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Explanatory Report to the European Convention on the Legal Status of Children born out of Wedlock

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I. The Convention on the Legal Status of Children Born out of Wedlock, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Legal Co-operation (CCJ), was opened to signature by member States of the Council of Europe on 15 October 1975.

II. The text of the explanatory report prepared by the committee of experts and submitted to the Committee of Ministers of the Council of Europe, as amended and completed by the CCJ, does not constitute an instrument providing an authoritative interpretation of the Convention, although it might be of such a nature as to facilitate the application of the provisions contained therein.

Introduction

1. In 1970 the question of the legal status of children born out of wedlock was included by the Committee of Ministers in the chapter of the Intergovernmental Work Programme of the Council of Europe concerning legal activities.

2. The study of this question was recommended by the European Committee on Legal Co-operation (hereafter called the CCJ), which had noted that present legislation in the various European States is tending to improve the situation of children born out of wedlock. The CCJ considered, therefore, that concerted action at a European level would be highly useful.

3. Furthermore, the Committee of Ministers adopted, on 15 May 1970, Resolution (70) 15 on the social protection of unmarried mothers and their children which had been prepared by the Social Committee of the Council of Europe.

4. The work of the Social Committee in the field mentioned above, and notably that of the ad hoe sub-committee instituted for this purpose, has also touched upon some legal aspects of the protection of children born out of wedlock. It was thus agreed that the C0 should take this work into account when carrying out the study of the problem of the legal status of children born out of wedlock.

5. For the study of this problem, the CCJ instituted, with the approval of the Committee of Ministers, an intergovernmental committee of experts whose terms of reference were to examine means of reducing the wide disparities at present existing in the legal status of children born out of wedlock. The Chairman of the ad hoe sub-committee of the Social Committee participated in the work of the committee of experts.

6. In carrying out its task, the committee of experts held six meetings during which it prepared a draft Convention on the Legal Status of Children Born out of Wedlock and a draft explanatory report to accompany this Convention.

7. The draft Convention and the draft explanatory report were submitted to the CCJ for consideration and observations. Taking into account the observations made by the governments and the Legal Affairs Committee of the Consultative Assembly, the CCJ set up a sub-committee with the task of revising the draft Convention in the light of the above-mentioned observations. The subcommittee held a meeting and submitted to the CCJ a revised text of the draft Convention and the explanatory report. The Committee of Ministers then adopted the text of the Convention, as submitted to it by the CCJ and authorised the publication of the explanatory report. The Committee of Ministers also decided to open the Convention to the signature of member States of the Council of Europe at their 249th meeting in October 1975.

General remarks

8. The rules which have been set out in the Convention have as their objective to assimilate the legal status of children born out of wedlock with those born in wedlock and also to contribute consequently to the harmonisation of the laws of States in this field.

9. However, as not all States are able to achieve this objective immediately, the Convention, by means of a system of reservations inspired by the system already in use in the European Convention on Adoption of 1967, allows States to achieve this progressively by requiring reservations to be re-examined every five years.

10. This Convention does not deal with all problems relating to the legal status of children born out of wedlock. In particular, it does not deal with the question whether paternal affiliation, evidenced or established as provided in Article 3 or legitimisation by subsequent marriage as provided in Article 10, should have retrospective effect.

11. As far as terminology in the Convention and the explanatory report is concerned, it should be noted that the terms:

- "father" and "mother", "parent" or "parents" mean a person or persons in respect of whom the affiliation of a child has been evidenced or established;

- "internal law" means the law of the Contracting State without prejudice to the eventual application of the rules of private international law.

Commentaries on the provisions of the Convention

Article 1

12. The measures referred to in this article will usually take the form of legal or administrative texts. These measures should be taken not later than the entry into force of the Convention in relation to the Contracting Party concerned. A Contracting Party will, however, be considered to have brought its law into line with the provisions of the Convention if a firm and constant practice implementing those provisions exists. Thus the term "law" used in the English text is to be taken, throughout the Convention, to mean legal rules of general application, including a firm and constant practice.

Article 2

13. The principle set out in the Convention and which is in force in most of the member States of the Council of Europe is that maternal affiliation is automatically established by the sole fact of giving birth to the child.

In unusual cases. where the mother is unknown, the maternal affiliation is established by the sole fact of the birth but would only come into full effect when the identity of the mother becomes known.

14. In some States, however, maternal affiliation is only established if the name of the mother is included in the birth certificate, and for some of the States even this indication is insufficient. According to the legislation of these States it is also possible to register a child at birth without giving the name of the mother. These States, if they maintain their legislation, may make reservations as provided for by Article 14.

15. The committee took into consideration the convention of the International Commission of Civil Status (ICCS) relating to the establishment of maternal affiliation of natural children of 12 September 1962. It came to the conclusion that the 1962 Convention may only constitute an intermediate stage in relation to the present Convention.

Article 3

16. This article sets out two ways of evidencing or establishing paternal affiliation as explained hereafter. It also sets out the general rule according to which legal proceedings to determine paternity should in all cases be allowed.

17. Thus, subject to reservations formulated in accordance with Article 14, any provision of the internal law limiting cases in which legal proceedings to establish paternity may be brought will be incompatible with the Convention.

18. The internal law shall determine the form of voluntary recognition. Such a recognition may arise in particular when the father makes a declaration on the birth certificate or on an official document, for example before the registrar, the courts, notaries, youth officers etc.

Furthermore, any doubt concerning the will of the person making the voluntary recognition is governed by the internal law.

19. The question was raised as to whether or not Article 3 is complied with if affiliation is established when the presumed father of the child, stated to be such in an administrative order, has failed to contest his paternity before a judicial authority within the relevant time limit.

It was thought that such an omission amounted to an implicit voluntary recognition and therefore the method in question complied with the provisions of the Convention.

20. The determination of the persons or authorities who may or shall take action to establish paternity of a child born out of wedlock as well as the time limits within which such proceedings may be brought are left to the internal law.

21. The words "judicial decision" include the decision of a judicial authority or an administrative authority acting judicially. This matter is left to the internal law to determine.

22. In certain States the establishment of paternal affiliation of some children born as a result of an adulterous association is not allowed. These States may formulate a reservation if they consider that they are not in a position to repeal the prohibition immediately.

23. The States may also formulate a reservation if they wish to maintain the prohibition on establishing an affiliation which would bring to light the incestuous nature of the relationship between the begetters of the child. However it was recognised that a single reservation could apply both to children born out of adulterous associations and to children born out of incestuous associations.

Article 4

24. This article preserves the possibility of opposing or contesting a voluntary recognition when the person seeking to recognise or who had recognised the child is not the biological father. It was noted that some States made use of the procedure of opposition, others made use of the procedure of contestation, while other States made use of both these procedures. For this reason the terms "opposed" or "contested" are both contained in Article 4.

25. The question of those persons or authorities who may oppose or contest a voluntary recognition is not dealt with by the Convention; this question is left to the internal law.

Article 5

26. This article applies to proceedings brought either to establish or contest paternity.

27. Owing to the importance of establishing an affiliation scientific evidence should be allowed. Evidence relates particularly to the methods of evidence resulting from recent advances in the field of heredo-biology and anthropo-biology.

The evidential material would permit the determination in many cases of the biological father of a child born out of wedlock, even where the mother had had sexual relations with several men during the presumed period of conception. As a result of this the prevailing reluctance to allow legal proceedings to take place in such cases was not shared.

28. The Convention does not affect the general rules of the internal law as to the rules of evidence.

Article 6

29. This article imposes on the father and mother of a child born out of wedlock and on certain members of his family the same obligation to maintain this child as in the case of a child born in wedlock. In order to determine the content, the extent, the duration etc. of this obligation reference should be made to the relevant provisions of the internal law relating to children born in wedlock. Thus children born out of wedlock should be treated in this matter on an equal footing with those born in wedlock.

30. The respective contributions of the father and mother and the members of their family for the payment of maintenance is left to the internal law.

Article 7

31. The attribution or transfer of parental authority is left to be determined by the internal law.

32. However, the effect of paragraph 1 of this article is to prevent paternal affiliation, established in respect of a child born out of wedlock whose maternal affiliation has already been established according to Article 2, from automatically resulting in the attribution of parental, authority to the father only. Therefore this rule is applicable only if the affiliation has been established in the case of both parents; it does not prevent the parental authority of a child born out of wedlock from being attributed jointly to the father and mother. This last solution would be very appropriate for the child when its parents, though not married, share a common household.

This does not prevent the parental authority from being attributed or given to a third party.

This same paragraph only deals with the situation where the mother is able to exercise parental authority; it does not prevent a provision of the internal law allowing parental authority to revert automatically to the father alone in a case where the mother is unable to exercise it.

33. According to paragraph 2 the internal law must provide for the transfer of parental authority. Thus it would be possible either to take the parental authority away from one of the parents to give it to the other or to a third party or, when it belongs to one of the parents, to give it to both or, furthermore, when it belongs to both parents, to give it to just one of them or to a third party. It is for the internal law to determine the cases for transfer; one such case might be where the parental authority is conferred on the mother and the mother dies or finds herself unable to exercise such authority or is regarded as not being fit to exercise it.

Article 8

34. This article imposes upon the Contracting Parties the obligation to provide in their internal laws for the possibility that the parent who does not have parental authority over or the custody of the child, might obtain access to it in appropriate cases. It is for the internal law to determine these cases, for example by providing that this right should be given whenever the interests of the child require it or else whenever access would not be contrary to the child's interests.

35. The exercise of this right to access would be granted or refused by a judicial or administrative authority. Where the exercise of such right of access is granted, the competent authority shall determine where necessary the extent and manner of such exercise.

Article 9

36. This article gives children born out of wedlock the same rights of succession as children born within wedlock.

Article 10

37. It was agreed that this assimilation need not be automatic but could be subject to a judicial or administrative authority establishing that the conditions have been fulfilled.

38. It was understood that the Convention does not forbid a Contracting Party from providing, by its internal law, a single legal status for all children and also does not forbid this party from taking special measures of protection for those children who do not live with their parents.

Articles 11 to 16

39. These articles are in conformity with similar provisions as set out in other agreements or conventions of the Council of Europe. Article 14 was drawn from the European Convention on the Adoption of Children.

40. As a result of the first paragraph of Article 14 a State may only formulate a maximum of three reservations. It is for the State to withdraw its reservations at an appropriate moment in order to attain progressively the objectives of assimilation in Articles 2 to 10.

41. It was agreed that the word "provision" in the second subparagraph of paragraph 1 of Article 14 refers to the contents of a single paragraph, therefore Articles 6 and 7 are to be considered as containing two provisions each.

42. A reservation made by a State under Article 14 in no way prevents a judge of another Contracting State from declaring contrary or not to public policy either the application of the law of the first State where it is applicable according to the rules of private international law or the recognition or enforcement of a judicial decision given in another State on the basis of the said law.