



Barriers to Access to Justice for Racialized and Economically  
Disadvantaged Women Victims of Sexual Violence:

A Study of Indigenous Women in Canada

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MA Human Rights Thesis  
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30 June 2021

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## Abstract

This paper will examine how race, ethnicity and socioeconomic inequality intersect with gender to heighten the inequality that racialized women experience throughout legal processes, to exacerbate their vulnerabilities to sexual violence, and increase their dependence on the justice system. By engaging in socio-legal empirical study and analysis of access to justice with intersectional feminist theory and critical race theory perspectives, this paper will explore how intersections of race, ethnicity, gender, and colonialism interconnect to influence the experiences that marginalized groups have with the law and in accessing justice. The examination will analyze the social consequences of law and policy and provide deeper understanding about the multifaceted barriers to access to justice that exist for marginalized victims of sexual violence who live at the intersection of racial, gender, and colonial oppression. To demonstrate the cumulative impact of differential and discriminatory treatment in access to justice based on marginalized facets of the identity of victims of sexual violence, this thesis will investigate the experiences of Indigenous women victims of sexual violence in Canada. Indigenous women in Canada exist at the crossroads of multiple facets of marginalized social identity. The intersection of multiple risk factors influencing the level of vulnerability of Indigenous women to sexual victimization, namely their gendered and racialized positions in a society afflicted by racial and gender-based systems of oppression, their intergenerational victimization by the colonial process, and their institutionalized socioeconomic disenfranchisement, places Indigenous women in Canada at an intensely vulnerable, marginalized and victimized position in society. These factors establish significant social, economic and structural barriers to access to justice. This paper will analyze how law and policy may function in ways that reinforce and perpetuate inequality and sexual violence and propagate barriers to access to justice.

## Introduction

The study of law and society is an area of focus of distinct importance, particularly as we experience growing widespread global change. Law and policy must be studied in its broadest social context, to consider how laws and policies interact with, shape and changes the society in which it permeates. Without comprehensive investigation of the gaps that exist between law and policy and their application, the law may function in ways that reinforce and perpetuate inequality and violence through differential access and subjugation.<sup>1</sup> As the social world experiences widespread shifts in socio-cultural norms and political thought, as civil society increasingly questions the fairness and legitimacy of the effects of legal rules, in some cases rejecting altogether the notion of presumed impartiality of the law, the need for socio-legal study and the necessity of law and society research becomes increasingly apparent. To study the law and society is to recognize the voices and investigate the claims of marginalized populations, who have questioned the role of the law in their lives and in their communities, and who have reported experiences of inequal access and subjugation to the law, legal actors and legal institutions. Motivated by a commitment to solving social problems and to inciting and affecting policy and social change, this thesis will be written from a socio-legal perspective and influenced by critical race theory and intersectional feminist theories. It will employ empirical legal research, social sciences, and evidence-based statistical data to examine the ways that the law is experienced differently by different and more marginalized persons. No simple task, for the examination of differences in life experiences and of patterns of unjust treatment of individuals

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<sup>1</sup> Felice J. Levine, *Goose Bumps and "The Search for Signs of Intelligent Life, in Sociolegal Studies After Twenty-Five Years*, in *LAW & SOCIETY REVIEW*. Wiley, Journal of the Law and Society Association. 1990. Vol. 24, No. 1. Pp. 7-34.

requires careful and lengthy study and comparison. To substantiate the claims made throughout the thesis, significant reference and analyses are made to key investigative reports released by United Nations treaty bodies and entities, international and national human rights commissions and committees, international and national non-governmental organizations, national governments, policing agencies, and Indigenous activist groups. The thesis will incorporate extensive use of diverse research studies, including analyses of statistical data, national surveys, census and crime reports, as well as academic papers investigating the social, historical, and psychological implications and influences involved in areas pertaining to sexual violence, colonial history, law and policy, intersecting marginalization, and socioeconomic inequality.

Often and historically, racial and ethnic communities have been left out of the area of focus of standard scientific study, academia and policy analysis and research, including within fields of legal study. Academics and activists alike have struggled to confront and challenge the colonial framework and dominant structures of white hegemony within areas of social, legal and scientific disciplines and research.<sup>2</sup> Research exists examining the ways that marginalized facets of identity such as race, ethnicity, gender and socioeconomic status impact the various lived experiences of those existing in the social world. However, common and mainstream research and policy analysis looking at living conditions and collecting census data often do not adequately incorporate the demographic information required to make significant supplementary observations in secondary research about the extent to which findings of empirical studies may also reveal disparities based on race, ethnicity and socioeconomic status in areas of law, justice

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<sup>2</sup> See, Roberts et al., *Racial Inequality in Psychological Research: Trends of the Past and Recommendations for the Future*, in PERSPECTIVES IN PSYCHOLOGICAL SCIENCE, Association for Psychological Science, 2020. Vol. 15, No. 6, Pp. 1295-1309. See, Enakshi Dua and Bonita Lawrence, *Challenging White Hegemony in University Classrooms: Whose Canada Is It?* Atlantis, Vol. 24. 2. 2000. Pp. 105-106.

and policy.<sup>3</sup> This deficit in available intersectional empirical legal research has introduced certain limitations for the purposes of this thesis in analyzing and conducting comparisons of the ways that marginalized groups experience the law differently within the broader social context, in seeking to identify existing gaps between the law and its application. Despite this difficulty, it has been possible to connect numerous variables and identify pertinent research and data that may be analyzed in order to isolate and ascertain elements and levels of differential treatment and experience of the law and the judicial system based on the facets of identity of race, ethnicity, gender and socioeconomic status.

This thesis will compare the interactions that different and more marginalized groups have with the law and the justice system, and it will analyze the ways that unequal treatment and differential experiences with the law and within the justice system interact to introduce and perpetuate significant inequality and disproportionate challenges in the lived experiences of marginalized groups. By employing and combining a socio-legal perspective and a range of feminist and critical race theory epistemological viewpoints related to legal research and social science, through challenging and analyzing the social consequences of law and policy and the impact of its application on particular groups, this thesis may offer arguments dispelling prevailing presumptions that the law is impartial, autonomous, and consistent, detached from social influence and bias, available to and affecting all persons equally. Analyzing disparities in applications of the law and differential access to the law will allow for deeper understandings of the social context and social character of the law. Critical analysis will serve to evaluate how the law affects those subject to it. By scrutinizing the ways that the law operates in the social world,

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<sup>3</sup> K. Steven Brown et al., *Confronting Structural Racism in Research and Policy Analysis*. Urban Institute. February 2019.

it is possible to assess its efficacy and its impartiality, resulting in work that may help uncover its limitations and contribute to solving social problems, and supporting future political and social change and policy improvement.

The rise of increasingly organized social movements, developments in technology and communication, and evolutions of international understandings and legal recognition of human rights have created global effects of rapid change of socio-cultural norms, attitudes, practices, and political thought and behaviour. These changes in global society have provoked diverse international recognition of injustice and heightened scrutiny of international and national human rights law and policy. A focus stronger than ever before has been placed on investigating and identifying flaws within human rights policies and legal frameworks, and on recognizing and addressing the increased vulnerability and special needs of different marginalized groups around the globe. Transnational cooperation and activism between grassroots advocacy groups and regional and international human rights organizations have helped increase the promotion and advancement of respect for human rights principles around the world. Human rights groups have strengthened international networks and have gained considerable influence in the standard setting of new human rights norms, and they maintain a central position in international human rights law and in domestic and international human rights investigation mechanisms.<sup>4</sup> In large part due to the powerful role of advocacy groups, marginalized populations have had more access to the resources and evidentiary data required to garner attention and raise awareness about the human rights violations they face in their countries. Subsequently, State governments have been subject to expanded international pressure to adhere to increasingly robust and

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<sup>4</sup> Giulia Dondoli, *Transnational Advocacy Networks and Human Rights Law: Emergence and Framing of Gender Identity and Sexual Orientation*. 1<sup>st</sup> ed. Routledge, 2019. Pp. 14-16, 28-30.



progressive human rights norms and standards. Although many governments continue to resist the practical application and realization of the human rights obligations and principles they have ratified and officially endorsed, human rights claims have enjoyed increased recognition and significantly stronger legal force in the international context. Moreover, shifts in the human rights discourse occurring throughout civil society have prompted burgeoning and widespread enquiry and investigation into not simply the state of living conditions and human rights claims of marginalized groups, but also into our understandings of justice and the law.

Legal rules and the rule of law are indispensable instruments for the protection and promotion of human rights regionally and around the world, providing the framework upon which guarantees for human rights are founded and enforced, and recourse and remedy for violations are prescribed. Access to justice and equal justice under the law are foundational pillars of international and regional legal systems, they are functions of the effectiveness and legitimacy of legal rules and the rule of law. The protection and promotion of human rights may only be guaranteed so long as access to justice is accessible to all. To make the law and human rights effective, there must be equal access to the law, to legal institutions, and to judicial remedy. Much focus is placed on procedural justice; on establishing, applying and enforcing fair and equal legal rules and on ensuring the effectiveness and impartiality of the different legal processes. Often, procedural justice is conflated with substantive justice, and it is presumed that perceivably adequate and effective procedural law and justice generate fair and impartial outcomes under all circumstances. Legal systems operate on the assumption that if fair legal procedures are adopted and followed, the outcomes produced are guaranteed to be fair and must subsequently achieve substantively just standards, reducing the justice of results to the

application of just procedure.<sup>5</sup> Furthermore, legal systems and their emphasis on procedural justice function under the presumption that effective and impartial rules and procedures are equally accessible by all who seek justice and remedy. This supposes that all who seek justice should have equal and effective access to substantive justice so long as they trigger the application of procedural justice. Do all persons, irrespective of gender, socioeconomic status, and racial or ethnic identity, enjoy equal and consistent access to justice? To assess whether procedures, rules and access to justice are equally accessible and impartially applied to all persons, we will analyze the degree of access to justice enjoyed by marginalized victims who attempt to utilize the fairness of the judicial procedural process. In studying the law from a socio-legal perspective that takes into account its broader social context, in order to identify how policy and the law interact with the social world and the different groups of people living in it, this thesis aims to identify inconsistencies in access to justice. Namely, inconsistencies and disparities in victims' access to justice that manifest based on facets of the victims' social identities; particularly, race, ethnicity, gender, and socioeconomic status. There are many factors that introduce obstacles and interfere with victims' access to justice. Fair and effective procedures and rules within the justice system do not produce equal and fair results in all similarly positioned cases of human rights violations, and substantive justice is not an automatic consequence of just procedure.

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<sup>5</sup> David Miller, *Procedural versus Substantive Justice*, in *Justice*. The Stanford Encyclopedia of Philosophy, Fall 2017 Edition (Edward N. Zalta ed.).

## Women and Access to Justice

By engaging in empirical study and analysis of the law and of legal institutions in order to understand how the law is experienced differently by marginalized groups, and to assess whether legal rules, processes and decisions are equally accessible and justly applied to more socially disadvantaged groups, this thesis will examine the relationship and interaction that racialized and economically disadvantaged women have with the law and within the justice system. Women worldwide experience disproportionate levels of violence in all areas of public and private life; this vulnerability increases for women with intersecting marginalized facets of identity. To demonstrate the cumulative impact of differential and discriminatory treatment in access to justice based on marginalized facets of the identity of victims, this thesis will investigate the experiences of Indigenous women victims of sexual violence in Canada. Indigenous women in Canada exist at the crossroads of multiple facets of social identity; they are women of colour who continue to suffer the acute, long-term and intergenerational effects of violent colonialism. They endure deep social and financial harm as a result of the State of Canada's long history of policies of cultural genocide and assimilation against Indigenous populations.<sup>6</sup> This thesis will examine how race, ethnicity and socioeconomic inequality intersect with gender to heighten the inequality that Indigenous women experience throughout legal processes, to exacerbate their vulnerabilities to sexual violence, and to increase their dependence on the justice system, amplifying the need for effective and accessible access to justice. The examination will provide deeper understanding about the multifaceted barriers to access to justice that exist for

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<sup>6</sup> See, *Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, Truth & Reconciliation Commission Canada. 2015. Pp. 183. See, Ruth Amir, *Cultural Genocide in Canada? It Did Happen Here*. Aboriginal Policy Studies, Vol. 7, No. 1. 2018. Pp. 103-126.

marginalized victims who live at the intersection of racial, gender, and colonial oppression. Research into the statistic, demographic and geographic data of the female population and victims of sexual violence in Canada will allow for comparative analysis of the different vulnerabilities of groups and of the different experiences that victims of sexual violence have with the legal system. Analyzing Indigenous women's access to justice will help identify whether the procedures, rules and access to justice are equally and impartially accessible to all persons, and it is possible to examine the degree of substantive justice enjoyed by Indigenous women victims of sexual violence who seek to access fair procedural processes in comparison to their non-Indigenous counterparts. Indigenous women are one of the most socially and economically disadvantaged groups in Canada.<sup>7</sup> Their vulnerabilities to and experiences of sexual violence are shaped by their socioeconomic conditions, their gender, and their racialized positions in Canadian society. Socioeconomic conditions such as increased rates of poverty, homelessness, unemployment, poor health, circumstances which are perpetuated and maintained by institutionalized sexism, racism, and colonialism, not only increase their vulnerability to sexual violence but also decrease their access to protection and resources and obstruct their ability to access justice following victimization. Sexual violence must be understood through a lens that recognizes its intersectional complexities, and I argue that understandings of the legal system and access to justice must consider a far more differentiated prism that explores how intersections of race, ethnicity, gender, colonialism and socioeconomic status interconnect to influence the experiences that marginalized groups have with the law and in accessing justice.

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<sup>7</sup> CEDAW, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*. CEDAW/C/OP.8/CAN/1. 20 March 2015. Pp. 7-8, 23-43.

## Stage 1: Pre-Victimization

The analyses conducted throughout the thesis will be structured by the stages of victimization and the corresponding experiences that Indigenous women and victims of sexual violence have within society, prior to victimization and throughout the process of seeking justice, following victimization and during their interactions with the judicial system. Analyzing the racialized, gendered, and socioeconomic factors that obstruct or influence access to justice for Indigenous victims of sexual violence through a format structured by the stages of victimization aims to place a survivor-centered focus on the socio-legal research and analysis process. A survivor-centered approach highlights the importance of evidence-based acquisition of knowledge and documentation of human rights violations acquired by listening to individuals and communities and centering their experiences within recovery, research, law, and policy making. The United Nations defines a survivor-centered approach as one that empowers survivors and prioritizes their voices, their needs, and their rights.<sup>8</sup> By centering and highlighting the lived experiences of survivors within academic analyses of the law and justice, documentation may contribute to the survivors' abilities to feel that they maintain agency and control over their stories and over the decision-making processes that follow the documentation of the violation of their rights.<sup>9</sup>

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<sup>8</sup> UN Women, *Survivor-Centred Approach*. Virtual Knowledge Centre to End Violence against Women and Girls, 2013. Adapted from, Ward, J., *Caring for Survivors Training Manual*. UNICEF, 2010.

<sup>9</sup> Michelle Caswell, *Toward a survivor-centered approach to record documenting human rights abuse: lessons from community archives*. Springer, 2014.

## 1.1 Process of Colonialization

To begin, this chapter will look at the social realities of the lives of Indigenous people and of indigenous women in Canada, a country that is often held in high regard for its human rights record and its commitments to improving human rights nationally and internationally.<sup>10</sup> Canada's positive reputation as a global defender of human rights and as a negotiator for peace has consistently diverted scrutiny and overshadowed its destructive colonial history, remnants of which continue to reverberate throughout society and have significant repercussions on the lives of Indigenous people. The country of Canada is not unique in having a violent colonial past; a significant number of countries around the globe have similar colonial histories of legalized violence against Indigenous populations and other minorities, policies of colonial oppression which continue presently to impact the lives of marginalized groups. The complex history in Canada of assimilation and mass destruction of Indigenous populations, of exploitation of resources, and of theft of lands by British and French colonial powers has had lasting and devastating social, economic, cultural, and psychological consequences on the remaining Indigenous peoples and their communities. Historical experiences of colonial violence remain a foundational root cause of the physical and sexual violence that First Nations, Inuit, and Métis women and girls experience today. Violent colonial experiences like the Sixties Scoop and the implementation of Residential Schools represent processes by which Indigenous people were

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<sup>10</sup> Andrew Lui, *Why Canada Cares: Human Rights and Foreign Policy in Theory and Practice*. McGill-Queen's Press, May 2012. Pp. 3-5.

made subject to external control and targeted for assimilation, indoctrination, and in some cases, extermination.<sup>11</sup> The Canadian Government used policy and legislation to do away with Indigenous systems and culture, legalizing the oppression and mass violence committed against Indigenous populations. Consequently, abuse, exploitation, marginalization, and incalculable death endured, including the deaths of an unknown number of Indigenous children in the thousands, forcibly sent to government and church-run Residential Schools and then covertly buried in unmarked mass-graves, some of which are currently being uncovered by Indigenous communities undertaking to recover the remains of victims and expose the mass human rights violation.<sup>12</sup>

The colonial process has caused deep intergenerational trauma that continues to affect Indigenous people in complex ways that interfere with and prevent their full enjoyment of social, economic, civil and cultural rights, in ways that the government has failed to sufficiently recognize and address. The ensuing consequence has been a process identified by the Truth and Reconciliation Commission of Canada as amounting to a policy of cultural genocide.<sup>13</sup> The legacy of such colonial history has been the institutionalization of systems of oppression across all major institutions, based on race, ethnicity and gender as well as the categorization of persons based on the aforementioned facets of their identities, thus constructing deep and systematic

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<sup>11</sup> See, Holly A. McKenzie et al., *Disrupting the Continuities Among Residential Schools, the Sixties Scoop, and Child Welfare: An Analysis of Colonial and Neocolonial Discourses*. The International Indigenous Policy Journal. Vol. 7, No. 2, Article 4. 2016. See, Truth & Reconciliation Commission Canada, supra note 6, Pp. 1-6, 37-69.

<sup>12</sup> See, Louise Hall, "Hundreds of unmarked graves discovered for second time at former Indigenous school in Canada." The Independent. 25 July 2021. Assessed Online: <https://www.independent.co.uk/news/world/americas/unmarked-graves-indigenous-canada-school-b1872219.html>. See, Guy Quenneville, "More Sask. First Nations announce efforts to find graves of residential school students." CBC News. 12 June 2021. Assessed Online: <https://www.cbc.ca/news/canada/saskatoon/battlefords-agency-tribal-chiefs-inc-star-blanket-cree-nation-saskatchewan-residential-school-1.6061615>.

<sup>13</sup> Truth & Reconciliation Commission Canada, supra note 6, Pp. 1-3, 183.

social, political and economic hierarchies within society. Consequently, existing power structures have helped condition and shape the actions and institutions, and the attitudes, beliefs, and emotions of non-Indigenous peoples towards Indigenous persons and communities.<sup>14</sup> This has had a substantial influence on policy-making and has functioned to reinforce and enhance hierarchy-maintaining policies, attitudes, institutions, prejudices, and hostile behaviours, which further perpetuate the group-based inequality founded by colonial policy and violence.<sup>15</sup> This is especially observable in the Canadian context.

### 1.1.1 Canada and Colonialism

Canada is a country that has been shaped by its violent and racist colonial history and legacy, and where non-Indigenous members of the population report prevalent negative attitudes and beliefs about the Indigenous people, often rooted in stereotypes that have deep ties to Canada's colonial past.<sup>16</sup> Colonization may be understood as an event occurring at a point in a nation's history, however, the act of invasion, the exertion of control and the implementation of assimilative and annihilative policy and legislation defined by colonization certainly embodies a structure; a construction by colonial powers of systems and processes built to acquire and maintain power.<sup>17</sup> In Canada, since the beginning of the colonial period, the structures and processes of colonialism are estimated to have eliminated more than two-thirds of Indigenous land and to have destroyed

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<sup>14</sup> Melanie A. Morrison, *Old-Fashioned and Modern Prejudice Toward Aboriginals in Canada*, in *The Psychology of Modern Prejudice*, Ch. 12. Nova Science Publishers. January 2008.

<sup>15</sup> Jim Sidanius et al., *Social Dominance Theory: Explorations in the Psychology of Oppression*, in Chris G. Sibley & F. Barlow (Eds.), *The Cambridge Handbook of the Psychology of Prejudice*. Cambridge Handbooks in Psychology. Pp. 149-187. Cambridge University Press, 2016. Pp. 149-152.

<sup>16</sup> Melanie Brockman and Todd G. Morrison, *Exploring the Roots of Prejudice Towards Aboriginal People in Canada*, in *The Canadian Journal of Native Studies*. ResearchGate. January 2016.

<sup>17</sup> The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girl, *Reclaiming Power and Place*. Vol. 1a. Canada, 2019. Pp. 232.



80 per cent of the Indigenous population.<sup>18</sup> Remaining Indigenous persons were prescribed specified territory and were relegated to reserves in the more rural regions of Canada, regions which have been neglected in regional and governmental administration. Under State policy and legislation, Indigenous people and communities could not manage their own reserve lands, their finances, nor the funds allocated to the provision and administration of services to the reserve lands. While provincial governments are responsible for the administration of services and resources to their communities outside of reserve lands, the responsibility of care to Indigenous communities living on reserves falls to the federal government. This has had a prominent and significantly detrimental and unrelenting impact on the quality of services and resources available and on the level of access enjoyed by Indigenous peoples in comparison to non-Indigenous Canadians.<sup>19</sup>

### **1.1.2 Violations of Land Rights and Increased Vulnerability to Sexual Violence**

The social and economic effects of the violation and lack of protection of land rights have been well documented, and the Canadian government has long been embroiled in land disputes and negotiations of Indigenous land claims, entrapping Indigenous communities into costly and often futile litigation and legal battles that last years and even decades.<sup>20</sup> Astonishingly, Indigenous groups and communities have been forced to borrow hundreds of millions of dollars from the federal government in order to cover the costs of the lengthy litigation and treaty negotiation

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<sup>18</sup> See, Report of the Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*. Canada. Vol. 1. October 1996. Pp. 20-25. See, CEDAW, *supra* note 7. Pp. 7.

<sup>19</sup> Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia, Canada*. OEA/Ser.L/V/II. Doc. 30/14. 21 December 2014. Pp. 22-25.

<sup>20</sup> Report of the Auditor General of Canada to the House of Commons, *Chapter 7: Federal Participation in the British Columbia Treaty Process – Indian and Northern Affairs Canada*. November 2006.

processes in opposition to the federal government, an affair which has been analyzed and denounced many times over.<sup>21</sup> Indigenous communities continue to incur debt to the federal government in order to exercise their legal rights in court, in hopes of obliging the Canadian government to honour its treaty commitments and its international human rights obligations, of having their rights to land and resources recognized, and in hopes of accessing justice. More than half of Indigenous communities are involved in litigation and negotiation processes with the Canadian government, this evidently plunges Indigenous communities further into economic and social disparity, intensifying their socioeconomic marginalization as a direct consequence of the violation of their land and resources rights by the Canadian government. The increasing and enduring socioeconomic disenfranchisement contributes to placing Indigenous women at a greater risk of vulnerability, and it contributes to social and economic barriers to access to justice. The relationship between socioeconomic marginalization caused by the State, social and economic barriers to access to justice, the disproportionate level of vulnerability of indigenous women, and the resulting high rates of sexual violence will be examined throughout this paper.

Government policy has sought to divert State responsibility and liability for Indigenous land and human rights protection, and to prevent the progressive development of Indigenous rights in domestic law, in efforts to avoid international and national human rights commitments.<sup>22</sup> There is a strong and recognized correlation between well-being, social and economic security and safety, and respect for and enjoyment of land rights. The exploitation and theft of Indigenous land and natural resources and the economic victimization of Indigenous communities by the

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<sup>21</sup> Id. Pp. 1-15, 25-26.

<sup>22</sup> CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada, UN Doc. CERD/C/CAN/CO/18. 25 May 2007. Para. 22.

Canadian government continue to have detrimental impacts on the living circumstances, health, environment, safety and socioeconomic conditions of Indigenous people in Canada. These disenfranchised conditions directly influence the risks Indigenous women face of experiencing sexual victimization, and contribute to increasing the cumulative social, economic and structural barriers to access to justice.

## **1.2 Systemic State Failure to Investigate, Collect Data, and Report on Sexual Victimization**

Canada is a country that is known internationally for having a strong commitment to human rights nationally and abroad. The State has signed and ratified numerous national and international human rights instruments, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol, the International Convention on the Elimination of All Forms of Racial Discrimination, and most recently in 2016, almost 10 years after its adoption by the General Assembly, has ratified and begun to apply into Canadian law the Declaration on the Rights of Indigenous People. Although Canada has surely committed itself to the protection and promotion of human rights, the level of implementation of human rights treaties within the national jurisdiction and the state of human rights conditions within Canada present a complex and multifaced picture. Despite the ratification of foundational human rights guarantees, Canada has been extremely reluctant and averse to taking the necessary steps to ensuring the full realization of many human rights principles and to implementing the required policies, mechanisms and action plans to end

documented and acknowledged discriminatory enjoyment of rights and protections. Canada has maintained the historic and systematic oppression and discrimination of Indigenous women and has allowed for the persistence of socioeconomic marginalization in its failure to fully implement and apply international human rights commitments into domestic law and policy. These systemic State failures have created and maintained conditions which put Indigenous women at risk of experiencing extreme levels of sexual violence. Despite repeated reports and appeals from the national and international community to correct the misapplication and the discriminatory implementation of law and policy and to take the steps required to lower the disproportionately high vulnerability of Indigenous women to sexual violence, the State has been accused of allowing for the inequality and discrimination of Canadians based on gender, race, ethnicity, and socioeconomic status. Consequently, Indigenous women in Canada face increased rates of sexual violence as well as inequal and differential access to the law and justice.

### **1.2.1 Government Refusal to Investigate and Collect Data**

A significant obstacle over the past decades to the comprehensive analysis of the links between race and ethnicity, social and economic conditions, and sexual violence in Canada has been the State government's reluctance to repair gaps in its data collection mechanisms and organize an effective action plan for the investigation and elimination of violence against Indigenous women. Despite recurring recommendations by international human rights bodies and organizations to collect and report more comprehensive statistical data, including on the racial and ethnic composition of victims of violence, and to implement and fully execute a national action plan, Canada has repudiated and diverted the requests, creating a significant absence of crucial

demographic data.<sup>23</sup> The widespread physical and sexual violence against Indigenous women in Canada has been an issue widely recognized nationally and internationally, however, there had been a dramatic scarcity of research into the violence until more recently. There remains to this day serious gaps in Canada's statistical and demographic data collection and in its implementation of effective national anti-sexual violence policies and programmes. Many sample designs and data collection of census research and critical social and victimization surveys exclude information about Indigenous people on and off reserves, thus failing to provide important figures about the scope of safety, well-being and victimization of Indigenous people and Indigenous women in particular.<sup>24</sup> The causes and the consequences of this deficit in data are multidimensional and complex. It was not until in 2014, after repeated appeals to improve data collection on the victimization of Indigenous women, that State policy changed to require police agencies and officers to begin to document the Indigenous identity of victims of violent crime. Previously, police services in Canada were not obliged to document the Indigeneity of victims of violence, resulting in country-wide underreporting of Indigenous victimization and an inability to determine the true extent of victimization of Indigenous women. This allowed the government to continue to overlook the systematic pattern of high rates of sexual victimization of Indigenous women in Canada.

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<sup>23</sup> See, supra note 22. Para. 11-13. See, CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*. UN Doc. CERD/C/Can/CO/19-20. 4 April 2012. Para. 7-8. See, Letter from Amnesty International and 25 organizations to Prime Minister Justin Trudeau, "*RE: Urgent Need for National Action Plan to Prevent and Address Gender-Based Violence in Canada*". 8 March 2018. See, CEDAW, *Concluding observations on the combined eighth and ninth periodic reports of Canada*. UN Doc. CEDAW/C/CAN/CO/8-9. 25 November 2016. Para. 20-27.

<sup>24</sup> *General Social Survey: An Overview, 2019*. Statistics Canada. Social and Aboriginal Statistics Division. Catalogue No. 89F0115X-2019001. 20 February 2019. Pp. 6.

For decades, law enforcement agencies and government officials refused to investigate the pattern of victimization, citing the lack of evidence and data. Due to the historic underreporting by law enforcement of the victimization of First Nations, Inuit, and Métis women, and a failure to fully and properly investigate and document much of the violence, disappearances, and the killings, to this day, there is still no reliable estimate of the scope of sexual and physical violence experienced by Indigenous women. Recent admissions made by the Canadian Government amidst reconciliation efforts, acknowledge that institutionalized colonial ideologies and systemic racial and gendered biases had influenced government action and policy. This hindered efforts to collect crucial data, initiate investigations, and implement national action plans and strategies, resulting in negligent and discriminatory treatment of Indigenous women by law enforcement agencies and by the government. Indigenous women were prevented from accessing life-saving protections and from accessing justice. In its discriminatory response to the high rates of physical and sexual victimization of Indigenous women, the Canadian government failed to meet its obligations to foundational international and national human rights documents, including the Canadian Charter of Rights and Freedoms and the Universal Declaration of Human Rights, nor did it uphold protections affirmed by the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Elimination of All Forms of Racial Discrimination.

Although the Canadian Government has since accepted recommendation to begin to take steps to implement a national database to document the cases of violence against indigenous women, experts warn that the database is inaccurate and misleading due to failures in data collection.<sup>25</sup>

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<sup>25</sup> See, Report of the Special Committee on Violence Against Indigenous Women, *Invisible Women: A Call to Action*. House of Commons, Canada. March 2014. Pp. 14-15. See, House of Commons Canada, *Special Committee*

The documentation of the Indigeneity of victims is a critical requirement for the accuracy of information in the database. Human rights bodies report widespread instances of missing and misleading information, misrepresenting the scope of the issue of physical and sexual violence against Indigenous women.<sup>26</sup> Failures in data collection and research by the State include the absence of acknowledgement of Indigenous identity of victims, the common use of a narrow scope of inquiry mandates, the exclusion of Indigenous women's rights groups from contributing knowledge and information, and a lack of cross-jurisdictional institutionalized collaboration and communication procedures and mechanisms between municipal, provincial, Indigenous and national police forces, impeding the collection of correct data and investigations into violence.<sup>27</sup>

### **1.2.2 High Rates of Sexual Violence and Low Reporting**

To exacerbate circumstances, while there is dramatic dearth in accurate and comprehensive data pertaining to the victimization of Indigenous women in Canada due to the State's unwillingness to investigate, document and report the violence, this deficit in data merges with the critical issue of the dramatically low reporting rates for cases of sexual violence. While all other types of non-violent and violent crimes have consistently been decreasing in prevalence in Canada over the past decades, victimization surveys continue to show that the prevalence of sexually violent

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*on Violence Against Indigenous Women*. IWFA. No. 006, 1<sup>st</sup> Session, 41<sup>st</sup> Parliament, Evidence (1845). 30 May 2013. Irene Goodwin, Director of Violence Prevention and Safety, Native Women's Association of Canada. "The RCMP missing persons database has only just become operational, and there are still substantial gaps in the collection by the RCMP of information on the aboriginal identity of victims, which makes this a poor source of information."

<sup>26</sup> CEDAW, *supra* note 7. Pp. 24-27.

<sup>27</sup> Amnesty International, *Stolen Sisters: A Human Rights Reponses to Discrimination and Violence against Indigenous Women in Canada*. AMR 20/003/2004. October 2004. Pp. 14-15, 36.

crimes has remained stable and has not diminished.<sup>28</sup> Sexual violence is one of the most underreported crimes in Canada and around the globe; it is estimated that in Canada and surrounding countries about 90% of all sexually violent crimes committed are never reported to police.<sup>29</sup> Of the near 10% of sexually violent crimes reported to police, fewer still are ever formally documented by law enforcement agents.<sup>30</sup> Discretion of the agents to formally document and investigate reports of sexual violence and the level of resources they may use can diverge based on the identity of the victim attempting to report, this contributes to creating a wide disparity in police-reported sexual violence rates among the territories and provinces in Canada.

The State has been widely criticized for its historic failure to document and report data disaggregated by race and ethnicity to identify the Indigeneity of victims of violent physical and sexual crime and murder, and its failure to release reports documenting the victimization of Indigenous women country-wide without excluding regions and jurisdictions, further contributing to incomplete statistical data about the victimization of Indigenous women in Canada.<sup>31</sup> The procedural deficits in data collection and analysis interfere with the examination and comparison of the social and economic conditions and disparities, and scope of human rights

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<sup>28</sup> See, Shana Conroy & Adam Cotter, *Self-reported sexual assault in Canada, 2014*. Juristat. Canadian Centre for Justice Statistics, Statistics Canada. 11 July 2017. See, Samuel Perreault, *Criminal victimization in Canada, 2014*. Juristat, Vol. 35, No. 1. Canadian Centre for Justice Statistics, Statistics Canada. 23 November 2015.

<sup>29</sup> See, Helen Luce et al., *Sexual assault of women*. American Academy of Family Physicians. Vol. 81, No. 4. 15 February 2010. Pp.489-495. See, Cecilia Benoit et al., *Issue Brief: Sexual Violence Against Women in Canada*. Status of Women Canada. December 2015. See, Shannon Brennan & Andrea Taylor-Butts, *Sexual Assault in Canada, 2004 and 2007*. Canadian Centre for Justice statistics Profile Series. No. 19. Statistics Canada. December 2008.

<sup>30</sup> *Id.* Canadian Centre for Justice Statistics Profile Series. Pp. 7-11.

<sup>31</sup> See, CEDAW, *supra* note 7. See, Jackie Hansen, *Missing and Murdered Indigenous Women and Girls: Every Life Should Matter*. No More Stolen Sisters, Canada. Amnesty International. 19 June 2015. See, *supra* note 27. Pp. 14-15.



enjoyment amongst racialized groups in Canada. This has introduced significant barriers to attempts to document the injustices against Indigenous women in Canada and has contributed to the prolongation of violations of their rights. This has meant an absence of statistical data compiled by the State analyzing the extreme vulnerabilities of Indigenous women to sexual violence as a direct correlation to the extensive social and economic inequality they face, stemming from their racialized and gendered position in Canadian society. The systematic and insubordinate failure to investigate, document and report on the widespread and historic victimization of Indigenous women constitutes a significant barrier to access to justice. Researchers have attempted to fill in some of the gaps in important demographic data to document the extreme vulnerability of Indigenous women to physical and sexual violence in Canada.<sup>32</sup> One such study used the administrative data compiled between 1974 to 2013 by the former Indigenous and Northern Affairs Canada to compare the mortality rates of Indigenous and non-Indigenous women.<sup>33</sup> While the research study remarked on the negligent absence of data documenting cause of death, it identified that Indigenous women and girls have mortality rates that are three to four times higher than their non-Indigenous counterparts, while the rate of mortality for Indigenous women and girls living on reserves further increases. The study found that Indigenous girls have higher mortality rates than Indigenous boys their age, which is unique to the Indigenous population and contrary to the case for non-Indigenous populations. This data substantiates the holding that Indigenous women and girls represent one of the most vulnerable and victimized peoples in Canada. The authors consider the disproportionately high levels of death amongst Indigenous women and girls a direct result of their severe socioeconomic

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<sup>32</sup> CEDAW, *supra* note 7. Para. 103.

<sup>33</sup> Donna Feir & Randall Akee, *First Peoples Lost: Determining the state of status First Nations mortality in Canada using administrative data*. Canadian Journal of Economics, Vol. 52, No. 2. May 2019. Pp. 490-525.

marginalization, high rates of physical and sexual violence and systemic barriers to accessing protection and utilizing the justice system.<sup>34</sup>

The Canadian government has for decades strategically evaded attempts to identify and recognize the deep institutionalized inequality and violence that Indigenous women experience. In defiance of countless recommendations and demands from international and national human rights bodies and organizations, the State government has continuously snubbed urgent appeals to make the necessary and sufficient action plans and policy changes needed to provide the appropriate resources to reduce and prevent the high rates of physical and sexual victimization of Indigenous women.<sup>35</sup> The State has failed to follow through on promises to take adequate action to combat the intense socioeconomic inequality and remove the barriers impeding full enjoyment of social and economic rights of Indigenous people and women, which would have aided in facilitating a decline in rates of sexual violence perpetrated against Indigenous women.<sup>36</sup>

### **1.3 Socioeconomic Marginalization, Sexual Violence and Barriers to Access to Justice**

Access to justice is a fundamental component of human rights enjoyment and protection; to have access to justice, persons must have a reasonable ability to understand and utilize good quality

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<sup>34</sup> *Id.*

<sup>35</sup> See, CERD, *Information provided by the Government Canada on the implementation of the concluding observations of the Committee on the Elimination of Racial Discrimination*. UN Doc. CERD/C/CAN/CO/18/Add.1. 27 October 2009. Recommendation contained in paragraph 21. See, CEDAW, *supra* note 7. Pp. 24-27. See, Human Rights Committee, *Concluding observations on the sixth periodic report of Canada*. UN Doc, CCPR/C/CAN/CO/6. 2015. Para. 9(b).

<sup>36</sup> See, CEDAW, *supra* note 23. Pp. 6-8. See, Amnesty International, *Submission to UN Committee Against Torture*. 72<sup>nd</sup> Session, List of Issues Prior to Reporting. December 2021. Pp. 9-10.

tools and services in order to participate in the legal system and defend their human rights. It is an essential duty of the State to promote and facilitate equal access to justice, a duty which includes the negative obligation to refrain from obstruction of access to justice, and the positive obligation to take the necessary steps to coordinate and implement policies and programs that ensure that access to justice is possible and equally accessible by all.<sup>37</sup> The State is required to facilitate access to justice and is required to eliminate any barriers to access to justice and prevent any discrimination which may result in unequal access to the law and justice. For racialized and gendered persons in society, discrimination, socioeconomic inequality, and systems of oppression based on race, ethnicity and gender, intersect to create pervasive and occasionally obscure obstacles to access to justice. Everyone should have equal enjoyment of protection under the law and equal access to justice and judicial remedy, however, there are systemic economic, social and structural barriers that prevent equal access to services, to police protection, to courts, to medical facilities, and more, barriers which significantly interfere with access to justice.<sup>38</sup> For Indigenous women in Canada, living in a state of post-colonial socioeconomic marginalization presents a multitude of substantial and complex disadvantages and barriers to rights protection and judicial remedy. Canada has not taken the necessary steps to eliminate the institutionalized socioeconomic marginalization of Indigenous women in Canada, this has contributed greatly to two outcomes to be analyzed here. Canada's failure to realize its positive obligations to ensuring access to justice has allowed for the perpetuation of the increased vulnerability and high rates of sexual victimization of Indigenous women, and has prevented and repudiated efforts and calls to remove the structural, economic and social barriers that interfere

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<sup>37</sup> United Nations Human Rights Special Procedures, *International Principles and Guidelines on Access to Justice for Persons with Disabilities*. August 2020. Pp. 6-8.

<sup>38</sup> Organization for Economic Co-operation and Development, *Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All*. Open Society Foundation. 2016. Pp. 7-8.

with Indigenous women's access to justice following victimization. First Nations, Inuit, and Métis women and girls are disproportionately at risk of violence in Canada, and violence against them has reached epidemic proportions throughout the country. Indigenous communities across Canada have long been urgently seeking help, yet for decades the State government and law enforcement agencies refused to believe their claims and investigate their concerns. Despite the growing culture of increased recognition of and demand for human rights protection, the rise of increasingly organized social movements, and the emergence of more prominent and in-depth national and international scrutiny of human rights law and policy, the Canadian government has been unwilling and unable to balance its social, political and legal obligations and promises to identify and remedy the significant implementation gaps in investigating the systemic patterns of violence and in protecting Indigenous women, thus tolerating the dangerous conditions and high rates of sexual violence.<sup>39</sup>

### **1.3.1 Violence Against Indigenous Women in Canada**

While Indigenous women account for a small percentage of the female population, they represent a large percentage of missing persons, of female homicide victims, and victims of sexual violence. They are more likely than their non-Indigenous counterparts to experience all forms of violence, and the types of violence they experience is more severe.<sup>40</sup> State-perpetuated structures of oppression, colonial policy and law, and dramatic inequality in socioeconomic status and in living standards have long interconnected to create a culture and a legal system in which the

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<sup>39</sup> Amnesty International, *Submission to the United Nations Committee on the Elimination of Discrimination of Women, Follow-Up*. Canada. June 2019. Pp. 5-10.

<sup>40</sup> See, Amnesty International, *No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Aboriginal Women*. AMR 20/012/2009. September 2009. Pp. 1.

marginalization, discrimination, and abuse of Indigenous women is pervasive and without penalty or intervention. International human rights bodies have investigated and reported on the dramatic vulnerability of Indigenous women in Canada to physical and sexual violence and on the root causes, linking the increased violence to racial and gender discrimination and socioeconomic marginalization. For example, both the Inter-American Commission on Human Rights as well as the Committee on the Elimination of Discrimination against Women, in investigating the allegations of severe and systematic violations by the Canadian government of rights enshrined within the American Convention on Human Rights and the Convention on the Elimination of All Forms of Discrimination against Women, highlighted data and reports verifying the high risks of vulnerability and extreme levels of victimization of Indigenous women and girls.<sup>41</sup> Such is evidenced by their increased likelihood by 3.5 times to experiencing physical violence, including sexual assault, sexual abuse, and intimate partner violence, and other violent physical and sexual crimes.<sup>42</sup> Reports document extremely high rates of all forms of violence amongst Indigenous women, including disappearances, murders, domestic and spousal violence, emotional and financial abuse, sexual violence, sex trafficking, and a risk of death as a result of violence that is 5 times higher for young Indigenous women than their non-Indigenous counterparts.<sup>43</sup> Indigenous groups and researchers claim that the risks are much higher than

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<sup>41</sup> See, Inter-American Commission on Human Rights, *supra* note 19. Pp. 49-53. See, CEDAW, *supra* note 7. Pp. 3-4.

<sup>42</sup> Jodi-Anne Brzozowski et al., *Victimization and offending among the Aboriginal population in Canada*. Juristat. Vol. 26, no. 3. Statistics Canada. 2006.

<sup>43</sup> See, *supra* note 40. See, Douglas A. Brownridge, *Understanding the elevated risk of partner violence against Aboriginal women: A comparison of two nationally representative surveys of Canada*. Springer. Journal of Family Violence, Vol. 23, No. 5. 21 February 2008. Pp. 353-367. See, Samuel Perreault & Laura Simpson, *Criminal victimization in the territories, 2014*. Juristat. Statistics Canada. 27 April 2016.

official data illustrates, calculating instead that Indigenous women are girls may be at least 12 times more likely to be killed or disappeared than non-Indigenous women in Canada.<sup>44</sup>

While the violent crime of sexual assault accounts for less than 10% of the violent crimes committed against non-Indigenous women in Canada, it constitutes one third of the violent crimes committed against Indigenous women in Canada.<sup>45</sup> Investigations by human rights organizations of official law enforcement agency and government of Canada reports concerning the statistics surrounding the victimization of Indigenous women often refute the official findings and point to systemic mistakes in the State's data collection and research sample designs.

Governmental and law enforcement agency reports have frequently been criticized in the reports by national and international human rights organizations for presenting inaccurate, incomplete and misleading information and statistics. For example, while the Royal Canadian Mounted Police, one of the largest jurisdictional law enforcement agencies in Canada, reports that Indigenous women and girls account for 11% of all missing females and 16% of all female homicide victims,<sup>46</sup> albeit a significant percentage when considering that Indigenous women represent only 4% of the female population, investigative reports led by human rights groups and by the National Inquiry into Missing and Murdered Indigenous Women and Girls stress that the correct and updated figures are significantly more alarming, increasing to demonstrate that Indigenous women and girls account for 24% of female homicide victims.<sup>47</sup>

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<sup>44</sup> The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, *supra* note 17. Pp. 55.

<sup>45</sup> See, Shannon Brennan, *Violent victimization of Aboriginal women in the Canadian provinces, 2009*. Statistics Canada. Juristat. 17 May 2011. See, Status of Women Canada, *supra* note 29. Pp. 17-18. See, Shannon Brennan, *Police-reported crime statistics in Canada, 2011*. Juristat. Statistics Canada. 24 July 2012.

<sup>46</sup> Royal Canadian Mounted Police, *Missing and Murdered Aboriginal Women: National Operational Overview*. May 2014. Pp. 7-9.

<sup>47</sup> The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, *supra* note 17. Pp. 55.

### 1.3.2 Socioeconomic Inequality as a Barrier to Access to Justice

Indigenous communities and human rights leaders across Canada have long alleged that Indigenous persons experience unequal access to protections, resources, and basic human services, due to discriminatory government policy. This marginalization takes the form of poverty, insecure housing or homelessness, barriers to education, training and employment, a lack of child welfare services, and an absence of support and victim services. Many Indigenous communities also lack some basic human resources, such as clean drinking water. A disproportionate number of Indigenous women are often forced into dangerous conditions as a result of their institutionalized socioeconomic marginalization, including homelessness, prostitution, extreme poverty, living near gang activity, and mobility issues, including having to travel great distances for education, lacking access to transportation, and hitchhiking for transportation out of rural areas, which contribute to their increased vulnerability to sexual violence.<sup>48</sup> Additionally, when Indigenous women are victimized, they are often left without the resources and support needed to escape physically and sexually violent environments. The institutionalized social and economic marginalization of Indigenous women in Canadian society puts them at a greater risk than non-Indigenous women of being exposed to racialized and sexualized violence, and at an increased risk of being targeted for misogynistic and racist violence. Emboldened Indigenous and non-Indigenous men alike recognize the vulnerable and disenfranchised position of Indigenous women in Canadian society and understand that they are less likely than their non-indigenous counterparts to have access to safety, security, and justice.

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<sup>48</sup> See, Sisters In Spirit 2010 Research Findings, *What Their Stories Tell Us*. Native Women's Association of Canada. 2015. Pp. 37-38. See, CEDAW, *supra* note 7. Para. 106, Pp. 30-31.

There is a strong relationship between sexual violence and socioeconomic marginalization.<sup>49</sup> The heightened vulnerability to violence and the social and economic disenfranchisement of Indigenous women introduces significant barriers to their access to justice. The failure of the State to take the necessary measures to confront the systemic social and economic inequality of Indigenous women in Canada constitutes a serious violation of their basic human rights and a violation of the State's international human rights obligations.

## **Stage 2: Following Victimization**

To have access to justice, persons must have access to information to make it possible to have a certain level of knowledge about the avenues available to them in seeking justice, they must also have a reasonable ability to obtain and employ effective services and resources, tools that are instrumental in allowing for access to the law and access to justice. Ensuring and promoting access to justice represents an essential responsibility of the State, placing negative obligations to refrain from obstruction of access to justice, as well as positive obligations to organize and implement policy to allow for the exercise of access to justice. The State is required to facilitate access to justice and is obligated to eliminate barriers to access to justice and prevent any differential treatment and discrimination which may result in unequal access to the law and justice.<sup>50</sup> Facilitating access to justice represents an essential component of a legal system and of

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<sup>49</sup> Donna Greco and Sarah Dawgert, *Poverty and Sexual Violence: Building Prevention and Intervention Responses*. Pennsylvania Coalition Against Rape. 2007. Pp. 71-84.

<sup>50</sup> Inter-American Commission on Human Rights, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights, Executive Summary*. Para. 1-9.



respect for and realization of the rule of law. Justice should be accessible by all equally and without discrimination, and all persons must have equal access to the effective services and resources needed to allow for access to justice. Governmental provision of essential services is directly linked to the ability of persons to understand information about their rights, to utilize essential tools and aid to protect and defend their rights, and to the ability of persons to have their basic human needs met so that they may be able to fully exercise their civil, political and legal rights. Equal and effective access to services is a prerequisite to fostering legal empowerment, to promoting access to justice and to respecting the rule of law.

## **2.1 Discriminatory Provision of Services and Unequal Access**

One of the most significant obstacles in Canada to a coordinated implementation of resource distribution policy, and to consistent application of international human rights obligations to ensure equal access to resources and services and to promote equal access to justice, is Canada's federalist political system. In Canada, governmental powers and responsibilities are separated between the federal, provincial, territorial, municipal, and to a lesser extent, First Nations governments. The State government of Canada shares separate legislative authority with the provincial and territorial governments, as prescribed by the Constitution Acts of 1867 to 1982.<sup>51</sup> Within the provincial and territorial jurisdictions, municipal governments are delegated separate responsibilities. The federalist division of governmental powers in Canada has posed challenges for the administrative provision of funds and services across regions in Canada, particularly in rural areas predominantly inhabited by Indigenous peoples since the colonial creation of reserve

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<sup>51</sup> Canada, *The Constitution Acts 1867 to 1982*. Minister of Justice. Current to 1 January 2021.

lands. While domestic law in Canada provides for a division in responsibility for the provision of services between the different levels of government, the State and the federal government itself continues to have a duty to ensure that its international human rights obligations are met consistently across the country, and that the provision of services between and among all regions in Canada be equitable and sufficiently available.<sup>52</sup> The State must take the necessary measures to prevent discriminatory access to and allocation of services, as obliged by the International Covenant on Economic, Social and Cultural Rights.

Following the ousting of the majority of remaining Indigenous persons to more rural reserve lands during a period of the execution of the colonial process in Canada, Indigenous communities began to face administrative and infrastructural neglect throughout their territories. The federal government reserved primary responsibility over the provision of resources to reserve land jurisdictions, and Canadian law and policy prohibited Indigenous communities from managing their own lands, finances, and social and human resources. Federal and provincial governments began to neglect to equitably provide the same level of funding and access to resources and services to Indigenous reserve lands as to non-Indigenous regions. Due to the large gaps in government funding and support and the discriminatory provision of services, Canada does not currently provide equal access to essential services, effective victim support services, nor sufficient protection from sexual violence. Federal, provincial and territorial governments throughout Canada provide varying levels of funding and service to the various jurisdictions. Often, rural regions and reserve lands, to which Indigenous peoples have been relegated, suffer from a lack of access to essential services. This has had lasting destructive and harmful effects

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<sup>52</sup> Human Rights Council, *Role of local government in the promotion and protection of human rights – Final report of the Human Rights Council Advisory Committee*. UN Doc A/HRC/30/49. 7 August 2015. Pp. 5-7.

on the land, lives, and rights enjoyment of Indigenous persons in Canada. The access to and the quantity and quality of the services, programs, and policies available to Indigenous people and Indigenous women have been inferior in comparison to the same services funded and provided to non-Indigenous communities. Indigenous women have suffered disproportionately; gender-based violence and discrimination have intersected with colonial socioeconomic disenfranchisement to create a kind of double discrimination based on Indigeneity and gender, placing Indigenous women at a disproportionately vulnerable position in Canadian society.<sup>53</sup> Concerns have been regularly and continuously raised about the Canadian government's inadequate application of CEDAW, CERD and ICESCR rights into domestic law and insufficient implementation of mechanisms to prevent discriminatory legislation and ensure that all levels of government apply effective legal and policy standards to curtail relentlessly high rates of physical and sexual violence against Indigenous women and to allow for the full realization of their social and economic rights.<sup>54</sup> The State's failure to comply with its own Canadian Human Rights Act as well as its respective international human rights obligations and cease its discriminatory provision of services to Indigenous communities has been established and denounced by Indigenous groups, the Canadian Human Rights Tribunal, and international human rights bodies alike.<sup>55</sup>

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<sup>53</sup> Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*. Organization of American States. OEA/Ser.L/V/II. Doc. 68. Para. 198-200. 20 January 2007.

<sup>54</sup> See, Amnesty International, *Canada Submission to the UN Committee on the Elimination of Discrimination Against Women 65<sup>th</sup> Pre-Sessional Working Group*. March 2016. Pp. 5-7. See, CEDAW, *Concluding observations on the seventh periodic reports of Canada*. UN Doc CEDAW/C/CAN/CO/7. 7 November 2008. Pp. 2-5. See, Amnesty International, *supra* note 39. Pp. 5-10.

<sup>55</sup> See, Cindy Blackstock, *The Complainant: The Canadian Human Rights Case on First Nations Child Welfare*. McGill Law Journal. Vol. 62, No. 2. December 2016. See, CEDAW, *supra* note 54. Pp. 2-5.

Canadians are guaranteed by numerous international human rights instruments, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, the right to a standard of living necessary for proper health, well-being, and dignity, requiring adequate services, resources and protections.<sup>56</sup> However, the State's discriminatory distribution of many essential services, including in areas of education, childcare, water sanitation, healthcare, family and child protection services, employment assistance, victim services, medical services, legal aid and services, shelters, domestic violence shelters and services, and more, has left Indigenous communities without the ability to maintain a standard of living equivalent to that of non-Indigenous Canadians.<sup>57</sup> The absence and lack of good quality vital services, stemming from the institutionalized disenfranchisement of Indigenous populations, serves to further perpetuate conditions of impoverishment and marginalization, conditions that intersect with systems of oppression and discrimination based on race, ethnicity and gender to increase Indigenous women's risks of experiencing sexual violence and interfering with their equal access to services following victimization. Furthermore, the existence and continuance of the discriminatory provision of essential services to Indigenous communities is contrary to Canada's obligation to eliminate barriers to access to justice. The State has a duty to develop and implement any policy changes needed to facilitate access to justice and to eliminate social, economic, and structural barriers to access to justice, to ensure that the law and access to justice be accessible by all without discrimination and differential access. Without equal funding and access to effective services, persons are left without the resources they need to understand,

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<sup>56</sup> See, *Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health*. UN Doc, E/C.12/2000/4. 2000. See, UN General Assembly, *Universal Declaration of Human Rights*. 10 December 1948. 217 A (III), Article 25.1.

<sup>57</sup> See, Truth & Reconciliation Commission Canada, *supra* note 6, Pp. 135-161. See, Amnesty International, *Briefing to the UN Committee on the Elimination of Racial Discrimination*. Eightieth Session. February 2012. Pp. 15-18. See, *First Nations Child and Family Caring Society v. Federal Court of Canada*, No. T-630-11 (Sworn 31 May 2011).

protect and defend their rights. Canada has failed to uphold its obligation to ensure equal access to justice, and as a result, Indigenous women have continued to suffer, remaining one of the most vulnerable and victimized groups in Canada. The failure of the Canadian government to cease discriminatory service provision and eliminate barriers to access to justice has been a primary contributor to the consistent and relentless pattern of high rates of sexual violence of Indigenous women. Indigenous women continue to be disproportionately sexually victimized in Canada as a result of the discriminatory lack of access to essential services, to protection, and to the judicial system, compounding to significantly interfere with their access to justice.

### **2.1.1 Unequal Access to Services: A Facilitator of Sexual Violence and a Barrier to Justice**

When Indigenous women are victimized, they are frequently left without access to services, often denied the same level of service or unable to access the help they require to stay safe and seek treatment, services like shelters, victim services, medical and forensic testing facilities, counselling and mental health services, police protection, and court and legal services. Although research and statistics in this area has been limited, in part due to the State's failure to study and collect data about the victimization and needs of Indigenous women, there are studies analyzing the data to demonstrate discriminatory provision of services and lack of access for Indigenous women. Studies by Indigenous groups have analyzed and compared the discrepancies in services and funding available for women victims of sexual violence in Indigenous and non-Indigenous regions. In examining access to women's shelters and analyzing the distribution of this service, reports show that for the 634 recognized Indigenous communities in Canada, the federal

government provides funding for only 46 women's shelters.<sup>58</sup> Of those 46 shelters, the government has only added 10 over the past decade, despite repeated international and nations appeals during the same time period highlighting the need to provide a significant number of more shelters and services to address high rates of victimization of Indigenous women.<sup>59</sup> Furthermore, although 46 shelters had been established by 2017, reports show that by 2018, only 38 shelters were operational.<sup>60</sup> For Inuit Indigenous peoples in Canada, across 51 communities, more than 70% do not have access to a women's shelter or facilities for victims escaping sexual violence.<sup>61</sup> Many of the operational shelters report lacking adequate funding, operating at full capacity and having to turn women away, and issues involving the remoteness of the shelters and of the surrounding communities, indicating that women often have fewer or no means of accessing the shelters.

Identical issues arise in regard to the various other services, including medical and forensic facilities, legal aid services and courts, police stations, and counselling services: a lack of funding, the low quality of facilities, a deficiency in practical support, slow or nonexistent developments in establishing added services and facilities, a lack of culturally appropriate services, mobility and transportation issues, an absence of childcare, a small number of services to operate for a large number of Indigenous women, spanning wide and more rural regions

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<sup>58</sup> National Aboriginal Circle Against Family Violence, *Addressing Funding Policy Issues: INAC-Funded Women's Shelters*. 2018. Pp. 7-8.

<sup>59</sup> See, Indigenous and Northern Affairs Canada, *Final Report: Evaluation of the Family Violence Prevention Program*. Project Number 1570-7/10024. May 2017. Pp. 20-28. See,

<sup>60</sup> Amnesty International, *Canada: Close the funding gap to ensure safety and support for indigenous women and girls escaping violence*. 14 February 2018. Assessed Online: <https://www.amnesty.ca/get-involved/take-action-now/canada-close-funding-gap-ensure-safety-and-support-indigenous-women-and>

<sup>61</sup> Pauktuutit Inuit Women of Canada, *Final Report: Study of Gender-based Violence and Shelter Service Needs across Inuit Nunangat*. March 2019. Pp. 51-65.

throughout Canada.<sup>62</sup> Despite the rise in national and international attention surrounding the systemic victimization of Indigenous women in Canada and appeals to the government to take the necessary steps to prevent the violence and adhere to international human rights obligations, the State has failed to promptly and adequately coordinate efforts to create and implement a sufficient action plan to ensure that all governmental jurisdictions provide equal funding and level of services to the First Nations communities as non-Indigenous populations in Canada.<sup>63</sup> This has had a prominent and significantly detrimental and unrelenting impact on the quality and availability of services accessible by Indigenous women. The State's inability to coordinate actions plans for service provision and funding across federal, provincial and territorial governments has resulted in a wide breadth of disparity and variance in access to shelter services, violence prevention programs, and medical centres throughout Canada. There exists a strong relationship between the institutional marginalization and discrimination of racialized and gendered groups, discriminatory provision and funding of essential services, disproportionately high rates of sexual violence, and increased barriers to access to justice. A deliberate and documented discriminatory allocation of services to Indigenous communities, caused by residual policies emanating from during the colonial process, dramatically amplifies the vulnerability of Indigenous women to experiencing sexual violence, and to experiencing multiple instances of sexual violence.<sup>64</sup> In combination with the multiple additional risk factors influencing the level of vulnerability of Indigenous women to sexual victimization, namely their gendered and racialized positions in a society afflicted by racial and gender-based systems of

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<sup>62</sup> Pauktuutit Inuit Women of Canada, *Executive Summary: Study of Gender-based Violence and Shelter Service Needs across Inuit Nunangat*. March 2019.

<sup>63</sup> CERD, *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*. CERD/C/CAN/CO/21-23. Para. 24. 13 September 2017.

<sup>64</sup> Catherine C. Classen et al., *Sexual Revictimization: A Review of the Empirical Literature*. Sage Publications. Trauma, Violence, & Abuse, Vol. 6, No. 2, Pp. 103-129. April 2005. Pp. 113-119.

oppression, their intergenerational victimization by the colonial process, and their sustained socioeconomic disenfranchisement, Indigenous women evidently exist at an intensely vulnerable, marginalized and victimized position in society. These factors establish significant social, economic and structural barriers to accessing justice.

## **Conclusion**

Law and policy and their application in the social world can influence the lives of people with great differentiations. Additionally, social factors like race, ethnicity and gender can have an effect on policy-making decisions and on the application of law and policy. The law is presumed to be impartial and autonomous. It's influence and its effect on the social world and on the lives of people is assumed to be steady and consistent, without variation in the ways that different groups of people utilize and experience its application. Furthermore, legal systems operate on the assumption that the implementation of fair legal rules and procedures should produce equal and fair results and rights protection for all, and that all persons, irrespective of gender, race, ethnicity, and socioeconomic status will have equal access to the law and to justice. To facilitate the realization and respect for human rights and for the rule of law, access to the law and to justice must be fairly and equally available to all. A socio-legal study of the social consequences of laws and policies allow for understandings about how different groups of people experience the effects of law and policy differently. In investigating the experiences and interactions that Indigenous women victims of sexual violence have with the social world and with the law, it can be demonstrated that intersections of race, ethnicity, gender, colonialism and economic disadvantage interconnect to influence the experiences that marginalized groups have with the



law and in accessing justice. The multifaceted economic, social and structural barriers to access to justice that exist for marginalized victims of sexual violence who live at the intersection of racial, gender and colonial oppression contribute to the perpetuation of inequality and discrimination. Indigenous women in Canada, and other women of colour living in countries similarly afflicted by systems of oppression and colonial legacies, are forced to exist at an intensely vulnerable and victimized position in society. Gaps in the law and policy and its application reinforce inequality and violence through differential access to justice. The cumulative effects of process of colonialization, government denial of human rights violations, the inability of sexual violence survivors to trust the judicial system, pervasive and widespread sexual violence, socioeconomic marginalization and oppression, these conditions intersect to establish significant barriers to access to justice for racially and economically disadvantaged women. They also allow for environments in which sexual violence is rampant and committed with impunity. Differential access to justice serves to promote violence, obstruct recognition of the rule of law, and maintain discrimination and inequality. Motivated by a commitment to solving social problems and to inciting and affecting policy and social change, the paper set out to identify complex and insidious factors that interfere with the human rights of racialized and economically disadvantaged women victims of sexual violence, who deserve to have equal access to access to justice.



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