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**ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY**

**Discrimination in the criminal justice system**

**Preliminary paper by Ms. Leïla Zerrougui, Special Rapporteur appointed to  
conduct a detailed study of discrimination in the criminal justice system  
in implementation of Sub-Commission Resolution 2002/3**

1. At its fifty-second session, the attention of the Sub-Commission on the Promotion and Protection of Human Rights was drawn to the extent of discrimination in the administration of justice. In response to this concern, the Sub-Commission's sessional working group on the administration of justice decided to request Ms. Leïla Zerrougui to prepare a working paper on discrimination in the administration of justice and in the criminal justice system for its next session.

2. At the Sub-Commission's fifty-third session, Ms. Zerrougui submitted a working paper to the sessional working group (E/CN.4/Sub.2/2001/WG.1/CRP.1), in which she confirmed the scale of the phenomenon of discrimination in the administration of justice and pointed out that she had found, in the light of the documentation that she had consulted and the research she had undertaken, that discrimination appeared to be common practice in police stations, the courts and prisons and suggested that she should undertake a study on discrimination in the criminal justice system.

3. In decision 2001/104 of 10 August 2001, the Sub-Commission, welcoming the working paper prepared by Ms. Zerrougui for the sessional working group, requested her to pursue her research, taking into consideration the comments made by members of the Sub-Commission, and to submit her final working paper at its fifty-fourth session.

4. At the Sub-Commission's fifty-fourth session, Ms. Zerrougui submitted a final working paper (E/CN.4/Sub.2/2002/5), which focused on four main areas: (i) a review of the Sub-Commission's contribution in the matter under consideration; (ii) the international context; (iii) further consideration of some features of the conceptual framework proposed for the study; and (iv) conclusions and recommendations.

5. In resolution 2002/3 of 12 August 2002, the Sub-Commission welcomed with satisfaction the two working papers presented by Ms. Zerrougui, recommended that the Commission of Human Rights should approve its decision to appoint Ms. Zerrougui as Special Rapporteur to conduct a detailed study of discrimination in the criminal justice system with a view to determining the most effective means of ensuring equal treatment in the criminal justice system for all persons without discrimination, particularly vulnerable persons, and requested her to submit a preliminary report to the Sub-Commission at its fifty-fifth session, a progress report at its fifty-sixth session and a final report at its fifty-seventh session.

6. At its 59th meeting, the Commission approved, by its decision 2003/108 of 23 April 2003, the appointment of Ms. Zerrougui as Special Rapporteur and requested the Secretary-General to provide her with any assistance necessary to enable her to fulfil her mandate, including the assistance of a consultant having specialized knowledge of the subject.

7. Owing to a lack of time between the confirmation of her appointment by the Commission and the deadline for the submission of Sub-Commission documents, the Special Rapporteur - whose appointment has not yet been confirmed by the Economic and Social Council - is not in a position to submit her preliminary report to the fifty-fifth session of the Sub-Commission. She has, however, decided to issue the present paper in order to clarify the general approach of the study and its conceptual framework and to propose a preliminary work plan to the Sub-Commission.

#### **I. REMINDER OF THE APPROACH ADOPTED IN ESTABLISHING THE FRAMEWORK OF THE STUDY**

8. The Sub-Commission will recall that Ms. Zerrougui was entrusted with the task of preparing the first working paper (E/CN.4/Sub.2/2001/WG.1/CRP.1) in the course of preparations for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (the Durban Conference). The paper recalls the significance of the non-discrimination clause, equality before the law and equal protection of the law in the most relevant international instruments, identifies the potential victims of discrimination, provides an overview of its various manifestations and proposes a conceptual framework for a possible study on discrimination in the criminal justice system. This framework stresses the need for information regarding the manifestations of discrimination in the criminal justice system, while suggesting that the study should concentrate on research into and the identification of discriminatory mechanisms responsible for the persistence of discrimination in the administration of criminal justice.

9. Comments were made on the first working paper by members of the sessional working group on the administration of justice and of the Sub-Commission. They recognized that, in view of its complexity and importance, the subject required a full study but that more detailed research needed to be undertaken on certain aspects. They stressed the need to identify discriminatory mechanisms in inter-State cooperation and those arising from the failure of national criminal justice systems to meet the requirements of vulnerable social groups, especially aliens, minorities, indigenous people and socially deprived categories.

10. The final working paper (E/CN.4/Sub.2/2002/5) was submitted against the background of the Durban Conference and the attacks of 11 September 2001. The consequences of those two events for the problem of discrimination in the criminal justice system were emphasized and it was proposed that future work should take place in the framework of the implementation of the Durban Declaration and Programme of Action. It should focus, moreover, unless other mechanisms were set up to that end, on violations of the right to non-discrimination arising out of measures adopted to prevent and combat terrorism, illegal immigration and transnational organized crime.

11. Lastly, in order to take into account the recommendations of the members of the Sub-Commission, some features of the conceptual framework proposed for the study had been considered in greater depth and two subjects of concern had been taken up, namely, the exclusion and discrimination experienced by non-nationals in the course of cooperation on criminal matters between States and the insensitivity of national criminal justice systems to the needs of vulnerable groups, in the light of the discrimination and difficulties encountered by destitute persons, indigenous people and minorities disadvantaged by the criminal justice system.

## **II. ESTABLISHMENT OF THE CONCEPTUAL FRAMEWORK FOR THE STUDY**

12. The study was authorized with a view to determining the most effective means of ensuring equal treatment in the criminal justice system for all persons without discrimination, particularly vulnerable persons. When the final working paper was submitted, several approaches were suggested for finalizing the framework of the study. Some participants drew attention to structural inequalities and highlighted the vicious circle of social discrimination and marginalization, resulting in frustration and potentially delinquent behaviour, which were ultimately a source of collective stigmatization.

13. Such a stigmatization circle was especially detrimental since justice reflects the beliefs, perceptions and stereotypes of society. The preparatory work for the study underlined those factors and highlighted poverty, the burden of the past and the influence of dominant groups as other determining factors in the persistence of discrimination in the criminal justice system. There was a clear link between the balance of power in society and discrimination in the criminal justice system, since it was generally the dominant groups which administered justice, directed criminal policies and set priorities together with the means of implementing them.

14. However, it was not enough to know the causes of stigmatization, they had to be acknowledged by showing that, in the daily working of criminal justice, the most vulnerable persons and groups in society were deprived of some of their fundamental rights. That is why it has been stressed from the outset that the Sub-Commission's contribution would be effective only if the study was aimed at dismantling discriminatory mechanisms in the criminal justice system, detecting de jure discrimination in legislation relating to matters of substance and/or procedure, identifying good practices already adopted at international, regional and/or national levels, with a view to reducing inequalities and eliminating discrimination in the criminal justice system, and making useful recommendations.

15. Generally speaking, the members of the Sub-Commission endorsed that approach, stressing that the future work must focus on the criminal process proper, without however losing sight of the social dimension of discrimination in the criminal justice system. Some participants hoped that the study would not entirely ignore the analysis of the motives for discrimination, particularly those relating to passive discrimination, in which particular attention should be paid to three main groups: aliens, vulnerable minorities and indigenous populations, with due regard for women in each of those categories.

16. Research carried out thus far shows that there is undeniably a racial dimension to discrimination in the criminal justice system. It is an established fact that it is often a manifestation of racism, xenophobia or intolerance, and that aliens, minorities and indigenous populations are the victims most seriously affected by such discrimination. Yet they are not the only groups to suffer: other persons for other reasons (poverty, sexual orientation, physical or mental handicap, gender, etc.) are also victims of discrimination and subjected to unequal treatment in the criminal justice system. The problems encountered by the potential victims are often very different, but there are also similarities and common characteristics, and it will not, perhaps, be necessary to consider them separately.

17. The Special Rapporteur does not plan to adopt an approach which focuses on the potential victims of discrimination,<sup>1</sup> but is in favour of a comprehensive approach based on supranational sources of criminal law and procedure relating to the protection of fundamental rights and freedoms. She will examine the institutional framework and legislation relating to matters of substance and procedure governing the activities of the investigating, prosecuting and law-enforcement agencies and the courts, with a view to identifying de jure discrimination, indirect discrimination and factors causing the persistence of discrimination in the criminal justice system. Behavioural discrimination will be dealt with only briefly, since, as already mentioned in the final working paper, behavioural discrimination in criminal justice was extensively covered in the study by Mr. Justice Abou Sayeed Chowdhury, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1982/7) and, in any case, where behavioural discrimination still exists it is because a collusive or ineffective judicial system ensures the impunity of its perpetrators.

18. The victimization of groups and persons whose precarious status and rights make them more susceptible to discrimination will be highlighted by analysing the legal framework of the criminal process and prison administration. In succession, structural inequalities - which, in the absence of affirmative action, jeopardize equal access to the law and justice, the precariousness of the victim in the criminal process and the distinctions and differences in treatment that are sometimes necessary for the proper administration of justice, but may result in the deprivation of

fundamental rights, will also be studied. Discrimination caused by the institutional framework of criminal justice, the choice of a type of organization, system or procedure, and by legislation concerning matters of substance and procedure that either openly establishes discrimination or, although neutral, gives rise to it, will also be dealt with. Emphasis will be laid on discrimination suffered by the poor, aliens, indigenous populations and minorities.

19. With regard to women, the Special Rapporteur considers that a gender-specific approach is required, not only because all United Nations bodies are requested to adopt such an approach in their work, but in particular because, in the various phases of the criminal process and in the prison administration of virtually all countries, women are the victims of multiple discrimination, which targets them because they are women irrespective of the group to which they belong or their status (victims, perpetrators of offences or simple witnesses). Women from vulnerable sectors of the population suffer other forms of discrimination on account of the precarious nature of the rights of the group to which they belong. That will of course be taken into account in the proposed approach, so as to highlight the many forms of discrimination suffered by women and girls in the criminal justice system.

20. Once the problem of discrimination in the criminal justice system has been clearly defined, the Special Rapporteur will focus on affirmative action and good practices adopted at the international, regional and national levels. These practices will serve as a basis for drafting guidelines or a guide to good practices to guarantee equal access to the courts, including equal access to the law and to a judge, and to ensure that vulnerable persons and groups are effectively protected against discrimination in the criminal justice system.

21. In that connection the following preliminary work plan is proposed for the Sub-Committee's consideration:

- (a) Vulnerable persons caught between formal equality before the law and the courts, and structural distinctions, differences in treatment and inequalities;
- (b) De jure discrimination and institutional discrimination in criminal process and prison administration;
- (c) Discrimination in the criminal justice system from the gender-specific standpoint;
- (d) Good practice adopted at the international, regional and national levels to reduce inequalities and eliminate discrimination in the criminal justice system; and
- (e) Conclusions and recommendations, including guidelines, to guarantee vulnerable persons the right to non-discrimination and respect for their basic rights in the criminal justice system.

### Notes

<sup>1</sup> This approach has been adopted by other bodies which, in accordance with their respective mandates, have dealt with discrimination in the administration of justice from the standpoint of a victim category or the victim (see, inter alia, the report on the draft basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law (E/CN.4/2003/63) and the report of the Working Group of Experts on People of African Descent (E/CN.4/2003/21)).

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