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COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS

DRAFT REPORT

on discrimination between men and women in the choice of a surname and in the passing on of parents' surnames to children

(Rapporteur: Mr MASSON, France, European Democratic Group)

I. Preliminary draft recommendation

1. The Assembly recalls that a name is an element which determines the identity of individuals and that, for this reason, the choice of name is a matter of considerable importance. Continued discrimination between men and women in this area is therefore unacceptable.

Many countries have introduced legislative reforms in recent decades with the aim of gradually achieving equality between the sexes in respect of the legal system governing surnames. Other countries have, however, retained the traditional legal systems based on criteria which are often doubly discriminatory: discriminatory between mother and father and discriminatory in terms of whether the child is legitimate or illegitimate. Accordingly, a determined effort needs to be made to ensure that the legislation of all Council of Europe member states is quickly brought into line with the major principles of equality.

2. The Assembly points out that the Committee of Ministers of the Council of Europe adopted a very explicit resolution in 1978 (Resolution (78) 37), which recommended *inter alia* that member states should eliminate all discrimination between men and women in the legal system governing surnames. It further points out that many Council of Europe member states have ratified the United Nations Convention of 18 December 1979, Article 16 of which stipulates that all signatory states should take the necessary measures to eliminate all sexist provisions in respect of the right to choose a family name.

3. The Assembly is therefore surprised that no follow-up action has been taken by some Council of Europe member states on the Committee of Ministers's 1978 resolution. It is also surprised that those member states which are signatories to the international convention initiated by the United Nations in 1979 have not fulfilled their commitments.

4. Consequently, the Assembly recommends that the Committee of Ministers of the Council of Europe identify those member states which retain sexist discrimination and ask them what measures they are planning in order to:

— implement strict equality between mother and father in the passing on of a surname to their children;

— ensure strict equality in the event of marriage with regard to the choice of a common surname for both marriage partners;

— eliminate all discrimination in the legal system for conferring a surname between legitimate and illegitimate children.

5. The Assembly also recommends that the Committee of Ministers ask each member state which is a signatory to the 1979 United Nations Convention and which has not brought its legislation into line to specify whether it plans to do so and if so, when and how.

II. Draft explanatory memorandum by Mr MASSON

In the majority of European countries, the concept of surname and particularly the introduction of legal regulations governing the passing on thereof are comparatively recent developments. Initially, surnames met a social need to designate persons outside the family group. There were no external legal constraints and individuals were referred to by some physical characteristic (Brown, Little, etc.), a geographical feature (Hill, Woods, etc.), their occupation (Carpenter, Butcher, etc.) or some other distinguishing feature.

The appearance of registers kept by civil or religious authorities (for example parish registers) brought with it a stabilisation of surnames. The ultimate consequence was the gradual introduction of strict legal rules governing the passing on of surnames. In virtually all countries the social system of the time gave a more decisive role to the man than to the woman. The rules for passing on surnames were therefore almost exclusively weighted in favour of the father's name.

Recent changes in values have prompted a reassessment of the role of men and women in society. For various reasons, however, the choice of surname is an area in which there has been little progress. Although certain countries have made an effort to bring about the gradual elimination of all discrimination, in many others the passing on of names has remained one of the last bastions governed by anachronistic rules.

Broadly speaking, there are four different situations: countries continuing to impose purely and simply the passing on of the father's surname; countries where the general rule is for the child to be given the father's surname but where the mother's name is accepted provided that this is at the specific request of the parents; countries where there is strict equality for father and mother in giving their child a surname; countries where the concept of surname is not fully established and where the surname is not necessarily decided on according to the surname of the parents.

The Council of Europe has a particular role to play in upholding human rights and in combating all forms of discrimination. It is quite legitimate therefore that it should concern itself with the problems involved in the passing on of surnames. Current interpretation of the European Convention on Human Rights condemns all inequality based on sex.

Accordingly, there is a need for analysis to highlight the different situations where discrimination exists and to underline the injustice caused as a result. This will demonstrate the need to adopt a resolution recommending that member states accord women the same rights as men with regard to the passing on of a surname to their children.

A. Regulations on the choice of surname vary from country to country

The legal regulations governing the passing on of surnames vary considerably from one country to another. The variety of systems in operation gives a fairly full idea of the possible changes which could take place in those countries where discrimination between the mother and father still exists. This report will look at the situation first in the twelve European Union member states and then in the other twenty Council of Europe member states.

1. The situation in the twelve European Union member states

Within the European Union some countries have adapted their legislation in line with the change in values and the principles of equality between the sexes. Different solutions have been adopted: the option of choosing either surname, the use of the two surnames collocated, the notion of the married name (the couple's surname being decided at the time of their marriage), etc. In several countries, legislative reform has only been introduced following developments in the case-law of the constitutional courts with regard to their interpretation of the concept of equality between the sexes.

The example of Germany is the most significant since several solutions were implemented successively, leading up to a modern and strictly egalitarian system for the choice of surname. Spain and Portugal are also interesting examples: in both cases the method of juxtaposing the parents' names is applied, with one system ensuring complete equality between the father and the mother (Portugal), the other partial equality (Spain). Finally, Ireland and the United Kingdom have a completely different philosophy since there are no hard-and-fast rules governing the choice of individuals' surnames.

a) The acquisition of surnames in Germany

In Germany, surname legislation is of relatively recent origin. Until the 18th century, the passing on of a surname was virtually always decided by practice and custom. Surnames appeared in the 11th century and became more widespread during the 15th century.

As with the formation of surnames, the use of a common surname for both parents came from the aristocracy and spread to the other ranks of the nobility between the 14th and 16th centuries: the wife took the name of her husband while specifying her maiden name ("née ..."). This practice was not adopted by the middle classes until the 17th century.

When Prussia introduced precise legal rules in this field for the first time in 1794, it merely sanctioned a widespread practice: the wife and legitimate children acquired the surname of the husband and father respectively. Nevertheless, until the middle of the 19th century, the law on surnames was still considered a private matter and, in fact, there were instances of children having their mother's surname.

The Civil Code (18 August 1896) retained the principle of the unity of the family name: Article 1355 stipulated that the wife should take the name of her husband. This rule was applied without great difficulty until the 1950s.

The Basic Law, promulgated on 23 May 1949, lays down in Article 3, paragraph 2 the principle of legal equality between men and women. Article 117, paragraph 1 stipulated that any provision contrary to the principle stated in Article 3, paragraph 2 must have been brought into line with the Basic Law by 3 March 1953.

These new constitutional provisions prompted a re-examination of the regulations applied hitherto to the passing on of surnames. Legal doctrine was divided between those who defended the law in force on the grounds that it did not contravene legal equality between the sexes and those who were in favour of reforming Article 1355 of the Civil Code. The latter also based their view on Articles 1, paragraph 1 (dignity of the human being), 2, paragraph 1 (free development of the personality) and 6, paragraph 1 (protection of marriage and the family by the state) of the Basic Law.

The courts ruled that Article 1355 of the Civil Code was compatible with the Basic Law, holding that it expressed the principle of the unity of the family name and that this was the family's distinguishing mark *vis-à-vis* the outside world. In their view, the principle of equality between men and women did not necessarily mean dispensing with provisions designed to safeguard the couple and the family. They pointed out that there was in fact only one choice — between the father's surname and the mother's surname — and that the opposite solution would create inequality to the detriment of the husband. The Federal Court (supreme court in civil matters) confirmed this case-law on 13 July 1957, considering that the principle of the unity of the family name and the fact that the husband was generally speaking the family's representative in its dealings with the outside world did not represent an infringement of the personal rights of women.

In the meantime, the law on equality of the sexes of 18 June 1957 had modified Article 1355 of the Civil Code, allowing the wife to add her maiden name to the husband's name. Conformity of this new amendment with the Basic Law was established by a ruling of the Federal Administrative Court (supreme court in administrative matters) on the grounds that it did not challenge the pre-eminence of the husband's surname.

The law of 14 June 1976, amending the law on marriage and the family, introduced a new wording of Article 1355 of the Civil Code. This henceforth offered a choice between the husband's surname and the wife's surname; if no choice were made or in the event of a dispute, the husband's name continued to prevail. Furthermore, the spouse whose name was not chosen could continue to use his or her own name. The *Bundestag* preferred this solution, despite the inconveniences it represented for the identification of families in the civil register, to allowing only a composite name. In its initial draft, the bill provided for a mandatory declaration by both spouses and not the automatic choice of the father's surname in the event of disagreement. The *Bundestag* had also dismissed the composite name in order to avoid overburdening the civil registry.

In a decision of 5 March 1991, the Federal Constitutional Court (supreme court in constitutional matters) ruled that Article 1355 was contrary to the Basic Law in so far as it stipulated that the husband's name would be chosen in the event of disagreement on the choice of the family name. It considered that Article 6, paragraph 1 of the Basic Law (protection of marriage) implied the imposition of a single family name if necessary. The inequality of treatment between men and women created in this way could not in its view be justified.

Calling for a redrafting of Article 1355 of the Civil Code, the Federal Constitutional Court spelled out the provisional system for family names in the event of disagreement between husband and wife: each spouse would retain his or her own name; the surname of the child would be decided by the registrar by drawing of lots.

On 28 October 1993 the *Bundestag* adopted legislation laying down new regulations on surnames. Henceforth, when no choice is expressed by the husband and wife, both retain their own names. With regard to legitimate children, if no choice has been made between the husband's and wife's surnames after one month, the decision will be taken by the guardianship court (the bill, in its initial form, had specified the drawing of lots). The court cannot choose a composite name.

b) The acquisition of surnames in Belgium

Belgium has the same system for conferring a surname as France. A legitimate child takes the father's surname.

In cases where only the paternal affiliation of a child is established or where both paternal and maternal affiliation are established at the same time, the child is given the father's surname, except where the father is married and recognises a child conceived during the marriage by a woman other than his wife.

In cases where only the maternal affiliation of the child is established, the child is given the mother's surname. If paternal affiliation is established after maternal affiliation, there is no change to the child's surname. However, both the mother and father together, or one of them if the other is deceased, may have a declaration drawn up by the registrar to the effect that the child will in future be known by the father's surname. Such a declaration may not be made, in the event of the father's prior death or during his marriage, without the agreement of the woman with whom he was married at the time when affiliation was established.

c) The acquisition of surnames in Denmark

There is no automatic acquisition in Denmark by one spouse of the surname of the other either to replace the previous surname or to be used in conjunction with it. The law stipulates that, in principle, both spouses retain their surname after marriage. Nevertheless, the couple may opt for a joint married name, which may be either the husband's or the wife's.

The other spouse's surname may only be adopted with his or her consent. The chosen name is then recorded on the marriage certificate and a declaration of change of name must be made. However, in the event of remarriage, this name may not be transferred to the new spouse.

In Denmark, a child's surname must be explicitly stated on the birth certificate, at the time of birth if the parents have a joint married name and no later than six months after the birth if they do not.

A legitimate child's surname is either: the parents' joint married name; the surname of the father or mother at the time of the child's birth (which may be a name acquired through a previous marriage); the last surname (not acquired by marriage) of the father or mother before the birth.

A natural child's name is given by the person who has parental authority. This may be the name of the mother at the time of birth, or the name of the father at the time of birth if he has recognised the child. Legitimation has no effect on the child's surname.

d) The acquisition of surnames in Spain

In Spain, the birth certificate indicates the child's surname (Article 55 of the Civil Registry Law and Article 12 of the Civil Registry's Rules of Procedure). With regard to the surname of a child born to married parents, regulations stipulate that the child has as a first surname the first surname of the father and as a second surname the first personal surname of the mother (Article 109 of the Civil Code, Article 55 of the Civil Registry Law and Article 109 of the Civil Registry's Rules of Procedure).

All the children of a married couple have the same name, unless changes are subsequently made. The child may, on reaching the age of majority, ask for the order of his or her surnames to be changed.

For children born out of wedlock, this same general rule is applied once the affiliation of both children has been established. If affiliation has been established only in respect of the father, the child has both the father's surnames in the same order. If affiliation has been established only in respect of the mother, the child has both the mother's surnames; however, their order may be reversed at any time, and also from the outset provided the mother makes a declaration to this effect within the time limit laid down for the birth certificate.

If the father has been convicted of a criminal offence for the sexual relations which led to the birth or if affiliation has been legally established despite the father's opposition, the child will not be given the father's surname unless the child or his or her legal guardian specifically requests (Article 111 of the Civil Code).

e) The acquisition of surnames in France

In France, the law of 6 Fructidor of the year II, supplemented by the law of 11 Germinal of the year XI, laid down the principle that "No citizen may bear a surname or first name other than those recorded on his or her birth certificate". Although there is no explicit legislative provision to this effect, a legitimate child must be given the name of the father. This is quite simply a consequence of traditional practice upheld by case-law. The courts have ruled that a child may only have the surname of the father and not that of the mother (Court of Cassation, 10 November 1902), even though the family may be known by the combined name of the two spouses (Paris Court of Appeal, 21 January 1903).

With regard to natural children, Article 334-1 of the Civil Code stipulates that the child "shall acquire the name of the parent in respect of whom affiliation is first established; he or she shall acquire the name of the father if affiliation is established simultaneously in respect of both parents". However, the changing of a natural child's surname is governed by Article 334-2, which enables him or her, even though paternal affiliation may only have been established subsequently, to take the father's surname if the two parents make a joint declaration to this effect to the guardianship court. The consent of the child is required if he or she is over 15 years of age.

The French system for passing on a surname is therefore discriminatory and archaic. The reason for this is that, in contrast to the situation in Germany, the developments in the constitutional concept of equality of the sexes have had no practical repercussions. Elimination of all discrimination in this regard did appear however among the 110 proposals put forward by the President of the Republic, François Mitterrand, during his election campaign. Similarly, under the 7th legislature (1981-1986), the

government pronounced in favour of reform but did not really have the necessary political will. Furthermore, the Minister for Justice, Mr Badinter, was himself in favour of keeping matters as they stood, and he had the support of his ministry's bureaucracy.

As is often the case, a number of vague and occasionally spurious excuses were put forward to delay any immediate reform. In his reply to a parliamentary question (No. 30956, Official Gazette of 18 July 1983, the Minister of Justice stated: "The Ministry of Justice has just initiated a study of the matter. But already it would appear that the problem of passing on a surname needs to be carefully looked at, bearing in mind the many psychological implications of a name and the importance of this question in forming children's personalities, and the consequences for the civil registry".

Faced with repeated parliamentary initiatives calling for legal changes in the period between 1981 and 1986, the Minister for Justice was forced to resort to stalling tactics. This involved the introduction of the concept of the "*nom d'usage*", which was in effect nothing more than a pseudonym. This had already been recognised by case-law. A judgment of 23 February 1965 by the Civil Division of the Court of Cassation stated that "... pseudonyms, which are bogus names chosen at will by a person to disguise from the public his or her real identity in carrying out a particular activity, should not appear in official documents".

The "*nom d'usage*" was defined in Article 43 of Law No. 85-1372 of 23 December 1985 relating to equality between spouses in matrimonial affairs and between parents in managing the effects of under-age children. This provisions states: "Any person of full age may add to his or her own name, for purposes of usage, the surname of whichever parent has not passed on his or her name. With regard to children not of full age, this right shall be exercised by those holding parental authority." In fact, Article 43 does not allow the "*nom d'usage*" to be passed on, and this name does not even appear in civil registry documents. In other words, the "*nom d'usage*" carries no more weight than a pseudonym and this only serves to confirm the totally discriminatory character of French legislation.

f) The acquisition of surnames in Greece

In Greece, the surname of a child born to married parents must appear on the birth certificate. Since 1983 it has no longer been obligatory for the child to take the father's surname. Nevertheless, in the absence of any declaration made before the marriage, the child is given the father's surname. A prior declaration determines the child's surname once and for all. This surname: may not contain more than two surnames; may be the surname of either parent; may be a combination of the surnames of both parents.

Natural children are given the mother's surname. If the mother marries, the husband may, subject to the consent of the mother and child, either give his name to the child or add his name to the child's surname. When the father marries the child's mother and recognises the child, the same rules as for legitimate children are applied in giving a surname to the child.

g) The acquisition of surnames in Ireland

In Ireland, the legal name of a person is the one he or she uses and by which he or she is known. It is usually — but not necessarily — the surname of the father. It is often the surname of the mother if the child is illegitimate.

The right to a name is not legally acquired simply by its being the surname of the father. The right is conferred by usage and common knowledge. The birth certificate contains the following information concerning the child's name: forenames of the child, forename and surname of the father if known, surname and maiden name of the mother. No changes can ever be made to the birth certificate and it contains only the information provided at the time of birth.

Changing one's name is a straightforward affair. The adopted name becomes the legal surname once the right to bear it is established by usage and common knowledge. However, persons who change their name are advised, to facilitate administrative procedures, to sign a legal declaration of change of name or a declaration under oath, to the effect that they no longer bear their previous name and that henceforth they intend to use the new adopted name and to be known by that name.

h) The acquisition of surnames in Italy

In Italy a child born to married parents is given the surname of the father. This principle has been established absolutely and incontrovertibly by usage and tradition, although there is no precise and explicit legislation.

A natural child is given the surname of the parent who is the first to recognise him or her. In the event of simultaneous recognition by both parents, the child is given the surname of the father. When the child has first been recognised by the mother, and subsequently by the father, the child may add the surname of the father to that of the mother or replace the mother's surname by the father's (Article 262 of the Civil Code).

i) The acquisition of surnames in Luxembourg

In Luxembourg, a legitimate child is given the surname of the father. A natural child acquires the surname of the parent in respect of whom affiliation is first established and the surname of the father if affiliation is established simultaneously.

j) The acquisition of surnames in the Netherlands

In the Netherlands, a legitimate child is given the surname of the father. An illegitimate child is given the surname of the father if he has recognised the child; if not, the child is given the surname of the mother.

k) The acquisition of surnames in Portugal

In Portugal, children are given the surnames of both the father and the mother or the surname of either the father or the mother. The choice of surnames for under-age children is decided by the parents. Should the parents disagree, the matter is decided by the courts in the child's best interests.

If paternal or maternal affiliation is established after the birth declaration, the name may be changed or modified depending on the circumstances.

When paternal affiliation is not established, the name of the mother's husband may be given to an under-age child if the husband makes an express declaration to this effect. The child may subsequently, within two years of his or her coming of age, ask for the husband's surname to be removed from his or her surname.

l) The acquisition of surnames in the United Kingdom

In the United Kingdom, an adult may take the name of his or her choice provided that this name is used habitually and the person is known by this name. A married women is not obliged to take her husband's name; the husband may take his wife's name. The child's surname is declared at birth and recorded on the birth certificate. Legitimate children usually take the father's name, although this is not mandatory. Occasionally they are given the mother's surname or a surname combining both the mother's and the father's surnames. The mother of an illegitimate child may declare him or her under the name of her choice, including the father's name even if he contests paternity.

The name recorded on the birth certificate can only be changed in the twelve months following the declaration. Thereafter, changes are possible only if the parents can prove that the child has in fact been known by the name they propose to substitute for the original name. When a child is legitimated and changes name, a new birth certificate is made out which is the same as a legitimate child's except for its date of registration.

Generally speaking it is easy to change name in the United Kingdom without this entailing any alteration to the birth certificate. One can change names as often as one wishes with a minimum of formalities. The name of a legitimate child cannot be changed without the consent of both parents, except with judicial authorisation. The name of an illegitimate child may be changed by the mother alone, unless the child has been declared under the father's name.

2. The situation in the other Council of Europe member states

In order to compile information on the systems in force in the other twenty Council of Europe member states, each national delegation to the Parliamentary Assembly was asked to provide details. The majority did reply and the details are collated below.

a) The acquisition of surnames in Austria

In Austria, a child born in wedlock is given the family name. The spouses' family name is chosen at the time of the marriage. If the spouses do not declare their choice at this time, the surname of the husband becomes the family name. Consequently, the family name of a child born to married parents is often the father's family name.

If the parents cease having a common name, the name of the legitimate child is the last common name of his or her parents, provided one of the parents still bears this name at the time of the child's birth. Otherwise, the child is given the father's name.

A natural child is given the mother's maiden name. Under certain circumstances the husband of the mother or the father of the child may give his name to a natural child not of full age.

A child who is "legitimated" (either through the parents' subsequent marriage or *per rescriptum*) is given the parents' common name. If the parents do not have a common name, the child is given the father's name.

b) The acquisition of surnames in Bulgaria

In Bulgaria, names must be made up of three elements: the forename; the patronymic; the family name. These three elements must be recorded on the birth certificate.

In accordance with the principle of equality between men and women, the child's forename may be chosen jointly by both parents at birth. If the parents cannot agree, the civil registry officer has the power to decide.

The patronymic system is used in virtually all Slavonic countries. The patronymic is derived from the father's forename with a patronymic suffix. In Bulgaria, for example, the suffix is -ov or -ev for a boy's name and -ova or -eva for a girl's name. The son of a father whose forename is Ivan will be, for example, Anton (forename) Ivanov (patronymic) Petrov (family name). The daughter of a father whose forename is Ivan will be, for example, Anna (forename) Ivanova (patronymic) Petrova (family name).

The child automatically bears the father's family name. However, in respect of both the family name and the patronymic there is an exception in cases where paternal affiliation is not established. In such cases, the child takes the mother's family name. Similarly, the child's patronymic is derived from the mother's forename. However, if the maternal grandfather agrees, the patronymic may be derived from his forename.

c) The acquisition of surnames in Cyprus

Although equality between men and women is established under the Cyprus constitution, in cases where the parents do not register a surname for their child, he or she will be given the father's surname.

However, parents have the right to determine the child's surname by mutual consent within three months of the date of birth. This surname must be common to all children of the family and it may be either the surname of one of the parents or a combination of the two. A child may not have more than two surnames.

Natural children take the mother's surname. If the mother is married, the husband may give his surname to the child subject to the mother's consent.

d) The acquisition of surnames in Estonia

There has been no reply from the Estonian delegation to the Parliamentary Assembly of the Council of Europe.

e) The acquisition of surnames in Finland

In Finland, legislation upholds the principle of equality between men and women and the principle of equality between legitimate and natural children. In principle, the child's surname may be determined only by mutual agreement between the parents.

If the parents have the same family name at the time of the child's birth, he or she will be known by that name.

If the parents do not have the same family name and already have a child, the child is given the same family name as the other child. If the parents do not have the same family name and do not have any other children, parents may choose between either of their surnames. If no choice is made, the child will be given the surname of the mother.

If paternity is established after the recording of the child's surname in the Population Register and if the parents are in agreement, the child's family name may be changed to that of the father.

f) The acquisition of surnames in Hungary

The rules governing children's surnames in Hungary are laid down in Articles 41 and 42 of Law IV of 1952 on marriage, the family and guardianship (amended in 1974 and 1986).

Depending on what the parents have agreed, the child will be given either the father's or the mother's surname. A child whose parents live as husband and wife can only be given the mother's family name if the mother bears that name and no other. All children born to parents who live as husband and wife must have the same family name.

If paternity has not been established, the child will be given the mother's family name until the name of a "ficticious" father is entered in the civil register. In the course of the procedure for registering a fictitious father, the mother may make a declaration that the child will continue to bear the mother's family name.

If the mother is known, the surname of the child's fictitious father will be recorded as the family name of the mother's closest known male ascendant. At the mother's request, however, the guardianship authority may record the family name of the child's father as the mother's family name or another family name specified by the mother, provided this has no impact on the legal interests of another person.

g) The acquisition of surnames in Iceland

Regulations governing the passing on of surnames in Iceland are based on old Nordic traditions. In practice, the child's family name is taken from the father's forename. However, legislation does not discriminate between men and women in this field; the family name may also be taken from the mother's name.

For example, the daughter of a father Jon (forename) and a mother Gudrun (forename) may be given the family name Jonsdottir ("daughter of Jon") or Gudrunardottir ("daughter of Gudrun"). Similarly, a son may be given the family name Jonsson ("son of Jon") or Gudrunarson ("son of Gudrun"). In this way, children in the same family may have different surnames.

A child whose paternity is not known is given a family name derived either from the mother's forename or from the forename of the mother's father, or may be given the mother's "special" family name. If the mother subsequently marries, she may choose to change the child's family name and derive it from the stepfather's name.

With regard to "special" family names, there are some old names such as Nordal which are handed down from generation to generation. It is not permitted to adopt a new "special" surname. It is possible at the time of marriage to change one's family name, but this practice is very uncommon in Iceland.

h) The acquisition of surnames in Liechtenstein

There has been no reply from the Liechtenstein delegation to the Parliamentary Assembly of the Council of Europe.

i) The acquisition of surnames in Lithuania

In Lithuania names are composed of three elements: the forename; the patronymic; the family name. All three elements are recorded on the birth certificate.

If both parents have the same family name, the child will be given this name. If parents have different family names, they may choose which of the two surnames will be given to the child.

Natural children are given the surname of the mother except where they are recognised simultaneously by both parents or there is a court decision establishing paternity. If paternity is established by a court decision, the birth certificate is changed and the child may be given the father's family name. The child's surname may also be changed in certain cases of divorce or adoption.

j) The acquisition of surnames in Malta

There has been no reply from the Maltese delegation to the Parliamentary Assembly of the Council of Europe.

k) The acquisition of surnames in Norway

In Norway, if the parents have a common family name, a child will be given this name.

If the parents have different family names, they may choose either of these names for the child's surname. The decision must be notified to the public authorities within six months of the birth of the child. If the authorities do not receive any such notification, the child is automatically given the mother's family name.

l) The acquisition of surnames in Poland

In Poland, a child whose father is presumed to be the husband of the mother is given the husband's surname. Even if the wife has retained the name she had prior to the marriage or if she has added this to her husband's name, the child will still be given the father's surname, except in cases where both parents made a declaration at the time of their marriage to the effect that the children of the marriage would be given the wife's surname. This provision also applies to the surname of a child whose parents married after the birth. If the parents married after the child's thirteenth birthday, the child's consent is required before the name can be changed.

When paternity has been established by recognition, the child will bear the father's name, unless the latter made a declaration at the time of recognition, with the agreement required for this to be valid, that the child would be given the mother's surname.

Where paternity has not been established, the child is given the mother's name. When both father and mother are unknown, the guardianship court gives a name to the child.

In cases where the mother of a child not yet of full age marries a man who is not the father, the spouses may make a declaration to the registrar that the child will be given the name of the mother's husband. However, the child cannot be given the surname of the mother's husband if he or she bears the father's name unless this name has been given to him or her as a result of a judgment establishing paternity.

m) The acquisition of surnames in Romania

In Romania, spouses have equal rights in marriage. At the time of the marriage, both parents make a declaration concerning the name they agree to be known by during the marriage. Spouses may retain their name prior to marriage, take the name of either of the spouses or combine the two names. In this way, children born in wedlock will be given the common family name.

If the parents do not have a common family name, the child will be given one of the family names or the two names combined. In such cases, the surname of the child as agreed between the spouses is notified to the civil registry at the time of birth. If the spouses cannot agree, the decision will be taken by the competent guardianship authority.

A child born out of wedlock is given the name of the parent in respect of whom affiliation is first established. In the event of simultaneous recognition of the child by both parents, the rules governing cases where spouses do not have a common family name are applied.

n) The acquisition of surnames in San Marino

In San Marino, a child born in wedlock is given the surname of the father (the mother's husband). A natural child is given the surname of the parent who was first to recognise the child. In the event of simultaneous recognition by both parents, the child is given the father's surname.

o) The acquisition of surnames in Slovakia

There has been no reply from the Slovakian delegation to the Parliamentary Assembly of the Council of Europe.

p) The acquisition of surnames in Slovenia

Acquisition of surnames in Slovenia is governed by the Personal Name Act, which stipulates that the family name of the child must be determined by mutual agreement between the father and mother since this is a matter with a major impact on the future development of the child. This means that even if one of the parents has no part in bringing the child up, the decision has to be a joint one.

The Act on Matrimony and Family Relations stipulates that in cases where the parents fail to agree on major issues relating to the development of a child, the decisions shall be made by the social assistance centre.

q) The acquisition of surnames in Sweden

A child born to parents sharing a common surname shall acquire that surname. Where the parents bear different surnames and where they already have children the child shall acquire the surname of the last-born of the other children.

Where there are no other children and where the parents bear different surnames, the parents may choose the surname of either parent or a surname used by either spouse prior to the marriage. The decision must be notified to the public authorities within three months of the child's birth. If no registration is made, the child shall be deemed to have acquired the mother's surname.

Where the paternity of a child is not established within three months of his or her birth, the child shall be given the mother's surname.

r) The acquisition of surnames in Switzerland

In Switzerland the children of a married couple acquire the couple's surname, which in principle is the name of the husband since the Swiss Civil Code stipulates that a married couple's surname is the surname of the husband. However, the code also stipulates that persons engaged to be married may, at their request and if there are legitimate reasons, be allowed to use the wife's surname as their family name once they are married.

Where the mother is not married to the father, the child acquires the mother's name or, where the mother has a composite name as a result of a previous marriage, the first of these names (a woman engaged to be married may however make a formal declaration to the registrar that she wishes to retain the name she has used hitherto, followed by the family name).

Accordingly, Swiss legislation does not, strictly speaking, uphold the principle of equality between spouses with regard to the choice of a child's surname. When Switzerland ratified Protocol No. 7 of 22 November 1984 to the European Convention on Human Rights, it lodged a reservation in respect of the application of Article 5 of the said protocol with regard to the provisions of federal law on surnames.

s) The acquisition of surnames in the Czech Republic

In the Czech Republic, spouses must choose their family name at the time of their marriage. The couple may choose a common family name or may decide that each spouse will continue to use his or her own family name. In this case, they must also decide (at the time of marriage) which surname — the husband's or the wife's — will be acquired by their children.

Accordingly, legitimate children acquire the common family name of the parents, or the family name of one of their parents in accordance with the decision taken at the time of the parents' marriage.

If the parents do not have a common family name and if no prior decision was taken with regard to the children's family name, parents may choose between their surnames and must notify the competent authorities of their decision. In the event of disagreement between the parents, the decision with regard to the child's family name is taken by the courts.

t) The acquisition of surnames in Turkey

There has been no reply from the Turkish delegation to the Parliamentary Assembly of the Council of Europe.

B. Discriminatory systems: an anachronism

As well as being unacceptable in terms of the principle involved, discriminatory systems for passing on surnames present several disadvantages: they speed up the depletion of the anthroponymic heritage and they may lead to the disappearance of some famous names or, on the contrary, impose embarrassing names or names which make integration into a national community all the more difficult. Conversely, the arguments put forward by those who are in favour of sexist criteria for passing on surnames are not very convincing. Lastly, there is the fundamental problem of the compatibility of this form of discrimination with current thinking regarding the application of the European Convention on Human Rights.

1. The disappearance of names: the example of France

In France, as in all European countries, family names are a part of the national heritage. Every European country is still lucky enough to have a rich anthroponymic heritage which is a living testimony to its history.

Several surveys have been carried out in France in an attempt to estimate the number of family names (Private member's bill No. 757 by Mr Jean-Louis Masson; National Assembly, 18 July 1989). The results have made it possible to classify names according to their frequency. It has thus been found that almost 1 million French nationals have one of the twelve most common surnames, namely: Martin, 168 000 — Bernard, 98 000 — Durand, 78 000 — Dubois, 77 000 — Petit, 76 000 — Thomas, 71 000 — Robert, 71 000 — Moreau, 70 000 — Richard, 70 000 — Michel, 70 000 — Leroy, 65 000 — Roux, 65 000. Taking these calculations further and adding together the numbers of people with the same name, it may be shown that approximately 12,5 million people, that is a quarter of the population of France share the top 1 000 names.

The top 1 000 names can therefore be classified as "very common names". For the remainder, no statistical survey is available. However, by extrapolation, it is possible to obtain rough figures:

— a quarter of the French population share the 1 000 very common surnames (0,4% of the total);

— another quarter share 6 000 common surnames (2,4% of the total);

— another quarter share 33 000 rare surnames (13,2% of the total);

— the final quarter share 210 000 very rare surnames (84% of the total). In this final quarter, there are on average no more than sixty homonyms per name.

Given the sexist rules governing the acquisition of surnames in France, the statistics prove that the smaller the number of males with a particular name, the faster that name will die out. For example, in a population of fifty men and fifty women all having different surnames, the fifty women's surnames will have disappeared at the end of one generation. In addition to this, approximately ten men will be single or married without children, and of the remaining forty, ten will have only girls.

In this example, seventy surnames out of 100 will have disappeared in one generation. But if married women were able to pass on their surname to their children, the only names which would disappear would be those of the persons remaining single and the childless married couples and half of the names of the couples having only one child, an approximate total of some thirty-four names.

If this were to continue over several generations and given the average number of people with the same surname, the above example demonstrates that within two centuries, 150 000 out of 250 000 French names will have disappeared. In parallel, there will be an increase by a factor of between five and ten of the number of some of the most common surnames. There will then be one Martin for every 150 inhabitants, and the number of people having the same name will then become an extremely awkward problem. At the same time, disparities in fertility rates will lead to changes in the frequency of surnames. Even now, some names of foreign origin are among the 250 most frequent names in France (Martinez, Lopez, Garcia, etc.).

2. The importance of an alternative choice of surname

In certain circumstances, it would be extremely valuable for the child or his or her family to have the option of choosing the mother's surname. The mother may, for example, have a distinguished name and if this were to be passed on it would be evidence of the child's ancestry. In other cases, the family might simply be concerned about the survival of a name which was likely to die out as there was no male line to continue it, etc.

Conversely, there may be good reasons for the child not to acquire the father's surname. This could be true for the children of criminals or people with a less than exemplary past. It is also true in cases where the father has an embarrassing name, a name indicating an ethnic or religious origin, or a foreign-sounding name which would be an obstacle to integration into the national community.

3. The acquisition of surnames and equality between the sexes

With regard to equality between the sexes, legislation on surnames merits particular attention. Of course, this is not a matter which has drastic material consequences. Its interest lies rather in the symbolic value of a name since a name is the most direct means of identifying an individual, and hence a matter of immediate concern to that individual.

The fact is that the discrimination we are seeing today in surname law is the legacy of a time when society was based on essentially unequal relationships between men and women. Nowadays, the situation is entirely different and it would be only logical for the principles of equality between men and women to be applied to surname law.

The problem of surname law is in fact much wider than merely the passing on of surnames to children. It also encompasses the problem of discrimination between natural and legitimate children with regard to the acquisition of a surname, and the problem of a common name for married couples.

Of course, genuine equality between men and women in respect of surname law is only possible if great care is taken not to create other difficulties. Otherwise, those in favour of keeping matters the way they are — and there are many of them in some countries — would seize upon this to veto any changes. Several countries (Germany, Portugal, etc.), where strict equality has been introduced, are examples showing that there are a number of satisfactory solutions.

There are only two constraints which if possible should be respected and these were mentioned in the report presented by the Minister of Justice of the Netherlands at the Conference of European Ministers of Justice in May 1982 in Athens: "If it were contemplated amending the law on surnames (...) account might be taken of the following ideas and principles: (...) the possibility of expressing the unity of the family by means of a surname must be maintained; — the new law on surnames must also take account of social and administrative considerations by setting reasonable limits on the freedom to change names".

C. The Council of Europe's position

The problem of surname law has been studied in detail on two occasions within the Council of Europe. First of all, in 1978, the Committee of Ministers adopted a very explicit resolution on the issue (Resolution (78) 37). Subsequently, in May 1982 in Athens, the Conference of European Ministers of Justice raised the problem again [MJU 13 (82) — Resolution No. 2]. Since then, there have been few developments and this is what prompted the author of this report to take an initiative so that the Parliamentary Assembly of the Council of Europe would look at the question again.

1. The 1978 Resolution

This resolution is fairly wide in scope since it concerns "Equality of spouses in civil law". It was the result of several years of work undertaken by a committee of experts set up under the authority of the European Committee on Legal Co-operation (CDCJ). The committee of experts submitted an explanatory memorandum and a draft resolution which were considered and adopted at the meeting of 27 September 1978.

a) Extracts from the explanatory memorandum

1. On a proposal from the European Committee on Legal Co-operation (CDCJ), the Committee of Ministers of the Council of Europe, at the 242nd meeting of the Ministers' Deputies, authorised the setting up of a sub-committee to examine the replies to a questionnaire concerning existing forms of discrimination against married women in civil law and to make proposals with regard to future work in the matter.

2. The sub-committee met in 1975 and, after having examined the replies of governments of member states to the above questionnaire, noted that all forms of discrimination in this matter arose from the greater important attached, either by the law or in fact, to the position of the husband, and that he was still, in principle, considered in some states as being the head of the family (...).

5. Experts from member states of the Council of Europe and observers from Finland, the Holy See and Spain attended the four meetings of the committee of experts and prepared the text of a draft resolution on equality of spouses in civil law and the text of the explanatory memorandum relating to the resolution. These texts, after having been examined and amended by the European Committee on Legal Co-operation (CDCJ), were transmitted to the Committee of Ministers which, at the 292nd meeting of the Ministers' Deputies on 27 September 1978, adopted the resolution and authorised the publication of the explanatory memorandum.

13. With regard to the extremely complex question of the choice of family name, the resolution seeks in paragraph 6 to achieve equality by listing examples of systems which states may follow to ensure that a spouse is not required by law to adopt the family name of the other spouse.

In the preparation of these proposals account was taken of the following factors:

a. the fact that there was full equality when each spouse kept his own family name;

b. the practical advantage of using a common family name for both spouses;

c. the difficulties arising from the formation of a common family name for spouses by the addition of their respective family names;

d. the advisability of allowing spouses to choose their common family name although such freedom of choice could result in one spouse being influenced by the other spouse. (...)

28. In view of the present trend to assimilate children born out of wedlock with children born in wedlock (see the European Convention on the Legal Status of Children Born out of Wedlock) any rule relating to the determination of the family name should not necessarily accentuate the distinction between such children (...).

b) Extracts from Resolution (78) 37

The Committee of Ministers, (...) recommends governments of member states to grant or promote equality of spouses in civil law concerning the matters referred to in paragraphs 1 to 19 of this resolution and to this end: (...)

6. to regulate matters concerning the family name of the spouses to ensure that a spouse is not required by law to change his family name in order to adopt the family name of the other spouse and, in doing so, to be guided for instance by one of the following systems:

i. choice of a common family name in agreement with the other spouse, in particular the family name of one of the spouses, the family name formed by the addition of the family names of both spouses or a name other than the family name of either spouse;

ii. retention by each spouse of the family name he possessed prior to the marriage;

iii. formation of a common family name by the operation of law by the addition of the family names of both spouses; (...)

17. to consider the possibility of taking the necessary steps with a view to allowing both spouses equal rights as to the family name to be given to the children of their marriage, or the children adopted by them, by making use, for instance, of one of the following systems:

i. when the parents do not have a common family name:

a. to allow the child to take the family name of the parent whose name he was not granted by law;

b. to allow the family name of the children to be chosen by the common agreement of the parents;

ii. when the parents have, by the addition of their family names, a common family name which has been either chosen by them or formed by the operation of law, the omission of part of this family name should not lead to discrimination concerning the choice of the family name or names to be omitted; (...)

2. The Conference of European Ministers of Justice (1982)

At this conference (Athens, May 1982) the Minister of Justice of the Netherlands presented a report specifically concerned with "acquisition of the surname". Following this, the problem was discussed by the ministers and finally a resolution was adopted. In the course of the discussions, the majority of speakers were in agreement on the principles and the resolution accordingly set down guidelines and called on the Committee of Ministers of the Council of Europe to examine this question.

a) Extracts from the report of the meeting

Mr J. de Ruiter, the Minister of Justice of the Netherlands, presented the report of the Netherlands delegation on acquisition of the surname. This report refers to the changes in the European laws concerning the attribution and transmission of the surname and notes that a number of laws prepared after 1970 ensure a greater equality between the spouses in this matter. The report also notes that in certain countries, the rules relating to the family name differ according to whether a child is born in or out of wedlock. (...)

Speakers in the discussions which followed the presentation of the Netherlands report included the Ministers of Justice for Austria, Finland, Iceland, Malta, Portugal, Sweden, Switzerland, the Secretaries of State of Justice for the Federal Republic of Germany, Luxembourg and Norway, the Spanish Vice-Minister of Justice, members of the Greek and Italian delegations and the Chairman of the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe. In addition the Portuguese delegation submitted a note on the acquisition of the family name.

During the course of these discussions the participants noted the different methods which were used to attribute a surname in the European states and the national and international importance of the surname, in particular with regard to civil, administrative, penal and private international law.

Comments and suggestions were put forward by certain delegations on the following points:

— the role of the surname in identifying a person and in indicating his relationship with other members of his family;

— the desirability of ensuring a reasonable degree of certainty with regard to the identity of a person;

— the methods of promoting the equality of children born out of wedlock by applying, where possible, the same rules which apply to children born in wedlock;

— the need to adapt laws to achieve a greater equality of the sexes concerning the acquisition and transmission of the surname;

— the different tradition of European states and the difficulties of attempting to find a uniform solution at a European level;

— the trend in some countries to give persons a greater freedom of choice concerning their surname;

— the possibility of finding, within the context of private international law, appropriate solutions to practical difficulties arising our of divergent national legislation;

— the importance of updating the law relating to the surname and dealing with the increasing number of problems which arise in this field;

— the advisability of examining in detail the recent developments in the European states with regard to the acquisition of the surname.

In order to consider existing problems and, as far as possible seek common European principles in this field, the Ministers unanimously adopted at the close of their discussion Resolution No. 2 appearing in Appendix III below.

b) Resolution on acquisition of the surname

The Ministers taking part in the Thirteenth Conference of European Ministers of Justice,

Having examined the report presented by the Netherlands Minister of Justice on acquisition of the surname;

Aware of the value of the surname at a national and international level as a means of identifying a person and his family;

Noting the increased movement of the population in Europe and the increased number of marriages between persons of different nationalities;

Aware of the practical difficulties arising out of the different national rules relating to the formation and attribution of the surname;

Recognising the personal and social importance of the surname for each person;

Believing in the desirability of avoiding discrimination in this field;

Considering that, as matters relating to the surname give rise to similar problems in most member states of the Council of Europe, it would be useful to consider the existing problems and as far as possible seek common principles in this field;

Recommend the Committee of Ministers of the Council of Europe to invite the European Committee on Legal Co-operation (CDCJ) to examine this question in the light of the Netherlands report and the Conference discussions on this subject.

3. Reviving the issue

Clearly it is essential to lay down clear principles excluding all sexist discrimination in the matter of surname legislation. No one seriously denies that legal systems for passing on surnames which continue to discriminate between the father and the mother are anachronistic and incompatible with the general rules of equality now recognised by all.

It was for these reasons that, on 14 May 1993, Mr Jean-Louis Masson presented to the Parliamentary Assembly of the Council of Europe a motion for a recommendation on equality between women and men in the choice of a child's surname.

This motion was co-signed by ten colleagues (Graenitz, Err, Durrieu, Regenwetter, Rodrigues, Brito, Halonen, Robert, Masseret, Seeuws). A draft opinion was subsequently drawn up for the Bureau of the Assembly and presented to the Committee on Legal Affairs and Human Rights on 7 September 1993 by Mrs Lydie Err.

After it had been approved by the committee, Mrs Err's opinion was submitted to the Bureau of the Assembly of the Council of Europe. The Bureau approved it and referred Mr Masson's motion to the Committee on Legal Affairs and Human Rights for a report. Shortly afterwards the Committee appointed Mrs Err and Mr Masson as co-rapporteurs.

a) Mr Masson's motion for a recommendation

The following is the text of the motion for a recommendation presented by Mr Jean-Louis Masson on 14 May 1993:

Motion for a recommendation on equality between women and men in the choice of a child's surname, presented by Mr Masson and others.

1. One of the major principles accepted by everyone is that of strict equality between women and men in societal life.

2. With regard to the choice of a child's surname, the Committee of Ministers of the Council of Europe has already adopted a resolution (No. 78 (37)) recommending that member states allow "both spouses equal rights as to the family name to be given to the children of their marriage".

3. Resolution No. 2 on the acquisition of surname adopted by the ministers participating in the Thirteenth Conference of European Ministers of Justice in Athens from 25 to 27 May 1982 proposes to examine the problems relating to the acquisition of a surname and to avoid any form of discrimination in this area.

4. Yet in many countries, discrimination between women and men still exists with regard to passing on a surname to children; there are also different rules applied depending on whether the child is born of married parents or unmarried parents.

5. For this reason, the Assembly recommends that the Committee of Ministers take every initiative it deems necessary to ensure strict equality between the father and mother with regard to passing on a surname and to eradicate any discrimination in the rules applied to natural children and legitimate children.

b) Draft opinion by Mrs Err

The following is the text of the draft opinion for the Bureau of the Assembly, presented by Mrs Lydie Err, on Mr Masson's motion for a recommendation:

Draft opinion for the Bureau of the Assembly on equality between women and men in the choice of a child's surname, presented by Mrs Lydie Err, Rapporteur.

Mr Masson and others, of whom I was one, submitted a motion for a recommendation, dated 14 May 1993, on equality between women and men in the choice of a child's surname (Doc. 6839).

Here I would refer the Bureau to Resolution (78) 37 of the Committee of Ministers of the Council of Europe on equality of spouses in civil law.

This dealt with legal equality between spouses in practice as well as in the statute book and made various recommendations to governments of member states for granting or promoting civil-law equality of spouses with regard to personal matters concerning them, matters concerning the property and financial relations of spouses and matters concerning spouses and their common children.

More specifically on equality in personal matters concerning spouses, it recommended that governments regulate matters of surname to ensure that a spouse was not required by law to change his or her surname to the surname of the other spouse, and that they be guided by one of the following systems:

"1. choice of a common family name in agreement with the other spouse, in particular the family name of one of the spouses, the family name formed by the addition of the family names of both spouses or a name other than the family name of either spouse;

2. retention by each spouse of the family name he possessed prior to the marriage,

3. formation of a common family name by the operation of law by the addition of the family names of both spouses".

It should be noted that the third possibility does not require that the names of the individual spouses be combined in any particular order.

The resolution also recommended to governments that, after the dissolution of a marriage, each spouse be allowed to retain the common surname unless, in the case of a divorce, one of the spouses had obtained a decision from the appropriate authority requiring the other to cease using the surname for serious reasons applying equally to both spouses.

Resolution No. 2 of the Thirteenth Conference of European Ministers of Justice (1982) is also relevant. This noted the personal and social importance to everyone of their surname and concluded that, as matters relating to surnames gave rise to similar problems in most member states of the Council of Europe, it would be useful to look at the problems and as far as possible seek common principles.

Mr Masson's motion for a recommendation of 14 May 1993 is therefore wholly in line with the 1978 Committee of Ministers resolution and the resolution of the Thirteenth Conference of European Ministers of Justice.

Clearly, therefore, this is a question which falls within the Council of Europe's field of responsibility, the Council having concerned itself with it before though without acting on the conclusion in the 1982 resolution of the European Ministers of Justice that the existing problems could usefully be considered and common principles sought.

Also of relevance is the United Nations Convention on the Elimination of All Forms of Discrimination against Women, adopted at New York on 18 December 1979.

Article 16 states:

"States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

...

g. The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation."

As most Council of Europe members have doubtless ratified the convention, there is an obligation on them to bring their national law into line with Article 16 unless (like Luxembourg) they lodged a reservation on the matter.

But a married couple's surname primarily poses an equality problem with regard to its handing on to the legitimate children of the marriage: it is contrary to the principle of equality between men and women that, with (rare) exceptions, it is the father's surname which the legitimate children of the marriage receive, by virtue of "tradition" and despite there being no legal requirement. If the problem of a married couple's surname were solved in accordance with the principle of equality, the problem of the surname of their legitimate children would be solved at the same time.

Without going into the details, which are complicated, there are obviously quite a few issues involved which it would be well worth analysing to try and identify common principles for standardisation of law in accordance with the principle of equality.

An analysis of the legal position in the various Council of Europe countries is warranted.

The Committee on Legal Affairs and Human Rights does not know why the Bureau has not referred the matter to committee without further ado, as it has with most other motions, recommendations or resolutions.

In my capacity as Rapporteur for opinion, I nonetheless recommend that the Bureau investigate the question in order to identify common principles. The logical course would seem to be to refer the motion to the Committee on Legal Affairs and Human Rights for report, which would not preclude the Ad hoc Committee on Equality of the Sexes giving an opinion on the matter.

Conclusion

The committee is wholly in favour of the motion for a recommendation being referred to the Committee on Legal Affairs and Human Rights (whose French title really needs altering) and the Ad hoc Committee on Equality of the Sexes for opinion.

c) The present report

This report has been written as part of the process of giving a fresh impetus to developments which will lead to the disappearance of discriminatory systems for passing on surnames.