

## EXPLORING THE LEGAL FRAMEWORK FOR MINORITIES IN THE CRIMINAL JUSTICE SYSTEM- AN IACHR PERSPECTIVE

My presentation today will focus mainly on two sets of minorities- Afrodescendants and indigenous peoples since these are the two main groups that come before the Commission. Religious minorities also have tremendous significance for the Americas, but as yet petitions and hearings are scarce in the Inter-American international human rights system.

Undoubtedly, the region, like much of the rest of the world enjoys de jure equality in terms of general principles. The principle of equality and non-discrimination is entrenched in all of the legal systems in the hemisphere. It is a principle of jus cogens, also enshrined in the human rights instruments of the Inter-American System of Human Rights. It is therefore an universal principle. In our jurisprudence, Art 1 of the Convention, which contains these grounding principles, are applied globally throughout the system to every other human right, as a framing principle, including ECONSOC rights, which must also be granted without discrimination.

While there is formal equality in terms of the legal framework, it is clear that in a number of important ways, there is de facto inequality, grounded in historical realities and paradigms that persist. This is very much evident in the criminal justice system, which might appear to be universally equitable, including in its mantra that every person is presumed innocent. Nevertheless, we observe clearly that minorities do not experience this presumption of equality, or often, even the presumption of innocence, in

practice, whether we are examining the status of the minority individual at the point of entry / just before entry, into the criminal justice system, when he or she first comes into contact with the law, during a formal criminal process, the arrest or the trial, or indeed, afterward, at the sentencing and incarceration processes. Moreover, our experience demonstrates clearly that this is true whether we are speaking of the adult, or child belonging to a minority group.

This experience has been gleaned from a variety of interventions, from petitions, site visits and hearings, more recently targeted hearings on Racism, including Race and the Criminal Justice system promoted by the Rapporteurship on the Rights of African Descendants and against Discrimination, whereby we gathered important information from civil society organisations and states. It has invoked the launch of a special report on the criminal justice system and race in the US, focusing on policing and was also interrogated by the IACHR's Rapporteur at two special fora in Canada on race and rights (Montreal 2013 and Toronto 2014). Racial discrimination in the criminal justice system and policing is certainly a microcosm of the wider societal problem. It is neither isolated not exceptionalistic.

### **Legal Framework only superficially cradles equality**

While I concede that our legal frameworks conceptualise general principles of equality, in many cases, it cradles equality only superficially. This is so whether we examine how laws are interpreted (for example, Stand your Ground laws), the kinds of laws or penalties that we *choose* to implement in the criminal justice system, e.g. which offences

attract criminal penalties and which do not (such as loitering, a remnant of slave plantation societies), or how laws are applied unequally in ways that disproportionately and unfairly impact minorities.

Some of these are fairly well known, but there are some surprising findings:

For example, in a recent site Rapporteurship visit to the US on this subject,<sup>1</sup> I discovered an intriguing link between excessive racial profiling of Afrodescendants (which we are familiar with) resulting in continuous traffic stops, fines, etc. and the legal framework for the funding arrangements for principalities in these states. In sum, the police departments and other law enforcement agencies were directly funded from the monies from these traffic tickets and other criminal fines. Thus, there was a considerable added incentive for targeting Afrodescendants. In fact, between 2012 - 2014, African Americans accounted for 85% of all vehicle stops, 90% of citations and 93% of arrests in Ferguson, Missouri, a place now infamous for allegations of racial profiling and killings.

Another current example is the way in which the legal framework has embraced notions of excess in terms of policing by combining anti-terrorism with ordinary law and order functions. In many cases in the Americas, anti-terrorist laws have been used for so called regulation of ordinary protesters with the full understanding that the typical protestor is in fact a minority, such as an indigenous person protecting land rights. This is an expansion of what should be a civil law framework into the most

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<sup>1</sup> In August of 2015, I visited, as Rapporteur, states which had been highlighted for racial unrest in recent times in the US, including Florida, New Orleans and Missouri.

dangerous and oppressive realm of the criminal law and constitutes a violation of several principles of international human rights law, including rights relating to movement, liberty and principles of proportionality. The Commission has spoken out against this trend and recently, the Chilean government abolished the use of anti-terrorist laws for this purpose.<sup>2</sup>

Laws which permit wide discretion to use force are also shown to be inherently discriminatory in societies where there are already set negative stereotypes of minorities fuelled by generations of inequality. This is so whether we are speaking of laws which concede such power to ordinary citizens, such as in Stand your Ground laws, a form of self defence, or legal norms on the use of force by the police.

In the Stand your Ground paradigm, such as we have seen in the Trayvon Martin case in Miami, there have been increased killings of minorities.<sup>3</sup> Interestingly, when these laws are attempted to be used by minorities themselves, in their own self defence, they are not successful, since the threshold for non-liability appears to be higher. We saw, for example, this in the Merlene Alexander case, concerning a black woman who unsuccessfully tried to use the defence when she fired a warning shot after being in fear of her life due to a domestic violence situation. This illuminates the underlying discriminatory attitudes inherent in such laws and the deep subjectivity which frames them.

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<sup>2</sup> The Rapporteur also made a country visit to Chile in November of 2014 and this topic was discussed.

<sup>3</sup> Trayvon Martin was an unarmed black youth who was killed by a gun by a neighbour patroller in 2012, in Miami while walking to his family's home, because he looked suspicious. The case sparked national outrage but the killer was not found guilty of any wrongdoing since he claimed to be in fear of his life.

The issue of the excessive use of force, including allegations of torture by the police against black minorities is now well documented and goes beyond special laws permitting latitude. The statistics are alarming. For example, in the USA, black males between 15 and 19 are 21 times more likely to be killed by the police than their white counterparts. The Department of Justice itself has confirmed such inequities. In Brazil, the statistics are equally frightening.

As in the case of Stand your Ground laws, the legal norms determining what is excessive force can be surprisingly fluid. Reasonableness is the standard but it is an objective one i.e. what the police believe to be reasonable, not the ordinary person, or the judge, which can be translated to mean a fairly subjective standard, in effect. In many countries, whether the US, or Mexico or elsewhere, there is no statute which attempts to delineate what this should mean in a modern context.

Moreover, international legal obligations as to where the base line must be, are typically ignored. In international rights, the principle of proportionality and the preservation of the right to life, are the first premises in terms of policing, not a subjective, or seemingly fluid test of what is reasonable. In a context of structural inequality, in which minorities exist, the standard of reasonableness on the part of a law enforcement officer, in particular, an untrained one, ignorant of the culture and experience of minorities, is not a fair standard. The use of force by the police must be guided by the principle of exceptionality.

### **Militarisation of Policing Protests**

The issue of excessive force is increased with the trend toward the militarization of the police, or in some cases in Latin America, the deployment of armed forces to carry out what should be policing functions to keep law and order. In some countries, the impetus for this militarisation has been the 'War on drugs' or responses to 9/11, e.g. in the North America. In others, it is an offshoot from former dictator regimes which linger. Such military style operations utilise swat teams and military style equipment. Such engagement does not meet the standards of the inter-American system which have emphasized that law and order functions should be the preserve of efficient, well trained national police forces utilizing proportionate methods of policing.

### **Criminalisation of Protests**

The Commission has interrogated the phenomenon of the criminalisation of protests and in addition, of human rights defenders in numerous fora. This is an abuse of the legal framework for law and order. Criminalisation applies across the board to both Afrodescendants, whether those protesting their disadvantage because of displacement due to the armed conflict in Columbia, or in Brazil, or Afro Americans protesting police abuse in the US. Incidentally, there is concrete evidence of blatant discrimination in this criminalization. In my recent site visit to Missouri I received testimony from white protestors who said that the police walked straight past them to deliberately arrest only the black protestors in Ferguson.

An important example too includes indigenous peoples all over the Americas attempting to protect their rights over ancestral lands in the face of developmental

projects. Such projects typically involve the action of transnational companies seeking and obtaining title over such lands without prior consent and consultation of indigenous peoples as obligated in international law and too often with the permission, acquiescence or willful blindness of the states itself. The role of the police in these encounters is not as the upholder of established rights. Rather, typically, the police protect the projects but not the people.

### **Core Similarities between Minorities before the Criminal Justice System**

Minority groups are clearly not identical, but it is apparent that there are a number of important similarities that we can observe when interrogating their interaction and experiences before the criminal justice system. One other parallel that we can note is the linkage between discrimination and poverty. The Commission has noted in several of its Reports, that indigenous peoples and Afrodescendants continue to occupy the lowest income groups in the Americas. We continue to observe with alarm that the phenomenon of persistent poverty, a historical paradigm, endures. In our view, poverty is both a cause of discrimination in the criminal justice system and an exacerbating factor. Further, discrimination fuels poverty.

### **Aftermath of Clashes with the Criminal Justice system - enduring cycles of poverty and disenfranchisement**

The glaring gaps and deficiencies of the legal framework in protecting minorities against discrimination and inequality have long term impact which reach beyond the arrest, conviction or incarceration. The aftermath of such inequitable clashes with the

criminal justice system is often enduring cycles of poverty and disenfranchisement because of the already existing vulnerabilities of minorities.

Thus, an arrest, even without a conviction, can further jeopardise already scarce opportunities for jobs, livelihoods and life chances.

The alarming statistics which demonstrate that blacks are several times more likely to be stopped and searched, resulting in an arrest (even if thereafter released for innocence), coupled with other severe deficiencies in the justice system, such as prolonged periods in pre-trial detention (itself a violation of human rights); and harsher sentences, therefore illuminate serious situations of violations of human rights, including economic, social and cultural rights, which must be addressed. For example, in New Orleans 90% of those arrested are Afro-American males under 30! After incarceration, the vulnerability and acute negative impact on livelihoods are even more severe. This situation, we were told in a recent hearing,<sup>4</sup> is being addressed in the US through special livelihood trial programs, but is in the infancy stage.

Just as serious are laws which have other indirect discriminatory impacts, such as moves to expand the disenfranchisement of persons because of criminal conviction, a troubling problem in the US. In an inherently inequitable criminal justice system, such laws in effect target minorities who lose core rights of citizenship.

### **Broad approach**

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<sup>4</sup> In an IACHR hearing in March 2015, Washington. The information was given by the Government of the United States.

While the legal framework contains broad principles of equality to which the criminal justice must conform, this is not sufficient to guarantee non-discrimination. There is need to have laws which specifically outlaw the worst forms of discriminatory practice, whether direct, such as racial profiling, unequal sentences etc. or indirect. Similarly the law must provide clear and specific models for accountability where violations occur.

### **Gender Dimensions**

The legal framework must also be able to take account of hidden or structural gender biases which intersect with questions of race. The Commission has had a long familiarity with this dimension, such as Afrodescendant women defenders in Honduras or in the armed conflict in Columbia, or indigenous women leaders, all of whom are targeted and our jurisprudence have emphasized this structural defect. More recent examples demonstrate how deeply race and gender prejudices can run, when the Commission heard recently of Afrodescendant women who, although victims of trafficking are prosecuted before the justice system as prostitutes. The US has recently been introducing laws in several states to prohibit this law enforcement response.

### **Juveniles**

Race is an important variable in the injustices and excesses that we see in juvenile justice. For example, because of the phenomenon of gangs and maras, there is a trend to increase penalties for youth; lower the age of criminal responsibility (Brazil); and institute draconian Gang Laws, all of which disproportionately penalize minorities in the current context.

The result is an increasing tendency to criminalise youth belonging to minority groups, particularly males, subjecting them to incarceration and harsh penalties, emphasizing the punitive instead of a rehabilitative environment. There is also a spill-over effect on their economic, social and cultural rights, in particular, the right to education and family life.

### **Legal Framework inadequately Contemplates Remedies for Race**

Despite the clear evidence of discrimination in the criminal justice system, the legal framework inadequately contemplates remedies for these violations. The Commission has found that police abuses across the region are met with indifference or refusal to address accountability issues. They are rarely, if every independent and predictably, conclusions are skewed against victims. In some cases, military tribunals are utilized. In Honduras, there is a proposal to enshrine military police in the Constitution, complete with military forms of justice. In the US, the Federal government itself has acknowledged this lack of accountability. The statistics are telling. This is by no means atypical. There is need for new laws and policies to ensure independence and accountability.

We must also guard against moves to undermine attempts to make law enforcement more accountable, such as laws that aim to make citizen cameras and videos outlawed. It is this technology that has made many of these abuses visible. Similarly laws are needed to prevent police cameras when utilized, from being tampered with or ensure that the recorded information is transparent.

I leave you with an important question: How can the criminal justice legal system better HARNESS complaints of race discrimination? Thankfully, this is an issue that has become more visible in recent years. There is evidence that these issues are still under-reported, so better data collection (which is necessary) will only go so far. Such cases are sparse even before international tribunals, such as the IACHR. There are many reasons for this, including:

- (i) A cycle of fear and victimization, easily understood given that we are speaking of already historically marginalized and discriminated communities;
- (ii) Improper classification of cases and petitions – We see this even in international tribunals. For example, the Commission hears many Death Penalty Cases but one can easily fail to recognise that often, these actually deal with Afrodescendants, because the issue of race is invisible, even in the face of alarming facts such as blatant race taunts. These are also cases of race discrimination but they do not get classified as such;
- (iii) Few civil society organisations (who are the main petitioners in human rights regimes) highlight, or even interrogate, the issue of race; and
- (iv) Improper classification of offences at the domestic level, for example, failing to investigate crimes perpetrated against minorities as hate crimes, instead treating them as mere assaults etc.

Ultimately, the issue of race in the criminal justice system needs to be visibilised if it is to be addressed effectively. The recent initiatives of the IACHR, in particular, the Rapporteurship on the Rights of Persons of African Descent and against Discrimination, including its forthcoming Report and a concerted effort to hold more hearings on this sensitive issue, are attempts to do exactly that.