

Indigenous Law Speaker Series 2013

Indigenous on the Margins of Colonizer Society
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What does it mean to be indigenous in today's multi-layered and multi-cultural societies? There are many indigenous societies within western and emerging states that underwent colonization, and upon examination there appear to be many similarities in the experience of these indigenous peoples.

Recognition of the Indigenous Nature of the People

What does it mean to be indigenous? Indigenous peoples have defined it as an inherent connection to the land. The United Nations and international law have defined it as inhabiting a land before it was conquered by colonial societies, and considering oneself as distinct from the societies currently governing those territories. Rigoberta Menchu Tum (Quiche Maya), recipient of the Nobel Peace Prize 1992, asserts that: "We are not myths of the past, ruins in the jungle or zoos. We are people and we want to be respected, not to be victims of intolerance and racism."² Oren Lyons (Onadaga Faith Keeper), speaks of being indigenous: "Our knowledge is profound and comes from living in one place for untold generations. It comes from watching the sun rise in the east and set in the west from the same place over great sections of time. We are as familiar with the lands, rivers, and great seas that surround us as we are with the faces of our mothers."

To be indigenous has a legally-defined meaning under International law. The United Nations Declaration on the Rights of Indigenous Peoples was adopted by General Assembly Resolution 61/295 on 13 September 2007. It states "People who inhabited a land before it was conquered by colonial societies and who consider themselves distinct from the societies currently governing those territories are *Indigenous Peoples*. They

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have the right of Self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

My research has included conducting a number of comparative studies of indigenous communities over the last fifteen years. These studies include American Indian nations throughout the U.S. (both reservation-based and urban), the Australian Aboriginal communities of Western Australia, the Western Plains and East Coast Canadian First Nations, the Pavee of Ireland, the Christian tribes of Nigeria, and, most recently, Māori of Aotearoa/New Zealand. These studies have revealed that being indigenous is synonymous with a lack of involvement with the power structure, and, in the criminal justice context, it often means a lack of confidence in the police services provided by government. Unfortunately, it also seems to mean not being invited to participate in those issues that affect your life and the lives of those in your community.

This paper will closely examine the similarities shared by the American Indians, Māori of Aotearoa/New Zealand, and the Pavee of Ireland. All are indigenous to their lands, and struggle for this recognition from their nations. They struggle for inclusion in the governments of their countries and for self-determination. They face significant criminal justice issues. They are largely urban, and most live under the authority of local or state governments. When one looks at these populations, one can discern five fundamental issues: concern about discrimination; a desire for recognition of the indigenous nature of the population; a quest for self-determination; a quest for empowerment; and a desire for integration with the power structure.

This paper focuses on the present day examples of American Indians, the Māori of New Zealand, and the Pavee of Ireland, their relationships with the colonizing entities of their communities and the challenges they face. Of particular emphasis are the issues they face in advancing self-determination; including education, criminal justice and integration with the state power structures.

The communities

There are 567 American Indian tribes in the United States, a number which includes 229 Alaska Native villages. As of the 2010 census, there are 2,932,248 American Indians, of which 119,241 are Alaska Natives. This number is approximately 1% of the American population.

The American Indian nations are sovereign. They have been deemed by the U.S. courts to be ‘domestic dependent nations’ with the right to make and enforce their own laws

and to hold their police accountable to their own rules. The American Indian nations also have the authority in certain circumstances (for example in contracting with local law enforcement) to define or restrict the activities of local law enforcement in Indian Country a term which was defined in legislation in 1948 by the U.S. Congress. Statute 18 U.S. C. A Section 1151 provides:

The term ‘Indian country’, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including right-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

According to the 2010, U.S. census, approximately 71% of American Indians are urban, as opposed to reservation-based. The experiences of both urban and reservation-based Indians with the police are remarkably similar from place to place. Regardless of the location, American Indians, individually and collectively, often experience a level of disproportionality with police departments and with local power structures. This disproportionality is evidenced in statistics, stories, and reflections. It is necessary to address this disproportionality if American Indians are ever to take their proper place in American society.

There are 682,200 Maori in New Zealand as of the 2013 census. This number represents approximately 15% of the total population. In New Zealand, more than 87% of Māori live on the North Island and in urban areas (Cormack, D, 2007)

There are 36,224 Pavee living in Ireland as of 2011. This number represents approximately .07% of the total population of Ireland. The Pavee organizations counted 36,244 Pavee in 2008 and estimate that this number is now approximately 40,000, or .09% of the Irish population.³ As with American Indians, many Pavee do not participate in the National census so the official number is somewhat lower than that known to Pavee organizations. The 2006 Irish census determined that 20,975 Pavee dwell in urban areas and 1,460 were living in rural areas. Using these official numbers, the Pavee national population would amount to just over 0.05%.⁴ There is some significant regional variation. Some areas were found by the census to have a higher proportion, with Pavee in Galway constituting 1.6% of the Irish population. The Pavee population is significantly urban. The national census numbers reflect that approximately 70% of the

Pavee live in and around cities, with slightly less than half (48%) living in just four counties: Cork (5.7% or 1,281), Dublin (22% or 5,029), Galway (13.9% or 3,113) and Limerick (6.3% or 1,411).⁵

Assertion of the right of Self-determination

The concept of self-determination as set forward in the UN Declaration can be defined in many ways. The focus of this paper is the comprehensive and responsible development, administration and provision of services for the Indigenous by an Indigenous community. To varying extents, and for different reasons, Indigenous peoples often have limited influence in the movement in their communities for self-determination. Few rights have been accorded specifically, and few have achieved political stature. However, where Indigenous communities and tribal governments have become the service providers of choice for their people, their communities have been empowered. This grass-roots empowerment gives rise to more and new powers. *De Jure* power, that granted by courts and official governments, is important, but not the only means to authority. The concept of *de facto* power, which arises from the taking or assertion of responsibility for particular tasks or functions, can be of great importance in the development of community empowerment and self-determination.⁶

The pervasive lack of critical opportunities

Education and employment are key to societal advancement, particularly in colonizer societies. The indigenous communities of America, New Zealand, and Ireland fare poorly in these key social indicators of the colonizer societies in which they reside, so this advantage is not generally part of their experience. The education and employment rates for these three peoples are significantly lower than the respective non-indigenous populations within their societies.

Almost 30% percent of American Indians (over the age of 25) have not completed a high school education, as compared with 20% percent of the total population. One-third of American Indians living in tribal areas do not have a high school education, compared with 20% percent of the total population. More than half (55%) of American Indian youth fail to complete high school within six years. This compares negatively with the US drop-out rate of 11% percent for all students in 2000. The Māori also have a high dropout or 'pushed out' rate. Only one third (32.5%) achieve complete required schooling (6th form cert. or higher), as compared with more than half (50.8%) of non-Māori (Statistics New Zealand, 2013). Legally a student in New Zealand may leave

school at age 16. In 2000 the national average in New Zealand of those students who leave high school prior to graduation was 19%. For Maori the number of students leaving secondary education without qualifications was 36%, or almost double the national rate.

According to the 2006 Irish census of the population, more than three fourths (77%) of Pavee over the age of 15 had only primary-level education or no formal education. Only 15% percent of the Pavee over the age of 18 completed their secondary education, and another 4% percent completed Higher Secondary.

American Indians are challenged by having one of the lowest employment rates in the United States. Only just over half (56.8 %percent) of all American Indians (over the age of 16) are employed, as compared with more than 70% percent of the total US population. The unemployment rates on many reservations exceed 60–70% percent. Only one quarter (24% percent) of American Indians are employed in managerial, professional, or office jobs, as compared with 34% percent of all workers.

The Māori unemployment rate is significantly higher than for non-Māori. More than 11% of Māori over the age of 15 are unemployed, compared with only 4% of non-Māori. Further, personal income disparity is also highly evident. More than 30% of Māori over the age of 15 have an annual personal income of \$10,000 as compared with 24% of non-Māori.

According to the 2006 Census of the population, only 14% percent of Pavee aged 15 years and over were described as "at work," compared with 53% percent of the general population of the same age bracket. Discrimination in seeking employment is an issue for the Pavee. The 2006 Report of the Government's High-level Group on Traveller Issues stated that the Pavee are discouraged from seeking mainstream employment by discrimination, hostility, and the fear of rejection.

Criminal Justice

The relationship between socio-economic disadvantage and increased risk of later persistent offending has been well established, notwithstanding the effects of systemic bias and lack of opportunity. When one considers the indigenous populations of the United States, New Zealand, and Ireland, this relationship is evident.

American Indians are 2.9% of the jail population in the United States, although they make up only 1.5% of the general population. The total American Indian rate of incarceration in both prison and jails is 15% higher than the overall national rate. In 1997, 47% of American Indian offenders were confined in prisons or jails, compared with 32% of non-Indians.

One in twenty-five American Indians age 18 or older are under some form of criminal justice supervision, which is 2.4 times the per capita rate for Anglo Americans, and 9.3 times the rate for Asian Americans.

The Māori of New Zealand are over-represented at every stage of the criminal justice process. Though forming just 12.5% of the general population aged 15 and over, 42% of all criminal apprehensions involve a person identifying as Māori, as do 50% of all persons in prison. For Māori women, the picture is even more acute: they comprise around 60% of the female prison population. When the author interviewed a senior police official, who was himself Māori, he contended that more Māori were arrested because they committed more crimes, that this disproportionality was simply driven by statistics rather than by any form of bias against Māori (interview July 26, 2013, Royal New Zealand Police College). This opinion flies in the face of research conducted by the author and others that reveal the existence of disproportionality of detention and arrest. (Weatherburn, D., Fitzgerald, J & Hua, J. 2003, D'Alessio S & Stolzenberg L (2003) Fergusson, D.M., Horwood, L.J., & Lynskey, M.T. (1993)).

The disproportionality of Māori in the criminal justice system extends to incarceration. At 30 June 2012, in New Zealand there were a total of 8,618 prisoners (8,091 males and 527 females). Of this population, 6,764 were prisoners serving a sentence, and 1,854 were remanded in custody. Māori made up 51 percent (4,391) of the total prison population. European prisoners made up 33 percent (2,835), and Pacific peoples accounted for 12 percent (1,006) of the total. A decade earlier, at 30 June 2002, there were 6,048 prisoners (5,773 males and 275 females); 4,983 were serving a sentence, and 1,065 were remanded in custody.

Another recent study of court criminal history data indicated that over 16,000 Māori males between the ages of 20 and 29 years had served one or more prison sentences.

Ethnicity

Throughout the first decade of this century, at least 3% of all Māori males between the ages of 20 and 29 years were in prison, with the number for non-Māori being less than one-sixth of this percentage.

Using data provided by Pavee Point Travelers Shadow Report.⁷ The Pavee of Ireland are 0.9% of the Irish population but comprise 4.6% of the prison population. The risk of a Pavee man being imprisoned was at least 5 times that of a non-Pavee man, and the risk for a Pavee woman was 18 times that of a non-Pavee woman.

The *An Garda Síochána* (commonly known as the Garda) is the national police force of the Republic of Ireland. The Pavee are subject to the police authority of the Garda, as Māori are to the New Zealand National Police. American Indians are subject to the authority of United States Federal police, and the Federal Bureau of Investigation. The Pavee and Māori are also subject to the civil and criminal authority of the Counties and to the local City Councils. This is similar to the authority that Public Law 280 states have over Indian Country in the United States.⁸

A recent study established that non-Pavee received comparatively lenient punishment when they committed crimes against Pavee, as compared with punishment of Pavee crime against non-Pavee.⁹

In surveys and interviews conducted by the author throughout Ireland, Pavee reported that they had observed incidents by Garda personnel that might have been the basis of complaint (sixteen incidents of discrimination, one of improper use of force, and one of discourtesy). However complaints were seldom filed with the Garda administration. This was due to the oft-stated belief that the filing of complaints would cause them to be "singled out" by police personnel (37%), or that "nothing might be done" (39.5% percent). When complaints were filed, no one reported that they were satisfied with the investigation, and only one respondent indicated that they were satisfied with the decision that was made regarding the complaint. There was widespread lack of confidence expressed in the Garda.

Self-Determination

The effort to assert control over one's own life is essential if a people are to become fully participatory in the life of their nation. It is not enough to simply receive services that are controlled and provided by others. This is paternalism, and does not meet the needs of a people, even if it is well intended.

Moves toward self-determination are aided by laws and the commitment of political agencies. In the United States such laws are in place. However, it is only very recently that the United States, Ireland, and New Zealand have supported the UN Declaration on the Rights of the Indigenous Peoples, and the expansion of indigenous rights to the native peoples of these countries has not yet occurred. As a result, self-determination for the indigenous peoples of these countries has lagged, awaiting the passage of laws in heated political environments. For example, many in the American Indian movement have encouraged the concept of de facto self-determination, that which results from the assertion of sovereignty and self-governance, not that which arises from legal cases. American Indian communities have simply decided to undertake and self-fund activities that benefit their people without waiting for federal government approval or funding.

In the United States, federal interests in tribal self-determination through tribal self-governance are now codified in a wide array of federal legislation that provides for “treatment as state” status for federally recognized tribes. “Treatment as state” gives tribal governments the legal authority to administer federal policies and requirements arising from legislation, ranging from the *Clean Water Act* to the legislation creating the federal program of Temporary Assistance for Needy Families (“TANF”).⁴³

Similarly, numerous federal programs have and do promote tribal economic self-sufficiency and effective self-government with explicit federal financial and technical support. Examples range from the programmes of the United States Small Business Administration, to the United States Department of Justice’s Office of Community Oriented Policing Services programme for the support of tribal and other jurisdictions’ law enforcement systems.⁴⁴ The recent so-called federal “stimulus package” provides explicitly for support of tribal governmental endeavors that promote economic development, public infrastructure investment, and other components of effectively governed communities.

The Pavee have yet to be identified as indigenous (or even as an ethnic minority) by the Irish Republic. Therefore any rights they could assert under the UN Declaration on the

Rights of the Indigenous Peoples are not yet available to the Pavee. The quest for empowerment is the result of a decision by people to assert themselves into a political situation, and to exert some control. Empowerment does not necessarily result from law, but may also arise from a 'de facto' assertion of responsibility. The quest for empowerment is revealed by the activities of government and of indigenous communities.

American Indians, Māori and the Pavee are making efforts to assert themselves into the political arena, and into areas where they can provide services for their people. Often the organizations seek public funding to allow them to provide services for their own people, rather than seeking services from agencies to which public funding has been awarded.

Māori have made significant advances into the assertion of self-determination through their work in the development of policies related to fishing rights¹⁰ and legislation such as the 1993 Te Ture Whenua Māori Act, which controls the sale and fragmentation of Māori land parcels. Māori have developed Parliamentary political agendas expressed through political movements such as the Mana Motuhake party, which was established in 1980.

It is important to recognise the extensive use of Māori language throughout Aotearoa/New Zealand and the incorporation of Māori self-governance and educational concepts by the state. These have the potential to extend Māori self-determination in a way that differs from that of American Indians.

American Indians work primarily through the existing political parties in the United States. There are few American Indian elected representatives in the U.S. political system, even where the native population is large. The National Congress of American Indians was formed in 1944. Its mission is to *“serve as a forum for unified policy development among tribal governments in order to: (1) protect and advance tribal governance and treaty rights; (2) promote the economic development and health and welfare in Indian and Alaska Native communities; and (3) educate the public toward a better understanding of Indian and Alaska Native tribes.”*¹¹

In the U.S. a number of pieces of legislation propelled the concept of self-determination for American Indians. On January 4, 1975, Congress passed the Indian Self-Determination and Education Assistance Act.¹² This Act allowed Indian tribes and tribal organizations to acquire increased control, through compacts and contracts, over the

management of federal programs that impact their members, resources and governments. Building on this foundation Congress passed the 1994 Indian Self-Determination Act,¹³ and the 1995 Indian Self-Determination and Education Assistance Act.¹⁴ These Acts supported the assertion of rights of self-governance by American Indians. On April 29, 1994, President William Clinton created an Executive Order entitled "Government-to-Government Relations with Native American Tribal Governments." This Order required that all departments of the Executive Branch of government interact with the tribal governments on a 'government-to-government' basis.¹⁵ These Acts and the Executive Order were instrumental in the development and implementation of American Indian governmental programs. Since that date a number of self-governance efforts have been successful and the lives of American Indians have improved. The tribes have become more competent in the running of tribal governmental programmes and in holding the U.S. government accountable for how they run federal programmes. Through the implementation of these laws, American Indian tribes have become empowered to take over the development and implementation of governmental activities paid for by federal funding.

Unfortunately there are many examples where urban American Indians have been unsuccessful in their efforts to be included in governmental power structures. For example, American Indians have sought to be included in police outreach efforts, efforts which have proven to be largely ineffective (Luna-Firebaugh, 2013).

The Pavee are increasing their efforts to inform the Irish population and to insert themselves into Irish policy making. These efforts include Shadow Reports, produced by Pavee organizations in response to reports made by the National government. One such example is the "Irish Travellers and Roma Shadow Report: A response to Ireland's Third and Fourth Report on the International Convention on the Elimination of all Forms of Racial Discrimination (CERD)". This report by the Pavee Point Travellers' Centre received wide attention when it was issued in January, 2011.

Governmental acts in Ireland have also proven to enhance Pavee self-determination efforts. The Irish Republic passed a number of laws protecting the Pavee and asserting their rights to equality. For example, the Employment Equality Acts of 1998 and 2004, the Equal Status Act of 2000 and 2004, and the 1998 Traveller Accommodation Act specifically protect the Pavee from discrimination.¹⁶

The passage of these Acts and the assertion of self-determination by the Pavee has also proceeded on a de facto basis. De facto efforts of the Pavee to assert their own self-

determination have resulted in some significant improvements. In Cork, for example, a group opened a new Centre for the West Cork Travellers Project. This project provides counseling, parent and toddler groups, youth programs, and educational programs for Pavee in County Cork. The services are provided by members of the community. The center was funded by a grant from the Health Services Executive (HSE) that provides funding for medical services throughout Ireland.

For Māori, the assertion of land claims, the development of the Rangatahi courts, and the integration into local and federal power structures are areas of potential success in the furtherance of Māori self-determination. Māori are making efforts to assert themselves into the political arena, and into areas where they can provide services for their people. The Rangatahi courts are a striking example, where the national government allows and even encourages the use of marae venues for the exercise of courts' jurisdiction over youth offenders.

Often marae and Māori urban social service agencies seek public funding to provide services for their own people, rather than seeking services from agencies to which public funding has been awarded. This has become a highly effective assertion of self-determination.

Conclusion

Although there are similarities between the experiences of American Indians, Māori and the Irish Pavee, particularly as they relate to colonization, the differences are great. These differences and similarities rely on various factors and all affect public policy development:

- the existence or not of treaties
- the formal, legal recognition of sovereignty and/or self-determination
- the integration of the Indigenous peoples with the national and state legal structures

However, the indigenous peoples of the United States, the Republic of Ireland and Aotearoa/New Zealand have undertaken efforts to take responsibility for the provision of essential services, including criminal justice programmes, other health services, access to transportation and shelters, and adequate housing, and to participate in the training of law enforcement personnel. These efforts are bearing fruit. The involvement of indigenous communities in the provision of critical services not only

enhances the quality of indigenous life, but also advances self-determination and de facto sovereignty.

The signing of the UN Declaration on the Rights of Indigenous Peoples will do much to advance Indian Country in the United States. Similarly, the full integration of Māori into the government of New Zealand, and the recognition of Pavee identity as an ethnic minority under the Irish constitution will be of great assistance to this movement. These achievements will encourage the growing acceptance among the citizens of the Irish Republic, Aotearoa/New Zealand, and the United States, of the indigenous status of their native peoples and the recognition of the legal rights afforded by this recognition.

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² Menchú, Rigoberta 1992. "Five Hundred Years of Sacrifice Before Alien Gods." Interview. Commission for the Defense of Human Rights in Central America. Internet Mayapage for Native Americans.

³ [McGaughey, Fiona](#) & [Pavee Point Travellers Centre](#). *Irish Travellers and Roma Shadow Report*. January 2011. Accessed at <<http://hdl.handle.net/10147/121627>>

⁴ Deegan, Denise, "Trapped by the Traveller code?" *The Irish Times*. May 28, 2011.

⁵ Central Statistics Office Ireland. "Volume 5 - Ethnic or Cultural Background (including the Irish Traveller Community)." http://www.cso.ie/census/Census2006_Volume5.htm [accessed November 21st 2011].

⁶ Cornell, Stephen, and Joseph P. Kalt. "American Indian Self-Determination: The Political Economy of a Policy that Works." HKS Faculty Research Working Paper Series RWP10-043, November 2010; Cornell, Stephen E., and Joseph P. Kalt. "Reloading the Dice: Improving Chances for Economic Development on American Indian Reservations." In *What Can Tribes Do?: Strategies and Institutions in American Indian Economic Development*, edited by Stephen E., Cornell and Joseph P. Kalt, 3-59. Los Angeles: American Indian Studies Center, University of California, Los Angeles, 1992.

⁷ [McGaughey, Fiona](#) & [Pavee Point Travellers Centre](#). *Irish Travellers and Roma Shadow Report*. January 2011. Accessed at <<http://hdl.handle.net/10147/121627>>

⁸ State Jurisdiction Over Offenses Committed by or Against Indians in the Indian Country. Public Law 83-280 (18 U.S.C. § 1162, 28 U.S.C. § 1360).

⁹ [McGaughey, Fiona](#) & [Pavee Point Travellers Centre](#). *Irish Travellers and Roma Shadow Report*. January 2011. Accessed at <<http://hdl.handle.net/10147/121627>>

¹⁰ Māori Fisheries Act 2004.

¹¹ <http://www.ncai.org/about-ncai>.

¹² The Indian Self-Determination and Education Assistance Act of 1975. Public Law 93-638. (25 USC §450, et seq; 88 Stat. 2203

¹³ Indian Self-Determination Act Amendments of 1994. HR 4842. Public Law. 103-413. 10/25/94

¹⁴ An Act to amend the Indian Self-Determination and Education Assistance Act to extend for two months the authority for promulgating regulations under the Act. Public Law 104-133 104th Congress. Apr. 25, 1996 [H.R. 3034]

¹⁵ *Government to Government Relations with Native American Tribal Governments*. Executive Order, Presidential Documents Federal Register Vol. 59, No. 85 Wednesday, May 4, 1994.

¹⁶ [McGaughey, Fiona](#) & [Pavee Point Travellers Centre](#). *Irish Travellers and Roma Shadow Report*. January 2011. Accessed at <http://hdl.handle.net/10147/121627>