to study separately those cases where filiation has been established as regards both parents and those where filiation has been established as regards one parent only. In the first case only, a useful comparison with the rights of persons born in wedlock may be made.

When filiation has been established as regards one parent only, the person born out of wedlock is entitled, in principle, to maintenance from that parent and his relatives. Children whose paternal filiation has not been established are normally maintained by the mother, who may be assisted by allowances from welfare institutions. In one country, the mother who refuses to co-operate in establishing the paternal filiation of her child is not granted any such allowances.[81]

Before examining cases in which filiation has been established as regards both parents, mention should be made of systems [82] in which children born of adulterous or incestuous relations can never legally establish their paternal filiation and therefore they may always only claim maintenance from their mother and her relatives upon establishment of maternal filiation. On the other hand, as regards persons whose parents could have married each other at the time of conception, since establishment of paternal filiation entails also the establishment of a " legitimacy " (by fiction of the law a marriage is deemed to have existed between the parents at the time of conception), whenever maternal and paternal filiation has been established, these persons would then, as " legitimate children ", have maintenance claims vis-à-vis the mother, the father and

[81] Denmark.

[82] Afghanistan, India (Moslem Law), Iraq, Jordan, Lebanon (Moslem Law), Malaysia (Moslem Law), Pakistan (Moslem Law), Sudan, Syria, United Arab Republic, United Republic of Tanzania.

their respective relatives. In another system [83] where paternal filiation of persons born out of wedlock may normally be established only upon the marriage of the parents and acknowledgement of paternity by the father, maintenance may be claimed, before the marriage, only from the mother who is assisted with public funds upon her request, but after the marriage and acknowledgement, maintenance may be claimed from both father and mother.

When filiation has been established as regards both parents, the person born out of wedlock is entitled in principle to maintenance from both parents and their relatives, and they in turn have a claim to maintenance. However, differences may exist in the laws as regards the maintenance of a person born in wedlock and a person born out of wedlock concerning:

(*a*) The persons who are under a legal obligation of maintenance,

(*b*) The content and extent of the obligation and

(*c*) The preference given to some persons over others.

1. *Persons who are under a legal obligation of maintenance*

(a) *Parents and children*

Except for one country [84] where father and mother are duty-bound to provide for the maintenance of their children born in wedlock while only the mother is under such an obligation with respect to her children born out of wedlock, and some other countries [85] where the obligation of maintenance falls primarily on the father in the case of children born in wedlock and primarily on the mother in the case of children born out of wedlock, in the vast majority of countries [86] both parents are equally obligated,[87] either together or separately, to maintain their children whether born in or out of wedlock. They must share this obligation according to mutually acceptable arrangements; in a few countries [88] the law explicitly provides that the obligation must be fulfilled according to their respective financial ability so that, as far as possible, a comparable burden should be borne by each parent.

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[83] Union of Soviet Socialist Republics.

[84] Mali (Customary Law).

[85] Australia, Ireland, Kenya, New Zealand, United States of America.

[86] Albania, Argentina, Austria, Brazil, Bulgaria, Canada, Ceylon, China, Cuba, Denmark, El Salvador, Federal Republic of Germany, Finland, France, Ghana (" no distinctions "), Guatemala, Honduras, India (Hindu Law), Israel, Italy, Ivory Coast, Jamaica, Japan, Laos, Lebanon (Christian communities), Malaysia (Common Law, Customary Law), Malta, Netherlands, Niger, Nigeria, Norway, Pakistan (Hindu Law), Peru, Republic of Korea, Republic of Viet-Nam, Sierra Leone, South Africa, Spain, Switzerland, Sweden, Thailand, Trinidad and Tobago, Turkey (" no distinctions "), Uganda, United Kingdom, United Republic of Tanzania (Tanganyika), Venezuela, Western Samoa.

[87] Explicitly stated for Denmark, El Salvador, Guatemala, Italy.

[88] Denmark, Finland, Guatemala, Nepal.

When the parents live together, there is generally no major difficulty in this connexion. When they live separately (whether married to each other or not), difficulties may — and often do — arise. The few countries for which information is available on this point, however, apply the same rules irrespective of whether the parents who are living apart are married to each other or not. In one of these countries,[89] questions concerning the custody of the child and the respective contributions toward the maintenance of the child and other related arrangements are to be settled by the mutual agreement of the parents as approved by the competent courts, or are determined by such courts in absence of such an agreement; in another [90] the respective contributions of the parents are fixed by law on the basis of the estimated cost of maintenance which is adjusted semi-annually, and it is stipulated that the parent who has custody is to contribute two fifths of the cost while the other parent is to contribute the remaining three fifths of said costs. Finally, in another country [91] there are special arrangements, equally applicable as regards all children. In accordance with the relevant rules the mother has a prior obligation to maintain the child until he reaches three years of age, unless the father volunteers to maintain the child; but from that age on, the father has a prior obligation to maintain the child.

(b) *Ascendants, descendants and other relatives*

In many countries, not only the parents but also their respective relatives are under a legal obligation to maintain the offspring, whether born in or out of wedlock.[92] In these countries, maintenance obligations affect all relatives whether in the direct line, ascending and descending, or in the collateral line, ascending and descending.

In some countries,[93] maintenance obligations fall on the father and mother and their respective relatives in the case of persons born in wedlock, while in the case of persons born out of wedlock there exist varying solutions. In a few countries,[94] the maintenance obligation extends in the ascending line only up to the grandparents. In some countries,[95] the paternal grandparents and further removed ascendants are excluded; in others,[96] all relatives on the mother's side are bound by this maintenance duty, while on the father's side this duty extends only in the ascend-

[89] Guatemala.

[90] Denmark.

[91] Nepal.

[92] Albania, Argentina, Brazil, Bulgaria, China, Guatemala, Hungary, Israel, Ivory Coast, Japan, Laos, Nigeria, Peru, Poland, Republic of Korea, Venezuela, Western Samoa.

[93] Austria, Canada, El Salvador, Federal Republic of Germany, France, Honduras, Italy, Mali, New Zealand, Philippines, South Africa, Spain, United States of America, Yugoslavia.

[94] Honduras, Italy.

[95] Austria, El Salvador, Federal Republic of Germany, United States of America (one of the solutions mentioned as prevailing in some jurisdictions).

[96] New Zealand, South Africa, United States of America (another solution mentioned as prevailing in other jurisdictions).

ing line and no further than the child's grandfather and grandmother; in still others [97] only the relatives of the mother are duty-bound to maintain her child born out of wedlock. In yet a few countries,[98] only the parents must maintain their children born out of wedlock; this duty does not extend to any other relative. In a few others,[99] in the case of persons born to parents who at the time of conception or birth could have married each other, all paternal and maternal relatives, in one case excluding the ascending line beyond father and mother,[100] are obligated to maintain the persons so born but, in cases of persons born of adulterous or incestuous relations, maintenance obligations are imposed on parents and children only, and exclude all other relatives. Finally, in a group of countries [101] no mention is made of any relatives other than parents.

(c) *Other persons*

In some countries, step-parents and step-children have a legal obligation to maintain each other.[102]

In certain countries,[103] a man is obligated to maintain the child, born to his wife prior to his marriage to her, whether the child was born in wedlock or out of wedlock, but in no case does he have any legal duty toward a child whom he has successfully disavowed. While in some of these countries,[104] this liability seems to exist whether or not the child lives with the couple, in another country,[105] which is a federal State, most of the state laws require that the child be a member of the household, although in one state [106] this duty does not exist in the absence of an " affiliation order ". In one country,[107] where the mere fact of conception is evidence of the existence of marriage between the parents in so far as the child is concerned, whenever the mother takes a " new husband ", he assumes maintenance of her children born previously. In a few countries,[108] a man who had sexual relations with the mother at the time of conception of the child is obligated to maintain that child even

[97] Mali, Finland.

[98] Canada (Quebec), France, San Marino, Yugoslavia.

[99] Cuba, Philippines, Spain.

[100] Philippines.

[101] Australia, Denmark, Jamaica, Kenya, Luxembourg, Malaysia, Nepal, Niger, Norway, Pakistan, Romania, San Marino, Sweden, Switzerland, Thailand, Trinidad and Tobago, Uganda, United Republic of Tanzania.

[102] Albania (while the spouse producing the affinity is living), Australia, Ireland, Israel, Italy, Ivory Coast, Nepal, New Zealand, Sweden.

[103] Australia, Ireland, New Zealand.

[104] Ireland, New Zealand.

[105] Australia.

[106] Australia (Eastern Territory).

[107] Nepal.

[108] Canada (all provinces except Quebec), Finland, Hungary, Norway (for persons born out of wedlock in whose favour maintenance contributions have been imposed in accordance with the 1915 and 1956 statutes, but not for those born out of wedlock on 1 October 1957, or later, since from that date on, no maintenance obligations may be imposed, unless paternity has been legally established).

when paternal filiation has not been formally established, unless there are obvious circumstances pointing to the impossibility that the child could have been born as a result of such relations.

2. *The content and extent of the obligation of maintenance*

Normally, maintenance is determined in proportion to the needs of the claimant and the resources of the obligated person.[109] However, in one country,[110] the basis for such determination is more limited in cases of persons born out of wedlock. In another country,[111] as a pre-condition to public aid, a " means test " is prescribed for the mother in cases where paternal filiation cannot be established in regard to a child who has reached three years of age. Before the child has reached this age, the allowance is paid to the mother without such a test.

No distinctions would appear to exist as to the content of maintenance, which usually includes the provision of all the necessaries of life (such as shelter, food, clothing etc.), and the cost of education [112] which would normally include the cost of training for a trade or profession. However, in certain countries,[113] in the case of children born of adulterous or incestuous relations, the fact that the parents have made their children learn a trade (*art mécanique*) is among the circumstances which would preclude a claim, to maintenance against the father's and/or the mother's estate.[114]

As a general rule, the obligation of maintenance would subsist as long as there would be need of assistance (situation of want, minority and/or infirmity) on the one part, and ability to help on the other part, the same rules applying as regards persons born in wedlock and persons born out of wedlock in this respect. It should be mentioned though, that in some countries [115] maintenance obligations are enforceable (in the absence of need or infirmity) not up to majority but only up to determined age-limits before majority is attained (sixteen years of age [116] or eighteen years of age [117]), while in other countries [118] a minimum age is established

[109] Brazil, Cuba (in principle), El Salvador, Federal Republic of Germany, Guatemala, Honduras, Israel, Ivory Coast, Japan, Malaysia, Peru, Republic of Korea, Republic of Viet-Nam, Spain (in principle), Sweden, Thailand, United States of America.

[110] San Marino.

[111] Sweden.

[112] Education is mentioned explicitly for Brazil, Canada, Cuba, Denmark, El Salvador, Guatemala, Honduras, Niger, Norway, Peru, Republic of Korea, Thailand, Trinidad and Tobago, Uganda, United Republic of Tanzania.

[113] France, Luxembourg.

[114] See p. 109, *infra*.

[115] Federal Republic of Germany, Ireland, New Zealand, Sierra Leone, United Kingdom.

[116] Ireland, New Zealand, Sierra Leone (sons up to 16 years of age; daughters until they marry), United Kingdom.

[117] Denmark, Federal Republic of Germany.

[118] Canada (New Brunswick — No child under the age of 16 shall be deemed able to maintain itself), Sweden.

before which maintenance obligations may not cease, but no maximum age-limit is prescribed. In one of them [119] it is stated that " the obligation is absolute until the age of 16 years but it does not cease until the child has obtained a reasonably adequate education ".

In some countries,[120] however, differences are made in this respect in the following ways: in one country,[121] for example, maintenance obligations exist until the child reaches twenty-one years of age in the case of persons born in wedlock, while only up to seventeen years of age in the case of persons born out of wedlock; in another country,[122] the courts may extend the maintenance obligations which in principle apply only up to age fourteen, but while in the case of persons born in wedlock they may order such extension for the rest of the claimants life, they may only decree the extension of such maintenance obligations up to the age of sixteen in the case of persons born out of wedlock.

In general, the extent of maintenance obligations conforms to what is considered reasonable in relation to the circumstances of the parents, the quantum being definitely determined by the courts.

In some countries, however, distinctions are made in this regard. In a few countries the courts have no limitations regarding the amount they can order to be paid by way of maintenance in the case of persons born in wedlock, while in the case of persons born out of wedlock the Courts may only order payments which do not exceed an amount fixed by statute.[123] In some countries [124] children born in wedlock have a claim to maintenance in keeping with the father's position or with the mother's position, while children born out of wedlock have only a claim to something less than such maintenance. In this connexion the information supplied merely stated that " it is not the same ",[125] or that maintenance is to be determined in accordance with the means (ability to pay) of the parents,[126] or that it consists merely of the " necessities of life ".[127] In other countries,[128] only some persons born out of wedlock (not all of them as in the countries just examined) would be entitled to the mere " necessities of life " as differentiated from full maintenance claims granted to persons born in wedlock. Persons born out of wedlock who are placed in such disadvantageous position would be: children whose paternal filiation has been established by Court decision, but who have never been acknowledged by the father; [129] or children born of adulterous,

[119] Sweden.

[120] Finland, Jamaica.

[121] Finland.

[122] Jamaica.

[123] Ceylon (maximum of 100 rupees), Malaysia (maximum of $50).

[124] Austria, Canada (Quebec), United States of America.

[125] Canada (Quebec).

[126] Austria.

[127] United States of America.

[128] Cuba, Italy, Malta, Spain.

[129] Malta (the mother always has the same full maintenance obligation, whether she has acknowledged the child or not).

incestuous or sacrilegious relations, whose filiation cannot be legally established as regards their parents; [130] or grandchildren and further removed descendants born in the circumstances described in the preeceding case.

Maintenance may be provided either in cash or in kind. Thus, a person who is under a legal obligation to maintain another may either pay a lump sum [131] or, as is more common, may fulfil his obligation by making periodic payments.[132]

The obligated persons may also allow the person whom they are under a duty to maintain to live in their home. When the obligated person is married, his spouse may not consent to the child's living in the conjugal home. In some countries [133] the parent, in such cases, is under a legal duty to give the child, outside the home, full assistance as well as maintenance corresponding to the one enjoyed in the home by his children born in wedlock.

3. *Preference of some persons over others*

The situation may exist in which persons born out of wedlock, together with persons born in wedlock, are each under an obligation of maintenance or in which they each have claims to maintenance. In these cases, as a general rule, maintenance claims are placed on an equal footing, the only order established respectively among ascendants, descendants and collaterals being that of proximity of relationship.[134] In some countries,[135] a similar solution is adopted by referring the matter to the order established for intestate inheritance rights. In a few countries,[136] the order of preference for the fulfilment of maintenance obligations is established by the courts if no agreement is reached. In certain countries,[137] however, maintenance claims of persons born in wedlock are given preference over those of relatives born out of wedlock. In one country,[138] claims by persons born of adulterous, incestuous or sacrilegious relations, are ranked after those of persons born out of wedlock whose parents could have legally married each other at the time of conception or birth. Their claims,

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[130] Cuba, Spain.

[131] The possibility of paying a lump sum is expressly mentioned for Uganda. (Conference Room Paper No. 64.)

[132] The wider possibility of complying with the maintenance obligation " in some other manner " instead of through " periodical payments in money " is mentioned for Thailand (Conference Room Paper No. 61).

[133] As for example in Brazil, Cuba, Guatemala, Peru, Republic of Viet-Nam, Spain.

[134] Information is available for Guatemala, Peru.

[135] Albania, Hungary (implied), Poland.

[136] Japan, Republic of Korea.

[137] France, El Salvador (as regards the father. Concerning the mother there is no difference), Honduras, Malta (persons born in wedlock are preferred over those born out of wedlock, even when the latter have been formally acknowledged), Venezuela.

[138] Philippines (implied in the order provided in the Civil Code).

in turn, rank after those of persons born in wedlock. The same solution is adopted in a few countries [139] by referring this matter to the order established for intestate succession, where such gradation of rights is made.

4. *The maintenance obligation as a liability imposed on the estate of the deceased parent*

As has already been stated,[140] the maintenance obligation is a personal duty and therefore ceases upon the death of the obligated person. In this connexion, a few countries [141] have expressly reported that maintenance obligations cease at the death of the person obligated to maintenance and are, therefore, not transmitted to his heirs. However, such is not always the case. In a few countries,[142] the maintenance obligation becomes a liability imposed on the estate of the deceased. In one country,[143] if a person dies, whether testate or intestate, and no adequate provision exists for the proper maintenance and support thereafter of persons entitled to maintenance, the court may at its discretion, on application made by, such persons or by others on their behalf, order that such provision as the Court thinks fit shall be made out of the estate of the deceased for all or any of those persons. Those persons are: children born in or out of wedlock; grandchildren born in or out of wedlock; step-children who were actually maintained or were entitled to be maintained totally or partly by the deceased immediately before his death; parents of the deceased, whether the latter was born in or out of wedlock. In another country [144] a dependant, among others, a dependent son (up to majority) or a dependent daughter (until she marries) is entitled to maintenance from those who take the estate of a deceased parent, if such an obligation " has been created by the will of the deceased, by a decree of court, by agreement between the dependant and the owner of the estate or portion, or otherwise ".

It should be noted that where the formal establishment of filiation is forbidden or does not entail inheritance rights with respect to the father in certain cases, the law provides for the continuation of the obligation of maintenance after the death of the deceased parent by making the estate of the latter liable for it, presumably until the person reaches the age set for the termination of the obligation.

This departure from the principle that maintenance rights are not inherited is usually explained by the fact that in such cases persons born out of wedlock who are already discriminated against in other fields such as the establishment of filiation and inheritance rights would be left

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[139] Cuba, Spain.

[140] See p. 101, *supra.*

[141] Denmark, Israel, Kenya, United Kingdom.

[142] India (Hindu Law), New Zealand.

[143] New Zealand.

[144] India (Hindu Law).

without any means of providing for their own maintenance after the death of the obligated person, a situation which would constitute an additional discrimination.

The continuance of the obligation of maintenance in these cases appears, therefore, as a means of neutralizing, at least partially, the effect of discrimination, which exist in other fields, against persons born out of wedlock.

In some countries [145] this is the case with regard to all persons born out of wedlock as regards their father with respect to whom they do not enjoy inheritance rights. One of these countries [146] expressly points out that " this privilege granted to the child born out of wedlock may be explained by the fact that he is not entitled to inherit from his father".

In another country [147] upon the death of any one of the parents, his or her estate is liable for such maintenance, although in respect of the mother the child enjoys full inheritance rights while the child enjoys no inheritance rights at all vis-à-vis the father.

In some other countries,[148] this is the case with regard to children born as a result of incestuous, adulterous or sacrilegious relations whose filiation cannot be legally established with respect to any of the parents. In some of these countries,[149] the claim of such persons for maintenance against the estate of the deceased parent may, however, be excluded in certain circumstances. Thus, in one of these countries,[150] the law provides that the claim for maintenance against the heirs must not affect the portion of the estate reserved for forced heirs, and no payment must be made if the forced heirs are in equally necessitous circumstances and the estate is insufficient to bear both charges. In some other countries,[151] if the parent (or parents) while alive maintained his children born of adulterous or incestuous relations, or wsa to it that these children learned a trade (*art mécanique*) such children will have no claim against their parent's (or parents') estate.

5. *Conclusions*

The analysis of the available data reveals that while in many of the countries surveyed no discriminatory distinctions exist in the matter of maintenance rights and duties between persons born in wedlock and per-

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[145] Austria, Federal Republic of Germany (liability up to an equivalent to the statutory share the child would have a right to receive if he had been born in wedlock), San Marino. Switzerland.

[146] Austria.

[147] South Africa.

[148] Cuba, France, Ivory Coast, Luxembourg, Netherlands (liability up to an equivalent to the statutory share the child would have a right to receive if he had been born in wedlock), San Marino, Spain, Switzerland, Venezuela.

[149] France, Luxembourg, Venezuela.

[150] Venezuela.

[151] France, Luxembourg.

sons born out of wedlock, in certain countries, despite a clearly discernible trend towards equality in this regard a variety of discriminatory distinctions still remains in effect against persons born out of wedlock. In some of these countries, differences are also made between categories of persons born out of wedlock.

In most countries surveyed, the formal establishment of filiation is a prerequisite for the existence in law of maintenance rights and duties between parents, children and their respective relatives.

In certain countries, maintenance rights and duties are or may be the main or the only effect attached to filiation and depending on the country, this may be the situation for all persons born out of wedlock or for persons born of incestuous, adulterous or sacrilegious relations only.

In countries included in the last group (as well as in certain countries where children born out of wedlock are denied inheritance rights vis-à-vis their legally established father), the parent's (or the parents') maintenance obligation may give those children maintenance claims against their parent's (or parents') estate, at least in a manner so as to guarantee their subsistence.

In most countries, when filiation has been established as regards both parents, persons born out of wedlock have exactly the same maintenance rights and duties as persons born in wedlock. However, the following discriminatory differences are revealed by the analysis of the available data:

(*a*) In some countries the parents' obligation to maintain their minor children falls differently upon them according to whether the children are born in wedlock or out of wedlock.

(*b*) In some countries, in the case of persons born in wedlock, maintenance rights and obligations obtain between parents and children and all their respective relatives, while in the case of persons born out of wedlock relatives are excluded in varying degrees according to the legal system involved. Relatives are excluded altogether in a few systems which strictly limit maintenance obligations and rights to parents and children.

(*c*) In certain countries the extent and the content of maintenance obligations vary according to whether a person is born in or out of wedlock. In some of these countries, there may also exist differences among different categories of persons born out of wedlock, especially regarding the education of minor children.

(*d*) In certain countries, in cases where there exist maintenance claims from persons born in wedlock and persons born out of wedlock, the former are given preference over the latter and sometimes an order of preference is also established among different categories of persons born out of wedlock.

Therefore, in the light of the above synthesis it would appear that once filiation has been established, whether it entails a full family rela-

tionship or limited effects only, all persons born out of wedlock should have the same maintenance rights as persons born in wedlock, in particular:

(*a*) Parents should always be equally obligated to maintain their children, without prejudice to proper arrangements to the effect that each of them may carry a comparable burden;

(*b*) Maintenance rights and obligations should extend to the same members of the family in all cases;

(*c*) The content of the obligation of maintenance should not be affected by the circumstances of the birth of the person entitled to it. In particular, maintenance should never be restricted to the necessaries of life because of the nature of filiation;

(*d*) All preference of one maintenance claim over another based on the circumstances of the claimant's birth should be eliminated. No other preference should exist than that based on proximity of relationship.

As regards those systems where the maintenance obligation of the deceased parents may be claimed against their estate either because the law forbids the establishment of filiation, or because inheritance rights are not granted to certain persons whose filiation is formally established, reference is made to all conclusions concerning the desirability for all persons born out of wedlock to have their filiation established with effects of full family relationship, including inheritance rights.

In those countries where the enactment of such measures cannot be envisaged, the claim against the estate of the parents should cover full maintenance. In particular, it should not be possible to reduce it to the necessaries of life and in no case should it be denied because the parents saw to it that the child learned a trade (*art mécanique*), nor because the child was given the necessaries of life during the lifetime of the parent (or parents).

Furthermore, whenever the establishment of paternal filiation is forbidden, the State, which imposes such a limitation, should, among other measures, assist the mother so as to enable her to furnish her child with means for adequate subsistence and education.

Maintenance should always be determined according to the needs of the person entitled to maintenance and the economic and social position of the obligated person, in particular:

(*a*) A minor, whether born in wedlock or out of wedlock, should always be entitled to maintenance until he has acquired an adequate education, and is able to provide for his own subsistence.

(*b*) When maintenance is provided for in kind, in the home of the person obligated ot, it it should be of a standard equal to that provided for other children of the same parent, irrespective of the nature of filiation.

(*c*) Whenever the spouse of the parent refuses to consent to having the child live in the home, the claimant, whether born in, or out,

of wedlock, should be assured, outside the home, of a standard of maintenance equal to that assured in the home to the other children of the same parent.

(*d*) In systems which do not provide for it yet, whenever a judicial decision obligating a person to the payment of maintenance is rendered, the State should give special assistance in enforcing it. In particular, the deliberate non-fufilment of such an obligation should be the object of serious penal sanctions.

E. Inheritance rights

Inheritance rights are recognized in one way or another in all of the countries studied. The mode of distribution of the property of a deceased person may stem either from the free will of the *de cujus*, or from the law itself. Therefore, succession *mortis causa* is governed, either by a specific act of disposition by a person concerning all or part of his estate to take effect after his death, or by legal provisions on the distribution of the property of a deceased person. In the first case, it is a testamentarv succession (or succession by will). In the second case, it is an intestate succession (or succession by operation of the law). Both forms may co-exist, and a succession may be partly testamentary and partly intestate.

In some legal systems, the testator may not dispose of all his property as he wishes. The law reserves for some specific members of his family, who are called forced heirs, a portion of the estate. However, the testator may dispose as he wishes of the remainder of the estate, or of the entire estate in the absence of forced heirs. If the deceased has not provided for the distribution of the estate the law makes provision for the distribution of the estate among the legal heirs, and in the absence of any such heirs, in the case of vacant succession, the estate escheats to the State.

In other legal systems, nobody has any recognized rights to any portion whatsoever of the estate, since no reserved portion is provided for in law. The testator may always dispose freely of all his property. If, however, by testament or otherwise, he fails to make adequate provision for the maintenance of certain close relatives specified by law or of other persons entitled to be maintained by him, the courts may order a limitation on his testamentary disposition and make adequate provision for that purpose out of the estate. If there is no testament, the law distributes the estate to the close relatives and the surviving spouse as his legal heirs, and in the absence of such, the estate escheats to the State.

In still other legal systems, no reserved portion exists, nor are there any limitations in favour of persons with a right to be maintained by the *de cujus*. Thus, the testator is free to dispose of his entire estate as he wishes. An action may be brought in equity to obtain a decree in favour of certain persons who may have special claims to such participation in the estate; if there is no disposition by testament, the law distributes the estate to the surviving close relatives and the surviving spouse. In the absence of such heirs, the estate escheats to the State.

The formal establishment of filiation is of crucial importance in the matter of inheritance rights, more so than in regard to any other right. The title to succeed by operation of the law and to share in the deceased's estate is parental filiation. All countries, for which information is available on this point either explicity or implicity state that the establishment of parental filiation is indispensable for the purposes of succession by operation of law.

When filiation has been established with respect to one parent only, rights in intestate succession or participation in the reserved portion of his estate may obviously derive only from this parent. Inheritance from the other parent who, although known in fact and sometimes determined for limited legal purposes (such as maintenance rights) is not in law considered as a parent, is possible only through what he bequeaths or devises in a testamentary succession, or through a gift *inter vivos*.

Before examining cases in which filiation has been established as regards both parents, mention should be made of a system [152] in which children born of adulterous or incestuous relations can never legally establish their paternal filiation and therefore may only enjoy intestate inheritance rights as regards their mother and her relatives upon establishment of maternal filiation. Under this system, as regards persons whose parents could have married each other at the time of conception, establishment of paternal filiation entails also the establishment of " legitimacy " (by fiction of the law a marriage is deemed to have existed between the parents at the time of conception). Therefore, whenever maternal and paternal filiation has been established, these persons would as " legitimate children ", have intestate inheritance rights vis-à-vis the mother, the father and their respective relatives. On the other hand, according to the same system, a testator cannot, by will, dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts if there are children. If not, he can dispose of a more substantial portion of his estate according to the nature and the closeness of the relationship of the existing heirs. Bequests in excess of the legal third cannot take effect unless the heirs consent thereto after the death of the testator.

In another system,[153] where paternal filiation of persons born out of wedlock may normally be established only upon the marriage of the parents to each other and acknowledgement of paternity by the father,[154] these persons would have intestate inheritance rights only vis-à-vis the mother before the marriage, but, after the marriage and acknowledgement by the father, they will enjoy these rights as regards both the mother and the father. These persons may also inherit under the terms of

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[152] Afghanistan, India (Moslem Law), Iraq, Jordan, Lebanon (Moslem Law), Malaysia (Moslem Law), Niger, Pakistan, Sudan, Syria, United Arab Republic, United Republic of Tanzania (Zanzibar). However, according to the *Shia* Law (one of the schools of Moslem Law) persons born out of wedlock may not inherit even from their mother and her relatives.

[153] Union of Soviet Socialist Republics.

[154] If the father's name had been entered in the civil status record books, persons born out of marriage registered before 8 July 1944 enjoy full inheritance rights as regards their mother and their father.

a will. On the other hand, there are circumstances in which certain persons, including persons born out of wedlock would inherit as " compulsory heirs ", even if the parents have not entered into a marriage and the father has not formally acknowledged paternity. This is the case for children born to parents who have not contracted marriage, who were dependents of the deceased father for not less than a year before the father's death and who are " incapable of work ". They would inherit, notwithstanding the terms of the will, not less than two thirds of what they would have taken as heirs at law.

Cases in which filiation has been formally established vis-à-vis both parents are examined below, and a comparison of the rights of persons born in wedlock and those born out of wedlock is made. Discrimination against persons born out of wedlock in the matter of inheritance rights may arise in different ways. These will be examined separately with respect to testamentary and intestate succession. First, however, a brief description will be made of the situation obtaining in countries in which either no discrimination whatsoever exists in this connexion or in which very simple and definite distinctions are made between persons born in wedlock and those born out of wedlock.

In some countries,[155] there is absolute equality between persons born in wedlock and persons born out of wedlock as regards both testate and intestate succession.

In one country,[156] equality is the general rule, but children born out of wedlock do not inherit from their father's relatives nor do those relatives inherit from the children unless the father has explicitly, or in any other way formally acknowledged the child. This means that a court decision establishing family relationship as regards the father is not enough for inheritance purposes without the father's unequivocal acknowledgement of paternity.

In another country,[157] children born out of wedlock inherit from their mother and her relatives as if they were born in wedlock, but they do not inherit from their father (nor does the father inherit from the children), unless the father has made a statement in compliance with the formalities required, acknowledging his paternity and providing that his children born out of wedlock are to succeed him as if they were born in wedlock. " Betrothal children " inherit exactly in the same manner as children born in wedlock.

In two countries,[158] the law provides for equality between persons born in wedlock and persons born out of wedlock for inheritance purposes. This does not apply, however, to persons born out of wedlock who were born before a specified date,[159] nor to those born out of wedlock

[155] Albania, Bulgaria, China, Finland, Ghana, Guatemala, Hungary, Republic of Korea, Nigeria, Poland, Romania, Thailand.

[156] Yugoslavia.

[157] Sweden.

[158] Denmark, Norway.

[159] Denmark (1 January 1938); Norway (1 January 1917).

in a specified region of one of these countries.[160] All persons born out of wedlock affected by these limitations inherit fully in their mother's line,[161] but in their father's line they would not inherit at all unless they had been voluntarily acknowledged by their father, in which case they would only take half of what a person born in wedlock would take,[162] or they would not inherit at all from or through their father.[163]

Before proceeding to the examination of systems which provide for complex distinctions between persons born in wedlock and those born out of wedlock and sometimes among various categories of persons born out of wedlock, it seems useful to deal briefly here with one country[164] where no distinctions are made, in principle, in this regard since the mere fact of conception is evidence of the existence of marriage between the parents in so far as the child is concerned. All children of the same mother have equal claims regarding her estate. All children of the same father have equal claims regarding his estate, but the paternal filiation has to be a matter of public knowledge prior to the death of the father in order to admit any claim for inheritance against his estate. There, is however, a group of persons who inherit less than other children. The law provides that a child born of incestuous relations shall inherit only one quarter of the share of a child who is not born in such circumstances. The " improper " marriage of this child's parents seems to impose limitations on his rights of inheritance.

Finally, it should be mentioned here that in accordance with a few systems,[165] persons born out of wedlock may not inherit neither from their father nor from their mother.[166]

1. *Intestate succession*

(a) *Rights of succession of persons born out of wedlock*

(i) *Distinctions as to the persons from whom children born in wedlock and those born out of wedlock may inherit*

While in all countries children born in wedlock inherit from their mother and her relatives and from their father and his relatives, the position of children born out of wedlock is dealt with a variety of ways. They are described below.

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[160] Denmark (Greenland).

[161] Denmark, Norway.

[162] Norway.

[163] Denmark.

[164] Nepal.

[165] Canada (Quebec, Nova Scotia), India (Christian communities), Sierra Leone, United Republic of Tanzania.

[166] This is also the case in accordance with the *Shia* Law, mentioned in connexion with p. 113, *supra*.

a. Countries in which all children born out of wedlock inherit irrespective of the circumstances of their birth

They inherit:

(i) From their mother and her relatives and from their father and his relatives; [167]

(ii) From their mother and her relatives in all cases, and from their father and his relatives whenever there are no surviving children born in wedlock; [168]

(iii) From their father and from their mother; [169]

(iv) From their mother in all cases, and from their father whenever there are no surviving children born in wedlock; [170]

(v) From their mother and her relatives; [171]

(vi) Only from their mother; [172]

(vii) Only whenever there are no surviving children born in wedlock, and then either from their father and from their mother,[173] or from their mother and her relatives,[174] or only from their mother; [175]

(viii) From their father, as an " act of grace of the Crown ", whenever the deceased has left no " lawful issue " and there is no surviving mother, the father's estate having therefore escheated to the Crown as *bona vacantia*. On the basis of a special petition, they are invariably " allowed to take benefit of the intestate's estate ".[176]

(ix) In principle neither from their mother nor from their father, but exceptionally from their mother and/or father, as follows: if the father's or the mother's estate escheats to the State because

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[167] Argentina, Honduras, Japan, Laos, Peru.

[168] El Salvador.

[169] Cameroon (East Cameroon — some customs), Canada (British Columbia) the child may apply to the court if the father has acknowledged and supported him, and obtain up to $500 or one tenth of the estate, whichever is greater), Malta.

[170] Canada (Ontario), Uganda.

[171] Cameroon (East Cameroon — other customs), Canada (Alberta, New Brunswick, Saskatchewan), Federal Republic of Germany, South Africa (Common Law).

[172] Australia (South Australia), Austria, Ceylon (General Law), India (Hindu law, " legitimate " brothers and sisters inherit from each other, " illegitimate " brothers and sisters inherit from each other, but neither group inherits from the other), Kenya, Mali (customary law), New Zealand, United Republic of Tanzania (Tanganyika — customary law), United Kingdom, Western Samoa.

[173] Burma.

[174] Jamaica (see (viii) which follows, for a possibility of succeeding to the father's estate).

[175] Australia (New South Wales), Canada (Newfoundland), Ireland, Malaysia.

[176] Jamaica. (It should be borne in mind that as regards their mother, persons born out of wedlock enjoy inheritance rights from her whenever there are no surviving children born in wedlock. See (vii) of this paragraph and foot-note 174 *supra*.)

there are no legitimate kin, the estate is distributed among the children born out of wedlock; [177] or, if the value of the mother's or the father's estate does not exceed a certain amount, children born out of wedlock share with the surviving spouse and with any other children born in wedlock who may exist. If the value of the estate exceeds that amount, the children may be granted an allowance by a court out of the estate for their maintenance and support.[178]

b. Countries in which not all children born out of wedlock inherit

Children born out of wedlock who enjoy inheritance rights are those born to parents who could have legally married each other at the time of conception and/or birth. They inherit:

(i) From their mother and her relatives and from their father and his relatives; [179]

(ii) From their mother and from their father in all cases, and from their respective ascendants in the direct line whenever there are no surviving relatives born in wedlock either in the direct line, or in the collateral line up to the third degree.[180]

(iii) From their mother and from their father, but not from the respective relatives of their mother and father.[181] However, in one country,[182] they may inherit from a relative of their mother if he died leaving neither relatives in the hereditary degree nor surviving spouse, in which case they are entitled to claim the estate which does not, then, escheat to the State.

(iv) From their mother and her relatives, and while they are generally only entitled to maintenance from their father's estate, by way of exception they may inherit one sixth of the father's estate in the absence of a surviving spouse and/or children born in wedlock.[183]

(v) Only whenever there are no heirs born in wedlock, and then from their father and/or from their mother.[184] A child born of adulterous relations and who has been acknowledged by his unmarried parent (the married parent may not legally acknowledge them)

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[177] Australia (Tasmania, Western Australia), Trinidad and Tobago (where " it is the practice for the Crown to waive its rights in favour of illegitimate or adopted children ").

[178] Australia (Queensland).

[179] Ivory Coast, Switzerland, Turkey (not in the case of judicial establishment of paternity with limited effects), Venezuela.

[180] Italy.

[181] Cuba (also including children born of adulterous intercourse whose filiation has been legally established), France, Lebanon, Luxembourg, Spain.

[182] Netherlands (see pp. 120 and 121, *infra*).

[183] San Marino.

[184] Republic of Viet-Nam.

enjoys inheritance rights in the intestacy of that parent unless the latter subsequently marries a person other than the other parent, in which case the child concerned would be excluded by the parent's spouse and/or children born of this marriage.

Children born out of wedlock who do not enjoy inheritance rights are those born as a result of adulterous or incestuous relations. However in one country [185] where usually the mother's name appears in the birth registration and the fact of birth establishes maternal filiation, the mother would, generally, have inheritance rights in the child's estate. Conversely, the child would generally have inheritance rights in her estate. In another country,[186] such children are granted a life annuity determined in proportion to the value of the estate and to the nature of the heirs, and up to a maximum amount not exceeding the revenue of the portion of the estate which they would have inherited had their filiation been formally established if this had been legally possible. In a few countries,[187] they are only entitled to a maintenance claim against their mother's or from their father's estate. In one country,[188] a person born of adulterous relation who has been acknowledged by the unmarried parent would only have a maintenance claim vis-à-vis that parent in case of marriage of the latter to a person who is not the other parent, and if the spouse, or any issue of the marriage is living. Finally, in one country,[189] it seems that these children do not have inheritance rights in the intestacy of their parents, nor do they have any maintenance claim against their estate upon their death.

(ii) *Distinctions made in law as regards the share of children born out of wedlock when they take with children born in wedlock or with other legal heirs*

a. They take with children born in wedlock

i. *Countries where all children born out of wedlock inherit from their mother and her relatives and from their father and his relatives*

In one of these countries,[190] children born to parents who could have legally married at the time of conception and/or birth take the same as children born in wedlock. However, if such children were acknowledged while their parent (or parents) were married to other persons, they would take half of the share of children born in wedlock, as do also children born as a result of adulterous relations who have been acknowledged after the

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[185] Ivory Coast.

[186] Italy.

[187] Cuba (with the exception of children born of adulterous intercourse whose filiation has been legally established), France, Ivory Coast, Lebanon, Luxembourg, Netherlands, San Marino, Spain, Switzerland, Venezuela.

[188] Republic of Viet-Nam.

[189] Turkey.

[190] Brazil.

dissolution of the " conjugal partnership " of their parent or parents. In other countries,[191] children born out of wedlock, irrespective of the circumstances of their birth or of the establishment of their filiation, take a share equal to one half of the share of children born in wedlock.

In one country,[192] children born out of wedlock take a share which should not exceed one half of the share taken by children born in wedlock. If there is no surviving spouse, the estate is divided as follows: three fourths for children born in wedlock and one fourth for those born out of wedlock.

In another country,[193] children born out of wedlock take less than children born in wedlock, their share amounting to one third or to one fourth of the share taken, by children born in wedlock, depending on whether they lived the deceased in his home or not.

In another country,[194] the rule " ten for each child born in wedlock, five for each child born out of wedlock, whose parents could have legally married, and four for the other children born out of wedlock, whose parents could not have legally married " is applied. Accordingly, each of the children born out of wedlock takes either one half of the share of each child born in wedlock, whenever their parents could have legally married each other at the time of conception and/or birth; or, they take four tenths of the share of each child born in wedlock or four fifths of the share of children born out of wedlock, whenever their parents could not have legally married each other at that time. It is provided further, that the shares taken by children born out of wedlock should not reduce those of children born in wedlock. Therefore, if the estate is insufficient for all, children born in wedlock take their shares first and the remainder, if there is any, is distributed among children born out of wedlock in the proportion of five to four, according to their respective category.

In still another country,[195] children born out of wedlock take a share amounting to one third of a share taken by children born in wedlock in all cases in which filiation has been legally established as regards their mother, as well as whenever they have been acknowledged by their father. However, when paternal filiation has been established by Court decision, their share as regards their father " shall in no case exceed such amount as, regard being had to the condition of the mother, may be necessary for the maintenance of each of such children during his or her lifetime ".

Finally, in another country,[196] children born out of wedlock inherit from their mother on an equal footing with children born in wedlock, but as regards their inheritance rights from their father, they are excluded by children born in wedlock; and therefore only inherit from him whenever there are no surviving children born in wedlock.

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[191] Argentina, Japan, Peru.

[192] Honduras.

[193] Laos.

[194] Philippines.

[195] Malta.

[196] El Salvador.

ii. *Countries where only children born to parents who could have married each other at the time of their conception and/or birth are granted limited inheritance rights, while other categories of children born out of wedlock are denied inheritance rights, and are granted only maintenance claims against their parent's estate*

In some of these countries children born out of wedlock who enjoy inheritance rights may inherit from both parents and their respective relatives.[197] In one of them,[198] they take shares equal to those of children born in wedlock. In others,[199] while in the maternal line their shares are equal to those of children born in wedlock, in the paternal line, their shares are equal to one half. In a few countries [200] where children born out of wedlock may inherit from their parents but not from their respective relatives, their shares are equal to one half [201] or to one third [202] of the shares of children born in wedlock.[203]

In one country,[204] the share of each child born out of wedlock is one fourth of the share of each child born in wedlock. In another country,[205] the share of a child born out of wedlock is one third of the share he would have taken if he had been born in wedlock. If the child born out of wedlock is acknowledged while his father is married to a woman other than his mother, he would be excluded by the issue of that marriage. In one country,[206] where children born out of wedlock may inherit only from their mother and her relatives, they take a share equal to that of children born in wedlock; however, in the absence of the latter and/or a surviving spouse they take one sixth of their father's estate.

Among countries where children born out of wedlock inherit only from their mother, there are two groups, namely: those in which children born in wedlock, whenever they exist, exclude children born out of wedlock from the succession to their mother's estate [207] and those in which children born out of wedlock take with children born in wedlock in their

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[197] Ivory Coast, Switzerland, Venezuela.

[198] Ivory Coast.

[199] Switzerland, Venezuela.

[200] Cuba, France, Italy, Luxembourg, Spain.

[201] Cuba, Spain (in these countries the share of each child born out of wedlock is one half of the share of any child born in wedlock who has not been " bettered " — see p. 124, *infra*), France, Italy (the share of each child born out of wedlock shall be one half of the share of each child born in wedlock, but keeping in any case at least one third of the estate for children born in wedlock).

[202] Luxembourg.

[203] This is extended to " descendants " born in wedlock rather than restricted to " children " born in wedlock in both France and Luxembourg.

[204] Lebanon.

[205] Netherlands.

[206] San Marino.

[207] Australia (New South Wales, Queensland, Tasmania, Victoria, Western Australia).

mother's estate.[208] In some of these countries, children born out of wedlock would take a part equal to that of children born in wedlock.[209]

b. They take with other legal heirs

While children born out of wedlock would generally take with other relatives of the deceased, whether such relatives are born in wedlock or out of wedlock, it appears that usually, children born in wedlock would exclude those relatives from the succession with the exception of other descendants, whether born in wedlock or out of wedlock.

Further, whenever children born in wedlock as well as children born out of wedlock take with other relatives, they do so in a different manner. In such a situation, differences between children born in wedlock and out of wedlock would concern either the shares taken individually or the portion of the estate each group takes.

In countries [210] where differences exist in the shares taken, the share of each child born out of wedlock amounts to: (*a*) one half, when he takes with ascendants and with brothers and sisters of the *de cujus*; [211] (*b*) three fourths, when he takes with ascendants, or with his own brothers and sisters and/or ascendants born in wedlock,[212] or when he takes with other relatives.[213]

In countries [214] where differences exist with respect to the portion of the estate taken, children born out of wedlock would take: (*a*) three fourths of the estate when they take with other relatives [215] who have to be " legitimate " in one country [216] and in another [217] are referred to as " more distant relatives " (such as those left when the decedent had neither lawful issue nor spouse, nor ascendants, nor brothers or sisters or their descendants) (*b*) two thirds of the estate, when they take with the spouse [218] *or* with " ascendants "; [219] (*c*) five twelfths of the estate, when they take with ascendants *and* spouse; [220] (*d*) one half of the estate, when they take with ascendants [221] who in a few countries have to be " legitimate ascen-

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[208] Mali, New Zealand.

[209] Australia (South Australia), Austria, Kenya, New Zealand.

[210] France, Luxembourg.

[211] Luxembourg.

[212] Luxembourg.

[213] France.

[214] Argentina, Australia (Victoria), Cuba, Honduras, Italy, Japan, Laos, Lebanon, Malta, Netherlands, Peru, Philippines, Spain, Venezuela.

[215] Lebanon, Netherlands.

[216] Lebanon.

[217] Netherlands.

[218] Italy, Japan, Malta.

[219] Italy, Malta.

[220] *Ibid.*

[221] Argentina, Laos (ascendants and adoptive children), Lebanon, Netherlands, Philippines, Venezuela.

dants "; [222] with " legitimate " brothers or sisters; [223] or with the " legitimate " issue of such " legitimate " brothers and sisters; [224] with brothers and sisters and/or their children; [225] with ascendants, brothers and sisters or their descendants;[226] or with the surviving spouse of the descendant; [227] (*e*) one third of the estate when they take with ascendants and the surviving spouse, [228] or with " other heirs; [229] or (*f*) one fourth of the estate when they take with " legitimate " ascendants.[230]

iii. *Distinctions made in law as regards the portion of the estate taken by persons born out of wedlock as sole heirs*

When only children born out of wedlock share in the succession to their parents' estate, they inherit the whole of the estate of the *de cujus* in exactly the same manner as children born in wedlock.[231] It should be stated again that there are systems in which not all children born out of wedlock are heirs on an intestacy.

c. Succession to the estate of a person born out of wedlock

As regards the heirs of persons born out of wedlock, it would seem that under the laws of most countries, the intestate succession of a person born out of wedlock would devolve according to the rules which have been outlined in the preceding paragraphs, that is: first upon his descendants and surviving spouse; in their absence, upon his mother and/or father and, whenever the law permits it, upon their respective relatives, as corresponding to the inheritance rights the person born out of wedlock would have in their estates. Collaterals would be called in as heirs in the absence of ascendants, and finally, the estate would escheat to the State.

Therefore, when a person born out of wedlock dies intestate, his heirs, besides his descendants and surviving spouse are, among others: either his parents, and in their absence their respective relatives; [232] or both parents (if both survive they share equally), [233] but not their relatives; or the mother and in her absence her relatives, and the father (but not his relatives), [234] or the mother and her relatives; [235] or the mother alone.[236]

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[222] Lebanon, Netherlands (" privileged "), Philippines.

[223] Lebanon.

[224] *Ibid.*

[225] Venezuela.

[226] Netherlands.

[227] Australia (Victoria), Honduras, Philippines, Venezuela.

[228] Venezuela.

[229] Cuba, Spain.

[230] *Ibid.*

[231] This is stated either explicitly or implicitly in all of them.

[232] As for example in Finland, Honduras, Ivory Coast, Malta (" ascendants "), Trinidad and Tobago (" ascendants "), Venezuela.

[233] As for example in France, Luxembourg, Philippines.

[234] As for example in El Salvador.

[235] As for example in Austria, Jamaica, New Zealand.

[236] As for example in Kenya.

2. *Testamentary succession*

Whenever the deceased has left a validity executed testament, his estate devolves in accordance with the provisions made by him for the disposition of his property after death. This rule, however, is not an absolute one. Restrictions or limitations may be imposed by law on such freedom to dispose by will. The law may require the testator to make provision, in one way or another for certain beneficiaries. Whenever he fails to do so, remedies and actions are available to such beneficiaries for the protection of their interests in the deceased's estate. This limitation of the freedom of the testator to dispose of his property, may take the form of a reserved portion of the estate, in some systems called " legitimate ", to which certain heirs, who are called forced heirs, have certain rights they cannot be deprived of without legal cause. It may also manifest itself in the nature of limitations imposed by the maintenance right that certain persons have vis-à-vis the testator. Lastly, the testator may enjoy practically unlimited and unrestricted power to make testamentary disposition of his entire estate without any forced heirs or maintenance duties being imposed on him. Even in systems of this last type, the courts may have discretionary power to make provisions in equity in favour of certain persons.

It would seem useful here to point out that, in certain countries [237] such terms as " child ", " children ", " issue ", and the like, when used by a testator who has children born out of wedlock as well as children born in wedlock, are construed as referring only to children born in wedlock unless it has been made quite clear that children born out of wedlock were intended to be included (while some require a specific mention of individual names,[238] in others a " clear indication ",[239] or " any intimation " [240] is enough for these purposes).

Distinctions made in law between persons born in wedlock and those born out of wedlock

(i) *Legal systems in which freedom to dispose of property by testament is restricted to a determined portion of the estate, the other being reserved in favour of forced heirs*

The question of the participation of children born in wedlock and children born out of wedlock in the reserved portion of the estate is dealt with in a variety of ways which may be described as follows:

(*a*) No distinctions are made: all children — whether born in wedlock or out of wedlock — participate equally in that reserved portion.[241]

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[237] Australia (except Western Australia), Burma, India (Hindu Law), Jamaica, Kenya, New Zealand, Sierra Leone, South Africa (Common Law), Trinidad and Tobago, United Kingdom (*prima facie* construction), United Republic of Tanzania, Western Samoa.

[238] India (Hindu Law), Jamaica, Trinidad and Tobago, Western Samoa.

[239] Sierra Leone, South Africa (Common Law).

[240] United Republic of Tanzania.

[241] Ivory Coast.

(*b*) No special distinctions are made; the same rules described for intestate succession, whether discriminatory or not, apply here. However, the shares of all heirs, whether born in wedlock or out of wedlock, are limited to a portion of their respective intestate shares: it may then be one fourth, one third, one half or three fourths of the corresponding intestate shares.[242]

(*c*) Special distinctions are established between persons born in wedlock and persons born out of wedlock with respect to their rights in the reserved portion.

In one country,[243] the reserved portion shall be two thirds of the estate if the decedent leaves surviving descendants, or parents, or adoptive children or the issue of such adoptive children, or spouse; or, one half of the estate if only ascendants of the decedent survive him or her.

In another country,[244] the reserved portion shall be as follows: (*a*) if there are only children born in wedlock: one half of the estate (if there is only one child), or two thirds of the estate (if there are two or more children); (*b*) if there are only children born out of wedlock: one third of the estate (if there is only one child), or one half (if there are two or more children); (*c*) if there are children born in wedlock and children born out of wedlock two thirds of the estate, which is to be distributed so that each child born out of wedlock receives one half of what is received by each child born in wedlock.

In two countries,[245] the reserved portion of the estate is established in favour of relatives born in wedlock.[246] Nevertheless, children born out of wedlock [247] have some participation in the estate of their parents [248] as " reserved inheritance ",[249] according to the following rules. The portion reserved for children is two thirds of the estate.[250] In the absence of special provisions by the testator, this reserved portion is to be distributed among the beneficiaries in equal shares. The testator has, however, the possibility to favour especially one or more of his statutory heirs by setting apart up to one half of the reserved portion for one or more of

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[242] Argentina, Austria, Brazil, Germany, Lebanon, Netherlands, Switzerland, Turkey, Venezuela.

[243] Peru.

[244] Italy.

[245] Cuba, Spain.

[246] It has been instituted in favour of descendants and ascendants who are " born in wedlock ", and not merely for " children ". The discussion is restricted here to " children " for the sake of clarity and brevity, since in any case it does not extend beyond parents and children in the case of persons born out of wedlock.

[247] Parents, when family relationship has been legally established, as well as when they have legitimated their children by executive decree, also would have the same right in their children's succession. The discussion is restricted to children for the reasons expressed in the preceding foot-note.

[248] As has been stated before, it is restricted to parents-children in the case of persons born out of wedlock.

[249] As will be seen, it sometimes is a " share " and in other cases it is a " portion ".

[250] In Cuba, Spain.

them. This is called " enhancement " or " betterment " of an heir.[251] But, as has been stated before, children born out of wedlock are entitled to a reserved portion as follows: (*a*) one half of the share of children born in wedlock whose inheritance has not been " enhanced " or " bettered ", if they take with children born in wedlock; [252] (*b*) one fourth of the estate, if they take with " legitimate " ascendants; [253] (*c*) one third of the estate if there are only children born out of wedlock.[254]

In one country,[255] children born in wedlock always seem to have a right to one half of the reserved portion, which is divided among them if they are two or more, while the share of children born out of wedlock in the reserved portion depends on whether other forced heirs, such as the spouse and the ascendants of the deceased take with them or not. For instance, in case of coexistence of two children born out of wedlock, two children born in wedlock and the surviving spouse, the children born in wedlock would take one half of the " legitime " and divide it among themselves (one fourth each); the spouse would take the same as one of the children born in wedlock (one fourth); each child born out of wedlock would take, if their parents could have legally married each other at the time of conception and/or birth, one half of the share of each child born in wedlock (in this case one eighth each); if the children's parents could not have married each other at that time, each child born out of wedlock would take four tenths of the share taken by each child born in wedlock. In case of coexistence of children born out of wedlock and the surviving spouse only, the spouse takes one third and the children one third and divide it among themselves. When only children born out of wedlock exist, they take one half of the " legitime " share and divide it among themselves.

In another country,[256] when by gifts, *inter vivos*, children born out of wedlock but not children born in wedlock) were granted one half of their intestate share in the reserved portion, and in so doing the deceased expressly stated his intention to reduce their portion to the amount given, such children might be excluded from the other half although they are forced heirs. Whenever the gifts *inter vivos* did not amount to half of their intestate share in the reserved portion, such children may claim in the estate the completion of that half.

In still another country,[257] children born out of wedlock seem to participate in the reserved portion of the estate only in the absence of children born in wedlock. The reserved portion may amount to: one fourth of the estate, when there are no descendants, but only ascendants

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[251] The Spanish word is *mejora.*

[252] In Spanish: *Hijo legítimo no mejorado.*

[253] The decedent's spouse, if surviving will have a right of usufruct on one third of the estate: Cuba, Spain.

[254] The decedent's spouse, if surviving, shall have a right of usufruct on one half of the estate: Cuba, Spain.

[255] Philippines.

[256] San Marino.

[257] France.

in one line; one half of the estate, when there is one child born in wedlock or, in the absence of such child, one child born out of wedlock, or in absence of the latter, ascendants in the paternal as well as in the maternal lines; two thirds of the estate, when there are two children born in wedlock, or in their absence, two children born out of wedlock; three fourths of the estate, when there are more than two children born in wedlock or, in default of such, more than two children born out of wedlock. Furthermore, it is also provided that the reserved portion of children born out of wedlock is a fraction of that of children born in wedlock, following the differences established as regards intestate shares. In cases of coexistence of children born out of wedlock and ascendants, the latter take up to one eighth of the reserved portion while the rest is taken by the former.

(ii) *Legal systems in which freedom to dispose of property by testament is only limited by the maintenance obligations of the* de cujus, *existing at his death*

In a few countries,[258] there is no recognition of any person's rights to a reserved portion of the estate, and the testator may always dispose freely of all his property by testament. Nevertheless, it is provided by statute that, if a person dies without having made adequate provision for the maintenance and support of certain relatives (including children born out of wedlock), then the court may order that such provision as it thinks appropriate for that purpose be made out of the estate,[259] or the court shall provide for the maintenance of these persons out of the estate in accordance with the rules governing maintenance obligations, which means that descendants born in wedlock will be preferred to descendants born out of wedlock.[260] It is further laid down by statute in this latter country,[261] that any provision made for the maintenance of a surviving spouse who is unable to provide for his or her support should never exceed one fourth of the estate, thus enhancing the chances of persons born out of wedlock to obtain a more meaningful provision for their maintenance out of the estate.

(iii) *Legal systems in which freedom to dispose of property by testament is neither restricted nor limited*

In one country [262] which is a federal State, inheritance and succession are matters governed by state law. In all states, all persons are free to dispose of their entire estate by testament and a parent may leave property to his children born out of wedlock just as he may in the case of children born in wedlock. However, children born out of wedlock who are not included in their parent's will do not have the right given by sta-

[258] Honduras, New Zealand.

[259] New Zealand.

[260] Honduras.

[261] *Ibid.*

[262] Australia.

tute to children born in wedlock to seek a discretionary order of a court that part of the estate be paid to them notwithstanding the terms of the will.

In one of the states in this country,[263] the statutory provision which enables a child born in wedlock left by a parent without adequate provision for his maintenance, support and advancement in life, to apply to the court for an allowance out of his parent's estate, does not apply to children born out of wedlock.

In another country,[264] all persons are equally free to dispose of their entire estate by testament, but if a father of a child born in wedlock disposes of his property by will and fails to make reasonable provision for an infant son, an adult child who is by reason of a disability incapable of maintaining himself, or an unmarried daughter, then the court may on application by the son or daughter, it it thinks fit, order a reasonable provision to be made. A child born out of wedlock has no rights in this respect.

In some countries,[265] however, the Courts do not seem to have power to make such provisions in any case, either in favour of persons born out of wedlock or in favour of persons born in wedlock. In one of these countries,[266] the situation in this regard has been described as follows: " In modern law either parent can leave to an illegitimate child his or her whole estate, to the exclusion of legitimate issue who . . . are not even entitled to legitimate portions. And as adultery has ceased to be a criminal offence, this applies even to adulterine issue. The position of the incestuous child is not equally clear, for incest is still a crime. The probabilities, however, are that the Courts would hold that these disabilities, too, have become obsolete . . . ". In the other few countries in this group,[267] there are no provisions restricting the devolution of property (" real or personal property ",[268] or property devised or bequeathed "[269], or just " property "),[270] provided the requirements of the wills law are satisfied.

3. *Effects of the loss of parental filiation and of change of status on inheritance rights*

As has been pointed out above [271] the formal establishment of filiation is of crucial importance in the matter of inheritance rights. The loss of parental filiation would, unavoidably, mean the loss of inheritance rights.

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[263] Australia (New South Wales).

[264] United Kingdom.

[265] Jamaica, Laos, Malaysia (Common Law), South Africa (Common Law), Trinidad and Tobago.

[266] South Africa (Common Law).

[267] Jamaica, Laos, Malaysia (Common Law).

[268] Trinidad and Tobago.

[269] Jamaica.

[270] Laos, Malaysia (Common Law).

[271] See p. 113, *supra.*

In countries in which the status of a person born in wedlock may be acquired,[272] acquisition entails an important improvement in inheritance rights. Such improvement may mean either an increase in the share taken, or a widening of the circle of persons from whom they may inherit, or an advancement of their rights in such matters as the order of preferences. The fact that acquisition is often operative as from a specified time, may, on occasion, preclude absolute equality with children born in wedlock who enjoy their status from birth.

In one country[273] legitimation normally entails the acquisition of full inheritance rights. There are, however, cases when this is not so. Children who have been acknowledged by their father while he was married to a woman other than their mother, and who, after the dissolution of the marriage have been legitimated by the subsequent marriage of their parents to each other, are excluded from the father's inheritance by children born of the previous marriage and they would not prejudice the previous spouse's inheritance rights. Children who have been acknowledged by their father and who have been legitimated by decree after the marriage envisaged by their parents has become impossible because of the death of one of the parents, are excluded from the succession by children born before such " legitimation ". On the other hand, in the case of legitimation by executive decree, there would exist inheritance rights only vis-à-vis the respective relatives of the parents who have expressly consented to the petition for the decree of legitimation.

In two other countries,[274] while " legitimation " by the subsequent marriage of the parents to each other places the " legitimated " children on an equal footing with " legitimate " children with effects as from the date of " legitimation ", " legitimation by executive decree " does not enhance in any way the inheritance rights of children who already had been acknowledged by their father and/or mother. They continue to enjoy exactly the same inheritance rights they had before " legitimation " as children whose filiation has been legally established.

In countries[275] where persons born out of wedlock are always granted full inheritance rights vis-à-vis their mother, acquisition would not be significant as regards the mother. In one such country,[276] the child would upon acquisition be fully assimilated, in the father's line, to children born in wedlock, provided that in the case of acquisition by special Act or decree, such acquisition has been requested by the father himself; the child cannot, however, dispute the right to primogeniture and other acquired rights of children conceived during a marriage entered into in the meantime.

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[272] See chapter III, *supra.*

[273] Netherlands.

[274] Cuba, Spain.

[275] See for example pp. 119 and 120 *supra.*

[276] Austria.

In another country,[277] the child would still not have a right to any titles or to sever property from title, or to inherit under a disposition in which a contrary intention is expressed.

On the other hand, in one country,[278] the fact that acquisition produces effects only as from the time of the marriage of the parents would not adversely affect the beneficiaries in the matter of inheritance rights, since "legitimation" is only possible by subsequent marriage of the parents to each other in this system, and obviously both parents would be alive until their marriage. The succession to their estates could, in all cases, only take place after their marriage has taken place (and with it, legitimation).

In countries in which the status of a person born in wedlock may be lost,[279] in case of such loss, the person concerned will fall into the inferior position provided for persons born out of wedlock. The loss of status would entail effects such as a decrease in the share taken, or a downgrading in the order of preferences, or a narrowing of the circle of persons from whom the person born out of wedlock may inherit.

4. *Conclusions*

The analysis of the data has revealed that while in several of the countries surveyed, no discriminatory distinctions exist against persons born out of wedlock in the matter of inheritance rights, in many other countries persons born out of wedlock are discriminated against in a variety of ways.

Discrimination against persons born out of wedlock can occur only in the case of a succession by operation of the law. Indeed, no legal discrimination is conceivable in the case of a testamentory succession, as far as the freely disposable portion of the estate is concerned.

As legal heirs, when there is no testament, or as forced heirs, where a testament exists, persons born out of wedlock may not be granted the same inheritance rights as persons born in wedlock. In fact, they may even be denied inheritance rights altogether.

In certain systems persons born out of wedlock whose parents could not have married each other at the time of conception and/or birth are denied inheritance rights altogether, while other persons born out of wedlock are granted inheritance rights which are not the same as those granted to persons born in wedlock especially in cases of coexistence with persons born in wedlock. The differences may consist, among others in the attribution of a smaller share of the estate, in a restriction of the group of persons from whom they would inherit, or in taking with relatives who would be excluded in the case of birth in wedlock.

Correlatively, more limitations are imposed on the freedom of the testator in favour of forced heirs who are born in wedlock than in favour

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[277] Kenya.

[278] Argentina.

[279] See chapter III *supra*.

of forced heirs born out of wedlock. In certain systems, special discriminatory distinctions are made against forced heirs born out of wedlock.

Although in many of the systems studied, these forms of discrimination against persons born out of wedlock in the matter of inheritance rights exist today, in all of them there has been a steady movement towards amelioration in this regard. There is a definite trend towards improving the status of persons born out of wedlock by giving them greater participation in the succession to the estate of their relatives. In some systems, this movement is clearly geared to the attainment of equality between persons born out of wedlock and persons born in wedlock in that field.

It is sometimes thought that in systems which retain discriminatory distinctions against persons born out of wedlock, legal inequities in the matter of inheritance rights may be offset by a testator's testamentary dispositions. Apart from the fundamental issue that legal discrimination should not be established even if a possibility of neutralizing it is provided, it is also true that in many systems, the power of the deceased to dispose freely of part of his estate is not enough to remedy such a situation: the portion of the estate of which he may dispose, especially in case of the coexistence of children born in wedlock and out of wedlock is considerably reduced; moreover, even by acts *inter vivos*, he may not diminish the portion reserved in favour of forced heirs since gifts *inter vivos* may at his death be reduced in order to restore to their full amount the reserved portions of the forced heirs.

As far as can be ascertained on the basis of the information available, ideas of protection of the family-based-on-marriage, and of a just distribution of the estate among those who are supposed to have co-operated in its formation, permeate the arguments for the establishment of distinctions against persons born out of wedlock in the field of inheritance rights.

But these arguments do not hold good in actual experience. Firstly, there is no evidence that recognition of full inheritance rights to persons born out of wedlock harms the institution of marriage or the family. It should be noted that no country where persons born out of wedlock have been granted equal inheritance rights with persons born in wedlock has reported a corresponding collapse or deterioration of the institution of marriage as a basis of the family, nor have the other evils feared by some writers come upon the community. In fact, to impose in the field of inheritance rights full responsibilities on parents in respect of all their children whether born in wedlock or out of wedlock, may well have a tendency to work the other way, that is to fortify rather than to weaken the institution of marriage as a basis of the family, as it would, in all likelihood, in the light of these enforceable responsibilities.

Secondly, the fact that a child may or may not have contributed his productive activities to the formation of the estate is quite independent of the fact of his birth in wedlock or out of wedlock. Children born out of wedlock may well have, in effect, lived with the *de cujus* during the time of the formation of the estate and contributed to the formation of the estate as much as, or even more than, children born in wedlock. The possi-

bility also exists that the latter may not have lived with the *de cujus* at all, or that, even if they lived with him they may not have contributed in any way to the formation of the estate. Furthermore, they may have, in fact, contributed to a substantial reduction of the estate during the lifetime of the person they will inherit from by wasteful or extravagant spending or other abusive practices.

Lastly, if chidren born out of wedlock have actually been deprived of a true family life and home atmosphere just because of the circumstances in which they were born, while children born in wedlock have enjoyed such life and atmosphere because of the circumstances of their birth, it seems to be an additional inequity to deprive the former of an equal share in their parent's estate also because of the circumstances of their birth, irrespective of how effectively they may have contributed to the formation of the estate. While measures to compensate them for this deprivation by granting them a greater share in the estate than children born in wedlock may provoke reservations, it seems only equitable to grant them the same participation as children born in wedlock. This may give them, belatedly, the possibility of obtaining an education and of developing their aptitudes at levels corresponding to the social and economic position enjoyed by children born in wedlock to the same parents.

Therefore, in the light of the above synthesis, it would appear that once filiation has been legally established, inheritance rights should obtain between persons born out of wedlock and their parents and relatives, as in the case of persons born in wedlock.

Moreover, no other formality than the legal establishment of paternal filiation should be required for the recognition of inheritance rights between father and child nor for the extension of these rights to other close relatives as in the case of birth in wedlock.

Besides in countries where equality has not yet been attained in the field of inheritance rights, the trend to improve the inheritance rights of persons born out of wedlock should be encouraged, and renewed efforts in that direction should be made with the ultimate goal of achieving full equality in law between persons born in wedlock and persons born out of wedlock.

In countries in which equality in all cases of birth out of wedlock is not envisaged, the following minimum goals should be aimed at:

(*a*) Denial of inheritance rights should be eliminated as a consequence of the elimination of the legal impossibility of establishing filiation in certain situation (see pages 74 and 77, *supra*).

(*b*) Limitations in the extension of inheritance rights to persons other than parents and children, in cases of birth out of wedlock, should be eliminated as a consequence of the elimination of limitation in respect of the extension of family relationship (see pages 74 and 77, *supra*).

(*c*) The reserved portion of forced heirs should not be diminished in cases of gifts *inter vivos* unless all legal formalities for disinheritance

have been fulfilled. If gifts *inter vivos* are kept as form of formal disinheritance, they should apply equally to all persons, whether born in wedlock or out of wedlock, and not only to the latter.

(*d*) General expressions such as " my children ", " my issue ", " my offspring " and the like, used by a person to designate his testamentary beneficiaries, should be construed to include all his children, or issue, or offspring, alike, whether born in wedlock or out of wedlock, unless those born out of wedlock have been excluded expressly.

CHAPTER VII

THE POSITION OF PERSONS BORN OUT OF WEDLOCK AS COMPARED WITH THAT OF PERSONS BORN IN WEDLOCK AS REGARDS THE STATE AND SOCIETY

A. LEGAL STATUS

1. *Nationality* [1]

Article 15 of the Universal Declaration of Human Rights proclaims that:

" (1) Everyone has a right to a nationality.

" (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

Two other international instruments also recognize the right to a nationality. On 20 November 1959, the General Assembly of the United Nations, at its fourteenth session, adopted the Declaration of the Rights of the Child which provides in principle 3 that: " The child shall be entitled from his birth to . . . a nationality." Later, on 28 August 1961, a Conference on Statelessness held in New York under the auspices of the United Nations adopted a Convention on the Reduction of Statelessness. This Convention provides *inter alia*:

" Article 1. A contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless . . .

" Article 4. A contracting State shall grant its nationality to a person, not born in the territory of a contracting State, who would otherwise be stateless, if the nationality of his parents at the time of the person's birth was that of that State . . .".

[1] In the context of this study, the term " nationality " is used in the following sense: " The quality or character which arises from the fact of a person's belonging to a state or nation." (*Black's Law Dictionary*, fourth edition, St. Paul, Minn., USA, 1951.)

While the information gathered on a large number of the countries surveyed consists of statements of a general nature to the effect that no distinction exists between persons born in and those born out of wedlock as regards nationality, the data concerning the rest of the countries surveyed may serve as a useful basis for a comparison of the situations of both categories of persons with respect to acquisition of nationality at birth, and for the determination of the discrimination which may exist in that field.

In all the countries for which information is available, *jus sanguinis* and *jus soli* appear to be the two predominant modes of original acquisition of nationality: filiation with regard to a person who is a national of a given country and the fact of birth in the territory of the country concerned are the principles upon which original acquisition of nationality is based. These two principles do not exclude each other, since international law grants to all States complete sovereignty in enacting their nationality laws. The legislation of the countries surveyed either applies both of them equally, tries to combine elements of the two into one system, or keeps both but emphasizes one of them.

(a) *Distinctions between persons born in wedlock and those born out of wedlock concerning the original acquisition of nationality*

In all countries for which information is available, the determination of the nationality of any person does not present any problem when his parents are nationals of the same State and he is born in the territory of that State. When the two elements coincide, i.e., when the parents are nationals of the State and the child is born inside its territory, the child is in his own right a national of that State. When the two elements do not coincide, either because the parents are not of the same nationality or because the child is born in a country of which his parents are not nationals, complex situations may arise. In countries which apply the principle of *jus soli*, the child is declared to be the national of the country where he is born and no consideration is thus given to the nationality of his parents. But, in order to protect the children of nationals, when these children are born in a foreign country, no State has ever relied on *jus soli* alone. On the contrary, where only one principle is predominant these States generally tend to choose the principle of *jus sanguinis*. The question may thus be raised as to whether the laws accord the same treatment to persons born in wedlock or out of wedlock when nationality is determined by filiation.

The principle of *jus sanguinis* is found in the legislation of all countries and in some instances [2] it appears to constitute the essential basis of original acquisition of nationality. The only requirement for the application of the principle of *jus sanguinis* is the legal establishment of filiation in the case of persons born out of wedlock. However, although there seems to be general agreement on that point, there are variations in the manner in which the principle of *jus sanguinis* is actually implemented.

[2] Ivory Coast, Philippines, Sierra Leone, Sudan.

(i) *Determination of the nationality of a person born in wedlock*

Where the principle of *jus sanguinis* applies, the nationality of a person born in wedlock follows, as a rule, that of the father, regardless of the place of birth, subject only in certain cases [3] to the registration of the birth in a consular office, if the child is born outside of the territory of the country concerned. Moreover, the nationality of the father, whenever it is known, is the sole basis for original acquisition of nationality. Maternal filiation is generally excluded, unless the father is stateless or of unknown nationality, although in several countries the law provides for transmission of nationality by descent, only through the " legitimate " male line.[4]

Various laws [5] however, place both parents on an equal footing and a person may acquire nationality by descent, irrespective of the place of birth, if either one of his parents is a national at the time of his birth, but maternal filiation does not always automatically produce the same effects as paternal filiation.[6]

In two countries,[7] maternal filiation is taken into consideration for determination of nationality, but with varying legal effects. The law stipulates that, if a child is born within the territory of the country of which his mother is a national, the child's nationality will follow that of his mother and the nationality thus acquired will be irrevocable, in the sense that no possibility of subsequent repudiation is allowed to the child. In this case, maternal filiation, combined with *jus soli*, produces effects similar to paternal filiation. If the person is born outside the country, however, he is still considered a national, but he may, upon reaching " maturity " reject the nationality transmitted to him by his mother. In another country,[8] maternal filiation may also be a basis for determination of nationality, but the option offered to the person when he has attained majority may be exercised whether he was born in or outside the country.

(ii) *Determination of the nationality of a person born out of wedlock*

In countries where the principle of *jus soli* is applied in its entirety, the person born within their territory is considered a national whether he was born in or out of wedlock, and, in such case, the question of establishment of filiation does not arise.

When *jus sanguinis*, not *jus soli*, is either the main principle or the sole principle on which nationality is based, it seems useful to distinguish between two situations: (*a*) where paternal filiation has not been established; and (*b*) where paternal filiation has been established. In these cases, *jus soli* serves only to strengthen or reduce the scope of the rules laid down according to the principle of *jus sanguinis*.

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[3] Peru, Ceylon.

[4] Australia, India, New Zealand, United Kingdom, United Republic of Tanzania.

[5] Cuba, El Salvador, Ghana, Israel, Peru.

[6] France, Philippines, Nepal.

[7] France, Nepal.

[8] Philippines.

a. Where paternal filiation has not been established

When paternal filiation has not been established, nationality by descent is generally transmitted by the mother, regardless of the place of birth and no restrictions of any kind are imposed. Thus, the mother of a person born out of wedlock plays a role similar to that of the father or a person born in wedlock. In some countries, however, nationality may be transmitted through her only if maternal filiation has been established while the child was a minor[9] or if the birth of the child occurs in their territories.[10]

As regards persons born outside of the country of which their mother is a national, the legislation of certain countries[11] provides that maternal filiation cannot, in any circumstances, transmit nationality, but in one case,[12] the Secretary of State has the power to register as a national the child, whether born in or out of wedlock, of a mother who is a national, if the child has substantial connexions with the interest country. Others[13] apply the principle of *jus sanguinis* but draw a distinction between persons born in wedlock and persons born out of wedlock. In these countries, while the child born in wedlock outside of the country automatically acquires nationality through his father, the child born out of wedlock does not automatically become a national through his mother. The mother or the child must make a request on which the competent authority must pass judgement. Thus, the child born out of wedlock is not, as is the child born in wedlock, a national by the mere fact of filiation; he may become one only when the request has been approved.

b. Where paternal filiation has been established

When paternal filiation has been established prior to or concomitant with the establishment of maternal filiation, the laws generally assign to the father of the person born out of wedlock a similar role to that of the father of a person born in wedlock. Nationality at birth is transmitted through him; maternal filiation is excluded unless the father is stateless or has no known nationality. No country appears to have made any distinctions between voluntary acknowledgement and establishment of paternity by court decision.

Some laws allow the child to take the nationality of the father even though the establishment of paternity is made before or after the establishment of maternity. In one country,[14] however, where in principle the nationality of the father prevails, the law provides that a person born out of wedlock of an alien father and of a mother who is a national retains the mother's nationality. In this case, acknowledgement by the father would not have any effect whatsoever on the nationality of the child. Also,

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[9] Cameroon, Italy, Luxembourg.

[10] United Arab Republic.

[11] India, Nigeria, Sierra Leone, United Kingdom, United Republic of Tanzania.

[12] United Kingdom.

[13] New Zealand, South Africa, United Arab Republic.

[14] Philippines.

in another country,[15] when the court decision establishing filiation is issued after the death of the father, the nationality of the child is not determined, as in the case of a person born in wedlock, by the nationality that the father had when the child was born, but by the nationality of the father at the time of his death.

In certain countries,[16] the father is exluded from any role as regards the nationality of his child born out of wedlock.

In various countries,[17] the law does not designate directly the parent whose nationality the child will follow. Nationality in this case depends on the parent who acknowledges first. When acknowledgement by both parents is made in a single document, the determination of the child's nationality is governed by the same rules as the ones provided for persons born in wedlock. Also the laws generally provide that the child will acquire the nationality of the second parent who acknowledges when the first one is stateless or is of unknown nationality.

In many countries, acknowledgement, whether by the father or the mother, affects the child's nationality only if it is made while the child is a minor. But in one instance,[18] the law provides that if the child has attained his majority at the time of acknowledgement, he may opt.

It should be finally pointed out that certain countries [19] ignore the fact of a person being born out of wedlock when nationality at birth is to be determined, although nationality is based on the principle of *jus sanguinis*. In those countries, anyone whose father or mother is a national is himself considered a national, irrespective of the place of birth.

(b) *Prevention of statelessness*

Analysis of the information available on this point tends to show that a great effort has been made in many countries to grant nationality to anyone born within their territory when difficulties arise in the determination of nationality. Many laws contain provisions which, directly or indirectly, help prevent statelessness.

First, the adoption in many countries of the principle of *jus soli* as an autonomous mode of original acquisition of nationality, and not just as a means of reinforcing the principle of *jus sanguinis*, constitutes the most effective way to combat statelessness. In countries where legislation of this kind is enacted, there are no distinctions made between persons born in wedlock and persons born out of wedlock.

When the principle of *jus sanguinis* is either the main or the exclusive basis for original acquisition of nationality, distinctions based on the fact of birth out of wedlock are either made in the law itself or are simply a

[15] Luxembourg.

[16] Australia, Denmark, India, New Zealand, Norway, United Kingdom, United Republic of Tanzania.

[17] France, Italy, Lebanon, Nepal, Niger, Republic of Viet-Nam, Spain, Syria.

[18] Italy.

[19] Cuba, El Salvador, Ghana, Israel, Ivory Coast, Peru.

consequence of the discriminatory attitude adopted towards all or certain categories of persons born out of wedlock. *De facto* discrimination in respect of nationality arises when filiation of the person born out of wedlock is not or cannot be legally established. However, in most countries the law provides effective remedies in cases of this sort by setting aside the principle of *jus sanguinis* and substituting for it the principle of *jus soli*. Thus the law has prevented, at least to some extent, the person born in wedlock or out of wedlock from becoming a stateless person. Almost all the countries for which information is available provide that the child who has been abandoned is a national if born within their territory. Several [20] go further and include the child whose parents are both legally known but are stateless, or the child who for any reason cannot acquire the nationality of his parent. It should be noted that the nationality thus granted in the circumstances described above is generally provisional in the sense that it will change if filiation of the child of the parent's nationality is subsequently established.

In various countries,[21] however, the principle of *jus soli* is completely excluded and it is expressly stipulated that the child whose filiation is not legally established or who has been abandoned by his parents is a stateless person. Thus if a child is not acknowledged, his nationality is in jeopardy.

The second step taken to prevent statelessness, as has been already observed, is the adoption of flexible rules for determining the parent through whom nationality is transmitted. Indeed, in designating that parent, there is often a provision in the laws to the effect that the child would follow the nationality of the other parent, if the one who is designated has no known nationality. Generally, such a provision applies to both persons born in wedlock and persons born out of wedlock. In the case of persons born out of wedlock, prevention of statelessness may be achieved by displaying flexibility in the provisions concerning the effect of subsequent acknowledgement of the parent designated by the law as the sole person capable of transmitting nationality.

As has been seen, in several countries the father is given precedence over the mother even though he is the second parent in relation to whom filiation is established. In such a case, it is often provided that when a subsequent establishment of filiation results in the change of nationality of the child, that rule will be discarded if the second parent has no nationality. But once again, the person born out of wedlock may find himself in an inferior position if filiation has been established as regards one parent only. The law will have no practical effect and he will remain a stateless person if the parent in relation to whom filiation is established has himself no known nationality, since, in this case, the child will not be considered a person whose filiation has not been established or who has been abandoned.

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[20] China, France, Italy, Japan, Lebanon, Luxembourg, Republic of Korea, Syria, Turkey.

[21] Nigeria, Norway, San Marino, Sierra Leone.

In a few countries,[22] the law itself distinguishes between persons born in wedlock and persons born out of wedlock. Nationality of a child born in wedlock is, in principle, transmitted through the father; however, a child born in wedlock to a mother who is a national will have the nationality of his mother if the father is stateless or if the child does not acquire the nationality of his father at birth. In these countries, however, where nationality of the person born out of wedlock can be transmitted by the mother only, there is no similar rule governing the nationality of a child born out of wedlock whose father is a national and the mother stateless. Examples of different treatment of the two categories of persons is found in all countries where the law forbids acknowledgement by the father or does not draw from it any legal consequences, and in countries which prohibit the full application of the principle of *jus sanguinis* through the mother.

Another method devised to prevent statelessness is to set aside the rules governing the automatic loss of nationality when their implementation might result in making some persons stateless. Two countries [23] provide that when the mother of a child born out of wedlock marries an alien, that child will not lose his nationality, whether he is or is not the child of that spouse, unless he is legitimated and has actually acquired the nationality of the mother's husband.

(c) *Naturalization*

Naturalization, in the context of this study, raises two questions: (*a*) Are the conditions required for naturalization the same whether the applicant is, or is not, a person born in wedlock ? (*b*) Do the minor children of a naturalized person acquire the new nationality of their parent or parents whether or not they are born in wedlock ?

With respect to the first question, in none of the countries studied does the law make a distinction between persons born in wedlock and persons born out of wedlock.

Information on the exact effect of naturalization on the nationality of the minor children of naturalized parents is scant. Where it is available, the general idea seems to be that these children acquire the new nationality of their parents either unconditionally or, in some countries, after certain requirements have been met, although, in a few cases,[24] the law specifically limits the application of this rule to persons born in wedlock. In certain countries,[25] the effect of naturalization normally depends on whether the children keep or automatically lose their original nationality. Also, naturalization of the mother of a child born out of wedlock may have no effect when the father of the child is an alien and has custody of the child.[26] Determination of an age-limit,[27] consent of

[22] Denmark, Norway.

[23] Austria, Switzerland.

[24] United Republic of Tanzania, Sweden.

[25] Austria, China, Italy.

[26] Denmark, Norway, Turkey.

[27] Norway, United States of America.

the child who has attained sixteen years of age,[28] or his residence [29] in the country are, on occasions, among the requirements for automatic naturalization of minor children. In three countries,[30] the child follows the nationality of his naturalized parents but he may repudiate it and opt for his original nationality after attaining twenty-one years of age. The new nationality thus has a provisional character.

In one instance,[31] while the minor child of a naturalized father becomes automatically a national himself, the minor child of a naturalized woman will acquire the new nationality only if his national law permits it.

(d) *Change of status*

There is absolutely no information on the effect of a rebuttal of the presumption of paternity on the nationality of the person whose paternal filiation was successfully challenged — an important point in the event that nationality is based on paternal filiation.

Legitimation, as regards its effect on nationality, usually results in the assimilation of persons born out of wedlock to persons born in wedlock. This rule is particularly beneficial in countries where nationality is transmitted only through the mother and where the position of the mother of a person born out of wedlock is legally inferior to that of the father or a person born in wedlock. The laws of various countries [32] state that a person born out of wedlock but legitimated by the subsequent marriage of his parents shall be treated for the purpose of determining his nationality as if he had been born in wedlock. Some differences between the two categories of persons may still remain despite the assimilation. The law limits somewhat the effect of legitimation in respect of the time when it becomes effective. While in the case of a person born in wedlock, the law provides that that person is a national by descent if his father was a citizen at the time of his birth, in the case of legitimation, the legitimated person acquires nationality not from birth but from the date of marriage.

In some countries,[33] the law stipulates that the child born out of wedlock of an alien father and a mother who is a national takes the mother's nationality. However, if the parents subsequently marry each other, the legitimated child acquires the father's nationality. Thus legitimation results in the loss of the original nationality. Some laws [34] provide, however, that in such cases legitimation has no effect on nationality.

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[28] Switzerland.

[29] Italy.

[30] Lebanon, Netherlands, San Marino.

[31] Turkey.

[32] Ceylon, Federal Republic of Germany, Norway, South Africa, United Kingdom, United Republic of Tanzania.

[33] China, Philippines.

[34] South Africa.

In some countries legitimation brings about a change of nationality only if certain basic conditions are met. For example, in several countries,[35] the law provides that the person legitimated acquires the nationality of his father only if the father is a national and if legitimation takes place while the child is still a minor and a resident.

(e) *Conclusions*

On the basis of the above analysis, it can be said that in respect of nationality there is a discernible trend in the countries studied to liberalize their laws in order that anyone born within their territory may have a nationality. In some instances, only minor distinctions exist between the status of persons born in wedlock and persons born out of wedlock. However, in some cases, persons born out of wedlock are governed by rules so different from those applied to persons born in wedlock that they are in a very real sense victims of measures of discrimination. It is therefore possible, within the framework of the laws of the countries surveyed, to draw the following conclusions:

(*a*) As has been observed, *de facto* discrimination against persons born out of wedlock is likely to be found whenever the principle of *jus sanguinis* constitutes the main or exclusive basis for original acquisition of nationality. Laws should therefore take into account the fact that filiation of a person born out of wedlock may not always be legally established. In such a case, and in order to prevent the child born out of wedlock from being a stateless person, the principle of *jus sanguinis* should be set aside and replaced by the principle of *jus soli.*

(*b*) When filiation has been established with respect to both parents and when the parent through whom nationality is transmitted has no known nationality, the child born out of wedlock should either be allowed to acquire the nationality of the other parent, or the principle of *jus soli* should be substituted for the principle of *jus sanguinis.*

(*c*) As has been observed, maternal filiation is usually taken into consideration in determining the nationality of persons born out of wedlock. But while in the case of persons born in wedlock the father usually transmits nationality irrespective of the place of birth of the child, in the case of persons born out of wedlock, *jus sanguinis*, through the mother, must often be combined with *jus soli*, and in many instances, has no effect whatsoever. This is just one example where maternal filiation, in respect of persons born out of wedlock, and paternal filiation, in respect of persons born in wedlock, do not lead to identical results. Discriminatory practices of this sort can be corrected, and parallel rules for persons born in wedlock and persons born out of wedlock should be adopted.

(*d*) As regards naturalization, it would seem beneficial to persons born out of wedlock who are not of age that they be automatically entitled to acquire the new nationality of their parent or parents in order to remove all possibility of their becoming stateless persons.

[35] United Kingdom, United Republic of Tanzania.

(*e*) Finally, in cases where filiation has been established successively as regards the parents or in cases of change of status, flexible rules should be adopted. Such situations should never entail an automatic loss of nationality. Furthermore, in such cases the persons concerned should always be given a choice between his former nationality and the one he could acquire as a result of the change of status or the establishment of filiation as regards the second parent.

2. *Public rights and social welfare services*

Public rights and social welfare services, as described in the outline for the collection of information for this study, are:

(*a*) Political rights, including the right to vote and to stand for election and the access to public service;

(*b*) Social rights, including the right to social security, medical care, and the necessary social welfare services;

(*c*) Economic rights, including the right to work and access to all occupations and professions;

(*d*) Cultural rights, including the right of access to public or private education facilities and the right freely to participate in the cultural life of the community.

Most countries have forwarded information indicating that no distinctions, either in law or in fact, are made between persons born in wedlock and persons born out of wedlock with respect to those rights.

Referring to political rights especially, while one country [36] states that the violation of the principle of non-discrimination could be a basis for proceedings before the Constitutional Court, cases of legal or *de facto* discrimination are reported in a few. For example, in certain countries, or sometimes only in certain areas of a country, the fact of being born out of wedlock would or could be disadvantageous to the candidate for elective or public office.[37] In two other countries, only persons born in wedlock may be elected to the Presidency,[38] or are in line of succession to the Crown.[39]

Concerning the application of the laws on social security and insurance, it should be stated that, usually, children born out of wedlock whose filiation is established, either by acknowledgement or judicially, enjoy the same rights as those born in wedlock. However, in one country,[40] the child born out of wedlock is excluded in principle. On the other hand, in various countries [41] the concept of a dependent person prevails, so that even a child whose parental filiation has not been established, but who

[36] Austria.

[37] Federal Republic of Germany, Japan, United States of America.

[38] United Arab Republic.

[39] Netherlands.

[40] Republic of Viet-Nam.

[41] For example, France, Guatemala, Mali, Spain.

is a dependant, is considered as a beneficiary. In this connexion, it is reported in one instance [42] that in case of adulterous relations of the father the members of the regular family as well as the members of the "irregular" family (provided there has existed a *de facto* union for at least one year) are considered as beneficiaries under the law on the protection of motherhood and infancy, if they were dependants of the affiliate. One country [43] where the establishment of paternal filiation has limited effects, provides that a child born out of wedlock can be treated for the purpose of family allowances as an issue only of the mother, although as regards the benefits due under other insurance laws, paternity will be taken into consideration. In another country,[44] it is reported that, although its social insurance law does not provide for a test of "legitimacy" as such, the law on devolution of intestate personal property is followed in order to determine whether a child qualifies for benefits on the basis of the father's earnings. Children born out of wedlock usually do not have the requisite status under such law with respect to the father.

The importance of the trend towards increased assistance to the mother and child by the State as well as by voluntary organizations has been stressed. Also, while the main emphasis may still be directed towards the protection of the child, service to the mother is recognized as being highly important in itself as well as being essential to the interests of the child.[45] In one country,[46] the special efforts which are being made to create child-mother entity and to enable the mother to bring up her child in the best possible conditions are stressed.

As regards cultural rights, it is noted in one country [47] that up to seven years ago, children born out of wedlock could not easily gain access to certain select private schools. It is added that with the advent of free secondary education, this kind of discrimination has been removed.

In some countries reference is made to specific measures concerning the protection of children born out of wedlock, such as: (*a*) obligation of midwives and doctors to report births out of wedlock to the local child welfare committee and local maternity welfare institutions;[48] (*b*) creation of welfare agencies on the provincial level [49] in order to preserve confidentiality, which would be affected if the unmarried mother's request for assistance is referred to her home community; (*c*) obligation of welfare agencies [50] to admit and accommodate the child at the full expense of the State, whenever the unmarried mother makes an application; (*d*) admission of children born out of wedlock in boarding schools

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[42] Guatemala.

[43] United Kingdom.

[44] United States of America.

[45] Canada.

[46] Switzerland.

[47] Trinidad and Tobago.

[48] Canada (except for Quebec), Norway.

[49] *Ibid.*

[50] Union of Soviet Socialist Republics.

on a priority basis;[51] (*e*) creation of services for the exclusive use of unmarried mothers;[52] (*f*) enactment of special laws of social welfare assistance and protection of children born out of wedlock and of unmarried mothers.[53]

Conclusions

It is encouraging to note that, with respect to public rights and social welfare services, the general situation is that of complete equality between persons born in wedlock and those born out of wedlock, the former enjoying, sometimes, a privileged position with regard to social welfare assistance.

Following the trend in one country, where it is considered in the best interests of the child for him to be raised by his mother, all efforts should be made to encourage the formation of the mother-child entity. To that end, it would seem appropriate that, when the child is raised by his mother, the help and assistance given by the State or public agencies should be at least of the same standard as that provided when the child is raised away from his mother, in State or public institutions.

In view of the fact that the unmarried mother finds herself, in most cases, in a situation which might be detrimental to the welfare of the child, the example set in two instances could be broadened: the mother or any person who has given assistance to her or has direct knowledge of the situation should be under obligation to report the pregnancy or the birth of the child to a competent authority, in order to enable the latter to fulfil its tasks with the maximum chances of success. Such disclosure should be subject to the rules of professional secrecy.

Concerning the application of laws on social security and insurance, efforts should be made to obtain acceptance of the principle that a person born out of wedlock whose filiation has not been established but who is a dependant may be considered a beneficiary under social security and other insurance laws.

Although the information gathered does not refer to this important point, it should be stressed here that it would be highly desirable that the mother should be entitled to *free* legal counsel in order to initiate proceedings to establish paternal filiation. The court costs and disbursements of such action should be waived.

B. Social position

It has often been said that a person born out of wedlock, his parents and sometimes his mother's entire family, suffer a stigma as a result of the nature of his birth. Words as strong as " discredit ", " disdain ", " shame ", " contempt " and " condemnation ", have been used to describe such stigma. When it exists, it impairs the social position of the person born out of

[51] *Ibid.*

[52] United States of America.

[53] Italy.

wedlock, thus constituting an obstacle to the free development of his personality in the community in which he lives. It is obvious, therefore, that what is dealt with here are matters of attitudes and behaviour patterns and not discrimination embodied in the law.

The degree of acceptance of a person born out of wedlock in the community in which he lives varies from one of total acceptance to complete rejection. On the other hand, there exists a variety of degrees of acceptance which depend on various factors of a complex nature.

In a large number of instances [54] no stigma is attached to persons born out of wedlock. In this connexion it should be noted that in the majority [55] of these countries, persons born out of wedlock already enjoy the same legal status as persons born in wedlock. In various other countries, the situation is also described as being one of no discrimination, but the statement to that effect is less affirmative and worded with some reservation. For example, it is said that " the social status of persons born out of wedlock is not inferior to that of persons born in wedlock, although no generalization is possible in this field",[56] or "is it not generally speaking inferior to that of persons born in wedlock ",[57] or "as a rule it does not appear to be inferior ",[58] or " it can hardly be considered as inferior ",[59] or " there is no appreciable residue of inferiority, nor recognizable disdain ".[60] In a few cases [61] reference is made to the absence of discrimination in the social position but to the existence of a stigma.

In various instances there exists a disparity of attitudes towards persons born out of wedlock which vary according to different circumstances. For example, the social position of a person born out of wedlock may be the same as that of a person born in wedlock, if " the behaviour of all persons concerned is irreproachable ",[62] or if he is accepted by the family of his parents,[63] or it is related to the social milieu and to the degree of development of the community in which he lives. Thus, for example, in certain cases where the over-all approach is one of equality in the social position of the two categories of persons, mention is made of the existence of a stigma in " some backward areas ",[64] or in " the less developed

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[54] Albania, Burma, Cuba, Denmark, El Salvador, Guatemala, Honduras, Ivory Coast, Jordan, Malaysia, Poland, Romania, Sweden, Thailand, Union of Soviet Socialist Republics.

[55] Albania, Denmark, Guatemala, Ivory Coast, Jordan, Malaysia, Poland, Romania, Thailand, Union of Soviet Socialist Republics.

[56] France.

[57] San Marino.

[58] Kenya.

[59] New Zealand.

[60] Trinidad and Tobago.

[61] China, Thailand, United Republic of Tanzania, Yugoslavia (" in some backward areas ").

[62] Luxembourg.

[63] Philippines.

[64] Yugoslavia.

communities ",[65] or in " some social classes ",[66] or in " some sections of society and some parts of the country ",[67] or " in urban areas and upper and middle classes "[68] or " in higher milieux ".[69] In other cases where the general approach is one of discrimination against persons born out of wedlock, sometimes [70] there is less acceptance in less developed communities and lower economic classes — usually in rural areas — while, on the contrary, in other cases,[71] there is a greater degree of acceptance in the lower economic classes of society.

In many instances [72] where a general stigma of discredit is attached to persons born out of wedlock and where they are socially discriminated against, no reference is made to any disparity of attitudes within the country. However, it should be pointed out that in some cases [73] the stigma is aimed more at parents, particularly the mother, than at the innocent child. In one such case [74] birth out of wedlock would be a source of great shame for the entire family of the mother and even of danger for herself.

In one instance, the person born out of wedlock is not accepted in the community in which he lives; he has no place in society. He is treated with contempt, the " assumption being that he will inherit the propensities of his parents ".

Information concerning the reasons why in so many instances a stigma is still attached to birth out of wedlock is scant. However, some general reasons have been advanced, the most widely accepted one being the existence, in certain communities, of very strong religious or ethical feelings entailing strict standards of behaviour and a deeply rooted belief in the sanctity of the family as the fundamental unit of society.[75] Rerefence has also been made to the economic and cultural level of development of the community (see page 144, *supra*).

It should be noted that the absence or the elimination of discrimination in the social position of persons born out of wedlock is sometimes linked to specific factors. Among such factors are the following: the enactment of legislation providing for equal legal status between persons born in wedlock and persons born out of wedlock;[76] the prevailing concept

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[65] Brazil.

[66] Finland.

[67] Norway.

[68] Ceylon, Jamaica.

[69] Italy.

[70] For example in the Federal Republic of Germany, Japan, Netherlands, United Arab Republic.

[71] For example in the Philippines, Republic of Viet-Nam, Spain, Sudan, Switzerland, Turkey, United States of America.

[72] Afghanistan, Iraq, Ireland, Japan, Mali, Niger, Peru, Republic of Viet-Nam, Spain, Sudan, Switzerland, Turkey, United Arab Republic, United Kingdom, United States of America.

[73] Australia, Canada, China, Israel, Sudan.

[74] Sudan.

[75] Brazil, Canada, Ceylon (in areas and classes where it exists), Federal Republic of Germany, Netherlands, Turkey.

[76] Denmark, Hungary.

of marriage which is regarded not as a necessary prelude to child bearing but as a " state which is attained after a reasonable degree of economic security has been achieved ";[77] the inexistence of the very concept of birth out of wedlock;[78] or the fact that, historically, " marriages were more by habit and repute ".[79] In some instances,[80] the stigma attached to persons born out of wedlock, and the discrimination they suffer in their social position, was reported to be on the wane. It was explained in one instance [81] that this was the result of the efforts made by all authorities concerned and of the existence of a greater number of fatherless homes due to the war and to the larger proportion of divorces. In this social context, fatherless children are no longer the only ones deprived of a normal family life, and they are more readily accepted in society.

As has been said, social discrimination manifests itself not only in the attitude of the members of the community towards the persons concerned, but also in the various aspects of the life of the person born out of wedlock, whether private or public. The person born out of wedlock may encounter great difficulty (if not complete impossibility) in marrying persons born in wedlock,[82] in getting a job,[83] in succeeding in a professional career,[84] or in attaining positions of leadership, political or otherwise.[85] In general, the fact of being born out of wedlock has no effect on membership in the religious community. However, in some instances, it may have some effect. It may cause the exclusions of the person born out of wedlock from full membership and from holding offices in religious communities.[86] It may prevent him from entering into religious convents,[87] theological seminaries and religious orders [88] or from being eligible for ordination under canon law.[89] It has been added [90] that, under canon law, discrimination ceases when the person is legitimated by the subsequent marriage of his parents or when a dispensation is granted although, even in this case, certain high spiritual offices remain closed to him.

Conclusions

Analysis of the available data reveals that the situation as to the social position of persons born out of wedlock varies widely not

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[77] Jamaica.

[78] Nepal.

[79] Ceylon.

[80] Federal Republic of Germany, Mali, Switzerland.

[81] Federal Republic of Germany.

[82] India, Japan, Republic of Viet-Nam, Switzerland, Turkey.

[83] Japan.

[84] Federal Republic of Germany.

[85] Federal Republic of Germany, United States of America.

[86] Nigeria (in certain communities).

[87] Philippines.

[88] Federal Republic of Germany.

[89] Federal Republic of Germany, Ireland, Italy, Spain.

[90] *Ibid.*

only among countries, but also sometimes within the same country. While in a number of countries, persons born out of wedlock definitely do not enjoy the same social position as persons born in wedlock, in others they do. In a third group of countries, there are variations in the degree of their acceptance in the community.

It was also observed that the reasons of discrimination, when such exists, are deeply rooted in the ethical beliefs and social concepts of a given community and are also related to the degree of its economic and cultural development.

Finally, the survey has disclosed that usually persons born out of wedlock are not usually discriminated against socially in countries where their legal status is equal to that of persons born in wedlock. Furthermore, the enactment of legislation embodying the principle of equality has sometimes been a help toward the improvement of the social position of persons born out of wedlock and the achievement of equality between the two categories of persons in that field.

Regardless of whether persons born out of wedlock enjoy a legal status equal or inferior to that of persons born in wedlock, once their social position in the community is at all impaired, efforts should be made, at all levels, and by all auhotirites concerned, public as well as private, with a view to eliminating discrimination in this field. Also it would be quite important, in order to minimize the scope of the problem, to prevent, the disclosure of the fact of birth out of wedlock and to encourage adoption.

Part Three

OTHER ASPECTS OF THE PROBLEM

CHAPTER VIII

DISCLOSURE OF THE FACT OF BIRTH OUT OF WEDLOCK

In most countries today, the important events of the civil life of a person — such as birth, acknowledgement, adoption, marriage and its dissolution, death — must be recorded in special public registers, or other similar official records.

The value of these records is contingent upon the mandatory character of the registration of such events and also upon the formal nature of the entries made in the registers. Efforts are made to ensure the accuracy of the registrations and to keep the records up to date in order to determine the situation of any given person at any given moment.

In most systems, these entries, as well as certified copies of them or certified statements of their content, have been statutorily declared to be legal evidence of the facts recorded, unless successfully challenged in court. This is important since on various occasions evidence of the facts recorded has to be produced, not only by the person concerned, but also by other persons or the State.

Publicity of the entries made in the registers has always been considered essential. However, such publicity is conceived and recognized in different ways, in the different systems studied. According to one system the principle of publicity of the entries may not be affirmed, although the right to obtain extracts of them may be recognized. According to another system, this principle may be affirmed, and extracts or attestations may be issued without restrictions, but access to the registers may be denied and certificates may not be issued unless a legitimate interest is shown to the satisfaction of the Registrar or of a court. Such restrictions (or stricter ones) may be imposed for a period of seventy or 100 years, the entries being made available to anyone after such a period has elapsed. According to yet another system, the publicity of the registers may be affirmed and recognized in its widest sense, registers being available for consultation at any moment and to anyone without restriction of any kind, and certificates, extracts and attestations being issued upon request to anyone without any restrictions.

By far the most important document issued by the Registrar is the certificate or extract of the registration of birth. This document, as well as many others based on it, are widely used in everyday life, and are apt to disclose the fact that a person was born out of wedlock. In countries where there are unfavourable social attitudes towards birth out of wedlock, the disclosure of the fact that a person was born out of wedlock may adversely affect the interests of the person concerned and cause this person serious social harm, regardless of whether or not legal discrimination exists against such persons. For this reason, efforts have been made and are being made to eliminate forms of avoidable and unnecessary disclosure of this fact. Such efforts are represented by two general types of measures: (*a*) restrictions on access to the records and on the issuance of full copies of them, and (*b*) restrictions on disclosure resulting from the entries themselves. However, the very nature of the entries, or the purpose for which the copy or statement is requested and issued, may make such disclosure unavoidable and even necessary, as for example when the entry concerns an acknowledgement or a judicial decision establishing paternal filiation.

This chapter deals with the general types of disclosure of the fact of birth out of wedlock found in the legislation of the countries surveyed.

A. Disclosure of the fact of birth out of wedlock in the entries of the birth registration

This type of disclosure may result from the entries of the birth registration made, either at the time of the registration of the birth, or at a subsequent time.

1. *Disclosure at the time of registration of the birth*

Registration of birth is compulsory in the vast majority of the countries surveyed for this study.[1] The fact that a person was born out of wedlock may be disclosed in many ways in the registration of birth. In some countries,[2] the fact that a person was born out of wedlock is explicitly stated [3] in the birth registration, either by filling in a special space or column or by designating the person as born out of wedlock. In most countries this fact is not explicitly stated, and in a few of them such

[1] Registration of birth is not compulsory in India, Nepal and Sudan, and it is compulsory only for smaller segments of the population in the United Republic of Tanzania and Uganda.

[2] China, Honduras, Philippines, Republic of Korea (in the Census Register, but not in the Family Register), San Marino (one of the possibilities), Switzerland, United States of America (in thirty-two States, but not in the remaining eighteen States), Yugoslavia.

[3] Certain countries report that this fact is " disclosed " (San Marino), or that it is " stated " (Yugoslavia). It should be noted that in Japan a child born out of wedlock is registered in the Family Register established for the mother and child, while a child born in wedlock is registered in the Family Register of his parents established at the time of their marriage.

statement is prohibited.[4] However, in all of them [5] the fact of birth out of wedlock may be deduced from the entries appearing in the registration or omitted from it. Such implicit disclosure may occur in one or more of the following ways.

(a) *Neither parent is mentioned*

Such is the situation only in cases where filiation has not been or cannot be established as regards either parent. There is, however, one country [6] where there is no duty to report the names of the parents even if the child is born in wedlock but, whenever the parents' names are mentioned, a reference as to the existence of a marriage between them must also be made. Consequently, while the absence of the parents' names is not conclusive, the absence of the indication of their marriage would lead one to conclude that the child is born out of wedlock. In two countries,[7] names of fictitious parents are registered *ex officio* immediately. by the Public Guardianship Authority in one, and by the Registrar, in the other, thereby avoiding disclosure.

(b) *One parent only is mentioned*

Such is the situation when the other parent is either unknown in fact or has not been entered or may not be entered as such in the registration of birth because of a legal prohibition. One or more of the following methods are then applied: (*a*) in some countries [8] the space or column provided for entries regarding that parent is left blank; (*b*) in a few countries [9] the civil status of the only parent entered in the birth registration is indicated either when the appropriate column is not filled, or by explicitly stating his or her civil status when this is mandatory; this type of disclosure however, is avoided in certain countries [10] where it is expressly forbidden to enter any statement concerning the civil status of this parent in the registration; (*c*) in some countries,[11] expressions such as " father unknown " or the like are entered in the space or column provided for the unascertained parent. In one country,[12] disclosure is avoided since, upon the request of the Public Guardianship Authority, the name of a

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[4] Brazil, Cuba, El Salvador, Guatemala, Peru.

[5] There are, nevertheless, certain instances in Hungary, Nepal and Spain in which disclosure would be avoided by entering names of fictitious parents in the registration.

[6] Ivory Coast.

[7] Hungary, Spain.

[8] Albania, Argentina (*de jure*), Australia, Brazil, China, Denmark, France, Hungary (up to three years after birth), Ireland, Ivory Coast (it is not necessary to mention the parents), Kenya, Luxembourg, Mali (it is not necessary to mention the parents), Philippines, (as one of the possibilities wherever there is no accurate information), Romania, Sweden, Trinidad and Tobago, Venezuela.

[9] Bulgaria, Denmark, New Zealand, Niger, Norway, South Africa, Sweden (Book of Births and Baptisms).

[10] Cuba, El Salvador, Guatemala.

[11] Argentina (*de facto*), Bulgaria, Niger, Philippines, Poland.

[12] Hungary.

fictitious father is entered whenever the mother asks for it, but never after the child has reached the age of three years. A similar practice exists in two other countries.[13]

(c) *Both parents are mentioned*

The fact of birth out of wedlock is, or may be disclosed by the very names of the parents, which may encourage anyone to find out whether they are married to each other or not, for example by consulting the marriage register.[14] Disclosure could be avoided if through a special procedure, the mother were to adopt the surname of the father for herself and for the child before registration.[15] In a few other countries,[16] the fact of birth out of wedlock would be disclosed by the absence of entry regarding the marriage between the parents (blank space, blank column, no indication).

2. *Disclosure upon establishment or loss of filiation subsequent to the registration of the birth*

In these cases, the fact that the person concerned was born out of wedlock will be disclosed unavoidably.

In most of the countries for which information is available on the subject,[17] the establishment of filiation, whether by acknowledgement, judicial decision or otherwise, must be registered, either on the birth registration only (generally in the form of a marginal note) or, in addition, in special books kept for that purpose. In one country,[18] the registration of the court decision establishing filiation is mandatory and must be made immediately; in the case of acknowledgement, however, registration may take place only if the child's mother agrees to it. In a few countries,[19] a new registration of birth is made upon the establishment of filiation (re-registration), and the first registration is excluded from the Register. From then on, the fact of birth out of wedlock would ordinarily be inferred from the date of the new registration.

In all countries for which information on this subject is available, the loss of filiation which took place after the registration of the birth is entered in the Register, as a marginal note on the birth registration, and

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[13] Sudan, Turkey.

[14] As for example in Argentina, Brazil, Cuba, Guatemala, El Salvador, Kenya, Spain.

[15] This is expressly reported for Kenya.

[16] Denmark, New Zealand, Sweden.

[17] Albania, Argentina, Brazil, Cameroon (East Cameroon), Canada, Ceylon, Cuba, Denmark, France, Guatemala, Israel, Italy, Ivory Coast, Jamaica, Kenya, Lebanon, Luxembourg, Malaysia, Netherlands, New Zealand, Niger, Pakistan, Philippines, Republic of Korea, Republic of Viet-Nam, Romania, Sierra Leone, South Africa, Spain, Thailand, Trinidad and Tobago, Turkey, Uganda, United Arab Republic, United Kingdom, United Republic of Tanzania, Venezuela.

[18] Poland.

[19] Albania, Hungary.

sometimes also in special books kept for that purpose. In some countries [20] this is mandatory in all cases where filiation is lost as a result of a court order. In others,[21] it may be done only upon a special court order to that effect.

3. *Disclosure upon the acquisition or the loss of the status of a person born in wedlock subsequent to the registration of the birth, in countries where the law provides for more than one status*

In such situations, disclosure of the fact of birth out of wedlock is both unavoidable and necessary.

In most countries [22] for which information is available on these points, the acquisition (through various forms of legitimation) of the status of a person born in wedlock, as different from the status of a person born out of wedlock, is registered on the birth registration only, generally in the form of a marginal note, and sometimes, in addition, in special books. In some countries,[23] the birth is re-registered upon the acquisition of the status of a person born in wedlock. The original registration being excluded from the register, disclosure would ordinarily, from then on, be inferred from the date of the registration.

In most countries,[24] the loss of the status of a person born in wedlock is mandatorily registered, either as a marginal note on the birth registration only, or also in special books and carries with it the same unavoidable disclosure of the fact of birth out of wedlock. In a few countries,[25] it is not mandatory to register such loss of status, but the birth registration is endorsed to that effect upon a court order issued on specific request.

B. DISCLOSURE OF THE FACT OF BIRTH OUT OF WEDLOCK IN THE CONTENT OF CERTIFICATES, EXTRACTS AND/OR ATTESTATIONS OF THE BIRTH REGISTRATION

The entries in the registers may be consulted, and therefore may be known directly. They can be known indirectly by obtaining copies of the birth registration or statements on them, issued by the Registrar.

Copies of the birth registrations and statements on their content are issued in varying forms in different countries. Such forms may be classi-

[20] Brazil, Cuba, Guatemala, Ivory Coast, Netherlands, Philippines, Republic of Viet-Nam, Thailand, Venezuela.

[21] Ceylon, Ireland, Jamaica, United Kingdom, United States of America.

[22] Argentina, Australia, Brazil, Cuba, Denmark, France, Italy, Ivory Coast, Luxembourg, Mali (implied), Netherlands, New Zealand, Nigeria, Peru, Philippines, San Marino, Spain, Switzerland, Turkey, Venezuela.

[23] Canada (Alberta, Saskatchewan, New Brunswick), Ireland, Jamaica, Japan (the Family Register is changed accordingly), Kenya, Malaysia, Trinidad and Tobago, United Kingdom.

[24] Argentina, Brazil, Cuba, France (implied), Japan (the Family Register is changed accordingly), Kenya, Luxembourg, Netherlands, Philippines, San Marino, Spain, Switzerland (implied), Venezuela.

[25] Ireland, Jamaica, New Zealand, United Kingdom, United States of America.

fied under the following three categories: [26] (*a*) *certificates*, which are full verbatim certified copies containing all the entries appearing in the registration; (*b*) *extracts*, which are partial verbatim reproductions of the entries of the registration; (*c*) *attestations*, which are certified statements by the Registrar concerning the essential entries of the registration, or only the main aspects of some of the entries, as specified in the request.

While in several countries [27] certificates, extracts and attestations are issued, in several others [28] only certificates and extracts may be obtained. In a few other countries [29] there is provision for the issuance of certificates only, while in still a few others [30] no certificates are issued at all, and only extracts and/or attestations may be obtained.

Certificates necessarily contain the same type and degree of disclosure as the registration, since they are certified verbatim copies of all the entries of the registration (the original as well as all subsequent entries).

When re-registration has taken place, certificates may reproduce only the new registration and, while in some systems [31] the reproduction of the original entries is absolutely forbidden, in other systems [32] they may exceptionally be included upon express request, when the Registrar or a court is satisfied that, in that instance, the inclusion of the original entries is justified.

It should be pointed out that in most of the countries which provide for the issuance of extracts and attestations, the content of such documents is strictly determined.[33] Extracts and attestations do not necessarily exclude details which result in disclosure, but since they do not reproduce birth registrations completely, some of the entries excluded may be, and generally are, those referring to the fact of birth out of wedlock or those from which this fact may be deduced.

However, in some cases, they would disclose the fact of births out of wedlock, as certificates do, for example when the name of one parent only is included. Disclosure would also result when it is specified that the

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[26] The terms used here are those used by the Special Rapporteur for the collection of information for this study, and do not necessarily reflect the terminology used by any particular country.

[27] Argentina, Austria, Brazil, Bulgaria, Cuba, Federal Republic of Germany, Guatemala, Italy, Ivory Coast, Japan, Niger, Republic of Korea, Spain, United States of America.

[28] Australia, Denmark, France, Ireland, Jamaica, Kenya, Lebanon, Mali, Netherlands, New Zealand, Republic of Viet-Nam, Trinidad and Tobago, San Marino.

[29] Albania, Honduras, Israel, Malaysia, Nigeria, Philippines, Venezuela, Yugoslavia.

[30] Hungary (" extract "), Luxembourg (" extraits certifiés "), Norway (" long certificates " and " short certificates "), Romania (" certificat en extrait "), Switzerland (" actes abrégés " and " extraits ").

[31] Albania, Hungary, Jamaica, South Africa.

[32] Canada, Ireland, Kenya.

[33] Argentina, Austria, Bulgaria, Canada, Cuba, Denmark, Finland, Federal Republic of Germany, Hungary, Ireland, Italy, Ivory Coast, Lebanon, Kenya, Mali, New Zealand, Niger, Norway, Poland, Romania, San Marino, Spain, Sweden.

mother's surname is her maiden name or that she is not married, or that the parents mentioned are not married to each other etc.[34]

In a few countries,[35] it is legally forbidden to make any reference, in extracts or attestations, to the nature of filiation or to the civil status of the parent or parents mentioned therein. In one of these countries [36] the registrar who includes such data in any document referring to the filiation of a person is subject to imprisonment.

Some countries [37] have provided for the issuance of two types of extracts or attestations, one including the parents' names and sometimes also other data on them, and the other containing no information at all on the parents. In all but one of these countries, certificates are also issued.[38]

It should be borne in mind that extracts and attestations which do not mention the parents nor disclose the filiation of a person are of no use when, for example, filiation has to be proved in court or status has to be revealed for maintenance or inheritance purposes.

C. Disclosure of the fact of birth out of wedlock by the access to the birth registration and the availability of certificates, extracts and/or attestations thereof to persons other than those concerned

In many countries [39] free consultation of the entries of the Register is provided for as well as the issuance of certificates to anyone requesting them. In these countries, the Registrar is duty-bound to show, and not to hinder the consultation of, any of the books of the Register and to issue certificates of any specified entry therein contained. Anyone may consult the entries and obtain certificates without having to prove any need or lawful interest.

In one country,[40] express provisions exist for the free consultation of the entries in the register by anyone upon payment of the prescribed fee, but there is no rule as to who is entitled to get a certificate. In a few countries [41] certificates may be freely obtained by anyone, but consultation of the entries in the register is either not allowed, or is not provided for.

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[34] As it occurs, for example, in: Austria, Bulgaria, Canada, Finland, Federal Republic of Germany, Ivory Coast, Norway, Spain etc.

[35] Cuba, El Salvador, Guatemala.

[36] Guatemala.

[37] Austria, Canada (British Columbia), Ireland, Italy, Ivory Coast, Lebanon, New Zealand, Norway, Poland, Spain, Sweden, Switzerland, Trinidad and Tobago.

[38] The exception is Switzerland (" extraits " and " actes abrégés ").

[39] Australia (Tasmania), Brazil, Bulgaria, Cuba, El Salvador, Guatemala, Honduras, India, Japan, Kenya, Malaysia, Malta, New Zealand, Nigeria, Pakistan, Philippines, Republic of Korea, Republic of Viet-Nam, South Africa, Sweden (Census Register), Trinidad and Tobago, United Kingdom, United Republic of Tanzania, Venezuela, Western Samoa, Yugoslavia.

[40] United Republic of Tanzania.

[41] Cameroon (East Cameroon), Ceylon, China, Cuba, Ireland, Jamaica, Lebanon.

In a few countries [42] where the law provides for free consultation and/or the obtaining of certificates by anyone, the authorities in charge of the registries are also empowered to refuse to allow such consultation or to issue such certificates " for proper reasons ". These " proper reasons " are not spelled out, although in one of these countries [43] it is stated in this connexion that the certificate may be refused if there are " reasonable grounds to suspect that... [it]... would be used for an unlawful purpose ".

In one country [44] where the law also provides that anyone may obtain certificates of the entries, it is stated that information relating to birth out of wedlock appearing in the " population register " may only be given " for official use whether for application of legislative provisions, or for religious, scientific or philanthropic purposes, or wherever such information is considered indispensable or appropriate in a given case ".

In several countries [45] the consultation of the entries and the issuance of certificates is allowed only to certain specified persons and to some specified public authorities. Such persons always include the person concerned and his parents. In some countries,[46] other close relatives are also included, while in other countries [47] any person showing a legitimate interest may consult the Register or obtain certificates even though he might first have to obtain permission from the competent authority. Appropriate administrative and judicial authorities and, in one country,[48] also representatives of the State and of social welfare organizations, are always permitted to consult the Register in connexion with the fulfilment of their official functions.

In a few instances,[49] only upon specific authorization by the competent public authorities may the entries be consulted or certificates obtained by private persons.

In certain countries,[50] during a period of seventy or one hundred years after the entry was completed or from the date of the birth, consultation is restricted to the officials working in the Registrar's Office, and the issuance of certificates is allowed only to competent public authorities and courts as well as to the person concerned, his close relatives, legal representatives and third parties showing legitimate interest and authorized

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[42] Jamaica, Japan.

[43] Jamaica.

[44] Netherlands.

[45] Albania, Argentina, Australia (New South Wales), Austria, Canada, Italy, Ivory Coast, Norway, Poland, Spain, Turkey, Union of Soviet Socialist Republics, United States of America.

[46] Albania, Argentina, Ivory Coast.

[47] Albania, Argentina, Australia (general statement by the Government), Austria, Ivory Coast.

[48] Poland.

[49] Canada (British Columbia), Iraq, Ireland (this applies exclusively in cases of re-registration and regarding original entries).

[50] Denmark (one hundred years), France (one hundred years), Sweden (seventy years, parish registers and population registers).

by competent authorities. When the period of time has elapsed, consultation of entries is allowed, and certificates are issued without restriction to any person.

In a few countries,[51] consultation of the entries by persons other than officials of the Registrar's Office is not allowed, and the issuance of certificates is not provided for; only extracts and/or attestations are issued.

Extracts and attestations are generally available to anyone without restriction in countries where they are issued,[52] irrespective of whether certificates are also issued to anyone, or only on a restricted basis, or not at all. In one country,[53] where certificates may only be obtained with the authorization of the competent public authorities, extracts and attestations are available only to appropriate public authorities, to the person concerned, his counsel and his close relatives. In some of the countries where only extracts and attestations are issued [54] they are always available on a restricted basis to public authorities, to the person concerned and to his legal representative. To this basic list, the person's parents and other close relatives may be added [55] as well as any other person showing a " direct interest which deserves protection ".[56] In some countries,[57] in addition to certificates which are available on a restricted basis similar to that just described, two types of extracts may be issued. One type contains data on the parents or other statements disclosing the fact of birth out of wedlock, and is available on the same restricted basis as certificates. The other type does not contain any reference to the parents and is available to any person without restrictions. In a few other countries,[58] as a general rule, extracts and attestations which do not include elements which may disclose the fact of birth out of wedlock are available to anyone and a fuller form of extract or attestation may be obtained upon request. In some countries,[59] this fuller form is available only to persons showing a legitimate interest or authorized by the competent authority. Lastly, in a few countries,[60] this matter is not determined in advance but is left to the discretion of the competent authorities in the Registries, the contents of the extract or attestation being determined on the basis of the purpose for which it is requested. In one of these countries,[61] it is stated, in this connexion, that " the form to be used and the information issued will

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[51] Hungary, Niger, Romania.

[52] Austria, Brazil, Bulgaria, Cuba, Guatemala, Hungary, Italy, Ivory Coast (" extraits ordinaires "), Kenya, Luxembourg, Mali, New Zealand, Republic of Viet-Nam, Sweden (census registers), Trinidad and Tobago, United Kingdom.

[53] Iraq.

[54] Federal Republic of Germany (case of birth out of wedlock), Norway, Switzerland.

[55] Federal Republic of Germany (general case), Switzerland.

[56] Switzerland.

[57] Ivory Coast, New Zealand, Niger, Poland, Spain.

[58] Brazil, Bulgaria, Ivory Coast, Mali, New Zealand.

[59] Ireland, Ivory Coast, Poland, Switzerland.

[60] Finland, United States of America.

[61] United States of America.

hinge upon the purpose for which the information is sought, the person or agency seeking the information and whether in light of the circumstances there is a legitimate right or need for the information ".

D. Conclusions

The analysis of the data has revealed that disclosure of the fact of birth out of wedlock may result, on the one hand, from the content of the birth registration and of certificates, extracts or attestations thereof, and, on the other hand, from the consultation of the birth registration and the availability of certificates, extracts and attestations thereof.

It is clear that disclosure of the fact of birth out of wedlock becomes a significant problem only where, because of prevailing social attitudes, the interests of persons so born would be adversely affected by such disclosure irrespective of whether or not legal discrimination exists against these persons.

Disclosure of the fact of birth out of wedlock stemming from the entries appearing in the birth registration may be explicit or implicit. Explicit forms of disclosure include entries referring to the nature of birth, or to the denomination of the registered person as born out of wedlock, or to the fact that the " father is unknown ", whether such entries were made at the time of the registration of birth or subsequently.

While in some countries these forms of explicit disclosure still exist, in most countries they have been eliminated by not making them mandatory or prohibiting them altogether when they concern entries to be made at the time of the registration of birth. Explicit disclosure stemming from entries made after the birth has been registered and referring to establishment or loss of filiation, or to acquisition or loss of the status of a person born in wedlock are especially difficult to eliminate. While such disclosure is unavoidable in cases of loss of filiation or of loss of status because of the very nature of the entries involved, it is avoidable in cases of establishment of filiation or of acquisition of status. In certain countries a procedure for re-registration has been instituted whereby in such cases, the original birth registration is excluded from the register and a new registration is made. Only the date of the new registration would then disclose the fact of birth out of wedlock.

Implicit forms of disclosure result directly from the absence of the names of the parents or the name of one parent, or from the presence of the parents' names together with a reference to their marital status, or else from the mandatory indication of the marital status of the parents in all cases. They may also result indirectly from the presence of the parents' names which permits ascertaining whether or not they are married to each other. Several of these forms of indirect disclosure have been eliminated in many countries by not requiring a reference to the marital status of the parents, or by permitting the mother to adopt the father's surname for herself and for her child through special procedures to be completed before

the registration of the birth, or by allowing fictitious names to be entered in certain circumstances.

Disclosure of the fact of birth out of wedlock may also result from the entries contained in certificates, extracts or attestations of the birth registration. Since certificates are verbatim copies of the birth registration, they will carry the same type and degree of disclosure as contained in the registration. Only when re-registration has taken place may disclosure be avoided since normally the entries appearing in the original registration will not be included. Extracts would usually not include data which would disclose the fact of birth out of wedlock. In some cases, however, they do disclose this fact by including references to the marital status of the parent (or parents), or by only mentioning one parent or by stating that the surname indicated is the mother's maiden surname.

Disclosure of the fact of birth out of wedlock occurs through the consultation of the birth registration or the availability of certificates. In most countries anyone may consult the birth register and may obtain certificates of a birth registration, while in other countries varying types and degrees of limitations have been imposed on the consultation of the entries and on the issuance of certificates. Thus, consultation may not be allowed at all and certificates may not be issued in any case; or consultation may be permitted and certificates may be available only to specified persons (the person concerned, his close relatives, his legal representatives, third persons showing a legitimate interest) as well as to certain public authorities; lastly, such restrictions may be applicable for a period of many years (generally from seventy to 100), but after the lapse of that period, consultation is allowed and certificates are issued to any requesting person.

As a general rule, extracts and attestations are available to anyone requesting them, but in some systems, whenever they contain data on parents, or other information which would lead to disclosure of the nature of the birth, they are available only to the person concerned and his relatives and legal representatives, and to third persons showing a legitimate interest as well as to appropriate administrative and judicial authorities.

In some countries where more than one type of extracts or attestations are issued, there is an established practice whereby extracts and attestations which do not contain unnecessary disclosure of the fact of birth out of wedlock are made available to any person requesting them unless they specifically ask for other types of extract or attestation which do disclose the fact. In some of these countries, however, these other types may only be issued to persons showing a legitimate interest, or having been duly authorized by the competent public authorities.

CHAPTER IX

THE INSTITUTION OF ADOPTION AS A MEANS OF IMPROVING THE POSITION OF PERSONS BORN OUT OF WEDLOCK

The institution of adoption is examined because, viewed in terms of its effects, it provides one way of improving the legal situation of a person born out of wedlock. Generally speaking, adoption confers on such a person a status similar to that of a person born in wedlock. However, this statement must be qualified. The change that adoption may produce differs depending on the family law of the country concerned. If in a country there are in force two sets of laws, one for persons born in wedlock and the other for persons born out of wedlock, adoption of a person born out of wedlock may result in a significant change in the legal status of that person. If, on the other hand, the two categories of persons enjoy the same privileges once filiation has been established, adoption will not result in a change of status, but will merely provide a new set of family relationships for the adopted person. In the context of the present study, the real interest of the following analysis is centred on the usefulness of adoption as a means to combat discrimination against persons born out of wedlock.

A. GENERAL REMARKS

1. *Definition*

While it does not seem that the law of any of the countries studied provides a precise legal definition of adoption, nevertheless, there seems to be a broad consensus as to the meaning of the concept. From the relevant provisions of the laws, adoption could fairly be defined in the following terms: it is a solemn act, decreed or approved by a competent organ of the State — whether judicial or administrative — which creates between two persons legal ties analogous to the relationship that would result from filiation through wedlock. An essential feature of adoption is the artificial character of the relationship it creates, which has important consequences.

First, since adoption involves matters of personal status, it is normally subjected to special conditions which are predetermined by the law and not by the parties concerned. Secondly, since the artificial family ties created by law carry with them the weaknesses inherent in every fiction, legal or otherwise, they must necessarily be subject to various limitations. Therefore, the situation of the person adopted and the person born to the adopter in lawful wedlock is, in principle, never completely identical.

2. *Wide acceptance of the institution of adoption*

The institution of adoption has been widely approved by States and recognized in various legal systems. Of the countries studied here, relati-

vely few [1] have not formally established adoption as a formal juridical institution. In three countries,[2] its exclusion from the legal system is due to the fact that their concept of the family is very broad. Indeed, while they exclude adoption as a legal institution, they implicity regard *de facto* adoption (a situation whereby a person is treated as a member of the household without any legal formalities) as a natural procedure. With reference to one of these countries, it has been stated that *de facto* adoption is an obligation which imposes itself *ex officio* on the nearest male relative when a minor has been deprived of the person who exercises parental rights over him. In another one, the concept of birth in wedlock is so broad that, *de facto* adoption is a common practice.

3. *Purposes and objectives of adoption laws*

The laws of the countries studied refer to the result of adoption, which is, as has been said above, the establishment of an artificial filiation between two persons. However, they do not generally contain any provisions specifying the categories of persons who may or should be given preference when adoption is contemplated, nor do they explicity state that adoption is intended primarily for the benefit of persons born out of wedlock. Adoption is not, in principle, confined or restricted to persons born out of wedlock. Instead it is usually open to all persons whether born in wedlock or out of wedlock. Only in one country[3] is it required that the prospective adoptee be either a person born out of wedlock, or an orphan, or a legitimated person whose birth has not been re-registered.

Although adoption is not, like legitimation, an institution exclusively intended to upgrade the status of persons born out of wedlock, the principle which lies behind it could nevertheless be applied in order to achieve such an objective.

In modern times, adoption is directed towards an improvement in the position of the adopted person. Therefore, in countries where persons born out of wedlock are subject to discriminatory treatment, either because they enjoy a status inferior to that of persons born in wedlock or are completely deprived of rights based on family relationship, adoption is likely to be helpful to them. In particular, it may contribute to their integration into a family and give them the rights and privileges of persons born in lawful wedlock. It is because the practical results of adoption may be beneficial to persons born out of wedlock that the question is dealt with in the present study.

Information about the number of persons born out of wedlock who have subsequently been adopted is not available for most of the countries studied. Nevertheless, the conclusion that the institution of adoption can be of great profit to persons born out of wedlock seems to be corroborated by the few cases where pertinent statistical information is given. For

[1] Moslem law does not generally recognize the institution of adoption.

[2] Mali, Nepal, Western Samoa.

[3] Ireland.

example, in one country,[4] 1,224 minor children were adopted in 1961 of whom 878 had been born out of wedlock. In 1962, the corresponding figures were 1,054 and 780. In another country,[5] in 1960, out of a total of 1,796 adoptions, 1,377 were persons born out of wedlock, while a third [6] reports that in 1962, the number of persons born in wedlock and out of wedlock who were adopted was respectively 115 and 386.

4. *Types of adoption*

Depending on the scope of its effects, different types of adoption are possible. The laws of the countries studied indicate that four main types of adoption are possible. They are listed as follows:

(*a*) The most common type, found in a majority of the countries studied, might be called " regular adoption ". This type creates between the adopter and the adoptee an artificial relationship of parent and child, and places the adopted person in a situation analogous to that of a person born to the adopter in lawful wedlock. Normally, however, certain limitations are placed upon the rights and privileges enjoyed by the adopted person.

(*b*) The second type might be called " incomplete adoption ". Its effects are considerably less extensive than those of the " regular adoption " and are restricted to certain specific matters. Only a very few countries [7] have referred to this type.

(*c*) The third type is known as " adoption with full effects ". In this type, all the limitations met in the " regular adoption " are swept way. The status of the adopted person is not analogous to, but identical in all respects with that of the person born to the adopter in wedlock. This type is found mostly in certain countries [8] where the law provides for one single status applicable to all persons irrespective of descent.

(*d*) In the fourth type of adoption, the adopted person's rights are identical with those of the person born to the adopter in lawful wedlock. This type of adoption is linked to the concept of legitimation itself. In the few countries [9] where it exists, the law sets conditions more stringent than those required for the other types; in particular, it is possible only when the person to be adopted is a minor of unknown parents. Only foundlings can benefit from such an adoption and for that reason, it will be excluded from further discussion in this study since foundlings may or may not be persons born out of wedlock.

In some countries,[10] more than one type of adoption is provided, and the parties concerned may choose the one they prefer.

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[4] Austria.

[5] New Zealand.

[6] Netherlands.

[7] Peru, Spain, Yugoslavia.

[8] Albania, Bulgaria, Hungary, Romania, Union of Soviet Socialist Republics.

[9] France, Luxembourg.

[10] Spain, Yugoslavia.

B. Legal requirements and legal procedure

Generally any person, single or married, who meets the requirements set by the law can apply for an adoption order. The law of only one country [11] specifically provides that the applicants for an adoption order must either be a married couple, or a natural parent or relative of the child or a widow.

The legal requirements and the procedure for a valid adoption vary from country to country. However, analysis of the information available reveals a basically common approach which would tend to show that the institution responds to quasi-universal needs. The question which arises is whether these requirements facilitate or impede the adoption of persons born out of wedlock.

1. *Legal requirements*

The following list of requirements is limited in scope and will deal only with the requirements on which some information has been collected.

(a) *Age*

(i) *Age of adopter*

Many laws set a minimum or a maximum age, although in most countries it suffices that the adopter is of age. The adopter must have attained at least twenty-five years of age in some countries,[12] thirty,[13] thirty-five,[14] forty,[15] or fifty [16] in some others. A few laws [17] provide for a maximum age: adoption then is not permitted to persons who have attained fifty years of age. Also, the legislation of a number of countries [18] requires a difference of age between the adopter and the adopted person, which varies from fifteen to twenty-five years, depending on the countries. In one case,[19] this provision applies only when the adoptee has attained sixteen years of age or when adopter and adoptee are of different sex. Furthermore, the law may invoke special circumstances or the existence of family relationship between the adopter and the adoptee, in order to reduce the scope of the requirements on age or set them aside altogether. Thus,[20]

[11] Ireland.

[12] Ceylon (General Law), Denmark, Finland, Malaysia (except for Moslems), New Zealand, Norway, South Africa (Common Law).

[13] Thailand.

[14] El Salvador, Ivory Coast.

[15] Lebanon (Christian communities), Switzerland.

[16] Federal Republic of Germany.

[17] Italy, Peru.

[18] Bulgaria, Canada, Ceylon (General Law), China, Cuba, El Salvador, Federal Republic of Germany, Israel, Italy, Ivory Coast, New Zealand, Peru, Republic of Viet-Nam, Spain, Thailand, Turkey, Union of Soviet Socialist Republics.

[19] South Africa (Common Law).

[20] Bulgaria, Ireland, Malaysia, New Zealand, Republic of Viet-Nam, South Africa (Common Law).

in some countries, an adoption order may be made in favour or applicants who have not attained the specified age, if they are spouses or relatives of the child.

(ii) *Age of the adopted person*

Generally, the laws have not set a minimum age for the adopted person. On the contrary, some laws,[21] stipulate the opposite rule and provide that only persons who are minors can be subjects for adoption. There are even cases,[22] where persons over fifteen or eighteen years cannot be adopted.

(b) *Sex*

In most countries, adoption appears to be open to persons of both sexes. But restrictions are also found. In some countries,[23] the law stipulates that an adoption order cannot be made in respect of a child who is a female in favour of a sole applicant who is a male unless the Court is satisfied that the applicant is the father of the child or that there are special circumstances which justify the making of the adoption order.

(c) *Religion*

Some laws [24] require that the adopter and the adopted person must be of the same religion.

(d) *Consent*

Consent is normally one of the most important requirements for a valid adoption. No difficulty would be raised if adoption were confined to persons of age. But as adoption creates filiation and involves minors most of the time, the laws in nearly all the countries studied require that certain persons other than the parties directly concerned give their consent in specific cases.

(i) *As to the adopter*

Persons whose position vis-à-vis the adopter might be decisively affected by an adoption can be required to give their consent. The need for the adopter's spouse to give his consent seems to be fairly general and all the countries studied prescribe such a rule. The rule may be set aside when the spouse is unable to express his will. Besides the spouse, the available information does not reveal that consent of anyone else among the members of the adopter's family is required.

(ii) *As to the adoptees*

When the adoptee is a person of age, there is no question that his personal consent is a necessary requirement. In this case, the contractual

[21] Bulgaria, Hungary, India, Union of Soviet Socialist Republics.

[22] India (Hindu Law).

[23] Ceylon (General Law), Malaysia (Common Law), New Zealand, Trinidad and Tobago, United Kingdom, United Republic of Tanzania.

[24] India (Hindu Law), Israel, Lebanon (Christian communities).

aspect of adoption is prominent and such consent is a natural consequence of the general principles of the law of contracts. But when the prospective adoptee is a minor, the question arises as to who should act on his behalf. Usually, it is the person who exercises parental authority over the child. On the other hand, the legislation of various countries [25] requires the consent of the minor himself when he has attained a certain age, which varies from country to country, between ten and fifteen years of age.

The rule requiring the consent of the natural family is not absolute and can be set aside in certain specific circumstances. When, for example,[26] the child was already in the custody of the prospective adopter, the court may be substituted for the parent if the parent is unable to give his consent or if he withholds it without valid reason and against the evident interest of the child. In one country,[27] the law provides that in these cases, the court may, upon petition by any interested person, appoint someone to give such consent.

(e) *Existence of adopter's children*

When the adopter has descendants of his own prior to the time of the application, this fact often constitutes a legal impediment to adoption. In countries where such a rule is in force a distinction is sometimes made between children born in wedlock or legitimated and children born out of wedlock. In certain countries,[28] only the presence of children born in wedlock can prevent an adoption. One country,[29] also, takes into consideration the sex of the adopter and the adoptee: the existence of a son would only prevent the adoption of a son, while the adoption of a daughter would be prohibited if the adopter has already a daughter born in wedlock living at the time of adoption. In various other countries,[30] the basis for prohibition is larger and the presence of certain categories of persons born out of wedlock, or even, in a few cases, of any descendants, including adoptees, constitutes an impediment. However, this interdiction based on the existence of previous children is far from general, and a large number of countries do not regard it as an obstacle to adoption.

(f) *Adoptee, child of the adopter or a member of his family*

The question may be raised whether through adoption a parent can circumvent the restrictions imposed by the law on the kind of relationship he can establish with his child born out of wedlock. In several countries,[31]

[25] Canada, Ceylon (General Law), Denmark, El Salvador, Israel, Japan, Lebanon (Christian communities), Norway, Peru, Romania, South Africa (Common Law), Thailand.

[26] Israel, Malaysia (Common Law).

[27] Ceylon (Kandyan Law).

[28] Cuba, Italy, Lebanon (Christian communities), San Marino, Turkey.

[29] India (Hindu Law).

[30] El Salvador, India (Hindu Law), Ivory Coast, Peru, Philippines, Spain, Switzerland.

[31] Austria, Australia, Canada (Quebec), Finland, Israel, Ireland, Malaysia (Common Law), New Zealand, South Africa (Common Law), United Kingdom, United Republic of Tanzania.

the analysis of information shows that it is not uncommon for the natural parent of a person born out of wedlock to adopt him although, in one instance,[32] it is specified that the fact of birth out of wedlock must not be revealed by an acknowledgement. In others,[33] the adoption of one's own child is prohibited and the interdiction is sometimes [34] extended to brothers and sisters. Furthermore, the laws generally stipulate that any person exercising parental authority over a child by order of a court cannot adopt that child.

(g) *Adoption by more than one person*

The general rule is that a person cannot be adopted by more than one person, except when the applicants for an adoption order are spouses. The legislation of nearly all the countries studied contains such a stipulation.

2. *Legal procedure*

In all the countries, studied, mere agreement between the parties concerned is not sufficient to give legal force to adoption. The private arrangement must be submitted for approval or ratification by a competent authority of the State before an adoption can be considered valid. The competent authority may be either judicial or administrative; in a substantial majority of countries it is judicial.

In most countries, the organ designated to decide on the merits of adoption is a regular court; there is one case [35] where the law gives competence only to the Supreme Court. In some countries, a special body known as the Guardianship Authority is set up to handle adoption and matters related to child welfare. There is fairly general agreement that the intervention of the State is not restricted to mere control of legal formalities but tends rather to the larger objective of the protection of the welfare of the prospective adoptee. Most laws define the role of the court and State that it must be satisfied that the adopter is a fit and proper person to have the care of the child and that the adoption is in the interest of the adopted person.

C. The nature of the change brought about by adoption in the status of a person born out of wedlock

As has been said before, adoption may result in a significant change in the status of a person, especially of a natural parent adopts his child born out of wedlock. However, this is true only in countries where persons born out of wedlock do not enjoy the same rights and privileges as those born in wedlock. In countries where the same law governs all persons,

[32] Italy.

[33] Bulgaria, El Salvador, Netherlands, Norway, Peru, Yugoslavia.

[34] Bulgaria, El Salvador, Peru.

[35] Australia (New South Wales).

adoption does not affect the status of the person born out of wedlock whose filiation has been established. Therefore, the question can be raised as to the nature of the change brought about by adoption in the status of a person born out of wedlock, in the first group of countries.

No legislation has gone so far as to proclaim that the adopted person becomes the " legitimate " child of the adopter. Such a formula can be found only in the case of " legitimating adoption ", an institution intended, where it exists, for the exclusive benefit of children — usually less than five years old — who are foundlings or whose parents are deceased. Such a situation is, as has been said before, outside the scope of the present study.

In nearly all the countries surveyed, the general principle of equalization of rights of the person adopted with those of persons born to the adopter in lawful wedlock has been laid down, although its formulation varies from country to country. Most laws use terms such as: (*a*) the adopted person acquires the status of a person born in wedlock; (*b*) the adopted person is deemed for all purposes to be the natural child of the adoptive parent; (*c*) adoption creates the same rights between the adoptive parent and the adopted child, as those resulting from legitimate descent. However, while one group of jurisdictions [36] emphasizes that the adopted child is, in all respects, considered as equal to the adopter's own children and that no distinctions whatsoever are made between the two categories, the effects of adoption are, in many countries, formulated in a less emphatic manner. These countries stress the restrictive nature of adoption which may, for example, confer the status, but not the quality of a person born in wedlock,[37] create a status comparable but not identical with that of a legitimate person,[38] or give to the adopted child the rights of a person born in wedlock, in certain respects only.[39] Some countries [40] point out also that the parties themselves or the courts, if circumstances so require, have the power to limit the effects of an adoption.

The integration of the adopted person may thus be complete, in some cases, but its scope may also be confined to the relationship between the adoptee and the adopted person and the question of integration of the adoptee in the family of the adopter is left open. This appears to be the prevailing situation in the substantial majority of countries, particularly those which differentiate between persons born in wedlock and persons born out of wedlock. Complete integration is realized in the type of adoption called " adoption with full effects ". Integration is rarely complete in a " regular adoption. " Indeed, the kind of relationship it generally establishes between the person adopted and the family of the adopter seldom grants rights and privileges to the adopted person vis-à-vis the family of the adopter. Because of the artificial nature of the

[36] Albania, Hungary, Poland, Romania, Union of Soviet Socialist Republics.

[37] Republic of Viet-Nam.

[38] Cuba.

[39] El Salvador, Ireland.

[40] Israel, Turkey.

relationship created by adoption, most countries have been reluctant to equate the adopted child to the natural born legitimate child of the adopter.

The precarious nature of adoption is further demonstrated by the fact that, in several countries, the relationship it creates may be terminated: (*a*) by agreement between the parties,[41] (*b*) by court decision [42] taken upon request of either the adopter, the adoptee or his natural parent or the competent authority; (*c*) by the marriage of the parties; [43] (*d*) and finally by the unilateral renunciation [44] of the adoptee when he becomes of age. Whether the adoption has been revoked with the consent of both parties or as the result of a decision of a court, all the effects of adoption are generally nullified from the date of the revocation. The parent-child relationship comes to an end and the adopted child reverts to his former status.

D. The degree of equalization of persons adopted to persons born to the adopter in lawful wedlock

On the basis of the fact that adoption creates a filiation subject to reservations, it is worthwhile to examine to what degree and as regards what specific matters a person born out of wedlock will, through adoption, benefit from the rights and privileges enjoyed by a person born to the adopter in lawful wedlock. The effect of adoption on the relationship between the person adopted and his natural parents will not be treated, as the main concern of this study is the possibility which adoption offers to the person born out of wedlock to acquire the status of a person born in wedlock.

1. *Recognition of family relationship*

Generally the recognition of family relationships in favour of the person adopted depends on the type of adoption. In the case of " adoption with full effects ", the family relationships created are entirely similar to those produced by blood filiation; they are extended not only to the descendants of the adoptee but to all relatives of the adopter. Such type of adoption, as already observed, is found only in a minority of the countries studied.

In the case of " regular adoption " which is the most common type found, a legal family relationship is, in principle, created between the adopter and the person adopted and, in various countries,[45] it is extended to the descendants of the person adopted who are born in wedlock. Except in a small number of countries,[46] marriage between the adopter and the

[41] China, El Salvador, Federal Republic of Germany, Guatemala, Japan, Peru, Thailand, Turkey.

[42] El Salvador, Guatemala, Israel, Italy, Japan, Laos, Peru, Republic of Viet-Nam, South Africa (Common Law), Spain, Turkey.

[43] Italy, Japan, Peru, Turkey.

[44] Peru.

[45] Cuba, Malaysia (Common Law), Peru, Spain.

[46] Israel, Italy, Turkey.

adoptee or the adoptee's descendants is prohibited. Where it is permitted, marriage between the two terminates the legal relationship.

Adoption, on the contrary, does not generally establish kinship between the adoptee and the relatives of the adopter, nor, indeed, the rights and duties based on such a relationship. Some laws,[47] however, provide that family relationship includes blood relations as well as a relationship by adoption and, as regards marriage, brings the person adopted and the members of the adopter's family within the prohibited degree of unsanguinity.

" Regular adoption " does not, therefore, result in equating the status of persons born out of wedlock to that of the person born to the adopter in lawful wedlock. It fulfils that objective in so far as the mutual relationship established between the adopter and the adopted is concerned.

2. *Name*

In all the countries studied, the law provides, in one form or another, that the adopted person is entitled to bear the name of the adopter. But there are variations in the character of that provision. In a majority of countries, the rule is mandatory, and in the case of adoption by two spouses, the name to be carried by the adoptee is that of the husband. In one country,[48] the adoption agreement must indicate the name to be given to the child when the adopter is a married woman. In the absence of such stipulation, the child will bear the woman's married name. In several countries,[49] the law permits a choice among three possible alternatives: the adoptee may use the name of the adopter; he may keep his own name; under special circumstances, the adoptee may finally add his own name to the adopter's name. Generally, the choice is made by the parties concerned themselves in the adoption agreement, but, sometimes,[50] the competent authority is called upon to decide whether or not the adoptee will keep his own name. One country [51] requires that the adoptee who has attained fourteen years of age must give his consent. In some countries,[52] it is mandatory for the adoptee to bear both names: his own and that of the adopter. In two countries,[53] such rule is mandatory only when the adopted person is over sixteen years of age. Two countries [54] in which the two types of adoption exist, adoption with full effects and regular adoption, state that it is mandatory for the adoptee of the first type to carry the name of the adopter.

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[47] Canada, Ghana, India (Hindu Law), Laos, Malaysia (Common Law).

[48] Federal Republic of Germany.

[49] Albania, Bulgaria, Cuba, Denmark, Federal Republic of Germany, France, Peru, Republic of Viet-Nam, Spain (as regards incomplete adoption), Thailand.

[50] Denmark, Hungary, Romania.

[51] Albania.

[52] Italy, Ivory Coast.

[53] France, Luxembourg.

[54] Romania, Spain.

In regard to name, therefore, the person born out of wedlock has, in principle, a status totally similar to that of a person born to the adopter in lawful wedlock.

3. *Nationality*

In most of the countries studied, there is no information on the effects of adoption on the nationality of the person adopted. Where information is available, regular adoption is not generally considered as a means of acquiring citizenship. In one country,[55] however, the person adopted acquires nationality if the adopter or one of the adopters, in case of adoption by two spouses, is himself a national. In another country,[56] while the person adopted does not automatically acquire the nationality of the adopter, he may nevertheless, before attaining majority and without going through the process of naturalization, claim it by a mere declaration before the competent authority. If he is over twenty-one years, he must be naturalized, but the legal requirements of residence are waived in his case.

On the basis of these limited observations, one might conclude that in the matter of nationality, adoption appears not to place the person born out of wedlock in a situation identical with that of a person born in wedlock and that further legal action may be necessary to attain this result.

4. *Domicile*

In nearly all the countries studied, the question of domicile is linked to the exercise of parental authority. As in the case of persons born in wedlock, the domicile of the adopted minor is that of the person exercising parental authority over him. The adopted child generally acquires the domicile of the adopter. In one country,[57] however, it is stipulated that adoption does not affect the domicile of origin of the adopted person, unless the adoption order was issued before the child was three years old.

Thus, regarding domicile, the person born out of wedlock who has been adopted enjoys the same status as that of a person born to the adopter in lawful wedlock.

5. *Parental authority*

In almost all the countries studied, the law contains specific stipulations granting to the adopter alone exclusive parental authority over the person adopted. Where this rule is not expressly formulated it is usually implicit, as every country states that the adoptee acquires all the rights and obligations of persons born to the adopter in lawful wedlock. If there is only one adopter, he exercises the same degree of parental authority

[55] Ivory Coast.

[56] France.

[57] New Zealand.

as would a surviving spouse. When the adopters are spouses, they stand to each other and to the child in the same relation as they would if they had been the lawful father and mother. The conclusion is evident: as regards parental authority the person born out of wedlock who has been adopted is equated to the person born to the adopter in lawful wedlock. However, concerning "regular adoption", the following observation should be made: whereas in the case of a person born in wedlock the duty of guardianship would normally be taken over by a relative when his parents are deceased or unable to fulfil it, in the case of the adopted person whose parental filiation is not established, that privilege cannot by enjoyed.

6. *Maintenance*

Maintenance being a natural consequence of filiation, such an obligation stems also from adoption. All the jurisdictions studied prescribe a reciprocal duty of maintenance between the adopter and the person adopted. However, while some countries extend it to the parents of the adopter, the great majority limit it to the adopter only. The former situation occurs in countries where adoption brings about the full effects of a blood relationship. But the latter expresses the general rule, from which it can nevertheless be concluded that, between adopters and adoptee, the right to maintenance is the same for the adopted child and the child born in wedlock.

7. *Inheritance rights*

The manner in which the question of inheritance rights resulting from adoption has been dealt with in the countries studied clearly demonstrates the artificial nature of the relationship established by adoption.

(a) *Rights of the adoptee to share in the intestate succession of the adopter*

In principle, the adopted person and, in many cases, his descendants born in wedlock, is entitled to inherit from the adopter. In several countries, however, his rights are subject to restrictions and are not equal to those of a child born in wedlock. The restrictions may take different forms. First, the rule that the adoptee can inherit from the adopter can be set aside altogether if the parties so wish, and the act of adoption may provide [58] that the person adopted will be excluded from succeeding to the estate of the adopter in the event of intestacy or that he will have only reduced rights. Secondly, the law can provide that in the matter of inheritance, the adopted person will not be treated as equal to a person born to the adopter in lawful wedlock, and stipulates, for example, that the inheritance rights of an adopted person will be equal only to those of a person born out of wedlock [59] (who has lesser rights than the person born in wedlock). The adoptee will then have rights similar to those of an acknowledged child of the adopter. Thirdly, in many countries, the

[58] Federal Republic of Germany, Spain, Switzerland, Turkey.

[59] Austria.

inheritance rights of the adopted person are affected when at the time of succession he is in concurrence with certain living relatives of the adopter. The law sometimes provides [60] that the adoptee has no inheritance rights or only a portion of the share of a person born in wedlock, when the adopter leaves natural-born descendants, ascendants or collaterals, whether such descendants are, or are not, born in wedlock. In one country,[61] the law has gone further; while the existence of descendants does not affect the inheritance rights of the adopted person, it is provided that he cannot have more succession rights than an acknowledged person born out of wedlock if the adopter is survived by parents or descendants born in wedlock. In addition, in two cases,[62] the restrictions concern not the rights of the adoptee but those of his descendants, as the law stipulates that only descendants of the adoptee who are born in wedlock may succeed to the adopter. Finally, it is the right of representation which may be affected by the restrictions. The law may indeed stipulate that the adoptee cannot represent the adopter in matters of succession.[63] However, the descendants of the adoptee who are born in wedlock are generally entitled to represent him in the succession to the adopter's estate.

(b) *Inheritance rights of the adopter to the adoptee's estate*

Generally, the laws studied exclude the adopter from intestate succession to the adoptee's estate. In one country,[64] however, the adopter is entitled to succeed to the property transferred to the adoptee by him or by a member of his family.

(c) *Inheritance rights of the adoptee to the estate of the adopter's parents*

In a majority of the countries studied, the adopted person is excluded from any inheritance rights in the estate of the adopter's parents. Others, where adoption has created the full effects of a blood relationship, recognize the right of the adopted person to be admitted to succession to the estate of the adopter's parents. When such a rule exists, it is usually reciprocal. Despite the trend towards equating the status of a person adopted to that of a person born to the adopter in lawful wedlock, it can hardly be said that in most countries full equality of rights has been achieved beyond the relationship established between the adopter and the person adopted. Even with respect to such relationship, the limitations referred to above allow differences that persist after adoption. Consequently, it can be stated that the person born out of wedlock who has been adopted has, in respect to inheritance rights (but subject to reservations), a status similar to that of the person born to the adopter in lawful wedlock, when his rights are analysed in the context of his relations with the adopter himself. How-

[60] Ceylon (Kandyan Law), Yugoslavia.

[61] Philippines.

[62] France, Luxembourg.

[63] Argentina.

[64] Ceylon (General Law).

ever, when his rights are analysed within the context of his relations with the adopter's family, he does not acquire, in most countries, the status of a person born to the adopter in lawful wedlock.

E. The effect of adoption on the entries in civil registers

As has been observed before, in a substantial number of countries, the fact of birth out of wedlock is implicitly or explicity disclosed in the civil register. What then is the effect of adoption in these countries? Does the fact of birth out of wedlock remain disclosed although the person has been adopted? Except for a few cases [65] where adoption does not entail the removal from the register of births of the original entry indicating birth out of wedlock, as a general rule, when a person is adopted, an entry to this effect is made in the registers and no certificate is issued of the registration as it appeared before the adoption. The new document shows the child as born to the adopter. In several countries, a special register of adoption is kept. One of these countries,[66] requires the registrar to keep such other register as may make traceable the connexion between the Register of births and the Adoption Register. This last mentioned register is normally open to the public for inspection or search. There are however different ways in which the disclosure is made.

A new registration may depend on the type of adoption: " adoption with full effects " will lead to a change; " incomplete adoption " will not. Most jurisdictions require full mention of all the pertinent facts in the registers and in birth certificates, but not always in the extracts. In one country,[67] however, the court decision is mentioned in the register of the place where the adopter is domiciled, but not in the birth certificate of the adopted person. In addition, conditions are sometimes attached to the registration of adoption itself. In a few countries,[68] disclosure cannot be made without a request by the adopter and the consent of the adopted person if he has attained a certain age which varies from country to country. In this particular case, the adopter is registered as mother or father of the child, a new birth certificate is issued, and no mention of adoption is made in this certificate.

As to whether certificates or extracts can be issued, the general rules on matters pertaining to birth registers apply, although in a few cases, the law contains special provisions. The fact of adoption may not be disclosed on any full copy of the register except upon the authorization of the adoptive parents.[69] The law may also provide [70] that only abridged extracts of births containing the name received by the adopted person and the name of the adoptive parents can be issued. In one country,[71] when

[65] Australia, Canada (Quebec), India, Ireland.

[66] United Republic of Tanzania.

[67] Luxembourg.

[68] Bulgaria, Union of Soviet Socialist Republics.

[69] New Zealand.

[70] Burma, Switzerland.

[71] Federal Republic of Germany.

an adopted child is registered, a special mark may be entered in the register upon request of the child's legal representative. In such a case, a certificate may not be delivered to anyone except the authorities, the legal representative of the child or the child himself, if of full age, nor will access to the original entry be permitted.

F. Conclusions

On the basis of this analysis, it appears that the institution of adoption might indeed be considered an effective means to upgrade the status of a person born out of wedlock. It has gained wide acceptance in the major juridical systems of the world and has become an integral part of the family law of almost all of the jurisdictions studied. Also, the fundamental principles under which it is developing are generally agreed upon. These two points indicate that further progress could be achieved which would serve to make the institution still more useful, and transform it into an instrument which would help alleviate the discriminatory practices which persist against persons born out of wedlock.

Additional legislative measures appear to be required because of the numerous provisions which limit the effects of adoption or which may prevent the person born out of wedlock from being adopted, or when he is adopted, from being fully integrated into the adopter's family. Measures of this type are already in force in a few countries, but their general extension could be proposed as they would not conflict with the basic objectives of the laws of any of the countries studied. Such measures, moreover, would not affect the nature of the laws in force; they would only enlarge their scope and the extent of rights already granted.

Some adoption laws restrict the right to adopt in the case of persons who are not of the same religion as that of the child to be adopted. The primary consideration of the competent authorities should be the interest of the child; consequently, they should take the most liberal view, one that would make it possible for the child to be adopted whether or not he belongs to the same race or ethnic or religious group as the adoptive parents.

In the analysis of legal requirements for a valid adoption, it was observed that a number of countries prohibit adoption if the adopter already has children of his own. While the existence of previous children is indeed worthy of factual consideration before an adoption takes place, it does not seem necessary that it should lead to a legal prohibition of adoption. Some latitude could be given to the judge or the competent public authority to at least decide on the merits of each individual case. Better still, this decision should be left to the individual persons concerned.

A similar remark could be made regarding the prohibition of adoption when the prospective adopter is the father or mother of the person to be adopted. Such adoption should not, in principle, be prohibited in any case where the law permits the establishment of filiation. Furthermore, it could even be envisaged that adoption should be authorized in cases where the law prohibits the establishment of filiation.

As has been observed, only the type of adoption called " adoption with full effects " of blood relationship leads to an equalization of rights between the person adopted and the person born to the adopter in lawful wedlock. But the analysis above reveals also that this type of adoption is practised mainly in countries where the law disregards the fact of birth out of wedlock. In countries which differentiate between the two categories of persons, and where therefore the status of persons born out of wedlock is generally inferior to that of persons born in wedlock, the most common type of adoption found is " regular adoption " which grants rights subject to limitations and usually restricts the effects of adoption to a relationship between the adopter and the adoptee. Efforts leading to a more liberal attitude should be encouraged, as the possibility for integration of the person adopted into the adopter's family is absent where it is most needed. In particular, the question of recognition of family relationship should be re-examined in order that " regular adoption " may place the adopted person, with all the consequences that such a step implies, on an equal footing with the person born to the adopter in lawful wedlock.

Finally, when the adoptee is a minor, he should be allowed to acquire, *ipso facto*, the nationality of the adopter in order to facilitate the process of integration.

Part Four

GENERAL PRINCIPLES AND PROPOSALS FOR ACTION

General principles

The conclusions emerging from the study of discrimination against persons born out of wedlock may be summarized in the form of general principles. Such general principles could serve to educate public opinion, and to guide the legislation of State Members when necessary. Furthermore, if agreement can be reached upon them, this may lead, in time, to the adoption by a competent organ of the United Nations of a declaration of principles which would exercise persuasive force and moral authority.

The following draft is submitted for the consideration of the Sub-Commission.

GENERAL PRINCIPLES ON EQUALITY AND NON-DISCRIMINATION IN RESPECT OF PERSONS BORN OUT OF WEDLOCK

Preamble

Whereas the peoples of the world have, in the Charter of the United Nations, proclaimed their determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to promote social progress and better standards of life in larger freedom,

Whereas the Charter sets forth, as one of the purposes of the United Nations, the promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights proclaims that all human beings are equal in dignity and rights and, elaborating the principle of non-discrimination, further proclaims that everyone is entitled to all the rights and freedoms set forth therein without distinction of any kind.

Whereas a portion of the population of the world is composed of persons born out of wedlock most of whom, because of the nature of their birth, are the victims of legal or social discrimination, a situation which

is a violation of the purposes set forth in the Charter of the United Nations, and of the principles of equality and non-discrimination proclaimed in the Universal Declaration of Human Rights,

Now therefore, with a view to eliminating this form of discrimination, the following general principles are proclaimed:

PART I

1. Every person born out of wedlock shall be entitled to legal recognition of his maternal and paternal filiation. Filiation, once established, shall entail in all cases a status equal to that of a person born in wedlock.

2. The fact of birth shall automatically result in the establishment of maternal filiation.

3. The establishment of paternal filiation shall be provided for by law through a variety of means, including acknowledgement, recognition of legal presumptions and judicial decision. Judicial proceedings to establish paternal filiation shall not be subject to any time-limits.

4. The husband shall be presumed to be the father of the children born to his wife whether they are conceived or born during the marriage. This presumption may be overcome only by a judicial decision based upon evidence that the paternity of the husband was impossible. Proceedings to that end shall be initiated within a limited period of time.

5. Any child born before the celebration of the marriage of his parents to each other shall be considered as born of that marriage.

6. Every person born in wedlock, or considered to be born in wedlock as a result of the subsequent marriage of his parents, shall remain so notwithstanding the invalidity or annulment of the marriage.

PART II

7. Every person born out wedlock whose filiation is established in relation to both parents shall have the right to bear a surname determined as in the case of a person born in wedlock. If his filiation is established in relation only to his mother, he shall be entitled to bear her surname, modified, if necessary, in such a manner as not to reveal the fact of birth out of wedlock.

8. The rights and obligations pertaining to parental authority shall be the same, whether the child is born in wedlock or out of wedlock. Unless otherwise decided by the court in the best interest of the child born out of wedlock, parental authority shall be exercised according to the same rules as for a child born in wedlock if his filiation is established in relation to both parents, or by his mother alone if his paternal filiation is not established.

9. The domicile of any child born out of wedlock shall be determined according to the same rules as for a child born in wedlock.

10. Every person born out of wedlock, once his filiation is established, shall have the same maintenance rights as a person born in wedlock. The fact of birth out of wedlock shall not affect the order of priority in case of a plurality of claimants.

The standard of maintenance shall be determined according to the needs of the person entitled to it and the economic and social position of the persons obligated to provide it. It shall in all cases be equal to that enjoyed by the children, if any, born in wedlock to the same parent.

11. Once his filiation is established, every person born out of wedlock shall have the same inheritance rights as a person born in wedlock.

Legal limitations or restrictions which may be imposed on the freedom of the testator to dispose of his property shall afford equal protection to his heirs whether they are born in wedlock or out of wedlock.

12. The same rules pertaining to the determination of nationality shall apply to all persons whether they are born in wedlock or out of wedlock.

Special protection against statelessness shall be provided for persons born out of wedlock. In particular, when only the maternal filiation of a person born out of wedlock is established, its effects shall be the same in the case of paternal filiation.

13. Public rights and social welfare services shall be enjoyed equally by all persons, whether they are born in wedlock or out of wedlock. In addition, children born out of wedlock and their mothers shall be entitled to special care and assistance.

14. Special efforts shall be made, through education and all other possible means, to promote respect for the inherent dignity and worth of the human person, so as to enable all members of society, including persons born out of wedlock, to enjoy the equal and inalienable rights to which they are entitled.

PART III

15. Information in birth and other registers containing personal data which might disclose the fact of birth out of wedlock shall be available only to persons or authorities having a legitimate interest with respect to filiation.

In referring to persons born out of wedlock, any designation which might carry a derogatory connotation shall be avoided.

16. In case of adoption, the adoptee shall be fully integrated in the family of the adopter so as to create the same legal relationship as that resulting from filiation through wedlock.

Restrictions on the right to adopt shall be limited to such requirements as are necessary to establish a parent-child relationship and to assure the best interests of the adoptee.

Proposals

It will be for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which initiated this study, to make recommendations on its own responsibility to the Commission on Human Rights for further action by the international community to eradicate discrimination against persons born out of wedlock.

In order to facilitate the Sub-Commission's task, which is certain to be a delicate one, it might be useful to set out here a few tentative proposals which could at least serve as a basis for discussion.

Dissemination of the Study

Believing that the most effective way of combating discrimination lies in sustained educational efforts on an international scale, the Sub-Commission decided, in respect of the previous studies in this series, that they should be printed for the use of Governments, specialized agencies, research centres, non-governmental organizations and interested persons and otherwise given wide circulation. The sub-Commission may wish to express its views on the dissemination of the information contained in this report, taking into account that, generally, little is known on the discriminatory aspects of the position of persons born out of wedlock.

Preparation of Draft Principles

The Sub-Commission may consider the desirability of reviewing the general principles set out in " Proposals " *supra* with a view to formulating a series of draft principles on equality and non-discrimination concerning in respect of persons born out of wedlock which could be sent forward to superior bodies of the United Nations for adoption.

Such draft principles might elaborate and interpret the equality and non-discrimination provisions of the Charter and the Universal Declaration of Human Rights and apply them to persons born out of wedlock. Reference should be made here to the principles on freedom and non-discrimination in education, in the matter of religious rights and practices, in respect of political rights and in respect of the right of everyone to leave any country, including his own, and to return to his country, which the Sub-Commission prepared at its ninth, twelfth, fourteenth and fifteenth sessions, respectively.

Preparation of International or Regional Instruments

The Sub-Commission may wish to consider whether it could usefully recommend the preparation of any international or regional instruments for the purpose of eradicating discrimination against persons born out of wedlock. It may perhaps be somewhat premature to decide on the form of the international instrument before determining whether or not agreement could be reached on principles. If, however, there can be a meeting of minds on the standards to be applied, then serious considera-

tion might be given to whether their incorporation into a convention would be the best way to promote the enjoyment of these rights or whether a simple declaration setting forth the principles would be adequate.

Whether or not an international instrument is prepared, groups of countries in various regions of the world might be encouraged to collaborate in the preparation of regional instruments designed to eradicate discrimination against persons born out of wedlock in their particular areas. Regional instruments of this type not only protect the inhabitants of the areas covered, but also serve as an example for other regions, leading them to make similar efforts. In addition, such efforts provide a stimulus towards widening further the scope of these arrangements and may well lead to the abolition on a world-wide scale of discrimination against persons born out of wedlock.

Even if a whole series of regional texts were to be prepared, there would still be room for an international instrument on the subject, if only to serve as an aid to greater uniformity. Indeed, such actions on a regional basis could be preparatory to broader action by the United Nations.

Reports to the Commission on Human Rights

It is possible that the reporting procedure of the Commission on Human Rights could provide a suitable framework within which Governments could indicate their progress towards combating discrimination in this field. Consideration could also be given to the possibility of collecting additional material from non-governmental organizations in consultative status. In any event, all the materials collected by the Secretary-General could be submitted to the appropriate organs of the United Nations at regular intervals for examination, comment and recommendation for further action.

Regional Seminars

Regional seminars held under the programme of advisory services in the field of human rights have proved to be especially useful; they have been well organized and their impact has been felt in a number of ways. The programme is making a significant contribution to the promotion of human rights.

The attention of the Sub-Commission is particularly drawn to the seminars held in various parts of the world on the status of women in family law and on the rights of the child (see annex III of this report, pages 200-205). The participants from the countries represented at the seminars discussed, *inter alia*, a variety of topics related directly or indirectly to the situation of persons born out of wedlock.

There is no doubt that seminars dealing exclusively with discrimination against persons born out of wedlock and relevant matters of family law could greatly contribute to a better understanding of the problem. Seminars of this kind might also make it possible to obtain a true and

up-to-date picture of the situation in various countries and regions, and to consider how difficulties could be overcome. Such seminars would be organized by the Secretary-General at the request of a host Government.

Fellowship Awards

Under the same programme of advisory services, human rights fellowships are awarded to candidates proposed by Governments, and nominated by the Secretary-General. The areas of study have covered a variety of fields, including the " rights of the child with particular reference to the protection of the rights of children placed for adoption and of children born out of wedlock ".

Without doubt, fellowships dealing with discrimination against persons born out of wedlock and related fields of family law which would be awarded to fellows from countries where the situation is not satisfactory, for study in countries which could provide useful examples, would greatly contribute to a re-evaluation and perhaps an improvement of the situation in the countries from which the fellows come.

ANNEXES

Annex I

HOW THE STUDY WAS PREPARED

At its fourteenth session in 1962, the Sub-Commission decided, in resolution 5 (XIV), to undertake a study of discrimination against persons born out of wedlock, and appointed the undersigned as Special Rapporteur to carry out the study. On the recommendation of the Commission on Human Rights, the Economic and Social Council, in resolution 888 D (XXXIV) of 24 July 1962, approved the Sub-Commission's decision.

The Special Rapporteur followed the standard directives relating to the preparation of studies and recommendations for action set out in resolution B of the Sub-Commission, adopted at its sixth session, as amended by the Commission on Human Rights at its tenth session. These directives (E/CN.4/703, para. 97) may be summarized as follows:

(i) The report should be undertaken on a global basis and with respect to all the grounds of discrimination condemned by the Universal Declaration of Human Rights, but special attention should be given to instances of discrimination that are typical of general tendencies and instances where discrimination has been successfully overcome.

(ii) The report should be factual and objective and should deal with the *de facto* as well as the *de jure* situation . . .

(iii) The report should point out the general trend and development of legislation and practices with regard to discrimination . . . stating whether their tendency is toward an appreciable elimination or reduction of discrimination, whether they are static, or whether they are retrogressive.

(iv) The report should also indicate the factors which in each instance have led to the discriminatory practices, pointing out those which are economic, social, political, or historic in character and those resulting from a policy evidently intended to originate, maintain or aggravate such practices.

(v) The report should be drawn up not only to serve as a basis for the Sub-Commission's recommendation, but also with a view to educating world opinion.

(vi) In drawing up the report full advantage should be taken of the conclusions already reached with respect to discrimination by other bodies of the United Nations or by the specialized agencies.

(vii) In addition to the material and information which he is able to collect and which he shall embody in his report in the form of an analysis, the Special Rapporteur shall include such conclusions and proposals as he may judge proper to enable the Sub-Commission to make recommendations for action to the Commission on Human Rights.

he procedure for preparing the study, as laid down by the Sub-Commission at s sixth session and approved by the Commission at its tenth session (E/2573, para. 418) called for the work to be carried on in three successive stages: (*a*) the collection,[a] analysis and verification of material, (*b*) the preparation of a report, and (*c*) the formulation of recommendations for action. Under this procedure the Special Rapporteur prepares summaries of material dealing with each State Member of the United Nations or of a specialized agency. The summaries include material collected from: (*a*) Governments, (*b*) the Secretary-General, (*c*) specialized agencies, (*d*) non-governmental organizations, and (*e*) the writings of recognized scholars and scientists. Each summary is forwarded to the Government concerned for comment and supplementary data, after which it is revised by the Special Rapporteur and circulated to the Sub-Commission as a conference room paper.

At the request of the Special Rapporteur, the Secretary-General addressed a circular letter to the Governments of States Members of the United Nations and of the specialized agencies on 11 March 1963, transmitting to them resolution 5 (XIV) whereby the Sub-Commission had initiated the study, together with a copy of the standard directives and a copy of the outline approved by the Sub-Commission to serve as a framework for the collection of information. The Secretary-General indicated that he would be grateful for any help that the respective Governments could give the Special Rapporteur in the preparation of the study, and added that the Special Rapporteur would appreciate having any relevant material, including the text of laws, administrative arrangements, judicial decisions and statistical data, as well as information on each of the particular points mentioned in the outline.

In addition, a circular letter was addressed to selected non-governmental organizations in consultative status on 8 March 1963 by the Director of the Division of Human Rights, inviting them to place at the disposal of the Special Rapporteur any information which they considered to be relevant to the study, including information on any particular points mentioned in the outline.

In compliance with resolutions 4 (XVI) [b] and 3 (XVII) [c] of the Sub-Commission, Governments and non-governmental organizations which had not already supplied information, were again invited to do so by circular letters dated 10 August 1964, 30 June 1965 and 1 July 1965.

The list of organizations which submitted material for the study is as follows:

CATEGORY A

International Confederation of Free Trade Unions
International Organization of Employers

CATEGORY B

Catholic International Union for Social Service
International Alliance of Women
International Association of Youth Magistrates
International Federation of Social Workers
International Federation of Women Lawyers

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[a] The outline used for the collection of information and in the preparation of Conference Room Papers is reproduced in annex II.

[b] E/CN.4/873, para. 150.

[c] E/CN 4/882, para. 339.

International Union for Child Welfare
Salvation Army
Society of Comparative Legislation
World Federation of Catholic Young Women and Girls
World Union of Catholic Women's Organizations
World Women's Christian Temperance Union
World Young Women's Christian Association

REGISTER

International Humanist and Ethical Union
St. Joan's International Alliance
No information for the study was furnished by any of the specialized agencies.

With the assistance of the Secretariat of the United Nations, the Special Rapporteur prepared draft monographs summarizing the situation in the countries listed below. Each draft monograph was forwarded to the Government concerned with the request that comments or supplementary data, if any, should be submitted within a two-month period. Where comments or supplementary data were received within this specified time, they were taken into account by the Special Rapporteur in revising the monographs. Where no such comments or supplementary data were received, the draft monographs were not revised. All monographs, whether or not revised, were circulated to Governments and to members of the Sub-Commission as " Conference Room Papers ", and were made available on request to bodies and persons interested in this study. In accordance with a decision of the Economic and Social Council (resolution 664 (XXIV)), they were not issued as documents.

The seventy-one Conference Room Papers prepared in this manner contain material relating to discrimination against persons born out of wedlock in the following countries:

Country	*Conference Room Paper No.*	*Country*	*Conference Room Paper No.*
Afghanistan	50	Guatemala	71
Albania	10	Honduras	31
Argentina	12	Hungary	14
Australia	1	India	32
Austria	3	Iraq	39
Brazil	13	Ireland	52
Bulgaria	5	Israel	58
Burma	42	Italy	40
Cameroon	67	Ivory Coast	18
Canada	37	Jamaica	27
Ceylon	51	Japan	59
China	46	Jordan	35
Cuba	70	Kenya	15
Denmark	19	Laos	34
El Salvador	43	Lebanon	57
Federal Republic of Germany	56	Luxembourg	11
Finland	68	Malaysia	60
France	2	Mali	6
Ghana	29	Malta	47
		Nepal	9

Country	Conference Room Paper No.	Country	Conference Room Paper No.
Netherlands	63	Syria	55
New Zealand	16	Thailand	61
Niger	20	Trinidad and Tobago	48
Nigeria	25	Turkey	45
Norway	66	Uganda	64
Pakistan	54	Union of Soviet Socialist Republics	41
Peru	44	United Arab Republic	49
Philippines	17	United Kingdom of Great Britain and Northern Ireland	28
Poland	4	United Republic of Tanzania	30/Rev.1
Republic of Korea	26	United States of America	53
Republic of Viet-Nam	65	Venezuela	22
Romania	7	Western Samoa	38
San Marino	23	Yugoslavia	8
Sierra Leone	33		
Spain	69		
South Africa	62		
Sudan	36		
Sweden	24		
Switzerland	21		

The Special Rapporteur prepared this report on the basis of the material available to him in the papers listed above, for examination by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its nineteenth session. It should be indicated, however, that in certain instances, the fragmentary nature of the information gathered has enabled the Special Rapporteur to make only a limited use of it in the preparation of the report.

No further Conference Room Papers were prepared because of the priority given to other studies initiated by the Sub-Commission.

Replies have been received from the Government of the Netherland Antilles and from the following Territories under United Kingdom administration: Aden, Bahamas, Basutoland,[d] Bermuda, British Guiana,[e] British Honduras, British Solomon Island Protectorate, British Virgin Islands, Cayman Islands, Dominica, Falkland Islands, Fiji, Gilbert and Ellice Islands, Gibraltar, Grenada, Hong-Kong, Mauritius, Seychelles, St. Helena, St. Lucia, St. Vincent, Southern Rhodesia, Swaziland, Turks and Caicos Islands.

On the basis of the information available to him, the Special Rapporteur prepared first a preliminary report (E/CN.4/Sub.2/223), then a progress report (E/CN.4/Sub.2/236 and Corr.1 and Add.1), a second progress report (E/CN.4/Sub.2/248) and a draft report (E/CN.4/Sub.2/252).

The preliminary report (E/CN.4/Sub.2/223) was examined by the Sub-Commission at its fifteenth session in January 1963. In resolution 3 (XV)[f] the Sub-Commission, *inter alia*, requested the Special Rapporteur to continue his study and to present to the Sub-Commission, at its sixteenth session, a progress report taking into account the views expressed in the debate.[g]

The progress report (E/CN.4/Sub.2/236 and Corr.1 and Add.1) was examined by the Sub-Commission at its sixteenth session in January 1964. In resolution 4 (XVI),[h]

[d] Now, Lesotho, a State Member of the United Nations as of 17 October 1966.

[e] Now, Guyana, a State Member of the United Nations as of 20 September 1966.

[f] E/CN.4/846, para. 161.

[g] *Ibid.*, paras. 148-159.

[h] E/CN.4/813, para. 150.

the Sub-Commission, *inter alia*, requested the Special Rapporteur, taking into account the exchange of views on the progress report,[i] to submit a draft report, approximating as far as possible the final report on the study, in time for it to be considered by the Sub-Commission at its seventeenth session.

The Special Rapporteur found it impossible to comply with this request without deviating from the directives set out in resolution B, adopted by the Sub-Commission at its sixth session and amended by the Commission on Human Rights at its tenth session, described on page [184], *supra*.

The Special Rapporteur accordingly submitted to the seventeenth session of the Sub-Commission, on January 1965, a second progress report (E/CN.4/Sub.2/248). In resolution 3 (XVII),[j] the Sub-Commission, *inter alia*, invited the Special Rapporteur, taking into account the exchange of views on his progress reports during the sixteenth and seventeenth session,[k] to submit a draft report, approximating as far as possible to the final report on the study, in time for it to be considered by the Sub-Commission at its eighteenth session.

The draft report (E/CN.4/Sub.2/252) was examined by the Sub-Commission at its eighteenth session in January 1966. In resolution 1 (XVIII),[l] the Sub-Commission invited Mr. Saario, taking into account the exchange of views which had occurred,[m] to submit a final report in time for it to be considered by the Sub-Commission at its nineteenth session.

The final report (E/CN.4/Sub.2/265) was examined by the Sub-Commission at its nineteenth session in January 1967. On the basis of the report, the Sub-Commission adopted a set of draft general principles on equality and non-discrimination in respect of persons born out of weldlock.[n] In resolution 1 (XIX),[o] the Sub-Commission *inter alia* transmitted the draft general principles to the Commission on Human Rights for examination and decision on subsequent action.

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[i] *Ibid.*, paras. 147-149.

[j] E/CN.4/882, para. 339.

[k] *Ibid.*, paras. 335-338.

[l] E/CN.4/903, para. 60.

[m] *Ibid.*, paras. 27-59.

[n] They are reproduced in annex VII of the present report.

[o] E/CN.4/930, para. 204.

Annex II

OUTLINE FOR THE COLLECTION OF INFORMATION *

PERSONS CONSIDERED TO BE BORN OUT OF WEDLOCK

Definition

1. Indicate what persons, if any, are considered under the law of the country to be born out of wedlock.

Disclosure of the fact of birth out of wedlock

2. Is the fact that a person was born out of wedlock disclosed explicitly or implicitly in his birth registration, birth certificate, or extracts thereof, and are any of these available to persons other than those directly concerned ?

ACQUISITION OR LOSS OF THE STATUS OF A PERSON BORN IN WEDLOCK

Acquisition of status

3. Indicate the procedures by which a person born out of wedlock may acquire the status of a person born in wedlock (acknowledgement, whether voluntary or by decision of a court, legitimation by subsequent marriage of the parents, or otherwise, adoption etc.).

Loss of status

4. Indicate whether and in what circumstances a person considered to be born in wedlock may subsequently be found to have been born out of wedlock (disavowal paternity, annulment of the marriage of the parents etc.).

STATUS OF PERSONS BORN OUT OF WEDLOCK

I. *Civil status*

Recognition of family relationships

5. Indicate whether a person born out of wedlock is legally related to (*a*) his mother (*b*) his father (*c*) the relatives of his father or mother by blood or marriage.

Name

6. Indicate any distinctions in law as regards the name of a person born out of wedlock and that of a person born in wedlock.

* Outline used by the Special Rapporteur in connexion with this study.

Nationality

7. Indicate any distinctions made in the law of nationality, or in its application, between persons born out of wedlock and those born in wedlock.

Legal domicile

8. Indicate any distinctions made in law as regards the legal domicile of a person born out of wedlock and a person born in wedlock.

II. *Parental rights and duties*

Guardianship and custody

9. Indicate any distinctions made in law as regards guardianship and custody of a child born out of wedlock and a child born in wedlock.

Maintenance

10. Indicate any distinctions made in law as regards maintenance of a child born out of wedlock and a child born in wedlock.

III. *Inheritance rights*

11. Indicate any distinctions made in law between persons born out of wedlock and those born in wedlock as regards inheritance rights.

IV. *Public rights and social welfare services*

12. Indicate any distinctions made in law or in fact between persons born out of wedlock and those born in wedlock as regards:

(*a*) *Political rights*, including the right to vote and to stand for election, and the access to public service;

(*b*) *Social rights*, including the right to social security, medical care, and the necessary social welfare services;

(*c*) *Economic rights*, including the right to work and access to all occupations and professions;

(*d*) *Cultural rights*, including the right of access to public or private educational facilities and the right freely to participate in the cultural life of the community.

STATISTICAL, SOCIAL AND OTHER ASPECTS OF THE PROBLEM

Statistics

13. Cite any available statistical data indicating the number of persons born out of wedlock in the country, and their proportion to the total number of births; and any available data concerning the number of these who have subsequently been acknowledged, legitimated or adopted.

Factors which lead to birth out of wedlock

14. Indicate the factors which lead to birth out of wedlock in the country (reduced marriage opportunities owing to an excess in the number of women over men, economic factors, problems relating to marriage or divorce laws, historical).

Social status of persons born out of wedlock and other aspects of the problem

15. Indicate whether the social status of persons born out of wedlock is inferior to that of persons born in wedlock due to any disdain or stigma attached to birth out of wedlock (on any grounds such as ethical standards, religious ideas, the social concept of the family etc.). Indicate also whether the fact of being born out of wedlock has any effect on membership in a religious community. Describe any other important aspect of the problem.

GENERAL TRENDS AND DEVELOPMENT

16. Indicate the general trends and development in the country with reference to the problem of discrimination against persons born out of wedlock, as reflected by recent legislation, recent judicial decisions and doctrine, law journals and the Press, and other media of information.

Annex III

CONSIDERATION BY THE UNITED NATIONS OF THE POSITION OF THE PERSON BORN OUT OF WEDLOCK

The position of the person born out of wedlock has been dealt with, within the framework of the United Nations, by a number of organs and bodies including the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights, the Commission on the Status of Women, the Social Commission, the Economic and Social Council and the General Assembly. This question has arisen, in particular, in connexion with the preparation of the United Nations Declaration of Human Rights, the Declaration of the Rights of the Child, the International Covenants on Human Rights and the discussions which took place in various United Nations seminars.

A. Universal Declaration of Human Rights

Paragraph 2 of article 25 of the Universal Declaration of Human Rights provides, *inter alia*, that:

> "... all children whether born in or out of wedlock shall enjoy the same social protection."

No such provision appeared in the draft of the article prepared by the Commission on Human Rights and submitted to the General Assembly. It was only during the discussion of the draft Declaration by the Third Committee of the General Assembly that a proposal relating to the position of persons born out of wedlock was submitted. The proposal, put forward by Yugoslavia (A/C.3/233), was to add the following text to article 22 of the draft Declaration:

> " According to the rights proclaimed in this Declaration, illegitimate children are equal to legitimate children and have the same right to social protection."

In explaining this proposal, the representative of Yugoslavia pointed out that discrimination against illegitimate children in certain countries, although it involved individuals only and did not affect entire social groups, was netherless, a serious infringement of human rights and as such should not be tolerated. He noted that children born out of wedlock were deprived in varying degrees and in varying forms of family rights, property rights and inheritance rights; in addition, positions in certain departments and in certain public officers were sometimes barred from them. Thus, from birth, various human being suffered injury to their personal dignity and were deprived of certain fundamental rights. In certain countries, the percentage of children born out of wedlock was as high as 30 per cent of the total children born. This meant that thousands of citizens were held responsible for a state of affairs that was completely beyond their control. The Yugoslav delegation was of the opinion that the Declaration could not ignore that form of inequality. It therefore requested the insertion of a provision to proclaim the equality of illegitimate and legitimate children and to guarantee children born out of wedlock the same social protection as that granted to other children. It was only

in that way that the principle of the equality of all men in rights, proclaimed in article 1 of the Declaration, would be fully implemented.

The representative of Yugoslavia hoped that no one would raise the objection that article 1 was adequate to deal with the particular problem raised by his delegation. If that reasoning were followed to its logical conclusion, it could be stated that it would be sufficient for the Declaration to contain only two articles: article 1, which would guarantee all human rights, and article 27, which would guarantee protection against any possible infringement of those rights. Nevertheless, the very aim of the Declaration was to clarify the principle of the equality of individuals proclaimed in article 1, to emphasize the fundamental rights which were most frequently violated and to ensure the implementation and the enjoyment of those rights.

The fact that the fundamental rights of illegitimate children were constantly violated was proved by the existence, in the majority of contemporary positive legislations, of exceptional provisions for the legitimation of illegitimate children, i.e., provisions enabling them, on an individual and exceptional basis, to enjoy complete equality of rights with other citizens. Those provisions thus gave an official character to the violation of the principle of the equality of all men. On the contrary, that equality should be sanctioned by the Declaration of Human Rights, and should no longer depend on individual action.

He also hoped that no one would protest that the Yugoslav amendment would result in encouraging an increase in the number of illegitimate children. Essentially, the amendment was designed to abolish discrimination against certain children because of the circumstances of their birth.

While some members of the Third Committee supported the Yugoslav proposal, they did not consider its wording to be completely satisfactory. One member pointed out in particular that the equality of legitimate and illegitimate children was not an automatic consequence of the other rights proclaimed in the Declaration. Moreover, he considered the term " illegitimate " to be inappropriate legally. He suggested that it should be replaced by " children whose parents have not contracted marriage ", or " children born out of wedlock ".

Other members opposed the Yugoslav proposal on a variety of grounds. It was said that the proposal rested on a fundamental error in that it considered the legal position of the child, while the Declaration was concerned with the individual, be it man or child, as a member of society; as a human being the illegitimate child had all the rights laid down in the Declaration without any consideration of his legal status. It was maintained that the Yugoslav amendment related to social policy and legislation, and was therefore out of place in the Declaration. It was maintained further that it would hardly be possible to proclaim that legitimate and illegitimate children might serve to discourage legal matrimony, which would conflict with the principle that the family was the fundamental group unit of society. Adoption of the Yugoslav proposal, it was said, would mean a denial of the importance of the marriage bond and would harm rather than benefit illegitimate children by constituting an inducement to beget and bear children out of wedlock.

At the close of the discussion, the representative of Yugoslavia withdrew his proposal in favour of an alternative put forward by Norway (A/C.3/344), reading as follows:

> " Children born out of wedlock are equal in rights to children born in marriage and shall enjoy the same social protection."

The text was voted in parts, so the Committee could decide separately on the principle of equality in rights and the principle of equal social protection. The first part of the Norwegian amendment reading, " Children born out of wedlock are equal in rights

to children born in marriage," was rejected by 18 votes to 18, with 9 abstentions.[a] The the second part of the Norwegian amendment, reading " Children born out of wedlock shall enjoy the same social protection as children born in marriage," was adopted by 32 votes to 3, with 10 abstentions.[b]

B. Declaration of the Rights of the Child

Principle 1 of the Declaration of the Rights of the Child, adopted and proclaimed by the General Assembly at its fourteenth session on 20 November 1959, reads as follows:

> " The child shall enjoy all the rights set forth in this Declaration. All children, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, whether of himself or of his family."

In various stages of the drafting of this principle, specific reference was made to the position of children born out of wedlock.

The first draft of the Declaration was prepared by the Social Commission of the United Nations, at its sixth session, on the basis of the Declaration of Geneva, which had been adopted on 26 September 1924 by the Assembly of the League of Nations. This draft included a principle (principle 10, which later became principle 1 of the Declaration) reading as follows:

> " The child shall enjoy the rights set forth above irrespective of any consideration of race, colour, sex, language, caste, religion, political or other opinion, national or social origin, property, birth, legitimacy or other status."

The Economic and Social Council, in resolution 309 C (XI) of 13 July 1950, requested the Commission on Human Rights to communicate to the Council " its observations of the Principle and contents " of the draft Declaration.

When the Commission on Human Rights examined the above principle at its fifteenth session, an amendment was submitted by Israel (E/CN.4/L.525) proposing the omission of the world " legitimacy " and the addition to the principle of the following sentence: " All children, whether born in or out of wedlock shall enjoy these rights ". This proposal was adopted by 9 votes in favour and 1 against, with 8 abstentions.

In draft of the Declaration submitted to the General Assembly by the Commission on Human Rights, the following principle was proposed:

> " The child shall enjoy all the rights set forth in this Declaration without distinction or discrimination on account of race, colour, sex, language, religion, poli-

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[a] In favour: Argentina, Byelorussian Soviet Socialist Republic, Colombia, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Honduras, India, Mexico, Norway, Poland, Sweden, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Venezuela, Yugoslavia.

Against: Afghanistan, Australia, Belgium, Bolivia, Brazil, Canada, China, France, Greece, Luxembourg, Netherlands, New Zealand, Paraguay, Syria, Turkey, United Kingdom, United States of America, Uruguay.

Abstaining: Burma, Chile, Ethiopia, Pakistan, Panama, Peru, Philippines, Saudi Arabia, Yemen.

[b] In favour: Argentina, Belgium, Bolivia, Brazil, Burma, Byelorussian Soviet Socialist Republic, Chile, Colombia, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, France, Honduras, India, Mexico, New Zealand, Norway, Pakistan, Panama, Poland, Saudi Arabia, Sweden, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Uruguay, Venezuela, Yemen, Yugoslavia.

Against: China, United Kingdom, United States of America.

Abstaining: Afghanistan, Australia, Canada, Ethiopia, Greece, Luxembourg, Netherlands, Paraguay, Peru, Philippines.

tical or other opinion, national or social origin, property, birth or other status, whether of himself or of either of his parents. All children whether born in or out of wedlock shall enjoy these rights."

An amendment, submitted by Saudi Arabia (A/C.3/L.715) proposed that the words " whether born in or out of wedlock " should be replaced by the words " with no exception whatsoever ". The representative of Saudi Arabia explained that this amendment was intended to make it clear that there was to be no discrimination against the child, whatever his status; he had felt that the second sentence of principle 1 did not cover all categories of children, such as for example children whose status was undetermined.

Some members of the Third Committee expressed the fear that the second sentence of the draft principle might jeopardize the institution of the family by putting legitimate and illegitimate children on the same footing. Others were of the opinion that this sentence should be deleted because the idea it contained was already covered by the word " birth " or by the expression " other status " in the first sentence of the draft. However, many members of the Committee felt that specific reference to children born out of wedlock should be maintained and that their rights should be emphasized either by adoption of the second sentence of the draft principle or by the adoption of the Saudi Arabian amendment.

In the light of the discussion, the representative of Saudi Arabia withdrew his amendment and co-sponsored, with the representative of Afghanistan, a proposal that principle 1 should be amended to read as follows:

" The child enjoy all the rights set forth in this Declaration. These rights shall be enjoyed by every child without any exception whatsoever and without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family."

The first sentence of the joint amendment was adopted unanimously. The first part of the second sentence reading: " These rights shall be enjoyed by every child without any exception whatsoever and without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status " was also adopted unanimously. The remainder of the second sentence reading " whether of himself or of his family " was adopted by 50 votes to 7, with 9 abstentions. The amendment as a whole was adopted unanimously.

C. International Covenant on Civil and Political Rights [c]

Article 22 of the draft Covenant on Civil and Political Rights, as submitted to the General Assembly by the Commission on Human Rights read as follows: [d]

" 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

" 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

" 3. No marriage shall be entered into without the free and full consent of the intending spouses.

" 4. The legislation of the States Parties to this Covenant shall be directed towards equality of rights and responsibilities for the spouses as to marriage, during marriage and at its dissolution. In the last mentioned case the law shall lay down special measures for the protection of any children of the marriage."

[c] *Official Records of the Economic and Social Council, Eighteenth Session, Supplement No. 7* (E/2573), annex I (B).

[d] Relevant articles of the International Covenant on Economic, Social and Cultural Rights are dealt with in section III of the Introduction, p. 17, *supra*.

Most of the discussion in the Third Committee centred on paragraph 4 of the article. On the question of the protection of children where a marriage is dissolved, some members of the Committee expressed the view that paragraph 4 should provide protection for all children, including those born out of wedlock. Accordingly paragraph 4 of the article was amended to read as follows:

> " States Parties to this Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the last mentioned case the law shall lay down special measures for the necessary protection of any children."

At the sixteenth session of the General Assembly, Poland submitted a working paper (A/C.3/L.943) proposing the insertion, after article 22, of a new article reading as follows:

> " 1. The child shall be entitled to special protection by society and the State.
>
> " 2. Every child, without any exception whatsoever, shall be entitled to equal rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.
>
> " 3. Birth out of wedlock shall not restrict the rights of the child.
>
> " 4. The child shall be entitled from his birth to a name and a nationality."

However, the working paper was not discussed at the sixteenth session.

At the seventeenth session, Poland and Yugoslavia submitted an identical proposal. Subsequently Poland and Yugoslavia submitted a revised proposal which took into account amendments and suggestions put forward during the discussion in the Third Committee. The revised proposal read:

> " 1. Every child shall be entitled to special protection by the family, society and the State, without any discrimination.
>
> " 2. The family, society and the State shall give particular attention to the education of the rising generations and shall ensure them the widest opportunities for development.
>
> " 3. The States Parties to this Covenant shall take steps to improve the legal status of the children born out of wedlock.
>
> " 4. Every child shall be entitled from his birth to a name and a nationality."

In discussing the revised Polish-Yugoslav proposal, the Committee was concerned, *inter alia*, with the question of the rights of children born out of wedlock. There was general agreement that such children should be protected against discrimination. It was pointed out in this connexion that article 2 of the draft Covenant would already obligate States Parties " to respect and ensure to all individuals . . . the rights recognized in this Covenant, without distinction of any kind, such as . . . birth or other status," a formulation which would cover persons born out of wedlock. Several representatives mentioned the desirability of omitting from civil documents all references as to whether persons where born in or out of wedlock. On the question, however, of whether a child born out of wedlock should be entitled to inherit from his natural father, opinions differed greatly. On the other hand, it was held that if the child was so entitled, the stability of the family would be undermined, and, in particular, the rights of any children of the same father who were born in wedlock would be diminished. On the other hand, it was agreed that if the father were held equally responsible for all his children, this would in effect contribute to the stability of the family. Attention was drawn to the fact that the clause of the rights of the child born out of wedlock as it appeared in the original proposal, did not specify the rights it sough to protect. Mention was also made of the question of establishing paternity. Throughout the discussion stress was laid on the great diversity of existing legal provisions dealing with this entire subject.

At its 1178th meeting, the Third Committee adopted a procedural proposal by which the Secretary-General decided " to refer to the Commission on Human Rights all proposals relating to an article on the rights of the child together with the discussion thereon at the seventeenth session of the General Assembly for serious study, taking into consideration all the legal implications of including all the articles of the draft covenants and requested the Commission to report through the Economic and Social Council to the General Assembly at its eighteenth session ".

At its nineteenth session, held in Geneva from 11 March to 5 April 1963, the Commission on Human Rights considered two draft articles relating to the rights of the child proposed for inclusion in the draft Covenant on Civil and Political Rights, one submitted by Poland (E/CN.4/L.649), the other by Chile (E/CN.4/L.650). The draft article proposed by Poland reads as follows:

" 1. Every child shall be entitled to special protection by the family, society and the State, without any discrimination.

" 2. The family, society and the State shall concern themselves with the physical and spiritual development of children, so that for their own welfare and for the welfare of society, children are suitably prepared for work according to their abilities.

" 3. Birth out of wedlock shall not affect the rights of a child. The States Parties to this Covenant shall progressively adopt suitable measures to improve the legal status of children born out of wedlock.

" 4. Every child shall be entitled from his birth to a name and a nationality."

The draft article proposed by Chile reads as follows:

" The States Parties to this Covenant recognize that special measures should be adopted to protect and assist all children and adolescents, without any exception or discrimination whatsoever."

In favour of paragraph 3 of the draft article proposed by Poland, it was pointed out that the provision reaffirmed the principle of the Universal Declaration that " all human beings are born free and equal in dignity and rights ". Attention was drawn to comments submitted by the Government of Tanganyika (E/CN.4/850/Add.1), in which it was pointed out that it was not the fault of the child if he was born out of wedlock and the question was explained that the word " progressively " had been included in the provision because it was recognized that existing legal systems dealt in many different ways with the position of children born out of wedlock.

While it was generally accepted that, as far as the subject-matter was concerned, a provision on the legal status of children born out of wedlock came within the scope of the draft Covenant on Civil and Political Rights, attention was drawn to the many different legal problem — in connexion with, for instance, inheritance — which would arise on the national level if an article in the terms proposed were included in the Covenant. Legal systems varied greatly in their approach to the problem, and some countries would be unwilling to grant the equality envisaged, in the interests of the stability of the family. On the other hand, it was maintained that special legislation on the inheritance rights of legitimate children would not violate the draft article and the stability of the family would not be threatened thereby. It was also claimed during the debate that excessive importance was being accorded to the question of inheritance, which affected only a minority of the world's children. Again, it was said that inheritance rights did not attach to children as such, by reason of their age, but arose out of a person's relationship with his parents.

Several representatives claimed that no decision should be taken by the Commission affecting the position of persons born out of wedlock until the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, who was making a study of that question, had presented his report.

The view was also expressed that to give equal rights to children born in and out of wedlock would encourage illegitimacy. It was also pointed out that the Universal Declaration referred only to the social position of children born out of wedlock; and it was maintained that it was impossible to provide that " Birth out of wedlock shall not affect the rights of a child " without specifying what was meant by " the rights of a child ", and that the first and second sentences of paragraph 3 were in contradiction to one another since the second contained the idea of progressive action whereas the first did not.

Attention was drawn to the fact that the article proposed by Chile referred specifically to adolescents as well as children, and was intended to cover the whole range of their problems, but in general terms such as would avoid the legal difficulties to which the Polish proposal had given rise. On the other hand, the feeling was expressed that the proposed text seemed to express a mere wish rather than an obligation and that it belonged more to the draft Covenant on Economic, Social and Cultural Rights. It was also pointed out that the rights of the child were not mentioned in the proposal. During the debate, the representative of Chile accepted an oral amendment proposed by Lebanon, adding the following to the proposed article:. " To this end, they undertake to adopt special legislative, administrative and other measures wherever necessary ".

At the 752nd meeting of the Commission, a procedural proposal submitted by the representative of Poland was adopted unanimously. In resolution 11 (XIX) the Commission requested the Economic and Social Council to transmit to the General Assembly the Commission's report on this question, together with the summary records of the discussion on this item in the Commission. A draft resolution to this effect was adopted unanimously by the Council as resolution 958 G (XXXVI), which reads as follows:

" *The Economic and Social Council,*

" *Noting* that, in accordance with General Assembly resolution 1843 A (XVII) of 19 December 1962, the Commission on Human Rights has discussed whether or not it was desirable to include an article on the rights of the child in the draft International Covenants on Human Rights, and also the question of the contents of such an article and the legal implications of its inclusion in the draft Covenants,

" *Noting* that the Commission had before it at its nineteenth session only a very small number of the comments of Governments referred to in paragraph 2 of General Assembly resolution 1843 A (XVII),

" Transmits to the General Assembly, in accordance with the request of the Commission on Human Rights, the Commission's report on its deliberations together with the summary records of the discussion of this item in the Commission."

At the eighteenth session of the General Assembly, the Third Committee considered, at its 1262nd, 1263rd and 1265th meetings, a proposal submitted by Afghanistan, Brazil, Iran, Nigeria, Panama, Poland, the United Arab Republic and Yugoslavia (A/CN.3/L.1174) to add a new article after article 22 of the draft Covenant on Civil and Political Rights, as follows:

" 1. Every child shall have the rights to special protection by his family, society and the State, without any discrimination.

" 2. Every child shall have the right from his birth to a name and nationality."

This proposal was later revised by its sponsors to read as follows (A/C.3/L.1174/Rev.1):

" 1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as required by his status, on the part of his family, the society and the State.

" 2. Every child shall be registred immediately after birth and shall have a name.

" 3. Every child has the right to acquire a nationality."

At the 1265th meeting of the Committee, oral amendments to paragraph 1 of the revised eight-Power proposal were submitted by Austria, Lebanon and Peru. The Austrian amendment was to replace, in paragraph 1, the word " society " by the words " appropriate social institutions ". The Lebanese amendment to paragraph 1 was to add after " status " the words " as a minor ". The Peruvian amendment was to delete from paragraph 1 the words " as to race, colour, sex, language, religion, national or social origin, property or birth ".

1. *Desirability of including an article on the rights of the child*

In introducing the eight-Power proposal, the representative of Poland pointed out that the draft Covenant on Economic, Social and Cultural Rights included many of the principles proclaimed in the Declaration on the Rights of the Child, but no provision regarding the child's legal status. The legal protection of the child should therefore be guaranteed by the Covenant on Civil and Political Rights, which was the appropriate instrument for defending children against abuse of power and discrimination. After recalling that the Government of Poland had sought to insert an article on the rights of the child in the draft Covenant on Civil and Political Rights since the sixteenth session of the General Assembly,[e] the representative of Poland explained that the sponsors of the eight-Power proposal had not included a provision relating to birth out of wedlock because they considered it to be too controversial.

As had been the case during the seventeenth session of the General Assembly (see A/5365, paragraphs 19-21), there was general agreement that children were entitled to special protection, but opinion was divided as to the desirability of including in the draft Covenant on Civil and Political Rights an article dealing specifically with the rights of the child. Those who favoured the insertion of such an article held, *inter alia*, that the rights and freedoms enunciated in the draft Covenant on Civil and Political Rights could not be fully exercised by children, who therefore stood in need of special measures of protection; that the principles enunciated in the Declaration of the Rights of the Child should be converted into legal obligations; and that the draft Covenant on Civil and Political Rights should contain an article corresponding to article 10, paragraph 3, of the draft Covenant on Economic, Social and Cultural Rights which extended special protection to children and young persons. The importance of allowing the younger generation to develop under conditions of freedom from discrimination was also stressed.

Those who opposed the inclusion of an article on the rights of the child in the draft Covenant on Civil and Political Rights pointed out that the Covenant applied to all individuals irrespective of age and status. It was also held that article 2 of the draft Covenant, as adopted by the Committee at its present session was sufficient to protect the child from discrimination. If the rights of one special group were singled out for mention in a separate article, the same would have to be done for other groups in need of protection, such as the aged and the mentally handicapped.

2. *Content of the article*

A number of representatives pointed out that the eight-Power proposal (A/C.3/L.1174) was less far-reaching than previous proposals on the subject and was in the nature of a compromise. The inclusion of a reference to the family was welcomed. The discussions relating to the text of the proposed article revolved principally around the meaning of " special protection ", the precise implications of the non-discrimination provision, and the question of the child's right to a nationality.

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[e] See pp. 195-197, *supra*.

3. *Special protection*

The question was raised as to what was meant by " special protection " of the child. It was pointed out, on the one hand, that children, in view of their weakness and immaturity, stood in need of special protective measures in fields covered by the draft Covenant on Civil and Political Rights and not only in fields covered by the draft Covenant on Economic, Social and Cultural Rights. While primary responsibility for the upbringing of the child rested with his family, legal protection was needed for children who were neglected, ill-treated, abandoned or orphaned. It was also stated that under modern conditions, society and the State assisted the family in providing for the child's development.

On the other hand, a number of representatives held that the words " special protection " conveyed no precise legal meaning. Attention was drawn, moreover, to the distinction between social protection and legal protection of the child, the latter relating to such matters as recognition of paternity, guardianship and succession. Some representatives thought that the rights of the child, in particular the protection of the child in civil law, might preferably form the subject of a separate convention. The question was also raised as to the upper age-limit intended by the use of the word " child ".

It was announced on behalf of the eight co-sponsors that their revised draft (A/C.3/L.1174/Rev.1) was intended to clarify the concept of special protection. The expression was said to correspond to the civil law concept of measures for the protection of persons under legal disability, meaning the protection of minors by their parents, adopted children by their adoptive parents, wards by their guardians and abandoned children by public assistance institutions.

4. *Non-discrimination provision*

Several representatives welcomed the general phrase " without any discrimination ", in paragraph 1 of the eight-Power proposal (A/C.3/L.1174) as a compromise, compared to the more specific wording proposed previously, and stated that it was acceptable to them. Others, on the contrary, pointed out that they would be unable to support it. While no child should be subjected to discrimination on grounds of sex, race, colour or religion, many legislations did distinguish, in matters of inheritance, between children born in wedlock and those born out of wedlock. Children born out of wedlock should not be subjected to any discrimination in respect of social protection, but the distinction in matters of inheritance was regarded by many countries as necessary to safeguard the family and the interest of the child born in wedlock.

On behalf of the eight co-sponsors, it was announced that, in their revised draft (A/C.3/L.1174/Rev.1), the phrase " without any discrimination " had been replaced by an enumeration of the grounds of discrimination. In reply to questions as to the meaning of the words " national origin " and " birth " in the revised proposal, the representative of Poland stated that " national origin " referred not to aliens but to different ethnic groups living the same country; and that, had the sponsors wished to refer to the distinction between children born in wedlock and those born out of wedlock, they would have chosen the work " filiation " rather than " birth."

5. *Right to a nationality*

Several representatives pointed out that they favoured a provision dealing with the child's right to a nationality; that they regretted the absence from the draft Covenant of an article on the right of everyone to a nationality; and that the eight-Power proposal was intended to eliminate statelessness among children as far as possible. Those who opposed a provision on the child's right to a nationality argued that the problems relating to a nationality were not problems peculiar to childhood; that no article on the right

to a nationality had been included in the draft Covenant on Civil and Political Rights precisely because of the complexity of the problem; and that a State could not undertake an unqualified obligation to accord its nationality to every child born on its territory regardless of circumstances. With reference to the revised draft, it was also pointed out that naturalization could not be a right of the individual but was accorded by the State at its discretion. Reference was made to the fact that the Convention on the Reduction of Statelessness, signed on 30 August 1961 (A/CONF.9/15), had not as yet received any ratifications.

6. *Vote on the article dealing with the rights of the child*

At its 1265th meeting, the Committee voted as follows on the revised eight-Power proposal (A/C.3/L.1174/Rev.1) and on the amendments thereto.

Paragraph 1

The Lebanese oral amendment, to add after " status " the words "as a minor ", was adopted by 38 votes to one, with 38 abstentions.

The Austraian oral amendment, to replace " society " by " appropriate social institutions ", was rejected by 27 votes to 22, with 23 abstentions.

The Peruvian oral amendment, to delete the words " as to race, colour, sex, language, religion, national or social origin, property or birth ", was rejected by 38 votes to one, with 34 abstentions.

At the request of the representative of France, separate votes were taken on the words " national or " and " birth ". The words " national or " were adopted by 33 votes to 6 with 32 abstentions. The word " birth " was adopted by 32 votes to 13, with 22 abstentions.

Paragraph 1, as amended, was adopted by 60 votes to one, with 14 abstentions.

Paragraph 2

Paragraph 2 was adopted 62 votes to none, with 9 abstentions.

Paragraph 3

Paragraph 3 was adopted by 51 votes to 4, with 16 abstentions.

The new article on the rights of the child, as a whole, as amended, was adopted by 57 votes to one, with 14 abstentions. The text of the article, as adopted by the Third Committee reads as follows:

> " 1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as required by his status as a minor, on the part of his family, the society and the State.
>
> " 2. Every child shall be registered immediately after birth and shall have a name.
>
> " 3. Every child has the right to acquire a nationality."

This article is now article 24 of the International Covenant on Civil and Political Rights.

D. United Nations seminars

Under the programme now being evolved as a result of General Assembly resolution 925 (X) on advisory services in the field of human rights, four regional seminars

on the status of women in family law [f] and one regional seminar on the rights of the child [g] have been held which dealt directly or indirectly with some aspects of the status of persons born out of wedlock.

The participants referred, *inter alia*, to the *de facto* marriages; the elimination of the term "illegitimate" in all public records; legitimation; adoption; the effect of the annulment of the marriage of the parents on the status of the child; the general question of equality of status between persons born in and out of wedlock; voluntary and judicial establishment of paternity and maternity; guardianship and custody, maintenance; inheritance rights; measures of social welfare to assist the unmarried mother; the social status of the unmarried mother and of the person born out of wedlock; the advisability of imposing heavy penalties on men for desertion of children and mother; the status of children born to mothers who have not attained the minimum age of marriage. Following are summaries of the views expressed in the debates on these various subjects.

1. De facto *marriages*

The question of the *de facto* marriages and the degree of recognition which it was desirable to accord to them was discussed in the Tokyo, Bogotá and Lomé seminars. While participants to the Lomé seminar, from countries of Africa where Moslem law is applied, pointed out that under Islamic law free unions are condemned and that the union between a man and a women should be sanctified by marriage,[h] participants to the Tokyo seminar, referred to countries from the Far East where free unions could be registered after a period of time and the children could, as a result, be considered as legitimate, or to countries where the courts would recognize such unions as quasi-legal. Reference was made also to the presumption of marriage arising from cohabitation which is recognized in certain countries. There was general agreement that parties to *de facto* unions, if monogamous, should be encouraged to regularize them and unless this was done, such unions should not be given the status of marriage, but that it was desirable that some protection be afforded to the children.[i]

The participants to the Bogotá seminar also considered this question. Many participants indicated that *de facto* unions are prevalent in some countries of the region. It was stated that lack of educational opportunities and facilities, combined with a low level of economic development are factors which contribute to the existence of such unions. One participant expressed the view that such unions are, to some extent, a vestige of the institution of slavery, which was once widespread in parts of the region.[j] While in some countries such unions may be registered (registration entailing among other effects inheritance rights to the children), in others, *de facto* unions are given full legal recognition if certain conditions are met. Uusually, recognition is accorded only if no impediment to a legal marriage is found to exist, if the couple has lived openly together for a specified period of time, and there is no evidence of any continuing relationship.[k]

Some participants were of the view that *de facto* unions are undesirable, because they seriously impair the institution of marriage, and should be condemned on moral grounds. On the other hand, many participants felt that such unions should be given

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[f] They were held respectively in Bucharest (Romania), in 1961; in Tokyo (Japan) in 1962; in Bogotá (Colombia) in 1963; and in Lomé (Togo) in 1964. The reports of the seminars will be found in documents ST/TAO/HR/11; ST/TAO/HR/14; ST/TAO/HR/18; and ST/TAO/HR/22; respectively.

[g] It was held in Warsaw (Poland) in 1963. The report of the seminar will be found in document ST/TAO/HR/17.

[h] The discussion of this question appears in chapter VI (Legal Status of Unmarried Women) of ST/TAO/HR/22.

[i] ST/TAO/HR/14, paras. 45-46 and 65.

[j] ST/TAO/HR/18, para. 133.

[k] *Ibid.*, para. 134.

legal recognition, under certain conditions, for only when such recognition is accorded, can women enforce claims for support for themselves and their children.[l]

The discussion leader drew the following 'conclusion: " Some participants considered that measures should be taken to establish conditions in which *de facto* unions may be given legal recognition."[m]

2. *The question of the elimination of the term " illegitimate " in all public records*

This question was discussed only in the Bogotá seminar. After an exchange of views in the course of which a number of participants expressed the hope that, in all countries of the region the terms legitimate and illegitimate would be eliminated and that public records and in particular birth certificates should not indicate the status of the child, the discussion leader concluded accordingly.[n]

3. *Legitimation*

The question of legitimation was discussed in the Bogotá seminar only. Many participants stated that in their countries a child born out of wedlock is legitimated through the subsequent marriage of its parents. They pointed out, however, that while a child born from an adulterous intercourse may be legitimated once the impediment (previous marriage) is removed, the child born of an incestuous relationship always retains the status of a person born out of wedlock under some legislations.[o]

4. *Adoption*

The institution of adoption was discussed in the Tokyo, Bogotá and Warsaw seminars. Except for some participants to the Tokyo seminar, who reported that adoption was not recognized particularly under Moslem law which gave adopted children no inheritance rights, importance was stressed on the fact that adoption should be permitted only in the interests of the child and that in order to prevent abuses in this field by the natural parents as well as by the adoptive parents, adoptions should not be arranged privately as they still are in some countries, but should be ordered by an appropriate court.[p] At the Bogotá seminar it was also suggested that some supervision should be exercised by the court such as the inspection of the home prior to the placement of the child, continuing supervision during a trial period before the issuance of the final order of adoption.[q] At the Warsaw seminar adoption as a means of enabling children to obtain the benefits of family life was mentioned by several speakers. It was suggested that adoption should do more than this and that it would be desirable that adoption in the fullest sense should be generally incorporated into national legal systems and should confer upon the adopted child exactly the same rights as those possessed by the natural-born child.[r]

5. *Effects of the annulment of the marriage of the parents on the status of the children*

This problem was discussed in the Bucharest, Tokyo, Bogotá and Lomé seminars. Except for the Lomé seminar where the great majority of participants pointed out that children should keep their status of legitimacy unless the good faith of one of the spouses

[l] *Ibid.*, para. 135.
[m] *Ibid.*, para. 137.
[n] ST/TAO/HR/18, paras. 118 and 121.
[o] *Ibid.*, para. 128.
[p] ST/TAO/HR/14, paras. 128-130.
[q] ST/TAO/HR/18, para. 131.
[r] ST/TAO/HR/17, para. 25.

was in question,[s] in all three other seminars, after the participants described the effects of the annulment of the marriage of the parents on the status of the children, and pointed out that the trend in most legislations was to provide for their legitimacy, the discussion leaders drew the conclusion that in all cases (even if both spouses were in bad faith at the time of the marriage), on the annulment of the marriage, the children of the union should retain their legitimate status.[t]

6. *The general question of equality of status between persons born in and out of wedlock*

This question was discussed in the Bucharest, Warsaw and Bogotá seminars. Participants to the Bucharest seminar stated that under some legislative systems a natural child was considered in the same position as a child born in wedlock.[u] At the Warsaw seminar, speakers insisted that such children must enjoy the same human rights as other children, and that they were entitled to the same social and legal protection, consistent with the position of the family as the fundamental group unit of society.[v] In the Bogotá seminar, while a number of participants expressed the hope that, in all countries of the region, the law would make no distinction between children born out of wedlock and children born in wedlock, other participants did not share the view that children born out of wedlock should have the same status as other children. They considered it impossible to accord them the same rights as children of a marriage (particularly in regard to inheritance) without detriment to the concept of the family as the fundamental group unit of society. It was pointed out that although the rights of the child born out of wedlock are worthy of special consideration, they should not jeopardize the rights of legitimate children. In summarizing the debate, the discussion leader concluded that " some participants emphasized that the law should make no distinctions between children born in and out of wedlock ".[w]

7. *Voluntary and judicial acknowledgement of paternity and maternity*

This problem was discussed in the Bucharest, Bogotá and Lomé seminars. While in the Lomé seminar, some participants (referring only to the judicial establishment of paternity) expressed the view that legislation should be enacted to ensure that an unmarried mother can bring an action to determine paternity,[x] in the Bucharest seminar it was stated that the legislation of some countries of the region provided not only for the voluntary recognition by the father of his natural child but also for a procedure for judicial recognition in other cases.[y] Procedures of acknowledgement were described in the Bogotá seminar. It was stated that in a number of countries of the region, a legal relationship with the mother exists as a consequence of birth. In other cases, however, informal and formal procedures for recognition of maternity have been established. Referring to the voluntary acknowledgement of paternity, some participants indicated that statements in a will, or a letter, or the fact that a father has voluntarily supported the child were deemed evidence of paternity. It was also pointed out that while in many countries of the region a mother may institute judicial proceedings for affiliation, in some countries, however, such proceedings may be brought by the mother on behalf of her minor child. The general conclusion of the discussion leader on this question was

[s] The discussion of this question appears in chapter IV (Dissolution of Marriage, Annulment and Judicial Separation) of ST/TAO/HR/22.

[t] ST/TAO/HR/11, paras. 61 and 65; ST/TAO/HR/14, paras. 115 and 120; ST/TAO/HR/18, paras. 107 and 110.

[u] ST/TAO/HR/11, para. 78.

[v] ST/TAO/HR/17, para. 24.

[w] ST/TAO/HR/18, paras. 118 and 121.

[x] The discussion of this question appears in chapter VI (Legal Status of Unmarried Women) of ST/TAO/HR/22.

[y] ST/TAO/HR/11, para. 78.

that there was agreement on the need to facilitate the proceedings for establishing paternity and maternity.[z]

8. *Guardianship and custody*

These questions were discussed at the Bogotá seminar only. Many participants expressed the view that parental authority should be vested in the mother exclusively when there was no acknowledgement by the father. It was emphasized that she should retain it in the event of her marriage. In the case of acknowledgement by the father, it was felt that joint exercise of parental authority, when feasible, was desirable, as it should also be in the case of annulment of the marriage. The discussion leaders concluded accordingly.[aa]

9. *Maintenance*

While in the Lomé seminar, participants held it desirable that the father should be compelled to assume the responsibility for maintaining a child born out of wedlock,[bb] and while in the Warsaw seminar one speaker expressed the same view,[cc] in the Tokyo seminar, it was explained that in some countries and territories of the region the unmarried mother could claim maintenance from the putative father, if she could establish paternity.[dd] Many participants to the Bogotá seminar were of the opinion that joint financial responsibility was desirable. It was also indicated that in some countries of the region during proceedings of affiliation, the mother is awarded a provisional order of support pending the outcome of the suit. There was agreement that this practice was desirable.[ee]

10. *Inheritance rights*

The question of inheritance rights was discussed specifically in the Bogotá seminar. In regard to children born from *de facto* unions and to children born out of wedlock, some participants recommended that they should have the right to inherit from both father and mother. The discussion leader concluded accordingly.[ff]

11. *Measures of social welfare to assist the unmarried mother*

In the Bucharest and Bogotá seminars the view was expressed by participants that the unmarried mother should benefit from additional advantages such as family allowances, to assist her in supporting the child.[gg] In the Bogotá seminar, the discussion leader grew the following conclusion: " Participants emphasized that increased legislative and social measures were needed to assist the unmarried mother, and suggested that such measures should include family allowances and maternity leave." [hh]

12. *Social status of the unmarried mother and of the child born out of wedlock*

While in the Bucharest seminar, some participants stated that in their countries neither the unmarried mother nor the child born out of wedlock suffer any discrimina-

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[z] ST/TAO/HR/18, paras. 126-217 and 137.

[aa] *Ibid.*, paras. 107, 116-117, 121, 129, 137.

[bb] The discussion of this question appears in chapter VI (Legal Status of Unmarried Women) of ST/TAO/HR/22.

[cc] ST/TAO/HR/17, para. 24.

[dd] ST/TAO/HR/14, para. 143.

[ee] ST/TAO/HR/18, paras. 117 and 127.

[ff] *Ibid.*, paras. 143 and 147. See also p. 203, *supra*, on the general question of equality of status of persons born in and out of wedlock.

[gg] ST/TAO/HR/11, para. 79 and ST/TAO/HR/18, para. 130.

[hh] ST/TAO/HR/18, para. 137.

tion, and other participants indicated that in their countries there was sometimes discrimination against an unmarried mother,[ii] in the Tokyo seminar it was generally stated that the unmarried mother suffered from the attitude or stigma of society which stigmatized her.[jj] In the Lomé seminar a number of participants indicated that the problem of the unmarried mother is faced by many of the countries of the region. The unwed mother has no legal protection and suffers from the attitudes of society which ostracizes her. In some communities an unmarried mother is considered as having brought shame and dishonour to the whole family and as a result, is sometimes murdered by her brother or her father, and usually no punishment or only a light sentence is imposed on the man involved.[kk]

13. *Penalties for desertion*

In the Bogotá and Lomé seminars, many participants recommended that heavy penalties should be imposed on the man who deserts his children and their mother.

14. *Children of mothers who have not attained the minimum age of marriage*

In the Bogotá seminar, one participant referred to examples of young girls, below the age of ten years, having children. She felt that the stigma of illegitimacy should not be placed on the child of such a mother.

E. Other United Nations action

In 1951 the Secretary-General presented a report on the position of persons born out of wedlock (E/CN.4/Sub.2/125) to the fourth session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Sub-Commission, after a preliminary discussion in which the view was expressed that the problem of illegitimate birth came within the purview of the Sub-Commission, adopted a resolution (E/CN.4/641, para. 39) in which it recommended, *inter alia*, that articles 1 and 26 (2) of the draft international covenant on human rights (at that time there was only one draft covenant) should be amended to include a specific reference to legitimacy (in article 1 which was the article concerning non-discrimination) and a special mention to children and young persons born out of wedlock (in article 26 paragraph 2, concerning special measures of protection to be taken on behalf of children and young persons). Later consideration of the relevant articles of the draft Covenants has been summarized above (see pages 194-200 of this annex). In the same resolution, the Sub-Commission drew the attention of the Commission on Human Rights and the Social Commission " to the discrimination which may, in existing social conditions, be practised against persons born out of wedlock ... ".

On recommendation of the Sub-Commission and the Commission on Human Rights, the Economic and Social Council in resolution 502 D (XVI) of 3 August 1953, drew the attention of the Social Commission, other intergovernmental organs, and interested non-governmental organizations, to:

" (*a*) the discrimination which may, in existing social conditions, be practised against persons born out of wedlock;

" (*b*) the desirability of preparing recommendations with a view to eliminating, with due regard to the necessity of preserving the unity of the family, discrimination which may, in existing social conditions, be practised against persons

[ii] ST/TAO/HR/11, para. 77.

[jj] ST/TAO/HR/14, para. 142.

[kk] The discussion of this question appears in chapter VI (Legal Status of Unmarried Women) of ST/TAO/HR/22.

born out of wedlock, and in particular of preparing recommendations with a view to eliminating the disclosure of illegitimacy in extracts from official documents delivered to third persons."

Pursuant to this resolution, the Social Commission placed the question of children born out of wedlock on its work programme. Subsequently, the question was removed from that part of the Commission's programme to which first priority was accorded. The Social Commission has not yet dealt with the question.

F. Studies of the United Nations containing information on the position of persons born out of wedlock

1. *Studies relating to the status of women*

Several studies relating to the status of women, prepared at the request of the Commission on the Status of Women and referring, *inter alia*, to the position of persons born out of wedlock, have been summarized in the report entitled *Legal Status of Married Women.*[ll] This report contained a chapter (chapter III) called " Paternal Rights and Duties ", section II of which deals with " Relations between parents and children born out of wedlock ". A later report entitled " Inheritance Laws as they Affect the Status of Women " (E/CN.6/391 and Add.1), submitted by the Secretary-General to the Commission at its sixteenth session (1962), deals in part (chapter I, section 2) with the rights of succession of issue born out of wedlock on an intestacy.

Two seminars on the status of women in family law[mm] have been organized under the Programme of Advisory Services in the Field of Human Rights. Some of the documents prepared in connexion with the seminars refer, *inter alia*, to the question of relations between parents and children born out of wedlock.[nn]

2. *Studies relating to child, youth and family welfare*

A number of Secretariat studies relating to child, youth and family welfare, refer *inter alia* to the position of persons born out of wedlock. In accordance with resolution 51 (I) of the General Assembly, the Secretary-General continued certain non-political activities of the League of Nations Secretariat, including the publication of reports on child and youth welfare and of a Legislative and Administrative Series on Child, Youth and Family Welfare. Five reports on child and youth welfare were published between 1948 and 1955.[oo] These reports include, *inter alia*, information concerning the legal status of persons born out of wedlock, welfare services, statistical data etc. At its eighteenth session, in 1954, the Economic and Social Council decided to discontinue the publication of the series (resolution 557 (XVIII)). Since 1955, information on child and youth welfare has been included in other publications. One of these publications, *The International Survey of Programmes of Social Development*, scheduled for publication every four years, has dealt, in its first two volumes,[pp] with such matters as measures to strengthen the family and programmes or services designed to meet the needs of children deprived of a normal home life.

[ll] United Nations publication, Sales No.: 1957.IV.8.

[mm] See reports of the Tokyo seminar (ST/TAO/HR/14) and of the Bucharest (Romania) seminar (ST/TAO/HR/11).

[nn] For the Tokyo seminar see, in particular, background papers B and D, part II. For the Bucharest seminar see, in particular, background papers C, D and E, part II.

[oo] United Nations publications, Sales Nos.: 1948.IV.6; 1949.IV.9; 1951.IV.1; 1952.IV.15; 1955.IV.4.

[pp] United Nations publications, Sales Nos.: 1955.IV.8; 1959.IV.2.

Eight reports of the Legislative and Administrative Series on Child, Youth and family Welfare were published.[qq] These reports include many provisions of national legislation relating to the position of persons born out of wedlock and supply information on such matters as birth registration and certificates, parental rights and duties, illegitimacy, guardianship and adoption. The publication of the series was discontinued by the same above-mentioned resolution.

3. *Studies relating to the social protection of children*

Several studies relating to the social protection of children, prepared at the request of the Social Commission, refer, *inter alia*, to the position of children born out of wedlock. Thus, the study entitled *Children Deprived of a Normal Home Life*,[rr] published in 1952, deals with a number of major causes of deprivation of normal home life and their effects upon children; it describes children born out of wedlock as a " particularly vulnerable " group for whom special protective measures are necessary. Similarly the *Study on the Adoption of Children*[ss] and its addendum, *Comparative Analysis of Adoption Laws*,[tt] pay special attention to ways of protecting the interests of children (including those born out of wedlock) and of the natural and adoptive parents. A third study, *The Institutional Care of Children*,[uu] deals with the situation of children who, for a variety of reasons, must live apart from their families, and refers in particular to children born out of wedlock.

4. *United Nations Children's Fund*

The United Nations Children's Fund published in 1963 a survey of the needs of children in the developing countries under the title " The Needs of Children ".[vv] This study is based on the reports prepared by UNICEF, WHO, FAO, UNESCO, the United Nations Bureau of Social Affairs and the ILO for the guidance of the UNICEF Executive Board. The survey deals, *inter alia*, with the problem of persons born out of wedlock.

[qq] United Nations publications, Sales Nos.: 1952.IV.5; 1952.IV.8; 1953.IV.7; 1953.IV.20; 1953.IV.25; 1954.IV.15; 1955.IV.3.

[rr] United Nations publication, No.: 1952.IV.3.

[ss] United Nations publication, Sales No.: 1953.IV.19.

[tt] United Nations publication, Sales No.: 1956.IV.5.

[uu] United Nations publication, Sales No.: 1956.IV.6.

[vv] UNICEF, *The Needs of Children*, (Illinois, The Free Press of Glencoe), p. 48.

Annex IV

CONSIDERATION BY THE LEAGUE OF NATIONS AND THE INTERNATIONAL LABOUR OFFICE OF THE POSITION OF THE PERSON BORN OUT OF WEDLOCK [a]

The question of illegitimate children was first raised in the former Child Welfare Committee during its 1927 session by the Women's Committee of the International Federation of Trade Unions, Amsterdam, which submitted a memorandum concerning the rehabilitation of unmarried mothers and the protection of illegitimate children.

In consequence, the former Child Welfare Committee decided to collect information on the special measures existing in the different countries for the protection of illegitimate children.[b] The results of this inquiry were published in 1929,[c] and Governments were required to send information on their progress in legislation. In this connexion, in 1929, the Advisory Committee adopted the following resolutions:

> " The Committee considers, from an examination of the replies received, that more effective protection should be ensured to illegitimate children, and to this end decides to keep the question on its agenda; and its also urges that for the future, in all questions of protection and assistance, the illegitimate child should be as well treated as the legitimate child, due respect being paid to the rights of the family."

The former Child Welfare Committee, at its 1930 session, asked the Secretariat of the League of Nations to prepare, in collaboration with the members of the Committee and the International Labour Office, a report on social measures affecting illegitimate children. At its 1932 session, it deal with the position of illegitimate children in respect of social insurance, on the basis of a report submitted by the International Labour Office.[d] This report was communicated to the Governments, and emphasis was laid on the tendency to treat illegitimate children in the same way as legitimate children as regards social insurance benefits.

Attention was also called to the utility of official guardianship for all illegitimate children chiefly in order to obtain the payment of maintenance allowances, and the Com-

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[a] This annex reproduces the Introduction to the *Study on the Legal Position of the Illegitimate Child* (League of Nations publication, document No.: C.70.M.24.1939.IV). The terminology used is that of the League of Nations.

[b] The following questionnaire was drawn up by the Committee and sent to all States:

1. What are the rights and obligations of the mother and of the father towards the illegitimate child ?
2. Is action to establish the paternity of the child allowed (affiliation proceedings) ? If so, how is this action undertaken ?
3. What conditions govern the legitimation of illegitimate children ?
4. What rights do illegitimate children possess to claim maintenance from their parents ?
5. What are the rights of inheritance or succession of illegitimate children ?
6. Is there a system of official guardianship for illegitimate children ? If so, how is this guardianship organized ?
7. Are there any other means, and, if so, of what nature, provided either by the laws or by institutions for ensuring the moral and material protection of illegitimate children ?

[c] *Study of the Position of the Illegitimate Child based on the Information communicated by Governments* (League of Nations publication, document No.: C.P.E.141(1).1929.IV).

[d] *Position of the Illegitimate Child under Social Insurance Laws* (League of Nations document, No.: C.P.E.283.1931).

mittee decided to collect the fullest possible information on the subject. This information was submitted to it in 1932.[e] The Committee took note of this document and discussed it. While some members maintained that official guardianship was of great practical utility, others considered it unjust.

At the same session in 1932, the Advisory Committee adopted the following resolutions aiming to ameliorate the situation of illegitimate children.

" The Committee:

" I.

" Having studied with interest the system of official guardianship, considers that compulsory guardianship, whether official or not, constitutes in certain countries one of the means enabling the lot of the illegitimate child to be improved, and requests the Council to recommend its study to Governments.

" It also requests the Council to point out to Governments that the establishment of paternity is an essential condition for improving the lot of the illegitimate child, and to invite them to consider what amendments they might deem it expedient to introduce for this purpose in their respective laws.

" II

" Having taken cognisance of the recommendation of the Fifth Committee of the Assembly not to neglect the examination of measures calculated to facilitate the marriage of parents with a view to the legitimation of children:

" Notes that the marriage of foreigners, particularly when they do not possess the necessary financial means, encounters in certain countries serious obstacles arising out of the complication of administrative formalities, whether national or international, and the expenses and delay connected therewith;

" Requests the Council to draw the attention of Governments to the importance, from the point of view of child welfare, of international agreements simplifying the formalities and expenses of marriage for foreigners, at all events when the latter do not possess the necessary financial means."

Feeling that such measures were to be recommended, the former Child Welfare Committee also studied the systems adopted in certain countries where the authorities are empowered to issue abridged extracts of birth certificates and of other official documents, not divulging illegitimacy.[f]

In 1933, the Committee drew the Council's attention to the importance of requesting Governments, Members and non-members of the League of Nations, to examine the possibility of authorizing the issue of abridged birth certificates and other official documents which made no reference to illegitimacy and which would be regarded as adequate in all cases where information regarding parentage is unnecessary. Many Governments subsequently sent in their opinions on that point.[g]

In 1937, the Advisory Committee on Social Questions, on the recommendation of a Sub-Committee which studied the question at this session, adopted a plan of work which has served as a basis for the present study.

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[e] *Official Guardianship of Illegitimate Children* (League of Nations publication, document No.: C.265.M.153.1932.IV).

[f] *Disclosure of Illegitimacy in Official Documents* (League of Nations publication, document No.: C.373.M.184.1933.IV).

[g] See League of Nations documents, Nos.: C.P.E.451.1934, C.P.E.469.1934, C.P.E.501. 1935, Addendum, and C.P.E.537.1935

Lastly, in 1938, after a thorough discussion, it was decided to submit the report to Governments for revision and completion. Subsequently, in 1939, the League of Nations published the *Study on the Legal Position of the Illegitimate Child.* (Official No.: C.70.M.24.1939.IV).

The published study dealt with the following matters:

(*a*) Historical outline of social aspects and legislation;

(*b*) Present position of illegitimate children;

(*c*) Legal protection of the child;

(*d*) Legal protection of the mother;

(*e*) Measures provided in social insurance laws;

(*f*) Special social welfare measures;

(*g*) Statistical information.

As regards the social aspects of the question, which in the opinion of many members of the Committee were of greater importance than the purely legal aspect, it was decided to study the matter and to submit a report to the Committee in 1939, which eventually would be published as a second volume of the study on the position of the illegitimate child. However, this study was not completed or published.

Annex V

CONSTITUTIONAL PROVISIONS CONCERNING PERSONS BORN OUT OF WEDLOCK

1. The present annex reproduces a sampling of provisions in national constitutions which deal with the status or position of persons born out of wedlock. The sampling is intended to be illustrative rather than exhaustive.

2. *Albania*

Constitution of 4 July 1950 [a]

"*Article 19.* ...

"...

"Parents shall have the same duties and obligations towards illegitimate as towards legitimate children. Illegitimate children shall have the same rights as legitimate children."

3. *Bolivia*

Constitution of 31 July 1961 [b]

"*Article 182.* ...

"Free or concubinary unions, if they are stable and monogamous, shall produce effects analogous to those of marriage, both in the personal and property relations of the man and woman living together, and with respect to the children.

"*Article 183.* Any inequality among children is not recognized; they shall all have the same rights and duties. Judicial proceedings to establish paternity shall be permitted in conformity with the law."

4. *Bulgaria*

Constitution of 4 December 1947 [c]

"*Article 76.* ...

"Children born out of wedlock have equal rights with the issue of lawful marriage."

5. *Central African Republic*

Constitution of 16 February 1959 [d]

"*Preamble.* ...

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[a] *Yearbook on Human Rights for 1950* (United Nations publication, Sales No.: 1952. XIV.1), p. 13.

[b] *Gaceta Oficial de Bolivia*, 16 August 1961, year I, No. 48, p. 1105.

[c] *Yearbook on Human Rights for 1947* (United Nations publication, Sales No.: 1949. XIV.1), p. 62.

[d] *Yearbook on Human Rights for 1959* (United Nations publication, Sales No.: 61. XIV.1), p. 44.

"... Children born out of wedlock shall have the same rights to assistance as legitimate children.

"..."

6. *Costa Rica*

Constitution of 7 November 1949 [e]

"*Article 53.* Parents have the same obligations towards their children born out of wedlock as towards those born in wedlock.

"Every person has the right to know the identity of his parents, in conformity with the law.

"*Article 54.* It shall be prohibited to use any terminology implying a distinction between persons born in wedlock and those born out of wedlock."

7. *Cuba*

Fundamental Law of 7 February 1959 [f]

"*Article 43.* ...

"The Courts shall determine the cases in which, on the grounds of equity, the union of a man and woman having the legal capacity to marry shall, because of its stable and monogamous character, be equated with civil marriage.

"*Article 44.* ...

"A child born out of wedlock of a person who at the time of conception had the capacity to marry shall have all the rights and duties specified in the preceding paragraph [g] except as otherwise provided in the matter of inheritance. For purposes of inheritance, a child born out of wedlock of a married parent shall have the same rights as a legitimate child if the said parent has acknowledged the child or if a court has made an affiliation order in respect of the child. The law shall regulate the matter of judicial proceedings to establish paternity.

"It shall henceforth be unlawful to use any terminology that implies a distinction between legitimate and illegitimate children. No statement implying a distinction between legitimate and illegitimate children or relating to the matrimonial status of the parents shall be included in any birth registration or in any attestation or certificate of baptism or affiliation certificate."

8. *Ecuador*

Constitution of 31 December 1946 [h]

"*Article 164.* Illegitimate children, like legitimate children, have the right to be brought up and educated by their parents and to inherit from them under the conditions specified by the law.

"Where a person leaves an illegitimate child besides legitimate issue, the share of the illegitimate child shall be one half of that of each legitimate child.

"*Article 165.* The law shall regulate all matters relating to affiliation and the rights resulting therefrom and to judicial proceedings to establish paternity. Upon the registration of a birth, it shall be forbidden to require any statement on the legitimacy of the child."

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[e] *La Gaceta Diario Oficial*, 7 November 1949, year LXXI, No. 251, p. 2070.

[f] *Gaceta Oficial*, 7 February 1959, No. 13 Extraordinary, p. 6.

[g] The preceding paragraph provides:

"Parents have the duty to support, help, educate and instruct their children, and children the duty to respect and help their parents. The law shall ensure the observance of these duties by providing adequate safeguards and sanctions."

[h] Borja y Borja, Ramiro, *Las Constituciones del Ecuador* (Madrid, Ediciones Cultura Hispánica, 1951), pp. 629-699. Article 65 appears on page 681.

9. *El Salvador*

Constitution of 8 January 1962 [i]

"*Article 108.* All children, whether born in wedlock or out of wedlock, and adopted children, have the same rights with regard to education, help and protection by the father.

"The registers of births, marriages and deaths shall not contain an indication of legitimacy or illegitimacy and the matrimonial status of the parents shall not be indicated in birth certificates.

"The law shall determine the rules governing judicial proceedings to establish paternity."

10. *Federal Republic of Germany*

Constitution of 23 May 1949 [j]

"*Article 6.* ...

"... (5). For their physical and mental development and for their position in society, illegitimate children shall, by legislation, be given the same opportunities as legitimate children."

11. *Gabon*

Constitution of 21 February 1961 [k]

"*Article 1.* In addition, the people of Gabon hereby proclaims its attachment to the following principles:

"...

"Children born out of wedlock have the same rights as legitimate children with regard both to assistance and to physical, intellectual and moral development.

"..."

12. *Guatemala*

Constitution of 15 September 1965 [l]

"*Article 86.* The law shall prescribe rules governing the protection to be afforded to the woman and children within a *de facto* union and the means of obtaining recognition of such a union.

"All children are equal before the law and have the same rights.

"The law shall regulate the matter of proceedings to investigate paternity."

13. *Haiti*

Constitution of 21 June 1964 [m]

"*Article 168.* Legitimate children and illegitimate children recognized according to law have the same rights to education, protection, assistance and care from their parents.

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[i] *Diario Oficial*, 16 January 1962, volume 194, No. 10, p. 407.

[j] *Yearbook on Human Rights for 1949* (United Nations publication, Sales No.: 1951. XIV.1), p. 80.

[k] Lavroff, D. G. and Peiser, G., *Les constitutions africaines*, vol. I (Paris, Editions A. Pedone, 1961), pp. 116-117.

[l] *El Guatemalteco, Diario Oficial de la República de Guatemala, Centro América*, 15 September 1965, Vol. CLXXIV, No. 65, p. 630.

[m] *Le Moniteur, Journal officiel de la République d'Haïti*, 22 June 1964, 119th year, No. 62, Extraordinary, p. X.

" *Article 169.* The law shall specify the circumstances in which judicial proceedings may be instituted to establish paternity.

" *Article 170.* The law shall set forth rules governing the position of children of adulterous and incestuous unions."

14. *Italy*

Constitution of 22 December 1947 [n]

" *Article 30.* It is the duty and right of parents to support, instruct and educate their children, even if born out of wedlock.

" . . .

" The law guarantees to children born out of wedlock every form of legal and social protection compatible with the rights of the members of the legitimate family.

" The law shall prescribe rules and restrictions for the establishment of paternity."

15. *Nicaragua*

Constitution of 1 November 1950 [o]

" *Article 80.* Parents have the same duties towards children, born out of wedlock as towards those born in wedlock.

" *Article 81.* The right to investigate paternity is established in accordance with the law."

16. *Panama*

Constitution of 1 March 1946 [p]

" *Article 56.* A *de facto* union between a man and a woman having the legal capacity to marry shall, if it continues for ten consecutive years and is monogamous and stable, have all the effects of a civil marriage.

" . . .

" *Article 58.* Parents shall have the same duties towards their children born out of wedlock as towards those born in wedlock. All children are equal before the law and shall have the same rights of inheritance in cases of intestacy.

" *Article 59.* The law shall regulate the matter of judicial proceedings to establish paternity. It shall henceforth be unlawful to use any terminology implying a distinction between birth in wedlock and birth out of wedlock. No statement implying a distinction between legitimate and illegitimate children, or relating to the matrimonial status of the parents, shall be included in any birth registration or in any attestation or certificate of baptism or affiliation certificate.

" The father of a child born before the entry into force of this Constitution may confer upon him the benefit of the provisions of this article by means of the rectification of any entry in the register or certificate that makes any such distinction as aforesaid with regard to that child."

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[n] *Yearbook on Human Rights for 1947* (United Nations publication, Sales No.: 1949. XIV.1), p. 165.

[o] *Yearbook on Human Rights for 1950* (United Nations publication, Sales No.: 1952. XIV.1), p. 208.

[p] *La Gaceta, Organo del Estado,* 4 March 1946 year XLIII, No. 9938, p. 5.

17. *Poland*

Constitution of 22 July 1952 [q]

" *Article 67.* ...

" 2. A child born out of wedlock suffers no loss of rights."

18. *Portugal*

Constitution of 19 March 1933 [r]

" *Article 13.* ...

" Para. 2. Legitimate children shall be guaranteed the full rights necessary for the order and unity of the family, and rights corresponding to their position shall also be recognized in the case of illegitimate children who can be legally recognized and likewise children not yet born, particularly the right to maintenance which shall be provided by the persons who are found, upon investigation, to be responsible for maintenance."

19. *Switzerland*

Constitution of 29 May 1874 [s]

" *Article 54.* ...

" Children born before marriage are legitimated by the subsequent marriage of their parents. ... "

20. *Venezuela*

Constitution of 23 January 1963 [t]

" *Article 75.* The law shall enact all necessary provisions to ensure that every child, regardless of his birth, may know the identity of his parents in order that these may perform their duty to help, support and educate their children and that children and young persons may be protected against neglect, exploitation and abuse.

" ... "

21. *Uruguay*

Constitution of 26 October 1961 [u]

" *Article 42.* Parents shall have the same duties towards children born out of wedlock as towards children born in wedlock. ... "

22. *Yugoslavia*

Constitution of 7 April 1963 [v]

" *Article 58.* ...

" ... Children born out of wedlock shall have the same rights and duties towards their parents as children born in wedlock."

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[q] *Yearbook on Human Rights for 1952* (United Nations publication, Sales No.: 1954. XIV.1), p. 233.

[r] *Yearbook on Human Rights for 1951* (United Nations publication, Sales No.: 1953. XIV.2), p. 298.

[s] *Yearbook on Human Rights for 1947* (United Nations publication, Sales No.: 1949. XIV.1), p. 294.

[t] *Gaceta Oficial de la República de Venezuela*, 23 January 1961, year LXXXIX, month IV, No. 662 Extraordinary, p. 6.

[u] *Diario Oficial*, 7 March 1952, volume 186, No. 13586, p. 254-A.

[v] *The Constitution of the Socialist Federal Republic of Yugoslavia* (translated into English by Petar Mijuskovic) (Beograd, Secretariat for Information of the Federal Executive Council, 1963), p. 30.

Annex VI

STATISTICAL INFORMATION FURNISHED BY THE GOVERNMENTS OF THE COUNTRIES SURVEYED

1. *Afghanistan:*

There are no data available.

2. *Albania:*

In 1960, 1,741 persons were born out of wedlock, 67,945 in wedlock. In 1961, the respective numbers were 1,229 and 67,223.

3. *Argentina:*

A. Percentage of persons born out of wedlock in proportion to the total number of births:

Argentine Republic, total	27.8 per cent
Richest province of Buenos Aires	16.7 per cent
Poorest province of Santiago del Estero	43.2 per cent

B. Total number of persons born out of wedlock who have been acknowledged or legitimated ..... not available

C. Number of subsequent adoptions ..... not available

4. *Australia:*

Year	*Average annual live ex-nuptial births*	*Proportion of total live births percentage*
1959	10,687	4.71
1960	10,987	4.77
1961	12,269	5.11
1962	12,813	5.40

5. *Austria:*

In 1945 the figure for live births out of wedlock was 28,015.

In 1961 it was 16,543.

In 1961, of the 1,224 minor children who were adopted, a total of 878 had been born out of wedlock. The corresponding figures for 1962 are 1,054 and 780.

6. *Brazil:*

Proportion of illegitimate children, live births and still births — 1959-1960 (per hundred births per annum):

	Illegitimate Children		
Year	*Born In the year*	*Live births (Percentage)*	*Still births*
1959	8.54	8.41	11.79
1960	7.74	7.57	12.68

7. *Bulgaria:*

In 1958, the percentage of children born out of wedlock was 7.6 per cent.

8. *Burma:*

The Government states that there are no data available.

9. *Cameroon:*

There are no data available.

10. *Canada:*

According to a source: the total number of illegitimate births in Canada increased from 6,207 in 1926 to 20,413 in 1960; the ratio of illegitimate births to total births increased from 2.6 per cent to 4.3 per cent during the same period. In 1945, the ratio has been slightly higher: 4.5 per cent. (Vital Statistics 1960, Dominion Bureau of Statistics, Health and Welfare Division, Vital Statistics Section, p. 20.)

11. *Ceylon:*

There are no data available.

12. *China:*

The Government states that:

"According to the census statistics of the Taiwan Province at the end of 1962, children born out of wedlock numbered 7,425 and constituted 1.75 per cent of the total number of births for that year; 1,779 of these children have already been acknowledged, and 5,646 have not."

The International Federation of Women Lawyers states that:

"The number of persons born out of wedlock, in the year of 1961 is 7,741; namely 1.84 per cent. The total number of births in 1961 is 420,254.

"The number of persons born in wedlock is 412,513; namely, 98.16 per cent (1961).

"The number of persons born out of wedlock who have subsequently been acknowledged is 1,835; namely, 23.7 per cent out of the total number of persons born out of wedlock (1961)."

13. *Cuba:*

The Government states that there are no data available.

14. *Denmark:*

Year	*All births*	*Births out of wedlock*	*Percentage of all births*
1959	75,023	5,507	7.3
1960	77,035	6,031	7.8
1961	77,410	6,260	8.1

15. *El Salvador:*

The Government states that in 1962, the number of persons born out of wedlock was 64.7 per cent of the total number of births."

16. *Federal Republic of Germany:*

Year	*Total number of births*	*Births out of wedlock*	*Percentage*
1946	718,551	117,410	16.3
1947	762,314	89,741	11.8
1958	885,659	59,045	6.7
1959	930,944	60,283	6.5
1960	947,124	58,035	6.1
1961	989,307	56,952	5.8
1962	994,002	53,540	5.4

The International Union for Child Welfare states:

" As to the frequency of acquisition of the status of a person born in wedlock, the only available data relate to the number of cases in which this process, in one form or another, brought to an end the guardianship of illegitimate children by the Youth Bureau in 1961; 22,429 legitimations; 307 declarations of legitimacy; 5,356 adoptions. It should be noted that these figures do not include the cases of children who, when they acquired the status of persons born in wedlock were no longer wards of the Youth Bureau but under the guardianship of a private individual or institution; however, such cases are relatively few. It should also be noted that these figures include, in addition to children born in 1961, others born in earlier years when the illegitimate birth rate was still higher.

" At all events, more than a third of all persons born out of wedlock in the Federal Republic of Germany subsequently acquire the status of persons born in wedlock."

17. *Finland:*

The Government states:

" The number of births out of wedlock during the 1920's and the 1930's averaged about 8 per cent of all births in Finland. In the period after the Second World War, this proportion has shown a decreasing tendency. The number of births out of wedlock in Finland in 1950 was 5,143 and their proportion to the total number of births was 5.2 per cent. The corresponding figures for 1955 were 3,811 representing 4.2 per cent of the total number of births and for 1961 they were 3,351, representing 4.1 per cent of the total number of births. According to statistical information concerning the city of Helsinki in the 1950's, about 22 per cent of the children born out of wedlock every year have been legitimated by the subsequent marriage of the parents and about 12 per cent have been adopted."

18. *France:*

The percentage of persons born out of wedlock is about 7 per cent in metropolitan France and about 52 per cent in overseas departments.

19. *Ghana:*

The Government states that there are no data available.

20. *Guatemala;*

There are no official data available.

21. *Honduras:*

According to a source, (United Nations, *Demographic Yearbook*, 1959, p. 229):

	Live births illegitimate	
Year	*Number*	*Ratio*
1954	43,266	64.2
1955	46,211	64.6
1956	44,991	64.4
1957	49,255	64.5

22. *Hungary:*

The Government states that there are no statistical data available.

23. *India:*

The Government states that there are no data available.

24. *Iraq:*

The Government states that there are no data available.

25. *Ireland:*

The Government transmits the following data:

" *Table I*

" Number of Illegitimate Births registered during each of the years from 1960 to 1962 inclusive

Year	*All births*	*Illegitimate births*	*Illegitimates as per cent of all births*
1960	60,735	968	1.59
1961	59,325	975	1.63
1962 * ...	61,611	1,106	1.80

* Provisional ".

26. *Israel:*

The Government forwarded the following statistical data:

Year	*Total of children born alive*	*Children born out of wedlock*	*Percentage of total*
1957	44,817	122	0.27
1958	42,872	88	0.21
1959	44,599	100	0.22
1960	44,981	138	0.31

27. *Italy:*

According to a source (*Demographic Yearbook*, 1951, p. 232): The ratio of births out of wedlock to the total number of births from 1949 to 1957 was:

1949: 3.4 per cent; 1950: 3.4 per cent; 1951: 3.4 per cent;

1952: 3.4 per cent; 1953: 3.3 per cent; 1954: 3.2 per cent;

1955: 3.1 per cent; 1956: 3.0 per cent; 1957: 2.8 per cent.

28. *Ivory Coast:*

The Government states that no data are available.

29. *Jamaica:*

The Government states:

" The Table below sets out the composition of live births in Jamaica, in terms of legitimacy, for the period 1953-1958.

	Live births			*Illegitimate births per 100 live births*
Year	*Total*	*Legitimate*	*Illegitimate*	
1953	51,131	14,878	36,253	70.9
1954	53,630	15,218	35,412	71.6
1955	55,767	15,823	39,944	71.6
1956	58,177	16,346	41,831	71.9
1957	60,445	16,905	43,540	72.0
1958	63,511	18,033	45,484	72.6

" *Source:* Abstract of Statistics — Department of Statistics. ' It shows that throughout the period, between 70 per cent and 73 per cent of the total number of live births were illegitimate.' "

30. *Japan:*

The International Alliance of Women reports that:

"In 1960 the total number of births was 1,606,041; 19,612 or 1.2 per cent of the total number of births were born out of wedlock".

31. *Jordan:*

The Government states that "there are no actual statistics on births out of wedlock."

32. *Kenya:*

The Government states that no data are available.

33. *Laos:*

There are no data available.

34. *Lebanon:*

There are no data available.

35. *Luxembourg:*

In 1960, 4,860 children were born in wedlock and 159 out of wedlock, a percentage, then of 3.2 per cent.

36. *Malaysia:*

There are no data available.

37. *Mali:*

The Government states that no data are available.

38. *Malta:*

The Government states that:

"*Illegitimacy rate*

Period	
1871-1881	15.9 per 1,000 total births
1881-1891	13.7 per 1,000 total births
1891-1901	11.8 per 1,000 total births
1901-1911	9.8 per 1,000 total births
1911-1921	11.2 per 1,000 total births
1961	6.6 per 1,000 live births
1962	8.7 per 1,000 live births."

39. *Nepal:*

The Government states that no data are available.

40. *Netherlands:*

The Government transmits data furnished by the Central Bureau of Statistics:

"1) Number of persons born and the proportion (per 1,000) to the total number of births of those born out of wedlock:

Year	*Total number of births*	*Proportion per 1,000 of persons born out of wedlock*
1960	238,789	20.8
1961	247,009	21.2
1962	245,739	20.8

" Concerning adoption, the Government states:

Year	*Legitimate*	*Legitimated*	*Illegitimate*
1960	115	14	278
1961	118	4	334
1962	115	9	386."

41. *New Zealand:*

The Government states:

" The latest figures available are those of the year 1960 and they relate to the European population only. The total number of persons born out of wedlock was 2,911 or 5.25 per cent of the total number of births. This percentage was 3.99 per cent in 1950, and there was a steady annual increase up to the present percentage."

42. *Niger:*

The Government states that no data are available.

43. *Nigeria:*

The Government states that there are no data available.

44. *Norway:*

The International Federation of Women Lawyers gives the following data:

Year	*Total children born alive*	*Total children born dead*	*Children born alive out of wedlock*	*Percentage of children born out of wedlock*
1960	61,880	873	2,277	3.68

The Government states:

" . . . There are no statistics concerning persons born out of wedlock and later legitimated through the subsequent marriage of their parents, or of cases where the identity of the father is established in accordance with regulations laid down by law. Research carried out by the Committee for the Inheritance Act of 1954 shows that out of the roughly 2,250 persons annually born out of wedlock since 1950, about 750 persons annually were adopted."

45. *Pakistan:*

The Government states that there are no data available.

46. *Peru:*

Year	*Number of births percentage*	*Legitimate percentage*	*Illegitimate percentage*
1961	100.00	57.3	41.9
1960	100.00	57.9	41.8
1959	100.00	58.0	41.6
1958	100.00	58.5	41.2
1957	100.00	58.3	41.2

47. *Philippines:*

The Government states that no data are available.

48. *Poland:*

Statistical data relating to the number of births in Poland in the years 1958-1960:

	1958	*1959*	*1960*
Total number of births	755,548	722,928	660,940
Persons born in wedlock	713,167	684,160	631,464
Persons born out of wedlock	37,910	34,536	28,883

Number of adoptions in the years 1959-1961: 1959, 6,648; 1960, 6,404; 1961, 5,860.

49. *Republic of Korea:*

There are no data available.

50. *Republic of Viet-Nam:*

The Government indicates that there are no data available.

51. *Romania:*

The Government states that no data are available.

52. *San Marino:*

"During the past fifteen years, the proportion of children born out of wedlock has been about 2 per cent. Almost all the children born out of wedlock have been either legitimated, acknowledged voluntarily or by court decision, or adopted."

53. *Sierra Leone:*

The Government indicates that statistical data are not available.

54. *Spain:*

The Government states:

	1959	*1960*	*1961*	*1962*
Illegitimate births	16,297	15,762	14,973	14,005
Total number of births ..	647,160	654,537	645,613	649,680
Rate per thousand			25.3	21.5
Number of illegitimate births in the capital city	7,081	6,886	6,509	6,734

55. *South Africa:*

The Government states that "complete up-to-date data for all groups of the population are not available".

56. *Sudan:*

The Government states that no data are available.

57. *Sweden:*

Year	*Number of live births*	*Number of illegitimate live births*	*Percentage of illegitimate live births*
1959	104,743	10,910	10.42
1960	102,219	11,535	11.28
1961	104,789	11,911	11.37

58. *Switzerland:*

	Live births		
Year	*Legitimate*	*Illegitimate*	*Rate of illegitimate births per thousand*
1961	95,311	3,927	4.0

59. *Syria:*

The Government states that:

"Records of Civil Registry indicate that seven (7) males and eleven (11) females born out of wedlock were registered throughout Syria during 1963."

60. *Thailand:*

The International Federation of Social Workers states that:

"There has not been as yet any compilation of statistics regarding children born out of wedlock."

61. *Trinidad and Tobago:*

The Government states:

"Available statistical data relating to the number of persons born out of wedlock in the country and their proportion to the total number of births are as follows:

Year	*Total No. of births (live)*	*No. of persons born out of wedlock*	*Ratio*
1959	30,592	13,513	44.2
1960	32,705	14,208	43.4
1961	32,991	14,023	42.5
1962	34,111	14,295	41.9."

The Government adds:

"During the period 1959 to 1963, 6,760 persons born out of wedlock were legitimated by re-registration following the marriage of their parents. During this period, a total of 79 children born out of wedlock were adopted."

62. *Turkey:*

There are no data available.

63. *Uganda:*

The Government indicates that there are no data available.

64. *Union of Soviet Socialist Republics:*

There are no data available.

65. *United Arab Republic:*

The Government states that:

"The number of foundlings averages 400 annually, in addition to about 150 born out of wedlock with known mothers. This constitutes about 0.1% of total births in the United Arab Republic."

The International Alliance of Women states that:

"In 1962 the number of children born out of wedlock was 524, out of a population of 26 million: 222 in Cairo, 54 in Alexandria. The number is less in [the] provinces, especially in those known as Upper Egypt... In four provinces, there were none during the year."

66. *United Kingdom of Great Britain and Northern Ireland:*

With regard to England and Wales, the Government states:

"Illegitimate births per 1,000 total live births:

1957	48
1958	49
1959	51
1960	54
1961	60
1962	66

"Total number of live births and of these the numbers which were illegitimate:

Year	*Total births*	*Illegitimate*
1957	723,381	34,562
1958	740,715	36,174
1959	748,501	38,161
1960	785,005	42,707
1961	811,281	48,490
1962	838,736	55,376."

In so far as Scotland is concerned, the Government states:

"The annual rate of illegitimacy in Scotland has remained fairly steady over the past twenty years — the number of illegitimate live births registered in 1962 being 5,020 or 4.8 per cent of the total number of live births in that year. Information is not available about the number of these subsequently legitimated or adopted, but in 1962 there were about 300 re-registrations due to legitimation by subsequent marriage and the adoptions of 1,435 illegitimate children were recorded. Subsequent acknowledgement of paternity is not a matter of record because no action is taken on such acknowledgments, but in 1961 the Courts pronounced decrees of paternity in 124 cases in none of which had paternity previously been acknowledged."

With regard to Northern Ireland, the Government states:

"The slight differences between Northern Ireland and England and Wales may be ignored."

67. *United Republic of Tanzania:*

The Government states that there are no data available.

68. *United States of America:*

The Government states:

"The estimated number of births out of wedlock in 1960 was 224,300 and in 1961 it was 240,200. This represents an estimate of 5 per cent of the total number of live births. We do not have figures pertaining to the number that have subsequently been acknowledged or legitimated. The estimate of the number of children born out of wedlock that were adopted in 1961 is 66,100."

69. *Venezuela:*

Year	*Total No. of births*	*Legitimate*	*Acknowledged*	*Illegitimate*	*Percentage*		
					Legitimate	*Acknowledged*	*Illegitimate*
1960 ...	338,199	153,686	49,313	135,200	45.4	14.6	40.0
1961 ...	344,989	158,080	53,721	133,188	45.8	15.6	38.6
1962 ...	341,324	158,693	55,331	127,300	46.5	16.2	37.3
1963 ...	253,546	163,619	60,899	129,028	46.3	17.2	36.5

70. *Western Samoa:*

The Government states that no data are available.

71. *Yugoslavia:*

Year	*Live births*		
	Total	*Born in wedlock*	*Born out of wedlock*
1959	424,276	387,412	36,863
1960	432,595	395,085	37,510
1961	422,180	386,525	35,655

Annex VII

DRAFT GENERAL PRINCIPLES ON EQUALITY AND NON-DISCRIMINATION IN RESPECT OF PERSONS BORN OUT OF WEDLOCK [a]

PREAMBLE

Whereas the peoples of the world have, in the Charter of the United Nations, proclaimed their determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to promote social progress and better standards of life in larger freedom,

Whereas the Charter sets forth, as one of the purposes of the United Nations, the promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights proclaims that all human beings are equal in dignity and rights and, elaborating the principle of non-discrimination, further proclaims that everyone is entitled to all the rights and freedoms set forth therein without distinction of any kind,

Whereas the principle of the same social protection for all children, whether born in or out of wedlock, has been proclaimed in article 25, paragraph 2, of the Universal Declaration of Human Rights and confirmed by article 10, paragraph 3, of the Covenant on Economic, Social and Cultural Rights and by article 24 of the Covenant on Civil and Political Rights,

Whereas a sizable portion of the population of the world is composed of persons born out of wedlock many of whom, because of the nature of their birth, are the victims of legal or social discrimination in violation of the principles of equality and non-discrimination set out in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Convention of the Elimination of All Forms of Racial Discrimination and the International Covenants on Human Rights,

Whereas efforts should be made, through all possible means, to promote respect for the inherent dignity and worth of the human person, so as to enable all members of society, including persons born out of wedlock, to enjoy the equal and inalienable rights to which they are entitled,

Now therefore, with a view to eliminating this form of discrimination, the following general principles are proclaimed:

Part I

1. Every person born out of wedlock shall be entitled to legal recognition of his maternal and paternal filiation in so far as compatible with the principle of the protection of the family.

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[a] The Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted these draft general principles on equality and non-discrimination in respect of persons born out of wedlock at its nineteenth session (1967), after examining the principles submitted by the Special Rapporteur (see Part Four of this report). The Sub-Commission transmitted the draft general principles to the Commission on Human Rights for further consideration and adoption.

2. The fact of birth of a child shall by itself establish maternal filiation to the woman who gives birth to the child.

3. The establishment of paternal filiation shall be provided for by law through a variety of means, including acknowledgement, recognition of legal presumptions and judicial decision. Judicial proceedings to establish paternal filiation shall not be subject to any time-limits.

4. The husband shall be presumed to be the father of any child born to his wife whether he is conceived or born during the marriage. This presumption may be overcome only by a judicial decision based upon evidence that the husband is not the father. Proceedings to that end shall be initiated within a limited period of time.

5. Any child born of parents who intermarry after the birth of that child shall be considered to be born of that marriage.

6. Every person born in wedlock, or considered to be born in wedlock as a result of the subsequent marriage of his parents, shall retain his status notwithstanding the invalidity or annulment of the marriage.

Part II

7. Every person, once his filiation has been established, shall have the same legal status as a person born in wedlock.

8. Every person born out of wedlock whose filiation is established in relation to both parents shall have the right to bear a surname determined as in the case of a person born in wedlock. If his filiation is established in relation only to his mother, he shall be entitled to bear her surname, modified, if necessary, in such a manner as not to reveal the fact of birth out of wedlock.

9. The rights and obligations pertaining to parental authority shall be the same, whether the child is born in wedlock or out of wedlock. Unless otherwise decided by the court in the best interest of the child born out of wedlock, parental authority shall be exercised according to the same rules as for a child born in wedlock if his filiation is established in relation to both parents, or by his mother alone if his paternal filiation is not established.

10. The domicile of any child born out of wedlock whose filiation is established in relation to both parents shall be determined according to the same rules as for children born in wedlock.

If the filiation is established in relation to the mother alone, appropriate rules shall ensure in any case that the child has a domicile.

11. Every person born out of wedlock shall, once his filiation has been established, have the same maintenance rights as persons born in wedlock. Birth out of wedlock shall not affect the order of priority of claimants.

12. Every person born out of wedlock shall, once his filiation has been established, have the same inheritance rights as persons born in wedlock. Legal limitations or restrictions on the freedom of a testator to dispose of his property shall afford equal protection to persons entitled to inheritance, whether they are born in wedlock or out of wedlock.

13. The nationality or citizenship of a person born out of wedlock shall be determined by the same rules as those applicable to persons born in wedlock.

Special protection against statelessness shall be provided for persons born out of wedlock. In particular, when only the maternal filiation of a person born out of wedlock is established, its effects shall be the same as in the case of paternal filiation.

14. Political, social, economic and cultural rights shall be enjoyed equally by all persons, whether they are born in wedlock or out of wedlock, without prejudice, as

regards social welfare services, to the special care which shall be provided to children born out of wedlock and their mothers, by the State or society, when necessary.

Part III

15. Information in birth and other registers containing personal data which might disclose the fact of birth out of wedlock shall be available only to persons or authorities having a legitimate interest with respect to filiation.

In referring to persons born out of wedlock, any designation which might carry a derogatory connotation shall be avoided.

16. The adoption of a child born out of wedlock shall be subject to the same rules and provisions and shall have the same consequences as the adoption of children born in wedlock.

Restrictions on the right to adopt shall be limited to such requirements as are necessary to establish a parent-child relationship and to assure the best interests of the adoptee. In particular, no restrictions based solely on a difference of race, colour or national origin shall be permitted.

Adoption procedure should be carried out under the supervision of the State and/or a competent social welfare agency to ensure full protection of the child and his well-being.

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