



Recommendation 1798 (2007)¹

Respect for the principle of gender equality in civil law

Parliamentary Assembly

1. The Parliamentary Assembly welcomes recent developments in many member states of the Council of Europe securing more respect for the principle of gender equality in civil law. It remains concerned, however, that in some areas of law and in some jurisdictions – even in Europe – women continue to suffer discrimination.

2. Two studies of Europe's legal systems commissioned by the Assembly's Committee on Equal Opportunities for Women and Men have revealed that this discrimination is especially frequent in terms of women's personal status and in family law, in both domestic and international law. In practice, in some cases, discrimination against men also occurs, in particular concerning the exercise of parental rights.

3. Regarding discrimination against women in private relations governed by national law, a certain lack of equality within couples (inequality in matters of marriage and in the event of divorce) can be cited, as well as discrimination against mothers in establishing relationships by descent and the legal consequences thereof (including the passing on of the mother's surname to her children). Regarding the principle of gender equality in private international relations, rules of private international law providing for attachment to the husband's or father's national law are especially worrisome, as is the inequality resulting from the application of discriminatory rules of foreign law.

4. The Assembly recalls its Recommendations 1271 (1995) and 1362 (1998) on discrimination between women and men in the choice of a surname and in the passing on of parents' surnames to children. While most Council of Europe member states have in the meantime made it legal for a woman to retain her maiden name upon marriage, few have made it possible for a woman to pass on her surname to her children. Forcing a woman to take her husband's name can be seen as a form of "depersonalisation" of the woman, reducing her to a "part" of the husband's family, and violating her private life in revealing her marital status and sometimes even her marital problems to complete strangers. Similarly, the inability of women in many jurisdictions to pass on their surname – and thus part of their identity – to their children can be seen as a form of discrimination against women. It is high time that all Council of Europe member states modify their legislation in both these areas without further delay in accordance with the Assembly's recommendations.

5. Discrimination against women also occurs in the sphere of private international relations, for instance where a conflict-of-law rule provides for a woman's attachment to the national law of residence of her husband or father. The same is true where such a rule results in the application of a foreign discriminatory provision. A typical example is legislation based on the traditional principles of Muslim law, which treat women as fundamentally unequal in status. When confronted with such legislation, European courts usually resort to the international public policy (ordre public) argument, which enables them to exclude the application of a rule of foreign law incompatible with the principle of equality.

6. However, the difficulties arising from acceptance of such foreign laws are greater where their application is an outcome of international treaties to which Council of Europe member states are party, as the European Convention on Human Rights (ETS N°. 5) does not automatically take precedence over other international instruments or provisions of foreign law designated by an international treaty.

1. Text adopted by the Standing Committee, acting on behalf of the Assembly, on 24 May 2007 (see [Doc. 11177](#), report of the Committee on Equal Opportunities for Women and Men, rapporteur: Mrs Smirnova).



7. The Assembly is convinced that only a new protocol to the European Convention on Human Rights enshrining gender equality as a human right can ensure that remaining discrimination against women in civil law, both in the domestic legislation of Council of Europe member states and in private international law, is finally eliminated.

8. This solution – going further than the existing rules of non-discrimination enshrined in Article 14 of the European Convention on Human Rights and in Protocol No. 12 to the Convention – would have the advantage of ensuring legal certainty by expressly providing for the pre-eminence of the principle of gender equality over any provision deriving from, or applicable under, an international agreement or convention. This pre-eminence would, of course, still be subject to the need to make an actual assessment of the question of equality in the case at hand.

9. The Assembly thus recommends that the Committee of Ministers:

9.1. draw up a new protocol to the European Convention on Human Rights enshrining gender equality as a fundamental human right with pre-eminence over any provision deriving from, or applicable under, private international law agreements or conventions;

9.2. invite member states, in the meantime, to ensure that they protect gender equality in civil law by:

1. reviewing and, if necessary, amending their own domestic legislation, especially in family law (including women's personal status, marriage and divorce law, and the rules governing the passing on of the mother's surname to her children);
2. reviewing and, if necessary, renegotiating or rejecting any provisions in bilateral or multilateral treaties which could lead to the acceptance or application of discriminatory rules of foreign law, including provisions in foreign law validating polygamous marriages and repudiations.