

**INDIGENOUS PEOPLE AND THE
ROLES OF CULTURE, LAW AND
GLOBALIZATION**

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**Comparing the Americas,
Asia-Pacific, and Africa**

KENNEDY M. MARANGA



Universal-Publishers
Boca Raton

*Indigenous People and the Roles of Culture, Law and Globalization:
Comparing the Americas, Asia-Pacific, and Africa*

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Dedicated to my wife, Janet, daughter, Geizy, son, Stanley Momanyi,
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PREFACE

Motivation for writing this book arose from the author's doctoral dissertation: *A Phenomenological Examination of the Perceptions of Rights, Status, and Protection of Indigenous People from the Perspective of the Ogiek People in Kenya*. This book is about the history, culture, rights and the effects of globalization on indigenous people. The intention is to draw lessons from the challenges facing indigenous people. In this book, the term "indigenous people" is used to refer to all native people in the world.

There are about 2,000 different indigenous tribes in the world. Each tribe has its challenges, but they share a lot in common. No community in the world has been negatively impacted by social, economic and political challenges, and over the years, no community has resisted these challenges without success like native people.

It has proved impossible to arrive at a commonly accepted legal definition of "indigenoussness." For a long time, indigenous people have been among the poorest and most marginalized people in the world. During the last two decades, however, various countries and the international community have increasingly recognized the particular needs and concerns of indigenous people. Yet, in spite of the increased attention, indigenous people still face problems and hardships that few other populations endure. Several factors contribute to this situation.

The impact of colonization on indigenous people has been profound. This study about indigenous people's challenges focuses not only on law, customs, globalization, and history, but also on the effects of the western legal system against its own standards. The book presents an analysis of common law regarding indigenous people's title to land and their views on legal issues. This discussion allows us to ask questions about the legal theory and policies that affect indigenous people and the extent that various legal systems provide justice for, recognize, and protect the rights of indigenous people. This framework offers exploration of indigenous people from different perspectives: Jurisprudential, sociological, philosophical, historical, political, and economic. This book attempts to illuminate each of the situations indigenous people have faced and continue to experience.

Indigenous people continue to resist racially discriminatory actions, policies, and laws, and are working toward a better society. Many non-indigenous people, descendants of colonizers biologically or culturally, are only now beginning to acknowledge the impact of colonization on indigenous people. To move forward, society must acknowledge the tragic consequences for indigenous people under colonization and the negative effects of these on their lives. These include the loss of land, natural resources, lives, family, ceremonies, rituals, sacred sites, culture, language, right to govern, dances, and stories.

In order for indigenous people to consent to any development that concerns their land, natural resources, environment, and means of subsistence, stronger levels of empowerment must be exercised toward indigenous people. Serious efforts to address imbalances among states, multi-nationals, and indigenous people must be ensured so that indigenous people have the means and capacity to participate in the international legal arena. Recently in 2011, the U.S. Congress passed a bill (Keystone XL Pipeline proposed to run from Canada to Texas) in total disregard to the Native Americans' and the environmentalists' outcry on its impact to land and the environment. The bill was not signed into law due to pressure from indigenous people and other environmentalists. Also, in Ethiopia in 2012, the government displaced 3,000 indigenous people from their ancestral land.

Indigenous people must have the right to reject any extraction or any other form of unsustainable development that would destroy their lands, territories, and cultural integrity. Indigenous people are the true owners of their lands and resources, as stipulated under the numerous guarantees of international law and to some extent, under the domestic laws of some countries. Indigenous people have provided the world with land and resources, and they are being wronged and destroyed. These issues should be a high priority. The destruction of indigenous lands and territories and the exploitation of natural resources, as well as the removal of indigenous people, based upon state industrial development schemes, must be addressed fully as the gross human rights violations that they are.

The historical deterioration of traditional indigenous societies is evident in the fact that the human rights of indigenous people have been ignored by states. The affinity and ties that indigenous people have to their lands, territories, and resources have been and continue to be threatened by a differing social order, one that is no longer

dictated by the natural environment and the relationship of the indigenous people to it. The fact that indigenous societies are experiencing rapid social change is due to this denial of their rights to their own lands, territories, and resources.

Indigenous people receiving representation in the criminal justice system remains problematic. In terms of indigenous people's land title, courts have developed precedents that define land ownership rights in favor of non-indigenous people. Other court decisions have been favorable. Perhaps non-indigenous people should listen and acknowledge that, for over 200 years, indigenous people in various countries have suffered severely. This book explores the role played by history and what the policy and law has provided and might provide for indigenous people and the way forward. Each of the seven chapters contains related subtopics. This book provides a broad overview of the challenges facing indigenous people and identifies the extent of these challenges.

These challenges fall into the following broad categories. It is in these areas that they have articulated their demands most strongly.

Self-determination: This category includes the rights of self-definition; self-government; law making; and maintenance of economic, cultural, and social relations across political borders.

Territory: This group contains a range of demands, all relating to land and resource rights.

Prior informed consent: In this section, the demands are related to respect for indigenous people's knowledge, protection of medicinal plants, and the right to determine standards for development.

Cultural rights: These cover the rights to maintain and express their distinct culture; speak their language; have access to sacred sites; and practice their religion freely.

Treaties: Demands in this category are related to treaties made between colonial rulers and indigenous people, in addition to calls for the recognition of treaties and the demand for the redetermination of treaties.

Human rights: Several related demands and rights in this area include freedom from discrimination and oppression, rule of law, and life and liberty.

Finally, many issues remain unresolved, including the prominent question of the definition: Who is "indigenous" ?

Dr. K. Momanyi Maranga
June 2013

OUTLINE OF CHAPTERS

This book is organized into three parts and seven chapters.

PART I: IDENTITY AND CULTURE

Chapter 1: Who are Indigenous People?

In chapter one, a review of the characteristics of indigenous people and an attempt to define indigenous people is made. A brief description of the way of life and challenges of a few selected indigenous people is included: Inuit, Aborigines, Maori, Navajo, Quichua, Chenchus, Ogiek, and Ogoni. Also, a review of the nature and common concerns of indigenous people in the Americas, Asia-Pacific, and Africa is made.

Chapter 2: Culture and Colonization.

This chapter explores culture and human rights of indigenous people from multiple perspectives, including the theoretical or philosophical aspects of human rights, the practical problems of implementation and protection, the institutional dimensions, and in particular, the dilemmas associated with the use of human rights in cross-cultural or comparative perspective. In addition, an analysis of the influence of colonization on indigenous people in the Americas, Asia-Pacific, and Africa, the significance of understanding cultures of indigenous people; and the effects of assimilation is made. Also, a brief examination of the theories of culture and how they relate to indigenous people is discussed.

PART II: LAW AND POLICY

Chapter 3: Legal Approaches.

In the third chapter, an assessment of the legal theory and impact of judicial decisions on indigenous people, within the framework of common and civil law is discussed. In this chapter, constitutions of a few countries in the Americas, Asia-Pacific, and Africa are examined on matters affecting the indigenous people. I argue that, although good constitutions are important, addressing stereotypes and perceptions about indigenous people, as well as to identify aspects of

legal systems that affect indigenous people in courts, to include evidentiary issues and sentencing disparities and to appraise the adjudication and enforcement of indigenous people's legal claims within the context of domestic and international law is vital.

Chapter 4: Land Rights.

In the fourth chapter, an examination and discussion of the difficulties of deposing indigenous people from their ancestral land in the Americas, Asia-Pacific, and Africa is made. Also, an examination of the relationship among freehold and indigenous title, and recent developments and difficulties of granting proprietary land rights to indigenous people.

Chapter 5: International Human Rights law and Indigenous People

Chapter five examines the role of international law on indigenous people's rights, along with its weaknesses. International customs and practices are also examined as well. The impact of the changing role of state responsibility, together with the concept of self-determination is discussed. The chapter also devotes attention to the Convention on the Elimination of Racial Discrimination. Finally, an explanation of a list of all international law documents on indigenous people is presented. This chapter also examines the role of non-governmental organizations in the protection of indigenous people's rights. In addition, a discussion on whether indigenous people's rights are rights in law is made. An analysis of the weaknesses of international conventions and declarations, as well as those of regional organizations, is made. A comparison is made between the Economic, Social and Cultural Convention (ECOSOC) and the Universal Declaration of the Rights of Man of 1948, the International Covenant on Human Rights and the Optional Protocol of 1966, the International Convention on Civil and Political Rights (ICCPR), and the Declaration of Indigenous people of 2007.

PART III: GLOBALIZATION AND THE FUTURE

Chapter 6: Globalization.

In this chapter, the impact of globalization on indigenous people is discussed. Discussions on the World Bank's policies, trans-national corporations, military activities, self-determination/sovereignty, compensation, and environmental policies is examined.

Chapter 7: The Road Ahead.

The last chapter discusses the future of indigenous people. This chapter presents an overview of the challenges of indigenous people, the effects of globalization on these populations, and their expectations in the 21st century.

PURPOSE, GOAL AND AUDIENCE

Topics and discussion on indigenous people are challenging. This book considers and examines aspects of the history, culture, law and the effect of globalization on indigenous people. The need to understand indigenous people is growing not only in the Americas, Asia-Pacific and Africa, but also all over the world, making this work timely. Indigenous/native study is increasingly occupying the time and attention of scholars and practitioners, policy makers, and changing domestic and international law.

A single book with an approach that presents essential elements that affect indigenous people in a clearly organized framework is lacking in the market. The message in this book is that understanding all aspects affecting indigenous people is critical. This book considers various facets of indigenous people lifestyle, discusses how to study it, how to analyze it, and how to improve their lives into the future. This book was written because something is amiss in existing books regarding the position of indigenous people and their social, political, and legal systems.

This book defines the role of culture, colonization, globalization, and policy on the lives of indigenous people. In this volume, the author describes how history, culture, law and globalization has affected indigenous people and the profound changes these aspects will bring to indigenous people in the future and the ways they need to respond. This fresh and compelling volume is essential for all those who care about indigenous people. Unlike existing books on indigenous studies, this book has synthesized a broad array of diverse material into a coherent whole that should prove useful for scholars and practitioners alike. In addition, readers in the area of indigenous studies will appreciate a concise reference book that compiles key elements from a wide perspective. Moreover, individuals with little background in indigenous studies will find this book an excellent source of introduction to key concepts and seminal works. This is what makes this book unique from other monographs in the market.

The book is intended for those who work with indigenous people in law, anthropology, public policy, international studies, integra-

tive studies, and other arenas, others who will find it of value are faculty and students in related disciplines and those interested in and work in human rights; research; comparative studies; and peace, social justice, and democracy. It has been written in simple, non-technical language, appropriate for those seeking general knowledge on indigenous people in various parts of the world.

The book presents knowledge, information, and appreciation of the ways of life of indigenous people, and examines global challenges common to all. The book relates the struggles and successes of indigenous people and the implications thereof. This book gives voice to individuals who are voiceless and helps readers see the world from a different angle. The book is a contribution to social discourse, rather than a discipline-based textbook. This book is a supplemental textbook on indigenous people/native studies.

PART I

IDENTITY AND CULTURE

CHAPTER 1

WHO ARE INDIGENOUS PEOPLE?

This chapter seeks a definition for the term “indigenous people” and describes a few groups of indigenous people from various parts of the world. It also analyzes and examines the history and common characteristics and challenges of indigenous people.

An indigenous person is one who belongs to any of the indigenous populations through self-identification as indigenous (group consciousness) and who is recognized and accepted by these populations as one of its members. Other definition of indigenous people include: occupation of ancestral lands as original occupants; having a common culture, such as religion; living under a tribal system; having a means of livelihood, lifestyle, and membership; language, whether used as a mother tongue, sole language, or habitual means of communication; and residence in certain countries or regions of the world.

A precise estimate of numbers of indigenous people and groups in the world is difficult, given the complications of identification and inadequacies of available census data. For instance, the population of various groups of indigenous groups in the United States of America before the 1492 voyage of Christopher Columbus are difficult to establish, as these estimates are based on archaeological data and written records from European settlers. Most scholars writing at the end of the 19th century estimated the pre-Columbian population at about 10 million. By the end of the 20th century, scholarly consensus had shifted population estimates to about 50 million, with some arguing for 100 million or more (Taylor, 2002).

Currently, an estimated 350 million indigenous people, with about 5,000 groups and approximately 7,000 languages, live throughout the world (United Nations Permanent Forum, 2009). Each of these groups has a unique language, culture, system of governance, history, and way of life. How necessary or useful is it to learn about the history of indigenous people? The answer requires knowledge of both pre-colonization and post-colonial history and politics.

The 19th century concept of new discoveries, with the assumption that indigenous people's lands were unoccupied territories (*Terra Nullius*) is the starting point of both the history and contemporary challenges of indigenous people. With the "discovery" of the "New World," people from European nations settled in North and South America, and eventually in other areas, including Australia, Africa, and some countries in Asia.

During this period, indigenous people were subjected to enslavement, death, displacement, and diseases, such as smallpox and syphilis. Those who survived endured a long legacy of discrimination that has continued to this day. As the European settlers left for their countries of origin after independence of their colonies, indigenous people throughout the world continued to be subjected to the same discrimination from local communities. Today, although each of these indigenous people live in different geographical areas, they continue to suffer common injustices (Mander and Tauli-Corpuz, 2009).

Around the world, indigenous people's culture is distinct from the cultures of other people. Unlike many non-indigenous populations and culture, the way of life of indigenous people is a culture integrated into their relationship with the natural world.

Historically, many indigenous people were hunter-gatherers, often practicing aqua-culture and agriculture, as well. Some indigenous people depended entirely on agriculture, while others practiced a mixture of farming, hunting, and gathering. In some regions of the world, indigenous people created organized empires, states, and chiefdoms for ease of governance (Mann, 2005). Today, some indigenous people still live in isolation from Western culture and maintain their cultural practices, including subsistence, social organization, language, and religion.

Defining Indigenous People

The term "indigenous" commonly means "origin." The key to a contemporary understanding of the term *indigenous* is the role cultur-

ally indigenous people play, but the term is taken conventionally to denote a politically underprivileged native people. The term *indigenous* carries a more restrictive interpretation when used in a formal, legalistic, and academic sense. In these contexts, the term is used to denote a particular indigenous people or groups around the world associated with collective rights. Throughout this book, the term “indigenous people” is used in this context.

There is no consensus on the definition of indigenous people and the terms used to define indigenous population vary. For example, in the United States (U.S.), the indigenous people are referred to collectively as Native Americans, American Indians, or Native North Americans, whereas, in Australia, they are referred to as Aborigines, and in Canada, as First Nations or Inuit people.¹

Native Americans, or American Indians, were sometimes referred to as Amerindians or Indians, originating from Christopher Columbus’s navigational error. He believed he had arrived in the East Indies on his expedition to explore Asia. Later, indigenous people in the Americas embraced and shared the name “Indian,” serving to unify them with codification of law, politics, and religion. The term “Native American” was introduced in the 20th century and remains the source of disputes regarding the acceptable reference to the indigenous people in the Americas.

The question *Who are indigenous people?* is complex and politically loaded, both in domestic and international contexts. Disputes center on two factors: First, who or what counts as indigenous. Second, who counts as a “people” in international law, especially when it comes to ascribing and respecting their right to self-determination.

There are two basic approaches to the question of who are indigenous people. First, one can link indigenous people to first residency or occupation of a particular territory. In this case, contemporary indigenous people would be descendants of the earliest populations living in that area. Second, one can tie indigenous people to those who lived in that territory before settlers arrived and colonization began. This raises issues about the definition of “prior” occupation rather than “first” occupation. Although there is enormous diversity among the many indigenous nations in the world, the con-

¹The Canadian Constitution recognizes three groups of Aboriginal People: Indians (First Nations), Metis, and Inuit. Each has a unique heritage, language, cultural practices, and spiritual beliefs.