

# Human Rights of Indigenous Small-Numbered Peoples in Russia: Recent Developments

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## Abstract

In Russia, there exist legal norms providing for the protection of indigenous small-numbered peoples' rights. Yet, indigenous small-numbered peoples face multiple challenges when it comes to the implementation of their rights. After a brief presentation of the Russian legislation on the rights of indigenous small-numbered peoples, peculiarities of the Russian legal system and impediments to the legal provisions regulating the status of indigenous small-numbered peoples, this article addresses several issues related to the implementation of indigenous small-numbered peoples' rights in Russia today. One of the core issues is the attribution of individual members of indigenous communities to indigenous small-numbered peoples. Such an attribution is still challenging despite the newly adopted amendments to the 30 April 1999 Federal Law N 82-FL: 'On Guarantees of the Rights of Indigenous Small-Numbered Peoples of the Russian Federation'. Another issue is application of the notion 'foreign agent' to individuals and non-commercial organizations. Still another issue is the State's pressure on independent indigenous organizations. The final challenge is the possible impact of amendments to the Constitution approved by popular vote in July 2020 on the rights of indigenous small-numbered peoples.

**Keywords:** *Identity, foreign agent, State's pressure, constitutional amendments*

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## Introduction

This article is devoted to a discussion of the present situation concerning the human rights of indigenous small-numbered peoples in Russia. The issues raised by the author are non-exhaustive but can be considered highly topical at the present time.

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In the first part of the article, the author presents the Russian legal acts on the status of indigenous small-numbered peoples, explains what peculiarities of the Russian legal system impact this status and also discusses one of the lingering challenges – impediments to the legal provisions regulating the status of indigenous small-numbered peoples.

The second part of the article focuses on the following issues: the attribution of individual members of indigenous communities to indigenous small-numbered peoples, the introduction of the notion ‘foreign agent’ into Russian legislation, the State’s pressure on independent indigenous organizations, and the impacts of recently adopted amendments to the Constitution on the rights of indigenous small-numbered peoples.

The topicality of the issues selected by the author has been emphasized at the international level. In its 113th session, The UN Human Rights Committee expressed its concern that “insufficient measures [are] taken to respect and protect the rights of indigenous peoples and to ensure that members of such peoples are recognized as indigenous.”<sup>1</sup> Already in 2010, the Special Rapporteur on Indigenous Peoples’ Rights, James Anaya, drew public attention to the fact that there was lack of effective implementation of laws on the rights of indigenous peoples.<sup>2</sup>

For a long time, there was no unified legal procedure regarding the attribution of individual members of indigenous communities to indigenous small-numbered peoples at the federal level. Recently, the Federal Law (FL) of 6 February 2020 N 11-FL ‘On Amendments in FL ‘On Guarantees of the Rights of Indigenous Small-Numbered Peoples of the Russian Federation’ (amendments in FL ‘On Guarantees’) was adopted. The law, which came into force on 7 May 2020, regards the establishment of registration procedures for persons belonging to indigenous small-numbered peoples and the establishment of a unified registry for these purposes. However, there is reason for concern. The origin of the determining criteria for the identification of persons belonging to indigenous small-numbered peoples is ambiguous. Moreover, the implementation procedures of the amendments are unclear. As a result, individuals belonging to indigenous small-numbered peoples may not receive benefits enshrined in law. Besides, indigenous activists are concerned about the survival of some small groups of peoples as indigenous small-numbered peoples due to the adoption of the amendments and after the 2020 Census, which has been postponed to 2021. When preparing the 2020 Census in the State Duma, the opinion was expressed that “Oroch people living on their land from time immemorial [...] will be eliminated from the indigenous small-numbered peoples’ list as a result of the 2020 Census.”<sup>3,4</sup> Despite the entry into force of the amendments, the registry itself will start functioning from 2022.

The Special Rapporteur on Indigenous Peoples’ rights drew public attention to the application of the notion ‘foreign agent’ to certain individuals and legal entities, whose activities can be limited when they get this status.<sup>5</sup>

Yet another concern is the State's pressure on independent indigenous organizations. For example, the work of the Center for Support of Indigenous Peoples of the North/Russian Indigenous Training (CSIPN) was terminated by the Ministry of Justice in 2019. According to the head of this Centre, state authorities continue terminating activities of groups who try to raise their voice.<sup>6</sup> An earlier but telling example is the suspension of the work of one of the largest indigenous organizations, the Russian Association of Indigenous Small-Numbered Peoples of the North, Siberia and the Far East (RAIPON), in 2013. After reopening, the organization has shown loyalty to the central government.<sup>7</sup>

A final concern regards amendments to the Constitution approved by popular vote in July 2020 and their impact on the rights of indigenous small-numbered peoples of Russia.

## **1 Legal framework on the rights of indigenous small-numbered peoples in Russia**

### **1.1 The Russian legislation**

The Russian Federation (RF) is not part of the Indigenous and Tribal Peoples Convention N 169 (ILO 169).<sup>8</sup> Russia did not endorse the Universal Declaration on the Rights of Indigenous Peoples although it was advised many times to do so.<sup>9</sup> The RF voted in favor of the Universal Declaration on Human Rights but is not bound by this document. However, the RF has joined other core international minority instruments and is consequently bound to protect indigenous rights due to this.<sup>10,11</sup> According to Article 69 (1) of the Constitution of the RF, “the RF shall guarantee the rights of the indigenous small peoples according to the universally recognized principles and norms of international law and international treaties and agreements of the RF.” Moreover, according to Article 15 (4), “the universally-recognized norms of international law and international treaties and agreements of the RF shall be a component part of its legal system. If an international treaty or agreement of the RF fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.” The Constitution also sets forth in Article 72 (1(м)) that “protection of traditional living habitat and of traditional way of life of small ethnic communities” falls within the joint competence of the Federation and subunits of the RF. In July 2020, the amendments to the Constitution concerning indigenous peoples' rights in Russia came into force, discussed in Subsection 2.4 below.

There are three main federal laws that directly regulate issues of indigenous small-numbered peoples: FL of 30 April 1999 N 82-FL ‘On the Guarantees of the Rights of Indigenous Small-Numbered Peoples of the RF’ (FL ‘On Guarantees’), FL of 20 July 2000 N 104-FL ‘On General Principles of Organization of Indigenous Small-Numbered Peoples’ Communities of the North, Siberia and the Far East of the RF’ (FL ‘On General Principles’) and FL of 7 May 2001 N 49-FL

‘On Territories of Traditional Use of the Natural Habitat of Indigenous Small-Numbered Peoples of the North, Siberia and the Far East’ (FL ‘On Territories’).

The rights of indigenous small-numbered peoples are partly enshrined in the Land Code of the RF,<sup>12</sup> the Water Code of the RF,<sup>13</sup> the Tax Code of the RF,<sup>14</sup> the Forest Code of the RF,<sup>15</sup> other federal laws and several decrees of the Government of the RF. In addition, some federal subunits have introduced legal regulations at the regional level. According to Kryazhkov, the intensity of legal regulation of the rights of indigenous small-numbered peoples in different subunits depends on many factors. These factors are: the ethnicity of the region (examples of sufficient regional legislation are the regulatory frameworks of the Republic of Sakha (Yakutia), the Nenets, the Khanty-Mansi and the Yamalo-Nenets Autonomous Okrugs); the economic situation (the economic indicators are among the highest in the country in the Khanty-Mansi and the Yamalo-Nenets Autonomous Okrugs, where there is extensive regional legislation on the rights of indigenous small-numbered peoples); the political will expressed in the readiness of the institutions of the public authority to understand the needs of small-numbered peoples and to create the necessary conditions to meet these needs, and; the proactive stance of the small-numbered peoples and their associations and their capability to clearly identify their interests and interact with bodies of state power.<sup>16</sup>

## 1.2 Peculiarities of the Russian legal system

The Russian legal system has some peculiarities *inter alia* due to the federal structure (federalism) of the State. The Russian Constitution defines three competence spheres of the State and the federal subunits of the State: the exclusive competence of the RF (Article 71), the joint competence of the RF and the subunits of the Federation (Article 72), and the full competence of the subunits of the RF (Article 73). There must be no contradiction between federal legislation and subunit legislation. In cases where there is a contradiction, federal legislation applies. This rule refers to the two former situations. If an issue falls within a subunit’s competence, legal acts of this subunit prevail.

The implications of federalism for the purposes of the present article can be outlined as follows. Firstly, the regulation of the legal status of indigenous small-numbered peoples falls within the competence of the RF (Article 71 (b)). Secondly, Article 72 (1 (6)) refers the protection of the rights of the national minorities to the joint competence of the RF and its subunits. This results in joint regulation of this issue: there exist regulations at the federal level and at the level of the subunits.

Another peculiarity of the Russian legal system is the existence of various types of subunits of the RF depending on their national-territorial status. According to Article 5 (1) of the Constitution of the RF, there exist “republics, krais, oblasts, cities of federal significance, an autonomous oblast, autonomous okrugs – which shall be equal subunits of the RF.” Article 5 (4) reads, “[a]ll subunits shall be equal

between themselves in mutual relationships with federal agencies of State power.” Thus, the Constitution of the RF establishes equality of all the subunits of the RF. During the existence of the USSR, the Autonomous Okrugs<sup>17</sup> were established to secure the rights of indigenous small-numbered peoples. It is no longer possible to claim whether these subunits correspond with the number of indigenous small-numbered peoples currently inhabiting these areas.<sup>18</sup>

Another peculiarity of the Russian legal system is the use of the term ‘indigenous small-numbered peoples.’ There are 47 indigenous peoples in the RF.<sup>19</sup> 40 of these indigenous peoples reside in territories of the North, Siberia and the Far East of Russia. The Russian legislation introduces the term ‘indigenous small-numbered peoples.’ FL ‘On Guarantees’ provides the following definition of indigenous small-numbered peoples of the RF in Article 1 (1): “peoples who live in the territories traditionally inhabited by their ancestors, maintain their traditional way of life and economic activity, number fewer than 50 000 and identify themselves as separate ethnic communities.” There is a difference between the international term ‘indigenous peoples’ and the Russian term, which introduces the numerical criterion. Indigenous peoples numbering more than 50 000 members are denied state legal support because they do not fall within the definition of indigenous small-numbered peoples according to the Russian legalisation.<sup>20</sup> Among such peoples are, for example, the Yakuts, Komi, Tuvans, Altaians, Khakas, Buryats, and the Karelians. Application of the numerical criterion can result in confusing situations. For example, the population of Nenets indigenous small-numbered peoples is approaching 50 000. If the population exceeds 50 000, the Nenets can lose their status as an indigenous small-numbered people and, consequently, will not receive state legal support. This example shows that application of the numerical criterion seems artificial and conditional in some situations.<sup>21,22</sup>

### 1.3 Impediments to the legal provisions

As mentioned in Subsection 1.1, the FL ‘On Guarantees’ comprises the core legal framework protecting the rights of indigenous small-numbered peoples. An analysis “of the content of this federal law allows to maintain that it has not achieved the required internal coherence and the completeness of the unity of legal regulation.”<sup>23</sup> Similar challenges apply to two other federal laws on indigenous rights (‘On General Principles’ and ‘On Territories’). Defective legislation is one of the main challenges regarding the protection of indigenous small-numbered peoples’ rights in Russia.

This problem is complex and encompasses smaller issues. The *first* issue is that the terms and concepts used in the legislation are not defined. This is typical of the norms on the protection of the traditional lands and ways of life of indigenous small-numbered peoples. For example, no consolidation of legal concepts such as ‘the cultural heritage of indigenous small-numbered peoples,’ ‘objects of the cultural heritage of indigenous small-numbered peoples,’ and ‘sanctuaries’ has been carried

out. Another example is the absence of a definition of ‘discrimination’ in the Russian legislation, which is relevant to several spheres of life of indigenous small-numbered peoples of Russia. According to Minority Rights Group Europe, this complicates implementation of anti-discriminatory provisions.<sup>24</sup>

The *second* issue is the lack of specific norms defining legal mechanisms for the realization of the proclaimed rights.<sup>25</sup> For example, the Fifth Arbitration Appeal Court in its Ruling of 20 June 2019 on case N A59-265/2019 considered the issue of traditional fishing by tribal family farm ‘Ulav.’ Ulav is a community of indigenous small-numbered peoples of the North called Nivkh which carries out traditional economic activities in order to preserve its members’ traditional way of life on the territory of the municipal area of the Okhinsky city-district of the Sakhalin Oblast. According to Article 69 of the Constitution, Article 8 of the FL ‘On Guarantees’, Article 24 (4) of the FL of 14 March 1995 N 33-FL ‘On Protected Areas’, Article 97 (5) of the Land Code, Order of the Government of 8 May 2009 N 631-p, and Decree of Administration of the Sakhalin Oblast of 3 March 2009 N 110-pa, this indigenous small-numbered people has the right to use lands of the reserve ‘Severny’ in order to preserve their traditional way of life and traditional economic activity in compliance with the order established by the bodies of the state power of the Sakhalin Oblast. Nevertheless, the state authorities of the Sakhalin Oblast have not elaborated a procedure for the allocation of land plots in the regional reserve ‘Severny’ to associations of small-numbered peoples with the purpose of carrying out traditional economic activities and traditional crafts on the territories of the nature reserve.

Another example is that according to Article 8 (1(8)) of the FL ‘On Guarantees’, indigenous small-numbered peoples have the right to compensation for losses caused by damage to their traditional lands by economic activities of organizations of all forms of ownership. However, the federal legislation does not provide for procedures for the effectuation of compensations from legal entities responsible for harming the traditional lands inhabited by indigenous small-numbered peoples.<sup>26</sup>

Still another example illustrating the lack of specific norms providing for the implementation of indigenous peoples’ rights is the participation of these peoples in environmental and ethnological assessments. It is not clear how indigenous small-numbered peoples are to take part in such assessments when federal and regional state programs are developed. These programs concern the extraction of natural resources and environmental protection on the territories of indigenous small-numbered peoples. These three examples demonstrate the current need for the specification of implementation mechanisms of the legislation on indigenous peoples’ rights.

The *third* problem is the lack of unified existing practices in the form of lists (in Russian – ‘perechen’). This lack of consolidation results in a fragmentation of legal provisions. It is necessary to elaborate unified criteria which apply to phenomena



in order to summarize them. For example, the current legislation does not provide a consolidated list of traditional catching methods and tools for fishing. This has resulted in confusion when executive bodies fail to identify methods and tools as traditional. In such cases, access to fishing grounds may not be granted.

The fishing example was addressed by the Federal Arbitration Court of the Far East District. In its Ruling of 6 August 2013 on case N A24-40/2013, the Court agreed with the indigenous community's claim. The counterpart to the indigenous community in this case was the North East territorial department of the Federal Agency for Fishery. The Agency's main argument was that the indigenous community used non-traditional fishing methods (fishing with a mobile bottom dragnet). The Federal Arbitration Court ruled that the permit-issuing body wrongly identified this method as non-traditional, and as such had interpreted the legal norms incorrectly. This problem is discussed in detail in Zmyvalova's article "Indigenous Peoples of the Russian North and Their Right to Traditional Fishing."<sup>27</sup>

The *fourth* challenging area concerns the subdivision of competences between public authorities located at different territorial levels within the state (Federal level, subunits level and municipal level). There is no clear distribution of powers between these authorities in several areas, like the protection of traditional lands and lifestyles of indigenous small-numbered peoples. The lack of a clear delineation of powers violates systemic approaches to regulating the mentioned relations. This, in turn, results in drawbacks in legal regulation at the regional and municipal levels. These drawbacks include gaps in regulation as well as excessive regulation, contradictions in the legal system of the State and ineffective protection of the rights of indigenous small-numbered peoples.<sup>28</sup> An example that illustrates the lack of distribution of competences is when bodies of executive power create additional requirements for the beneficiaries of rights. The Department of Natural Resources and the Non-Oil and Gas Sector of the Economy of the Khanty-Mansi Autonomous Okrug-Ugra puts forward additional requirements to members of the community when considering their applications for traditional fishing quotas. The community contested this practice in the Arbitration Court of the West Siberian District. In its Ruling of 26 August 2014 on case N A75-12108/2013, the Court also interpreted the legal norm restrictively and took the side of the authorities. The Court concluded that some members of the community did not reside on the territory of their traditional habitation because they did not have residence registration in this territory. This resulted in the necessity for each member of the community to apply individually for traditional fishing quotas.

The *fifth* problematic issue is a lack of a systemic approach to the way in which subunits approach law-making concerning indigenous small-numbered peoples. Law-making practice in subunits is diverse. Some subunits have substantial practice, i.e. their laws are elaborated and detailed. Other subunits have superfluous practice, i.e. their law-making lacks a unified approach and understanding of priorities regarding the human rights of indigenous small-numbered peoples. The issue of

indigenous languages is an illustration of such varying practice. Only a few subunits have elaborated laws regulating the status of the indigenous languages of the peoples who reside there. The Nenets Autonomous Okrug is an example of such a subunit. The Murmansk Oblast is an example of the opposite.

## **2 Current obstacles to the realization of the rights of indigenous small-numbered peoples**

### **2.1 The procedure of establishing indigenous small-numbered persons' identities**

To take advantage of their privileges, indigenous individuals need to confirm their ethnic identity.<sup>29</sup> This has been problematic in Russia for a long period of time. The total number of indigenous small-numbered peoples in Russia is calculated based on Census data, where indigenous small-numbered peoples indicate the ethnic identity they themselves consider relevant.

The Constitutional Court of the RF turned its attention to the issue of attribution of identity in its Ruling of 27 March 2018 on case N 628-O 'On the Refusal to Consider Complaints from Citizens D.G., D.Yu. and D.D. for violation of their Constitutional Rights by Article 69 (2) of FL 'On Acts of Civil Status'. The Court ruled that data on ethnic identity should be entered into a record of the birth of a child and on a birth certificate, at the request of interested parties. According to the Ruling, obligatory data in a birth certificate shall not include information about ethnic identity. A birth certificate is used by citizens in legal relations and is, therefore, an important source of information about and acknowledgment of the ethnic identity of a person. The act of attribution of ethnic identity is based on the principle of self-identification. As presented in court practice, a citizen is entitled to self-determine one's ethnic identity at any time, for any ethnicity and for an unlimited number of times. It is worth noting that Article 26 of the Constitution provides for individuals' right to freely indicate one's ethnic identity and that nobody can be forced to identify and indicate one's national identity. Despite the existing constitutional framework for indication of identity and the opinion of the Constitutional Court, members of indigenous small-numbered communities face challenges in this regard.

Until 1997, the issue of individual ethnic identification of indigenous small-numbered peoples was resolved in a unified manner at the federal level. There was a line in passports where citizens could add their national identity.<sup>30,31</sup> This line was removed from passports in 1997.<sup>32</sup> However, passports that contain the national identity line were still in use until 2004.<sup>33</sup> Currently the line 'nationality' exists in documents certifying state registration of acts regarding civil status: birth, marriage, divorce, adoption, establishment of paternity, and change of name.<sup>34</sup>

For a long time, there existed no mechanisms at the federal level that allowed for individual members of indigenous small-numbered peoples' communities to register their ethnic attribution. This led to the establishment of such procedures in the federal subunits. According to Plyugina:



[o]n the one hand, this practice is not consistent with the constitutional distribution of competences of the Russian Federation and subunits of the Russian Federation according to which the regulation of human and civil rights and freedoms as well as the regulation of the rights of national minorities belongs to the competence of the RF (in this case it regards regulation, but not protection). On the other hand, without establishment of the fact of belonging to indigenous small-numbered peoples of persons who in fact are such, it is impossible to exercise the rights and freedoms arising from the corresponding legal status.<sup>35</sup>

The following practices were used to determine national identity in subunits. The *first* and main practice applied by subunits is a record of national identity in a birth certificate or a court decision. For example, this is provided in the law of Khanty-Mansi Autonomous Okrug-Yugra of 14 November 2002 case N 62-O3 'On the Transport Tax in the Khanty-Mansi Autonomous Okrug-Yugra.' According to Article 4 (1(6)), documents confirming a citizen's belonging to an indigenous small-numbered people of the North residing in the territory of the Khanty-Mansi Autonomous Okrug-Yugra (the Khanty, Mansi, or Nenets peoples) is a birth certificate or a court decision entered into force on the established fact of a citizen's national identity. Similar provisions can be found in Article 6.1. (5 (3)) of the law of the Khanty-Mansi Autonomous Okrug-Yugra of 29 December 2006 case N 147-O3 'On Regulation of Certain Issues in the Field of Water and Forest Relations on the Territory of the Khanty-Mansi Autonomous Okrug-Yugra'. Paragraph 4.3 of the Procedure for Harvesting Forest Plantations for Citizen's Personal Needs on the Territory of the Chukotka Autonomous Okrug of 16 April 2008 case N 64 provides that a birth certificate indicating national identity or a court decision entered into legal force on establishment of the fact of a citizen's national identity are recognized as documents confirming a citizen's belonging to an indigenous small-numbered people of the RF. According to Polishchuk-Molodozhenya, in the Murmansk Oblast there also existed a practice of recognizing the nationality of indigenous persons by the Committee of the Fisheries of the Murmansk Oblast (at present – the Ministry of Natural Resources and Ecology of the Murmansk Oblast) on the basis of a birth certificate in addition to a passport of the old standard.<sup>36</sup> According to paragraph 2.4 (4(B)) of the Decree of the Government of the Kamchatka Kray of 18 April 2014 case N 183-II 'On Approval of the Procedure of Social Support to Certain Categories of Citizens During the Period of their Education in State and Municipal Educational Organizations in the Kamchatka Kray,' in order to receive educational support it is necessary to submit the birth certificate of the student or one of his or her parents that indicates belonging to an indigenous small-numbered people of the North, Siberia and the Far East, or to submit a court decision entered into legal force on establishment of the fact of national identity for students from indigenous minorities from families where the only parent or at least one of the parents belongs to an indigenous small-numbered people.

The *second* practice was a passport insert. Issuance of a so-called insert to a passport of a citizen of the RF was regulated by the Decree of the Government of the RF of 9 December 1992 case N 950 'On Temporary Documents Certifying the Citizenship of the RF' (invalid at present). In the subunits, there was an attempt to apply their own 'inserts'. A decree on such an annex existed in the Republic of Sakha (Yakutia) from 2000 to 2016.<sup>37</sup>

The *third* practice was the use of archival records in some subunits, which were also used as evidence of belonging to an indigenous small-numbered people. Such a document together with a birth certificate and a court decision is specified in the Decree of the Kamchatka Krai of 21 December 2017 case N 560-II 'On Approval of the Territorial Program of State Guarantees of Free Provision of Medical Care to Citizens in the Territory of the Kamchatka Krai for the 2018 and for a Planning Period of 2019 and 2020.' There are also other documents that can confirm belonging to indigenous small-numbered peoples in the subunits. Examples of such documents are documents of local self-government (for example, certificates confirming the residence of a person within territories of traditional nature use and where they carry out traditional economic activities). In addition, information provided by indigenous communities is sometimes used to confirm the national identity of indigenous persons.

Confirming national identity by court decision has become common practice in recognizing the national identity of indigenous persons. For example, in the Murmansk Oblast a member of the Sámi indigenous small-numbered peoples' community, Andrei Danilov, intended to exercise his special right to traditional hunting in 2019. Initially he applied to the Ministry of Natural Resources and Environment of the Murmansk Oblast to make a note in his hunter's ticket that he had the right to hunt as a Sámi. The Ministry rejected his application due to two reasons: he had to prove his individual ethnic identity and he had to prove that hunting supports his traditional way of life. According to Danilov, these requirements were illegal, and he addressed the Ombudsman of the Murmansk Oblast to protect his rights. The Ombudsman concluded that the procedure to establish individual ethnic identification involves applying to a court and submitting all the necessary documents.<sup>38</sup> Danilov did so regardless of the fact that his identity was already confirmed in his birth certificate. Even though some bodies of State power in other subunits recognize the record on national identity as sufficient, in the Murmansk Oblast this fact currently needs to be confirmed by a court decision.

Courts, as a rule, access the totality of criteria for the attribution of individual ethnic identity indigenous persons. In some cases, a specific criterion is enough to determine the national identity of members of indigenous small-numbered communities. For example, such a criterion of identification could be the ethnic identity of the parents of the applicant. This position is indicated in, for example, the decision of the Berezovsky District Court of the Khanty-Mansi Autonomous Okrug-Yugra of 7 February 2018 on case N 2-146/2018, and in the Appeal Ruling

of the Court of the Chukotka Autonomous Okrug of 28 January 2016 on case N 33-8/2016.

The existence of such varying practice at the subunit level, as well as the lack of unified practice at the federal level resulted in the need to create a unified procedure for determining the national identity of indigenous small-numbered peoples at the federal level. For example, the first head of RAIPON and later head of the Center of Development of Reindeer Herding and deputy director of the non-commercial partnership “The Russian Arctic Development Center,” Khariuchi, spoke in favour of “adopting a normative act granting persons from indigenous small-numbered peoples the right to indicate their national identity in a special insert to a passport,”<sup>39</sup> According to him, the FL ‘On Guarantees’ should be amended correspondingly. Khariuchi also proposed “to develop a decree of the Government of the Russian Federation ‘On Approval of Regulations of the Certificate Confirming National Identity of Persons Belonging to Indigenous Small-Numbered Peoples of the North, Siberia and the Far East of the Russian Federation’.”<sup>40</sup> According to Kryazhkov, “it would be right to develop a general procedure for ethnic identification of persons who want to be officially included into one or another small-numbered people in order to obtain privileges granted to these peoples. The absence of such an order creates problems.”<sup>41</sup> To solve this problem Kryazhkov has proposed “to prepare a federal normative legal act on ethnic identification of persons from among indigenous small-numbered peoples.”<sup>42</sup> According to Andrichenko, the procedures regulating the legal status of indigenous small-numbered peoples of Russia must be provided in the text of the FL ‘On Guarantees’.<sup>43</sup>

This has resulted in amendments to the law ‘On Guarantees’ initiated by the Federal Agency of Nationalities Affairs. It has also been proposed to create a federal registry of persons belonging to indigenous small-numbered peoples of Russia in order to simplify the allocation of privileges and state support. Commenting on the creation of such a registry, Fondahl, Filippova and Savvinova underline that “only with the adoption of the law calling for the establishment of an Indigenous registry [...], has the issue started to be addressed on how an individual who is a member of an Indigenous people can authenticate her or his claim to be indigenous, in cases where such is required.”<sup>44</sup> According to newly adopted amendments to the FL ‘On Guarantees’, indigenous persons must provide proof of their identity to be included in official lists of persons belonging to small-numbered peoples of Russia. Such an acknowledgement implies that the RF will grant certain privileges to these indigenous small-numbered peoples.<sup>45</sup> The amendments came into force on 7 May 2020. In addition to the previously mentioned purpose of these amendments to the FL ‘On Guarantees’, i.e. obtaining benefits by indigenous persons, “minimizing the corruption component in providing support to indigenous persons and reducing the number of abuses in the provision of benefits”<sup>46</sup> is indicated.

Amendments to FL ‘On Guarantees’ contain general data concerning the registry’s formalities, such as what information is to be entered in the registry and what

materials and information is to be submitted by applicants to the authorized bodies for inclusion in the registry.<sup>47</sup>

As determined in para 2 of FL of 6 February 2020 case N 11-FZ ‘On Amendments into FL ‘On Guarantees of the Rights of Indigenous Small-Numbered Peoples of the RF’ in the section establishing procedures for registering persons belonging to indigenous small-numbered peoples’, “[t]he procedure for conducting the list, providing data from the list, as well as interaction between federal bodies of executive power and local self-government with the authorized body about conducting the list, is determined by the Government of the RF.” At present, this order does not exist, and is under development.<sup>48</sup> Moreover, in accordance with Article 7.1 (1(2)) of FL ‘On Guarantees’, bodies of State power, bodies of self-government and State extra-budgetary funds use data contained in the list (registry) and have no right to demand that persons belonging to small-numbered peoples submit documents containing data about their nationality. This provision comes into force on 7 February 2022 according to FL N 11-FZ ‘On Amendments into the FL ‘On Guarantees’. This means that such a list will have been created by 7 February 2022 in accordance with the legislator’s plan.

The amendments raised questions from indigenous small-numbered peoples and activists regarding interpretation and compliance.<sup>49</sup> According to their opinion, the amendments have anti-constitutional and discriminatory traits. When discussing the draft, it was noted that participation by indigenous small-numbered peoples in the preparation of the rules for establishing and maintaining the federal registry of indigenous small-numbered peoples was not presupposed. The purpose of submission of certain types of information for the registry is not clear, such as the personal number of a taxpayer and the insurance account number of an insured person. It is also unclear whether the child of indigenous parents who already have indigenous status, will also have to apply to be included in the registry or if this will happen automatically. Another question is whether a whole family can apply to be entered into the registry or if every family member must apply individually. The procedures for applying and submitting information are unnecessarily complicated. A problem may occur for those members of indigenous small-numbered peoples whose way of life or illiteracy prevents them from understanding all the nuances of the application procedure. When presenting the concerns of different stakeholders, Fondahl, Filippova and Savvinova identify three main challenges associated with the registry: “exclusion and inclusion in the registry; the burden of proof of indigeneity; and the question of who ultimately decides who is Indigenous.”<sup>50</sup>

Such concerns are supported by some indigenous peoples’ organizations, for example, the local public organization ‘Association of the Indigenous Small-Number Peoples of the North of the Evenki Municipal District of the Krasnoyarsk Kray ‘Arun (Revival)’<sup>51</sup> and an informal group of leaders and activists of Indigenous small-numbered peoples of the North, Siberia and the Far East called ‘Aborigin Forum’.<sup>52,53</sup> As a result of heated discussion on amendments to FL ‘On

Guarantees', the 'Revival' forwarded their opinion to the State Duma, but never received a response.

Murashko, a Russian anthropologist and one of the co-founders of the former IWGIA Moscow, stated that only one proposal from indigenous small-numbered peoples, among many others, was taken into consideration when the final draft of the law was edited. It concerned Article 7.1 (3(8)). She concludes that the main challenge of the amendments is their compliance with the Constitution of the RF when it comes to the requirement to prove national identity and the probability of refusing self-determination.<sup>54</sup>

## 2.2 The notion 'foreign agent' in the Russian legislation

In 2012 a new notion was introduced into the Russian legislation – 'a non-commercial organization functioning as a foreign agent' (foreign agent) in connection with amendments to the FL 'Non-Commercial Organizations'.<sup>55</sup> According to Article 2 (6) of FL 'On Non-Commercial Organizations,' "a non-commercial organization functioning as a foreign agent is understood in the present federal law as a Russian non-commercial organization that receives funds and other property from foreign states, their State bodies, international and foreign organizations, foreign citizens, stateless persons or persons authorized by them and (or) from Russian legal entities receiving funds or other property from the named sources (with the exception of open joint-stock companies with State participation and their branches) (foreign sources), and which participates, *inter alia*, in the interests of foreign sources, in political activities carried out on the territory of the RF." In short, according to the Law, NGOs must declare themselves 'foreign agents' if they exercise political activities and receive funds from abroad.

The law introduces a number of compulsory provisions and sanctions for such organizations, such as, for example, their inclusion in a special registry; indication of their status as 'foreign agent' in all documents and publications; and keeping separate accounting of income and expenses received within the framework of errands from foreign sources and other errands. Such non-commercial organizations must submit reports on their activities more often than other NGOs. Besides, an authorized body is obliged to carry out planned inspections and is entitled to suspend by its decision the activity of a foreign agent NGO for not applying for inclusion in a special registry provided by law, etc. The legislation establishes fines for non-commercial organizations who do not wish to be included into the registry of foreign agents. As a result of these additional requirements, many organizations have chosen to cease their activity to avoid legal risks.<sup>56</sup>

Turning to the history of the issue, the purpose of introducing a notion of a foreign agent and the corresponding normative regulation was to ensure publicity and transparency of finances coming from foreign sources to Russian non-commercial organizations participating in political activities. Besides, the aim was to ensure proper

control over NGO activities financed from foreign sources and pursuing political goals, *inter alia*, in the interests of their financial donors.<sup>57,58</sup>

In practice, this law has led to a gross violation of human rights. According to Alenkin “[w]hen analyzing the goals of legislative regulation and the practice of applying the relevant norms, one can observe a clear disproportion between them, manifested in the excessive interference of the State in the freedom of exercise of the right to associations.”<sup>59</sup> Most studies dedicated to a ‘foreign agent’ notion emphasize the duality of the Russian state policy towards NGOs. On the one hand, the State introduces repressive legislation that forces NGOs to reject international partnerships. On the other hand, the authorities open state programs to support Russian NGOs. This situation has contributed to an increase in the number of ‘pocket’ NGOs, whose activities aim at legitimizing the ruling regime.<sup>60</sup> All this is complicated by the fact that “[t]he fundamental institutional problem is a weak development of Russia’s institutions of charity, patronage and voluntarism. (...) It is aggravated by the lack of effective stimuli in the tax system for financing of non-commercial organizations by individuals and business. In this situation, foreign funding of Russian NGOs plays an important role.”<sup>61</sup>

The situation of human rights in Russia has attracted the attention of international bodies such as the Commissioner on Human Rights,<sup>62</sup> the Human Rights Committee,<sup>63</sup> the European Parliament<sup>64</sup> and others. The Special Rapporteur on Indigenous Peoples’ rights has emphasized the negative effect of the Law on the rights of indigenous small-numbered peoples of Russia.<sup>65</sup> Commenting on the introduction of the term ‘foreign agent’, the International Working Group on Indigenous Affairs observed: “[c]ivil society is affected by a continually shrinking space.”<sup>66</sup>

Despite the criticism, the Law exists and is valid, but its provisions must be executed for the purposes for which the Law was created. Both international bodies and Russian scholars point to multiple challenges regarding the content of the legal provisions on ‘foreign agent’. For example, the Human Rights Committee notes that “the definition of ‘political activity’ in the Law is very broadly construed.”<sup>67</sup> The definition permits authorities to register NGOs carrying out various activities as ‘foreign agents,’ without their consent or a court decision. These activities can relate to public life and include human rights and environmental issues.<sup>68</sup> According to the Committee, “procedure of removal from a ‘foreign agent’ list is complex.”<sup>69</sup> To conclude, the Committee recommends reviewing the procedural requirements and sanctions applicable under the law to ensure their necessity and proportionality. Besides, the Committee recommends dropping the notion ‘foreign agent’ from the law.<sup>70</sup> Minority Rights Group Europe states that a lack of legal clarity regarding the term ‘political activity’ means that it can be subject to wide interpretation.<sup>71</sup> The Russian scholar Korneichuk also states that the law contains “many errors of logical, legal and ethical character.”<sup>72</sup> In this regard, “the legislator should clearly identify these ‘functions of foreign agents’ that serve as the basis for including NGOs in the



registry. It is necessary to determine what kind of political activity is prohibited, taking into consideration that public activity is one of the basic human rights that cannot be limited.<sup>73</sup> As noted by some scholars, there exists “perception in the public mind of the notion a ‘foreign agent’ as a synonym for ‘people’s enemy’, ‘a traitor’.”<sup>74</sup> Thus, Korneichuk argues, ‘foreign agent’ must be replaced by the term ‘a Russian agent of a foreign principal’.<sup>75</sup>

The International Development Foundation for Indigenous Peoples of the North, Siberia and the Far East, ‘Batani’, is one of the indigenous organizations recognized as a ‘foreign agent’ in accordance with this law.

According to the author’s opinion, it is not only the number of listed NGOs that raises concern but the fact that NGOs have been threatened with being listed. For example, the NGO ‘The Fund of Sámi Heritage’ gained the attention of the regional Ministry of Justice.<sup>76</sup> The employees of the fund were informed about a possible unscheduled inspection. According to the head of the fund, Sámi activist Danilov, the grounds for the inspection was a complicated relationship with the prosecutor’s office.<sup>77</sup> The purpose of the inspection was to investigate if the fund and its activity fell within the definition of a ‘foreign agent’. According to Danilov, the actual reason for the inspection was the prosecutor’s office’s concern about the fact that the fund had sent a complaint to a UN Organization. In its complaint, the fund revealed the fact that the lands of traditional Sámi habitation had been granted to a hunter’s club, which was approved by the Government of the Murmansk Oblast. This situation is a vivid illustration of the threat to NGOs’ activities.

The novelty of the 2019 Russian legislation is the expanded range of ‘foreign agents’ included. Now even individuals can be recognized as ‘foreign agents’, in cases where they

- disseminate messages and materials made and (or) disseminated by a foreign mass media source acknowledged as a ‘foreign agent’, and (or) by a Russian legal entity established by foreign mass media and (or) participating in the above-mentioned messages and materials;
- get economic support or property from a foreign state, bodies thereof, international and foreign organizations, foreign citizens or stateless persons or persons authorized by them, foreign mass media, any of them acknowledged as a ‘foreign agent’; Russian legal entities established by mass media acknowledged as a ‘foreign agent’ and getting financing from abroad.

The decision to recognize individuals as ‘foreign agents’ was taken by the Ministry of Justice in agreement with the Ministry of Foreign Affairs. Individuals acknowledged as ‘foreign agents’ are required to establish a Russian legal entity which in turn will disseminate printed, audio, visual and other types of messages and materials (also via Internet) aimed at an unlimited number of persons on the territory of the RF. When establishing such a Russian legal entity, an individual must report to an executive

body authorized by the Government, and must comply with requirements established for NGO ‘foreign agents’. They are required to indicate on their materials that their messages and materials are issued and disseminated by a ‘foreign agent’.

At the moment, it is difficult to estimate how many individuals belonging to indigenous small-numbered peoples will be recognized as foreign agents due to the fact that the procedure for recognizing individuals as foreign agents has not yet entered into force and is at the project stage.<sup>78</sup> However, it seems that there may potentially be a large number of such citizens.

### 2.3 The State’s pressure on indigenous organizations with divergent opinions

The current situation in Russia is characterized by the increased attention of the State on and control over organizations concerned with human rights, and indigenous peoples’ rights, in particular. A vivid example is the case of RAIPON, although it is not recent. RAIPON was founded in 1990 and is an umbrella organization that unites 40 indigenous peoples of Russia. In 2012, the Ministry of Justice ordered to terminate all activity of the organization for six months.<sup>79</sup> This event raised concerns in international society.<sup>80</sup> According to some activists, the reason for suspending the activities of the organization was RAIPON’s opinion on indigenous peoples’ rights. After the ban, RAIPON was revived. The organization changed the character of its relations with the Kremlin, becoming more cooperative and compliant.<sup>81</sup> The current leader of RAIPON is a deputy of the State Duma, representing the United Russia party. Some former members of RAIPON had to move abroad to secure their personal safety because of the authorities’ actions. Among them are Pavel Sulyandziga, who moved to the USA, and Dmitry Berezhkov, who moved to Norway.

A more recent example illustrating the State’s pressure on indigenous organizations is the case of CSIPN.<sup>82</sup> This is one of the oldest organizations representing the interests of indigenous small-numbered peoples of Russia. Its activity in Russia was terminated in November 2019 by a court’s decision.<sup>83</sup> CSIPN is the only organization of indigenous small-numbered peoples of Russia which has special consultative status and accreditation power in agencies and structures of the UN such as UNE-SCO, the UN Environmental Program, the Food and Agriculture Organization of the UN, the UN Executive Secretary of the Convention on Biological Diversity, and the UN Economic and Cultural Council. In addition, CSIPN has full membership in the educational network of the University of the Arctic, various worldwide networks of indigenous peoples of the world and promotes participation of indigenous small-numbered peoples in international forums important for them. Thus, IWIGA states: “[t]his decision affects one of the best established and last remaining internationally known Indigenous organizations in Russia.”<sup>84</sup>

The termination of the organization’s activity by court order was based on formalities regarding the organization’s location, inconsistency of the organization’s charter with legislation, and non-registered educational activity of the organization. Even

though the organization immediately started to correct their documentation, the Moscow City Court rejected giving additional time for editing the documentation.<sup>85</sup> The Center's appeal and cassation complaints have been rejected by the corresponding courts.<sup>86,87</sup>

Spokesperson for Foreign Affairs and Security Policy/European Neighbourhood Policy and Enlargement Negotiations, Kocijancic, thinks that the termination of this organization goes “against an independent and active civil society. [...] It is vital to create the proper conditions of the State's support for NGOs and to foster an open and inclusive environment for their growth.”<sup>88</sup> Kocijancic maintains that the active position of such organizations is essential for every democratic society, and a tribute to fundamental human rights and freedoms. She claims that “the European Union stresses that the fundamental right to freedom of association is enshrined in the Russian constitution and is part of the Russian Federation's international obligations.”<sup>89</sup>

According to the head of CSIPN, their activity was terminated because they support the local population, which has interfered with the State's activities regarding the extraction of oil, gas and gold.<sup>90</sup> Indigenous small-numbered peoples need access to their lands and to their territories where they carry out reindeer herding, hunting and fishing and these territories are areas where extractive industries take place. In this conflict of interests, the State has taken the side of the extraction companies.

According to the organization's lawyer, Vaipan, CSIPN will go as far in protecting its rights as to appeal to the European Court of Human Rights (ECHR).<sup>91</sup>

These two examples of relatively large NGOs demonstrate how aggravated the situation is. Smaller organizations have even less power to oppose and resist the State.

#### 2.4 Amendments to the Constitution

Amendments to the Constitution of the RF were approved by popular vote in July 2020.<sup>92</sup> Prior to the vote, many indigenous small-numbered peoples expressed their opinions on necessary changes to the Constitution. For example, in the Nenets Autonomous Okrug, the Nenets people proposed that the rights of indigenous small-numbered peoples to protect their languages and traditional nature use, primarily for reindeer herding, be specified and guaranteed in the Constitution.<sup>93</sup> Moreover, some representatives of the regional authorities declared that “regional legislators were officially withdrawn from this process”<sup>94</sup> (from the process of discussing amendments to the Constitution). Even though the proposals were forwarded to the State Duma, they were ignored at the federal level.<sup>95</sup>

The new text of the constitutional Article 68 (1) reads: “State language of the RF throughout its territory is Russian as the language of a *State-forming people* that is part of a multinational union of equal peoples of the RF.”

This amendment has met with a lot of resistance. The Council of the World Forum of the Tatar Youth appealed to the State Duma to reject the amendment “as contrary to the principles of a democratic Federal State”.<sup>96</sup> The All-Tatar Public

Center, standing in opposition to the authorities, manifested that the amendment violates the rights of 25 million *non-State forming* citizens of the RF. The State Duma objected saying that activists should have expressed their position when the amendments were under consideration in the working group.<sup>97</sup> Some expressed their opinion that Russia is on the way to forming a unitary State where one people enjoy special status while others, though recognized as equal, are afforded downgraded status.<sup>98</sup> It is worth noting that it was primarily representatives of the republics and non-indigenous small-numbered peoples who criticized this amendment. In addition to the Tatars, representatives of the Kabardino-Balkarian Republic expressed their opinion: “[t]he head of Kabardino-Balkarian human rights center notes that the amendments should be treated as a continuation of the Kremlin’s antifederal policy.”<sup>99</sup> This situation is potentially dangerous for indigenous small-numbered peoples who, compared to peoples of the republics, have an even vaguer status. The Kremlin’s representatives refused to see the inherent contradiction between the amendment and the Constitution.<sup>100</sup>

Ex-member of the UN Permanent Forum on Indigenous Issues, Loode, remarks that the amendments to the Constitutions can be criticized for their internal inconsistency, and, more importantly for the excessive moral hierarchy which they create for the people of Russia. According to him, this can have unpredictable consequences for Russia’s national stability. Loode states that “internal inconsistency is reflected in the labelling of the Russians as ‘a State-forming people’, while the same sentence defines the Russian Federation as a union of peoples with equal rights. If the latter is true and is the main issue then why distinguish one from the other? How does this correlate with the idea of equal rights? Obviously, this concept was added to allay fears of overt apartheid. But the logical inconsistency remains and is not easy to explain.”<sup>101</sup> Loode informs that this amendment will surely raise more confusion among the non-State forming peoples of Russia.

Article 79 was also amended and reads as follows:

The RF can participate in international associations and delegate part of its powers to them in accordance with international treaties of the RF if this does not entail limitations on the rights and freedoms of man and citizen and does not contradict the foundations of the Constitutional structure of the RF. Decisions of the international bodies adopted on the basis of the provisions of international treaties of the RF and which in their interpretation contradict the Constitution of the RF, ***are not subject to enforcement in the RF.***

The constitutional changes concern the second part of the mentioned article. Despite the existence of Article 15 (4), which establishes the priority of international law, the Russian authorities still seem to be trying to limit the sphere of influence of international law and give priority to Russian law (Article 15 was not amended in a popular vote because it cannot be changed through amendments but only via adoption of a new Constitution). The above-mentioned amendments to Article 79 potentially

mean that the decisions of bodies such as ECHR will not necessarily come into effect in Russia. In cases where indigenous organizations appeal to the Court for protection of their rights, as for example CSIPN intended to do (See Subsection 2.3), these rights can still be violated.

The article which directly concerns the rights of indigenous small-numbered peoples is Article 69. At present, this Article is complemented with paragraphs 2 and 3 (originally, it provided guarantees only to indigenous small-numbered peoples):

2. The State protects the cultural identity of all peoples and ethnic communities of the RF, and guarantees the preservation of ethno-cultural and language diversity.
3. The RF provides support to compatriots living abroad in the exercise of their rights, ensuring protection of their interests, and preserving all-Russian cultural identity.

Concerns have been raised by some indigenous activists about the supremacy of national law over international. This increases the possibility to manipulate the decisions of international bodies. Besides, a covert signal is given to the bureaucracy that there is no need to comply with international law when dealing with international issues.<sup>102</sup>

From the point of view of the author of the present article, it is unclear why paragraph 3 was added to the article which concerns indigenous small-numbered peoples. Moreover, it is confusing why the legislator focuses only on the cultural identity and preservation of ethno-cultural and linguistic diversity and ignores other rights of indigenous small-numbered peoples, such as land rights and rights to natural resources. Murashko is of a similar opinion, emphasizing that the meaning of Article 69 of the Constitution is blurred because of the new clause 2 in that it limits the range of indigenous small-numbered people's rights to the 'preservation of ethno-cultural and linguistic diversity,' meaning that the rights to land and resources are ignored by default.<sup>103</sup> She highlights that para 3 of the Article 69 does not fit into the context of the Article since it does not regard indigenous small-numbered people's rights.

Commenting on para 2 and 3, Berezhkov and Sulyandziga point out: "[u]nfortunately, we were unable to find any intelligible explanations from the official and/or officially registered documents for why it was necessary to make these amendments to Article 69 of the Constitution, despite the fact that we carefully followed the entire path of the bill in the State Duma."<sup>104</sup> Therefore, they conclude the following: "we can assume that there are no public documents explaining the meaning of the amendments to Article 69, at least such explanations are not reflected in the official 'bill's passport' in the web-system of the State Duma."<sup>105</sup>

## **Conclusion**

At present, 47 indigenous small-numbered peoples live in the RF. The size of an indigenous group is determined by the Census data. Nevertheless, individual ethnic

identification of a particular person to obtain special rights has been problematic and nonsystematic up to date. Amendments to the FL ‘On Guarantees’ have been adopted regarding a person’s attribution to an indigenous group. A registration procedure and a unified registry are currently under elaboration by the RF Government. It is planned that the registry will come into use in 2022. It is important to note that the state authorities have undoubtedly tried to regulate this issue, however, many questions have arisen regarding these amendments. Indigenous small-numbered peoples claim that many of their proposals were not taken into consideration. It is unclear why certain types of information must be submitted to the registry; whether children of people who already have indigenous status will have to apply to be included in the registry or if this will happen automatically; whether a whole family can apply to be entered in the registry or if every family member must apply individually. Besides, the application and submission procedures are unnecessarily complicated.

Alongside the problem of the attribution of individual members of indigenous communities to indigenous small-numbered peoples, this article has highlighted several other issues currently problematic for the implementation of indigenous small-numbered peoples’ human rights in Russia. One of these issues is the introduction of the notion ‘foreign agent’ in relation to NGOs as well as individuals since 2019. NGOs and individuals recognized as such must comply with additional legal requirements to continue their activity, a burden which may result in the termination of their activities. Those organizations and individuals not yet recognized as such face the threat of enrollment in these lists. This situation is typical of indigenous organizations and individuals belonging to indigenous small-numbered peoples. Still another issue is the State’s pressure on independent indigenous organizations. Finally, the author discusses the amendments to the Constitution. The introduction of ‘state-forming people’ and the constitutional provision on the possibility of not fulfilling the decisions of international bodies adopted on the basis of the provisions of international treaties of the RF, can potentially affect the human rights of indigenous small-numbered peoples of Russia negatively. In addition, Article 69 is complemented with two paragraphs which have nothing to do with indigenous small-numbered peoples (para 3) nor do they cover the whole range of indigenous rights (para 2).

## NOTES

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12. Land Code of the RF of 25 October 2001 N 136-FL.
13. Water Code of the RF of 3 June 2006 N 74-FL.
14. Tax Code of the RF (part two) of 5 August 2000 N 117-FL.
15. Forest Code of the RF of 4 December 2006 N 200-FL.
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25. Andrichenko. "Assessment of the need of and appropriateness of systematization of the legislation of the Russian Federation on the regulation and protection on the rights of indigenous small-numbered peoples of the North, Siberia and the far East of the Russian Federation," 157.
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