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Respect for the principle of gender equality in civil law

Reply to Recommendation¹: Recommendation 1798 (2007)
Committee of Ministers

1. The Committee of Ministers has examined the Parliamentary Assembly's [Recommendation 1798 \(2007\)](#) on respect for the principle of gender equality in civil law with close attention, and shares its concern about the continued discrimination suffered by women. It recalls that the aim of the Council of Europe, in particular through the activities of its Steering Committee for Equality between Women and Men (CDEG), to which it has forwarded the recommendation for comments (see Appendix 1), is to combat all discrimination against women in order to achieve genuine equality between women and men.

2. It welcomes the Parliamentary Assembly's proposals for eliminating all forms of discrimination against women and achieving equality between women and men in civil law. The Assembly's recommendations in paragraph 9.2.1, inviting member states to review and, if necessary, amend their domestic legislation, especially in family law, to ensure that they protect gender equality in civil law, are particularly relevant. On this point, and on several others raised in the recommendation, the Committee of Ministers would draw the Assembly's attention to the comments of the Bureau of the European Committee on Legal Cooperation (CDCJ) (see Appendix 2).

3. Turning to paragraph 9.2.2 of the recommendation, the Committee of Ministers acknowledges the fundamental nature of equality between spouses, as set out in Article 5 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and confirmed in the Court's case law.² It invites member states to review any provisions in bilateral or multilateral treaties that could lead to the acceptance or application of discriminatory rules of foreign law.

4. Several other legal instruments aimed at combating all forms of discrimination against and violence towards women have already been adopted. The Committee of Ministers refers in particular to Article 14 (prohibition of discrimination) of the ECHR and Protocol No. 12 to the Convention, which establishes a general prohibition of discrimination. It also draws attention to its Recommendations No. R (85) 2 on legal protection against sex discrimination, Rec(2002)5 on the protection of women against violence and Rec(2007)17 on gender equality standards and mechanisms.

5. Together, these instruments provide an important legal framework for combating discrimination in all its forms. The Committee of Ministers therefore encourages member states to consider signing and ratifying these protocols and take all necessary steps to implement the aforementioned recommendations, in order to make them fully effective.

6. Bearing this in mind and in the light of the comments of the committees it has consulted, particularly those of the Bureau of the Steering Committee for Human Rights (CDDH) (see Appendix 3), the Committee of Ministers does not see, at this stage, the need for the drafting of a new protocol to the European Convention on Human Rights, as the Assembly proposes in paragraph 9.1 of its recommendation.

1. Adopted by the Committee of Ministers on 18 June 2008, at the 1030th meeting of the Ministers' Deputies.
2. Refah Partisi (The Welfare Party) and Others v. Turkey (judgment of 13 February 2003, paragraph 128).



Appendix 1 – Comments of the Bureau of the Steering Committee for Equality between Women and Men (CDEG)

1. The CDEG Bureau thanks the Parliamentary Assembly for this recommendation and shares its concern regarding the continuing discrimination against women. It recalls that the aim of the Council of Europe, in particular through the action of its Steering Committee for Equality between Women and Men (CDEG), is to combat any discrimination against women in order to achieve effective gender equality.
2. It agrees with the proposals made by the Parliamentary Assembly to eliminate any form of discrimination against women and achieve gender equality in civil law. In particular, it welcomes and supports paragraph 9.2.1 recommending the Committee of Ministers to invite member states to review and, if necessary, amend their domestic legislation, especially in family law (including women's personal status, marriage and divorce law, and the rules governing the passing on of mothers' surnames to their children) to ensure that they protect gender equality in civil law.
3. It also welcomes and supports the call of the Assembly (paragraph 9.2.2) recommending the Committee of Ministers to review any provisions in bilateral or multilateral treaties, which could lead to acceptance or application of any discriminatory rules of foreign law.
4. It recalls that the Committee of Ministers has already adopted several texts to combat any form of discrimination and violence against women. It refers in particular to Article 14 (prohibition of discrimination) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which stipulates that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".
5. It recalls that Article 5 (equality between spouses) of Protocol No. 7 to the Convention establishes that "Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent states from taking such measures as are necessary in the interests of the children" and that Protocol No. 12 to the Convention establishes a general prohibition of discrimination. It also refers to Recommendation No. R (85) 2 on legal protection against sex discrimination and Recommendation Rec(2002)5 on the protection of women against violence.
6. Finally, the CDEG Bureau wishes it to be recalled that the 1988 Declaration of the Committee of Ministers on the Equality of Women and Men states that "sex-related discrimination in the political, economic, social, educational, cultural and any other fields constitutes impediments to the recognition, enjoyment and exercise of human rights and fundamental freedoms".
7. All these instruments provide a legal framework to combat any form of discrimination. The CDEG Bureau therefore encourages member states to sign and ratify the protocols to the Convention and to take all the necessary measures to implement the recommendations quoted above in order that they become fully effective.
8. Concerning the invitation of the Assembly to the Committee of Ministers to draw up a new protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, enshrining gender equality as a human right with pre-eminence over any provision deriving from, or applicable under, private international law agreements or conventions, the CDEG Bureau will examine this proposal further, in co-operation with the other relevant Council of Europe steering committees, in particular the European Committee on Legal Co-operation (CDCJ) and the Steering Committee for Human Rights (CDDH), and thinks that this question could be considered by the Committee of Ministers at a later date.

Appendix 2 – Comments of the Bureau of the European Committee on Legal Co-operation (CDCJ)

1. Following the adoption by the Parliamentary Assembly of [Recommendation 1798 \(2007\)](#) on respect for the principle of gender equality in civil law, the Committee of Ministers decided to communicate it to the European Committee on Legal Cooperation (CDCJ), for information and possible comments by 15 October 2007.
2. The Bureau of the CDCJ took note of the recommendation of the Parliamentary Assembly and underlined that it covers many areas of concern to the CDCJ.
3. The Bureau of the CDCJ welcomes the recommendation of the Assembly to invite member states to review and, if necessary, amend their legislation in civil law in order to foster the principle of gender equality. The Bureau of the CDCJ agrees that inequalities in matters of family law, including marriage and divorce, manifest themselves in various forms and concern women more frequently, although they also affect men in some legislation and administrative and judicial practices.
4. As regards the minimum age for marriage, the Bureau of the CDCJ notes that the explanatory memorandum to this recommendation refers, in paragraph 8, to Assembly [Resolution 1468 \(2005\)](#) that requests member states of the Council of Europe to fix at or raise to 18 years the minimum statutory age for marriage for women and men. Indeed, the CDCJ, in its Opinion on Parliamentary Assembly [Recommendation 1723 \(2005\)](#) on forced marriages and child marriages, presented to the Committee of Ministers (see CM/AS(2006)Rec1723 final), noted the actual changes in Europe in this respect and identified a clear tendency to fix this age for both men and women at 18 years.
5. The Bureau of the CDCJ shares the observation of the Parliamentary Assembly concerning the outdated character of domestic legislation of some of the Council of Europe member states obliging women to bear their husband's surname. The Bureau of the CDCJ recognises that it is the fundamental right of a woman to retain her maiden name upon marriage, as guaranteed under the provision of Article 8 (right to respect for private and family life), combined with Article 14 (prohibition of discrimination) of the European Convention on Human Rights (ECHR) (*Ünal Tekeli v. Turkey*, judgment of 16 November 2004, paragraph 68). This principle is also affirmed in the Committee of Ministers' Resolution (78) 37 on equality of spouses in civil law, which in paragraph 6 recommends member states not to require by law a spouse "to change [...] family name in order to adopt the family name of the other spouse".
6. The explanatory memorandum of [Recommendation 1798 \(2007\)](#) identifies, in paragraphs 14 and 15, the inequalities which are to the detriment of women regarding the financial consequences of and the grounds for divorce, and which still survive in the domestic legislation of a few member states. The Bureau of the CDCJ stresses that legal provisions granting privileges for men in the event of divorce violate the principle of gender equality (*Refah Partisi (The Welfare Party) and Others v. Turkey*, judgment of 13 February 2003, paragraph 128). The Bureau of the CDCJ emphasises the need to urge member states to amend, where necessary, their legislation in order to suppress any discrimination between the spouses in the case of divorce.
7. Regarding paragraph 4 of the recommendation and the discrimination between women and men in the passing on of the parents' surname to children, standard-setting activities have already been carried out in this field by the CDCJ. Further to the Committee of Ministers' authorisation (890th meeting, Document CM(2004)106 rev), the "White Paper on the principles concerning the legal consequences of parentage", prepared by a working party of one of the subordinate bodies of the CDCJ, the Committee of Experts on Family Law, was published. The White Paper, in principle 27/2, sets out that any system for the choice of family name of the child should not result in "an unjustified discrimination of one of the parents". The Bureau of the CDCJ notes that principle 27 of the White Paper refers to paragraph 17 of Resolution (78) 37 on equality of spouses in civil law, which gives parents the option of choosing which surname to attribute to their child.
8. The explanatory memorandum to the recommendation notes, in paragraph 16, the lack of legal provisions in some states for a woman to challenge her husband's legal paternity. The White Paper, in principle 8/2, lays down that a right to establish paternal affiliation shall be given to the child and that it may also be given to the mother and/or the person claiming to be the father. The Bureau of the CDCJ is of the view that this possibility, if given to one of the parents (or claiming parent), should also be given to the other in order to avoid discrimination against one of the parties.
9. The recommendation refers in paragraph 2 to the practice, in some cases, of discrimination against men concerning the exercise of parental rights. The Bureau of the CDCJ emphasises that recent Council of Europe conventions concerning family law contain provisions to ensure equal application of parental rights for both genders. Article 4.1 of the Council of Europe Convention on Contact concerning Children (ETS No. 192)

enables both parents to obtain and maintain regular contact with their child. In the draft European convention on the adoption of children (revised), the consent of the father of the child is also required in order that an adoption may be granted, whether the child was born in or out of wedlock. This is not the case in the 1967 version of the convention, which refers in Article 5, paragraph 1 to “the consent of the mother and, where the child is legitimate, the father”.

10. The Bureau of the CDCJ shares the concern of the Parliamentary Assembly concerning the application of discriminatory rules of foreign law by member states under bilateral and multilateral treaties. The Bureau of the CDCJ recognises the fundamental nature of equality between spouses, as enshrined in Article 5 of Protocol No. 7 to the ECHR. This principle is also affirmed by the European Court of Human Rights in its Grand Chamber decision concerning *Refah Partisi (The Welfare Party) and Others v. Turkey* (judgment of 13 February 2003, paragraph 128), which condemns “rules permitting discrimination based on the gender of the parties concerned, as in polygamy and privileges for the male sex in matters of divorce and succession”. The Bureau of the CDCJ supports the call of the Parliamentary Assembly to urge member states to take measures, where necessary, in order to eradicate discrimination linked to rules of foreign law arising from their commitments under bilateral and multilateral treaties.

11. As regards the call of the Parliamentary Assembly to adopt a new protocol to the ECHR, in order to secure gender equality as a positive human right with pre-eminence over domestic legislation and any provision of private international law agreements and conventions, in the opinion of the Bureau of the CDCJ, this question is premature and could be considered by the Committee of Ministers in due course.

Appendix 3 – Comments of the Bureau of the Steering Committee for Human Rights (CDDH)

1. The Bureau of the CDDH welcomes this Parliamentary Assembly recommendation and refers to the very relevant comments drawn up by the Bureau of the Steering Committee for Equality between Women and Men (CDEG).
2. Concerning the Assembly's proposal to draw up a new protocol to the European Convention on Human Rights enshrining gender equality as a fundamental human right with preeminence over any provision deriving from, or applicable under, private international law agreements or conventions (paragraph 9.1), the Bureau of the CDDH endorses the Assembly's reasons behind this proposal, but considers nevertheless that effective implementation of the existing set of legal standards would be perfectly adequate to deal with the problems raised in the recommendation. In this regard, it draws attention to the fact that at the base of Protocol No. 12 was the member states' will to achieve complete equality between women and men by elimination of all forms of discrimination. This is why it is essential to encourage ratification of this protocol, as well as Protocol No. 7.
3. The Bureau of the CDDH can therefore only but join the Assembly in inviting member states to ratify these two protocols.
4. Moreover, it agrees with the Assembly that member states that have not yet ratified these protocols must be encouraged to review, without delay, both their own domestic legislation, especially in family law, to ensure that they protect gender equality in civil law (paragraph 9.2.1), and any provisions in bilateral or multilateral treaties which could lead to the acceptance or application of discriminatory rules of foreign law (paragraph 9.2.2).