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COMMENTS OF GOVERNMENTS ON THE DRAFT GENERAL PRINCIPLES ON EQUALITY AND NON-DISCRIMINATION IN RESPECT OF PERSONS BORN OUT OF WEDLOCK

Note by the Secretary-General

1. In its resolution 1787 (LIV) of 18 May 1973, the Economic and Social Council requested the Secretary-General to transmit to Governments, specialized agencies, regional intergovernmental organizations and non-governmental organizations in consultative status, for their comments and observations, the draft general principles on equality and non-discrimination in respect of persons born out of wedlock drawn up by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its nineteenth session in 1967. 1/ The Council requested the Commission on Human Rights to consider the matter at its thirty-first session.

2. By resolution 1 (XXXI) of 7 February 1975, the Commission requested the Sub-Commission to consider the draft general principles further, in the light of the replies from Governments, of the comments made by other United Nations bodies, the specialized agencies and non-governmental organizations and of the summary records of the discussion of this question by the Commission at its thirty-first session, and to submit the results of its work to the Commission at its thirty-second session in such form (recommendations, statements) as it considered appropriate. 2/

3. At its twenty-eighth session, in 1975, the Sub-Commission established an informal working group consisting of five of its members to undertake the examination and review of the draft general principles. After discussion of the

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1/ The draft principles adopted by the Sub-Commission were based upon those contained in the Study of Discrimination against Persons Born out of Wedlock, prepared by M. Vieno Voitto Saario, Special Rapporteur of the Sub-Commission (United Nations publication, Sales No. E.68.XIV.3).

2/ Official Records of the Economic and Social Council, Fifty-eighth Session, Supplement No. 4 (E/5635), chap. XXIII.

report of the group, 3/ the Sub-Commission agreed that the report should be submitted to the Commission on Human Rights.

4. At its thirty-third session, in 1977, the Commission established an informal working group open to all its members which undertook the examination and review of the draft general principles. After discussion of the group's report, 4/ the Commission decided to accept in principle the revised draft general principles and to refer them to the Economic and Social Council for further consideration. 5/

5. The Economic and Social Council in its decision 234 (LXII) of 13 May 1977 requested the Secretary-General to transmit the draft general principles on equality and non-discrimination in respect of persons born out of wedlock to Governments for comments and to consider those principles further with priority at its sixty-fourth session, with a view to their approval. (For the text of the draft general principles, see the annex to the present document.)

6. Accordingly, appropriate notes verbales were sent to Governments. By 26 January 1978 substantive replies had been received from Madagascar, Malawi, Sweden, Tunisia and Upper Volta. Those replies are reproduced below. Any further replies received will be issued as addenda to the present document.

3/ E/CN.4/1180, chap. XVII.

4/ E/CN.4/L.1360.

5/ Official Records of the Economic and Social Council, Sixty-second Session, Supplement No. 6 (E/5927), chap. XIV.

MADAGASCAR

/Original: French/
/17 November 1977/

It must be noted that, as a whole, the draft legal principles on persons born out of wedlock are of undeniable interest, inasmuch as they help fill the gap which separated such persons from persons born in wedlock and made them real pariahs of society.

The principles would clearly improve their lot, since the proposed measures would henceforth give them, on the internal plane, guarantees equal to those proceeding from wedlock.

The Malagasy Republic is all the more willing to support these new concepts inasmuch as they are in line with the legislation in force.

That is the case, in particular, with regard to principle 6, on annulment of marriage, principle 11, on maintenance rights, and principle 12, on rights of succession, which are conceived in a spirit identical to that prevailing in the drafting of article 51 of Ordinance No. 62-089 of 1 October 1962 on marriage (Official Gazette, 19 October 1962), articles 22 and 29 of Act No. 63-022 of 20 November 1963 on filiation (Official Gazette, 30 November 1963) and articles 16 and 17 of Act No. 68-012 of 4 July 1968 on succession (Official Gazette, 13 July 1968). In particular, the two last-mentioned articles make no distinction between children entitled to succession born in wedlock and those born out of wedlock, provided that their filiation is legally established.

However, with regard to the establishment of paternal filiation (draft principle 3), the Malagasy Government considers that it would be preferable to set a time-limit for it, perhaps of one year beginning from a point in time to be determined by the national legislature.

The omission of such a time-limit might in some cases lead to considerable family and social trouble by calling everything in question, for example, where inheritance of the parents of the individual concerned has already been divided up among those initially identified as entitled to it.

It may further be noted that the one-year time-limit is that adopted in the legislation in force under article 27 of the above-mentioned Act No. 63-022 of 20 November 1963 on filiation, which also sets forth the conditions for applying for the establishment of paternal filiation.

MALAWI

/Original: English/
/9 January 1978/

The Ministry is pleased to inform the Secretary-General that all proposals contained in the draft, except proposals numbers 3, 5 and 6, are already covered by Malawi's existing legislation. For this reason, they are whole-heartedly supported. With regard to the three proposals mentioned above, the Ministry is under instruction to comment as follows:

Proposal No. 3. Under Malawi's legislation, there are "time-limits" which restrict judicial proceedings. On policy grounds, the Malawi Government does not consider it expedient to amend its law in order to conform with the proposals contained in the draft.

Proposal No. 5. Malawi's existing case law provides that where a child is conceived and born prior to its parents' marriage, such child is regarded as illegitimate although if such parents marry before such child is born, the child is regarded as legitimate.

Therefore, this proposal cannot be adopted in its present form as the child born in such circumstances can be made legitimate by adoption if the parents so wish.

Proposal No. 6. This proposal provides that, in the event of a marriage being annulled by the courts, the status of children born out of such a relationship should not alter, in other words, such offspring should remain legitimate.

Under the Common law, a decree of nullity has the effect of bastardizing the offspring. The Malawi Government does not see compelling reasons to alter its law so as to follow the proposal.

SWEDEN

/Original: English/
/2 January 1978/

The Swedish Government is in agreement with the general purpose of the draft general principles which is to prevent discrimination against persons born out of wedlock. Indeed, Swedish law is based on the same concept and was recently revised with the aim of creating legal equality between children born in wedlock and those born out of wedlock.

Nevertheless, it seems that the draft general principles should be amended or improved on several specific points.

Principle 4 provides that the husband shall be presumed to be the father of any child born to his wife if it is conceived or born during the marriage. This legal presumption seems to be justified in respect of births occurring during the marriage. It is doubtful, however, whether the presumption is also justified in cases where the child is conceived during the marriage but the marriage is subsequently dissolved through divorce before the child is born. In most such cases a legal presumption would not seem to correspond to the biological reality and the Swedish Government therefore feels that the presumption should not apply to such cases. Consequently, it is suggested that the words "conceived or" should be deleted in Principle 4.

Principle 4 further provides that the presumption of paternity may be overcome only by a judicial decision. In the opinion of the Swedish Government, it does not seem necessary to require a judicial decision in cases where clear declarations showing that another man than the husband of the mother is the father have been made in due form by all the persons involved. It is suggested, therefore, that the second sentence of Principle 4 should be worded as follows:

> "This presumption may be overcome only by a judicial decision based upon evidence that the husband is not the father or by an acknowledgement of paternity by another man than the husband, provided that this acknowledgement is approved by the husband as well as by the mother herself."

Principle 7 provides that a person born out of wedlock shall have a legal status equal to that of a person born in wedlock. This Principle seems to be worded in too general terms, since it may be in the interest of children born out of wedlock that special rules shall apply to them, for instance in respect of custody and nationality (see below).

Principle 8 gives a person born out of wedlock whose filiation is established in relation to both parents the right to bear a surname determined as in the case of a person born in wedlock. In many countries this would mean that a child born out of wedlock would be entitled to bear his father's surname. The Swedish Government accepts this Principle but wishes to observe that his right to bear that name may, in some countries depend upon a specific request to be made by himself or by his guardian and that this should not be considered to be inconsistent with the rule laid down in Principle 8.

In the last sentence of Principle 8, the Swedish Government proposes to delete the words "modified, if necessary, in such a manner as not to reveal the fact of birth out of wedlock", since these words give the impression that birth out of wedlock is something shameful or disreputable. The purpose of the Principles should be to combat the idea that a child born out of wedlock is in any way inferior to a child born in wedlock and this purpose is not served if birth out of wedlock is regarded as a fact which has to be concealed.

Principle 9 provides for full equality between persons born in wedlock and those born out of wedlock as regards the rights and obligations pertaining to parental authority. The Swedish Government wishes to observe that under the laws of many countries a distinction is made in so far as the custody of a child born out of wedlock is normally entrusted to the mother alone, even if the paternal filiation has been established. In the view of the Swedish Government the aim to be pursued

by the legislators as well as by the courts should be to achieve what is in the best interest of the child. This consideration may in some countries lead to the conclusion that there should be a legal presumption in favour of making the mother the sole guardian of a child born out of wedlock, although the father is normally - alone or jointly with the mother - the guardian of a child born in wedlock. It is suggested, therefore, that Principle 9 should be reworded as follows:

> "The rights and obligations pertaining to parental authority, shall, whether the child is born in wedlock or out of wedlock, be determined exclusively on the basis of what is in the best interest of the child."

In connexion with this provision it might be considered to add a further rule that the parent who does not have parental authority over the child shall normally have a right of access to the child.

As regards Principle 10, it would seem that the domicile of a child born out of wedlock is normally dependent on what the parent or other person who has parental authority over the child decides in respect of the place where the child is to have its home. This question is therefore closely linked to the question of parental authority and it does not seem necessary to keep Principle 10 as a separate principle.

The question of the nationality or citizenship of a person born out of wedlock is dealt with in Principle 13 which provides that the same rules shall apply as those applicable to persons born in wedlock. However, the nationality laws of many countries provide that the child born in wedlock acquires the citizenship of its father, whereas the child born out of wedlock acquires the citizenship of its mother. It is at least doubtful whether it would be an advantage for the child born out of wedlock to acquire the citizenship of its father, since its links with the home country of the father are in many cases very weak or even non-existent. For this reason, the Swedish Government would favour the deletion of Principle 13.

It should be added that Principle 13 in its present wording could not be applied in cases where the paternal filiation has not been established.

Principle 14 provides for certain restrictions of the access to birth registers and other similar records which contain information on a person's birth out of wedlock. The Swedish Government considers, however, that the access to public records should only be restricted if such access would be prejudicial to public or private interests and that such prejudice does not necessarily result from the disclosure of a person's birth out of wedlock. Moreover, secrecy about births out of wedlock may, in fact, contribute to maintaining the idea that a birth out of wedlock is something shameful or disreputable. For these reasons, the Swedish Government finds it doubtful whether Principle 14 should be retained. If it is to be retained, it is suggested that the first sentence of the Principle should be reworded as follows:

> "Information in birth and other registers containing personal data, for instance about births out of wedlock, shall not be made available to the public where such disclosure would cause prejudice to the person or persons concerned."

TUNISIA

/Original: French/
/4 January 1978/

There is no legal or social discrimination in Tunisian law between children born in wedlock and those born out of wedlock.

The law guarantees all the general principles set forth in the above-mentioned draft regarding the concepts of filiation, recognition and disavowal of paternity, legitimization (arts. 68 et seq. of the Code of Personal Status), adoption (arts. 8 et seq. of Act No. 58-27 of 4 March 1958), custody of foundlings (art. 77 of the Code of Personal Status), civil status (arts. 24, 26 and 27 of the Code of Personal Status), patronymic, rights of succession, rights to maintenance (art. 37 of the Code of Personal Status) and nationality (art. 6 of the Code of Nationality). It is apparent from the above that draft principles 1 to 16 do not call for any special comment and are in conformity with the provisions of Tunisian law.

It would, however, be beneficial for draft article 2 to be completed as follows, with reference to article 152 of the Tunisian Code of Personal Status:

"A child shall inherit from its mother and its mother's parents.

"Only the mother and her parents shall have hereditary rights in respect of the child."

We should mention also the innovation introduced by the Tunisian legislature in favour of minors without parents or abandoned by their parents through the establishment of informal guardianship (Law 27/58 of 4 March 1958).

Informal guardianship consists of a notarized deed validated by a judge whereby a major having full civil capacity or an assistance organization assumes custody of a minor and undertakes to care for him and provide for his needs until his attainment of majority (arts. 4, 5, 6 and 7 of Act No. 27/58 of 4 March 1958).

The above-mentioned legislative provisions show, if needed, the constant efforts of the Tunisian legislature to enable all persons, without any discrimination, to exercise their rights as recognized by the law.

UPPER VOLTA

/Original: French/
/13 January 1978/

1. The principle of equality in the legal establishment of filiation, in accordance with the liberal spirit of customary African rules and with modern tendencies, is now generally accepted. In the initial draft of the Upper Voltan law on filiation, an effort has been made to equate maternal and paternal filiation, on the one hand, and filiation in wedlock and filiation out of wedlock on the other.

2. According to the provisions of article 1 of the Upper Voltan initial draft Act on Filiation, "maternal filiation results from the sole fact of birth". It assumes as established the material fact of the mother's confinement and the identity of the child to which she gives birth.

3. The various ways of establishing paternal filiation set forth in general principle 3 are reflected in the legislation of the Republic of Upper Volta. However, suits for the establishment of paternity are not, in certain cases, without time-limits.

Thus, where such suits are brought by heirs for purely monetary purpose, filiation suits are subject to ordinary law and therefore to time-limits (cf. art. 30 of the Upper Voltan draft Act).

Similarly, article 42 of the draft Act on Filiation provides that "no person may claim filiation other than that given in his birth certificate and in accordance with the status quo in that regard, where the latter has lasted 10 years". In this instance, the presumption of truth is so great that it would not be reasonable to allow it to be called in question.

4. That is an application of the traditionally accepted rule pater is est enshrined in article 4 of the draft Act on Filiation: "The father of a child conceived or born during marriage and a child carried by a married woman is the husband".

The effects of the presumption of paternity can only be combated by the husband of the mother by a disavowal suit (cf. art. 34, para. 3 of the draft Act on Filiation).

5. This principle is affirmed by the Upper Voltan draft Act on Filiation (cf. art. 13): "Where a child is born out of wedlock, as soon as his filiation is established in respect of his mother and father and where the latter are joined in marriage, the child shall be regarded as born of that marriage".

6. It is accepted, in application of the putative marriage theory, that, in spite of the annulment of a marriage, the effects on children born of such a marriage, such as the maintenance of legitimacy and legitimization, remain valid.

7. The principle of equality of legal status, which is aimed at by the authors of the draft legislation which will constitute the Upper Voltan Code of Personal Status, is developed in the following articles.

8. With regard to the patronymic, under the initial draft Act on Names:

(a) A child born of a marriage bears the name of his father (cf. art. 5 of the draft Act). In the event of disavowal, he assumes his mother's name;

(b) A child who is born out of wedlock and whose filiation is established with respect to his mother and father bears his father's name (cf. art. 6 of the draft);

(c) A child who is born out of wedlock and whose filiation is established in respect of only one of his parents bears the name of that parent (cf. art. 7 of the draft).

9. The principles which have guided the work of the Sub-Commission on Upper Voltan Civil Legislation are, as a whole, in accordance with those currently submitted for our consideration.

With regard to parental authority, under article 32 of the Upper Voltan initial draft Act on the protection of Minors:

Authority over children born out of wedlock is exercised by the parent (mother or father) in respect of whom filiation is established.

Where filiation is established with regard to both, the authority is exercised by the parent (father or mother) who has custody of the child.

These provisions are similar to those applicable to children born in wedlock (for example, where a mother and father are divorced or where a mother has been authorized to reside separately, parental authority is exercised by the parent who has custody of the child).

10. With regard to domicile:

A non-emancipated minor is domiciled with the person who has the right of custody over him (cf. art. 3 (b) of the initial draft Act on Domicile). This applies to the domicile of any minor without distinction as to filiation in or out of wedlock.

11. With regard to maintenance:

According to the draft prepared by the Sub-Commission on Civil Legislation, "the maintenance obligation incumbent on the holders of parental authority implies the provision of sustenance". Here also no distinction is made between persons born in wedlock or out of wedlock. Nor is any order of priority established among the claimants on the basis of birth out of wedlock.

12. With regard to succession:

The Upper Voltan initial Draft Act on Succession distinguishes, with regard to children born out of wedlock, between those born before or after the dissolution of marriage and those born during marriage, i.e., the fruit of adulterous relationships. The former have the same rights of succession from their father or their mother as children born in wedlock. The latter have lesser rights where they compete with children born of the marriage.

These provisions gave rise to controversy within the Commission. However, they have been retained, the majority considering that they constituted a measure of protection of the family and were in conformity with traditional law.

13. Nationality:

In the Upper Voltan Nationality Code, the distinction between legitimate filiation and natural filiation has been eliminated.

14. According to the draft Regulations on Civil Status:

A full copy of the document inscribed or transcribed in the registers of civil status is given only to certain persons or authorities (cf. art. 46 of the draft).

Excerpts given to any other applicant indicate "without other information, the year, day, hour and place of birth, and the sex, given names and family names of the child ...".

15. In Upper Voltan legislation, there are no special restrictions for the adoption of a child born out of wedlock, either with regard to the terms of adoption or the consequences thereof.

16. The new constitution of the Republic of Upper Volta guarantees equality of civic rights, without discrimination on the basis of birth out of wedlock.

Any distinction as to birth ... is abolished (cf. para. III, subpara. 2). State aid to children born out of wedlock comes within the more general framework of social action. It consists of assistance to persons having care of children and not having sufficient resources, without distinction as to whether the children are born in wedlock or out of wedlock.

This assistance also takes the form of school or other supplies.

Annex

DRAFT GENERAL PRINCIPLES ON EQUALITY AND NON-DISCRIMINATION IN RESPECT OF PERSONS BORN OUT OF WEDLOCK

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 and 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 that everyone is entitled to all the rights and freedoms set forth therein without distinction of any kind,

Whereas the same social protection for all children, whether born in or out of wedlock, has been proclaimed in the Declaration of the Rights of the Child of 1959 and in article 25, paragraph 2, of the Universal Declaration of Human Rights and confirmed by article 10, paragraph 3, of the International Covenant on Economic, Social and Cultural Rights and by article 24 of the International Covenant on Civil and Political Rights,

Whereas efforts should be made, through all possible means, to enable all persons to enjoy the equal and inalienable rights to which they are entitled,

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 against themselves or their unmarried mothers in violation of the principles of equality and non-discrimination set out in the Charter of the United Nations, the International Covenants on Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Universal Declaration of Human Rights and the Declaration of the Rights of the Child,

Now therefore, with a view to eliminating this form of discrimination, the following general principles are proclaimed:

1. Every person born out of wedlock shall be entitled to legal recognition of his maternal and paternal filiation.

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 if it 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.

5. Any person born of parents who marry each other after the birth of that person shall be considered to be born of that marriage.

6. Every person born in wedlock, or considered so as a result of the subsequent marriage of his parents, shall retain his status notwithstanding the invalidity or annulment of the matrimonial link.

7. Every person born out of wedlock, once his filiation has been established, shall have a legal status equal to that of 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, provided filiation has been established. 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.

14. 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.

15. When national legislation provides for adoption, the adoption of children born out of wedlock shall not be subject to any additional restrictions beyond those applicable to the adoption of children born in wedlock. Adoption shall have the same consequences in both cases.

16. Every person born out of wedlock shall enjoy the same political, social, economic and cultural rights as persons born in wedlock. The State shall render material and other assistance to children born out of wedlock.
