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**Gaps and Peculiarities of Russian Legislation in Reference to International
Instruments on Indigenous Peoples' Rights**

Master's Thesis

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INTRODUCTION

Since the very beginning of European colonization, the subject of the relations between indigenous peoples and settlers was constantly going through changes. What usually started from peaceful co-existence and trade cooperation eventually turned into violent oppression, discrimination and cultural genocide. For centuries indigenous peoples were seen as uncivilized barbarians, who, in the mind of rulers and scholars of the time, did not deserve either sovereignty, or rights equal to those that colonizers had.

The situation with indigenous peoples gradually began to change for the better in 20th century. Various prominent international instruments were drafted, with norms prohibiting discrimination and protecting the rights of ethnic minorities. The adoption of specialized international instruments on indigenous peoples' issues marked a turning point in indigenous peoples' place in international law. The Indigenous and Tribal Peoples Convention (No.169) of the International Labour Organization and the United Nations Declaration on the Rights of Indigenous Peoples contain a wide spectrum of indigenous peoples' rights: the right to self-determination,¹ land tenure right,² the right to have their lands and natural resources protected by the state,³ the right to be consulted with on the matters that affect them,⁴ etc.

Granting indigenous peoples collective rights, international legal documents designated the special status of indigenous peoples as a distinct group that needs special protection. Subsequently the rights of indigenous peoples were reiterated in other international instruments. However, many problems that indigenous peoples face in the countries they inhabit still remain.

Violation of indigenous peoples' rights in various countries across the world is one of the global problems. Although every country has its own historical background regarding their indigenous peoples, the problems that indigenous population faces in each country are very similar. The pressure of dominant cultures and institutionalized discrimination give little possibility for indigenous peoples to maintain their traditional lifestyle and pursue freely their economic and cultural development. Civil society institutions, international organizations and NGOs play an important role in protection of indigenous peoples' rights, but states' legislation, general policy on indigenous peoples and actions of state authorities are crucial.

¹ United Nations Declaration on the Rights of Indigenous Peoples, New York 13.09.2007 (UNDRIP). Art. 3.

² Indigenous and Tribal Peoples Convention 169, Geneva 27.06.1989, e.i.f. 05.09.1991 (ILO Convention). Art. 14.

³ UNDRIP. Art. 26(3).

⁴ ILO Convention 169. Art. 6.

For Russia the issue of indigenous peoples' rights is very relevant. The Russian Federation has 47 officially recognized indigenous peoples.⁵ Some ethnic minorities are still fighting to be recognized as indigenous, but the state constantly denies them this right because of non-compliance with criteria of being indigenous peoples. Russian criteria differ from those used in the context of international instruments. Some of Russian criteria are quite problematic. For example, the criterion of forming a non-dominant ethnic group is narrowed down to being counted less than 50 000 individuals,⁶ and the requirement to maintain traditional lifestyle and economic activity is necessary.⁷ For that reason, some ethnic groups who meet other criteria cannot get an official recognition as indigenous peoples and, therefore, claim for the rights guaranteed to indigenous peoples under Russian law.

On an individual level, obtaining a status of an indigenous person is also not easy. In Russia there is no single document approving indigenous descent. Indigenous persons mostly have to prove their ethnicity through judicial procedure as it is the most reliable way. Recently made changes in legislation regarding indigenous status did not improve the situation.⁸

There are quite many challenges that indigenous peoples in Russia struggle with apart from the official recognition. These challenges are mainly related to land use and natural resources management. The land issue is crucial for indigenous peoples' physical and cultural survival, because economic well-being of indigenous peoples as well as their spiritual and cultural spheres of life are closely connected to the land they historically occupy and use. Some indigenous persons express it in a way that they would not survive without their land.⁹

The core of all indigenous peoples' rights is the right to self-determination. For indigenous peoples this right primarily means the ability to determine their own future, economic, social and cultural development, the ability to protect and maintain their distinct culture and spiritual legacy. Without the realization of the self-determination right the rest of indigenous rights are impossible to exercise. Consequently, to ensure that indigenous peoples can exercise the whole range of their

⁵ Unified List of Indigenous Small-Numbered Peoples of the Russian Federation. Adopted by the Government Decree No.255, 24.03.2000. Available at: <http://ivo.garant.ru/#/document/181870/paragraph/20:0>

⁶ Federal Law No. 82-FZ On the Guarantees of the Rights of Indigenous Small-Numbered Peoples of the Russian Federation. Adopted 30.04.1999, e.i.f. 12.05.1999 (Federal Law On the Guarantees of Indigenous Peoples' Rights). Art. 1(1). Available at: <http://ivo.garant.ru/#/document/180406/paragraph/9576/doclist/%D1%84%D0%B7%2082:0>

⁷ Ibid. Art. 1(1).

⁸ The special register of indigenous peoples in Russia created under the amendments to the Federal Law On the Guarantees of Indigenous Peoples' Rights and its shortcomings are discussed in the following chapters.

⁹ Anti-Discrimination Centre Memorial. "Без этой земли жизни мне не будет": Нарушение прав коренных народов при угледобыче в Южной Сибири, 2020, p.25. Available at: <https://adcmemorial.org/publications/bez-toj-zemli-zhizni-mne-ne-budet-narushenie-prav-korenyh-narodov-pri-ugledobyche-v-yuzhnoj-sibiri/> (01.04.2021).

rights the state has to build up a system of protection of indigenous peoples' rights in which all elements (i.e., legal instruments and mechanisms of implementation) are consistent with each other.

The research problem of this master's thesis lies in controversial Russian legislation on indigenous peoples' rights and its practical application. The unified system of protection of indigenous peoples' rights is lacking. Some specialized legal acts that guarantee indigenous peoples' rights contradict legal acts from other branches of law (this is especially relevant for land relations). Other legal instruments intended to protect indigenous peoples' rights cause problems for indigenous peoples more than actually help. Some laws are just hard to implement in practice taking into account the conditions in which indigenous peoples live.

The objective of the present study is to establish possible ways to improve legal regulation of indigenous peoples' rights in the Russian Federation in a way that these peoples could exercise their rights as a specially protected group in line with relevant international standards. Not all problems that indigenous peoples face can be resolved by applying the already existing Russian legal instruments the way they are. Thus, the author proposes some amendments to be made to certain legal acts as well as to create a document with a standardized form to deal with the problem of acknowledgement of indigenous status of individuals.

The paper evolves around the hypothesis that Russian legislation on indigenous peoples does not allow indigenous peoples to fully enjoy their rights outlined in norms of international instruments. The reason for that lies in the fact that main international instruments enshrining crucial rights of indigenous peoples are not ratified by the Russian Federation. In case of ratification indigenous peoples in Russia will have a solid legal basis to demand the compliance with international norms from the Russian state. Furthermore, ratified international documents would serve as the basis for the creation of the Russian indigenous peoples' rights protection system. The adjustment of some norms to the Russian reality probably would be needed, but the key rights such as the right to self-determination and the right to land possession must be guaranteed.

Leaving the ratification issue aside, the comprehensive system of protection of indigenous peoples' rights is needed in any case. When various legal instruments contradict each other and the gaps are left in the legislation, the mechanisms of practical implementation of indigenous peoples' rights cannot be established.

The present thesis consists of three chapters. The first chapter deals with indigenous peoples' legal status and rights in international law. The overall view on indigenous peoples in international law

system and international legal instruments regulating the issue are being discussed in order to have a comprehensive understanding of how the system of indigenous peoples' rights protection works on international level. The principles developed by international experts and scholars on the treatment of indigenous peoples may serve as a standard for the states with indigenous population because legal norms of these states on indigenous peoples are based on those principles. Since the definition of indigenous peoples is absent in international law, the main characteristics that legal scholars and international experts set forth are given. The rights of indigenous peoples stipulated in various international instruments are classified.

The second chapter analyzes the guarantees of indigenous peoples' rights provided in Russian legislation. For a better understanding of indigenous peoples' current place in Russian law system the overview of the historical development of indigenous peoples' legal status is given. Then the rights of indigenous peoples provided by Russian domestic law are described. The amount of Russian regional legal norms on indigenous peoples' rights is very large, so the full list of those norms is not given to avoid the overburdening of the work. The relevant provisions of regional legal acts are inserted in the text when appropriate. The main focus of the chapter is on land rights as they are vital for indigenous peoples and are very closely related to the right to self-determination. However, all rights of indigenous peoples are interrelated, and this point is highlighted repeatedly and illustrated by examples throughout the thesis.

The third chapter explores the principle of free prior informed consent (FPIC) in international legal instruments and Russian legislation. Constituent elements of FPIC are described in detail based on the character of FPIC provisions in international legal instruments, substantive number of manuals and guidelines issued by various UN specialized organizations such as Food and Agriculture Organization and International Fund for Agricultural Development, and the UN-REDD Programme. Before the analysis of FPIC concept an overview of indigenous peoples' participation in decision-making processes is presented. FPIC, whether it is defined as a right or a principle, is an ultimate form of indigenous peoples' participation and involvement. For that reason, an examination of indigenous peoples' right to be involved in decision-making on matters affecting them is necessary. As for FPIC in Russian legislation, the concept itself or its elements both in federal and regional laws are introduced.

The main research method used in the present work is analytical method. Comparative method is used in some parts of the thesis to show how similar issues of indigenous peoples are resolved in different states and how indigenous matters are regulated by the domestic law of those states.

Historical research method is used when describing the development of indigenous peoples' status in Russia.

For purposes of this study the author has analyzed two main groups of legal instruments: international legal instruments regulating the rights of indigenous peoples and Russian legal acts of federal and regional level containing the norms on indigenous peoples. The author has also analyzed the standards and guidelines of the UN specialized organizations and commercial companies on FPIC. The cases of international courts as well as Russian national courts were used to illustrate the points made by the author.

The value of the present thesis lies in the comprehensive analysis of Russian legal norms on indigenous peoples' rights. This work addresses the main gaps and shortcomings of Russian legislation in relation to indigenous peoples and examines how the insufficient or controversial regulation may affect the realization of indigenous peoples' rights. Finally, the suggestions are made by the author to amend certain legal provisions of the Russian laws on the rights of indigenous peoples in regard to the term "indigenous peoples", land management, FPIC and solve the problem of indigenous individual recognition by creating a unified document.

Keywords: indigenous peoples, indigenous peoples' rights, self-determination, land tenure, free prior informed consent, Russia.

I. THE STATUS OF INDIGENOUS PEOPLES AND THEIR RIGHTS IN INTERNATIONAL LAW

1.1 The Problem of the Definition of Indigenous Peoples

Historically there has never been a universal definition of indigenous peoples, and this uncertainty still remains in international law. The existing international documents focus more on the scope of rights of indigenous peoples rather than try to define these peoples. Two main international instruments regulating the rights of indigenous peoples - United Nations Declaration on the Rights of Indigenous Peoples and the Indigenous and Tribal Peoples Convention 169 of the ILO – do not provide a concrete definition. However, the latter states that indigenous peoples can be regarded as such on the account of their descent from populations which inhabited the country or its region at the time of conquest, colonization or establishment of the state.¹⁰

At the same time the terms used in legal systems of various countries may differ significantly. For instance, in the USA indigenous population is called Native Americans, in neighboring Canada they are usually referred to as First Nations, and in Australia the term “aboriginal people” is widely used. This situation creates confusion in regard to which people are considered indigenous under international legal norms and, subsequently, which rights provided by international treaties on indigenous peoples they can enjoy.

In 2005 the World Bank issued an Operational Manual 4.10 which recognizes the difficulty of identifying who are considered indigenous peoples. The Manual provides a statement regarding those who fall under the protection of the Manual, highlighting that indigenous peoples as a group have following features in common:¹¹

- separate from the dominant society economic, cultural and social institutions;
- indigenous self-identification;
- collective attachment to their territories and the natural resources of these territories;
- indigenous language.

The Manual mentions, however, that a technical judgement might be needed to identify if a certain indigenous group falls under the Manual. In this case the Bank should conduct a screening with

¹⁰ ILO Convention 169. Art.1(b).

¹¹World Bank. Operational Manual 4.10 – Indigenous Peoples, 2005, para. 4. Available at: <https://ppfdocuments.azureedge.net/1570.pdf> (10.10.2020).

social scientists involved to find out whether the social group in the project area can be considered indigenous or not.

Some researchers, lawyers and international institutions attempted to formulate the definition of indigenous peoples or at least identify criteria by which it would be possible to determine whether a certain ethnicity belongs to indigenous peoples' group or not. For example, S.J. Anaya in his *Indigenous Peoples in International Law* states that the term "indigenous" refers 'broadly to the living descendants of pre-invasion inhabitants of lands now dominated by others'.¹² The term "peoples" largely refers to communities with an identity that connects them with their past ancestors.

The UN Special Rapporteur on the Study of the Problem of Discrimination against Indigenous Populations Martínez Cobo defines indigenous peoples as "communities, peoples and nations which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them".¹³ He also outlined the following criteria of determining indigenous peoples:

- indigenous peoples are non-dominant in society;
- their goal is to transmit their ancestral territories and ethnic identity to future generations to ensure their continuing existence;
- self-identification plays a crucial role in defining indigenous peoples.¹⁴

The UN Permanent Forum on Indigenous Peoples has also come up with several additional criteria to distinct indigenous peoples:

- separate economic, social and political systems;
- strong connection with territories and natural resources;
- distinct language, beliefs and culture.¹⁵

¹² Anaya S.J. *Indigenous Peoples in International Law* (II edition). - Oxford University Press, 2004, p.3

¹³ UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Final Report of the Study of the Problem of Discrimination against Indigenous Populations. E/CN.4/Sub.2/1983/21/Add/8, 30.09.1983, para. 379.

¹⁴ Ibid, para. 379.

¹⁵ Office of the UN High Commissioner for Human Rights. *Indigenous Peoples and the United Nations Human Rights System*. Fact Sheet No.9/Rev.2. New York and Geneva, 2013, p.3.

In literature on indigenous peoples the criterion of self-identification often comes up as a crucial one. ILO Convention 169 in its Article 1(2) even claims self-identification to be a fundamental criterion for determining indigenous peoples. It is very interesting that this precondition which is a rather subjective issue is given such an importance. Of course, it is very unlikely that persons who do not belong to indigenous peoples in any way will try to obtain indigenous status because they still would have to meet objective criteria listed in international documents. On the other hand, not paying enough attention to this criterion may cause problems for indigenous groups who struggle for their official recognition as indigenous (for example, Yakuts in Russia). That is why indigenous peoples themselves insist on self-identification to be a key element due to the concern that certain groups would be excluded from indigenous by states.¹⁶

Another feature that is emphasized when defining indigenous peoples is their special relationship with the land. Not only do indigenous communities have economic ties with the land they use and/or occupy and its resources, but also a deep spiritual bond which is also of a great significance to these people. This exceptional connection serves as the basis for the norms on relocation and resettlement of indigenous peoples and obtaining their free prior informed consent (FPIC), which will be discussed in following chapters.

The absence of a universally accepted definition often creates confusion when it comes to determining what rights certain social groups are entitled to. A term that is frequently used in relation to vulnerable groups which need special protection is “minorities”, regarding ethnicity – “ethnic minorities”. Despite the lack of a solid definition of indigenous peoples, it is obvious that this term is narrower than the term “ethnic minorities”. Although ethnic minorities and indigenous peoples share some similarities, such as non-dominance in the society and their own language, cultural and ethnic identity, not all minorities are indigenous peoples, but indigenous peoples are mostly minorities in their countries. Thus, indigenous peoples theoretically can exercise the rights enshrined in international documents on minorities, but not vice versa. Again, because of the lack of a universal definition of the term “indigenous peoples” a situation may arise when a state recognizes a certain ethnicity as a minority, but not as indigenous peoples, and so the community becomes deprived of their full range of rights provided to them by specific international agreements.

¹⁶ Göcke, K. ‘Indigenous Peoples in International Law’ in Hauser-Schäublin B., *Adat and Indigeneity in Indonesia: Culture and Entitlements between Heteronomy and Self-Ascription*. – Göttingen University Press, 2013, p.23.

This is the main reason why the application of legal norms protecting ethnic minority rights is deemed to be non-effective – the minority status does not cover all the issues indigenous peoples face. The indigeneity status, on the other hand, contains a wider spectrum of rights since indigenous peoples are considered “original discoverers”, which entails the right to the occupied land under natural law and international legal norms on the occupation of *terra nullius*.¹⁷ Definitely minorities and indigenous peoples have some common concerns such as discrimination and struggle for cultural integrity, but the majority of indigenous peoples’ issues do not overlap with those of minorities.

Indigenous individuals and communities should not be confused with “local” or “traditional” communities as well. Local and traditional communities may have a connection with particular lands, but this factor only does not make them indigenous peoples. International treaties or other instruments, however, do not contain either the definition of local/traditional communities, or the definition of minorities. Hence, lawyers and researchers have to operate with key characteristics of each group to separate them from each other.

At the present moment it is universally accepted that the UN Declaration on the Rights of Indigenous Peoples incorporates elements that are clear enough to indicate whose rights the document covers. Those elements are:

- a distinct identity and the right to collective legal personality on a par with other peoples;
- the inherent value of indigenous peoples’ distinctive identities;
- a collective experience of historic injustices as a result of colonization and dispossession of lands;
- the unique form and content of indigenous identity;
- self-identification as indigenous and declaratory recognition;
- the universal right to self-determination.¹⁸

A clear understanding of who can be attributed to indigenous peoples is extremely important for protection of indigenous peoples’ rights. Quite often states do not want to claim specific peoples to be indigenous in order not to be obliged to protect their special rights granted by international documents.

¹⁷ Hohmann, J., Weller M. (eds.). The UN Declaration on the Rights of Indigenous Peoples. A Commentary. – Oxford University Press, 2018, p.25.

¹⁸ Ibid, p.33-35.

To summarize, there is no specific definition of indigenous peoples in international law. Various international legal instruments provide characteristics that delineate which ethnic groups can be considered indigenous peoples, but eventually each state has its own understanding of who can be categorized as indigenous peoples within this particular state. Different approaches of states are reflected in distinct terms that are used to name indigenous peoples.

1.2 International Regulation of Indigenous Peoples' Rights

As already indicated, the main international treaties which establish legal regime regulating indigenous peoples' rights are the UN Declaration on the Rights of Indigenous Peoples (further – UNDRIP), adopted in 2007, and the Indigenous and Tribal Peoples Convention of the International Labour Organization (Convention 169), adopted in 1989. Those two documents specifically deal with indigenous issues. Additionally, norms of some other international treaties are also applicable, for example:

- Convention on the Elimination of All Forms of Racial Discrimination: prohibits any distinction, exclusion, preference or restriction based on race, descent, colour or ethnic origin in every field of public life.¹⁹
- International Covenant on Civil and Political Rights: protects the rights of ethnic, religious and linguistic minorities to enjoy their culture, practice their religion and use their language.²⁰
- International Covenant on Economic, Social and Cultural Rights: enlists the rights of the named categories, including collective rights.²¹
- Convention on the Rights of the Child: provides that children of minorities or indigenous peoples cannot be denied the right to their culture, language and religion.²²
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: protects free expression and development of minorities' culture, association of minorities among themselves, participation in decisions that have to do with minorities, etc.²³

¹⁹ Convention on Elimination of all Forms of Racial Discrimination, New York 21.12.1965, e.i.f. 04.01.1969. Art. 1.

²⁰ International Covenant on Civil and Political Rights, New York 16.12.1966, e.i.f. 23.03.1976 (ICCPR). Art. 27.

²¹ International Covenant on Economic, Social and Cultural Rights, New York 16.12.1966, e.i.f. 03.01.1976.

²² Convention on the Rights of the Child, New York 20.11.1989, e.i.f. 02.09.1990. Art. 30.

²³ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, New York 18.12.1992. Art. 2(3), Art. 4(2).

- Convention on Biological Diversity: obliges state parties to respect and maintain knowledge and practices of indigenous communities relevant for conservation and sustainable use of nature, promoting wider application of such practices with the consent of indigenous communities.²⁴
- Rio Declaration on Environment and Development: acknowledges special relationship between indigenous peoples and the land, highlights the vital role of indigenous peoples in environmental management.²⁵

Many soft law instruments such as Agenda 21, the UN Programme of Action for the Sustainable Development of Small Island Developing States (Barbados Programme of Action) and Plan of Implementation of the World Summit on Sustainable Development (Johannesburg Plan of Implementation) also contain provisions on indigenous peoples (the relevant provisions of these documents will be discussed later in the thesis). Many international institutions and even corporations have policies, standards and recommendations on various indigenous issues aimed to make a change for indigenous communities on different levels. One of the great examples of such documents is the Food and Agriculture Organization of the UN (FAO) manual for project practitioners on free prior and informed consent (FPIC), that lays out in detail the whole process of obtaining FPIC before the beginning of economic activity. As for resource companies, many of them understand the necessity to realize the policy of social responsibility, not only because of the modern business trends, but because of the investors' requirements.

One of the main international instruments on indigenous peoples, the UNDRIP, regulates a wide range of issues related to indigenous peoples. The drafting process, however, was not always smooth, as some indigenous rights come in conflict with the political interests of states. Probably one of the most contested rights was the indigenous peoples' right to self-determination.

1.2.1 The Right to Self-Determination

Initially in international law the right to self-determination was viewed in the context of decolonization process.²⁶ Although this right was formulated by the UN Charter as the right of "peoples"²⁷, it would appertain to territories within the colonial boundaries rather than peoples. It

²⁴ Convention on Biological Diversity, Rio de Janeiro 05.06.1992, e.i.f. 29.12.1993. Art. 8(j).

²⁵ Rio Declaration on Environment and Development, Rio de Janeiro 14.06.1992. Principle 22.

²⁶ Hohmann, Weller (n 16) 118.

²⁷ Charter of the United Nations, San Francisco 26.06.1945, e.i.f. 24.10.1945. Art. 1.

was not intended that the right to self-determination would be exercised by ethnic groups or tribal communities.²⁸ The borders of independent states were meant to stay the same as they were in order to preserve international peace and security. In *Burkina Faso v Mali* the International Court of Justice (ICJ) emphasized that respect to the colonial frontiers should be upheld in the interpretation of self-determination.²⁹

Indigenous peoples' right to self-determination is a contested issue in both legal theory and practice. The main concern of the states is that this right may spark claims for secession from the state within which indigenous peoples reside. This is partly understandable, since claims for self-determination in some cases equal claims for secession from the state. Self-determination right clashes with the concept of state's territorial integrity because historically not so many states, if any, were formed in a way that several nations voluntarily decided to live together. People who feel underrepresented and wish to exercise self-determination right usually either form an ethnic minority inside a state, or they are divided among several states. This is very relevant for indigenous peoples because most of them, especially nomadic tribes, never had a concept of territorial boundaries.

In order to alleviate the states' concern two solutions were found. First, it was decided to include the provision which stresses that nothing in the Declaration should be interpreted as authorizing or encouraging the actions aimed at deterioration of states' territorial integrity (Art.46). Second, two articles that followed Art.3 granting indigenous peoples self-determination right stipulate that the named right is mainly related to autonomy or self-government in indigenous local and internal matters, and maintenance of distinct indigenous social, cultural and political institutions.³⁰

The UN Committee on the Elimination of Racial Discrimination in its General Recommendation XXI defines the right to self-determination in two aspects: internal and external. The internal aspect implies the right of peoples to freely pursue their economic, social and cultural development without outside interference.³¹ The external aspect implies that all peoples are entitled to freely determine their political status and their place in the international community.³² Self-determination of indigenous peoples is an illustration of an internal aspect, however, the fact that indigenous

²⁸ Hohmann, Weller (n 16) 118.

²⁹ Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali), judgment, ICJ 22.12.1986, para. 25.

³⁰ Hohmann, Weller (n 16) 117-118.

³¹ UN Committee on the Elimination of Racial Discrimination. General Recommendation XXI on the Right to Self-Determination, UN Doc. A/51/18, 08.03.1996, para. 4.

³² *Ibid*, para. 4.

peoples actually became a subject of international law can be seen as an element of an external aspect.

Several UN institutions, such as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and some regional human rights courts, such as the African Court of Human and Peoples' Rights, have recognized indigenous peoples' right to self-determination as an imperative norm of customary international law.³³ This was a major step forward, considering that the right to self-determination was traditionally appertained to "people" in the meaning of "state" during the decolonization in Asia and Africa. The UNDRIP changed this discourse by granting self-determination right to indigenous peoples as a collective right. Thus, indigenous peoples obtained a status of international legal actors, even though they were not equalized with sovereign states.

Martínez Cobo in his "Study of the Problem of Discrimination against Indigenous Peoples" notes that the right to self-determination is a basic precondition for indigenous peoples to exercise fundamental rights.³⁴ The right to self-determination does not necessarily include the right to secession from parent state, but rather gives indigenous peoples possibility to enjoy different forms of autonomy within the state. This fixes the historic injustice and allows indigenous peoples to live in dignity and determine their own future. He also mentions that international law should focus on indigenous peoples' ethnical development and self-determination, not on their "integration and protection".³⁵

Indeed, it can be said that other indigenous rights stem from or are closely related to the right to self-determination. For example, the right to cultural integrity including the maintenance of customary self-governance institutions is impossible to exercise for peoples who are legally deprived of their unique identity. As it was put in a separate opinion in the *Yakye Axa v Paraguay* case, cultural identity is attached to the right to life, so if cultural identity suffers, the right to life of the members of indigenous community is also threatened.³⁶

³³ Hohmann, Weller (n 16) 120.

³⁴ UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Final Report of the Study of the Problem of Discrimination against Indigenous Populations. E/CN.4/Sub.2/1983/21/Add/8, 30.09.1983, para. 580.

³⁵ Ibid, para. 337.

³⁶ *Yakye Axa Indigenous Community v. Paraguay*, judgment, IACtHR 17.06.2005, para. 18-19.

The Yakye Axa indigenous community filed a complaint alleging that Paraguay refused to recognize Yakye Axa property right over their ancestral territory. In its decision the IACtHR acknowledged indigenous peoples' right to collective land ownership, taking into account that Yakye Axa ancestral land has a special significance for their spirituality, cultural integrity and economic stability.

1.2.2 The Right to Cultural Integrity

To protect indigenous peoples' right to cultural integrity the UNDRIP provides the norms that outlaw forced assimilation, genocide and any action that could dispossess indigenous peoples of their identity. Before the adoption of the document there were no provisions in international law on the protection of indigenous peoples from violence and discriminatory treatment. On the contrary, some norms of international law as well as domestic laws of various countries were discriminatory towards indigenous peoples.³⁷ The denial of the factual existence of indigenous population through *terra nullius* doctrine, coerced removal of indigenous children from their families in Canada and aboriginal people of Australia being identified as animals under domestic legal acts are just a few examples of long history of discrimination and ethnocide. As A. Anghie notes, indigenous peoples were considered uncivilized heathens by the founding fathers of international law, and so lacked sovereignty (including the right to defend themselves from the settlers' acts of aggression).³⁸

The norms of new specialized international instruments such as the UNDRIP and the ILO Convention prohibiting discrimination of indigenous peoples restored the justice on both individual and collective level. In accordance with these documents indigenous persons have the same civil and political rights as other citizens, and indigenous communities are free to develop their cultural identities in a peaceful coexistence with other ethnic groups.

1.2.3 Land Rights

Land rights are also tied to the indigenous self-determination. As it was previously mentioned, indigenous peoples have a firm connection to their ancestral lands, and this connection is not only physical but also spiritual. Without their traditional lands indigenous peoples are denied their identity. Indigenous peoples living in Arctic regions need lands for reindeer herding, tribes living in tropical forests of Africa and Latin America find food and shelter in forests, and so on. Without land and natural resources indigenous peoples cannot maintain their traditional lifestyle and, therefore, protect their identity. This makes the survival of indigenous cultures impossible without realization of land and resource rights. In the *Awes Tingni Community v Nicaragua* the Inter-American Court of Human Rights admitted that indigenous people's close relationship with the

³⁷ Hohmann, Weller (n 16) 197.

³⁸ Anghie A. Imperialism, Sovereignty and the Making of International Law. – Cambridge University Press, 2005, p.29.

land must be recognized as the fundamental basis of indigenous cultures, spiritual life and integrity, and this connection they must enjoy fully in order to transmit cultural legacy to future generations.³⁹

Today indigenous peoples still fight for their cultural survival having the lands and resources lost to settlers and, later, commercial companies and state enterprises.⁴⁰ To protect indigenous populations from the abuse of states, international instruments grant indigenous peoples the right to territories and resources which they have historically occupied or used. It is accepted that indigenous peoples' relationship with lands and resources should be continuing, meaning that to have possessory rights the occupancy of the land must be connected to the present moment. At the same time, indigenous peoples can demand a redress in a form of restitution or compensation for the lands and resources which were confiscated, taken, occupied, used or damaged without their consent.

Both the UNDRIP and the ILO Convention prohibit forced relocation and resettlement of indigenous communities, but the ILO Convention permits removal of indigenous peoples from the lands they occupy only as an exceptional measure and with indigenous peoples' free prior informed consent. When the grounds for relocation no longer exist, there should be a possibility for indigenous communities to return back.⁴¹ The option of just and fair compensation is an alternative if the community cannot return.

Lands and territories also have a material value for indigenous peoples, allowing them to exercise their independent economic and cultural development. Considering that many indigenous peoples still live off traditional economy the loss of lands can be – and often has been - fatal for the communities. For this reason, states are obliged to protect the environment and the productive capacity of indigenous lands and resources. Military activities of any kind must not be conducted on indigenous territories, unless it was agreed or requested by the indigenous peoples themselves or the activities can be justified by relevant public interest.⁴² Even though these norms are quite often violated, the mere existence of these regulations shows how international instruments give special protection and significance to indigenous lands and their integrity.

³⁹ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, judgment, IACtHR 31.08.2001, para. 149.

⁴⁰ UN Committee on the Elimination of Racial Discrimination. General Recommendation XXIII: Indigenous Peoples, CERD/C/51/misc 13/Rev.4, 18.08.1997, para. 3.

⁴¹ ILO Convention 169. Art. 16(3).

⁴² UNDRIP. Art. 30.

Hand in hand with the right to land tenure and use goes the right to natural resources pertaining to those lands. States have an obligation to safeguard natural resources on indigenous territories and respect the right of indigenous peoples to participate in the use, management and conservation of those resources.⁴³ The ILO Convention, however, acknowledges that there might be cases when the ownership of mineral and sub-surface resources is retained by a state, and for such cases the consultation process with indigenous communities should be established to find out whether or to what extent the communities' interests are endangered. This is where the state's obligation to obtain free prior informed consent of indigenous peoples comes in.

1.2.4 FPIC Principle and Environmental Rights

Free prior informed consent (FPIC) is a notion targeted specifically at indigenous peoples' groups. The FPIC concept implies that prior to any economic activity which may affect indigenous peoples or their lands a state or a company should consult indigenous peoples affected. Due to global industrialization and the fact that many indigenous peoples do not know their rights outlined in international documents (or even national ones) this principle quite often gets breached. FPIC will be discussed in more detail in a separate chapter of the present thesis.

As it was previously mentioned, environmental protection of the lands and resources which indigenous peoples own and use is very important for indigenous communities' economic well-being. The Barbados Programme of Action stresses that in some countries – particularly small island developing states – the lives of citizens significantly depend on natural resources, especially marine ones.⁴⁴ Interestingly, many states are now starting to recognize that it works both ways: not only indigenous peoples need healthy environment, but for the protection of the environment and preservation of biodiversity the elements of indigenous traditional resource management are needed. This new approach is reflected, again, in the Barbados Programme of Action. The Johannesburg Plan of Implementation links indigenous peoples' traditional resource management systems with sustainable development and use of biodiversity.⁴⁵ The Convention on Biological Diversity directly puts an obligation on member states to respect, preserve and maintain

⁴³ ILO Convention 169. Art. 15(1).

⁴⁴ UN Programme of Action for the Sustainable Development of Small Island Developing States, Bridgetown 25.04.1994-06.05.1994, Chapter IV, para. 25.

⁴⁵ Plan of Implementation of the World Summit on Sustainable Development, Johannesburg, 26.08.2002-04.09.2002, Chapter V, para. 40(h), 40(r).

indigenous knowledge and practices relevant for the conservation and sustainable use of biodiversity and promote a wider application of those practices and knowledge.⁴⁶

1.2.5 Social and Cultural Rights

One of the biggest segments of indigenous rights system is social and cultural rights. A wide variety of such rights is protected under international treaties and promoted by NGOs and international institutions. The importance of cultural rights protection lies in a fact that a culture which is significantly outnumbered becomes more vulnerable even in a democratic state. It should also be considered that indigenous peoples' distinct culture is one of their defining features, which makes the question of cultural survival heavily essential for the very survival of indigenous peoples. To prevent the disappearance of an indigenous culture a state should not only refrain from forced assimilation of indigenous peoples, but also take an affirmative action to protect this culture.

It must be mentioned specially that not all cultural elements should be protected, but only those which fit in the frames of contemporary human rights framework. As it is known, some customs and practices are a threat to human rights of vulnerable groups within the communities, for instance, women. A Maasai woman Nasieku Tarayia in her article on the Maasai people argues that the practice of female genital mutilation, widely used in Maasai community, must be abandoned as it infringes women's rights, despite the fact that this tradition has historical roots.⁴⁷ Tarayia sees formal education as a tool for reform in a treatment of women in Maasai community. The UNESCO Universal Declaration on Cultural Diversity stresses that cultural diversity cannot be invoked to justify human rights infringement or limit the scope of human rights.⁴⁸

Indigenous peoples' cultural rights outlined in international treaties include the following: not to be subjected to forced assimilation,⁴⁹ to practice and revitalize indigenous customs and traditions,⁵⁰ to have their cultural and religious values recognized and protected,⁵¹ to have access in privacy to their religious and cultural sites,⁵² the right to protect, maintain and control traditional

⁴⁶ Convention on Biological Diversity. Art. 8(j).

⁴⁷ Tarayia, N. The Legal Perspectives of the Maasai Culture, Customs and Traditions. – 21 Arizona Journal of International and Comparative Law, 2004(1), p. 198-199.

⁴⁸ UNESCO Universal Declaration on Cultural Diversity, New York 02.11.2001. Art. 4.

⁴⁹ UNDRIP. Art. 8.

⁵⁰ Ibid. Art. 11(1).

⁵¹ ILO Convention 169. Art. 5(a).

⁵² UNDRIP. Art. 12(1).

knowledge system and transmit this knowledge, philosophies and languages to their future generations.⁵³

Social rights of indigenous peoples recognized in international law are also based on the will to compensate the wrongdoings made to indigenous peoples in the past. In almost all countries where indigenous peoples live, they are at the bottom of the economic and social ladder. This is the result of the long history of discrimination when indigenous peoples did not have access to healthcare and educational systems and at the same time could not develop their own social institutions. Nowadays indigenous peoples have a right to establish their own educational system, media in indigenous languages, maintain traditional health practices and, generally, the right to the improvement of their social and economic conditions. Indigenous peoples shall not be discriminated in regard to employment, salary and labour conditions. Special attention is given to the rights of vulnerable groups in the communities, such as elderly people, children, women and individuals with disabilities – states together with indigenous communities must ensure that persons belonging to these groups are protected against violence and discrimination and enjoy continually improving economic conditions.⁵⁴

To sum up, international instruments contain wide variety of indigenous peoples' rights. The most crucial rights are enshrined in specialized international documents such as the United Nations Declaration on the Rights of Indigenous Peoples and the Indigenous and Tribal Peoples Convention of the International Labour Organization. Except those two documents, many other international instruments encompass various provisions related to indigenous peoples.

The core of all indigenous rights is the right to self-determination. Without realization of this right other rights cannot be exercised, because the very essence of indigenous legal status lies in the right of indigenous peoples to determine their destiny and identify themselves as a separate ethnic group with its own unique culture, history and a place in the world. From self-determination come land rights, as indigenous peoples have a strong spiritual and economic bond with territories that they occupy. As the continuation of self-determination follow the right to cultural integrity and other cultural rights, including the right to practice indigenous traditions and spirituality. Social rights, just like cultural rights, are aimed at restoring historical justice made to indigenous peoples.

⁵³ Ibid., Art. 13(1).

⁵⁴ Ibid., Art. 21, 22.

Like other vulnerable groups, indigenous peoples need special protection from a state, and it means that the state should not only abstain from discriminatory actions towards indigenous peoples, but also pursue a policy of granting benefits and paying special attention to the needs of indigenous peoples. In the system where inequality and discrimination still exist on various levels, it is very hard for indigenous peoples to at least get an equal treatment, not to mention have their culture and lifestyle protected from the outside influence.

II. GUARANTEES OF INDIGENOUS PEOPLES' RIGHTS IN THE RUSSIAN FEDERATION

2.1 Historical Overview of the Development of Indigenous Peoples' Status

Russia has not always been a country with so many indigenous peoples as it is now. Only in 16th century when the colonization of Siberia, North and Far East started the question of relations between the Russian state and indigenous peoples became relevant.

Throughout history Russian policy on indigenous peoples changed. Up until 1917 indigenous peoples were very rarely mentioned in Russian legal acts, except for quite broad terms such as “aliens” (*inorodtsy*, literally “of a different kind”). The Charter on the Management of Aliens 1822 was one of the few documents which thoroughly regulated the rights of indigenous peoples of Siberia. The Charter divided Siberian indigenous population in three groups: settled, moving and nomadic. These groups had different legal status depending on their lifestyle.⁵⁵ Settled ones had the same rights as peasants in the Russian Empire. The second group included fishers and hunters and the third one consisted of horsemen. All indigenous peoples of Siberia were freed from military duty and were guaranteed the freedom of religion. Nomadic and moving peoples had the right to live by their own laws and customs, which were taken into consideration by local Russian authorities in indigenous related affairs, but Russian criminal law applied to indigenous persons. Nomadic and moving peoples could also bring claims to the authorities, send their children to Russian schools or build their own, had a right of free trade and land tenure.⁵⁶

Despite quite a wide range of rights granted to indigenous peoples, they still faced certain difficulties. Even though the assimilation policy was not extensive, the Russian law enshrined the dominant position of the ethnic Russians. Indigenous peoples were treated as a colonized population and paid a special tax just for the fact of their mere existence. According to the evidence of the past, local administrations only gave attention to indigenous peoples when collecting taxes.⁵⁷ The alcohol trade, although prohibited by the Charter of 1822, was thriving between Russian merchants and indigenous populations, which led to the spread of alcoholism among the latter.

⁵⁵ Nuttall, M. *Encyclopedia of the Arctic* (Vol. 1,2 and 3). New York and London: Routledge, 2005, p.1943.

⁵⁶ Charter on the Management of Aliens. Adopted 22.07.1822, annulled in 1917. Available at: http://irkipedia.ru/content/ustav_ob_upravlenii_inorodcev

⁵⁷ Agalarkhanova, A. Национальная политика Российской Империи и Советской России в отношении коренных малочисленных народов Севера, Сибири и Дальнего Востока. (*National Policy of the Russian Empire and Soviet Russia on Indigenous Small-Numbered Peoples of the North, Siberia and Far East*). – Humanitarian Research in Eastern Siberia and Far East, 2013(6), p.20.

The same happened with the drug trade between Chinese merchants and indigenous persons in Siberia and Far East regions.

After the 1917 Socialist Revolution indigenous peoples' special status was revoked. According to the RSFSR Constitution 1918, any privileges and benefits given to any ethnic group would contradict the Soviet law.⁵⁸ New Soviet government abolished private property, including the private ownership of land, thus putting the land tenure right for indigenous peoples out of question. Nevertheless, in 1920s indigenous peoples again obtained a distinctive status, this time as “aborigines” (*aborigeny*). The USSR legal instruments of that decade were aimed at cooperation with indigenous populations in the industrial development of the northern parts of the country taking into account indigenous interests.⁵⁹ Later the state took a paternalistic approach towards indigenous peoples which included forced relocation to big towns and cities, abolishment of small indigenous crafting and large-scale collectivization.

In the second half of the 20th century the assimilation policy continued. The Soviet law did not distinguish indigenous peoples into a separate subject of land relations.⁶⁰ As ordinary land users, they could get their land use rights restricted by the state just like other citizens. The RSFSR Land Code 1970 provided that damages caused to land users had to be compensated⁶¹, however, areas which indigenous peoples inhabited (Siberia, North and Far East) were subjected to extensive industrialization that did not involve any damage compensations.

As it can be seen, not only the state's approach but the very term for indigenous peoples living in Russia has changed repeatedly. The word *inorodtsy* (aliens) in times of the Empire was used not only towards indigenous peoples, but other ethnic minorities as well.⁶² In the Soviet time indigenous peoples were allocated to a separate category of “aborigines”, which acknowledged them as native to the territories they inhabited. Nowadays the official term that is used in Russian

⁵⁸ The Constitution of the Russian Socialist Federative Soviet Republic. Adopted 10.07.1918, e.i.f. 19.07.1918, annulled 11.05.1925. Art. 22. Available at: <http://constitution.garant.ru/history/ussr-rsfsr/1918/chapter/16f2ab7cf5882f7ecb6db3138b94fd15/>

⁵⁹ Дюпин, А. Государственная национальная политика в отношении коренных малочисленных народов в дореволюционном, советском и постсоветском законодательстве. (*State National Policy on Indigenous Small-Numbered Peoples in Pre-Revolutionary, Soviet and Post-Soviet Legislation*). – Issues of Social-Economic Development of Siberia, 2019(2), p.112

⁶⁰ Agalarkhanova (n 56) 23.

⁶¹ Land Code of the Russian Socialist Federative Soviet Republic. Adopted 01.07.1970, e.i.f. 01.12.1970, annulled 25.04.1991. Art. 22. Available at: <https://base.garant.ru/5631260/>

⁶² Big Russian Encyclopedia (digital version). Available at: https://bigenc.ru/domestic_history/text/2012436 (10.10.2020).

law is “indigenous small-numbered peoples of the North, Siberia and Far East”, or the shorter option - “indigenous small-numbered peoples”.

This term, as comprehensive as it may seem, is quite controversial. The controversy lies in the word “small-numbered”. This word in itself limits the group of people who are entitled to the indigenous peoples’ rights. If being a small-numbered ethnicity is one of the key criteria that defines the beneficiaries of indigenous rights, then many ethnic groups native to certain regions of Russia cannot be considered indigenous peoples as Russian law determines them. One of the most prominent examples is the case of Yakuts.

In the Republic of Sakha (Yakutiya) Yakuts make up more than 50% of the population,⁶³ which is more than 400 000 people. According to the Federal Law On the Guarantees of Indigenous Peoples’ Rights, a people is considered small-numbered if the number of its individuals is no more than 50 000 persons.⁶⁴ Hence, the Yakuts are not a small-numbered people in the eyes of a Russian legislator. Meanwhile, the Yakuts satisfy all other criteria listed in law to be considered indigenous small-numbered peoples: they are the native inhabitants of the territories where they currently live, they maintain traditional lifestyle and economic activity and identify themselves as distinct ethnic group.⁶⁵ The only obstacle that prevents Yakuts from getting benefits from the state as indigenous peoples is the large number of individuals.

And so, the question arises: does it mean that in order to retain their special rights indigenous peoples have to curb the growth of their population and be a minority on their own land? Such a bargain for state’s protection does not seem fair and is, in fact, very discriminatory.

Summarizing all of the above, the indigenous status is not so easy to get officially acknowledged. The criterion of being less than 50 000 persons to be considered indigenous peoples is not in line with any international instrument on indigenous peoples’ rights. Indigenous peoples should not face a dilemma of curtailing the population growth versus getting benefits from the state. Indigenous peoples in Russia are either way a minority who need special protection especially in the face of rapidly growing industrial economy which affects indigenous peoples’ traditional lifestyle and, as a result, quality of life and self-identification. In my opinion, Article 1(1) of the

⁶³ Якутия.Инфо. Маханьков, М. Якутия: народ, которому удалось снова стать большинством на своей земле (*Yakutiya: the People Who Managed to Become the Majority on Their Land*), 05.09.2017. Available at: <https://yakutia.info/article/181640> (01.03.2021).

⁶⁴ Federal Law On the Guarantees of Indigenous Peoples’ Rights. Art. 1(1).

⁶⁵ Ibid. Art. 1(1).

law On the Guarantees of Indigenous Peoples' Rights should be amended in the following way: the wording "counted less than 50 000 persons" should be changed to "constituting an ethnic minority".

2.2 Legal Norms Related to Indigenous Peoples in Russian Legislative System

Before analyzing Russian legal norms on indigenous peoples' rights, it is necessary to first take a look at the structure of the legislative system of the Russian Federation. Russia is a federal state and has a continental legal system. The highest law in Russia is the Constitution of the Russian Federation. All other legal acts must not contradict the Constitution. Hierarchically all Russian legislation can be divided into three groups: federal legal acts (federal constitutional laws, federal laws, various executive regulations such as presidential orders and governmental decrees), regional legal acts (constitutions, statutes and laws of Russian regions) and legal acts of local governments (decisions and decrees).

International law is recognized as a part of legislative system in Russia and international agreements are applied when their provisions differ from those of domestic laws. As for the main international documents on indigenous peoples' rights – the ILO Convention and the UNDRIP – the Russian Federation has not ratified them.

The Russian legislation on indigenous peoples' rights is very diverse. The highest law of the country, the Constitution declares that the Russian Federation guarantees the rights of indigenous small-numbered peoples in accordance with principles and norms of international law and international agreements of the Russian Federation.⁶⁶

On the federal level there are several legal acts that specifically regulate indigenous peoples' issues. The main one is the Federal Law №82-FZ On the Guarantees of the Rights of Indigenous Small-Numbered Peoples of the Russian Federation which deals with economic, social and cultural rights of indigenous peoples in Russia. The Federal Law №104-FZ On General Principles of Organization of the Communities of Indigenous Small-Numbered Peoples of the North, Siberia and Far East of the Russian Federation⁶⁷ and the Federal Law №49-FZ On the Territories of

⁶⁶ The Constitution of the Russian Federation. Adopted 12.12.1993, e.i.f. 25.12.1993 (Constitution of Russia). Art. 69. Available at: <http://www.constitution.ru/en/10003000-01.htm>

⁶⁷ Federal Law No. 104-FZ On General Principles of Organization of the Communities of Indigenous Small-Numbered Peoples of the North, Siberia and Far East of the Russian Federation. (Federal Law on the Communities of Indigenous Peoples). Adopted 20.07.2000, e.i.f. 25.07.2000. Available at: <http://base.garant.ru/182356/>

Traditional Nature Use of Indigenous Small-Numbered Peoples of the North, Siberia and Far East of the Russian Federation are more specialized.⁶⁸ Some norms related to various indigenous issues such as land use, protection of indigenous cultural and religious sites, environmental management are contained in different federal laws and codes (Land Code, Forest Code, the Federal Law On Fishing and Conservation of Aquatic Bioresources, etc.). The provisions of these legal acts related to indigenous peoples will be discussed later in the thesis.

Another important federal legal act is the Unified List of Indigenous Small-Numbered Peoples of the Russian Federation. The List contains 47 indigenous peoples and the names of the regions where they live.⁶⁹ The peoples included in the list vary significantly from each other in terms of population size – some of them are approximately 44 000 people (Nentsy), some are less than 500 people (Aleuts). Peoples who are not on this list are not considered indigenous, hence, cannot claim special rights which indigenous peoples are guaranteed. Ethnicities willing to be officially recognized have to be first and foremost added to the List by the government of the Russian Federation, otherwise they will not be able to claim rights provided by the law On the Guarantees of the Rights of Indigenous Small-Numbered Peoples of the Russian Federation (further – On the Guarantees of Indigenous Peoples' Rights).

The majority of Russian legal acts on indigenous peoples are regional.⁷⁰ Since indigenous peoples live in different regions of the country and every region has its own specifics, it seems reasonable that local authorities are given the power to make decisions on indigenous issues.

The problem of recognition mentioned before is relevant not only for certain native ethnic groups, who struggle to be recognized as indigenous peoples collectively (e.g., Yakuts). In some instances, it goes down to individual level when persons of indigenous origin face difficulties in being identified as a part of the group already recognized as indigenous peoples.

⁶⁸ Federal Law No. 49-FZ On the Territories of Traditional Nature Use of Indigenous Small-Numbered Peoples of the North, Siberia and Far East of the Russian Federation. Adopted 07.05.2001, e.i.f. 11.05.2001 (Federal Law on TTNU). Available at: <http://base.garant.ru/12122856/>

⁶⁹ Unified List of Indigenous Small-Numbered Peoples of the Russian Federation. Adopted by the Government Decree No.255, 24.03.2000. Available at: <http://ivo.garant.ru/#/document/181870/paragraph/20:0>

⁷⁰ For example, Law of Amur Region No. 250-OZ On the Territories of Traditional Nature Use of Indigenous Small-Numbered Peoples of the North in Amur Region. Adopted 27.10.2003, e.i.f. 07.11.2003; Law of Khanty-Mansi Autonomous District No. 92-OZ On the Sanctuaries of Indigenous Small-Numbered Peoples in Khanty-Mansi Autonomous District – Yugra. Adopted 07.11.2005, e.i.f. 17.11.2005, etc.

For example, the requirement to maintain traditional lifestyle in order to uphold indigenous status is hard to adhere to in the modern world. Many indigenous persons, especially the young ones, move to big cities, live and earn money there. Indigenous kids are sometimes sent to boarding schools in cities, and later to the universities, because there are no educational institutions in the areas where indigenous peoples live. Obviously, a person who was born indigenous cannot stop being indigenous because of moving away from the community and studying in the city or working an ordinary job. For that reason, none of the international instruments mentions that an indigenous individual *de jure* loses their indigenous identity and, consequently, special rights, if they do not engage in traditional economy.

This problem occurs not only in Russia: in famous *Kitok v Sweden* case the Saami man was expelled from the Saami community because according to the Swedish law a Saami who engages in any profession other than reindeer herder for three years, loses their status as a member of the Saami community and cannot re-enter it unless by special permission.⁷¹

As for Russia, self-identification as a basis for granting indigenous status is usually dismissed by Russian authorities. The eligible documentary confirmation of belonging to indigenous peoples may be applicant's birth certificate that has an 'ethnicity' column or old Soviet passport of the applicant or the applicant's parents where ethnicity was also written.⁷² Some regions issue special certificates of belonging to indigenous small-numbered peoples, for example Khanty-Mansi Autonomous Region, but there is no mandatory unified document certifying an individual's indigenous status. Indigenous persons willing to officially obtain this status often have to go to court because different state bodies and agencies (Pension Fund, Tax Service, etc.) refuse to grant them benefits which indigenous peoples are entitled to, and only the court's decision can fix the problem.

Except documentary evidence Russian courts take various factors into consideration, specifically the following: living on territories traditionally occupied by indigenous communities, engagement in traditional economy, participation in indigenous social events, the membership in indigenous

⁷¹ *Kitok v. Sweden*, Communication No. 197/1985, UN Doc. CCPR/C/33/D.197/1985, 27.07.1988.

⁷² Polishuk-Molodozhenua, T. Правовые проблемы определения статуса коренных малочисленных народов Севера в России (на примере Мурманской области). (*Legal Issues of Defining the Status of Indigenous Small-Numbered Peoples of the North in Russia (with Murmansk Region as an Example)*). – 11 The Works of Kola Scientific Centre of Russian Academy of Science, 2017(4), p.114.

peoples' organizations.⁷³ First two conditions are compulsory, otherwise the law On the Guarantees of Indigenous Peoples' Rights is not applicable.⁷⁴

Sometimes documents that confirm indigenous ethnicity are assessed by the court as insufficient. Andrey Danilov, a Saami man from Murmansk region, was requested to present evidence of living a traditional lifestyle in order to exercise his right of hunting without license. Although he had his ethnicity written in his birth certificate and marriage license, this was not enough to win the case.⁷⁵

Similar case was brought in 2019 before the Kirovskiy district court in the city of Irkutsk when the District Environmental Prosecutor filed a complaint against an Evenki man A. Kalugin (Evenki are one of the indigenous peoples living in the Irkutsk region, in the South-Eastern Siberia) and the Ministry of Forestry of the Irkutsk region. Kalugin had a hunting permit which had a reference allowing him to hunt for the purpose of maintaining traditional lifestyle in the amount required for personal consumption without any additional permission. By the time the reference was made, Kalugin had been permanently living outside of indigenous territories and working a regular job as an ordinary citizen. The court concluded that in order to be allowed to hunt in the amount necessary for sustaining traditional lifestyle one should actually live that lifestyle, and since hunting was not a source of Kalugin's subsistence but rather a sport, he could not be given this privilege just because he was coming from the indigenous background.⁷⁶ The Ministry of Forestry was obliged by the court's decision to annul the specific reference from Kalugin's hunting permit.

The absence of official recognition as an indigenous person entails the inability to enjoy benefits granted to indigenous peoples. Most often people of indigenous ancestry do not seek legal recognition of their origin unless they want to use those benefits. Nevertheless, it appears that exercising special rights is easier through the membership in indigenous community. For instance, regional fishing quotas for traditional fishing are distributed among indigenous persons and indigenous communities.⁷⁷ So a person who wants to get the quota faces a choice: to let the community apply for quota and then use it as a member or to go through judicial process of

⁷³ Decision of Elizovo District Court of Kamchatka Region No. 2-1162/2019, date 26.07.2019.

⁷⁴ Federal Law On the Guarantees of Indigenous Peoples' Rights. Art. 3.1.

⁷⁵ Новая Газета. Брицкая, Т. Назад в тундру (*Back to Tundra*), 04.12.2019. Available at: <https://novayagazeta.ru/articles/2019/12/04/82985-nazad-v-tundru> (10.04.2021).

⁷⁶ The Decision of Kirovskiy District Court of Irkutsk No. 2-2552/2019, date 22.07.2019.

⁷⁷ Government Decree No.558 On the Approval of the Rules for the Distribution of Fishing Quotas for the Maintenance of Traditional Lifestyle and Economy of Indigenous Small-Numbered Peoples of the North, Siberia and Far East of the Russian Federation, 05.05.2018, para. 5.

recognition as indigenous and only then apply separately for quota. Apparently, the first way will be the easier one.

This approach, unfortunately, does not work with strictly individual benefits. Special pension, admission quotas at some universities, one-time child benefit are several examples of what an indigenous person can get only by themselves.

Acquiring indigenous status through judicial procedure may be a reliable way to solve the issue, but it definitely cannot be a universal solution. After all, many indigenous persons live in remote areas, so getting involved in litigation and everything that comes with it (hiring a lawyer, attending court proceedings, finding witnesses, appealing if necessary, receiving a paper copy of the court's decision) is very time-consuming and costly for these people.

In 2020 the amendments to the law On the Guarantees of Indigenous Peoples' Rights were made. According to these amendments a person can get an official recognition as an indigenous individual if their name is entered in the special register of indigenous small-numbered peoples.⁷⁸ For that an indigenous person has to submit a package of documents, including passport information, information on close family members, registration address, personal tax number, etc.⁷⁹ The proclaimed goal of creating a register was to make the process of recognition easier for indigenous peoples. Contrary to this goal, new problems arose.

The list of documents for submission is extensively long and includes documents that not all indigenous peoples have (personal tax number, social security number), especially those who live in remote areas. An indigenous person again has to prove that he/she lives a traditional lifestyle and conducts traditional economic activity, so those who live in towns and cities will be excluded again. If the authorities refuse to put a person on the register, there is no established appeal procedure. Probably the worst thing is that the register was included in the monitoring programme in the field of interethnic relations, and this programme is controlled by the Federal Security Service (FSB).⁸⁰ The aim of the monitoring is to fight extremism. Considering that indigenous peoples often face political persecution and are accused in separatism for publicly addressing various indigenous issues or protesting (UN expert Pavel Sulyandziga who applied for political

⁷⁸ Federal Law On the Guarantees of Indigenous Peoples' Rights. Art.7.1.

⁷⁹ Ibid. Art.7.1(4).

⁸⁰Новая Газета. Брицкая, Т. Учти меня, олень! (*Register Me, Reindeer!*) 09.09.2020. Available at: <https://novayagazeta.ru/articles/2020/09/09/87006-uchti-menya-olen> (10.04.2021).

asylum in the USA⁸¹, Saami people raising Saami flag in Murmansk⁸²), the fact that FSB officially gets access to indigenous individuals' personal data is alarming.

Taking into account the importance of the benefits guaranteed to indigenous peoples, the fact that many of those people cannot afford or simply do not know how to prove their indigenous origin to authorities, and the newly created register seems to be more problematic than helpful, it would be reasonable to design a unified document approving person's indigenous status. My suggestion is that this document should be given out to every person who is a member of an indigenous community at the time of birth. Indigenous persons who are not members of the community should be assisted by the authorities in getting the document. Article 39 of the UNDRIP stipulates that indigenous peoples have the right to financial and technical assistance from states for the enjoyment of their rights⁸³, and this norm is in compliance with the nature of international human rights law. It is the state's obligation to ensure that people who belong to a vulnerable group (in this case - indigenous peoples) have access to the benefits and services provided by law, not to make people struggle with bureaucratic procedures to get what they are entitled to.

The complexity of Russian regional legislation on indigenous peoples' rights very much depends on the region. In those regions where indigenous population is denser there is a quite strong representation of indigenous peoples in local state bodies either by indigenous individual representatives or indigenous organizations and associations, such as Yasavey in Nenets Autonomous Region and Association of Indigenous Small-Numbered Peoples of the North in Krasnoyarsk Region.

The rights of indigenous peoples guaranteed under the Russian national legislation can be classified the same way as the rights under international law: cultural rights, economic and social rights, land rights. Curiously, the cornerstone of all other rights – the right of indigenous peoples to self-determination – is nowhere to be found in Russian law. Russia takes a clear stance on the issue of self-determination calling all attempts to exercise this right an extremism or separatism. While some other countries have indigenous self-government bodies (e.g., Saami Parliament in Finland and Norway) that have a decisive word in launch of any state's project potentially

⁸¹Сноб. Миколайчук, Д. История защитника коренных народов, который сбежал в США от российских спецслужб (*The Story of Indigenous Peoples' Defender Who Escaped to the USA from Russian Intelligence Services*), 27.12.2019. Available at: <https://snob.ru/entry/186908/> (10.04.2021).

⁸²Lenta.RU. Туровский, Д. Саами все делают сами (*Saami Decide for Themselves*), 10.10.2013. Available at: <https://lenta.ru/articles/2013/10/10/saami/> (10.04.2021).

⁸³ UNDRIP. Art.39.

threatening indigenous traditional lifestyle, indigenous activists in Russia are oftentimes ignored or even persecuted by the state.

Russian laws provide a wide variety of social and economic rights to indigenous peoples. Among them are the right to free healthcare, the right to carry out alternative civilian service instead of ordinary military service (in Russia military service is compulsory for all men 18-27 years old), to participate in the formation and activity of councils of representatives of indigenous small-numbered peoples under the executive state bodies.⁸⁴ Some regional laws also oblige local state bodies and municipal bodies to hold consultations with organizations of indigenous peoples when making decisions that can affect indigenous traditional lifestyle and habitat.⁸⁵ Indigenous communities function based on the principles of equality of all members, self-governance and voluntariness.⁸⁶ The members of communities have the right to participate in decision-making process and elections of community governing bodies, to receive a share of the community's property or compensation when leaving the community or in case of its liquidation.

Cultural rights provided in Russian law include the right to preserve, maintain and develop indigenous culture, language and traditions. In this regard indigenous peoples have the right to receive and disseminate information on their native languages, perform their religious rituals, establish and develop contacts with representatives of indigenous peoples from other regions of the country or abroad.⁸⁷ Those rights though in accordance with international standards are quite hard to realize in Russian reality. Indigenous peoples have a hardship with preserving native languages because of assimilation and lack of state's support in setting up schools and study centers. Maintaining contacts with indigenous peoples from other countries is nowadays very risky due to the newly implemented laws on so-called "foreign agents"⁸⁸ which basically put many organizations including indigenous ones under a threat of being labeled a 'foreign agent' for receiving financial assistance from abroad and conducting political activity, and an obligation to pay big fines.

⁸⁴ Federal Law On the Guarantees of Indigenous Peoples' Rights. Art. 8(5), Art. 8(7), Art. 9.

⁸⁵ Law of Yamalo-Nenets Autonomous District No. 114-ZAO On the State Support of Indigenous Small-Numbered Peoples of the North Communities and Organizations Conducting Traditional Economic Activities on the Territory of the Yamalo-Nenets Autonomous District. Adopted 28.12.2005, e.i.f. 30.12.2005. Art. 5(2). Available at: <https://docs.cntd.ru/document/800113324>

⁸⁶ Federal Law On the Communities of Indigenous Peoples. Art. 5.

⁸⁷ Federal Law On the Guarantees of Indigenous Peoples' Rights, Art. 10.

⁸⁸ The latest one is the Federal Law No.426-FZ On the Amendments to the Law of the Russian Federation "On Media" and the Federal Law "On Information, Information Technologies and Data Protection". Adopted 02.12.2019, e.i.f. 02.12.2019. Available at: <https://rg.ru/2019/12/04/smi-dok.html>

Many problems that indigenous peoples in Russia deal with are similar to the issues of other indigenous peoples around the world. Rights that are fundamental in regard to indigenous peoples are denied. This does not necessarily mean systemic ethnocide and gross violation of basic human rights like it was centuries or even decades ago, but state's discriminatory approach to indigenous peoples may be observed in the absence of important norms such as the provisions on the right to self-determination and land possession. Other rights set forth in national law are definitely significant, for instance protection of the environment of the territories traditionally inhabited by indigenous peoples, the right to maintain and develop indigenous traditions and the right to establish organizations to promote and protect unique indigenous culture. However, these and other rights cannot be fully guaranteed if the essential rights are lacking. The state must conduct a unified integrated policy based on respect and recognition of the key rights laid out in specialized international instruments.

A prime example of how indigenous rights are intertwined with each other is the matter of protection of indigenous sacred sites. Indigenous animistic beliefs imply that certain lands carry great spiritual value, and this value is a part of indigenous cultural code. The right of indigenous peoples to self-determination is not explicitly provided in Russian law and because of that not enough attention is paid to protection of the elements that constitute self-determination, in this case – sacred sites. Several regional laws regulate the issue (e.g., the Law of Khanty-Mansi Autonomous Region On the Sanctuaries of Indigenous Small-Numbered Peoples⁸⁹), but there are no special legal acts and mechanisms on federal level. This results in numerous cases when sacred lands are seized by the state for industrial enterprises, ancient ancestral burials and monuments are ruined and natural landscapes holding spiritual as well as environmental value (including lakes, mountains and forests) are destroyed.

In summary, Russian legal regulation of indigenous peoples' rights is very diverse and sometimes contradictory. The key issue is that some of the rights provided to indigenous peoples under international law are either not implemented in Russian reality, or not reflected in Russian legislation at all.

Some native ethnic groups struggle to get an official recognition as indigenous peoples. Apart from the criterion of population size, another requirement – to maintain a traditional lifestyle and

⁸⁹ Law of Khanty-Mansi Autonomous District No. 92-OZ On the Sanctuaries of Indigenous Small-Numbered Peoples in Khanty-Mansi Autonomous District – Yugra. Adopted 07.11.2005, e.i.f. 17.11.2005. Available at: <http://base.garant.ru/18919472/>

economy – seriously restrains these ethnic groups from indigenous recognition. The same is applicable on an individual level. That being said, I suggest that the provision of the Article 1(1) of the law On the Guarantees of Indigenous Peoples’ Rights setting the requirement to maintain a traditional lifestyle and economy should be abolished.

The problem of getting recognized as an indigenous person is one of the most relevant problems indigenous peoples in Russia face. To make it easier for indigenous individuals to recognize them as indigenous so they could get the benefits guaranteed to them by law without any problems and delays, a special document affirming one’s indigeneity should be given out. As I noted before, this should be realized by authorities, probably with the assistance of indigenous organizations and/or communities. A document that will be a kind of “indigenous certificate” should be given by birth to eliminate the need to go through numerous court proceedings and officials’ offices in adult age to prove that one does not fake their ethnicity and is really entitled for the legally guaranteed benefits.

Before resolving the problem of individual recognition, the state’s approach to the system of indigenous peoples’ rights should be changed. All indigenous rights are linked to each other, and as it can be seen in reality, one right cannot be exercised without another. Just like in international system of indigenous rights designed by the international instruments on indigenous peoples, Russian legislation on indigenous peoples should be coherent and no necessary element (i.e., right) should be lacking.

2.3 Land Tenure and the Right to Traditional Nature Use

Before discussing land rights that indigenous small-numbered peoples in Russia have it is necessary to note that the crucial right provided to indigenous peoples by the related international instruments – land tenure – lacks in Russian legislation. This is one of the main obstacles for ratifying the ILO Convention and signing the UNDRIP by the Russian Federation. Both documents enshrine indigenous peoples’ right of ownership and possession over lands, territories and resources they traditionally occupy or use. According to Russian law, indigenous peoples only have the right to use the lands of their traditional residence or traditional economic activity free of charge for maintaining their traditional economy.⁹⁰ In addition to that, in order to protect indigenous peoples’ culture, traditional lifestyle and original habitat the so-called territories of

⁹⁰ Federal Law On the Guarantees of Indigenous Peoples’ Rights. Art. 8.1(1).

traditional nature use (further – TTNU) can be created on federal, regional and local level. Legal regime of those territories will be discussed later in the chapter.

The land rights are significantly important in the context of indigenous peoples' cultural survival and economic well-being for the reasons previously mentioned. Land is a basis of traditional economy, a source of livelihood and spirituality for indigenous peoples. Nevertheless, land rights of indigenous peoples all over the world are still being violated. Governments, particularly in Scandinavian countries, base their position on *terra nullius* concept or other arguments related to it, claiming that during the years which passed after settling new rules and rights on lands were established.⁹¹ Thus, indigenous peoples frequently find themselves in a situation when they neither have the right of possession of their historical lands, nor the effective state's protection of those lands.

One of the reasons why indigenous peoples in Russia do not have the right of ownership over their lands is because of rapidly growing resource-based economy, which includes industrial development of the land, especially in the Arctic region. Many territories that are affected by this development are inhabited and used by indigenous small-numbered peoples. In these conditions the gap regarding land tenure in Russian law ultimately leads to overlapping land claims that put indigenous peoples in an even more vulnerable position. More often than not, those claims are decided in favor of state's interest, while indigenous peoples' rights are ignored. Murmansk region is a perfect example: all of the industrial facilities in the region were set up on Saami indigenous lands in Soviet times, and today the state's approach remains the same.⁹² In February 2021 the federal government together with the State's Commission on Arctic Development decided to construct a mining plant and two quarries, all of them on Saami sacred lands.⁹³

The land legislation regulating indigenous peoples' land rights is quite contradictory. On the one hand, the abovementioned provision of the law On the Guarantees of Indigenous Peoples' Rights enables indigenous peoples to use for free the lands they traditionally occupy or use in traditional economy and the natural resources on those lands.⁹⁴ Additionally, they have the right to participate

⁹¹ Tranin, A. Territories of Traditional Nature Use of Indigenous Small-Numbered Peoples of the North. (Challenges and Perspectives). Moscow: Institute of State and Law of the Russian Academy of Science, 2010, p.15.

⁹² Новая Газета. Брицкая, Т. Чтобы убить шамана, нужно убить весь народ (*To Kill a Shaman You Have to Kill the Whole People*), 30.03.2021. Available at: <https://novayagazeta.ru/articles/2021/03/30/chtoby-ubit-shamana-nuzhno-ubit-ves-narod> (10.04.2021).

⁹³ Ibid.

⁹⁴ Federal Law On the Guarantees of Indigenous Peoples' Rights. Art. 8.1(1).

in control over the use of the named lands and resources.⁹⁵ On the other hand, legal acts that specifically cover land relations actually negate this right. Article 10(5) of the Federal Law №101-FZ On the Agricultural Lands Transactions states that agricultural lands can be rented to indigenous peoples' communities for haymaking and grazing, and the leased land cannot be bought out.⁹⁶ This norm seriously contradicts indigenous peoples' right to use their traditional lands free of charge.

The main law regulating land relations in Russia – the Land Code of the Russian Federation – stipulates that indigenous peoples and their communities may use lands traditionally occupied and used by them for setting up buildings and constructions necessary for conservation and development of traditional lifestyle, economic activity and crafts, but no more than for 10 years.⁹⁷ Neither the Land Code, nor the Forest Code has norms on free use of land for indigenous peoples. The law On General Principles of Organization of Indigenous Peoples' Communities provides that members of indigenous communities are allowed to use flora and fauna objects and other natural resources for the needs of traditional economy and craft,⁹⁸ but does not go into detail about the conditions of such use.

Let's take a look at the specially protected territories - territories of traditional nature use (TTNU). TTNU are created under the Federal Law №49-FZ On the Territories of Traditional Nature Use of Indigenous Small-Numbered Peoples of the North, Siberia and Far East of the Russian Federation (further – the TTNU law). According to this law, TTNU are the territories that are established for indigenous small-numbered peoples to maintain their traditional lifestyle and traditional nature use.⁹⁹ Generally speaking, TTNU are the territories which are not deteriorated by industrial activities and need special protection due to their high environmental value. On TTNU indigenous persons and communities have the right to use natural resources for maintaining traditional lifestyle and use mineral resources for their personal needs free of charge.¹⁰⁰ Traditional nature use carried out on these territories by indigenous peoples implies historically developed sustainable use of natural resources.

⁹⁵ Ibid., Art. 8.1(2).

⁹⁶ Federal Law No. 101-FZ On the Agricultural Lands Transactions. Adopted 24.07.2002, e.i.f. 27.07.2002. Art. 10(5). Available at: <http://base.garant.ru/12127542/>

⁹⁷ Land Code of the Russian Federation. Adopted 25.10.2001, e.i.f. 30.10.2001 (Land Code of Russia). Art. 39.10. Available at: http://www.consultant.ru/document/cons_doc_LAW_33773/

⁹⁸ On the Communities of Indigenous Peoples. Art.12.

⁹⁹ Federal Law on TTNU. Art. 1.

¹⁰⁰ Ibid. Art. 13-14.

The problem with TTNU lies in the conflict between the state's economic interests and the obligation to protect and preserve indigenous peoples' traditional habitat. TTNU often are the same territories that are being exploited by resource companies.¹⁰¹ At the same time those lands have been for centuries occupied and used by indigenous peoples, who cultivated lands and used natural resources not causing damage to the environment. Indigenous peoples' special bond with land is reflected in their customs in a form of sustainable nature use. As the UN Department of Economic and Social Affairs notes, after many years of being ignored and dismissed, indigenous traditional knowledge related to land use (in other words, indigenous environmental management) is now recognized to be an important and necessary part of conservation of biodiversity.¹⁰²

As the territories of special importance in the context of state's economic interests, TTNU are not given to indigenous peoples under their full control. According to Article 12 of the TTNU law, lands and other natural objects can be seized of the TTNU for state's and municipal needs. Indigenous persons and communities are entitled to the compensation for the seized property.¹⁰³ The vague wording of the provision leaves room for the abuse of power by the state – practically, anything that the state may consider its “need” can be the basis for the land seizure. One of the prominent examples of such abuse is the so-called Far Eastern Hectare programme which allows any Russian citizen to get a land plot in the Far East regions of Russia for use free of charge.¹⁰⁴ As a result of the programme implementation some reindeer pastures and hunting lands in Khabarovsk region were seized by the state, leaving indigenous hunters and reindeer herders with half as much land than they had before. In several cases indigenous peoples were left with 10% of their previous territories or even less.¹⁰⁵ This, of course, happened without obtaining any kind of consent or consulting with indigenous communities.

Far East regions, however, were granted a right to decide upon the territories that would be prohibited to seize under the programme. In Buriatiya, for example, TTNU and sacred sites were excluded from the programme.¹⁰⁶ This seems to be more reasonable than the alternative suggested to indigenous peoples by authorities - to get a land under the Far Eastern Hectare programme

¹⁰¹ Tranin (n 90) 9.

¹⁰² UN Department of Economic and Social Affairs. State of the World's Indigenous Peoples. ST/ESA/328, 14.01.2010, p.94

¹⁰³ Federal Law on TTNU. Art. 12.

¹⁰⁴ Коммерсантъ. Коренным предложили потесниться (*Indigenous Peoples Were Told to Move Over*), 25.10.2016. Available at: <https://www.kommersant.ru/doc/3125232> (02.03.2021).

¹⁰⁵ Ibid.

¹⁰⁶ Baikal Daily. Дальневосточный гектар в Бурятии нельзя будет получить в сакральных местах (*Far Eastern Hectare Not Provided on Sacred Sites*), 19.03.2019. Available at: <https://www.baikal-daily.ru/news/16/359980/> (02.03.2021).

instead of the land that was seized. Not only the idea of indigenous peoples having to engage in a special programme to get back the lands they legally used sounds absurd, but also the fact that one hectare obtained under this programme is noticeably disproportional to the amount of land lost in state's favor. As indigenous persons themselves say, one hectare is hardly enough for dog-breeding or fishing in the lake, not to mention hunting, reindeer herding and wild plants harvesting.¹⁰⁷ By now lawsuits filed by indigenous peoples at the initial stage of Far Eastern Hectare programme implementation have been withdrawn because of hopes to reach an agreement with authorities, partially succeeding in that.¹⁰⁸ Some indigenous persons decided to participate in the programme, but it is the minority of all indigenous individuals in the regions.

Environmental situation is another problematic point in TTNU legal regime. Industrial enterprises and factories set up next to TTNU cause serious harm to the local ecosystems which affects indigenous traditional economy. The procedure for conducting ethnological expertise necessary for the potential impact assessment of economic activities on indigenous peoples' lives is not exhaustively regulated in Russian law.

Some scholars claim that in past decade contrary to the Western countries in Russia indigenous peoples' rights (including land rights) have not expanded but have been limited.¹⁰⁹ Norms on free of charge land and forest use were annulled from the Land Code, Forest Code and Water Code. On the regional level various problems related to land use are yet to be solved. In regions where not many indigenous peoples live their rights are not thoroughly regulated by local legislation and are violated more often. In regions where indigenous population is bigger and better represented in local authorities or by indigenous associations it is easier for indigenous peoples to fight for their rights.

Nonetheless, it is crucial to understand that, just like with the issue of obtaining indigenous status, other problems have much to do with the fact that many indigenous peoples simply do not have access to information. The case of Far Eastern Hectare in Khabarovsk region illustrates this quite well. When the head of the Department for Indigenous Small-Numbered Peoples of the Ministry of Natural Resources claimed that indigenous peoples never objected during the public hearings

¹⁰⁷ Национальный Акцент. Гектар для коренных (*Hectare for Indigenous Peoples*), 20.02.2017. Available at: <https://nazaccent.ru/content/23240-gektar-dlya-korenyih.html> (02.03.2021).

¹⁰⁸ Ibid.

¹⁰⁹ Kondrashev, A., Zenkina A., Ronzhina O. Правовой режим арктических территорий РФ и предоставление особых прав коренным (аборигенным) народам. (*Legal Regime of the Arctic Territories of the Russian Federation and the Granting of Special Rights to Indigenous (Aboriginal) Peoples*). – 18 Scientific Yearbook of the Institute of Philosophy and Law of Russian Academy of Science Ural Branch, 2018(1), p.67.

on land seizure for the project and all the information was published on the governmental website, indigenous representatives answered that in some areas indigenous individuals do not even have a computer which can only be found in the district administration.¹¹⁰

One of the ways to make indigenous peoples of Russia more protected in regard to their land rights is to guarantee representation in state bodies and implement co-management over territories occupied and used by indigenous peoples. In the USA, for example, the norms on co-management are being developed in the environmental, land and resources legislation.¹¹¹ In the state of Alaska resource companies and indigenous communities conclude agreements on compensation for the use of subsoil on indigenous peoples' lands. In 1999 in Canada Inuits received about 350 000 km² of land under their direct management.¹¹²

In Russia the situation with co-management is not so favorable for indigenous population. There are several factors that significantly hinder indigenous peoples' possibility to be involved in land and resource management on par with the state. First, Article 13 of the law On the Guarantees of Indigenous Peoples' Rights which guaranteed representation of indigenous small-numbered peoples in regional and local legislative organs was abolished. Second, there are no federal state bodies which would deal specifically with indigenous issues, unlike, for example the US Bureau of Indian Affairs. Third, councils of representatives of indigenous peoples established under the auspices of heads of municipalities do not have any real power in decision-making process and serve only as consulting bodies with meetings held once in six months.

Another way to protect indigenous land rights is to organize proper consultations with indigenous peoples before making decisions that can affect their traditional lifestyle or breach their rights guaranteed by international instruments. Obtaining FPIC from indigenous peoples is the ultimate form of consulting and taking into account indigenous interests. The international and Russian legislation on FPIC will be discussed in the next chapter.

The best option would definitely be the recognition of indigenous peoples' right of ownership over the lands they traditionally occupy and use. Despite the fact that this right is a matter of disputes

¹¹⁰ Коммерсантъ. Коренным предложили потесниться (*Indigenous Peoples Were Told to Move Over*), 25.10.2016. Available at: <https://www.kommersant.ru/doc/3125232> (02.03.2021).

¹¹¹ Kondrashev, A., Zenkina A., Ronzhina O. Правовой режим арктических территорий РФ и предоставление особых прав коренным (аборигенным) народам. (*Legal Regime of the Arctic Territories of the Russian Federation and the Granting of Special Rights to Indigenous (Aboriginal) Peoples*). – 18 Scientific Yearbook of the Institute of Philosophy and Law of Russian Academy of Science Ural Branch, 2018(1), p.66.

¹¹² Ibid., p.67.

in most of the countries where indigenous peoples live, this is, at the end of the day, the right enshrined in the main international instruments on indigenous peoples' rights. If this right was recognized and implemented in practice, a substantial part of problems that indigenous peoples face today would have been eliminated and historical justice restored. Establishing special legal regimes of certain territories is an important and necessary step in the state's policy on indigenous peoples, but this still does not equal the right of possession and does not secure indigenous traditional lifestyle and economy fully.

To sum up, the land tenure right, which is one of the most important indigenous rights provided by international law, is not guaranteed to indigenous peoples living in Russia. While indigenous peoples are enabled to use lands of their traditional residence free of charge, establish and use specially protected TTNU, participate in control over the lands they traditionally occupy, the absence of ownership right still puts indigenous peoples in vulnerable position. Any time the state is willing to carry out an activity for which it needs indigenous lands, those lands will be taken away without consultations and sometimes even proper notification from the state's side.

If the ILO Convention and the UNDRIP are never respectively ratified and signed by the Russian Federation (which is highly likely even because of this one provision on land possession), it is necessary that the principles of co-management and consultation with indigenous peoples should be practically implemented. It is misleading to claim that indigenous peoples have control over their traditional territories when huge parts of those territories are seized from indigenous peoples without any attempts to involve them in decision-making process. In addition, to ensure indigenous peoples' involvement the due representation in state bodies must be guaranteed as well.

It is very important that indigenous peoples are not deprived of their identity by inability to prove who they are in a face of the state or losing the land which is the foundation of indigenous traditional economy and spiritual life. At the end of the day, the issues discussed in the chapter boil down to self-identification that is vital for indigenous peoples' cultural survival.

III. REFLECTION OF THE PRINCIPLE OF FREE PRIOR INFORMED CONSENT (FPIC) IN RUSSIAN LEGAL ACTS

3.1 Indigenous Peoples' Right to Participation in International Law

In all countries where indigenous peoples reside, they are among the most marginalized and isolated groups of society. As FAO notes, indigenous peoples account for 5% of the world's population, and at the same time constitute 15% of its' poor.¹¹³ Poverty, marginalization and isolation from the rest of the society makes it very hard for indigenous peoples to determine their future and economic development, including involvement in making decisions on the issues that affect indigenous interests. The right to participation is crucial for indigenous peoples because it enables them to protect, inter alia, their culture, land rights and economic well-being. The number of provisions on indigenous peoples' right to participation accentuates its importance in the system of indigenous rights.

The UNDRIP provides a broad variety of norms regulating indigenous peoples' participation, such as the states' obligation to consult and cooperate with indigenous peoples in order to eliminate discrimination¹¹⁴ and ensure the implementation of indigenous rights.¹¹⁵ Article 18 of the UNDRIP specifically stipulates that indigenous peoples are entitled to participation in matters which would affect their rights. The ILO Convention contains quite a number of provisions on the right of indigenous peoples to participation: in development, coordination and systematic action to protect their rights and integrity together with the government (Art.2), in formulation, implementation and evaluation of programmes for national and regional development directly affecting indigenous population (Art.7), in elective institutions and administrative bodies that develop projects and programmes concerning indigenous peoples (Art. 6.1), in use, management and conservation of natural resources on indigenous lands (Art.15), etc.

The International Covenant on Civil and Political Rights does not mention specifically indigenous peoples' right to participation, but General Comment No. 23 on Article 23 of the ICCPR states that the enjoyment of cultural rights by minorities may require measures to ensure the effective

¹¹³ Food and Agriculture Organization of the UN. Free Prior and Informed Consent: An Indigenous Peoples' Right and a Good Practice for Local Communities, 2017 (FAO Manual). Available at: <http://www.fao.org/3/i6190e/i6190e.pdf> (10.10.2020).

¹¹⁴ UNDRIP, Art. 15.

¹¹⁵ Ibid, Art. 36.

participation of members of minority communities in decisions which affect them.¹¹⁶ The similar situation is with the International Covenant on Economic, Social and Cultural Rights: while the Covenant does not provide for indigenous peoples' participation, General Comment No. 20 encourages the states to ensure that individuals and groups of individuals who may be subjected to discrimination on various grounds have the right to participate in decision-making processes.¹¹⁷

However, the international human rights treaties not specialized on indigenous issues primarily enshrine the right to participation in public affairs pertaining to individuals. For instance, the ICCPR guarantees every citizen the right to take part in the conduct of public affairs¹¹⁸ and the Universal Declaration of Human Rights provides that everyone is entitled to take part in the government of their country¹¹⁹. In relation to indigenous peoples the right to participation has a collective nature, allowing them to engage in decision-making process as a people.

The right to participation, as all other indigenous rights, is based on the right to self-determination. The UN Human Rights Council highlights in its Progress Report 2010, that self-determination implies the continuance of indigenous peoples' participation in decision-making process and control over their destinies. Therefore, the institutions for decision-making should be devised so that indigenous peoples could make decisions related to their local affairs, and also take part collectively in external decision-making.¹²⁰

While internal decision-making is realized through institutions functioning according to indigenous traditional and newly evolved practices, external decision-making comes in various forms of participation of indigenous peoples. It can be a representation in the parliament of a country: in New Zealand, for example, Maori have been represented in the state's Parliament since 1867, with the number of seats proportional to the number of Maori registered on the Maori electoral roll, and in Colombia two seats in the upper Senate and one in the lower Chamber of

¹¹⁶UN Human Rights Committee. CCPR General Comment No. 23: Article 27 (Rights of Minorities), CCPR/C/21/Rev.1/Add.5, 08.04.1994, para. 7.

¹¹⁷ UN Committee on Economic, Social and Cultural Rights. General Comment No.20: Non-Discrimination in Economic, Social and Cultural Rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20, 02.07.2009, para. 36.

¹¹⁸ ICCPR, Art. 25(a).

¹¹⁹ Universal Declaration of Human Rights, Paris 10.12.1948. Art. 21.

¹²⁰ UN Human Rights Council. Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making. A/HRC/EMRIP/2010/2, 17.05.2010, para. 31.

Representatives are reserved for indigenous peoples elected directly by indigenous communities.¹²¹

Another form is direct participation through specially established institutions. In Argentina the Indigenous Participation Council was set up to guarantee indigenous peoples' engagement in the alignment of national law with the ILO Convention. In Guatemalan city Totonipacán the municipal council is made up of Maya representatives elected according to Mayan traditions.¹²²

Indigenous peoples can also participate in local, regional and international forums, establish specialized international organizations and funds (e.g., International Work Group for Indigenous Affairs, Cultural Survival, Native American Rights Fund). The UN actively integrate indigenous peoples' issues in the agenda. The UN Permanent Forum on Indigenous Issues, an advisory body to the Economic and Social Council, holds annual sessions discussing various challenges that indigenous peoples face in regard to economic and social development, culture, environment and human rights. Since 2001 a Special Rapporteur in the Rights of Indigenous Peoples is appointed to report and address human rights situation of indigenous peoples in different countries and violation of rights happening. In 2007 the Expert Mechanism on the Rights of Indigenous Peoples was set up under the UN Human Rights Council to provide the Council with advice on indigenous peoples' rights.

Indigenous peoples' external participation often involves consultations. The form and content of the consultations should allow indigenous peoples to freely express their views. The consultations must be conducted in a manner acceptable to all parties. It is essential that consultations with indigenous peoples are organized not with the aim to just inform them on the planned activities which will affect indigenous communities, but to reach an agreement with indigenous peoples. For indigenous peoples to be able to influence the decisions, measures have to be taken to ensure that indigenous peoples are aware of the potential outcomes of those decisions. Relevant institutions and customs of indigenous peoples have to be accounted in the decision-making process.

Institutions of autonomous governance and consultative arrangements through which indigenous communities engage in decision-making should not be imposed on indigenous peoples from outside. Since self-determination is the basis of indigenous self-governance and participation,

¹²¹ UN Human Rights Council. Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making. A/HRC/18/42, 17.08.2011, para. 43.

¹²² Ibid, para. 52.

indigenous peoples should freely choose their representatives and have a say in how they prefer the consultation process to be conducted.

The main requirements for the consultations are that the process is carried out in good faith, a genuine dialogue is established between the parties, there is a proper communication, mutual respect and a will to reach an understanding with each other.¹²³

Whatever the issue consulted on with indigenous peoples is, the decisions made upon the consultation process must not violate indigenous peoples' substantive rights.¹²⁴ The state's obligation is to ensure that the decision is in line with international norms on indigenous peoples' rights.

3.2 Indigenous Peoples' Right to FPIC in International Legal Instruments

One of the most important and problematic in terms of implementation forms of indigenous peoples' participation is free prior informed consent (FPIC). This principle can be implemented through legislation, but more often it is reflected in specific policies and guidelines of companies, especially resource companies, and organizations. FPIC is sometimes referred to as a "right" by the UN institutions such as the Human Rights Committee, the Permanent Forum on Indigenous Peoples, the Expert Mechanism on the Rights of Indigenous Peoples.¹²⁵ Some scholars and lawyers describe it as a "principle". Others claim it is appropriate to call FPIC both a right and a principle.

The UN-REDD Programme Guidelines on FPIC go further, naming FPIC not a right per se, but a derivative of substantive rights which it is made to protect: the right to participation, self-determination, non-discrimination, property, freedom from forced relocation.¹²⁶ Another view presented by the Guidelines describes FPIC as an aspect of other human rights, bringing an example of the right to property which includes the right to own, control, manage and choose what does and does not happen with that property – the last element is, in fact, FPIC.¹²⁷

¹²³ Rombouts, S.J. Consultation and Consent Norms under ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples Compared, 2018. Available at: <https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/FPIC/RomboutsSJ.pdf> (10.04.2021), p.6.

¹²⁴ Anaya (n 11) 56.

¹²⁵ UN-REDD Programme. Guidelines on Free, Prior and Informed Consent, 2013, p.9. Available at: <https://www.unredd.net/documents/un-redd-partner-countries-181/templates-forms-and-guidance-89/un-redd-fpic-guidelines-2648/8717-un-redd-fpic-guidelines-working-final-8717.html?path=un-redd-partner-countries-181/templates-forms-and-guidance-89/un-redd-fpic-guidelines-2648> (08.04.2021)

¹²⁶ Ibid., p.9.

¹²⁷ Ibid.

The essence of the FPIC principle is that indigenous peoples are entitled to give or withhold consent to a planned project which may affect indigenous territories or directly indigenous peoples. Obtaining a FPIC can be considered an objective of consultations with indigenous peoples, its ultimate goal. However, it is very important to note that consent as a result is not guaranteed. Indigenous peoples may or may not reach an agreement with the counterpart and it is fully up to them. Moreover, even if the consent was given, indigenous peoples have the right to take it back at any stage of the process.

As a form of indigenous peoples' participation in decision-making, FPIC is embedded in the right to self-determination. The Expert Mechanism on the Rights of Indigenous Peoples notes that FPIC is an integral element of the right to self-determination, and the duty to obtain FPIC is a mechanism for ensuring indigenous rights.¹²⁸

It was mentioned repeatedly that indigenous peoples' self-determination is strongly tied with their land rights. Self-determination as the fundamental right is best enjoyed by indigenous peoples when it is exercised in relation to lands and natural resources.¹²⁹ This is why the emphasis is put on obtaining FPIC for extractive industries' projects – the impact on lands and natural resources caused by industrial economic activities can be fatal for indigenous peoples' traditional lifestyle and economy, hence, their right to self-determination. Another reason the FPIC principle has a great significance is because it manifests the ability of indigenous peoples not to just be nominally involved in decision-making, but to directly control the outcome of their participation.

The legal framework for FPIC is quite extensive. The main legal acts declaring FPIC principle are the ILO Convention, UNDRIP and Convention on Biological Diversity. National laws of various countries also include the obligation to obtain FPIC of indigenous peoples before starting an economic project that can affect indigenous interests. For instance, in Philippines the Republic Act No.8371, unofficially called as Indigenous Peoples Rights Act, states that all department and governmental agencies shall be “strictly enjoined from issuing, renewing or granting any concession, license or lease, or entering into any production-sharing agreement, without prior certification from the National Commission on Indigenous Peoples that the area affected does not

¹²⁸ UN Human Rights Council. Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making. A/HRC/18/42, 17.08.2011, para. 21-22.

¹²⁹ UN Human Right Council. Follow-Up Report on Indigenous Peoples and the Right to Participate in Decision-Making, with a Focus on Extractive Industries. A/HRC/21/55, 16.08.2012, para. 9.

overlap with any ancestral domain”.¹³⁰ The provision further elaborates that no such certification shall be issued by the Commission without free prior informed and written consent of indigenous peoples concerned.

The UNDRIP lays down the following cases when obtaining indigenous peoples’ FPIC is a requirement: relocation (Art.10), adoption or implementation of legal or administrative measures that may affect indigenous population (Art.19), storage or disposal of hazardous material in the lands of indigenous peoples (Art.29.2), use of indigenous lands and territories in military activities (Art.30.2). If cultural, intellectual or spiritual property was taken from indigenous peoples or their lands confiscated, used or damaged without their FPIC, indigenous peoples have a right to redress including restitution or compensation (Art.11.2 and 28.1 respectively).

The ILO Convention uses the term FPIC explicitly only in one article on relocation.¹³¹ Other provisions use the word “consultations”, obliging the Parties to consult with indigenous peoples whenever considering legislative and administrative measures that may affect them,¹³² capacity to alienate indigenous lands,¹³³ organization of vocational training for indigenous peoples¹³⁴ and before implementing or permitting any programmes for the exploration and exploitation of natural resources on indigenous lands¹³⁵. The consultations should be arranged in a good faith and in a form appropriate to the circumstances, with the agreement or consent as an objective of those consultations.

The Convention on Biological Diversity in its Article 8(j) allows to use indigenous knowledge for conservation of biodiversity with the approval and involvement of holders of this knowledge. One of the general principles of the Programme of Work on the Implementation of Article 8(j) and Related Provisions of the Convention on Biological Diversity further provides that access to traditional knowledge and practices of indigenous communities should be the subject to prior informed consent or approval from them.¹³⁶

¹³⁰Philippine Republic Act No.8371. Approved 29.10.1997. Section 59. Available at: http://ncip.gov.ph/?page_id=133 (16.04.2021)

¹³¹ ILO Convention 169, Art. 16.

¹³² Ibid, Art. 6(1).

¹³³ Ibid, Art. 17.

¹³⁴ Ibid, Art. 22(3).

¹³⁵ Ibid, Art. 15.

¹³⁶ Programme of Work on the Implementation of Article 8(j) and Related Provisions of the Convention on Biological Diversity (COP 5 Decision V/16), Nairobi 26.05.2000. Principle 5.

Regional legal instruments also refer to FPIC as a prerequisite for certain activities. The American Declaration on the Rights of Indigenous Peoples almost mirrors the UNDRIP provisions on FPIC, obliging states to obtain indigenous peoples' FPIC before adopting legislative and administrative measures affecting indigenous peoples,¹³⁷ launching a project which affects indigenous lands and resources, particularly in regard to utilization and exploitation of water and mineral resources¹³⁸. In addition, the Declaration prohibits to subject indigenous individuals to any research programmes, biological and medical experiments without FPIC.¹³⁹ Indigenous peoples have the right to redress for their cultural, intellectual and spiritual property taken without their FPIC.¹⁴⁰

Several instruments of the African human rights system regulate FPIC issue in a similar way. Resolution 224 of the African Charter on Human and Peoples Rights calls upon state parties to ensure participation, including FPIC of communities, in decision-making related to natural resources governance.¹⁴¹ States shall also secure human rights impact assessments that guarantee FPIC. The ECOWAS Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector calls the mining companies to obtain FPIC before the exploration and prior to each of the mining phase.¹⁴² Importantly, consultations and negotiations on important decisions should last throughout the project lifecycle.

As it can be seen from the norms of international instruments, FPIC is not a merely abstract principle, but a practical working tool for protection of various indigenous peoples' rights: environmental rights, land rights, cultural rights. FAO in its manual on FPIC highlights that FPIC is both a result of a process and a process in itself, a one that enables indigenous peoples to hold their own independent discussions on the matter and carry out a collective decision-making.¹⁴³

To better understand what specifically the FPIC implies in terms of implementation, it is necessary to dwell upon its constituent elements.

Free

¹³⁷ American Declaration on the Rights of Indigenous Peoples, Santo Domingo 15.06.2016. Art. 23(2).

¹³⁸ Ibid, Art. 29(4).

¹³⁹ Ibid, Art. 18.

¹⁴⁰ Ibid, Art. 13(2).

¹⁴¹ 224 Resolution on a Human Rights-Based Approach to Natural Resources Governance – ACHPR/Res.224(LI)2012, Banjul 02.05.2012, para. ii.

¹⁴² Economic Community of West African States. Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector, C/DIR, Abudja, 03.05.2009.

¹⁴³ FAO Manual (n 112) 13.

A consent must be given without any coercion, intimidation or manipulation from the other side. Indigenous peoples should not feel any external pressure in terms of time limit, organization and format of meetings and the outcome of the consultation process. There must not be bribery, blackmail and any promises of rewards. How, when and where meetings and discussions are organized is completely up to the right-holders. All community members should be allowed to participate in the process, including those from vulnerable groups (women, elderly, persons with disabilities).

Generally speaking, it is a requirement that indigenous peoples feel safe and able to fully express their opinions in a manner that is familiar to them. Different peoples and communities may have different customs in regard to decision-making and negotiations with people from outside, and this should be understood and respected. Most likely the process will take place in indigenous territory and may take wholly or partly a ritualistic form.

Prior

The consent has to be sought well in advance of any activities that can affect indigenous territories and resources, at the project planning stage. There should be enough time for indigenous communities to obtain and analyze the information on the project activities. Another important thing is that indigenous peoples themselves set time frames for making decision on whether to give their consent or not. Some customs through which indigenous peoples conduct decision-making process also take time. Besides, indigenous peoples should have sufficient time to verify and analyze the information.

Initiating FPIC process at a stage when all activities have already been planned out or even have started is a violation of the 'prior' principle. Seeking FPIC of indigenous peoples is a long and complex process that consists of many steps: spotting the potentially affected communities, learning about their self-governance systems and traditions, establishing communication with those communities, documenting the process and the result reached, and other additional procedures. Starting the process not early enough will negatively affect the process itself and the outcome.

Informed

This element entails that all relevant information should be provided to indigenous peoples so they can make their decision based on sufficient data. Information should be accurate, clear, consistent and accessible. For that the negotiating party has to deliver the information in a manner and form understandable and appropriate to indigenous peoples, preferably in indigenous language. The informing process is carried out by culturally appropriate personnel and in culturally appropriate locations.

The information presented has to be objective and complete, covering both positive and negative factors, all potential risks, environmental, economic and cultural impacts. The scope, duration and pace of the planned project should also be communicated to indigenous communities.

It is crucial that information is provided continuously during the whole process, and is accessible to everyone from the communities, including vulnerable groups. There must be an absolute transparency and no distortion of the facts. Apart from the information on the project, the negotiating party should clearly address that indigenous communities have the right to withdraw their consent at any time and are allowed to give feedback, monitor the process of project implementation and raise concerns and complaints.

Consent

In case of FPIC, the consent is a collective decision made according to relevant customs and traditions of the affected indigenous communities through their freely chosen representatives. Again, indigenous peoples do not have to give their consent, they may decide to withhold their consent or give it on certain terms. If new information on the project emerges or the proposed activities change, indigenous peoples may withdraw the consent. The consent can be given not for the whole process and at once, but for different phases of the project over specific time periods. The right-holders may give a partial consent agreeing to certain activities and disagreeing to others. Indigenous peoples may request to make adjustments to the project plan or change some conditions and give their consent after. In any case, the consent once given can be recalled at any stage.

The final agreement should be documented in a form of a legal contract between indigenous peoples/community and the corresponding party. This contract should prescribe, among other things, the options for conflict resolution, mechanisms for redress and responsibility for non-compliance with the conditions of the contract. In case of infringement of the agreement towards indigenous peoples, possible remedies may be the following: return of lands and resources or other

property, restoration of damaged resources or ecosystems, various benefits, money payments, formal guarantees of non-repetition, permanent suspension of the activities in the disputed area, new FPIC process and drafting a new agreement.

Throughout the FPIC process indigenous communities should be able to monitor and evaluate the project implementation and how the other party complies with the agreements reached. They should be informed about the progress of the activities and have an ability to bring up concerns, ask questions and monitor the project activities on indigenous lands.

All FPIC elements are interrelated with each other and should not be implemented separately. For the achieved consent to be valid, the requirements described above must be met. The process should be undertaken in good faith and a mutually respectful manner.

Mo'otz Kuxtal Guidelines published by the Secretariat of the Convention on Biological Diversity note that depending on national circumstances the FPIC concept may be alternatively referred to as "approval and involvement".¹⁴⁴ Indeed, not all countries where indigenous peoples reside may have legal norms explicitly mentioning FPIC, but reference to indigenous peoples' involvement in decision-making process and – most importantly – their approval of activities that affect indigenous communities has to be made. Otherwise, there is only formal participation of indigenous peoples and their opinion is advisory, not decisive for the outcome.

Apart from various international treaties, there are plenty of guidelines and policies of international organizations and companies. Understanding the importance of indigenous peoples' engagement in decision-making process on the issues affecting them and the necessity to respect FPIC concept, many organizations implemented FPIC in their activities. Forest Stewardship Council, World Wildlife Fund, Conservation International, European Bank for Reconstruction and Development, International Council on Mining and Metals, Business for Social Responsibility, Sakhalin Energy are among those who issued manuals and guidelines on cooperation with indigenous communities and obtaining their FPIC for projects.

Protecting FPIC principle in business activities becomes more and more relevant nowadays. The need to address FPIC is precisely explained in Business for Social Responsibility (BSR) report of 2012. BSR indicates, that following FPIC principle assists companies with risk mitigation by

¹⁴⁴Secretariat of the Convention on Biological Diversity. Mo'otz Kuxtal Guidelines, 2019. Principle A (6). Available at: <https://www.cbd.int/doc/publications/8j-cbd-mootz-kuxtal-en.pdf> (08.04.2021)

improving the quality of social impact assessments and supporting the corporate responsibility in regard to human rights.¹⁴⁵ At the same time, failure to comply with FPIC has resulted in numerous court cases, advocacy campaigns and adverse attention to companies that conduct large-scale extractives.

FPIC is an inclusive and equitable concept that safeguards indigenous peoples right to self-determination and many other rights. However, this concept has its challenges as well. Those challenges may vary depending on the country in which the FPIC process is implemented. First, in some countries where indigenous peoples reside FPIC is not supported by the state's legislation. In relation to land and natural resources an obligation to obtain FPIC may be seen as undermining national sovereignty, especially when indigenous peoples do not have lands and territories in possession. Second, due to the absence of relevant domestic laws and regulations of FPIC companies may turn to international standards, which do not necessarily comply with national legislation. This will inevitably lead to a conflict between the company and the state. Third, even if implemented, FPIC may raise issues like the need for excessive financial and human resources or significant delay of project realization.

To summarize, indigenous peoples' participation in external decision-making processes is a necessary precondition for indigenous peoples to exercise their rights, primarily – the right to self-determination. The named right cannot be realized without participation and involvement of indigenous peoples in decisions, because the very essence of self-determination is in the ability to collectively determine the destiny of a people as a whole.

Indigenous peoples' participation comes in various forms, such as representation in the parliament of a country, direct participation by specially established institutions, participation in regional and international forums, engaging in consultations. One of the most crucial forms of indigenous peoples' participation is free prior informed consent. The legal framework for FPIC includes various international and regional instruments that outline in which situations obtaining indigenous peoples' FPIC is a requirement. Different international organizations and resource companies

The FPIC principle implies that prior to any activity which can possibly affect indigenous peoples, their free and informed consent is required. The constituent elements of FPIC are free (independent, without coercion, intimidation and any outside influence), prior (before start of any

¹⁴⁵ Business for Social Responsibility. Engaging with Free, Prior and Informed Consent, 2012, p.5. Available at: https://www.bsr.org/reports/BSR_Engaging_With_FPIC.pdf (08.04.2021)

activities, well in advance, at the planning stage), informed (all related information provided clearly, transparently, objectively and completely), consent (decision made collectively through independently chosen indigenous representatives according to indigenous customs). The negotiating party is not guaranteed beforehand that the consent will be given, as indigenous peoples have the right to withhold consent or agree only on certain conditions.

Notwithstanding all the benefits of FPIC, practical implementation of this principle may be rather challenging. The challenges can be related to gaps in national legislation, lack of understanding how to apply the FPIC concept in real life conditions or the consequences of such application that are not beneficial for companies (e.g., delay in project timeline).

3.3 Analysis of Russian Laws Related to Implementation of FPIC Principle

As it was mentioned earlier, Russian legislation on indigenous peoples consists of federal and regional legal acts, and some issues are regulated in more detail on a regional level. This is exactly the case with the FPIC concept, since Russian federal legislation does not impose an obligation to obtain indigenous peoples' FPIC neither on private companies, nor on the state. Although there are references to indigenous peoples' participation and involvement, it is mostly indigenous individuals and indigenous communities or associations who can participate in decision-making processes as Russian citizens or civil society organizations. Strictly speaking, this cannot be considered a specific legislation on indigenous peoples and those legal acts in no way protect particularly indigenous peoples as a vulnerable group, but in the absence of specialized legal norms indigenous peoples can base their claims on existing laws on citizens' (public) participation.

Speaking about federal laws that refer specifically to indigenous peoples, there are only a few to name. The Land Code stipulates that when providing land plots on territories of traditional residence and economy of indigenous peoples for the construction of facilities not related to indigenous traditional economic activity, referendums may be held if this construction affects indigenous peoples' interests.¹⁴⁶ The results of the referendum are taken into account, but they do not play a decisive role. The Federal Law On Fishing and Conservation of Aquatic Bioresources and the Federal Law On Hunting and Conservation of Hunting Resources mention that interests

¹⁴⁶ Land Code of Russia. Art. 39.14.

of those whose livelihood depends on fishing and hunting respectively, including indigenous peoples, must be taken into consideration.¹⁴⁷

According to the Water Code, the basin councils, created to develop recommendations for the use and protection of water objects within the basin district, shall include representatives of indigenous peoples' communities.¹⁴⁸ Article 8.1 of the law On the Guarantees of Indigenous Peoples' Rights provides that indigenous peoples and their associations have the right to participate in control over the use of lands and natural resources in places of indigenous peoples' traditional residence and economy.

The only legal act that contains the norms closest to the FPIC elements is the recently issued Standard of the Arctic Zone Residents' Responsibility in Relations with Indigenous Small-Numbered Peoples of the Russian Federation Living and/or Conducting Traditional Economic Activity in the Arctic Zone of the Russian Federation.¹⁴⁹ The Standard was developed by the Ministry for the Development of the Far East and the Arctic. The Standard sets forth the standards for the companies that carry out economic activity in the Arctic regions, and has an advisory nature. Provision 2.2 calls upon the companies-Arctic residents to preliminary agree on a project plan with indigenous peoples' representatives on each stage of plan implementation, to organize consultations with indigenous peoples prior to implementation of industrial development projects on territories of indigenous peoples' traditional residence and economic activity, to familiarize indigenous peoples with industrial facilities location map, etc.

Indigenous peoples' participation is widely covered in the Decree. The document stresses that the company should keep indigenous peoples informed on the project implementation process and how the standards of the Decree are being complied with.¹⁵⁰ The Decree calls for full transparency of economic, organizational and financial activities of the company in their relations with

¹⁴⁷ Federal Law No. 166-FZ On Fishing and Conservation of Aquatic Biological Resources. Adopted 20.12.2004, e.i.f. 03.01.2005. Art. 2(6); Federal Law No. 209-FZ On Hunting and Conservation of Hunting Resources and Amendments to Certain Legislative Acts. Adopted 24.07.2009, e.i.f. 01.04.2010. Art. 2(4).

¹⁴⁸ Water Code of the Russian Federation. Adopted 03.06.2006, e.i.f. 08.06.2006. Art. 29. Available at: http://www.consultant.ru/document/cons_doc_LAW_60683/

¹⁴⁹ Standard of the Arctic Zone Residents' Responsibility in Relations with Indigenous Small-Numbered Peoples of the Russian Federation Living and/or Conducting Traditional Economic Activity in the Arctic Zone of the Russian Federation. Adopted by the Decree No.181 of the Ministry on the Development of the Far East and the Arctic of the Russian Federation, 23.11.2020 (Arctic Zone Residents Standard). Available at: <https://minvr.gov.ru/upload/iblock/12c/prikaz-181.pdf>

¹⁵⁰ Ibid., para. 2.4.

indigenous peoples, including the establishment of feedback mechanisms,¹⁵¹ and organization of consultations with indigenous peoples.¹⁵²

The Decree became the first document developed by Russian governmental institutions together with social organizations (including the Association of Indigenous Small-Numbered Peoples of the North, Siberia and Far East), which regulates the interaction of companies and indigenous peoples. The standards outlined in the Decree were developed based on the experience of companies operating in the Arctic regions.¹⁵³

Because the Decree entered into force only in February 2021, it has not yet been put into practice. The positive side is that there is now a legal act providing for certain FPIC elements on a federal level. On the other hand, this act is not binding and does not have a power of a federal law. Because Russian legislation does not have a binding federal law which would require obtaining a FPIC, not many companies are ready to take responsibility and implement FPIC principle voluntarily. Since Russia set a course on the Arctic industrial development, indigenous peoples living in the Russian Arctic regions are the ones who may suffer the most from the disregard of FPIC.

For example, right now in Lovozero district, Murmansk region, where the Kola Peninsula Saami reside and carry out traditional economic activity, the territories called Fedorova tundra are being developed without any prior consultations, let alone FPIC, with local Saami community. Fedorova tundra, unofficially called “the Russian Klondike”, is the largest platinum deposit in the world, and also a sacred site of Saami people.¹⁵⁴ The start of the development was delayed because of COVID, but by now the work has already begun, and the start of the mining is planned for 2027. The implementation of this industrial project is under the control of the governor of the Murmansk region.¹⁵⁵

Again, according to international standards, no project plan can be developed and no work started without consultations with indigenous peoples and their FPIC given if the project under discussion

¹⁵¹ Ibid.

¹⁵² Ibid., para. 2.5.

¹⁵³ Ministry for the Development of the Far East and the Arctic. Standard of the Arctic Zone Residents’ Responsibility in Relations with Indigenous Peoples Entered into Force, 04.02.2021. Available at: <https://minvr.gov.ru/press-center/news/31379/> (05.04.2021).

¹⁵⁴ Новая Газета. Брицкая, Т. Капли крови на сером камне (*Drops of Blood on the Grey Stone*), 13.11.2020. Available at: <https://novayagazeta.ru/articles/2020/11/13/87944-kapli-krovi-na-serom-kamne> (10.04.2021).

¹⁵⁵ Новая Газета. Брицкая, Т. Чтобы убить шамана, нужно убить весь народ (*To Kill a Shaman You Have to Kill the Whole People*), 30.03.2021. Available at: <https://novayagazeta.ru/articles/2021/03/30/chtoby-ubit-shamana-nuzhno-ubit-ves-narod> (10.04.2021).

affects the rights, lands or resources used by indigenous peoples. In neighboring Norway and Finland, the project of the railway between the towns of Rovaniemi and Kirkenes is being blocked by Finnish and Norwegian Saami Parliaments. Local Saami people do not agree to risk their historical lands, reindeer pastures and sacred sites for the financial benefit of the governments, and without the consent of Saami Parliament of each country, the project cannot be implemented.¹⁵⁶

Saami Parliament was established also in Murmansk in 2008 but was abolished 10 years later. As its representatives explained, the main task of interaction with the authorities and defense of Saami interests failed.¹⁵⁷ Instead the authorities established the Council of Representatives of Indigenous Small-Numbered Peoples of the North under the Government of the Murmansk region. The problem with the mentioned Council is that it does not in fact represent Saami people. Members of the Council are appointed by the regional government, not by actual Saami. Among the members are former regional politicians who are not even Saami by ethnicity. The Council basically plays a nominal role of representation of indigenous peoples without any real representation and influence (the decisions of the Council are advisory).

Evidently, to have their rights protected indigenous peoples need a strong representation in local governing institutions. When indigenous peoples are properly represented, it is hard for the state to ignore their voices. It was mentioned earlier that the provision of the law On the Guarantees of Indigenous Peoples' Rights that envisaged indigenous peoples' representation in regional and local legislative organs was abolished. Meanwhile, in regions where the share of indigenous people in the total population is significant and indigenous communities have representatives in local authorities, the regional legislation has more provisions on indigenous peoples' participation in decision-making processes. Furthermore, in laws of some regions FPIC principle is explicitly mentioned.

For example, the law of Sakhalin region On Legal Guarantees of the Protection of the Original Habitat, Traditional Lifestyle, Economy and Crafts of Indigenous Small-Numbered Peoples of the North unequivocally puts that the protection of indigenous peoples' original habitat, traditional lifestyle and economy is based on the principle of free informed consent of indigenous peoples for

¹⁵⁶ Ibid.

¹⁵⁷ Lenta.RU. Туровский, Д. Саами все делают сами (*Saami Decide for Themselves*), 10.10.2013. Available at: <https://lenta.ru/articles/2013/10/10/saami/> (10.04.2021).

the use of the places of their traditional residence and economic activity.¹⁵⁸ The companies may undertake industrial development in the places of indigenous peoples' traditional residence and economy under the following conditions:

- 1) The company conducts project impact assessment on the original habitat and traditional lifestyle of indigenous peoples;
- 2) The ethnological expertise is carried out;
- 3) The company concludes agreements with indigenous peoples on compensation payments and indigenous peoples' participation in project implementation monitoring.¹⁵⁹

Thus, the regional law not only secures FPIC principle, but also ensures indigenous peoples' involvement in monitoring process, in line with international standards.

In Nenets Autonomous District (NAO) the Resolution of the NAO Administration On the Territories of Traditional Nature Use of Indigenous Small-Numbered Peoples of the North in Nenets Autonomous District stipulates that the seizure of land plots and other natural objects located within the boundaries of the regional TTNU for the needs other than traditional nature use is carried out with prior notification, consultations and with the consent of indigenous peoples, their communities or indigenous representatives.¹⁶⁰ Another provision of the same Resolution obliges citizens and legal entities using land plots within the TTNU borders temporarily for business activities need the consent of indigenous peoples, their communities or their representatives.¹⁶¹

The law of Amur region On the Territories of Traditional Nature Use of Indigenous Small-Numbered Peoples of the North in Amur Region mentions the obligation to obtain indigenous peoples' consent for conducting economic activities within the borders of the TTNU, even if those activities had been started before the relevant territories were recognized as the TTNU.¹⁶² The law also states that construction of industrial and other facilities, development of mineral deposits,

¹⁵⁸ Law of Sakhalin Region No. 72-ZO On Legal Guarantees of the Protection of Original Habitat, Traditional Lifestyle, Economy and Crafts of Indigenous Small-Numbered Peoples of the North in Sakhalin Region. Adopted 04.07.2006, e.i.f. 05.07.2006. Art.4(3). Available at: <https://docs.cntd.ru/document/802072844>

¹⁵⁹ Ibid. Art. 8.1.

¹⁶⁰ Decree of the Administration of Nenets Autonomous District No. 1025 On Territories of Traditional Nature Use of Indigenous Small-Numbered Peoples of the North in Nenets Autonomous District. Adopted 29.12.2001 Para 3.4. Available at: <https://docs.cntd.ru/document/802001260>

¹⁶¹ Ibid, para. 3.7.

¹⁶² Law of Amur Region No. 250-OZ On the Territories of Traditional Nature Use of Indigenous Small-Numbered Peoples of the North in Amur Region. Adopted 27.10.2003, e.i.f. 07.11.2003. Art.6(3). Available at: <https://docs.cntd.ru/document/961701483>

timber harvesting within the TTNU borders are allowed only with the consent of indigenous peoples who use the land adjacent to the land plot provided for industrial development and if this development does not harm the conditions of traditional nature use.¹⁶³

In the Republic of Sakha (Yakutiya) the law On the Territories of Traditional Nature Use and Traditional Economic Activity of Indigenous Small-Numbered Peoples of the North in Republic of Sakha (Yakutiya) the seizure of land plots and other natural objects within the TTNU borders for state and municipal needs is conducted after prior notification, consultations and with the consent of indigenous peoples using the TTNU.¹⁶⁴ Another law of Yakutiya On the Legal Status of Indigenous Small-Numbered Peoples of the North enables indigenous peoples to participate in the development of programmes and decision-making on the placement of industrial facilities in the places of indigenous traditional residence and economic activities, and provides for the mandatory participation of indigenous peoples in resolving the matters affecting their rights and interests.¹⁶⁵

The examples presented above are the provisions that embody FPIC principle wholly or in part. There are quite many other norms in Russian regional legislation which guarantee indigenous peoples' participation in public and local affairs, allow them to establish councils of representatives or participate in other different ways. For instance, the Republic of Khakassia has a decree of the local government On the Establishment of the Council of the Representatives of the Indigenous Small-Numbered Peoples under the Government of the Republic of Khakassia. The law of the Irkutsk region On Certain Issues of Organization and Protection of Original Habitat and Traditional Lifestyle of Indigenous Small-Numbered Peoples of the Russian Federation in Irkutsk Region stipulates that the protection of indigenous peoples' original habitat is based on the principle of transparency and consideration of indigenous peoples' opinions.¹⁶⁶

The question is whether the legal norms that vaguely mention “the right to participate” or “the right to have their interests considered” have any real life effect. The absence of legal acts clearly

¹⁶³ Ibid. Art. 6(1).

¹⁶⁴ Law of the Republic of Sakha (Yakutiya) No.756-III On the Territories of Traditional Nature Use and Traditional Economic Activity of Indigenous Small-Numbered Peoples of the North in Republic of Sakha (Yakutiya). Adopted 13.07.2005, e.i.f. 23.07.2005. Art. 13(3). Available at: <https://docs.cntd.ru/document/802070067>

¹⁶⁵ Law of the Republic of Sakha (Yakutiya) No.461-III On the Legal Status of Indigenous Small-Numbered Peoples of the North. Adopted 31.03.2005, e.i.f. 10.04.2005. Art. 8(8), Art. 18(1). Available at: <https://docs.cntd.ru/document/802058430>

¹⁶⁶ Law of the Irkutsk Region No.140-OZ On Certain Issues of Organization and Protection of Original Habitat and Traditional Lifestyle of Indigenous Small-Numbered Peoples of the Russian Federation in Irkutsk Region. Adopted 16.12.2013, e.i.f. 27.12.2013. Art. 3. Available at: <https://docs.cntd.ru/document/460226522>

outlining the implementation of participation right puts the enforcement under the question. When the obligation to obtain FPIC is clearly enshrined, there is a concrete positive right that indigenous peoples can refer to in case of conflict and less room for speculation from the state and corporations. In regions where FPIC concept is not entirely reflected in regional laws, indigenous peoples are barely involved, if at all, in matters affecting their lifestyle, when their interests clash with the interests of more powerful and influential entities. Seizure of lands for the Far Eastern Hectare in Khabarovsk region and Fedorova tundra in Murmansk region are just a few examples.

It is also crucial that FPIC principle should not be a matter of regional legislation only. When the interests of the state or large oil/mining companies are at stake, regional laws are not enough to protect indigenous peoples' rights. The due mechanisms should be established on the federal level, because, as it follows from the Constitution, federal state bodies have a primary role in human rights protection, particularly in protection of the rights of ethnic minorities, and the protection of indigenous peoples' original habitat and traditional lifestyle.¹⁶⁷ Moreover, some regions where indigenous peoples reside like Arkhangelsk region and Altai region do not even have any specialized laws on indigenous peoples at all.

Apart from that, the reality shows that when law does not adequately address the issue and the state does not provide real protection to vulnerable groups, but rather operates for its own benefit, people tend to take matters in their own hands, and indigenous peoples are not an exception. This is perfectly illustrated by many incidents in the USA, where the problem of FPIC is very relevant as well. The US is one of the countries which has not ratified the UNDRIP. In 2011 the US Department of State released the official position statement on the UNDRIP, declaring that the US recognizes the importance of FPIC and calls "for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken".¹⁶⁸

One of the most recent and notable cases in the US related to FPIC is the case of Mauna Kea. In 2019 the Department of Land and Natural Resources in Hawaii announced the resumption of the construction of the Thirty Meter Telescope (TMT) on the top of Mauna Kea, the largest mountain in Hawaii.¹⁶⁹ Those who made the decision, however, did not take into account that Mauna Kea,

¹⁶⁷ Constitution of Russia, Art. 71-72.

¹⁶⁸ U.S. Department of State. Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, 12.01.2011. Available at: <https://2009-2017.state.gov/s/srgia/154553.htm> (16.04.2021).

¹⁶⁹ Hawaii Department of Land and Natural Resources. Notice to Proceed: Conservation District Use Permit, 19.06.2019. Available at: <https://dlnr.hawaii.gov/occl/files/2019/06/3568-TMT-Notice-to-Proceed.pdf> (16.04.2021).

and especially its summit, is considered a place of worship by Native Hawaiians – the home of Hawaiian deities and divine ancestors. The project which started in 2014 was met with an outcry from the Hawaiian public, but in 2018 the Supreme Court of the State of Hawaii approved the construction of the TMT.¹⁷⁰ The decision to continue the construction works resulted in massive protests, with hundreds of people blocking the road to Mauna Kea and arrests that followed as a response, making headlines in the media worldwide. Finally, after almost half a year of ongoing protests, Hawaii governor removed the police from the site and announced that the project would not proceed with construction at this time.¹⁷¹

The case of Mauna Kea also shows once again how indigenous rights are interrelated. The authorities did not ask Native Hawaiians for their FPIC, because the obligation to obtain FPIC is not prescribed by American law. Another issue was indigenous land rights: the land where Mauna Kea is located is a public land, which means that this land belongs to everyone.¹⁷² It means that Native Hawaiians do not have any special rights to this land, therefore, FPIC concept is seemingly not applicable.

A similar story happened in Russia, in the Republic of Bashkortostan. Although Bashkir people involved are not officially recognized as indigenous, they are considered an ethnic minority. In 2018 the state industrial enterprise Bashkir Soda Company obtained a permission for the development of the mountain Kushtau, a unique environmental site and a sacred place for Bashkir people.¹⁷³ In summer 2020 deforestation began on Kushtau for the planned development. The locals gathered at the root of the mountain, set up a campground and tried to block the way to the mountain. Throughout the next two weeks the police, private security guards and riot police violently attacked the protesters and their camp. Among the hundreds of people more than 80 were detained and arrested, many injured, including women and elderly people. The head of the district

¹⁷⁰ RTVI. На Гавайях жители вышли на акцию против строительства телескопа на горе, которую они считают священной (*In Hawaii Locals Protest Against the Telescope Construction on the Mountain They Deem Sacred*), 16.07.2019. Available at: <https://rtvi.com/news/na-gavayakh-zhiteli--protiv-stroitelstva-teleskopa-na-svyaschennoi-gore/> (16.04.2021).

¹⁷¹ CNN International. Holcombe, M., Boyette, C. Hawaii Governor Pulls State Police from Site of Monthslong Telescope Construction Protests at Mauna Kea, 20.12.2019. Available at: <https://edition.cnn.com/2019/12/20/us/mauna-kea-construction-stopped/index.html> (16.04.2021).

¹⁷² High Country News. LaPier, R. The Legacy of Colonialism on Public Lands Created the Mauna Kea Conflict, 06.08.2019. Available at: <https://www.hcn.org/issues/51.15/tribal-affairs-the-legacy-of-colonialism-on-public-lands-created-the-mauna-kea-conflict> (16.04.2021).

¹⁷³ Медиазона. Сугуева, Ю. “Мы – защитники Куштау”. Краткая история протестов на шихане в Башкортостане, которые (пока) закончились победой местных жителей (*“We Are the Defenders of Kushtau”*). *Summary of Protests at the Mountain in Bashkortostan, which (by now) Have Ended in Victory for Locals*, 22.08.2020. Available at: <https://zona.media/article/2020/08/22/kushtau-toratau> (15.04.2021).

also took part in the violent clashes – on the police side.¹⁷⁴ In the end the governor of Bashkortostan arrived to the mountain and asked the protesters to leave the place, promising to stop development works. In the next weeks Kushtau mountain gained a status of a specially protected area.¹⁷⁵

The described cases clearly exemplify consequences of denial or ignoring of the right to participation and consultation. Whether the project activities may affect the environment, indigenous peoples' livelihoods or their cultural and spiritual integrity, FPIC principle has to be abided by. The reason for that is that all these rights are ultimately linked to self-determination of indigenous peoples, and so is the FPIC concept. The continuing disregard of FPIC may eventually lead to dramatic consequences such as the deterioration of indigenous peoples' original habitat, erasure of indigenous culture and the very survival of indigenous peoples.

Currently in the absence of federal legislation on FPIC related regional legal norms are supplemented by the companies' corporate policies. The large corporations like Sakhalin Energy, Rosneft and Gazprom covered indigenous peoples' participation, consultations and FPIC in their policies on cooperation with indigenous peoples and sustainable development. Following best international business practices, Russian resource companies aim to minimize the negative impact on indigenous peoples' lifestyle¹⁷⁶, maintain the balance of company goals and indigenous peoples' interests while involving indigenous peoples in consultation process¹⁷⁷ and conclude cooperation agreements¹⁷⁸.

Sakhalin Energy together with the Sakhalin government and Regional Council of Representatives of Indigenous Small-Numbered Peoples of the North in Sakhalin Region implements the programme called Assistance Development Plan for Indigenous Small-Numbered Peoples of the North in Sakhalin Region. The latest five-year plan implementation finished in 2020. This plan recognized FPIC principle as a necessary element of work with indigenous peoples and noted that the previous plan of assistance was the first case of a private company obtaining FPIC from

¹⁷⁴ Ibid.

¹⁷⁵ BBC News Русская Служба. Шамина, О. Гора Куштау в Башкирии стала природоохранной территорией. Все ли довольны? (*Kushtau Mountain in Bashkiria Becomes a Specially Protected Territory. Is Everyone Pleased Now?*) 02.09.2020. Available at: <https://www.bbc.com/russian/news-53973295> (15.04.2021).

¹⁷⁶ ПАО «Роснефть». Политика компании в области устойчивого развития, 2017, para.4.3.2. Available at: https://www.rosneft.ru/upload/site1/document_file/development_policy.pdf (09.04.2021)

¹⁷⁷ ПАО «Газпром Нефть». Политика взаимодействия с коренными малочисленными народами Севера, Сибири и Дальнего Востока, 2017, para 4.2.1. Available at: https://www.gazprom-neft.ru/files/documents/Politika-Vzaimodeystviya_s_narodami_Severa-18-10-17.pdf (09.04.2021).

¹⁷⁸ Сахалин Энерджи Инвестмент Компани Лтд. План содействия развитию коренных малочисленных народов Севера Сахалинской области. Третий пятилетний план (2016-2020 годы), 2016. Приложение 1. Available at: http://www.sakhalinenergy.ru/media/library/ru/social/indigenous/SIMDP_3_rus.pdf (09.04.2021).

indigenous peoples affected by the project activities.¹⁷⁹ The plan went in detail through the current situation with indigenous peoples in Sakhalin region, impact assessment, indigenous peoples' role in plan implementation, monitoring mechanisms, complaints procedure, etc. For a private company, not an international organization, this is, indeed, a socially responsible act that may serve as a great example for other resource companies.

Unfortunately, in the absence of clear legislative norms and mandatory requirement to obtain FPIC, most of the extractive companies do not consult with indigenous peoples or organize formal meetings but do not in fact consider indigenous peoples' interests. This is why relying only on company policies and standards is not enough to protect indigenous peoples' right to participation and FPIC.

In conclusion, Russian legislation does not have norms properly regulating FPIC on federal level. Some legal acts provide for indigenous peoples' participation, consideration of their interests, but consent is nowhere to be mentioned, so those norms are not the due reflection of FPIC. Regional legislation varies significantly, some regional legal acts refer to consultations with indigenous peoples on matters affecting their interests, other laws specifically impose an obligation to obtain indigenous peoples' FPIC, and laws of some other regions do not mention consultations at all.

Meanwhile it is very important for FPIC to be enshrined in federal legislation as well. Regional laws are not enough to protect indigenous peoples from violation of their rights for several reasons. First, too much depends on the heads of regions who do not always act in indigenous peoples' interests (as in the case of Fedorova tundra), so chances are that FPIC would not even be provided in regional laws. Second, in regions with more indigenous people legislation is visibly more inclusive in regard to consultation process and FPIC, and local industrial enterprises are more prone to consult and interact with indigenous peoples. Third, the state has a primary responsibility for the protection of indigenous peoples' rights, and such critical matters as FPIC must be regulated on a higher level. FPIC is a logical extension of indigenous peoples' self-determination and, at the same time, its necessary element. For that reason, inclusion of FPIC in Russian federal legislation is essential for protection of indigenous peoples in Russia. The obligation to obtain FPIC can be included in the Federal Law On the Territories of Traditional Nature Use.

¹⁷⁹ Ibid, para. 1.3.

CONCLUSION

The goal of the present thesis was to find solutions for the improvement of legal regulation on indigenous peoples' rights in Russia so indigenous peoples could enjoy their special rights provided in international legal instruments.

Indigenous peoples typically are an isolated, marginalized social group that needs special attention and protection from the state. Specialized legal acts protecting indigenous peoples' rights have to be drafted, and relevant international instruments should become the basis for state's regulation on indigenous peoples' rights. Nevertheless, it is not enough to simply adopt the law claiming that the state strives to protect indigenous peoples' special rights while the real life practice shows the opposite. The implementation of the rights of indigenous peoples has to be guaranteed by the establishment of due mechanisms and consistent state's policy.

Russian legislation on indigenous peoples' rights is quite diverse. On regional level the sphere of indigenous rights is regulated more thoroughly because each region has its own specifics and approach to the matters of indigenous peoples. However, this is also an indicator that the Russian state does not have a unified policy on indigenous peoples. The main approach seems to be contradictory to the claimed protection of indigenous rights. Indigenous peoples in Russia are underrepresented, discriminated on various levels, sometimes even persecuted for the mere fact of demanding the respect to their rights. The crucial rights guaranteed to indigenous peoples by international legal instruments are not abided by. Partly this happens because some instruments are not ratified by the Russian Federation, so legally the Russian state does not have an obligation to comply with the norms of those legal acts.

The official recognition of indigenous peoples' right to self-determination and land possession should be the first step on the way to improve the situation of indigenous peoples in Russia. This study continuously proved that self-determination right is a foundation of the whole system of indigenous peoples' rights. The right to land possession is another central element of this system. Indigenous peoples deprived of their lands are doomed to the loss of self-identity, cultural integrity and livelihood.

Taking into account the overall Russian internal policy it is very unlikely that the land possession right will ever be granted to indigenous peoples the way it is outlined in the UNDRIP. The lands and territories which indigenous peoples in Russia inhabit are mostly state-owned. The rapidly growing industrial economy and the industrial development of the Arctic regions where many

indigenous peoples live significantly lowers the probability of the state transferring the lands into indigenous peoples' full ownership. Unfortunately, the absence of this right leaves room for the abuse of power by the authorities. Although indigenous peoples are allowed to use specially protected TTNU and lands of their traditional residence free of charge, the lack of ownership right means that indigenous peoples do not have real control over their lands. When the state considers it necessary for its needs, the lands or natural objects will be seized, and indigenous peoples can do little about it.

As an alternative, I suggest that norms on co-management of the lands and natural resources that indigenous peoples traditionally occupy and use should be developed. Indigenous peoples should be entitled to exercise control over the lands they inhabit, not only in theory, but in practice.

Additionally, it is necessary to guarantee representation of indigenous peoples in state bodies. Until indigenous representatives are among the officials who make decisions, there is always a chance that indigenous interests will be disregarded.

The problem of obtaining indigenous status exists on two levels – collective and individual. On a collective level some ethnicities fight for recognition as indigenous peoples because from the angle of international law they meet the criteria of being called indigenous, including self-identification. However, the Russian law sets forth other criteria that can be viewed as discriminatory. Those criteria are not consistent with international standards, and they substantially limit the rights of certain peoples who are, in fact, indigenous. Even once officially recognized as indigenous and being put on the Unified List of indigenous peoples, a people can lose their status just because their population has risen above 50 000 individuals. Thus, indigenous peoples have to make a choice between staying literally small-numbered (as they are named in Russian law) and get the guaranteed benefits, or do not control their population growth and not get the benefits.

The same is applicable for the requirement of maintaining traditional lifestyle and economy. The state's position on the issue is frankly the following: by moving to a city an indigenous person loses their ethnic affiliation. This is, of course, far from the truth. Instead of helping indigenous peoples to improve their life conditions while preserving their culture and identity, the state pushes them out of the society even further, and this only strengthens the injustice made to indigenous peoples in the past. The aim of the state, conversely, should be to restore the justice for indigenous peoples. Therefore, the author's suggestion is to change the provision of the law On the Guarantees of Indigenous Peoples' Rights requiring indigenous peoples to be "counted less than 50 000 persons" to "constituting an ethnic minority". In regard to the condition of living traditional

lifestyle, this provision should be eventually eliminated. However, the author understands that it is unrealistic to expect that the legislator would at once change several crucial requirements for the benefit of indigenous peoples. In spite of this, getting the norms on who can be called indigenous in line with international standards is the ultimate goal.

On an individual level, indigenous peoples mainly face the same problem of not getting recognized as indigenous because of not living traditional lifestyle. Additionally, the mechanism of recognition of a person as indigenous has not been established still. The recent amendment to the law setting up the procedure of applying to the indigenous peoples' register only created more problems. Indigenous individuals have to collect a large package of documents (some of them indigenous peoples do not even have), in case of refusal to put the applicant on the register no appeal procedure is established. The register was also included in the monitoring programme in the field of interethnic relations, which is controlled by the Russian FSB. In light of constant persecution of indigenous activists and Russian authorities using "fight with extremism" as an instrument of political repressions, this fact is very disturbing. Finally, the problem of traditional lifestyle and economic activity criterion was not solved by the creation of the register: the criterion remained among other requirements for being registered as indigenous.

To solve the issue of individual indigenous recognition, the author proposes to create a document that can be viewed as an "indigenous certificate" - a unified document approving one's indigenous ethnicity. This certificate should be given out to every member of an indigenous community at the time of the person's birth. Those indigenous individuals who are not members of the community should get the certificate with the assistance of the authorities and, when it is necessary, local indigenous associations. Indigenous persons born in remote area who do not have access to state's services should not struggle with getting benefits guaranteed to them by law. The state is the main actor in indigenous peoples' rights protection; hence, it is the state's duty to help indigenous peoples get this important document. Furthermore, it does not make sense to demand that indigenous peoples should live in rural area carrying out traditional economic activities to be considered indigenous, but not leaving them a chance to get official recognition as indigenous because they live in rural area.

Another critical issue to be resolved is indigenous peoples' participation and FPIC. Russian federal legislation does not enshrine FPIC principle, nor does it establish adequate mechanisms of indigenous peoples' involvement in decision-making. The norms that vaguely mention indigenous peoples' engagement and consideration of their interests cannot be properly implemented because

1) the wording is too abstract; 2) the enforcement of those norms is not regulated. Laws of some regions contain more concrete provisions on how the involvement of indigenous peoples should be carried out. In those regions indigenous peoples' participation is more evident. Some regional laws go further and protect the FPIC principle or its elements. Partially this happens due to the fact that in those regions indigenous peoples have a large share in a population of the region, so they have more influence.

Despite the number of regional legal acts safeguarding indigenous peoples' engagement and FPIC, regional legislation is not enough to protect the named rights of indigenous peoples. For that purpose, federal legislation is absolutely needed. While in regions with a high number of indigenous individuals they are more represented and consulted with, in regions with less indigenous persons their real participation is oftentimes denied. The heads of the regions tend to pay more attention to the interests of industrial enterprises than interests and rights of indigenous peoples.

Consequently, not only local authorities, but also resource companies disregard the necessity to hold meetings and consultations with indigenous population, which leads to violation of other indigenous rights. The lands are seized from indigenous peoples, the environment is degraded, and cultural and spiritual legacy of indigenous peoples is threatened.

Again, it should be stressed that the state plays the key role in protection of indigenous peoples' rights. If participation of indigenous peoples and their FPIC is not guaranteed on the level of federal law, leaving it to regional authorities means putting indigenous peoples for the mercy of local officials and taking off the responsibility from the state. Crucial rights of indigenous peoples must be protected and stipulated in laws that have higher power in Russian legal system.

Special attention should be paid to FPIC concept. FPIC is based on and extends indigenous peoples' right to self-determination. It is a prerequisite for enjoyment of this right. Considering that, FPIC should be explicitly provided in Russian federal legislation. The existing standards of some resource companies and international organizations can be viewed as an example of thorough regulation of obtaining FPIC and serve as the basis for the creation of legal norms on FPIC. The appropriate federal legal acts for the inclusion of provisions on FPIC, consultations and involvement of indigenous peoples in decision-making process would be the Federal Law On the Guarantees of Indigenous Peoples' Rights and the Federal Law on the Territories of Traditional Nature Use.

Finally, it can be argued that the hypothesis of the study proved to be true. Indigenous peoples in Russia cannot fully exercise their rights guaranteed under international legal instruments because of the gaps and shortcomings of the relevant Russian legislation. In order to fix the situation, the creation of coherent system of indigenous peoples' rights protection is necessary. The ratification of the main international instruments on the rights of indigenous peoples would be a great step in that direction. Implementing best world practices and international standards, building up on the guarantees of indigenous peoples' fundamental rights and establishing proper implementation mechanisms, it is very possible to improve the situation with indigenous peoples in Russia and restore the justice.

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