

MINORITIES IN THE CRIMINAL JUSTICE SYSTEM

Contribution of the United Nations Network on Racial Discrimination and Protection of Minorities to the Eighth session of the Forum on Minority Issues

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I. Introduction

The United Nations Network on Racial Discrimination and Protection of Minorities (hereinafter “Network”) was established in 2012¹ by the Secretary-General in order to enhance dialogue and facilitate coordination of the work of the UN system in the field of racial discrimination and protection of minorities in both the headquarters and field offices. The Network is a group of over 20 UN Departments, Agencies, Programmes and Funds.²

As one of its first undertakings, the Network developed a Guidance Note, endorsed in 2013 by the Secretary-General, to guide UN entities in its work in combating racial discrimination and advancing rights of persons belonging to minority groups in their respective fields and mandates. It highlights the key principles in combating racial discrimination and protection of minorities and contains 19 recommendations on its implementation. The Network has also adopted a four-year Action Plan with concrete action points and time frame for their implementation.

One such action point is to increase system-wide interaction with mechanisms such as the Forum on Minority Issues. Continuing from the Network’s first-ever intervention made at the Forum in 2014, this intervention contributes to this action point. The theme of this year’s Forum on Minority Issues, “Minorities in the Criminal Justice System”, is an integral part of the Network’s work in combating racial discrimination and protecting rights of persons belonging to minorities. The importance of this year’s theme of the Forum is also reflected in the Secretary-General’s Guidance Note, which calls for addressing “institutional racism and systemic discrimination” by making “consolidated and integrated efforts to support and empower reforms of the relevant institutions with a view to advancing minority participation and full equality before the law without any discrimination.”³ In view of its mandates and expertise, the United Nations Office on Drugs and Crime (UNODC) has coordinated the development of the following contribution with inputs from members of the Network.

II. Legal Framework and Key Concepts

¹ United Nations Policy Committee decision No.2012 of 6 March 2012.

² Current members of the Network include: DESA, DOCO, DPA, DPI, DPKO, ILO, OCHA, OHCHR, OSAPG, PBSO, UNAIDS, UNAOC, UNDP, UNEP, UNHCR, UNESCO, UNICEF, UNFPA, UNICEF, UNITAR UNODC, UN Women and WFP. Other UN entities are welcome to join.

³ Guidance Note of the Secretary General on Racial Discrimination and Protection of Minorities, March 2013, Guiding Principle 7.

The principle of non-discrimination is one of the most important and fundamental principles of international human rights law. Its inclusion in the *Charter of the United Nations*, the *Universal Declaration of Human Rights* and all successive major human rights instruments, including those specifically addressing different forms of discrimination, such as the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) or the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), makes it one of the central themes of international human rights law. The principle is also at the centre of the *UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities* (1992), the *Durban Declaration and Programme of Action* (2001) as well the Outcome Document of the Durban Review Conference (2009). Under Article 2 of the *Universal Declaration of Human Rights*, the principle of non-discrimination is stated as follows: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.”⁴ At least some aspects of the principle of non-discrimination are considered customary international law.⁵

This overarching principle of non-discrimination is also a foundation on which the rights of persons belonging to minorities are built under international law. In the context of the criminal justice system, the unhindered enjoyment of fundamental rights without discrimination must be guaranteed to individuals belonging to a minority group, whether they are suspected, accused or convicted of criminal offences, whether they are detained or imprisoned, or whether they are victims or witnesses of crime. Relevant rights include, *inter alia*, the right to a fair trial by a competent, independent and impartial court established by law and the right to legal aid, presumption of innocence, the principle of legality and non-retroactivity of more stringent criminal laws, the prohibition of torture and cruel, inhuman or degrading treatment and the right to liberty and security of person, as well as the right to participation and protection in the criminal justice processes as well as the right to protection, assistance, effective remedy and reparation for victims of crime and abuse of power.

A closely related concept to the principle of non-discrimination is the general principle of equality—equality before the law, equality before the courts and the equal protection of the law. The prohibition of discrimination requires States to comply with the general principle of equality and ensure full exercise of the right to non-discrimination by all persons under their jurisdiction. These obligations are both negative and positive in nature—States must not only refrain from violating the right to non-discrimination but also, where necessary, take positive measures to protect the individuals belonging to minority groups from both State and non-State entities. In many countries, members of minority groups face discrimination in accessing justice either as victims or offenders, and/or are overrepresented in the penal system because of bias or because of social and economic disadvantage leading to increased vulnerability to come into contact with the criminal justice system.

III. Multiple and Intersecting Forms of Discrimination

⁴ Universal Declaration of Human Rights, Article 2.

⁵ See the report of the International Law Commission on its fifty-third session, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, p. 208.

Persons belonging to minority groups face discrimination in the criminal justice system on account of their ethnicity, religion or language. Some of them face additional and intersecting forms of discrimination due to their age, gender, sexual orientation or disability. In the criminal justice system, a number of groups and individuals are therefore particularly vulnerable to these forms of discrimination.

1. Minority children

As highlighted by the UN Study on Violence against Children and the Joint Report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system, detention of children is one of the most important factors of violence and human rights violations of children. With an estimate of at least 1 million children deprived of their liberty worldwide, the majority of whom are awaiting trial, held for minor offences and are first-time offenders. Incidents of violence occur while in custody of police and security forces, in both pre-trial and post-sentence detention or during a form of sentencing. Violence can be perpetrated by staff, adult detainees and other children, or as a result of self-harm.

Children from ethnic, religious or linguistic minority groups, in particular, are often overrepresented in the criminal justice system. This may be explained by discrimination by law enforcement officials, but also by the greater extent of social exclusion experienced by those groups in the countries where they live. Social exclusion tends to result in patterns of poverty, domestic violence, gang activity, substance abuse, barriers to education, and poor prospects of meaningful employment.⁶ Children of minority groups may also face additional discrimination when their parents are in contact with the criminal justice system due to lack of appropriate social and educational opportunities. The General Assembly, when adopting the *UN Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice* in 2014, urged Member States to remove any barrier—including any kind of discrimination—that children may face in accessing justice and in effectively participating in criminal proceedings, to pay particular attention to the issue of the rights of the child and the child's best interests in the administration of justice and to ensure that children in contact with the criminal justice system are treated in a child-sensitive manner, taking into account the specific needs of those children who are in particularly vulnerable situations.⁷

2. Minority women

The disturbingly high incidence of violence against women continues to be met with impunity. Reasons include discriminatory provisions and practices in the criminal justice systems, such as those allowing perpetrators to avoid prosecution if they marry the victim or attaching low evidentiary weight to the testimony of the victims. Even where adequate legal protection and safeguards are in place, there are chronic implementation failures in every region of the world.

⁶ See https://srsg.violenceagainstchildren.org/sites/default/files/documents/docs/A-HRC-21_25_EN.pdf

⁷ A/RES/68/189.

Judicial stereotyping, prosecutorial inaction, police indifference—or, worse yet, active abuse, such as sexual violence against women in custodial settings—remain widespread.

These challenges are exacerbated for minority women, who suffer from compounded discrimination due to the intersection of race and sex with other factors such as poverty, location and language. Many of them are subjected to violence at even higher rates than other women and face additional obstacles in obtaining legal protection and remedies. Women belonging to ethnic minority groups who are accused or convicted of crimes often have socio-economically marginalized backgrounds and are overrepresented in many national criminal justice systems. They require specialized help in overcoming obstacles to accessing services before, during and after trial, imprisonment or release, including legal aid, translation and interpretation, health care, housing, social welfare or employment.

3. Minority individuals living with disabilities, HIV/AIDS or other special needs

According to the World Health Organization, around 10% of the world's population, or 650 million people, live with a disability.⁸ Persons with disabilities are particularly vulnerable to discrimination. Comparative studies on disability legislation show that only 45 countries have anti-discrimination and other disability-specific laws.⁹ Thus, minority individuals who are physically or mentally disabled inevitably face compounded discrimination. In most countries, there already exists a need to address problems related to access to adequate healthcare services, particularly for those from poor and socially disadvantaged groups, which often has a disproportionate percentage of ethnic minorities, including indigenous peoples. National or ethnic, religious or linguistic minorities with physical or mental disability constitute a particularly vulnerable group in the criminal justice context, in particular in detention.¹⁰

IV. Minorities and the Law Enforcement

Direct and indirect discrimination manifests itself in multiple sectors of society and, as a result, minority groups are often underrepresented in the criminal justice system including within law enforcement. Over time, a criminal justice system that does not reflect the demographics of the general public can lead to a vicious cycle where social discrimination and marginalization contributes to an accumulation of societal tension between communities and stigmatizes some communities as possessing or displaying certain undesirable traits. Such stigmatization then fuels further discrimination, leading long-term and deeply entrenched structural inequalities.

A representative law enforcement body reflecting the general society is an essential part of a democratic society. While representation alone is not enough to ensure protection against discrimination and violence by law enforcement, it is an essential tool in ensuring accountability and integrity of law enforcement bodies.¹¹ Excessive use of force, racial profiling and

⁸ United Nations Convention on the Rights of Persons with Disabilities, Fact sheet: Some Facts about Persons with Disabilities, available at www.un.org/disabilities/convention/facts.shtml.

⁹ *Ibid.*

¹⁰ See UNODC handbook on Prisoners with Special Needs at: https://www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf

¹¹ See UNODC Handbook on Police Accountability, oversight and Integrity and UNODC/UNHABITAT Handbook on Policing Urban Space at <https://www.unodc.org/unodc/en/justice-and-prison-reform/tools.html?ref=menuaside> and forthcoming UNODC/OHCHR Handbook on use of force and firearms in law enforcement.

discriminatory treatment by law enforcement authorities all disproportionately affects members of minority groups.

In 2005, OHCHR's Committee on the Elimination of Racial Discrimination (CERD) issued General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System. As part of strategies to be developed to prevent racial discrimination in the administration and functioning of the criminal justice system, CERD recommended, *inter alia*, promotion of proper representation of persons belonging to racial and ethnic groups in the police and the system of justice and recruitment and promotion in the judicial system of persons belonging to various racial or ethnic groups.

Limited degree of minority representation in the work of the law enforcement agencies and to the existence of significant challenges to these agencies' ability to effectively perform their duties in a multiethnic environment. Achieving progress in minority participation in law enforcement and capacity building of law enforcement staff is important in strengthening the confidence of minority communities in the law enforcement system. Such confidence is indeed essential for the development of trust between state institutions and minority communities.

In 2008, OHCHR organized an expert meeting on integration with diversity in policing. The OHCHR invited 10 professionals from the police service of different regions and countries of the world (Brazil, Cameroon, Canada, Hungary, India, Ireland, Nigeria, Pakistan, Samoa and South Africa) to participate in the meeting as experts and deliver presentations focused on sharing of good experiences and lessons learned in relation to inclusion with diversity in policing. Regarding dialogue and co-operation with minority communities, community policing, with its many models, was identified as a crucial concept for this topic.

1. Minority groups' vulnerability and exposure to arbitrary and/or discriminatory exercise of police powers

As outlined by the United Nations Special Rapporteur on contemporary forms of racism,¹² the practice of racial and ethnic profiling in law enforcement constitutes a violation of human rights for the individuals and groups targeted by these practices as it is fundamentally discriminatory in nature and expands the discrimination already suffered as a result of membership in an ethnic or minority group. Racial and ethnic profiling violates multiple human rights, including the right to live free from discrimination, the right to equality before the law, the right to personal freedom and security and the right to the presumption of innocence. This is particularly important in the context of the fight against terrorism.

2. Measures that mitigate the disproportionate impact of discriminatory law enforcement practices

As the Special Rapporteur warned, while training and awareness-raising is a positive step in the right direction, they cannot alone eradicate profiling by law enforcement. Enacting specific legislation outlawing the practice of racial and ethnic profiling and gathering of law enforcement data, including statistics collected according to ethnicity and race, are essential measures in proving and combatting the existence and the extent of racial and ethnic profiling.

The adoption of codes of conduct by law enforcement bodies that prohibit the use of

¹² Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere. A/HRC/29/46, 20 April 2015.

ethnicity, religion and national origin in targeting persons as suspects, which also include the requirement that law enforcement officers base their decisions on reasonable suspicion is a positive step.¹³

Another important good practice is the recruitment of persons from minority backgrounds to law enforcement agencies. Police agencies are often composed of individuals from the dominant community of society. In many countries, women, in particular minority women, enjoy only limited access to participation in the law enforcement service. Homogeneity in the composition of the police can increase the likelihood of biased behaviour towards minorities. Restrictions imposed on the participation of minorities in society can contribute to confrontational rather than cooperative relations between police and minorities, which raises intercommunal tensions and can lead to conflict. Experiences demonstrate that minority representation in the police leads to much more efficient law enforcement operation.

In order to improve participation of minorities in the administration of justice, including law enforcement authorities such as the police, OHCHR launched a series of consultations on good practices in policing and minority communities with the aim to collect experiences that can serve as a model and can be replicated in other communities to benefit participation and representation. OHCHR collected practices that: (i) work well in particular circumstances; (ii) result in better protection of minorities; (iii) and enhance the work of the police.

The consultations demonstrated that a policing strategy that includes minorities should be part of an overall governmental policy relating to the protection of minority rights. An isolated and piecemeal approach in including minorities will likely be ineffective, in light of conflicting minority-related policies in other areas. Therefore, coherent and comprehensive policies on increasing minority participation require meaningful consultation designed to address the particular needs and circumstances of minorities, as well as their full and equal access to the police services. After all, modern, good practice models of policing are all based on a service-oriented approach, which requires communication and consultation with all groups in the society, including minorities. In this regard, it is of paramount importance that police agencies conduct outreach programmes to minority communities in order to build trust.

Inclusive crime prevention strategies that contain community policing models can also be a highly useful tool in addressing root causes of criminality within the community and improve relations between law enforcement and minority communities. They should include at least two main components: (i) an intensive partnership established with the aim to create and build relationships between police and communities by sharing joint responsibility for public safety and security; and (ii) a problem-solving approach that includes, for instance, efforts to identify and address the underlying causes for the commission of certain crimes.

V. Access to Justice for Minorities as Offenders, Victims and Witnesses

Access to legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. Legal aid includes legal advice, assistance and representation, legal education and access to legal information and should be provided at no cost

¹³ Open Society Foundations, *Reducing Ethnic Profiling in the European Union: A Handbook of Good Practices* (New York, 2012), p. 38.

for offenders, victims and witnesses if they do not have sufficient means or if it is in the interests of justice.¹⁴ This is particularly important in the early stages of the criminal justice process for those who have been arrested or detained for a criminal offence. Decisions made and actions taken, or lack thereof, will determine their ability to effectively defend themselves, whether they are arbitrarily detained before trial, whether they receive lawful and appropriate treatment during prosecution, including being duly considered for diversion from the criminal justice system, and ultimately, whether they receive a fair trial with due process. Legal aid is also crucial to protect and safeguard the rights of victims and witnesses in the criminal justice process and it can be used to contribute to prevention of crime by increasing awareness of the law.¹⁵

In many countries, members of minority groups are often overrepresented in both the number of alleged offenders and victims. Access to legal aid is thus all the more important to ensure protection of minorities' fundamental rights, such as rights to a fair trial and equality before the law or to liberty and security of person and to an effective remedy. Members of a minority group can also be subject to discriminatory treatment rising from pernicious stereotypes and biases from criminal justice officials, which can result in injustices such as in their statements being considered less credible or facing heavier burden of proof than members in the dominant community.

1. Obstacles to enjoying minorities' rights in the criminal justice system

For minority groups whose language and culture differ from those of the dominant community, such as foreign nationals, recent immigrants or racial, linguistic or cultural minorities, the lack of or dearth of linguistically or culturally competent legal information and aid augment the difficulties faced by all those accused or victims of crimes. For members of such groups, the language used in the courts is the primary obstacle to the right to a fair trial in addition to all the other challenges of navigating the criminal justice system that a person from a dominant culture already faces. For their fundamental rights such as right of equality before the courts and the right to a fair trial to be protected, a party to the proceedings who does not understand or speak the language used in the courts must be given assistance of an interpreter free of charge and be given a translation of the main procedural decisions.

Under Article 14(f) of the *International Covenant on Civil and Political Rights*, people accused of criminal offences are explicitly guaranteed the right to have the assistance of an interpreter if he or she cannot understand or speak the language used in court. In practice, however, States seldom have sufficient budget to have qualified and competent interpreters who can understand the complex legal concepts. Moreover, translation of proceedings is often limited to the sentencing stage only, thereby overlooking potential procedural flaws that can infringe upon the defendant's right to due process. In this way, minority groups are made even more vulnerable to arbitrary and excessive pre-trial detention, unawareness of or inability to exercise the right against self-incrimination or disproportionate and unjust sentencing.

The *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, the *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* and the *UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* include non-discrimination clauses and provide concrete measures that should be taken to ensure the rights of victims and witnesses in the criminal justice system. However, in most legal

¹⁴ See United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, para. 8.

¹⁵ *Ibid.*, para. 3.

systems, the victims' role in criminal proceedings is already minimal and secondary. In some countries, for example, the victim is treated merely as a witness and cannot take part in arguments or sue for damages in criminal proceedings. As a victim or a witness of a crime, filing a complaint or taking steps to obtain protection is never easy and this is especially so if he or she belongs to a minority group. Fear of retaliation, lack of trust in the justice system's ability to protect rights of individuals belonging to a minority group and lack of resources due to social and economic disempowerment are some of the reasons why minority victims and witnesses can be reluctant, or even fearful, in initiating or pursuing legal measures to protect themselves or redress their injury.

2. Measures to protect minorities' rights in the criminal justice system, including victims and witnesses

One of the measures that can increase protection for minorities' rights in provision of legal aid is to develop a national strategy for legal aid, ideally as a part of the comprehensive strategy on criminal justice system. Although primarily a responsibility of the State, the strategy will be made more effective in addressing the needs of the intended beneficiaries of legal aid if its development is held in close consultation with key stakeholders such as bar associations, law enforcement authorities, prosecutors, the judiciary, NGOs and civil society organizations. A national strategy that: (i) identifies the needs and demand of legal aid with due regard for minorities and other vulnerable groups; and (ii) identifies and implements appropriate methods of delivery according to those needs is essential in increasing protection of minorities' rights in the criminal justice system.

Another good practice in ameliorating infringement of rights of individuals belonging to minorities groups is development and promulgation of a professional code of conduct for legal aid providers. Professional codes of conduct are often developed by bar associations and in some countries, regulated by law. But in many countries, lawyers are not always a member of a bar association and thus are not bound to comply with professional standards. Moreover, in some countries, paralegals, who are not subject to lawyers' code of conduct, can also provide legal aid services. As such, a good practice in improving services and conduct by legal aid providers is to incorporate quality standards for legal aid providers that includes duty treat individuals belonging to a minority group fairly and with dignity. The professional code of conduct should also include, *inter alia*, a duty to protect the interests of clients regardless of background, a duty to act with integrity and independence as well as a duty to act impartially.

A good practice in enhancing assistance and protection of minority victims and witnesses is providing specialized training to criminal justice officers (e.g. police, prosecutors, legal aid providers, judges) in dealing with victims including special categories of victims. Such training programmes can cover the particular needs and circumstances of members of ethnic or racial minorities, such as the impact of certain crimes on minority victims. Being cognizant of and taking cultural implications into consideration improves the criminal justice system's ability to assist and protect minority victims and witnesses of crimes. This also applies to offenders from minority groups.

VI. Overrepresentation of Minorities in Detention and Imprisonment

Minorities are disproportionately represented in detention facilities, in both pre-trial detention and post-conviction imprisonment in many countries. In some jurisdictions, ethnic minorities represent over 50 percent of prison population.¹⁶ This overrepresentation of minority groups can be attributed to various reasons: legislation and law enforcement strategies that have a disparate impact on ethnic or racial minorities, social and economic disempowerment resulting from discrimination in society-at-large, inability to afford bail or to hire a lawyer, inadequate availability of linguistically- and culturally-competent legal aid, stigmatization against a certain minority group and heightened risk and exposure to institutional violence.

1. Particular vulnerability of members of minority groups in detention and prison facilities

The discrimination and stigmatization encountered by people from minority groups from the general public are magnified in the closed environment of detention. The discrimination in the society-at-large contributes to minimising or even legitimising the continued and amplified discrimination of such minority groups by both prison staff and other detainees and inmates. Discrimination is likely to have an impact on the detainee's access to legal aid, access to other services within prison such as educational and vocational training programmes or visitation privileges.

Discrimination in prison can take many forms. It can range from physical and verbal abuse from prison staff or other prisoners to systematic classification into higher security institutions than necessary. It can also take the form of heightened searching procedures or unnecessary disciplinary punishments imposed on only certain minority groups. In many countries, population management often fail to accommodate the special needs of minority groups relating to their cultural and religious diversity. For example, a detainee from a minority group can be prevented from following their dietary restrictions or do their prayers. This is in direct contravention to the principle of non-discrimination as well as Rule 2 of the *UN Standard Minimum Rules for the Treatment of Prisoners* (the “Mandela Rules”), which states that “the religious beliefs and moral precepts of prisoners shall be respected”.¹⁷

2. Measures to improve access to justice and accountability for minorities in detention

A necessary measure in improving protection of minorities in detention facilities is implementing human rights standards in prisons, most notably equitable treatment of all prisoners. Equitable treatment is essential in establishing a prison environment that does not perpetuate discrimination against minorities. In addition to explicit commitment in eliminating all forms of discrimination, implementation of human rights standards must also include taking affirmative action to ensure that the special needs of minority groups are met.

Some of the good practices identified by UNODC¹⁸ include making the policy of non-discrimination visible to all detainees and prisoners (e.g. displayed on the walls of the prison establishment) and making it an integral part of prison staff training as well as consulting representatives of minority groups on a formal basis during the formulation of policies against discrimination on the basis of race, ethnicity or descent and developing regulations reflecting

¹⁶ *UNODC Handbook on strategies to reduce overcrowding in prisons*, p.11

¹⁷ *Standard Minimum Rules for the Treatment of Prisoners* (revised 2015), rule 2.

¹⁸ *UNODC Handbook on prisoners with special needs*, p.68.

such policies. Recruiting staff from national, ethnic, religious or linguistic minorities is also a key component in effective implementation of non-discrimination policies in detention facilities. Moreover, staff must be trained on cross-cultural issues so that they are cognizant of and can effectively deal with the special needs of minority groups.

Moreover, measures to improve access to justice for minorities in detention also include providing information on various non-governmental and paralegal services that can assist minority groups as well as information on access to legal aid in a language that minority groups understand. Providing written copies of prison rules and regulations in the language spoken by the minority groups is likewise important so as to prevent further discrimination and stigmatization in prisons for violating rules that they were not aware of.

For protection of rights of religious minorities, a necessary measure is ensuring that religious minorities are able to observe the tenets of their religion, including having an access to a minister of their own religion, being able to undertake communal worship, being provided with special diets and being to fulfil special hygiene requirements.

An equally important measure for protection of minorities is putting in place mechanisms for ongoing monitoring of discrimination based on ethnicity, race and descent. Monitoring and analysis needs to cover all aspects of daily life in detention, such as accommodation, vocational training programmes, education, disciplinary measures, recreation, libraries and religious chapels or parole decisions. Any notable racial or ethnical imbalances should be examined and any direct or indirect examination identified.

VII. Discrimination in Judicial Proceedings and Sentencing

Ethnic minorities also face discrimination in judicial proceedings and sentencing. In many countries, those from ethnic minority groups are given longer sentences than their non-minority counterparts for the same category of crime with comparable severity. This can be a result from both direct and indirect discrimination. Direct discrimination can take the form of, for instance, a judge or member of the jury who, under influence of his or her own biases, imposes a harsher sentence on a minority. It can also result from the criminal justice system's negligence in meeting the special needs of minority groups, such as failing to provide interpretation when the accused minority group member does not understand the language used during the trial and cannot effectively defend him or herself.

Indirect discrimination, on the other hand, is harder to discern. It often arises from laws, policies or practices that appear neutral but in practice has a disparate impact upon members of minority groups. Mandatory sentencing laws, which impose a mandatory minimum sentence on certain types of crimes with little to no judicial discretion, are one such example. Although it may appear neutral, many mandatory sentencing laws have had a disparate impact on minority groups, as: (i) the offences selected to be subjected to mandatory minimum sentencing are likely to be those committed predominantly by the socially disadvantaged; and (ii) application of legislation and law enforcement policies into practice has led to significant racial and ethnic disparities in arrest and detention. The practice and effects of a policy is therefore the applicable test of whether indirect discrimination has occurred.

1. Measures to remove obstacles to fair judicial proceedings for minorities

As mentioned previously, access to legal aid is critical in preventing infringement upon fundamental rights such as right to a fair trial and right to equality before the law. Access to legal aid is particularly important during criminal proceedings, including on appeal and other related proceedings, as the likelihood of wrongful convictions and violation of due process rights increase exponentially without advice of a lawyer. For members of minority groups, in particular, the risk is even higher due to direct and indirect discrimination discussed above. For some minority communities, their exclusion from the dominant group may even result in some minority defendants not even being aware of their basic rights such as the right a court-appointed lawyer due to exclusion resulting from language barriers and declining the assistance of the lawyer in fear of having to pay for the legal services. A good practice in enhancing protection for members of minority groups in this regard is raising awareness on the rights of the accused, particularly in marginalized and socially disadvantaged communities where members of minority groups are concentrated, delivered in the language spoken by such minorities.

Another essential measure in protecting rights of individuals belonging to a minority group in judicial proceedings is for States to take remedial action on those legislation and practice with an unjustifiable disparate impact groups distinguished by race, descent or ethnic origin, such as mandatory sentencing laws. States should review their legislation, policies and practices and take affirmative action to prevent or end policies with such unjustified discriminatory impact.

2. Measures to increase diversity in criminal justice system professionals

As with law enforcement officials and prison staff, international good practice indicates that the makeup of judges, prosecutors and other professionals in the criminal justice system must also reflect the ethnic, racial, cultural and religious diversity of the community-at-large. Judges and prosecutors should also be trained in issues relating to cultural and religious diversity so as to foster an understanding of the special needs of minority groups in criminal justice systems. This in turn contributes to reducing overt discrimination against defendants from minority groups and mitigates the risk of infringing upon the fundamental rights such as the right to a fair trial and right to equality before the law.

VIII. Conclusion

This joint written submission has identified gaps and challenges in the field of minority protection in the criminal justice context. By suggesting practical measures and good practices that can contribute to filling such gaps and protect the human rights of individuals belonging to minority groups, the Network aims to assist in identifying ways to engage with stakeholders in preventing and addressing possible contributing factors to discrimination in criminal justice processes. Through its Action Plan to support the implementation of the Guidance Note, the Network is available to support the recommendations of the 8th session of the Forum on Minority Issues.