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PRIMARY ELEMENTS OF THE INDIGENOUS PEOPLES' RIGHT TO SELF-DETERMINATION AND THEIR REFLECTION IN INTERNATIONAL CASES

Maxim Yu. Zadorin[1], Elena F. Gladun[2]

[1] *Northern (Arctic) Federal University named after M.V. Lomonosov, Arkhangelsk, Russia*

[2] *University of Tyumen, Tyumen, Russia*

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The article touches upon the issues of law enforcement and court practice related to the collective rights of aboriginal communities.

The purpose of the article is to reveal the content of the right to self-determination through the prism of the most significant cases related to indigenous peoples.

The methodological basis of research is the general principles of scientific knowledge, widely used in works in the field of law: system-structural, formal-legal, comparative-legal, historical, methods of analysis and synthesis, analogies, etc. Particular attention was paid to the formal legal method, which was used by the authors of the study to analyze international judicial practice on the rights of indigenous peoples, as well as, in some cases, the national legislation of the countries participating in a particular case.

The main results, scope of application. The right to self-determination of indigenous peoples is multicomponent and includes a number of specific elements and facets of interpretation. The authors have made an attempt to reveal the fundamental elements of the right to self-determination of indigenous peoples, which, in their opinion, consist of: the right to sovereignty as such, or autonomy and recognition as collective subjects of law, the right to land and resources, traditional nature management, autonomous education, mother-tongue and culture.

For each of the above-mentioned elements, a specific case is described, which was considered in international courts, primarily in the International Court of Justice, the Inter-American Court of Human Rights, the ECHR and etc.

Conclusions. International recognition of a state through inclusion in the UN General Assembly is impossible without the permission of the Security Council; the issue of "effective occupation" has played and continues to play a large role in the issue of governance and sovereignty over a specific space and territory, and not only settlers, but also traditionally living indigenous peoples play a significant role;

Indigenous peoples living in the coastal zone should have the right to dispose of income from the exploitation of the continental shelf; the relationship with the land is not only a matter of ownership and production, but a material and spiritual element that indigenous peoples must fully enjoy, if only to preserve their cultural heritage and pass it on to future generations; the status of "national minority" deprives the indigenous people of priority in the use of land for traditional reindeer herding; means of ensuring freedom of expression of indigenous peoples is an important element for the promotion of identity, language, culture, self-identification, collective rights.

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1. Introduction

The international system of indigenous peoples' rights is based on the principle of recognizing them as self-sufficient "subjects-actors" who for many centuries were in colonial dependence, in conditions of oppression by dominant societies and, in connection with which, the international community and most states grant them special rights, in particular, the "right to self-determination" and "development" [1].

At the same time, the existing international mechanisms for the protection of "aboriginal rights" establish general frameworks of self-determination, emphasizing the essential difference between "indigenous peoples" and "peoples" in general, mentioned, for instance, in the International Covenant on Civil and Political Rights of 1966 (part 1 article 1).

Self-determination, as a general rule, is the right to use wider autonomy in the political, economic, social, cultural spheres, including through the foundation of an independent state. It should be noted that currently self-determination of indigenous peoples in global political system is absent de jure and de facto. An exception to this rule is, perhaps, the broad autonomy of Greenland.

In most countries, indigenous peoples are under the government "protection" because they are considered unable to regulate their life independently, and governments are aimed at preserving the traditional way of life, culture, religion and crafts, transferring their experience to future generations. That is why article 46 of the 2007 Declaration on the Rights of Indigenous Peoples (UNDRIP) makes clear that aboriginal "self-determination" cannot be associated with a violation of the principle of "territorial integrity" [1].

At the same time, ethnic, cultural and natural resource rights are usually extremely politicized and is under the special dominance of independent states. These states, on the one hand, desire general civil unity (using various terms within the framework of ethnopolitics, including "one common civil nation", "American people", "melting pot"), and on the other hand, they grant specific population groups with particular rights and guarantees.

Nevertheless, in many states there are no by-laws that would clearly and specifically determine procedures to support and guarantee constitutional rights to traditional use of natural resources, to establish the status of particular ethnic groups, and to protect the "mother language" [2], as well as, e.g., procedures for exercising the right to representation in government at the local, regional and national levels [3].

Even if there is appropriate legal support at the international and national levels, the issue of law enforcement will always be at the forefront. This is due not only to the presence of "declarative" or the imperfection of "reference-blank" norms, but also to the fact that ethnopolitics always affects the state system, and any mistakes, including legislative ones, can lead to serious social turbulence associated with ethnic self-determination, since certain rights and guarantees for ethnic groups often become a factor in social tension.

Hence legislators are not willing to offer specific norms related to indigenous self-determination in order to be able to follow social processes and submit controversial issues for decision by the highest judicial instances.

National law in this area is developing tremendously slowly and it is not necessary to expect the speedy implementation of international standards in the field of the rights of aboriginal communities at the national level, and therefore, exclusive attention should be paid to law enforcement and judicial practice.

Thus, the objective of our research is to comprehensively study the right to self-determination of indigenous peoples, taking into account how certain elements of this right are considered in international courts.

As M.P. Fomichenko mentioned:

"The problem of the right to self-determination is extremely complex in theoretical and in political sense. Nationalist tendencies and groups have always insisted on unconditional and immediate secession, seeking the disintegration of multiethnic states by the methods of separatism and

[1] Declaration on the rights of indigenous peoples (UNDRIP). United Nations. URL: https://www.un.org/ru/documents/decl_conv/declarations/indigenous_rights.shtml

national enmity" [4].

On the other hand, the self-determination of any social group does not necessarily mean isolation or independence, or even full separation. Some of them may become self-determined in the sense that they will reject any kind of independence. Others can self-determine in such a way that they will give part of their rights to the community, and they will manage part of it themselves. Still others will renounce any "guardianship" or "protection". Undoubtedly, many types of self-determination exist and can be formulated regardless of the political will of the state.

We understand the right of indigenous peoples to self-determination as the genetic desire of peoples to independently govern their own destiny, in conditions of complete freedom, to determine their own internal and external political status at their own will, to exercise their own political, economic, social and cultural development.

Part 1 Article 1 of the International Covenant on Civil and Political Rights of 1966 (ICCPR) enshrines the right of peoples to self-determination. The same right is contained in the article 3 UNDRIP. However, the question of to what extent it is possible to exercise the people's right to self-determination remains yet open. The doctrines and concepts of this right are various, ranging from "positivist approach", when this right can only be delegated "from above", by the governments, to very radical ones, when it is stated that this right exists regardless of established state borders, since the people should have the right to independently choose the level of their political independence.

Russian legal researchers working on legal doctrines of self-determination are Garipov R.S. and Andrichenko L.V. (the topics of their studies are indigenous peoples in international law) [5] [6], Kryazhkov V.A. (Russian constitutional law on the rights of indigenous peoples) [7], Abashidze A.K. (general issues of human rights, indigenous peoples and national minorities [8]), etc.

International researchers studying issues of self-determination are Christie Gordon (self-determination in Canada) [9], Valmaine Toki (self-determination of indigenous peoples in the field of criminal law) [10], Jessica Eichler (indigenous self-determination in Latin America) [11], Margaret Connell-Szasz (American Indian right to education) [12], Andrew Gray (indigenous self-determination of the Amazon) [13], Mark Nuttall (self-determination and indigenous peoples of the Arctic) [14], Alexandra Xanthaki (self-determination of indigenous peoples at the UN level) [15], Timo Koivurova (self-determination of Arctic indigenous peoples) [16], James S. Anaya (indigenous self-determination: international and national practice) [17] and others.

Over the past century, a sufficient amount of judicial practice has been accumulated in the field of arbitration procedures, litigation, which makes it possible to trace the vector of development of the international legal dimension of the rights of indigenous peoples and understand the prospects of the right to self-determination in days to come.

The subject of our research is the selection of cases compiled by Stephen James Anaya (S. J. Anaya), the author of a well-known book "Indigenous Peoples in International Law", and who from 2008 to 2014 was the UN Special Rapporteur on the rights of indigenous peoples[2]. In general, the selection of cases includes about fifty court cases that directly or indirectly affect basic issues of the implementation of "collective rights" as the "right to self-determination", "the right to development", state sovereignty, the right to traditional economic activity, the right to fair compensation, the right to a fair and independent trial, the right to protection from cruel and degrading treatment, the right to protection from torture and the right to life.

Specifically, this article presents court cases that affect, foremost, the right to self-determination and its key elements:

– the right to sovereignty/autonomy and recognition;
– the right to land and resources;
– the right to traditional nature management;
– the right to autonomous education;
– the right to language and culture.

2. "Self-determination" and its focal elements

[2] James Anaya. UN Special Rapporteur 2008–2014. URL: http://unsr.jamesanaya.org/

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The right to self-determination is very important for indigenous peoples and various issues of their development. At the international and domestic levels, as well as, among the representatives of indigenous peoples, there are different ideas about what self-determination means, what should be the extent of freedom and development opportunities, and for what purposes it is necessary. The balance of the principles of self-determination, the territorial integrity of states, the belonging of territories to the peoples who live there and the scope of other rights of these peoples for a long time determines the importance of specific approaches in each single case.

The basic principle of a democratic state is national (ethnic) equality. It has collective and individual forms of expression. When it comes to the self-determination of an ethnos, we mean the collective form, which consists in the right of each ethnic group to independently decide its own destiny, choose the forms of public and private life. We believe that the self-determination of ethnic groups must be considered in a broader sense than is accepted in domestic and foreign doctrine, namely, self-determination can be understood as a phenomenon associated not only with a certain decision of an ethnic group (for example, to separate), but also as a process of its dynamic development.

Self-determination can become an independent legal institution, within which the political, social, economic and cultural vectors of the development exist and change.

If we consider self-determination as a set of rights of indigenous peoples, then the most important element of this system is the possibility of self-government and self-organization: for indigenous peoples, this is a single process based on centuries of experience in managing their potential based on internal motivation. The system of self-organization and self-government is connected with the realization of the rights and freedoms of citizens, both collective and individual, on the basis of independence and recognition of their responsibility. In the international law and the domestic legislation of many states, both institutions are characterized by similar goals – socio-economic and cultural development, protection of the original habitat, traditional way of life, culture and crafts of indigenous peoples, all this is viewed through the prism of national, historical and other traditions.

The global community is currently developing approaches to the self-determination of indigenous peoples, in particular, the focus of the activities of international organizations and national bodies remains the implementation of their land rights and territorial self-government.

3. Institutions of “self-determination” and “recognition” of states

The relationship between the institutions of “self-determination” and “recognition” is vividly illustrated in the Advisory Opinion of the International Court of Justice on the competence of the General Assembly to admit a new state to membership in the organization. The conclusion was that without the recommendation of the UN Security Council, the admission of new states to the General Assembly is impossible.

Consequently, if indigenous peoples want to exercise their right to self-determination through the recognition of their territory as an independent state, they are unable to do this, since even at the UN level it is not provided with specific rules and norms, using which people could form their own state. That is why we witness such a variety of “unrecognized states” [18], whose population also includes indigenous peoples: Azad Jammu and Kashmir in Pakistan and the Federal Republic of Ambazonia in East Africa, Shan in Myanmar, Tigray in Ethiopia.

The geographic scope of the “unrecognized” or “partially recognized” states mentioned above was chosen intentionally, because they are located in the southern regions of the globe that account for the largest number of indigenous peoples, and one nationality or even a sub-ethnos can contain dozens of tribes, such as peoples living from Indochina to Africa (for example, according to the above-mentioned state formations: Burushu people, Ambazonian people, Shan people, Tigrayans).

Thus, the issue of self-determination of nations and peoples, apparently, will never leave the scope of geopolitics, and the final decision on granting independence and recognizing a new state

depends not only on the political will of the "metropolis", but also of the main international "players", in particular, the UN Security Council, and what, to a certain extent, is in conflict with the "principle of equal rights of states".

4. The concepts of "terra nullius" and "effective occupation"

a. The Case of Western Sahara

On 13 December 1974, the UN General Assembly requested an advisory opinion on the following questions: "I. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (terra nullius)?". If the answer to the first question is negative, "II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?".

In its Advisory Opinion, delivered on 16 October 1975, the Court negatively replied to Question I. Relatively to Question II, it expressed the opinion that the materials and information presented to it demonstrated legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara in the times of Spanish colonization. They equally showed the existence of rights, including some land rights, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara.

On the other hand, the Court's conclusion was that the materials and information presented did not establish any borders between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity.

Thus, the Court did not find any legal evidence that might affect the application of the resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, applied to the principle of self-determination through the free and genuine expression of the will of the peoples living in the territory.

b. Legal Status of East Greenland Case

The dispute over the legal status of Eastern Greenland (so called, the "Erik the Red's Land" after the occupation of this territory by Norway in the early 1930s) arose in connection with the expansive aspirations of Norway, which had previously extended its sovereignty to the Svalbard archipelago under an international treaty of 1920. At the same time, the concept *"terra nullius"* was used in relation to Svalbard, despite the existence of a long diplomatic relations between Norway and its predecessors and the Russian Empire, where the archipelago was designated as "common territory", in connection with the centuries-old exploitation of its archipelago by nationals of both countries [19].

The Court, after considering the case, ruled that "the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid".

As one of the important items of the judgment, point No. 71 should be mentioned, which refers to the measures of the Danish Kingdom to establish "effective occupation" on the island (that is, the title of "legal possession" of the territory). According to this doctrine, the ownership of newly discovered lands belongs to the state whose citizens (nationals) discovered this territory, and in the case of Denmark, it was the indigenous peoples – the Eskimo (in current term – the Inuit) recognized as "subjects".

In particular, the Court mentioned the laws adopted of April 1, 1925 "On fishing and hunting in the waters of Greenland", of April 8, 1925 "On the governing of Greenland" and other acts extending Danish sovereignty to any commercial activity on the island. This caused resistance from the Norwegian government, which was extremely interested in fishery on the east coast. However, the Court ruled that Danish sovereignty was indisputable.

Here it is wise to show the experience of the Russian Empire, which asserted its sovereignty and presence on the Novaya Zemlya archipelago, organizing the resettlement of the indigenous nomads of the North – the Nenets – back in the XIXth century, who, however, did not gain a foothold there for a long time due to objective reasons [20]. The fact of "effective occupation" for a long period of time was extremely important for the precedent that was supposed to legalize the right of the dominant nation to sovereignty in a particular territory.

That is, as can be seen from the above

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examples, the issue of "effective occupation" [21] [22] has played and continues to play a large role in the process of maintaining sovereignty over a specific territory. A significant role in this process is played not only by settlers, but also by traditionally living indigenous peoples.

5. Right to land and resources

a. The Continental Shelf Case

Although the issue in the Continental Shelf Case (Tunisia v. Libya) concerned a special agreement brought to the attention of the International Court of Justice in 1978 regarding the determination of the principles and rules of international law applicable to the delimitation of the frontiers between Tunisia and Libyan Arab Jamahiriya of the relevant areas of the continental shelf, the case still indirectly relates to the system of rights of indigenous peoples who can live in states with access to the sea.

Actually, both states were not parties to the 1958 Convention on the Continental Shelf, which, in article 6 establishes the principles of delimitation of the continental shelf adjacent to the territories of two or more states, therefore the dispute was submitted to the court under a special agreement between the parties (para. 36 of the Decision), and not according to the principle *"ex aequo et bono"* [23] (para. 46 of the Decision).

In Special Agreement brought to the attention of the Court in 1978, it was asked to determine which principles and rules of international law are applicable to the delimitation of the respective areas of the continental shelf between Tunisia and the Libyan Arab Jamahiriya relating to each of them.

This case did not affect the rights of the communities inhabiting both states, however, it is clear that the decision made by the Court can have a significant impact on the lifestyle, well-being and development of indigenous peoples living on the coastal zone of Tunisia and Libya.

The national law of some states enshrines the priority right of indigenous communities to the extraction and exploitation of marine resources in the shelf area.

In particular, even before 2007, the article 11 of the Russia's Federal Law of November 30, 1995 No. 187-FZ "On the Continental Shelf of the Russian Federation"[3] set up the preferential right to use living resources by representatives of indigenous peoples and ethnic communities of the North and Far East of the Russian Federation, whose lifestyle, employment and economy traditionally based on the fishing of living resources, as well as the population of the North and the Far East of the Russian Federation in places of permanent residence in the territories adjacent to the sea coast.

Currently, this rule is not valid, but the very fact of its existence is demonstrative.

The fundamental international rules regulating the sovereign rights of states to marine living organisms are formulated in the 1982 UN Convention on the Law of the Sea (UNCLOS), in particular, the part 4 of article 77 refers to marine resources related to "sessile species", para. "i" of article 5 establishes the duty of states to cooperate in the conservation and management of straddling fish stocks and highly migratory fish stocks.

Some articles of this international act also refer to indigenous peoples, meanwhile, without directly naming them. In particular, article 62 of the UN Convention says that the coastal state, when disposing of marine living resources, should take into account the importance of the living resources for the economy of this coastal state concerned, and also minimize the risks for citizens who usually fish in this zone.

Pursuant to the Convention provisions, the UN Fish Stocks Agreement of December 10, 1982, was adopted, which in para. I of the art. 5 establishes the obligation of states to cooperate in order to conserve fish stocks, taking into account the interests of local coastal communities and artisanal fishers.

That is, indigenous peoples can be included in this category, since handicraft (small-scale production of goods using manual labor, which is carried out by indigenous peoples) falls under the concept of "traditional technologies" referred to in article 11 and 31 UNDRIP, article 23 of the ILO

[3] Federal Law of November 30, 1995 No. 187-FZ "On continental shelf of the Russian Federation" (with amendments). Article 11. Expired. Garant.ru. URL: https://base.garant.ru/5224831/9d78f2e21a0e8d6e5a75ac4e4a939832/#block_11

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Convention No. 169 on Indigenous Tribal Peoples in Independent Countries, 1989[4].

Returning to Arabic-speaking Africa, it is worth noting that, for example, on the territory of Libya[5] and Tunisia[6], the Berber people (known as "Amazigh people") live sharing the territories of the two countries and locating in the north coastal areas. Both Tunisia and Libya signed the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[7], in which the right to resources is enshrined in the preamble, as well as in paras "b" of part 2 of article 8, articles 26, 27, 28, part 1, article 31, part 2 of article 32.

In particular, article 25 of the UN Declaration provides that:

"Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard[8].".

Despite recognized international norms, the question of whether the governments can pave the way for the implementation of the indigenous communities' right to marine resources (living and non-living) into domestic law remains open.

The situation is also complicated by the fact that the Government of Tunisia does not recognize the Berbers as a special ethno-cultural group, and the country's Constitution of 2014 establishes that Tunisia is part of the "cultural and civilizational society of the Arabs and the Muslim nation" [9].

This policy of the state is justified by the fact that Tunisia is a state party to the ILO Indigenous and Tribal Populations Convention No. 107 (1957) [10], aimed at the gradual assimilation and integration of indigenous peoples in national space" (clause "c", part 2, article 2) [11] .

In Libya, the situation in this regard remains uncertain, since, on the one hand, a civil war has been going on in the country for a decade, and on the other hand, like Tunisia, there is a desire for pan-Arab unity. Particularly, local communities like the Berbers, for objective reasons, do not find support from the government at the current stage of the country's development.

Based on this case, we can conclude that the rights of indigenous peoples to marine resources and the priority right to use them in order to preserve their traditional way of life, even though they are enshrined in international documents, are not necessarily supported or guaranteed by states, unless it is reflected in their public policy, and are not considered by international courts.

b. Case of South West Africa

The process of decolonization in Africa lasted for more than a decade, and considering current armed and humanitarian conflicts, it continues until now. This case seems interesting in its explanation of the fact that after 1945, when the UN Charter was adopted and provided for the obligation to respect the "territorial integrity and political unity of states", the processes of "redrawing" state borders continued and took place even in the era of decolonization of the 1960s.

Until 1990, on the territory of Namibia, there was a territory called "South West Africa" controlled by the Republic of South Africa. This territory was under the sovereignty of South Africa under the relevant UN mandate. In its Advisory Opinion of June 21, 1971, at the request of the UN Security Council,

[4] Indigenous and Tribal Peoples Convention, 1989 (No. 169). United Nations. URL: https://www.un.org/ru/documents/decl_conv/conventions/iol169.shtml

[5] Indigenous peoples in Libya. IWGIA. URL: https://iwgia.org/en/libya/3586-iw-2020-libya.html

[6] Indigenous peoples in Tunisia. IWGIA. URL: https://www.iwgia.org/en/tunesia/1016-indigenous-peoples-in-tunisia.html

[7] Declaration on the rights of indigenous peoples. Ibid.

[8] Ibid.

[9] Tunisia's Constitution of 2014. URL: https://www.constituteproject.org/constitution/Tunisia_2014.pdf

[10] Ratifications for Tunisia. International Labour Organization. URL: https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102986

[11] ILO Convention No. 107 concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries (1957). International Labour Organization. URL: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/normativeinstrument/wcms_c107_ru.htm

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the International Court of Justice found that South Africa's continued presence in Namibia was illegal and that it was under an obligation to immediately abandon its jurisdiction[12].

In general, about 200 million peoples of the Bantu and Bushmen (San)[13] groups live in these territories, representing several ethnic groups among which none is dominant [24]. Each ethnic group has historical territories of compact residence within the country.

With regard to the right of indigenous peoples to self-determination within state borders, the opinion has been repeatedly expressed that the "spatial-territorial" factor should play a paramount role. Indigenous peoples in colonial countries objectively have the right to the widest autonomy and even independence, especially when the distance between the conventional "metropolis" and the "colony" is significant, or, for example, indigenous communities live in remote territories.

In addition, the international community often performs a "peacekeeping mission" in such cases and actually guarantees the independence of the territory, which was subjected to pressure from the government and experienced genocide [25], apartheid [26] and other forms of crimes against humanity. Ethnic autonomies in countries that were previously in the colonial regime can act as a mechanism for ethnic, ethnocultural self-defense of indigenous peoples, namely, territorially localized ethnic groups that have retained their historical areas and ethnic boundaries.

The African continent is characterized by a large number of tribes, including "transboundary" ones. In particular, the Bushmen people live on the territory of both Namibia and South Africa. However, both the Constitution and the national law of Namibia do not recognize them as an indigenous people with special guarantees[14].

The importance of this case lies in the fact that in South Africa having until recently an apartheid regime under which the Bantu people and the Bushmen people belonged to the so-called "colored" people, now recognizes them as indigenous, and the state has signed UNDRIP[15]. South Africa's jurisdiction over the part of Namibia's territory meant not only the actual "occupation", but also negative legal consequences for these tribes.

The Constitution of South Africa, adopted in 1996, refers all people living in the state as "the people of South Africa united in diversity", which means that the Republic of South Africa defines all its citizens as "one nation". On the other hand, the state recognizes that "small-numbered" peoples, distinguished by cultural, linguistic and ethnic characteristics, have special interests.

It was only in 2015 that the "San Development Bureau" under the Office of the Prime Minister of Namibia was renamed the "Department of Marginalized Communities" and transferred to the Office of the Vice President. The Division is mandated to focus on a group of peoples (San, Himba, Chimbas, Zemba and Twa) with the main goal of integrating marginalized communities into the mainstream of the economy and improving their livelihoods. That means that South Africa, as one of the directions of its development, considers the preservation of cultural diversity, "which is a value for national identity" [27].

Nevertheless, it is obvious that at the current stage of development of the political system of both countries, we cannot observe the possibility of "designing" ethnic autonomies in the domestic system.

c. The case of Mayagna (Sumo) Awas Tingni v. Nicaragua

The well-known case of the community "Mayagna (Sumo) Awas Tingni against Nicaragua" [16] describes the community "Mayagna (Sumo) Awas

[12] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970). International Court of Justice. URL: https://www.icj-cij.org/en/case/53

[13] South African Peoples. URL: https://pro-afriku.ru/narody-yuzhnoj-afriki

[14] Namibia. IWGIA. URL: https://www.iwgia.org/en/namibia.html

[15] Indigenous Peoples in South Africa. IWGIA. URL: https://www.iwgia.org/en/south-africa.html

[16] Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua [ENG]. ESCR-Net – International Network for Economic, Social & Cultural Rights. URL: https://www.escr-net.org/caselaw/2006/case-mayagna-sumo-awas-tingni-community-v-nicaragua-eng

Tingni" living on the Atlantic coast of Nicaragua and consisting of approximately 142 families.

The community leader Jaime Castillo Felipe has filed a petition with the Inter-American Commission on Human Rights, blaming Nicaragua for refusing to allocate land to indigenous communities and for failing to take the necessary measures to protect property rights, including ancestral lands and natural resources. In addition, the complainant accuses the state of failing to guarantee access to effective remedies in connection with community claims to make 62,000 hectares of rainforest available for commercial use.

The Inter-American Court of Human Rights adopted a judgment (August 31, 2001) that prohibits the state from granting rights to third parties on above-mentioned lands, and establishes an obligation to take measures to demarcate indigenous lands and grant rights to these lands to indigenous communities.

The Commission referred the case to the Inter-American Court of Human Rights (IACHR), which concluded that Nicaragua violated the right to judicial protection and property rights. The Court noted that the property right established by the American Convention on Human Rights[17] protects the property rights of indigenous peoples, which originate from their traditions and customs, and therefore the state does not have the right to grant concessions to third parties within their territories.

Consequently, the Court ruled that the state must take the necessary measures to establish an effective mechanism for demarcating and formalizing property rights in the territories of indigenous peoples in accordance with their customary law, values and traditions. The Court also ruled that pending the establishment of such a mechanism, the state should refrain from taking any decision that could affect the way of life and activities of indigenous peoples or the state of their ancestral lands and resources.

In January 2003, the community filed a lawsuit in accordance with the "amparo procedure" (a specific institution of constitutional law, meaning the protection of the right by the Constitutional Court of the state on the basis of an individual claim) [18] [28] against President Bolaños and ten other high-ranking governmental officials, since the Court's decision was not carried out. That same month, the Nicaraguan National Assembly passed a new law governing the granting of land to indigenous peoples.

The case of the Mayagna (Sumo) people was mentioned in the "Review of the practice of interstate bodies for the protection of human rights and fundamental freedoms No. 10 (2021)"[19], where the Supreme Court confirms the conclusions of the IACHR that "the relationship with land is not only a matter of property rights and means of production, but also a significant spiritual element of the ethnic identity of indigenous peoples, which allows them to preserve their cultural heritage and pass it on to future generations".

6. Right to traditional use of natural resources

a. The case of the Saami village of Handesdalen and others v. Sweden

This case, which was brought before the European Court of Human Rights, concerned the rights of the Sami to traditional reindeer herding in Sweden[20]. The bottom line is that the Sami do not have the status of "an indigenous people", they are officially called a "national minority", and thereupon, cases of discrimination based on language occur quite often (unlike countries such as Norway [29] and Finland [30])/ Also. the implementation of the right to traditional resource management in the form of reindeer husbandry until the consideration of this issue in the international court remained in question.

[17] American Convention on Human Rights, 1969. URL: http://hrlibrary.umn.edu/russian/instree/Rzoas3con.html

[18] An analogue of the "amparo procedure" can be considered a "constitutional complaint".

[19] Review of the practice of interstate bodies for the protection of human rights and fundamental freedoms No. 10 (2021). Supreme Court of the Russian Federation. URL: http://supcourt.ru/documents/international_practice/30437/

[20] European Court of Human Rights (Application no. 39013/04), Court (Third Section), Judgment (Merits and Just Satisfaction), Case of Handolsdalen Sami Village and Others v. Sweden. Strada Lex. URL: https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_39013-04

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The reason is trivial: the small territory of Sweden and the high cost of land.

As noted in para. 7 of the judgment, the Sami have inhabited the northern parts of Scandinavia and the Kola Peninsula since ancient times. Initially engaged in hunting, fishery and gathering, the Sami eventually changed their traditional activities and began to live mainly in reindeer herding.

The historical attachment to the land became the basis for the establishment of special rights to land, as well as the right to engage in reindeer herding ("renskötselrätten"). This right is currently regulated in Sweden under the Reindeer Husbandry Act (Rennäringslagen, 1971:437), and includes the right to use land and water for the Sami people's own subsistence and reindeer husbandry.

This right can only be exercised by members of the Sami community ("village"). Thus, the Sami villages are both "administrative territories" within the boundaries of their ancestral lands, and "economic entities". However, they do not have a public legal status (in particular, see: "The case of Könkämä and 38 other Sami villages v. Sweden") [31].

Reindeer herding areas occupy approximately 1/3 of Sweden and are divided into "year-round pastures" and "winter pastures". In some parts of the country, rangeland boundaries are disputed and not legally defined. This is especially true of winter pastures, and it was about them that the long-term dispute described below was discussed.

The essence of the litigation was that, since 1990, a large number of private landowners (about 500 [32]) in the municipality of Härjedalen filed claims against five Sami villages, four applicants and the Sami the village of Idre Nya to the District Court ("tingsrätten"). On June 4, 1991, other landowners initiated a similar process against the Sami villages. The landowners' claims were "claims for recognition" ("negativ fastställelsetalan") that Sami villages do not have the right to herd reindeer without a contract between the landowner and the village (para. 8 of the Judgment).

On November 25, 1991, the Sami villages (communities) submitted a response challenging the actions of the landowners. The communities claimed that they had the right to winter pastures in their territories based on (1) the right to own land from time immemorial ("urminnes hävd"), (2) the provisions of the reindeer grazing and reindeer husbandry laws of 1886, 1898, 1928 and 1971, (3) custom or (4) public international law, in particular article 27 of the ICCPR.

The examination of the case in the national courts of Sweden ended only in 2004, where the objections of the Sami were not accepted, since they could not confirm that winter grazing was the form of traditional nature management. That is, in fact, the Swedish courts agreed with the landowners that the Sami communities need to conclude agreements with landowners in order to be able to use specific areas for pastures.

Interestingly enough that the Court found that the villages' claim for the right to winter reindeer grazing was not sufficiently substantiated to qualify as a defense of property rights and declared this part of the application inadmissible. The Sami communities argued that the burden of proof placed on them in relation to the specific areas where they had been with their herds over the past 200 years was unreasonable and made it much more difficult to exercise their rights.

The significance of this case for indigenous communities lies only in the fact that effective access to justice was ensured in the process, which is very rarely possible due to the high costs and length of trials. However, with regard to the implementation of ownership right no significant precedent has occurred. Despite the fact that the villages received the right to exist and were recognized as victims, the court did not recognize their right to land use.

As we see from this case, the national legislation of Sweden, which does not recognize the Sami as an indigenous ethnic group, is dominant, and this case differs from the Awas Tingni case in Nicaragua, where indigenous peoples were prioritized.

7. Right to autonomous education
The Case of Minority Schools in Albania

For indigenous peoples, one of the most important issues of preserving their identity is the

possibility to follow religious and educational traditions, and autonomy can contribute to the transmission of their native culture, language and religion to future generations. The case on ensuring the right to religious education for the Greek diaspora in Albania in the first half of the XXth century became one of the most famous at the international level. And the relevance of the problem remains hitherto [33].

The provisions of articles 206–207 of the Albanian Constitution of 1933 established:

"The instruction and education of Albanian subjects are reserved to the State and will be given in State schools. Primary education is compulsory for all Albanian nationals and will be given free of charge. Private schools of all categories at present in operation will be closed".

Para. 48 of the Judgment emphasizes that "[…] The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and cooperating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.".

Paras. 49–51 states that to ensure such an approach, two fundamental conditions must be observed: equality with other citizens and guarantees for the preservation of racial differences, traditions and other national characteristics.

Para. 52 postulates that the rejection of ethno-cultural characteristics automatically entails the rejection of the principle of equality, since full cultural integration of one community into another is an inequality:

"These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.".

The termination of private religious and educational schools in Albania contradicts to the letter and spirit of national law, as the Court argues, claiming that the Greek diaspora has every right:

"to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.".

Also, para. 91 of the decision postulates:

"[…] the closing of all private schools in Albania in virtue of Articles 206 and 207 of the Constitution of 1933 would not be consistent with the Albanian Declaration of 1921.".

It is noteworthy that, after a little more than twenty years, the International Labor Organization adopted Convention No. 107 on tribal peoples, which, on the contrary, is aimed at the progressive integration and cultural assimilation of indigenous communities, in particular: rejection of traditional public institutions (clauses "b", "c" of the article 4), special integration programs (clause 2 of the article 7), rejection of the native language in favor of the national (state) language (clause 2 of the article 23) [21].

Only in 1989, with the adoption of ILO Convention No. 169, the trend towards "integration and paternalism" changed to the vector "self-determination and development": the "right to self-determination" (section 3 of the article 1), "non-discrimination" (article 3), the principle of consultation (article 6), land rights (section 2 of the article 13), the right to "traditional crafts" (section 1 of the article 23), protection of the native language (section 1 of the article 28) etc.[22]

8. Right to language and culture

On December 17, 2021, the IACHR announced its decision on the case "*Maya Kaqchikel indigenous community of Sumpango, et al. v. Guatemala"* [23]. The court ruled that the Republic of Guatemala bears "international responsibility for violating the rights to freedom of expression,

[21] ILO Convention 107. Ibid.
[22] ILO Convention 169. Ibid.
[23] *Case of Maya Kaqchikel indigenous community of Sumpango, et al. v. Guatemala. URL:* https://www.corteidh.or.cr/docs/casos/articulos/seriec_440_esp.pdf

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equality before the law and participation in cultural life" of indigenous peoples.

The case alleged that Guatemala's telecommunications law prohibited indigenous peoples from accessing their own media through local radio broadcasting.

At least 43,6% of Guatemala population are indigenous peoples, and approximately 80% of them belong to the poor. In Guatemala, there are about 424 (four hundred twenty-four) radio stations licensed for the FM frequency and 90 radio stations for the AM frequency, one of which is an indigenous radio station.

On the other hand, there are various radio stations operated by indigenous peoples that do not have a state license to operate, such as the Maya Kaqchikel indigenous stations of Sumpango, the Maya Achi of San Miguel Chicaj, the Maya Mam of Cajola, and the Maya Mam of Todos Santos Cuchumatán. Radio stations "Ixchel" and "Uqul Tinamit La Voz del Pueblo", operated by the Kaqchikel peoples of Sumpango and the Achi peoples of San Miguel Chicaj, were searched by government agencies based on court orders issued in criminal proceedings.

Their equipment was confiscated and some of their operators, members of the communities, were prosecuted. Radio "Ixchel" stopped broadcasting for seven months and community members had to raise funds to buy new equipment in order to be able to broadcast again.

Radio "Uqul Tinamit", in turn, stopped broadcasting after a second search. In its decision, the IACHR recalled that freedom of expression is the cornerstone of a democratic society and emphasized the importance of media pluralism in the exercise of this right.

The Court held that, at the international level, states have an obligation to establish policies and enact laws that "democratize access to the media" and guarantee pluralism of media or information in different media, such as radio. In addition, it was noted that indigenous peoples have the right to be represented in various media because of their specific way of life, their relationship with communities and the rest of the population. In this sense, indigenous peoples have the right to create and use their own means of communication.

Access to one's own radio stations as a "means of ensuring freedom of expression" of indigenous peoples is an important element for preserving identity, language, culture, self-identification, collective rights.

Thus, in the opinion of the Court, States have an obligation to take the necessary measures to enable indigenous communities to gain access to the radio frequency spectrum of community radio stations.

Due to the "systemic and long-term discrimination" suffered by indigenous peoples, the Court held that all necessary measures should be taken in Guatemala to eliminate the various factors of their disadvantage and ensure their access to radio frequencies, in order to guarantee the material equality of these peoples compared to other social strata that have the economic conditions to participate in auctions for the acquisition of radio frequencies, the only criterion of which is the highest price.

The Court determined that the way in which broadcasting in Guatemala is regulated is to effectively, almost completely, ban indigenous peoples from exercising their right to freedom of expression and, in turn, prevent them from exercising their right to participate in public life.

In connection with these violations, the Court ordered the following measures to be taken:

1) recognize the indigenous communities as victims in this case and allow them to freely operate their radio stations;

2) amend internal regulations to recognize community radio stations as differentiated mass media;

3) provide a simple and accessible procedure for obtaining media licenses;

4) reserve parts of the radio frequency spectrum for radio stations of indigenous peoples;

5) stop criminal procedure of individuals operating radio stations of indigenous peoples, including searches of above-mentioned radio stations and confiscation of their transmitting equipment;

6) recognize that access to one's own radio stations as a means of ensuring freedom of expression of indigenous peoples is an important

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element for preserving identity, language, culture, self-identification, collective rights.

9. Conclusions

Self-determination is an extremely complex theoretical and politically sensitive topic. The right to self-determination of indigenous peoples is multi-component and includes a large number of elements. The modern understanding of the right to self-determination involves several forms of its implementation. First of all, this is the recognition of the right to determine whether a community should be a part of any state or create an independent state. But there are other elements of this right that also matter.

The cases considered in our article represent only a small part of the array of court cases and arbitration procedures accumulated by international practice. Key findings from this study could be as follows:

1. International recognition of a state, even on an ethnic basis, cannot be carried out using the existing norms of international law by membership of the UN General Assembly. This process requires the permission of the UN Security Council, which indicates the extreme politicization of the right to self-determination and serious contradictions regarding this right in existing international acts.

2. The issue of “effective occupation” has played and continues to play a large role in the process of establishing sovereignty over a specific territory where indigenous peoples traditionally lived. According to the concept of “ingenuity”, i.e. the original belonging of aboriginal groups to the territory in which their ancestors lived, these peoples have a primary right to establish their jurisdiction over the territory. As we can see, this concept is supported by international law, but remains controversial in many states.

3. Close in meaning is the concept of “attachment” to the land. Many scholars and practitioners note its special connection with identity and culture, this concept is titled as an integral part of “indigenous peoples” concept and the system of their rights. The connection with land is not only a matter of ownership and production, but also a material and spiritual element that indigenous peoples must fully enjoy if only to preserve their cultural heritage and pass it on to future generations.

4. Indigenous peoples living in the coastal zone should have a priority right to exploit the resources of the continental shelf. States, in whose coastal territories indigenous peoples live and use biological resources for their livelihood, should take measures to implement the relevant norms of international law in domestic legislation.

5. Issues of self-determination are also related to the status of indigenous peoples, which in many countries is devoid of specifics. Thus, granting local groups the status of a “national minority” deprives the indigenous people of priority in the use of land for traditional nature management, for example, reindeer herding, the right of peoples to own their ethnic territory or to use the lands of traditional nature management to lead a traditional way of life. This right appears to be controversial in some countries. At the same time, the traditional economy and nature management are the basis of the livelihood of indigenous peoples, the most important factor in preserving their original way of life, culture, national psychology and identity.

6. The self-determination of ethnic groups is closely connected with the development of their languages and the possibility of education in their native languages. In fact, this right was first of all enshrined at the international level and is successfully ensured by many states, especially those in which cultural genocide and the integration of ethnic groups into the general education system took place in the past. However, as we see, in the implementation of this right, some states see a threat to national interests and the integrity of national systems. In our opinion, the forcible dissemination of a culture, religion, and language alien to the natives leads to the infringement of their rights in comparison with other categories of citizens and to adverse social consequences.

7. Ensuring self-determination is also possible through the right to freedom of speech and expression. States must take all necessary measures to promote the development of various sources through which the voices of indigenous peoples are heard. So, despite the relevance of the term and the principle of “self-determination” both in the

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legislative practice of states and in international law, no effective attempts can be noted to describe it in strict definitions, as well as to prescribe its main components and norms with which they can be provided. Indeed, the principle of self-determination has not actually received legal content in the context of ethnopolitical realities at the global and national levels [34].

Thus, we conclude that the development of collective rights, in particular, the right to self-determination, is proceeding uniformly; rather, one can speak of "evidential jurisprudence", when the question of interpreting and applying a norm depends on the level of the international organization and the political agenda in general. Moreover, for a long time, states purposefully delineated the status of indigenous peoples and national minorities, including drawing a line between "minorities from among the citizens of the state" and "migrants" who do not have a political affiliation with their place of residence. Researchers admit that the phrasing of international acts on the right to self-determination is a compromise, and therefore largely unclear and controversial [35]. The content of this principle, apparently, is yet to be in the future, and will depend solely on the specific political and ideological interests of states and the international community as a whole.

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INFORMATION ABOUT AUTHORS

Maxim Yu. Zadorin – PhD in Law, Associate Professor; Associate Professor, Department of International Law and Comparative Law
Northern (Arctic) Federal University named after M.V. Lomonosov
59, Lomonosova pr., Arkhangelsk, 163000, Russia E-mail: m.zadorin@narfu.ru
ORCID: 0000-0002-2080-6752
ResearcherID: P-6211-2016
RSCI SPIN-code: 5251-3431; AuthorID: 724759

Elena F. Gladun – PhD in Law, Associate Professor; Professor, Deparment of State and Municipal Management
University of Tyumen
6, Volodarskogo ul., Tyumen, 625003, Russia E-mail: efgladun@yandex.ru
ORCID: 0000-0003-2525-6638
ResearcherID: V-5072-2018
RSCI SPIN-code: 5288-3022; AuthorID: 297789

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