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SPECIFIC HUMAN RIGHTS ISSUES: WOMEN AND HUMAN RIGHTS

The rights of women married to foreigners

Working paper submitted by Mr. Vladimir Kartashkin pursuant to Sub-Commission decision 2002/112

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I. INTRODUCTION

1. In its decision of 2002/112 of 14 August 2002, the Sub-Commission on the Promotion and Protection of Human Rights requested Mr. Vladimir Kartashkin to prepare, without financial implications, a working paper on the rights of women married to foreigners, and to submit it to the Sub-Commission for consideration at its fifty-fifth session. In their discussion of the draft decision, the members of the Sub-Commission expressed their wish that the working paper should focus on questions relating to the nationality of women married to foreigners.

2. This question is directly related to the elimination of all forms of discrimination against women and the achievement of full equality with men. In many countries, women who marry foreigners still face discrimination, since marriage with a foreigner involves the loss and change of their nationality. Lack of nationality (statelessness) inevitably entails an infringement of women's civil and political and social and economic rights.

3. Nationality is the stable relationship between individuals and the State, expressed as the totality of their rights and duties. Wherever they may be, all nationals are subject to the sovereign power of their respective State. Unlike foreigners, they enjoy all fundamental rights and freedoms.

4. Questions of nationality and the conditions governing its acquisition or loss are chiefly regulated by States' domestic legislation and generally relate to their domestic jurisdiction. This does not mean that international law is excluded from the process of regulating nationality. In this connection, the "invasion" of international law into States' domestic jurisdiction takes different forms. This involves, first of all, the adoption of international instruments regulating questions of nationality in such a way as to ensure that men and women enjoy equal rights. Secondly, since each State acts independently in this sphere, conflicts between the nationality legislation of different States are inevitable. The existence of such conflicts gives rise to the need to regulate questions of nationality at the international level through the conclusion of both bilateral and multilateral agreements.

5. Conflicts between nationality legislation generally arise in cases involving the acquisition or loss of nationality. The most common means of acquiring nationality is by birth. States' legislation on this subject is based on one of two principles: *jus sanguinis* or *jus soli*. Nationality may be acquired by naturalization, that is, by granting the request of an interested person to acquire the nationality of a particular State. There are also other ways of acquiring nationality, including option (choice of nationality), the granting of nationality to groups and restoration of nationality.

There are also many ways to lose nationality: automatic loss of nationality, relinquishment of nationality and deprivation of nationality.

6. Conflicts between the legislation of different States that arise when nationality is acquired or lost, as well as the question of ensuring equality between men and women, may be obviated by the application of the generally accepted principles and rules of international law and by the conclusion of bilateral and multilateral agreements regulating specific questions of nationality.

This working paper analyses only universal, international instruments that in one way or another formulate both general and specific principles and rules relating to the nationality of women married to foreigners.

II. INTERNATIONAL REGULATION OF QUESTIONS RELATING TO NATIONALITY, PRIOR TO THE ADOPTION OF THE CHARTER OF THE UNITED NATIONS AND THE FOUNDING OF THE UNITED NATIONS

7. During the period preceding the adoption of the Charter of the United Nations and the founding of the United Nations, only a limited number of States had concluded the first international agreements regulating, in one way or another, certain questions relating to nationality. And this is no accident. At the time, relations between the State and its nationals were considered to be the exclusively internal affair of each State. Nevertheless, the development of cooperation between States led to problems requiring international regulation.

8. One of the first such universal agreements, together with the protocols on statelessness, was the Convention on Certain Questions relating to the Conflict of Nationality Laws of 12 April 1930.

The Convention consolidates both general principles and special rules relating to nationality. The general principles stipulated the following:

(a) "It is for each State to determine under its own law who are its nationals" (art. 1);

(b) "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State" (art. 2);

(c) "… a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses" (art. 3);

(d) "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses" (art. 4);

(e) "Within a third State, a person having more than one nationality shall be treated as if he only had one. … a third State shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected" (art. 5);

(f) "… a person possessing two nationalities acquired without any voluntary act on his part may renounce one of them with the authorization of the State whose nationality he desires to surrender. This authorization may not be refused in the case of a person who has his habitual and principal residence abroad, if the conditions laid down in the law of the State whose nationality he desires to surrender are satisfied" (art. 6).

9. The High Contracting Parties agreed to apply these principles in their relations with each other. At the same time, however, they emphasized that such principles should in no way be deemed to prejudice international law. Moreover, these principles, like the provisions of the Convention as a whole, did not affect the provisions of any treaty, convention or agreement in force between any of the High Contracting Parties relating to nationality or matters connected therewith.

10. The principles set forth in the Convention affirmed that, in matters of nationality, the law of States remains decisive. In this regard, article 1 of the Convention declares: "This law shall be recognized by other States in so far as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality". However, this article does not specify which sources of international law the authors had in mind. Moreover, even if their incompatibility with the law of a State were specified, or if a State refused to recognize this Convention, the legal consequences would still be unclear.

The effectiveness of the provisions of the Convention was also diminished because article 20 permitted States to make reservations to articles containing the aforementioned principles.

11. Article 7 of the Convention contains the following important provision: "Insofar as the law of a State provides for the issue of an expatriation permit, such a permit shall not entail the loss of the nationality of the State which issues it, unless the person to whom it is issued possesses another nationality or unless and until he acquires another nationality." An expatriation permit shall lapse if the holder does not acquire a new nationality within the period fixed by the State which has issued the permit. This provision shall not apply in the case of an individual who, at the time when he receives the expatriation permit, already possesses a nationality other than that of the State by which the permit was issued to him.

The question arises: What is to be done in cases where the law of a State does not provide for the issue of an expatriation permit? The Convention does not solve this problem. The aim of article 7 of the Convention is to ensure that a person who renounces his former nationality does not become stateless. At the same time, the State that issues the expatriation permit is not in a position to force another State to grant nationality to that person. In this regard, article 7 is only of an advisory nature: "The State whose nationality is acquired by a person to whom an expatriation permit has been issued, shall notify such acquisition to the State which has issued the permit."

12. Chapter III of the Convention is specially devoted to the question of the nationality of married women, which is the subject of this study. Article 9 of the Convention stipulates that, "if the national law of the wife causes her to lose her nationality upon a change in the nationality of her husband occurring during the marriage, this consequence shall be conditional on her acquiring her husband's new nationality". Unfortunately, this article of the Convention does not contain specific mechanisms for or guarantees of the acquisition of the husband's nationality. In this regard, article 10 of the Convention provides only that "naturalization of the husband during marriage shall not involve a change in the nationality of the wife except with her consent".

The restoration of the wife's nationality in the event of the dissolution of the marriage is dealt with in article 11, which reads:

"The wife who, under the law of her country, lost her nationality on marriage shall not recover it after the dissolution of the marriage except on her own application and in accordance with the law of that country. If she does recover it, she shall lose the nationality which she acquired by reason of the marriage."

13. The Convention on Certain Questions relating to the Conflict of Nationality Laws entered into force in 1937, seven years after its adoption. It did not acquire wide currency in international relations, and many of its provisions were not implemented even by the few States that had ratified it.

III. THE UNITED NATIONS AND RECOGNITION OF THE PRINCIPLE OF EQUALITY BETWEEN MEN AND WOMEN

14. The founding of the United Nations and the adoption of the Charter of the United Nations marked the beginning of a qualitatively new stage in international relations in this field. The Charter of the United Nations was the first multilateral instrument in the history of international relations to lay the foundations of the subsequent broad development of cooperation among States in the field of human rights. The Charter strictly forbids discrimination on the basis of sex and establishes the principle of equality between men and women, making no distinction between married and unmarried women (Art. 1, para. 3; Art. 55 and others).

15. Pursuant to the provisions of the Charter of the United Nations, important international instruments are drafted and adopted by the United Nations; these include: the Universal Declaration of Human Rights (1948), the International Labour Organization (ILO) Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (1951), the Convention on the Political Rights of Women (1952), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the international human rights covenants (1966), the Convention on the Elimination of All Forms of Discrimination against Women (1979) and many others.

The Universal Declaration of Human Rights contains provisions on nationality and prohibits discrimination on the basis of sex. Thus, article 15 of the Declaration reads:

"1. Everyone has the right to a nationality.

"2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

The International Covenant on Civil and Political Rights only in a general manner obliges States to "take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution" (art. 23, para. 4).

These rules are consolidated in international law and developed in the above-mentioned treaties. They are based on the principles of the equality of all people, the prohibition of discrimination, and the equality of rights between men and women. In contemporary

international law, these principles have acquired the status of *jus cogens*, that is, they are binding on all States, including those which are not members of the United Nations. The primacy of these principles over the law of any State does not depend on its position.

IV. UNITED NATIONS CONVENTIONS GOVERNING THE NATIONALITY OF MARRIED WOMEN

16. The principles of the equality of all people, the prohibition of discrimination and the equality of rights between men and women are laid down in a number of instruments adopted by the United Nations and concerning the nationality of married women, including the nationality of women who marry foreigners.

17. In 1957, the General Assembly of the United Nations, pursuant to its resolution 1040 (XI), opened the Convention on the Nationality of Married Women for signature and ratification; the Convention entered into force in 1958. In the 45 years since the adoption of the Convention, less than half of the States Members of the United Nations have become a party to it. More than 100 States that participate in international relations have yet to define their position on this matter.

18. Particular attention is drawn to the fact that the preamble to the Convention deals not with the acquisition of nationality (that is, the husband's nationality) by married women but with conflicts in law in practice with reference to nationality that arise as a result of provisions concerning the loss or acquisition of nationality by women as a result of marriage, of its dissolution or of the change of nationality by the husband during marriage.

The main provisions concerning these questions are contained in articles 1 to 3 of the Convention. In these articles, each Contracting State agrees that:

(a) "Neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife" (art. 1);

(b) "Neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national" (art. 2);

(c) "The alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures; the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy" (art. 3, para. 1);

(d) "The present Convention shall not be construed as affecting any legislation or judicial practice by which the alien wife of one of its nationals may, at her request, acquire her husband's nationality as a matter of right" (art. 3, para. 2).

19. Articles 1 and 2 of the Convention on the Nationality of Married Women contain provisions, in many respects similar to those of the 1930 Hague Convention, which seek to enable the wife to retain her nationality in different situations. However, such an approach does not deal with the main problem: when a woman marries a foreigner and changes her place of permanent residence, she is not guaranteed that she will acquire her husband's nationality quickly and without hindrance. This question is entirely regulated by the law of the relevant State. As a result, in many cases a woman who marries a foreigner remains a foreigner in the territory of her husband's State, with all the consequences ensuing therefrom. Moreover, according to the law of many States based on *jus soli* or *jus sanguinis*, a child born of such a marriage is automatically considered to be a national of these States. Thus, in such situations, a married woman and mother is a foreigner to her own child.

Although, article 3, paragraph 1, of this Convention provides that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures, unfortunately this provision is not supported by any guarantees. There are no such guarantees in the Convention itself nor in other rules of contemporary international law. The Convention does not oblige States parties to make any amendments to their domestic legislation on nationality or the legal status of foreigners. On the contrary, States may, on the basis of article 3, paragraph 1, of the Convention, toughen the provisions of their legislation on nationality "in the interests of national security or public policy".

The tenuous status of this Convention is made even worse by the fact that article 8, paragraph 1, permits reservations to any article of the Convention other than articles 1 and 2. Thus, in acceding to the Convention, a State may, through reservations, exclude the provision on the granting of its nationality to a married foreign woman by a simplified procedure. Moreover, article 9, paragraph 1, of the Convention, which deals with the right to denounce the Convention, is also unjustified.

The situation is not improved by article 10 of the Convention, which deals with the settlement of any dispute between States concerning the interpretation or application of the Convention by the International Court of Justice. The fact is that the overwhelming majority of States Members of the United Nations do not recognize the competence of the International Court of Justice in all questions and, with regard to the provisions of article 10 of the Convention, they may make use of a reservation and thereby nullify the effectiveness of this article and the Convention as a whole.

20. In spite of certain positive provisions of the Convention on the Nationality of Married Women and the recognition of the principle of non-discrimination on the basis of sex, women married to foreigners continue to face some forms of discrimination. The Convention on the Reduction of Statelessness, adopted in 1961, did not do away with such discrimination. It did not lay down any new provisions relating to the nationality of women married to foreigners. In this regard, the international community is still faced with the task of guaranteeing in law and in practice the universal recognition of the principle of equality between men and women. The provision contained in article 1 of the Declaration on the Elimination of Discrimination against Women, adopted by the General Assembly in its resolution 2263 (XXII) of 7 November 1967, remains as timely as ever:

> "Discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity."

Discrimination against women married to foreigners (because such women do not have the nationality of the husband's country), should also be characterized as an offence against the dignity of women who, along with men, make an essential contribution to the development of every State.

Unfortunately, the Declaration as a whole did not lay down any new provisions concerning the nationality of married women. Article 5 of the Declaration automatically repeats the provisions of previous instruments:

> "Women shall have the same rights as men to acquire, change or retain their nationality. Marriage to an alien shall not automatically affect the nationality of the wife either by rendering her stateless or by forcing upon her the nationality of her husband."

21. The basic international legal instrument adopted by the United Nations with a view to prohibiting discrimination against women is the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, which entered into force on 3 September 1981. The preamble to the Convention reflects the international community's concern that, despite the various instruments that prohibit discrimination, extensive discrimination against women continues to exist. The preamble also contains important provisions that stress the "great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children" and recognizes that "the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole".

Article 1 of the Convention defines the term "discrimination against women" as being of a general nature and meaning "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

In article 2 of the Convention, the States parties condemn discrimination against women in all its forms and agree to adopt appropriate legislative and other measures prohibiting all discrimination against women, and to repeal all provisions of national legislation that constitute discrimination against women. According to article 4 of the Convention, the adoption by States parties of temporary special measures aimed at accelerating de facto equality between men and women is not considered discrimination.

Article 11 of the Convention provides for measures by States parties to prevent discrimination against women on the grounds of marriage or maternity; for example, dismissal on the grounds of pregnancy is prohibited, subject to the imposition of sanctions.

Article 16 of the Convention requires States parties to take measures to eliminate discrimination against women in all matters relating to marriage and family relations and to ensure, in particular, the same rights and responsibilities during marriage and at its dissolution, and the rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.

The Convention also contains provisions on the nationality of women married to foreigners. Article 9 of the Convention reads:

> "1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
>
> "2. States Parties shall grant women equal rights with men with respect to the nationality of their children."

On the whole, the Convention on the Elimination of All Forms of Discrimination against Women develops many principles and rules of international law with a view to ensuring equality between men and women.

22. A special feature of the Convention that distinguishes it from other international agreements in this field is the provision on the establishment of the Committee on the Elimination of Discrimination against Women. The Committee considers reports of States on the legislative, judicial, administrative or other measures that they have adopted to give effect to the provisions of the Convention and on the progress made in this respect. According to the Optional Protocol to the Convention, adopted by the General Assembly in 1999, the Committee may receive and consider communications from individuals claiming to be victims of a violation of any of the rights set forth in the Convention by a State party. Moreover, the Committee may conduct an inquiry into a violation and visit the territory of the State party concerned.

The effective work of the Committee will help to eliminate discrimination against women and ensure gender equality.

V. PRELIMINARY RECOMMENDATIONS

23. Ensuring gender equality has become one of the principal tasks of the United Nations. These questions are also discussed at various world conferences on the legal status of women and the elimination of all forms of discrimination. However, problems relating to the rights of women married to foreigners do not always receive the attention they deserve in the work of international forums.

24. Globalization has led to increased cross-border contacts between people; the number of marriages between nationals of different States is growing, which entails the change not only of place of residence but also of nationality. In such circumstances, it is essential to adopt special, concrete and comprehensive non-discriminatory regulations concerning the nationality of women married to foreigners and also rules that guarantee their equality with men.

25. The Committee on the Elimination of Discrimination against Women should request participating States to provide in their reports information on any measures that they have adopted to guarantee the rights of women married to foreigners, and on existing legislation in this field. At the same time, the Committee should, on the basis of the information received, consider the question of drafting an appropriate recommendation of a general nature.

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