ACCESS TO JUSTICE FOR INDIGENOUS PERSONS WITH DISABILITIES: KEY ISSUES AND OPPORTUNITIES

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Introduction

In addressing access to justice issues experienced by Indigenous Peoples, the rights and concerns of Indigenous persons with disabilities must be taken into consideration. This is critical both because of the magnitude of the barriers to justice faced by many Indigenous persons with disabilities and because of the number of people impacted. Over 1 billion people, or approximately 15 percent of the world’s population, have disabilities. While no global data exists regarding Indigenous persons with disabilities, available statistics show that Indigenous persons are often disproportionately likely to live with a disability in comparison to the general population. Indigenous persons with disabilities frequently experience multiple forms of discrimination and face barriers to the full enjoyment of their rights, based on their Indigenous status and also on disability.

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3 For example, in 1991, 31 per cent of Canada’s adult Indigenous population, aged between 34 and 45, reported a disability, compared to 13% for the total Canadian population. (See: http://www.statcan.gc.ca/pub/82-003-x/1996001/article/2823-eng.pdf). In 2002, in Australia, over one third of Aboriginal and Torres Strait Islander people aged 15 years or older reported a disability or long term health condition. (See The National Aboriginal and Torres Strait Islander Social Survey (NATSISS, 2002), summary at: http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4714.0Main+Features12002?OpenDocument).
International Normative Framework

The United Nations Declaration on the Rights of Indigenous Peoples (the UN Declaration) and the Convention on the Rights of Persons with Disabilities (the CRPD or the Convention) are the most comprehensive international instruments expressing the rights of Indigenous Peoples and of persons with disabilities. As such, they provide key frameworks for ensuring access to justice for Indigenous persons with disabilities and should guide the interpretation of other relevant international human rights and development instruments in this regard.

As detailed throughout this volume, the Declaration includes extensive and detailed provisions relating to access to justice. It also calls for specific attention to be paid to the rights and special needs of Indigenous persons with disabilities, including to measures taken by States to ensure continuing improvement of economic and social conditions for Indigenous Peoples (UN Declaration, arts. 21(2) and 22(1)). These provisions must accordingly be considered in terms of the Declaration’s protections relating to access to justice.

Non-discrimination is a general principle of the CRPD, (art. 3b), to be applied in interpretation of all of its provisions. The Convention expresses a particular concern regarding the situation of persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of, inter alia, Indigenous status (preambular para (p)).

The Convention specifies that States Parties are to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of specified accommodations, in order to facilitate their effective role as direct and indirect participants (art. 13(1)). It further prescribes positive measures to be taken for the fulfillment of the rights of persons with disabilities in relation to justice. For example, States Parties are to promote appropriate training for those working in the field of administration of justice, including police and prison staff (art. 13(2)).

The Convention reaffirms that persons with disabilities have the right to recognition everywhere as persons before the law, enjoying legal capacity on an equal basis with others in all aspects of life (art. 12). To ensure effect is given to this right, States Parties are to take measures to
provide persons with disabilities access to the support they may require. Moreover, all measures that relate to the exercise of legal capacity are to include safeguards to prevent abuse in accordance with human rights law. (art. 12 (3)).

**Specific Issues Faced by Indigenous Persons with Disabilities**

In spite of protections such as these, Indigenous persons with disabilities face considerable obstacles in terms of access to justice. Barriers and impediments are often complex, involving combined forms of inaccessibility and other forms of discrimination, as well as their socio-economic impacts.

These overarching barriers, which can be compounded for those living in rural areas, include, for example:

Limited access to information provided in accessible formats and appropriate languages, such as educational materials regarding one’s rights, what constitutes a crime and how to report it, and how to find legal or other services. Lack of initiatives to educate people in this regard can be compounded by the limited information technology infrastructure available for Indigenous Peoples in rural areas.

Inaccessibility of legal counsel, for example where appropriate free legal aid is needed, but not offered, or where available counsel is not appropriately trained to address the legal and other needs of Indigenous clients with disabilities. Moreover, Indigenous persons with disabilities may face transportation-related barriers to obtaining legal or related services, for example, where long distances must be travelled to obtain services and where there is a lack of accessible transportation to reach these.

Inaccessibility of proceedings may be experienced in international, State or traditional systems in cases where measures have not been taken to ensure the accessibility of physical environments, including

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4 Accessibility is a general principle of the CRPD (art. 3), which specifies that States Parties are to take measures to ensure to persons with disabilities, on an equal basis with others, access to the physical environment, to transportation, to information and communications, and to other facilities and services open or provided to the public, both in urban and rural areas (art. 9(1)).
courthouses,\textsuperscript{5} and where there is a lack of assistive technology, such as hearing loops, sign language interpretation, CART services\textsuperscript{6} and materials in alternative formats, to enable persons with disabilities to understand or participate in proceedings. For Indigenous persons with disabilities, inaccessibility may be compounded in instances where educational materials and proceedings are also not available or conducted in Indigenous languages.

These overarching barriers can compound additional specific access to justice issues faced by Indigenous persons with disabilities, which can include and relate to some of the following, among others:

\textit{Legal capacity}

Persons with disabilities, including Indigenous persons with disabilities, are at risk of being deprived, in contravention to the Convention, of legal capacity to make their own decisions. Deprivation of legal capacity has been seen to facilitate involuntary institutionalization and medical treatment, including forced electroshock therapy, intake of psychotropic drugs or other forced psychiatric treatment.\textsuperscript{7}

\textit{Family law}

While little data exists on Indigenous women with disabilities, existing information indicates that women with disabilities are often at increased risk of having their children removed because of their disability.\textsuperscript{8} Contributing factors may include assumptions by child protection authorities regarding competence of mothers with disabilities; lack of support for parents with disabilities (as called for in article 23 of the CRPD) and lack of access to adequate legal representation and assistance in judicial proceedings.

\textsuperscript{5} A/HRC/24/50, para. 72.
\textsuperscript{6} CART (Communication Access Real Time Translation) Services provide instant translation of the spoken word into written text using a computer and relevant software. The text produced can be displayed in a number of ways, including on individual computer monitors, projected onto a screen or combined with video presentation.
\textsuperscript{7} Women Enabled, Submission to the Committee on the Elimination of Discrimination Against Women (2013).
\textsuperscript{8} See, for example, National Council on Disabilities (United States), Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children, 2012.
The United Nations Permanent Forum on Indigenous Issues has found evidence that a lack of support and services for families with Indigenous children with disabilities has also led to children being separated from their families, communities and cultures, and placed in institutions or with non-Indigenous families. This is particularly the case in societies in which Indigenous Peoples suffer historical trauma caused by, among other things, generations of children having been removed from their families.9

_Imprisonment and Detention_

While data on incarceration rates of Indigenous persons with disabilities are scarce, the data available suggest that Indigenous persons with disabilities may experience disproportionately high rates of incarceration.10 People with mental health conditions and intellectual disabilities are also sometimes subject to arbitrary and indefinite detention in long-stay institutions.11

There are also concerns regarding the treatment of Indigenous persons with disabilities in detention. The United Nations Office on Drugs and Crimes (UNODC) has found that “the difficulties people with

9 E/C.19/2013/6, para. 46
10 See, for example, Aboriginal Disability Justice Campaign, _No End in Sight: The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment_, prepared for the National Justice Chief Executives Officers Working Group, September 2012, finding that Indigenous Australians with cognitive impairments (compared to the non-disabled population) are “more likely to come to the attention of police, more likely to be charged, more likely to be remanded in custody, and more likely to be sentenced and imprisoned. They spend longer in custody than people without cognitive impairments, have far fewer opportunities in terms of program pathways when incarcerated and are less likely to be granted parole. They also have substantially fewer program and treatment options, including drug and alcohol support, both in prison, and the community when released, than their non-disabled and non-indigenous counterparts.” p. 8.
disabilities face in society are magnified in prisons”\textsuperscript{12} and has detailed many shortcomings in the treatment of both Indigenous prisoners and prisoners with disabilities, including in terms of protection, discriminatory treatment, lack of access to appropriate health care, and separation from family, communities and culture. In terms of protection, the UNODC has found that women prisoners with disabilities are at a particularly high risk of manipulation, violence, sexual abuse and rape.\textsuperscript{13}

\textit{Access to Justice in relation to physical and sexual violence}

There is a lack of data regarding the specific situation of Indigenous women with disabilities. However, available information shows that both Indigenous women\textsuperscript{14} and women with disabilities\textsuperscript{15} often experience higher rates of violence and sexual abuse than the general population of women.

Violence may be experienced in the home and in other settings, including institutions, and may be perpetrated by care givers, family members or strangers, among others. Violence can also take the form of forced medical treatment or procedures, including forced sterilization, the incidence of which has been documented in many countries and regions.\textsuperscript{16}

Significant barriers exist to escaping and reporting violence, and in accessing justice and services. These include the overarching barriers detailed above relating to lack of access to communications, information


\footnotesize{13} UNODC, p. 45.

\footnotesize{14} See, for example, Amnesty International, \textit{No More Stolen Sisters: The need for a comprehensive response to discrimination and violence against Indigenous women in Canada} (2009), and \textit{Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA} (2007).

\footnotesize{15} In his 2006 In-Depth Study on All Forms of Violence against Women, the Secretary-General observed that surveys conducted in Europe, North America and Australia have shown that over half of women with disabilities have experienced physical abuse, compared to one third of non-disabled women. A/61/122/Add.1, para. 152, citing to Human Rights Watch, “Women and girls with disabilities”, available at: http://hrw.org/women/disabled.html.

\footnotesize{16} Thematic study of the Office of the High Commission for Human Rights on the issue of violence against women and girls and disability, A/HRC/20/5, para. 22.}
and education regarding violence; and barriers to mobility, including lack of accessible transportation to relevant services. In addition, Indigenous women with disabilities may experience fear of losing independence or fear of retaliation, or may rely upon a perpetrator for assistance with life activities. In some instances, complicated jurisdictional laws may result in confusion regarding which authorities (for example, national, local or tribal) have authority over a particular case, and may contribute to inadequate response in cases where violence is reported. In addition, law enforcement officers or other relevant service providers, such as those responsible for carrying out sexual assault forensic examinations, may not be prepared to respond adequately to reports of violence against Indigenous women with disabilities.

**What factors could contribute to overcoming these challenges?**

The last two years have witnessed a growing international movement of Indigenous persons with disabilities, culminating in the launching of a Disability Caucus at the 12th session of the UN Permanent Forum on Indigenous Issues. This movement, with the support of the international community, can play an important role in bringing attention to and engendering change with regard to access to justice and other issues faced by Indigenous persons with disabilities. At the international level, there are a number of entry points for this.

The Committee on the Rights of Persons with Disabilities, the United Nation’s newest treaty body, has already taken the opportunity in its concluding observations to comment on the situation of Indigenous persons with disabilities in ways that relate to access to justice. Its relevant observations to date have focused, *inter alia*, on:

- **Equality and non-discrimination,** inclusion in relation to judicial and administrative remedies and relating to the need for policies and programmes for persons with disabilities who belong to Indigenous Peoples with a view to ending the many forms of discrimination to which they may be subjected.

17 CRPD/C/AUS/CO/1, para. 15.
18 CRPD/C/ARG/CO/1, para. 11.
19 CRPD/C/ARG/CO/1, para. 12, CRPD/C/PER/CO/1
• Liberty and security of the person, including with regard to the overrepresentation of persons with disabilities, in particular Indigenous persons with disabilities, in prison and juvenile justice systems. In this regard, the Committee has recommended the establishment of legislative, administrative and support frameworks that comply with the Convention.20

• The importance of disaggregated data and statistics on persons with disabilities, to understand the situations of specific groups who may be subject to varying degrees of exclusion, including Indigenous Peoples, in particular Indigenous women and children with disabilities.21

• The Committee has addressed the situation of Indigenous children with disabilities. Its recommendations in this regard have called for the strengthening of legislation and adoption of specific programs to guarantee the rights of children with disabilities, with particular attention to Indigenous children,22 and that a State make special care and assistance to children with disabilities, in particular Indigenous children, a matter of high priority; invest in the elimination of discrimination against them; and take steps to prevent violence, abuse and abandonment.23

UN entities with mandates focused specifically on Indigenous Peoples, as well as their Secretariats, have demonstrated a growing commitment to addressing the needs and rights of Indigenous persons with disabilities. The Permanent Forum on Indigenous Issues issued a series of recommendations specifically focused on disability in the reports of its 11th and 12th sessions. It also prepared and adopted a “Study on the situation of Indigenous persons with disabilities, with a particular focus on challenges faced with regard to the full enjoyment of human rights and inclusion in development.”24 The UN Expert Mechanism on the Rights of Indigenous Peoples addressed the situation of Indigenous persons with disabilities in its recent study on “Access to justice in the

20 CRPD/C/AUS/CO/1, paras. 31–32.
21 CRPD/C/AUS/CO/1, paras 53 and 55.
22 CRPD/C/SLV/CO/1, para. 20.
23 CRPD/C/PER/CO/1, para. 17.
24 E/C.129/2013/6
promotion and protection of the rights of Indigenous Peoples,” as well as relevant recommendations in its advice No. 5(2013) on the same theme.\textsuperscript{25}

Going forward, there is room to encourage increased attention by these mandates, as well as those of the Special Rapporteurs on the rights of Indigenous Peoples and on disability, to access to justice issues faced by Indigenous persons with disabilities, including through the submission of parallel reports to the CRPD, as well as attendance and participation in the sessions of each mandate, as well as their various consultation processes, as relevant.

There are also opportunities for Indigenous persons with disabilities to raise awareness regarding access to justice concerns at other relevant UN development or human rights forums and conferences. For example, Indigenous persons with disabilities participated in the preparatory process for the 23 September 2013 General Assembly High-level Meeting on disability and development. Member States subsequently included, in the very concise outcome document adopted at that Meeting, a call for all development policies and their decision-making processes to take into account the needs of and benefit all persons with disabilities, including Indigenous Peoples.\textsuperscript{26} The World Conference on Indigenous Peoples, to be held from 22–23 September 2014 presents a new opportunity for commitment to the inclusion of the voices and concerns of Indigenous persons with disabilities in efforts towards implementation of the UN Declaration.

Going forward, of particular significance is the ongoing process towards a future international sustainable development agenda, to be put into place following the 2015 deadline for achievement of the Millennium Development Goals. The development agenda has important implications for Indigenous persons with disabilities, particularly with regard to social, economic and cultural barriers.

Similarly, there are disability-related developments at the regional level with access to justice implications, and in which Indigenous persons with disabilities should have a voice. These include the African Union’s launching of a new, strengthened regional approach to advance the rights of persons with disabilities and the implementation of the

\textsuperscript{25} A/HRC/24/50
\textsuperscript{26} A/68/L.1, para. 4(b).
Incheon Strategy to Make the Right Real for persons with disabilities in Asia and the Pacific.

At the national level, there are also important opportunities for advancing access to justice for Indigenous persons with disabilities, particularly through efforts to translate the Convention and the UN Declaration, as well as other relevant instruments, such as the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Rights of the Child, into real changes on the ground.

In terms of traditional justice mechanisms, there is great scope for exploration of how traditional justice systems ensure or do not ensure accessibility and the full participation of Indigenous persons with disabilities, as well as the gathering of examples of good practices in this regard. This could be examined in the Expert Mechanism’s Follow-up Study on Access to Justice, planned for 2014.