

THE DEVELOPMENT OF CONSTITUTIONAL NORMS ON INDIGENOUS PEOPLE'S RIGHTS FOR THE TRADITIONAL USE OF LANDS AND NATURAL RESOURCES

Elena Gladun

SUMMARY: The article touches upon the issues of indigenous rights and interests established in the Constitution of Russia in 1993. The author pays particular attention to the right of indigenous peoples to lands and natural resources. The federal and regional legislation is analysed in order to show the lack of legal mechanisms in the implication of constitutional provisions.

KEY WORDS: constitutional rights of indigenous peoples, traditional territories, land use

There is a growing public interest in the world towards indigenous people, their rights and interests. Nowadays indigenous people's lives are affected by different factors including environmental changes, industrial development, chemical contaminants, and social integration. Indigenous populations take much effort to promote their way of life and to use the environment and natural resources for living sustainably. They are a source of traditional knowledge as they have responded to major climatic and environmental changes by altering group sizes, relocating, and being flexible with seasonal cycles in hunting or employment. However, the indigenous people have very limited opportunity to effectively voice their opinions in international dialogue on the environment and resources.¹

The United Nations supports aboriginal people in the world: two International Decades of the World's Indigenous People were proclaimed by the General Assembly consecutively in 1993 and 2004, adopted international documents including the Declaration on the Rights of Indigenous Peoples was adopted on 13 September 2007.² International documents set subjective and objective criteria, which are jointly applied to guide the identification of indigenous peoples in a given country. According to these criteria, indigenous peoples have social, cultural, and economic conditions that distinguish them from other sections of the national community; have their status regulated wholly or partially by their own customs or traditions or by special laws or regulations; have a special relationship with the land and natural resources. These characteristics immediately underline the importance of land, territories, and resources for indigenous peoples.³

¹ Eunjung Park. Feature: Searching for a Voice: the Indigenous People in Polar Regions.8 Sustainable Dev. L. & Pol'y 30. P. 30.

² Resolution adopted by the General Assembly 61/295 Available at
// http://www.un.org/ru/documents/decl_conv/declarations/indigenous_rights.shtml.

³ Birgitte Feiring. Indigenous Peoples' Rights to Lands, Territories, and Resources. Available at

Russia is one of those countries that incorporates international rules concerning indigenous peoples into constitutional provisions. The first norms regulating indigenous peoples appeared in the Constitution of the Russian Federation in 1993 and since that time legislation for indigenous peoples has been extensively developed both on a federal and regional level. The laws establish standards for the state support of indigenous peoples, measures for the preservation of their unique culture, language, traditions, as well as guarantees for their traditional occupations and lifestyles. The constitutional provisions have become the frameworks for national and regional policies towards the indigenous peoples of Russia.

The Russian Constitution provides for the protection of indigenous peoples establishing equal conditions for the development of all peoples and ethnic groups in the state. It guarantees the equality and self-determination of peoples in the Russian Federation (part 3 of Art. 5); the equality of rights and freedoms of citizens, regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership of public associations, and also of other circumstances (part 2 of Art. 19); the right of everyone to freely determine and indicate his or her nationality, to use his or her native language, the right to a free choice of the language of communication, upbringing, education and creative work (article 26); the right for all people to preserve their native language and to create conditions for its study and development (part 3 of Art. 68).⁴

There are special provisions in the Constitution guaranteeing “the rights of indigenous small peoples according to the universally recognised principles and norms of international law and international treaties and agreements of the Russian Federation” (article 69), the basic one is the right to the protection of their “traditional living habitat and of traditional way of life” (article 72). These provisions are included in Chapter 3 “The Federal Structure” and in this context they become the framework of national and regional policy.⁵

The Russian Federation is implementing international rules on the legal status of indigenous peoples and their rights. The main international documents which are the guidance for national and regional legislation are the Indigenous and Tribal Populations Convention, 1957 (No. 107); the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169); the UN Declaration on the Rights of Indigenous Peoples, 2007. The documents cover a wide range of issues of indigenous peoples such as land; recruitment and conditions of employment; vocational training, handicrafts and rural industries; social security and health; and education and means of communication. The Indigenous and Tribal Peoples Convention, developed by the International Labour Organisation (ILO) on 26 June, 1989, says in article 2: “Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and

<http://www.landcoalition.org/publications/ilc-publishes-study-indigenous-peoples%E2%80%99-rights-lands-territories-and-resources>

⁴ SZ RF. 2009. No. 4. P. 445.

⁵ Kryazhkov V.A. *Korennye Malochislennye Narody Severa v Rossiiskom Prave* // NORMA, 2010. P. 75.

systematic action to protect the rights of these peoples and to guarantee respect for their integrity”.⁶

Some international acts underline special conditions for a traditional way of life of indigenous peoples. For example, the Convention on Biological Diversity entered into force on 29 December 1993 and ratified by Russia on 29 February 1995 in article 8 states that each party shall “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity”.⁷

International rules and constitutional norms concerning indigenous peoples are implemented, first of all, in the federal legislation. V.A. Kryazhkov characterises the federal laws related to indigenous peoples as “comprehensive and developed”.⁸

The Federal Law “On Guarantees of Rights of Indigenous Peoples in the Russian Federation” is a basic document that determines the status of indigenous peoples in Russia, protects their rights and interests.⁹ For its realisation the Government adopted the Concept of Sustainable Development of Indigenous Peoples of the North, Siberia and the Far East in 2012-2015” (4 February 2009).¹⁰ On 12 October 2013, the Prime Minister of the Russian Federation Dmitry Medvedev signed an order approving the plan of activities to implement this concept. The plan aims to improve the quality of life of indigenous peoples and to protect their rights, as well as to develop traditional ways of life and traditional occupations, and to preserve their cultural heritage.

The federal legislation establishes some specific rights of the indigenous peoples of the North, Siberia and Far East guaranteeing their traditional habitat and lifestyle: territories of traditional natural resource use; land use regime; legal regime of water and forest use; consent on the acquisition of lands for non-traditional forms of occupation; priority access to hunting and fishing resources; tax benefits; limits on the use of wildlife and quotas of aquatic biological resources; gratuitous use of land, etc. However, the Federal Government and the Ministry of Regional Development have not adopted the sub-laws regulating the issues mentioned above and this fact has become an obstacle for indigenous peoples to enjoy their rights established by the Constitution and federal laws.¹¹

The most important right declared by international acts and national legislation is the right to possess and use lands and natural resources for traditional occupations and ways of life.

Traditional occupations and the lifestyle of indigenous peoples is the main condition for their social-economic development in any country. In the North and the

⁶ Konvencii i Rekomendacii, Prinjatye Mezhdunarodnoy Konferenciej Truda 1957 – 1990. T. II Geneva: Mezhdunarodnoe buro truda, 1991. P. 2193 – 2207.

⁷ Convention on Biological Diversity. Available at: <http://www.cbd.int/convention/articles/default.shtml?a=cbd-08>

⁸ Kryazhkov V.A. Korennye Malochislennyye Narody Severa v Rossiiskom Prave // NORMA, 2010. C. 77

⁹ SZ RF.1999. No. 18. P. 2208.

¹⁰ SZ RF. 2009. No. 7. Ст. 876.

¹¹ See Tranin A.A. Ecologo-pravovyye Aspekty Nacionalnoy Strategii Rossii Po Voprosam Razvitiya Korennykh Malochislennykh Narodov // Ecologicheskoe pravo, M.: YURIST, 2009, No. 4. P. 7-12.

Arctic with its intensive economic and industrial development, the protection of the indigenous way of life is a factor in their survival. Using lands for traditional occupations such as reindeer breeding means the exploitation of huge territories which can also be used for industrial development. In Russia there is a system of “land categories” which means that every land plot is referred to one of seven landscape types such as agricultural lands, urban territories (settlements), lands for industry and some special objects; protected natural landscapes, forest lands, lands under water objects; reserved lands. The lands used by indigenous peoples may at the same time be used by the oil and gas industry, agriculture industry, landowners. The oil and gas industry and indigenous peoples have been increasingly coming into contact with each other over the past few decades as the search for new oil and gas resources has engendered more exploration and development in lands that indigenous peoples traditionally occupy or customarily use.¹²

Therefore article 9 of the Constitution is very important in protecting the right of indigenous peoples to lands. In part 1 the article reads: “lands and other natural resources in Russia are used and protected as the basis of traditional life and occupations of the people inhabiting the territory”. The Constitutional Court of the Russian Federation expounded this norm in its ruling on 9 January 1998 No. 1-P “The Case on the Constitutionality of the Forest Code of the Russian Federation”. The Constitutional Court sets: “land and other natural resources (subsoil, forest, wildlife) are the natural wealth, the commons, i.e. it is public property of multinational people of Russia, and a specific type of federal property, which has a special legal regime”.¹³ Some authors suggest another interpretation of this constitutional provision. Thus, E.V. Zhukova believes that, being public property of the multinational people of Russia, the land is, first of all, the property of the people who live on this territory and who have a close relationship with the land. And it is fair for the indigenous peoples to have certain advantages over the non-indigenous people because the traditional use of land is the main condition for the aboriginal way of life, economy and culture. It is even more important if we understand the fact that the traditional use of lands means their sustainable development, which preserves the lands and resources for the next generations of Russia.¹⁴

To protect indigenous rights to land and natural resources means to set rules and standards regulating land issues in legislation. Russian federal legislation fails to recognise the need for indigenous people to use lands freely to maintain their traditional way of life. Legal rules concerning indigenous rights to lands, territories and resources are characterised as non-compliable with constitutional provisions, incomplete, declarative and they do not imply mechanisms for their realisation.¹⁵

¹² Indigenous Peoples and the Oil and Gas Industry Context, issues and emerging good practice. IPIECA 2011 P. 3.

¹³ Postanovlenie Konstitucionnogo Suda ot 9 janvarja 1998 No. 1-P «Po delu o proverke konstitucionnosti Lesnogo Kodeksa Rossiiskoy Federacii // SZ RF. 1998. No. 3. P. 429.

¹⁴ Zhukova E.V. Pravo na Tradicionnoe Prirodopolzovanie: Ego Mesto v Sisteme Prav Korennyh Malochislennyh Narodov i Problemy Realizacii// Vestnik AltGTU im. I.I. Polzunova, No. 1-2 2010. P. 135.

¹⁵ Galinovskaya E.A. Osobennosti Pravovogo Regulirovania Poryadka Ispolzovania Zemel Obschinami

Federal laws establish general provisions for the realisation of the rights of indigenous peoples to land and other natural resources. In particular, it is mentioned that in Russia a special legal regime is established for the territories of traditional natural resource use.¹⁶

For example, the Federal Law “On Guarantees of Rights of Indigenous Peoples in the Russian Federation” (30 April 1999 No. 82-FZ) sets out the right of indigenous peoples, associations of indigenous peoples to gratuitous use of lands referred to different categories and common minerals in order to maintain their traditional occupations and way of life, the procedure of land granting is regulated by federal and regional legislation.¹⁷ The Forest Code of the Russian Federation (4 December 2006 No. 200-FZ) provides for the right of indigenous peoples of the North, Siberia and Far East of Russia to harvest timber for their own needs on the territories of their traditional habitat and occupations.¹⁸ The Water Code of the Russian Federation (3 June 2006 No. 74-FZ) regulates the use of water objects by indigenous peoples on their traditional territories.¹⁹ The Federal Law “On Production Sharing Agreements” (30 December 1995 No. 225-FZ) establishes that in the case of developing deposits located on the traditional territories the main condition of the auction should be the compensation for indigenous peoples whose traditional land is used.²⁰

The main federal law regulating aboriginal land rights is “On Territories of Traditional Natural Resource Use”. According to article 10 of this act land plots and waters are granted for indigenous peoples within the special territories to be used for traditional occupations. Article 11 of the same act sets out the legal regime of traditional territories and refers to other federal laws that regulate the land rights and resource-related rights. However the law doesn’t set the conditions under which land rights are provided and protected because this is the scope of the land legislation. Thus, in spite of the importance of lands and resources for traditional occupations and lifestyle of indigenous peoples, in Russian legislation there are no norms granting them specific rights to land and resources.

Article 97 of the Land Code of Russia provides that in the areas of native settlements and traditional occupations of indigenous peoples special territories of traditional resource use can be organised. The procedure of organisation of such a territory, establishing its borders and legal regime is regulated by the Government of the Russian Federation.

Korenykh Malochislennykh Narodov v Regionah Sibiri i Dalnego Vostoka RF I Ih Uchastia v Ohrane Prirodnkh Resursov // Sbornik vystupleniy, dokladov i I materialov Vserossiiskogo nauchno-prakticheskogo seminaru «Zemlepolzovanie v mestah prozhivania korenykh malochislennykh narodov Rossii: zakonodatelstvo i praktika». M.: PROSPEKT, 2010. P. 22.

¹⁶ *Ibid*

¹⁷ SZ RF. 1999. No. 18. P. 2208.

¹⁸ SZ RF. 2006. No. 50. P. 5278.

¹⁹ SZ RF. 2006. No. 23. P. 2381.

²⁰ SZ RF. 1996. No. 1. P. 18.

Realising this norm the Government approved a list of traditional territories and traditional occupations of indigenous peoples of the Russian Federation by the Government Order (8 May 2009 No. 631-p).²¹ Nevertheless the Government hasn't established a legal regime and conditions of use of these territories.

Commenting on the present situation V.A. Kryazhkov wrote: "The Government does not fulfil its obligation to adopt the necessary regulations; for a long time it rejects requests on organising traditional territories, focusing on law amendments it does not take particular measures and doesn't involve practical mechanisms for traditional territories' organisation. De facto: the policy of the Federal Government violates the rights of indigenous peoples to traditional resource use and a traditional lifestyle".²² This opinion is shared by S.N. Kharjuchi, the President of Indigenous Peoples of the North, Siberia and Far East Association. He says: "Up to now there haven't been any federal traditional territories organised and the number of regional traditional territories is too small. Moreover, there is only one federal law with a few instruments protecting indigenous rights to traditional lands and lifestyle and this law is not enforced properly because of the inaction of federal authorities"²³. The result is a situation in which indigenous peoples cannot enjoy their rights to traditional land and resource use.²⁴

The rights of indigenous peoples to lands and natural resources are also in the scope of land and forest legislation. General and special rules on land rights are set out in articles 15, 20-24, 29, 34 of the Land Code adopted on 25 October 2001 (No. 136-FZ); articles 38, 71-74 of the Forest Code adopted on 4 December 2006 (No. 200-FZ); article 10 of the Federal Law "On Turnover of Agricultural Lands" adopted on 24 July 2002 (No. 101-FZ). The analysis of these norms proves that in Russia there are no legal provisions for the gratuitous use of lands by indigenous peoples even in the areas of their traditional habitat and way of life. Indigenous peoples can only use lands under general conditions: on land lease agreement or property rights. These conditions considerably narrow the opportunities of indigenous peoples to use lands and resources in the traditional form.

Part 3 of article 7 of the Land Code reads that the regions of the Russian Federation and municipalities can regulate the use of lands and set a special legal regime for territories of traditional occupation and lifestyle if these laws do not contradict federal legislation. Interpretation of this norm together with the norms of the Federal Laws "On Guarantees of Rights of Indigenous Peoples in the Russian Federation", "On Territories of Traditional Natural Resource Use" lets the author

²¹ SZ RF. 2009. No. 20. P. 2493.

²² Kryazhkov V. A. Territorii Tradicionnogo Prirodopolzovaniya kak Realizacii Prava Korenyh Malochislennyh Narodov na Zemli // Gosudarstvo i pravo. 2008. No. 1. P. 14

²³ Otchetny Doklad Prezidenta Associacii Korenyh Malochislennyh Narodov Severa, Sibiri i Dalnego Vostoka S.N. Kharjuchi // Mir korenyh narodov. Zhivaja Arktika. Almanah Associacii korenyh malochislennyh narodov Severa, Sibiri i Dalnego Vostoka, No. 22, 2009. P. 7.

²⁴ Zhukova E.V. Pravo na Tradicionnoe Prirodopolzovanie: Ego Mesto v Sisteme Prav Korenyh Malochislennyh Narodov i Problemy Realizacii// Vestnik AltGTU im. I.I. Polzunova, No. 1-2 2010. P. 135.

assume that the regional authorities are vested with the powers to regulate land issues and therefore they can fill the gaps of federal regulations. But the problem is that the Land Code itself restricts the authority of regional legislature in land issues.

It happens because the federal land laws (Land Code and others) regulate the whole set of issues concerning land rights, procedure of land granting, land transactions, disposal of land, preservation of lands, etc. The Land Code set the legal regime of all land categories, including agriculture lands (on which traditional settlements are mostly located). According to part 1 of article 76 of the Russian Constitution “on the issues under the jurisdiction of the Russian Federation federal constitutional laws and federal laws shall be adopted and have direct action in the whole territory of the Russian Federation”. Thus, the issues of land use, traditional territories’ organisation, indigenous rights to lands and resources are under the jurisdiction of the federal laws and regional laws cannot comprise special rules in the same issues.

This legal interpretation is approved by the high judicial authorities of the Russian Federation (for example, Determination of the Supreme Court of Russia on 16 May 2012 No. 92-APG12-5, Determination of the Supreme Court of Russia on 26 June 2003 No. 57-G-2).

The author makes the conclusion that there is no legal instruments for the realisation of constitutional norms providing indigenous rights to lands and natural resources either in federal or in regional laws and regulations.

Summing up it should be noted that the Constitution of 1993 provides rights of indigenous peoples and these rights are concretised and guaranteed in federal and regional legislation, still there are some gaps in the realisation of indigenous rights, namely, the right to use lands for traditional occupation and lifestyle. The analysis of legal provisions and practice makes it possible to suggest some proposals.

1. Many problems of indigenous rights to lands and natural resources can be resolved if Russia ratifies the Convention concerning Indigenous and Tribal Peoples in Independent Countries and incorporates its rules to the national legislation. Indigenous Peoples hold specific rights under international law and in many national legislative contexts. It is the responsibility of Russian Government to uphold and protect indigenous peoples’ rights.

2. The federal laws and sub-laws providing indigenous rights to lands and natural resources are not systematised, not coordinated and have many references to other laws. Also they do not include legal instruments for the realisation of indigenous rights. It is necessary to amend the Land Code and the Federal Law “On Territories of Traditional Natural Resource Use” with the traditional right of indigenous peoples to the gratuitous use of land on the territories of their traditional habitat and occupations.

3. In order to protect the areas of traditional habitat and to provide conditions for traditional occupations there should be a special legal regime for the traditional territories, especially when they are used for non-traditional purposes.

The regional authorities should be empowered with the right to establish and guarantee the rights of indigenous peoples to lands and natural resources and to

regulate legal regimes of traditional territories. The suggested amendments can guarantee a comprehensive realisation of constitutional norms concerning indigenous rights and interests and the effect of it will be the sustainable development of indigenous peoples of Russia who have traditional knowledge and attitudes to the land and natural resources.