

CONSTITUTIONALIZATION OF NATIONAL MINORITY RIGHTS IN BRICS COUNTRIES (BRAZIL, INDIA AND RUSSIA)

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On the basis of comparative law, this paper analyzes the issues of national minorities in three BRICS member-states (Brazil, India and Russia), and considers the directions and trends of the constitutionalization of national minority rights in these states. The authors argue that the coordination of the interests of industrial companies, regional communities and national minorities, alongside the establishment of common standards between BRICS are vital in order to ensure the sustainable growth of the economies of its member-states. The main comparison criteria are as follows: the understanding of the term “national minority” in different jurisdictions; the delimitation of powers of federative and regional authorities; a list of national minority rights; and instruments of representation and legal protection of national minorities. In regards to Brazil, this article focuses on the impact of the historic concept of racial democracy on contemporary policy on the issues of national minorities. For India the focus is on case law of the Supreme Court on minority issues, and for Russia the focus is on the protection of indigenous “small-numbered” peoples. The authors conclude that the direction of the constitutionalization of national minority rights differs dramatically in Brazil, India and Russia. Therefore, it is necessary to provide a common understanding of the purpose of such constitutionalization, which is namely, to preserve the identity of such minorities in the process of their gradual involvement in modern economic structures and national processes.

Keywords: national minorities; constitutionalization; indigenous peoples; minority rights; Federative Republic of Brazil; Republic of India; Russian Federation; BRICS.

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Introduction

Securing the interests of non-dominant communities in international treaties is a longstanding historical practice. However, international law has declared the special rights of national minorities relatively recently, in the second half of the

20th century. At the turn of the centuries, documents were adopted that agreed on approaches to regulating their legal status (for example, the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), and the United Nations Declaration on the Rights of Indigenous Peoples (2007)).

At the same time (and often under the influence of international law), the process of constitutionalization of national minorities rights continues in modern states (i.e. the process of establishing a system of principles, institutions and some rules of law, addressed exclusively to such minorities). Their direct reflection in the constitutions of modern states is only the “tip of the iceberg.” This process includes several directions in the development of national constitutional law. Firstly, defining the subject of law, which requires understanding and legislative consolidation of the legal criteria for the belonging of communities and individuals to national minorities. Secondly, the cataloging of special rights of national minorities. Thirdly, setting the rules for the representation and legal protection of national minorities. In federal states, a solution is required for the delineation of powers between federal and regional bodies in the sphere of regulation and protection of the national minorities’ rights. It should be noted, however, that the content of national minorities’ rights is changeable and largely reflects the peculiarities of national history. At the same time, the institutions that guarantee the implementation of these rights are relatively stable and can be reproduced in the legal systems of various states. These circumstances make it possible to compare different national trajectories for the constitutionalization of national minorities. It is also a prerequisite for the internationalization of particular rules of aboriginal law. To identify the direction and trends of the constitutionalization, we have researched the laws of the following BRICS states – Brazil, India and Russia. Their constitutions recognize the special legal status of national minorities. These countries have developed their own views on the legal criteria for belonging to minorities as well as the main vectors of the constitutionalization of national minorities.

Since one of the tasks of the BRICS is to ensure the sustainable growth of the economies of its member-states,¹ the coordination of the interests of industrial companies, regional communities and national minorities has become an urgent request of national policy. The establishment of common standards within the BRICS for ensuring the rights of national minorities could drive the sustainable social and economic development of the BRICS states.

¹ Dmitry Ivanov & Maria Levina, *Prospects of International Legal Cooperation of States Under U.N. Auspices in Developing a Treaty on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, 8(1) BRICS L.J. 135 (2021).

1. The Case of Brazil: From 500-Year Legacy of Slavery to Democratic Approaches to National Minorities Protection in a “Post-Racial” Age

1.1. Who Are the National Minorities in Brazil?

Brazil is a highly diverse society with countless minority groups. Originally inhabited by indigenous peoples, Portuguese colonization in the 21st century saw the first mass influx of Europeans into the territory. The colony entered the slave trade and soon became the largest importer of African slaves in the Americas. It is estimated that up to 5 million Africans were brought to Brazil as slaves.² Massive influx of slaves and an economic model based on slavery laid the foundation for social inequality in Brazil. The economy became dependent on slave labor especially in the mining and sugar cane industries.

Brazil was the last nation in the Western Hemisphere to abolish slavery (in 1888). However, this did not lead to an equalization of the position of Afro-Brazilians and white landowners – they still had limited opportunities to own their own homes or develop livelihoods. This led to the development of impoverished favelas, which further entrenched their disadvantage and marginalization.

At the beginning of the 20th century, about 5.2 million Western Europeans migrated to Brazil as a result of the immigration policy of bleaching (“*branqueamiento*”). The race of a country, according to the belief of Brazil’s ruling elites, explained its development as a civilized (or uncivilized) country. Based on the need to improve the Brazilian race, the case for European immigration was overwhelming. This racist discourse was not only supported by arguments in favor of a policy to whiten the Brazilian population but also determined that free labor would be imported according to racial criteria.³ At the time of European contact, some of the Indigenous people were traditionally semi-nomadic tribes who subsisted on hunting, fishing, gathering and migrant agriculture. Many tribes suffered extinction as a consequence of the European settlement, and many were assimilated into the Brazilian population.

Subsequently, the political discourse of “racial democracy” emerged in Brazil, which was presented as a national achievement. This theory, based on the work of Brazilian sociologist G. Freyre “The Masters and the Slaves: A Study in the Development of Brazilian Civilization” (1933), stated that all groups in Brazil experienced conditions of juridical and social equality. In fact, some groups, notably those who migrated to Brazil as part of the *branqueamiento* agenda, were able to enjoy social and economic success. Others, most notably Afro-Brazilians, remained severely marginalized owing to historically rooted patterns of discrimination, as well as ongoing structural

² UN General Assembly, Report of the Special Rapporteur on Minority Issues on her Mission to Brazil, A/HRC/31/56/Add/1, 9 February 2016 (Jun. 4, 2021), available at <https://digitallibrary.un.org/record/831487>.

³ Santos Sales, *Historical Roots of the “Whitening” of Brazil*, 29(1) Lat. Am. Perspect. 61, 70–71 (2002).

discrimination. It took years to expose the racial democracy myth. This myth has contributed to false assumptions that the marginalized situation of Afro-Brazilians is attributable to factors of class or wealth, rather than racial factors or institutional discrimination. The predominantly white elite within Brazilian society promoted racial democracy to obscure very real forms of racial oppression.⁴

With a population of more than 204 million people Brazil has approximately 4.5 million people which belong to so-called “traditional peoples and communities” and occupy approximately 25 percent of the national territory.⁵ *Presidential Decree No. 6.040 of 2007 on the National Policy for the Sustainable Development of Traditional Peoples and Communities* defines traditional communities as culturally differentiated groups which recognize themselves as such, which have their own forms of social organization, which occupy and use territories and natural resources as a condition for their cultural, social, religious, ancestral and economic continuity, using knowledge, innovations and practices generated and passed on through tradition.⁶ Two specific characteristics are important in this definition. The first concerns territory, which is a necessary space for the cultural, social, and economic reproduction of these communities, whether used permanently or temporarily. The territory predetermines the material basis of culture and historical memory that make up the group’s identity. The second characteristic is sustainable development: it is common to use natural resources in a balanced way, with concern in preserving resources for future generations. The subsistence economy is the basis for the life of the community.

In Brazil, traditional communities include many Afro-Brazilian communities as well as those of indigenous descent. They also include Quilombos, communities established by escaped African slaves in diverse and often remote and isolated regions of Brazil, as well as a range of other groups. For example, Rubber tappers, Brazil nut gatherers, Babassu nut breakers, Mangaba gatherers, Faxinalenses (social groups that make up specific areas of the Central Region and South Central State of Paraná), Traditional fishermen, Shellfish gatherers, River dwellers, Varjeiros, Yard Peoples (communities of African cults), Beach dwellers, Cowboys, Rafters, Gypsies, Pomeranians, Azores, Campeiros, Varzanteiros, Swamp dwellers, Geraizeiros, Veredeiros, Caatingueiros, Araguaia Retireiros.⁷

So, despite their numerological majority some traditional communities including Quilombo are considered as political national minorities in Brazil. The size criterion is not essential for identifying a community as a national minority.

⁴ Thomas E. Skidmore, *Black into White: Race and Nationality in Brazilian Thought* 86–87 (1974).

⁵ Sales 2002.

⁶ Decreto nº 6.040, de 7 de fevereiro de 2007 (Jun. 4, 2021), available at http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2007/decreto/d6040.htm.

⁷ Júlia Morim, *Traditional Peoples and Communities*, Pesquisa Escolar, 23 March 2020 (Jun. 4, 2021), available at <https://pesquisaescolar.fundaj.gov.br/en/artigo/traditional-peoples-and-communities/>.

1.2. Political and Legal Basis for Protection of National Minorities Rights in Brazil

The formation of policy on the protection of indigenous peoples began in the early 20th century when C. Rondon helped to establish the Service for Protection of Indians (SPI), which became the first federal body charged with protecting Indians and preserving their culture.

However, by the 1960s the SPI's activities fell into disrepair. SPI sought to solve tribal problems by transforming tribes into the mainstream of Brazilian society. The lure of reservation riches enticed cattle ranchers and settlers to continue their assault on Indians lands – and the SPI eased the way. In 1967, following the publication of the Figueiredo Report, commissioned by the Ministry of the Interior, the military government launched an investigation into SPI. High levels of corruption among agency officials were identified and criminal prosecutions followed. SPI was disbanded. In the same year, the government established the National Fund for Indians (FUNAI), which is responsible for protecting the interests, cultures, and rights of the indigenous people of Brazil to this day. Initially, the policy of the state was aimed at the adaptation of indigenous peoples into Brazilian society, which led to social disintegration and spread of disease. Only in the late 1980s the political course changed to excretion of non-contact tribes from invasion and interference in their way of life and territory.

In the 1960–70s under the military government, the indigenous peoples suffered colossal losses. The resources of the Amazon had been exploited to create the world's leading economy. With financial support from the World Bank, thousands of square miles of forests had been cleared without regard to reservation status. After the construction of highways, giant hydroelectric power plants appeared, and then areas of the forest were cleared for pasture for cattle. As a result, the lands of the reservations have suffered from massive deforestation and flooding.

Today, Brazilian policy on the issues of national minorities is based on implemented international acts, the Constitution, several laws, presidential decrees, and acts of the states of Brazil. A feature of Brazil's policy on minority issues is in its close connection with anti-racism policy, which is based primarily on the establishment of criminal liability for anti-racist crimes, in connection with which the activities of the courts are vital.⁸

Brazil has applied United Nations (UN) human rights instruments (*International Covenant on Civil and Political Rights*, *International Covenant on Economic, Social and Cultural Rights*, *International Convention on the Elimination of All Forms of Racial Discrimination*, *International Labor Organization (ILO) Indigenous and Tribal Peoples Convention No. 169 (1989)*).⁹ As well as mechanisms of the Organization of the American States (OAS) (*American Convention on Human Rights*) and the additional protocol thereto on the area of economic, social and cultural rights, the OAS Special Rapporteur on the

⁸ Marta Rodriguez de Assis Machado et al., *Anti-Racism Legislation in Brazil: The Role of the Courts in the Reproduction of the Myth of Racial Democracy*, 6(2) Rev. Investig. Const. 267 (2019).

⁹ Indigenous and Tribal Peoples Convention, 1989 (No. 169) (Jun. 4, 2021), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314.

Rights of Persons of African Descents and against Racial Discrimination, *Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance* (A-68) and *against All Forms of Discrimination and Intolerance* (A-69). In Brazil, treaties on the issues of human rights are considered as constitutional amendments, more specifically, constitutional amendment No. 45 of 2004.

The *Constitution of the Federative Republic of Brazil of 1988*¹⁰ has become a truly progressive document in the protection of the rights of national minorities. From this moment, a targeted policy of the Brazilian state began to form to protect the rights of national minorities. It contains fundamental principles for the reduction of social and regional inequalities, for example, principle on non-discrimination (Art. 3) “without prejudice as to origin, race, sex, color, age and any other forms of discrimination,” the dignity of the individual (Art. 1), the principle of equality before the law (Art. 5), the criminalization of acts of racism (Sec. XLII) and the outlawing of discrimination against fundamental rights (Sec. XLI). A series of racial equality laws were adopted as a follow-up to the constitution both at the federal levels (for example, the *Statute 12288 of 2010 on Racial Equality*) and state levels (for example, *Law 13.182 of 2014 in the State of Bahia*).

According to Article 231 of the Constitution

Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all of their property recognized Indians’ rights to practice their customs without pressure to assimilate or integrate into mainstream Brazilian society.¹¹

The article also states that mining and other energy resources on indigenous lands may be exploited only with the approval of the National Congress, and “after hearing the communities involved, and the participation in the results of such mining shall be ensured to them.” The Constitution prohibits the removal of Indians from their lands with some exceptions. The definition of Indigenous land rights has been widened in order to encompass not only the areas actually occupied, but also all the space “necessary for the groups’ physical and cultural survival according to their uses, customs and traditions.”¹² The Quilombo lands are considered Afro-Brazilian Cultural Territory and should be protected as a national public asset (Arts. 215, 216).¹³

¹⁰ Constitution of the Federative Republic of Brazil (Jun. 4, 2021), available at https://www.constituteproject.org/constitution/Brazil_2017.pdf?lang=en..

¹¹ *Id.*

¹² See François-Michel Le Tourneau, *The Sustainability Challenges of Indigenous Territories in Brazil's Amazonia: Current Opinion in Environmental Sustainability*, Elsevier (2015), at 213–220 (Jun. 4, 2021), available at <https://halshs.archives-ouvertes.fr/halshs-01241071/file/The%20Sustainability%20Challenges%20of%20Indigenous%20People%20in%20Brazil-V3.pdf>.

¹³ *Supra* note 10.

Presidential Decree No. 6.040 of 2007 defines the principles and objectives of the national policy for sustainable development of traditional peoples and communities. This policy is based on the following principles: respect for the socio-environmental and cultural diversity of traditional peoples; the visibility of traditional peoples; food and nutrition security as a right of traditional peoples; sustainable development; the socio-environmental, economic and cultural plurality of traditional peoples; the broad participation of civil society in the elaboration, monitoring and implementation of this policy; the recognition and consolidation of the rights of traditional peoples and communities; the promotion of the means necessary for the effective participation of traditional peoples in decision-making processes related to their rights; the eradication of all forms of discrimination the preservation of cultural rights; the exercise of community practices; cultural memory and racial and ethnic identity.¹⁴ The goals of this policy are to guarantee the right to land and access to natural resources; to implement infrastructure appropriate to the demands of traditional peoples; to guarantee and value the traditional forms of education; to recognize the self-identification of traditional peoples for providing full access to their individual and collective civil rights; to guarantee access to quality health services; to ensure the participation of representatives of traditional peoples; to ensure the process of institutional formalization, when necessary, taking into account the traditional forms of local organization and representation; to promote sustainable technologies, respecting the system of social organization of traditional peoples and traditional technologies.¹⁵

In our mind, lack of mechanisms for the implementation of legislative provisions is the main problem of the above-mentioned policy. In practice, Brazil's indigenous peoples still face several external threats and challenges although the legislation declares their necessary rights of indigenous peoples.

The issue on demarcation of lands has paramount meaning. Although constitutional recognition was an important symbolic step towards recognizing the rights of indigenous communities, the pledge remains largely unfulfilled. Besides there have been several initiatives to cancel Brazilian commitment to *ILO Convention No. 169* in 2014. The demarcation process is still incomplete and often involves protracted legal battles, furthermore, the FUNAI do not have sufficient resources to enforce the legal protection on indigenous land.¹⁶

Although the *General Education Law* guarantees indigenous peoples the right to education and *Law 10369 of 2003* (amended), the above-mentioned law makes the teaching of history and culture of Afro-Brazilians at the basic and secondary levels obligatory where traditional communities are often lacking education services.

¹⁴ Decreto nº 6.040, *supra* note 6.

¹⁵ *Id.*

¹⁶ For more information, see Georgia O. Carvalho, *The Politics of Indigenous Land Rights in Brazil*, 19(4) Bull. Lat. Am. Res. 461 (2000); Anthony Stocks, *Too Much for Too Few: Problems of Indigenous Land Rights in Latin America*, 34(1) Annu. Rev. Anthropol. 85 (2005); Silvano Paixao et al., *Modeling Indigenous Tribes' Land Rights with ISO 19152 LADM: A Case from Brazil*, 49 Land Use Policy 587 (2015).

Traditional communities have not been adequately consulted during the licensing process and the environmental impact assessment. The Special Rapporteur has recorded many cases of failure to implement the rights to free, prior and informed consent (FPIC) according to *ILO Convention No. 169*.¹⁷ In 2009, the FUNAI was reformed through Presidential Decree 7056 (known as the “FUNAI Statute”), aimed at closing hundreds of indigenous posts and regional FUNAI offices. Hundreds of indigenous representatives protested in front of the Ministry of Justice building, but the decree remained in effect.

Regrettably, there are no positive trends in Brazilian policy change on indigenous issues. In 2019, the current president J. Bolsonaro made two significant changes to FUNAI immediately after taking office: he moved FUNAI from under the Ministry of Justice to be under the newly created Ministry of Human Rights, Family and Women. He delegated powers to demarcate territories of the indigenous peoples to the Ministry of Agriculture, although according to the Brazilian Constitution the FUNAI fulfils these powers.¹⁸ These changes aimed at increasing the economic exploitation of Brazil’s resources and commercial mining and farming on indigenous reserves. Later, the National Assembly abolished these changes. There are also environmental impact concerns due to the 2019 EU–Mercosur agreement.¹⁹ The fear is that the deal could lead to more deforestation of the Amazon rainforest.

The deficient implementing the rights of the national minorities hinders the realization of the sustainable development in Brazil. The current policy develops a restrictive view on Indigenous people’s rights because the implementation of these rights is seen as blocking the path for new infrastructure projects. Furthermore, experts generally negatively assess the development of Brazilian constitutional legislation in recent years in connection with the reduction in funding for social policy and the public sector in general.²⁰

1.3. Instruments for Protection of National Minorities Rights in Brazil

Brazil widely applies systemic and program approach to implement policy on the national minority issues and to protect their rights. The system is the coordination mechanism, which aims at the implementation of certain policies across a set

¹⁷ Report of the Special Rapporteur, *supra* note 2, at 13–15.

¹⁸ See Phillips Dom, *Bolsonaro Pick for Funai Agency Horrifies Indigenous Leaders*, The Guardian, 21 July 2019 (Jun. 4, 2021), available at <https://www.theguardian.com/world/2019/jul/21/bolsonaro-funai-indigenous-agency-xavier-da-silva>.

¹⁹ See Johnathan Watts, *We Must not Barter the Amazon Rainforest for Burgers and Steaks*, The Guardian, 2 July 2019 (Jun. 4, 2021), available at <https://www.theguardian.com/environment/commentisfree/2019/jul/02/barter-amazon-rainforest-burgers-steaks-brazil>.

²⁰ See Yaniv Roznai, *Unconstitutional Constitutional Amendments – The Limits of Amendment Powers* (2017); Yaniv Roznai & Leticia R. Camargo Kreuz, *Conventionality Control and Amendment 95/2016: A Brazilian Case of Unconstitutional Constitutional Amendment*, 5(2) Rev. Investig. Const. 57 (2018).

of functions, institutes and programs. At least three systems are involved in the implementation of policy on issues of national minorities: these include: the National System for the Promotion of Racial Equality²¹ (coordination body – the National Council for the Promotion of Racial Equality); the System for the Sustainable Development of Traditional Communities (coordination body – the National Commission for the Sustainable Development of Traditional Communities); and the Food and Nutrition Security System²² (coordination body – the National Council for Food and Nutrition Security (CONSEA)). It is highly appreciated that all the mentioned coordinating bodies are formed on a parity basis from representatives of civil society and the state. For example, CONSEA is formed of 19 State Ministers and 38 representatives of civil society, who are joined by a dozen observers representing international organizations and other national councils. Equally important to the autonomy of the Council is the fact that the President of CONSEA is chosen among civil society representatives, and the General Secretariat is headed by someone from the Ministry with the largest number of actions related to food and nutrition security, namely the Ministry of Social Development and Fight against Hunger. The National Council for the Promotion of Racial Equality is comprised of 44 members, with 22 representatives from the federal government, 19 representatives of organizations of civil society and three well-known figures in the field of racial relations.

Several ministries are involved in the realization of policy on the issues of national minorities: Ministry of Woman, Racial Equality and Human Rights, Ministry of Agriculture, Ministry of Culture, Ministry of Justice, and the Ministry of the Environment. FUNAI (under the Ministry of Justice) is a specialized government agency for protection of rights of the Indian population, but its concept is initially conflicting, because FUNAI, as a part of the government, has authority to act contrary to the welfare of the Indians. According to the current FUNAI Statute²³ (Presidential Decree No. 9.010 of 23 March 2017) FUNAI aims to protect and promote the rights of indigenous peoples; to manage the assets of indigenous heritage, except those whose management has been assigned to indigenous people or their communities; to promote and support scientific research on issues of indigenous people; to monitor providing health care and education services for indigenous peoples; to promote and support sustainable development of indigenous lands; and to exercise

²¹ This system is established by the Presidential Decree 4.886 of 2003. Decreto nº 4.886, de 20 de novembro de 2003 (Jun. 4, 2021), available at http://www.planalto.gov.br/ccivil_03/decreto/2003/d4886.htm.

²² For more information, see Marília Leão & Renato S. Maluf, *Effective Public Policies and Active Citizenship: Brazil's Experience of Building a Food and Nutrition Security System*, ABRANDH (2012) (Jun. 4, 2021), available at https://www-cdn.oxfam.org/s3fs-public/file_attachments/rr-brazil-experience-food-nutrition-security-190214-en_1_0.pdf.

²³ Decreto nº 9.010, de 23 de março de 2017 (Jun. 4, 2021), available at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/decreto/d9010.htm.

police power for protection of indigenous peoples. Besides, FUNAI is responsible for preserving the culture, traditions and customs of isolated tribes.

Brazil uses quota instruments, but in limited forms. Brazil is a regional leader in the development of race-based affirmative action policies.²⁴ *Quota Law 12.711 of 2012* states, that the governments shall promote the special program for access to higher education institutions of black (negros), mix-raced (pardo) and Indian students (Art. 7).²⁵ Quotas are established by individual universities. In 2014, the government introduced a quota system for federal jobs.²⁶ The affirmative action regulations require that 20 percent of all government positions be filled by negros or pardos. This also applies to public companies controlled by the federal government. Some Brazilian states have enacted similar affirmative action policies for civil servants (Mato Grosso, Rio de Janeiro, Rio Grande do Sul, etc.). Unfortunately, quotas are not applied to the legislative and judicial bodies.

In response to mounting existential threats, indigenous rights movements and NGOs have been established in Brazil in order to protect environmental and territorial rights. Brazil's National Indigenous Movement has inspired a spectrum of Brazilian civil society to join forces under the slogan "Land Demarcation Now!" Some indigenous peoples and conservation organizations in the Brazilian Amazon have formed alliances, such as the alliance of the A'ukre Kayapo village and the Instituto Socio Ambiental (ISA) environmental organization. Movement of the Landless (MST) has made important contributions to constitutionalizing indigenous land rights.²⁷

Since the mid-1990s, the national Quilombo movement has effectively mobilized rural black communities around the issues of landownership and the regularization of Quilombo territories. Quilombos have their own self-representative body, the National Coordination Body of Rural Black Quilombo Communities (CONAQ).²⁸ CONAQ is the national Quilombo land movement that was established in 1996 in the State of Bahia and nowadays represents the Quilombo communities of 22 states in Brazil.²⁹

Despite the fact that Brazil uses democratic instruments to protect the rights of national minorities, it should be admitted there has been a failure in the choice

²⁴ Veronica Daflon et al., *Race-Based Affirmative Actions in Brazilian Public Higher Education: An Analytical Overview*, 142 *Cadernos de Pesquisa* 302 (2013).

²⁵ Lei nº 12.711, de 29 de agosto de 2012 (Jun. 4, 2021), available at http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/lei/112711.htm.

²⁶ Lei nº 12.990, de 9 junho de 2014 (Jun. 4, 2021), available at http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/112990.htm.

²⁷ For more information, see *Law and Globalisation from Below: Towards a Cosmopolitan Legality* 218–240 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005).

²⁸ See official site <http://conaq.org.br/>.

²⁹ Merle L. Bowen, *The Struggle for Black Land Rights in Brazil: An Insider's View on Quilombos and the Quilombo Land Movement*, 2(3) *Afr. Black Diaspora* 147, 151 (2010).

of state strategy to avoid structural discrimination and racial subordination, and to challenge the post-racial ideologies.

2. The Case of India: From the Constituent Assembly Debates to Present Time

2.1. Rights of the Minority in the Constituent Assembly Debates

Lord Atkin rightly remarked:

The most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities.³⁰

The objective resolution moved by Pandit Jawaharlal Nehru in the Constituent Assembly on 13 December 1946 clearly mention the concerns about the protection of the interests of minorities which was finally adopted by Constituent Assembly on 22 January 1947:

Wherein adequate safeguards shall be provided for minorities, backward and tribal areas and depressed and other backward classes.³¹

This objective resolution provided assurances to the minorities that their interests and concerns would be safeguarded by the Constitution in Independent India. For achieving this goal, the Constituent Assembly created an Advisory Committee on Fundamental Rights and Minorities under the chairmanship of Sardar Vallabh Bhai Patel.³² This Advisory Committee scheduled its first meeting on 27 February 1947 and divided itself into four sub-committees out of which the question of safeguards and rights of minorities were mooted primarily by two sub-Committees – the Sub-Committee on Minority Rights and the Sub-Committee on Fundamental Rights.³³ The first one was entrusted with the task of considering and suggesting the nature and scope of safeguards which shall be made available to the minorities under the scheme of the Constitution. The members of Constituent Assembly shared

³⁰ Mustafa Faizan, *An SC Verdict Violative of Minority Rights*, *The Hindu*, 19 March 2020 (Jun. 4, 2021), available at <https://www.thehindu.com/opinion/op-ed/an-sc-verdict-violative-of-minority-rights/article31101652.ece>.

³¹ M. Mohibul Haque, *Constituent Assembly Debates on Minority Rights* (Jun. 4, 2021), available at https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/human_rights_and_duties/09_human_rights_of_minorities/04_constituent_assembly_debates_on_minority_rights/et/7966_et_04.pdf; Constituent Assembly of India Debates (Proceedings) – Volume I (Jun. 4, 2021), available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/1/1946-12-13.

³² Granville S. Austin, *The Indian Constitution: Cornerstone of a Nation* 246 (2nd ed. 1973).

³³ *Id.* at 250.

the concerns of minorities that unless proper safeguards and protection for their upliftment are incorporated within constitution, these communities on the margin of the society would never be able to come in mainstream along with majority and the basic values of constitution, i.e. liberty, justice equality and fraternity would remain a distant dream for them.³⁴

The Drafting Committee formulated the rights of minorities into ten articles starting from Article 292 to Article 301 and placed them under a separate chapter titled "Special Provisions Relating to Certain Classes."³⁵ These, inter-alia, included: the reservation of seats in Lok Sabha and State Legislative Assemblies for people from Muslim community, SCs and STs and Christians from the State of Madras and Bombay; nomination of the people of Anglo-Indian community to the Lok Sabha and State Legislative Assemblies; consideration of the claims of minorities with maintenance of efficiency; appointment of Special Officers for Minorities, etc.³⁶

Nonetheless, the events that took place during partition significantly changed the mood of the country and had considerable impact on the minds of the members of the Committee as a consequence of which minority rights underwent significant changes in comparison to what was discussed earlier by the Advisory Committee relating to minorities.³⁷ In a letter written by Sardar Patel, it was mentioned that "the changed circumstances" require that the original recommendations of the Advisory Committee relating to minorities be reviewed.³⁸ Patel thought it would be inappropriate to reserve seats for religious minorities as that could lead "to a certain degree of separatism and to that extent contrary to the conception of a secular democratic state"³⁹ and the Assembly rejected the idea of separate electorates which had existed in colonial India.

In Constituent Assembly, it was decided that a clause protecting freedom of conscience and the profession and practice of religion would be incorporated in the Constitution. However, in the sub-committee meetings, one of the Member of Constituent Assembly, Rajkumari Amrit Kaur opposed the free 'practice' of religion as she feared that "anti-social" practices like *devadasi* (temple prostitution), *purdah*, and *sati* might get validated and because the secular gains such as *the Widows Remarriage Act*

³⁴ Constituent Assembly of India Debates (Proceedings) – Volume VII (Jun. 4, 2021), available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29.

³⁵ Constitution of India 1950, Part XVI (Jun. 4, 2021), available at https://www.constitutionofindia.net/constitution_of_india/special_provisions_relating_to_certain_classes/articles.

³⁶ *Id.*

³⁷ Nilanjan Mukhopadhyay, *Past Continuous: Constituent Assembly Debate on Minority Safeguards* (2018) (Jun. 4, 2021), available at <https://thewire.in/communalism/past-continuous-constituent-assembly-debate-on-minority-safeguards>.

³⁸ Constituent Assembly of India Debates (Proceedings) – Volume VIII, Para 8.91.5 (Jun. 4, 2021), available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/8.

³⁹ *Id.* Para. 8.91.63.

and *Child Marriage Restraint Act* which had consumed lot of sacrifice and tremendous efforts in their realization may be lost.⁴⁰ Another Member of Constituent Assembly, Alladi Krishnaswamy Ayyar was also opposed to the use of word 'practice' as it was too wide claiming that British Parliament had also refused to insert any provision which might interfere with social reform.⁴¹ They suggested to the Constitutional Advisor B.N. Rau to insert an exception clause to reflect that the right to freely practice religion shall not be allowed to prevent the State from making laws providing for social welfare and reform.⁴² Hence, Article 25 was inserted in a form so as to allow the State to outlaw certain derogatory practices. This article read as follows:

Freedom of conscience and free profession, practice and propagation of religion

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law:

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I: The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II: In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jains or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Certain protection was provided in Article 28⁴³ as well, thereby ensuring that religious instructions cannot be imparted in a totally state-funded school. Additionally,

⁴⁰ Vineeth Krishna E., *Religious Freedom and Social Reform #2: Early Developments in Indian Constitution Making*, Constitution of India, 12 February 2019 (Jun. 4, 2021), available at https://www.constitutionofindia.net/blogs/religious_freedom_and_social_reform__2__early_developments_in_indian_constitution_making.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Article 28 reads as follows:

Freedom as to attendance at religious instruction or religious worship in certain educational institutions

(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

minorities were also guaranteed the right to establish and administer educational institutions for the upliftment of their community from darkness of ignorance and clutches of illiteracy. The protection under Article 30 applies to religious as well as educational minorities. Article 30 reads as follows:

Right of minorities to establish and administer educational institutions

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

The original proposal of the Advisory Committee had formulated the protection of minority rights in following terms:

1. Minorities in every unit shall be protected in respect of their language, script and culture and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect.

2. No minority, whether based on religion, community or language shall be discriminated against in regard to admission into state educational institutions, nor shall any religious instruction be compulsorily imposed on them.

3. (a) All minorities, whether based on religion, community or language, shall be free in any unit to establish and administer educational institutions of their choice.

(b) The State shall not, while providing state aid to schools discriminate against schools under the management of minorities whether based on religion, community or language.⁴⁴

However, after various rounds of discussion and deliberation⁴⁵, Article 29 was adopted in present form. It reads as:

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto Cultural and Educational Rights.

⁴⁴ Subhash C. Kashyap, *The Framing of India's Constitution – A Study* 273 (4th ed. 2004).

⁴⁵ Faizanur Rahman, *Education, Minorities and Constitution of India*, 1(1) *Jamia L.J.* 46, 48–49 (2016).

Protection of interests of minorities

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Nonetheless even after securing the interests of minority in best possible manner in the Constitution, the Constituent Assembly had failed in its primary obligation by not defining the term “minority,” perhaps they wanted this somewhat enormous task to be taken up by the Judiciary in due course of time.

2.2. The Definition of a National Minority and Constitutional Framework for Minority Protection

The Constitution of India mentions the word “minority” in several provisions,⁴⁶ however, falls short of defining it anywhere within the Constitution. In common parlance, the term “minority” generally refers to those who are not Hindu, a conception which implies that dominantly the core of Indian identity is Hinduism.⁴⁷ However, religion is not the sole criterion for the determination of Minority but caste, tribal and linguistic criterion as well have been taken into account in deciding the status of minorities.⁴⁸

The question whether a community is a minority or not is not only a question of relative numbers but also of other significant factors.⁴⁹ The Union Government of India has set up the National Commission for Minorities (NCM) under the *National Commission for Minorities Act 1992* but even this legislation does not offer any comprehensive definition of the term “minority.” Section 2(c) of the above-mentioned Act provides that “minority,” for the purposes of this Act, means a community notified as such by the Central Government. By exercising powers provided under Section 2(c), the Indian government has officially notified five religious’ communities – Muslims, Christians, Sikhs, Buddhists and Zoroastrians as national religious minorities in October 1993⁵⁰ and the list was further amended to include Jains as a minority community in India in 2014

⁴⁶ Arts. 29, 30, 350A, 350B of Constitution of India.

⁴⁷ Manoj K. Sinha, *Minority Rights: A Case Study of India*, 12(4) Int'l J. Minor. Group Rts. 356 (2005).

⁴⁸ *Id.*

⁴⁹ For more information, see Rochana Bajpai, *Minority Rights in the Constituent Assembly Debates 1946–1949*, QEH Working Paper Series – QEHWPS30 (1999) (Jun. 4, 2021), available at <http://workingpapers.qeh.ox.ac.uk/RePEc/qeh/qehwps/qehwps30.pdf>; Mariella Sica, *Politics and Religion in India: Minorities*, 19(1) *Transit. Stud. Rev.* 131 (2012).

⁵⁰ Hilal Ahmed, *Indian Constitution Doesn't Call Muslims a Minority, Who Turned Them into One?*, *ThePrint*, 27 December 2018 (Jun. 4, 2021), available at <https://theprint.in/opinion/indian-constitution-doesnt-call-muslims-a-minority-who-turned-them-into-one/169501/>.

without laying down any parameters for the determination of minority community at national level. In the constitutional scheme, there are two bases for determination of minorities: linguistic and religious.

Constitution of India uses the word “minority” in Articles 29, 30, 350A and 350B. While Articles 29 and 30 relate to religious as well as linguistic minorities, Articles 350A and 350B scope is limited only to linguistic minorities. There are some other generic provisions in nature under Constitution which talk about welfare and protection of minorities namely, Articles 15, 16, 25, 26 and 27.

Article 15 prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. Article 16 enshrines equality of opportunity in matters of public employment wherein it provides that no citizen shall be denied public employment on the ground of religion, race, caste, sex, descent, place of birth or residence. Article 25 allows every citizen the freedom of conscience and the right to profess, practice and propagate freely his/her religion. But this right is subject to public order, morality and health and also to other provisions of Part III of the Constitution. Article 26 guarantees all religious denominations and sects to manage their own affairs in the matter of religion, establish their own institutions and own, acquire, manage a property in accordance with law subject to public order, morality and health. Article 27 specifies that no person shall be compelled to pay any taxes, the proceed of which are specifically allocated for the payment of expenses for the promotion and maintenance of any particular religion or religious denomination.

2.3. National Minorities and their Rights: Judicial Pronouncement and Interpretation

The Supreme Court of India has a huge role in the constitutionalization of the national minorities’ rights and has formed a whole system of judicial precedents on minority issues.⁵¹

The elusive question of “who is minority” appeared for the first time before the Supreme Court of India in 1957 in the case of *Re Kerala Education Bill*⁵² in which opinion of Supreme Court was sought by the President of India regarding questions of vital importance. In this case, the State of Kerala contended before Supreme Court that persons who are alleged to be a minority for claiming protection under Articles 29 and 30 must be a minority in the particular region in which the educational institution involved is situated. The Supreme Court answered the question in negation by saying that

⁵¹ Dhavan Rajeev & Fali Nariman, *The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities in Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* 256 (Rajeev Dhavan et al. eds., 2020).

⁵² [1959] 1 S.C.R. 995.

... for the Bill in question before us extends to the whole of the State of Kerala and consequently the minority must be determined by reference to the entire population of that State.⁵³

In *Bal Patil v. Union of India*⁵⁴ the appellant which is an organization representing a section of Jain community had approached the High Court of Bombay to issue appropriate writ to the Central Government for bringing a notification to the effect of declaring "Jains" as a "minority" community under Section 2(c) of the National Commission for Minorities Act 1992. The Supreme Court refused to recognize the Jain community as a minority. The Supreme Court had faced with arguments like whether minority status is to be granted at national level or State level or whether the litmus test should be the socioeconomic conditions. *Patil* made a call to the National Commission for Minorities to gradually eliminate minority and majority classes.

In other cases, it has been observed also that The Supreme Court has adopted similar criterion for the determination of minority which is primarily based on the numerical strength of the community of less than 50 percent of the total population of the State but this simple arithmetical formula may somewhat be misleading or can create confusion. As in smaller States where population may be diverse on lines of religion, language, there may be reasonable possibility that no community may constitute 50 percent of numerical strength or the vice versa may also be true wherein all community may fall under minority. Further there also might be a situation where numerically so-called majority community may still be lagging behind in terms of socio-economic or political factors. Therefore, the determination of minority solely on numerical strength of a community may not yield desired results in the long run in conformity with ideals of Constitution. A noteworthy position taken up by the Supreme Court and High court constantly on the issue of determination of minority is that it is to be determined in reference to the particular legislation, which is sought to be enforced. Thus, if the impugned legislation is State law than the entire population of the concerned State shall be taken into account for the determination of status of minority.

Another area which has attracted multiple litigations and have caught Supreme Court attention is Article 30 wherein minority has been empowered to establish and administer the educational institution of their choice.

In the case *Ahmedabad St. Xaviers College Society & Anr. v. State of Gujarat*⁵⁵ the Supreme Court constituted nine judges' bench to resolve the controversy surrounding the state interference and the autonomy of the educational institutions established and run by minority community. In this landmark case, the main contention revolved

⁵³ [1959] 1 S.C.R. 995.

⁵⁴ [2005] 6 S.C.C. 690.

⁵⁵ [1974] 1 S.C.C. 717.

around the question of what limits were to be set to prevent government interference, especially in cases of appointment and dismissal of teachers and admissions of students of minority community so as to keep the character of Minority Institutions intact and sound for achieving the ideals as enshrined in the Constitution. The Court said that the object of Articles 25 to 30 was to preserve the rights of religious and linguistic minorities, to place them on a secure pedestal and withdraw them from the vicissitudes of political controversy. These provisions enshrined a befitting pledge to the minorities in the Constitution of the country whose greatest son had laid down his life for the protection of the minorities, as long as the Constitution stands as it is today, no tampering with those rights can be countenanced. Any attempt to do so would be not only an act of breach of faith, it would be constitutionally impermissible and liable to be struck down by the courts.⁵⁶

The Court also pointed out that sometimes what is required in certain circumstances is the differential treatment for the minorities by providing them special rights which is desired to bring about equilibrium, so that the ideal of equality may not be reduced to a mere abstract idea, but should become a living reality and result in true, genuine equality, an equality not merely in theory, but in fact.⁵⁷

Another landmark judgment having remarkable impact on the rights of minority as provided under Articles 29 and 30 with regard to running and administering educational institutions is the famous *St. Stephen's College v. University of Delhi*⁵⁸ case. This judgment conferred unfettered freedom to minority institutions with one condition of providing at least 50 percent of the available seats being kept open for students of non-minority background. The court also said that the minority institution has a distinct identity and the right to administer with continuance of such identity cannot be denied by coercive action. Any such coercive action would be void being contrary to the constitutional guarantee.⁵⁹ Justice Shetty speaking for the Constitutional bench comprising of five judges made the following important observations:

It is well said that in order to treat some persons equally, we must treat them differently. We have to recognize a fair degree of discrimination in favour of minorities.⁶⁰

The decision of Supreme Court in *TMA Pai Foundation v. State of Karnataka*⁶¹ decided by 11 judges' bench also carries lot of importance on the right of minority to establish

⁵⁶ [1974] 1 S.C.C. 717.

⁵⁷ *Id.*

⁵⁸ [1992] 1 S.C.C. 558.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ [2002] 8 S.C.C. 481.

and administer educational institutions of their choice in India. The court held that the rights of linguistic and religious minorities as well as the majority community for establishing educational institutions of their choice are unrestricted, but as far as the right of administering these educational institutions is concerned, it is not absolute. A distinction was also made in case of unaided minority institutions whose right to admit students should be respected as far as if the procedure adopted by these institutions are transparent and merit based. Therefore, the right to admit students falls under the ambit of the right to administer educational institutions by the minority which was left in the hands of educational institutions.⁶² This judgment also paved the way for the State to make regulations/bye-laws for administering the educational institutions run by minority as Court held that the right to administer does not include right to maladminister the educational institutions. Any regulation made in consonance and in parity with the national interest must necessarily be made applicable to all educational institutions, whether run by the majority or the minority.

In *Society of St. Joseph's College v. Union of India*⁶³ the Supreme Court held that so long as the basic right of minorities to manage educational institution is not taken away, the State is competent to make regulatory legislation. Regulations, however, shall not have the effect of depriving the right of minorities to educate their children in their own institution (*St. Stephen's College v. University of Delhi*).

In the case *Christian Medical College Vellore Association v. Union of India*⁶⁴ a bench comprising Arun Mishra, Vineet Saran and M R Shah, JJ. noted that the right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an 'absolute right'. This right is not free from regulation.

The rights to administer an institution under Article 30 of the Constitution are not above the law and other Constitutional provisions. Reasonable regulatory measures can be provided without violating such rights available under Article 30 of the Constitution to administer an institution. Professional educational institutions constitute a class by themselves. Specific measures to make the administration of such institutions transparent can be imposed.⁶⁵

Another decision of Supreme Court which is worth mentioning here is *Rafique v. Managing Committee, Contai Rahamania High Madrasah and Others*.⁶⁶ Wherein the

⁶² [2002] 8 S.C.C. 481.

⁶³ [2002] 1 S.C.C. 273.

⁶⁴ [2020] 8 S.C.C. 705.

⁶⁵ Article 30 Doesn't Prevent State from Imposing Reasonable Regulations to Make Administration of Minority Institutions Transparent, Live Law, 30 April 2020 (Jun. 4, 2021), available at <https://www.livelaw.in/top-stories/article-30-doesnt-prevent-state-from-imposing-regulations-to-make-administration-of-minority-educational-institutions-transparent-sc-155979>.

⁶⁶ [2020] 6 S.C.C. 689.

Division Bench held categorically that rights of minorities mentioned under Article 30 is not absolute therefore any regulation made in the true interest of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may likely be imposed. In this case, the impugned Sections 10 and 11 were contested which empowered state government to take away the powers of appointment of teachers in Madrasah from the Management committee of the minority institutions. The Supreme Court conveniently overlooked the earlier judgments⁶⁷ wherein it was held that Article 30 does empower the minority institutions to select their governing bodies, teachers and staff and exercise disciplinary control over them and a right to fix reasonable fees and admit students in a fair and transparent manner. In one earlier case of *In Rev. Sidharjbhai* (1963) a six-judge bench of the Supreme Court had laid down significant dual test criterion to examine the validity of the regulations imposed by Government if the impugned regulation satisfies twin conditions, i.e. firstly that it is regulative and not destructive of the organization's minority character and secondly, it makes the minority institution an effective vehicle of minority education.⁶⁸

3. The Case of Russia: Legal Regulation of the National Minorities Rights and Direction of its Development

3.1. The Rights of National Minorities as a Subject of Legislation in the Russian Federation

The current Constitution of Russia 1993⁶⁹ is the fifth fundamental law of the Russian state. But it is the first constitution in which national minorities are recognized as subjects of constitutional rights. The provisions of Articles 71 and 72 of the Constitution contain a reference to "national minorities" as a subject of legislative jurisdiction.⁷⁰ The regulation and protection of their rights is the subject of exclusive federal jurisdiction, and the protection of rights is the subject of joint jurisdiction of the Russian Federation and its constituent entities. The legislative concretization of the constitution eliminates the contradictory nature of the constitutional formula (the protection of the rights of national minorities is both the exclusive jurisdiction of the Federation and the joint jurisdiction of

⁶⁷ *Ahmedabad St. Xaviers College* (1974) and 11 judges in *T.M.A. Pai Foundation* (2003).

⁶⁸ [1963] 3 S.C.R. 837.

⁶⁹ Конституция Российской Федерации (принята всенародным голосованием 12 декабря 1993 г.) (с учетом поправок, внесенных Законами РФ о поправках к Конституции РФ от 30 декабря 2008 г. № 6-ФКЗ, от 30 декабря 2008 г. № 7-ФКЗ, от 5 февраля 2014 г. № 2-ФКЗ, от 21 июля 2014 г. № 11-ФКЗ) // *Собрание законодательства РФ*. 2014. № 31. Ст. 4398 [Constitution of the Russian Federation (adopted by a nationwide vote on 12 December 1993) (considering amendments, introduced by the RF Laws on amendments to the RF Constitution of 30 December 2008 No. 6-FCL, of 30 December 2008 No. 7-FCL, of 5 February 2014 No. 2-FCL, of 21 July 2014 No. 11-FCL), *Legislation Bulletin of the Russian Federation*, 2014, No. 31, Art. 4398].

⁷⁰ *Id.*

the Federation and its constituent entities). The list of powers of the state bodies in the framework of joint jurisdiction of the Russian Federation and its constituent entities is closed; on all issues included in this list, federal laws carry out primary regulation, and the legislation of the constituent entities of the Russian Federation carry out secondary (specifying) regulation. All other (not included in the list) powers in the framework of joint jurisdiction are considered as federal, so federal laws regulate them. Thus, in fact, federal legislation delimits the powers on the protection of the national minorities' rights. In addition to this, Article 69 of the Constitution specifically stipulates the status of indigenous small-numbered peoples in Russia and guarantees their rights "according to the universally recognized principles and norms of international law and international treaties and agreements of the Russian Federation."⁷¹

Federal laws classify indigenous 'small-numbered' peoples as a type of national minority. For example, "the protection of the rights of indigenous small peoples and other national minorities" is the sphere of responsibility of the governments of the constituent entities (regions) of the Russian Federation (*Federal Law of 6 October 1999 No. 184-FZ "On the General Principles of the Organization of the Legislative (Representative) and Executive Organs of State Power of the Constituent Entities of the Russian Federation"*),⁷² and "the implementation of the rights of indigenous peoples and other national minorities" is one of the issues of local importance (*Federal Law of 6 October 2003 No. 131-FZ "On the General Principles of Organizing Local Self-Government in the Russian Federation"*).⁷³

At the same time, the set of regional powers to protect both those and other minorities is not significant and does not contain powers implemented regardless of federal decisions. The constituent entities of the Russian Federation have the right to support national-cultural autonomies at the regional and local levels, as well as create conditions for the study of national languages in educational organizations. They can develop their own programs of state support, preservation and development of languages and cultures of the peoples of the Russian Federation and realize other measures to preserve ethnocultural diversity and to protect the rights of indigenous peoples and other national minorities.⁷⁴

⁷¹ Constitution of the Russian Federation, *supra* note 69.

⁷² Федеральный закон от 6 октября 1999 г. № 184-ФЗ «Об общих принципах организации законодательных (представительных) и исполнительных органов государственной власти субъектов Российской Федерации» // Собрание законодательства РФ. 1999. № 42. Ст. 5005 [Federal Law No. 184-FZ of 6 October 1999. On the General Principles of the Organization of the Legislative (Representative) and Executive Organs of State Power of the Constituent Entities of the Russian Federation, Legislation Bulletin of the Russian Federation, 1999, No. 42, Art. 5005].

⁷³ Федеральный закон от 6 октября 2003 г. № 131-ФЗ «Об общих принципах организации местного самоуправления в Российской Федерации» // Собрание законодательства РФ. 2003. № 40. Ст. 3822 [Federal Law No. 131-FZ of 6 October 2003. On the General Principles of Organizing Local Self-Government in the Russian Federation, Legislation Bulletin of the Russian Federation, 2003, No. 40, Art. 3822].

⁷⁴ Elena Gladun, *Sustainable Development of the Russian Arctic: Legal Implications*, 12(2) NISP. J. Public Adm. Pol'y 29 (2019).

Nevertheless, the constitutional and administrative law of the constituent entities of the Russian Federation has become the main platform for the development of unique aboriginal law institutions, particularly the institution of the Commissioner for the Protection of the Indigenous Minorities Rights and the Institute of Ethnological Expertise. The Constitution of the Russian Federation initially included provisions on the rights of indigenous minorities not in the chapter on human rights (Chapter 2), but in the chapter on the federal structure (Chapter 3), making the peculiarities of their legal status part of federal relations. Thus, the constitutionalization of national minorities rights in Russia occurs under the influence of two opposite factors. On the one hand, it is the unifying factor of federal legislative regulation, which dictates the bulk of the rules, limiting the law-making will of the constituent entities of the Russian Federation. On the other hand, it is a diversifying factor of the objectively existing regional diversity, including the diversity of situations of preservation (loss) of traditional institutions of aboriginal law. These institutions (for example, congresses of indigenous minorities) may not be enshrined in positive law at all, but they can exert political influence on the development of federal and regional legislation. The competing influence of these factors explains the national characteristics and dynamics of the process of constitutionalization of the national minorities' rights in Russia.

3.2. Who Are the National Minorities in Russia?

The originality of the legal regulation of the legal status of national minorities in Russia lies in several aspects. The first feature is that national minorities referred to in the laws are exclusively "ethnic communities." The concept of "ethnos" or "ethnic community" developed in Soviet ethnology in the middle of the 20th century has been considered as an alternative to official Marxist sociology. Ethnologists have systematized such properties that are equally characteristic of any "ethnic community," regardless of their hierarchy established by "historical materialism." The common properties of ethnic communities include: the unity of culture and origin, the awareness of their belonging to an ethnic group, as a rule, and the unity of language. Amendments to the Constitution of the Russian Federation in 2020 correspond to this logic.⁷⁵ The new provisions of Article 69 of the Constitution address "peoples and ethnic communities" of Russia and guarantee equally the preservation of ethnocultural and linguistic diversity.

This approach, of course, differs markedly from the one that is characteristic of modern international law, in which "national minorities" and "ethnic minorities" are

⁷⁵ Закон Российской Федерации о поправке к Конституции Российской Федерации от 14 марта 2020 г. № 1-ФКЗ «О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти» // Собрание законодательства РФ. 2020. № 11. Ст. 1416 [Law of the Russian Federation No. 1-FKZ of 14 March 2020 on the Amendment to the Constitution of the Russian Federation. On Improving the Regulation of Certain Issues of the Organization and Functioning of Public Authorities, Legislation Bulletin of the Russian Federation, 2020, No. 11, Art. 1416].

related as categories of genus and species.⁷⁶ For a constitution to guarantee the rights of all (not just ethnic) minorities there must be a legal, and not an ethnological understanding of the nation. However, this remains a serious problem of legal consciousness in the absence of stable traditions of parliamentarism. It is difficult to imagine a dependent parliament as a body for shaping the will of a nation as a subject of law. Nevertheless, the development of Russian constitutional law is moving in this direction. The first solution to the problem was the concept of the “Russian nation” declared in the *State Program of the Russian Federation “Implementation of the State Ethnic Policy,”* adopted through Decree of the Government of the Russian Federation of 29 December 2016 No. 1532.⁷⁷

At the same time, Russian constitutional legislation does not often mention the rights of a national minority (a collective subject of law), but the rights of persons belonging to such a minority (individual subjects of law), that in general corresponds to the approaches adopted in international law.

The second feature of Russian law is that the criterion of size is mandatory and even decisive in several legal criteria for the belonging of communities to indigenous peoples or other national minorities. Understanding this feature requires additional clarification.

The list of indigenous small-numbered peoples of the Russian Federation is included in a special act of the Government of the Russian Federation; it numbers 47 nations (this is more than 300 thousand people in total).⁷⁸ *Federal Law of 30 April 1999 No. 82-FZ “On Guarantees of the Rights of Indigenous Small-Numbered Peoples”* defines four criteria that make it possible to classify communities as such peoples.⁷⁹ One of the criteria, namely the awareness of oneself as an independent ethnic community, is universal. This is a property of any ethnic group. Two other criteria point to the qualitative characteristics of these peoples as special ethnic minorities: living in

⁷⁶ Мочалов А.Н. Правовое положение национальных меньшинств: обзор некоторых подходов в международном праве // Электронное приложение к «Российскому юридическому журналу». 2017. № 4. С. 60–61 [Artur N. Mochalov, *The Legal Status of National Minorities: the Overview of Some Approaches in International Law*, Electronic Supplement to Russian Juridical Journal 53, 60–61 (2017)].

⁷⁷ Постановление Правительства Российской Федерации от 29 декабря 2016 г. № 1532 «Об утверждении государственной программы Российской Федерации «Реализация государственной национальной политики» // Собрание законодательства РФ. 2017. № 2 (ч. 1). Ст. 361 [Decree of the Government of the Russian Federation No. 1532 of 29 December 2016. On Approval of the State Program of the Russian Federation ‘Implementation of the State Ethnic Policy,’ Legislation Bulletin of the Russian Federation, 2017, No. 2 (Part 1), Art. 361].

⁷⁸ Численность коренных малочисленных народов в России выросла более чем на 20% за 30 лет // ТАСС. 6 апреля 2021 г. [The Number of Indigenous Peoples in Russia Has Grown by More than 20% in 30 years, TASS, 6 April 2021] (Jun. 4, 2021), available at <https://tass.ru/obschestvo/11076891>.

⁷⁹ Федеральный закон от 30 апреля 1999 г. № 82-ФЗ «О гарантиях прав коренных малочисленных народов Российской Федерации» // Собрание законодательства РФ. 1999. № 18. Ст. 2208 [Federal Law No. 82-FZ of 30 April 1999. On Guarantees of the Rights of Indigenous Small-Numbered Peoples, Legislation Bulletin of the Russian Federation, 1999, No. 18, Art. 2208].

territories of traditional settlement of their ancestors and preserving traditions, that are pre-industrial, for example, way of life and crafts. An act of the Government of the Russian Federation supplementing the law ensures the unambiguity of the application of these two criteria.⁸⁰

This act established a list of places of traditional living and traditional economic activities of the indigenous small-numbered peoples of the Russian Federation and a list of their traditional activities. The first list includes individual municipal districts and urban districts on the territories of 28 constituent entities of the Russian Federation; the second list includes 13 types of traditional economic activities.⁸¹ Finally, the fourth criterion indicates the permissible size of the indigenous community as a whole. It cannot exceed 50,000 people.

It is difficult to determine the real number of representatives of one people; the data of the last all-Russian population census (2010) are no longer relevant. In the absence of an indication of ethnicity in the passport of a citizen of the Russian Federation, the question of whether persons belong to the indigenous minorities required a special decision. In 2020, the Government of the Russian Federation determined the procedure for establishing the belonging of a person to a particular indigenous small-numbered people and the rules for maintaining a list of such persons by the Federal Agency for Ethnic Affairs (*Decree of the Government of the Russian Federation of 23 September 2020 No. 1520*).⁸²

Some Russian and international experts consider the “quantitative” criterion of belonging to a national minority as a manifestation of discrimination. There are such indigenous communities, the number of which is more than the limit established by law, who do not have a special legal status and preferences provided for by law. M. Zhukov lists at least seven such peoples: Altaians (67,000), Buryats (480,000),

⁸⁰ Распоряжение Правительства РФ от 8 мая 2009 г. № 631-р «Об утверждении перечня мест традиционного проживания и традиционной хозяйственной деятельности коренных малочисленных народов РФ и перечня видов их традиционной хозяйственной деятельности» // СПС «КонсультантПлюс» [Directive of the Government of the Russian Federation No. 631-r of 8 May 2009. On Approval of the List of Places of Traditional Residence and Traditional Economic Activities of the Indigenous Peoples of the Russian Federation and the List of their Traditional Economic Activities, SPS “ConsultantPlus”] (Jun. 4, 2021), available at http://www.consultant.ru/document/cons_doc_LAW_87690/.

⁸¹ These types of activities include nomadic animal husbandry, dog breeding, beekeeping, hunting, fishing, construction of national traditional dwellings.

⁸² Постановление Правительства РФ от 23 сентября 2020 г. № 1520 «Об утверждении Правил ведения списка лиц, относящихся к коренным малочисленным народам Российской Федерации, предоставления содержащихся в нем сведений, а также осуществляемого в связи с его ведением межведомственного взаимодействия» // СПС «КонсультантПлюс» [Decree of the Government of the Russian Federation No. 1520 of 23 September 2020. On the Approval of the Rules for Maintaining a List of Persons Belonging to the Indigenous Peoples of the Russian Federation, the Provision of Information Contained in It, as Well as Interdepartmental Interaction Carried Out in Connection With its Maintenance, SPS “ConsultantPlus”] (Jun. 4, 2021), available at http://www.consultant.ru/document/cons_doc_LAW_363124/.

Karelians (61,000), Komi (202,000), Khakases (73,000), Tuvinians (264,000), Yakuts (478,000).⁸³

In August 2017, the UN Committee on the Elimination of Racial Discrimination assessed the quantitative criterion of belonging to indigenous peoples in Russian legislation as follows:

The legal definition of indigenous peoples in the State party imposes a numerical ceiling of 50,000 individuals beyond which a self-identified indigenous group may not be classified as indigenous, thus prevented from enjoying legal protection of their lands, resources and livelihoods.⁸⁴

Indeed, the logic of Russian legislation differs from the logic of international treaties. Different definitions of subjects of law (“indigenous peoples” and “indigenous small-numbered peoples”) are due to different ideas about the essential characteristics of such peoples. *ILO Convention No. 169 of 1989* defines these characteristics as follows: 1) self-determination as an indigenous people; 2) preservation of the traditional (tribal) way of life and traditional institutions; 3) living in the territories where the ancestors of these peoples lived during the period of conquest (colonization) “or during the establishment of existing state borders.”⁸⁵ For Russia, the second variant of the legal connection between the aborigines and their places of living is inherent, and federal legislation indirectly reflects this.⁸⁶

Documents of international financial institutions make important additions to the list of characteristics of indigenous peoples. The World Bank considered such characteristics as: 1) lower social status of indigenous peoples in comparison with other communities of the country (region) and 2) dependence of such peoples on natural resources. The term “dependency” means that

for many generations the group concerned has lived and had economic ties to land and territory that it traditionally owned or usually used or occupied, including areas of special importance to it (for example, sacred sites). It also means the use of the territory by migratory pastoralists and nomadic groups of the indigenous population on a seasonal or periodic basis.⁸⁷

⁸³ Жуков М.А. О проблеме коренных народов России // Редкие земли. 2016. 23 нояб. [Mikhail A. Zhukov, *On the Problem of the Indigenous Peoples of Russia*, Rare Earth, 23 November 2016] (Jun. 4, 2021), available at <http://rareearth.ru/ru/pub/20161123/02704.html>.

⁸⁴ Committee on the Elimination of Racial Discrimination, Concluding Observations on the Twenty Third and Twenty Fourth Periodic Reports of the Russian Federation, CERD/C/RUS/CO/23-24/Add.1, 25 August 2017 (Jun. 4, 2021), available at <https://undocs.org/CERD/C/RUS/CO/23-24/ADD.1>.

⁸⁵ Indigenous and Tribal Peoples Convention, *supra* note 9.

⁸⁶ See, e.g., Elena Gladun & Olga V. Zakharova, *Traditional Environmental Values as the Frameworks for Environmental Legislation in Russia*, 23(1) Ethics Pol’y Environ. 37 (2020).

⁸⁷ Operational Manual OP 4/10 “Indigenous Peoples” (was applied till 1 January 2018) (Jun. 4, 2021), available at <https://ppfdocuments.azureedge.net/1570.pdf>.

Documents of other international financial institutions reflect similar approaches. As usual, the number of people has no legal significance for its recognition as an indigenous people.

Only one constituent entity of the Russian Federation has adopted this approach – the Republic of Sakha (Yakutia). According to its Constitution, the Yakuts are among the indigenous peoples in this Republic, the number of which is almost ten times more than the limit established by federal law.⁸⁸ The Constitutional Court of the Republic of Sakha considered the case on the interpretation of Article 42 of the Constitution of the Republic.⁸⁹ The court concluded that

indigenous peoples are the descendants of those people and peoples who inhabited this territory before the arrival of people and peoples with a different culture, religion, language, customs, and other ethnic and racial origin; they are characterized by cultural, linguistic differences, differences in traditions from the rest of the population of a country or region; they consciously consider themselves as such (indigenous) and such self-awareness is part of their culture, religion, being and existence. This is expressed in a sense of spiritual closeness, the consciousness of belonging to an original culture with characteristic features; indigenous peoples have close connection to their native land, nature and their environment.⁹⁰

The indigenous peoples in this Republic include the Russian old-time population.⁹¹

But the example of Yakutia does not change the general rule. The preferences stipulated by federal legislation are not guaranteed to all indigenous peoples, but only to small-numbered ones, numbering less than 50,000 people.

Regarding other ethnic minorities, federal legislation has developed a similar approach in meaning. There is still no federal law in Russia that regulates the

⁸⁸ In total, there are more than 470 thousand Yakuts in Russia, of which about half live in the Republic of Sakha, so that in the population of this republic they are the absolute majority, more than 82 percent. For more information, see *Маклашова Е.Г.* Трансформация этнической структуры населения Якутии: территориальный срез // Ойкумена. Регионоведческие исследования. 2019. № 4. С. 98–105 [Elena G. Maklashova, *Ethnic Structure's Transformation of Population of Yakutia (Territorial View)*, 4 Ojkumena. Regional Researches 98 (2019)].

⁸⁹ Постановление Конституционного суда Республики Саха (Якутия) от 21 октября 2016 г. № 4-П «По делу о толковании положений статьи 42 Конституции (Основного закона) Республики Саха (Якутия)» [Resolution of the Constitutional Court of the Republic Sakha (Yakutia) No. 4-P of 21 October 2016. On the Interpretation of the Provisions of Article 42 of the Constitution (Basic Law) of the Republic of Sakha (Yakutia)] (Jun. 4, 2021), available at <https://ks.sakha.gov.ru/uploads/ckfinder/userfiles/files/%D0%9F%D0%BE%D1%81%D1%82%D0%B0%D0%BD%D0%BE%D0%B2%D0%BB%D0%B5%D0%BD%D0%B8%D0%B5%20%E2%84%96%204-2016.pdf>.

⁹⁰ *Id.*

⁹¹ *Боякова С.И.* Русские старожилы Якутии: культура и ландшафт // Арктика и Север. 2012. № 9. С.73–80 [Sardana I. Boyakova, *Russian Old-Timers of Yakutia: Culture and Landscape*, 9 Arctic and North 73 (2012)].

status of national minorities in general and procedures for protecting their rights. Attempts to accept it have been made since the 1990s.⁹² At the same time, some of the neighboring republics of the former USSR adopted such laws (for example, Ukraine). Russia signed but did not ratify the *CIS Convention on the Ensuring of the Rights of Persons Belonging to National Minorities* (Moscow, 21 October 1994). The definition of national minorities, contained in Article 1 of this treaty, did not become part of the current Russian law.

The tasks of ensuring the rights of ethnic minorities are solved fragmentarily by several federal laws, systematically – only one – *Federal Law of 17 June 1996 No. 74-FZ “On the National Cultural Autonomy.”*⁹³ In its first edition, the Law defined the national cultural autonomy as a form of national and cultural self-determination that unites citizens of the Russian Federation who identify themselves as belonging to certain ethnic communities. In 2003, the definition changed, and this approach was preserved in the current version of the Law. It is

a form of national and cultural self-determination, which is an association of citizens of the Russian Federation who identify themselves as belonging to a certain ethnic community in the situation of a national minority in the respective territory ...⁹⁴

The change in the definitions of the Law was the result of legal proceedings. Since national cultural autonomy was initially understood as a special public association, its formation was limited by the principle of territoriality, which is the same for all public associations in the Russian Federation. It was possible to form national cultural autonomies of local, regional, and federal meaning. The subject of the dispute was the formation of the national-cultural autonomy of Russians, since they are the majority.⁹⁵ The joint position of the Ministry of Justice of the Russian Federation and courts of general jurisdiction was that an ethnic community that forms a majority

⁹² *Скоробогатов А.В.* Понятие «национальное меньшинство» в российском законодательстве // Актуальные проблемы экономики и права. 2008. № 3. С. 82–85 [Andrei V. Skorobogatov, *The Concept of “National Minority” in Russian Legislation*, 3 Actual Problems of Economics and Law 82 (2008)].

⁹³ Федеральный закон от 17 июня 1996 г. № 74-ФЗ «О национально-культурной автономии» // Собрание законодательства РФ. 1996. № 25. Ст. 2965 [Federal Law No. 74-FZ of 17 June 1996. On the National Cultural Autonomy, Legislation Bulletin of the Russian Federation, 1996, No. 25, Art. 2965].

⁹⁴ Федеральный закон от 10 ноября 2003 г. № 136-ФЗ «О внесении изменений в Федеральный закон «О национально-культурной автономии»» // Собрание законодательства РФ. 2003. № 46 (ч. 1). Ст. 4432 [Federal Law No 136-FZ of 10 November 2003. On Amendments to the Federal Law on National Cultural Autonomy, Legislation Bulletin of the Russian Federation, 2003, No. 46 (Part 1), Art. 4432].

⁹⁵ *Калашников К.Н.* Национально-культурные автономии в современной России: проблемы представительства и эффективности // Вопросы территориального развития. 2020. Т. 8. № 3. С. 1–20 [Konstantin N. Kalashnikov. *National Cultural Autonomies in Modern Russia: Problems of Representation and Efficiency*, 8(3) Issues of Territorial Development 1 (2020)].

within a certain territorial unit does not have the right to autonomy in this territory. Only being in a “minority state” gives such a right. Therefore, in relation to those ethnic minorities that are not indigenous peoples, the key condition for obtaining a special status (the right to autonomy) *de jure* has also become a quantitative feature. *De facto* restrictions of the law can be circumvented. The only national and cultural autonomy of Russians, according to the official information of the Ministry of Justice of the Russian Federation, is their regional autonomy in the Kaliningrad region.⁹⁶ The share of Russians in the ethnic composition of the region’s population is more than 77 percent.

3.3. Limitations, Imbalances and Directions of Modernization of Russian Law on National Minority Issues

The essential role of the size criterion has advanced in Russia historically and will continue. However, its significance should not be exaggerated. For the recognition of the special status of a community, the entire set of legal characteristics is important. Thus, the traditional way of life is led by the old-time population of the North (Russians and Tatars), Old Believers and other communities. Even with a small number (less than 10,000) and the preservation of the traditional way of life, the Pomors could not prove their belonging to the aboriginal ethnic groups; they were not included in the list of indigenous small-numbered peoples of the Russian Federation (one of the obstacles in resolving the issue was the Pomor language, which is a dialect of the Russian language). Equally important is the procedure for changing the list of such peoples. A new procedure for revising the List of Indigenous Minorities of the Russian Federation was determined in 2020. The Government of the Russian Federation makes changes at the suggestion of the Federal Agency for Nationalities Affairs on the basis of the submissions from the highest officials of the constituent entities of the Russian Federation (heads of the supreme executive bodies of state power of the constituent entities of the Russian Federation), in whose territories the indigenous small-numbered peoples live. Aboriginal communities, their organizations or representatives are not direct participants in this process, but, of course, they can influence the position of the head of the constituent entities of the Russian Federation. Community councils with the participation of aboriginal representatives under the executive authorities of the constituent entities of the Russian Federation have become the main instrument of such influence. As a rule, they are headed by senior officials of the constituent entities of the Russian Federation.

Comparing the legal status of aboriginal and other small ethnic groups, one can see a huge distance between them in the issue of formalizing their legal status. The law on issues of indigenous small-numbered peoples sets a system of special legal institutions, including the unique institution of the commissioner for the

⁹⁶ See official portal of the Ministry of Justice of the Russian Federation (<http://unro.minjust.ru/NKAs.aspx>).

protection of the rights of indigenous small-numbered peoples, which arose in some constituent entities of the Russian Federation (Krasnoyarsk Territory, Kamchatka Territory, Republic of Sakha (Yakutia)). But those ethnic minorities that are not indigenous and, at the same time, are not “titular” in the constituent entities of the Russian Federation, have practically no special tools to protect their collective rights. Such communities, as well as their public associations, do not have additional rights to participate in the exercise of public power. The practice of including the leaders of ethnic public associations in the public councils under the President of the Russian Federation and the heads of the constituent entities of the Russian Federation partially compensates for this.

3.4. Institutions of Representation of Indigenous Small-Numbered Peoples in Russia

Indigenous small-numbered peoples have a diversified system of institutions for their representation. Over the almost two-hundred-year history of the existence of these peoples as part of the Russian state, it has changed markedly. We can talk about the “rudiments” of traditional institutions that took shape in the pre-Soviet period; about the practices of representation that developed during the Soviet period and in the 1990s; and finally, about the modern institutions of their representation, which partly replace the earlier ones, partly re-established, representing the newest (modernized) aboriginal law. However, their representative institutions are formed at the regional and local levels, practically without affecting the federal level. The exceptions to this rule are: the *Council for Interethnic Relations under the President of the Russian Federation* (established in 2012; it includes the President of the All-Russian public organization “Association of Indigenous Minorities of the North, Siberia and the Far East of the Russian Federation”), as well as the *Public Council of the Arctic Zone under the Ministry of the Russian Federation for the Development of the Far East and the Arctic* (includes presidents of four regional associations of indigenous peoples: Murmansk Oblast, Krasnoyarsk Territory, Nenets and Yamalo-Nenets Autonomous Districts).

The tribal community is a traditional form of self-organization of the aborigines, which has been preserved since pre-revolutionary times where there has long been a practice of general gatherings of the clan, if a collective decision was required. During the period of the Soviet state, the community was “completed” by various institutions of direct and representative democracy. These included tribal meetings and tribal councils in the 1920s; National District Councils; rural and nomadic Councils in national districts and Congresses of such councils in the 1930–80s. A new look at the nature of local government and the establishment of local self-government in Russia in the 1990s set a precedent for representation in the Soviet state. New representative institutions were created on the initiative of the aborigines themselves, although in terms of their organizational and legal form they often resembled the usual Soviet ones. The 1990s brought on the establishment of

associations of indigenous minorities and public associations were formed on the basis of ethnicity which later were enlarged within the constituent entities of the Russian Federation and the state as a whole (the Association of Indigenous Peoples of the North, Siberia and the Far East was created in March of 1990 at the First Congress of the Peoples of the North).

Regional trajectories for the formation of new representative aboriginal institutions were not the same. In the Republic of Sakha (Yakutia), for example, there is a unique experience in the formation of ethnic self-government of the Yukaghirs, including local representative bodies.⁹⁷ In addition, the regularly held congresses of this people formed the Council of Elders of the Yukaghirs and elected leadership of the Association of this people.⁹⁸

Nevertheless, it is possible to identify some common approaches for all regions, partly due to the requirements and assumptions of federal legislation. Thus, at the turn of the 20th–21st centuries, two main forms of representation of aboriginal communities were formed in the constituent entities of the Russian Federation.

The first form is public (parliamentary) representation. Quotas of representation (“assembly”) of indigenous minorities in regional legislative bodies that are present in the Republic of Buryatia and the Republic of Sakha (Yakutia), Khanty-Mansiysk, Yamalo-Nenets and Nenets autonomous districts. Nowadays, such a representation has survived only in two regions. A feature (and limitation) of this form of representation is that Russian electoral legislation does not allow the establishment of ethnic qualifications in the exercise of electoral rights and the formation of ethnic electoral associations. Consequently, it is possible for when citizen of the Russian Federation who does not belong to such peoples to become a representative of the aboriginal communities in the regional parliament. It is also possible that a representative will not be elected at all. For example, in 1996, following the results of the elections to the Duma of the Khanty-Mansiysk Autonomous District (in a single national territorial constituency), only two out of six deputies were elected, who then formed the Assembly of Indigenous Minorities of the North as part of this body. For other candidates, the elections were invalid: the number of “against” votes turned out to be more than “for” votes. In this regard, a special law was adopted, according to which four deputies were elected in a single 6-mandate constituency and additional elections were held (*Law of the Khanty-Mansiysk Autonomous District of 24 September 1997 No. 48-OZ “On the Election of Four Deputies of the Duma of the Khanty-Mansiysk*

⁹⁷ Астахова И.С. Самоуправление юкагигов Якутии: история становления и современность // Современные проблемы науки и образования. № 6. 2013. С. 804 [Irina S. Astakhova, *Self-Governance of the Yukaghirs of Yakutia: History of formation and modernity*, 6 Modern Issues of Science and Education 804 (2013)].

⁹⁸ UN Economic and Social Council, Representative Institutions and Models of Self-Governance of Indigenous Peoples in Eastern Europe, the Russian Federation, Central Asia and Transcaucasia: Ways of Enhanced Participation, E/C.19/2021/8, 27 January 2021 (Jun. 4, 2021), available at <https://undocs.org/en/E/C.19/2021/8>.

Autonomous District in a Single Six-Member National-Territorial Constituency).⁹⁹ At present, the “quota” of representatives for the formation of the Assembly of Indigenous Minorities in the Duma of the District has been reduced to three mandates; a single multi-mandate constituency is not formed for their election, but there is an informal agreement between the three parliamentary factions that one mandate in the list of each electoral association goes to a representative of indigenous peoples.

In the Republic of Sakha (Yakutia), the issue of formation of the Assembly of Indigenous Small-Numbered Peoples of the North in Il Tumen (the regional parliament) is decided following the results of the past parliamentary elections; the election of representatives of indigenous communities is ensured by cutting electoral districts with a smaller number of voters (the federal law allows for a decrease in the number of voters in an electoral district formed in the territories of traditional residence of indigenous minorities by 40 percent in comparison with the average rate of representation). At the same time, not only the elected deputies themselves, but also other representatives of these communities (deputies of the representative bodies of municipalities from among these peoples, representatives of their public associations) take part in the meetings of the Assembly; foreign citizens – representatives of aboriginal communities are invited as guests. This practice is reasonably recognized as being more successful.¹⁰⁰

The second form of representation of indigenous communities is their authorized representation at the state bodies of the constituent entities of the Russian Federation. According to the main legal characteristics, such representation cannot be classified as public, it is a variant of corporate representation and representation of the interests of a certain social group, which is implemented like a private legal representation. According to federal legislation, authorized representatives of indigenous communities include non-profit organizations, unions, associations of communities, as well as the Russian Association of Indigenous Peoples of the North (RAIPON). According to the legislation of the constituent entities of the Russian

⁹⁹ Закон Ханты-Мансийского автономного округа – Югры от 24 сентября 1997 г. № 48-оз «О выборах четырех депутатов Думы Ханты-Мансийского автономного округа по единому шестимандатному национально-территориальному избирательному округу» [Law of the Khanty-Mansiysk Autonomous District No. 48-OZ of 24 September 1997. On the Election of Four Deputies of the Duma of the Khanty-Mansiysk Autonomous District in a Single Six-Member National-Territorial Constituency] (Jun. 4, 2021), available at <https://www.lawmix.ru/zakonodatelstvo/1940112>.

¹⁰⁰ *Никитина Е.Е.* Формы и способы привлечения представителей коренных малочисленных народов Севера, Сибири и Дальнего Востока Российской Федерации к принятию решений органами государственной власти и местного самоуправления // Анализ российской и зарубежной правовой базы, международно-правовых актов, а также правоприменительной практики в области защиты прав коренных малочисленных народов Севера, Сибири и Дальнего Востока Российской Федерации [Elena E. Nikitina, *Forms and Methods of Attracting Representatives of the Indigenous Small-Numbered Peoples of the North, Siberia and the Far East of the Russian Federation to Decision-Making by State and Municipal Bodies in Analysis of the Russian and Foreign Legal Framework, International Legal Acts, as well as Law Enforcement Practice in the Field of Protecting the Rights of Indigenous Small-Numbered Peoples of North, Siberia and the Far East of the Russian Federation*] 62 (2019).

Federation, individuals are also included in the above-mentioned subjects of law.¹⁰¹ In the Republic of Buryatia, Magadan and Sakhalin regions, an authorized representative acts under the legislative (representative) bodies of these constituent entities of the Russian Federation. Authorized representatives are delegated or elected by community associations of indigenous minorities to lobby their interests; they can also be endowed with a special right of legislative initiative in regional parliaments (Magadan and Sakhalin regions).

Somewhat later, in the second decade of the 20th century, a third form of representation of indigenous communities developed in the constituent entities of the Russian Federation, this involved community representation under executive authorities of the constituent entities of the Russian Federation and under the heads of municipalities. Such representation takes the form of a public council or an interdepartmental commission, to which representatives of the communities of indigenous small peoples, their public organizations, including territorial community self-government of indigenous people, are delegated. Federal legislation allowed this form of representation in the 1990s but interest in it arose later. Moreover, this representation plays an increasing role in the relations of indigenous communities not only with state authorities and local self-government bodies, but also with economic entities whose interests often compete with the interests of indigenous peoples. The initial diversity of regional practices¹⁰² begins to unify under the influence of changes in federal legislation in 2019–2020.

In 2019, the Federal Law “On Guarantees of the Rights of the Indigenous Small-Numbered Peoples of the Russian Federation” was supplemented by a provision where the Government of Russia approved a procedure for compensation for losses caused to communities of indigenous small-numbered peoples as a result of damage to their original habitat by economic entities. The Government approved this procedure in 2020. According to the government act, compensation for losses to communities and individual households of indigenous peoples is carried out on the basis of agreements between economic entities operating in the territories of traditional residence and traditional economic activities of such peoples, as well as public councils with their participation under the executive authorities of the

¹⁰¹ Закон Хабаровского края от 27 ноября 2001 г. № 351 «Об уполномоченном представителе коренных малочисленных народов Севера, Сибири и Дальнего Востока Российской Федерации в Хабаровском крае» [Law of the Khabarovsk Territory No. 351 of 27 November 2001. On the Authorized Representative of the Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation in the Khabarovsk Territory] (Jun. 4, 2021), available at://docs.cntd.ru/document/995105495.

¹⁰² Плюгина И.В. Институциональная основа обеспечения и защиты прав коренных малочисленных народов в субъектах Российской Федерации и муниципальных образованиях [Irina V. Pliugina, *Institutional Framework for Ensuring and Protecting the Rights of Indigenous Small-Numbered Peoples in the Constituent Entities of the Russian Federation and Municipalities*] in *Analysis of the Russian and Foreign Legal Framework*, *supra* note 100, at 103, 108.

constituent entities of the Russian Federation (Decree of the Government of the Russian Federation of 18 September 2020 No. 1488).¹⁰³

Along with the system of institutions for the representation of indigenous minorities in the constituent entities of the Russian Federation, either specialized human rights institutions are created (authorized to protect their rights); or regional commissioners for human rights in the constituent entities of the Russian Federation (Sverdlovsk Region, Republic of Buryatia, Khanty-Mansi Autonomous District – Yugra, etc.) perform these functions. In this case, a group of public assistants to the commissioner was formed among the members belonging to indigenous small-numbered peoples.

Other ethnic minorities in Russia do not have specific rights or representative institutions, but the 2020 constitutional reform creates the legal prerequisites for the formation of targeted measures to ensure and protect their rights. In addition, there are mechanisms common for all citizens of Russia to ensure their constitutional rights.

Conclusion

Various national vectors of the constitutionalization of national minorities' rights in Brazil, India and Russia have a common social context: the incompleteness of the process of forming a nation as a form of unity that dominates racial, ethnic, religious, linguistic, and other social differences. This significantly complicates the task of national legal regulation. Determination of the legal status of national minorities should exclude the prospect of their separation and the risks of social and economic disintegration of the territories.

At first view, the legislation of these states legal criteria for belonging to national minorities provide different understandings of the term "national minority." In Russian constitutional law, there is the concept of "national minority," which is interpreted in laws identical to the concept of "ethnic minority." Among ethnic minorities, the group

¹⁰³ Постановление Правительства РФ от 18 сентября 2020 г. № 1488 «Об утверждении Положения о порядке возмещения убытков, причиненных коренным малочисленным народам Российской Федерации, объединениям коренных малочисленных народов Российской Федерации и лицам, относящимся к коренным малочисленным народам Российской Федерации, в результате нанесения ущерба исконной среде обитания коренных малочисленных народов Российской Федерации хозяйственной деятельностью организаций всех форм собственности, а также физическими лицами» // СПС «КонсультантПлюс» [Decree of the Government of the Russian Federation No. 1488 of 18 September 2020. On Approval of the Regulation on the Procedure for Compensation for Losses Caused to the Indigenous Peoples of the Russian Federation, Associations of Indigenous Peoples of the Russian Federation and Persons Belonging to the Indigenous Peoples of the Russian Federation, as a Result of Damage to the Original Environment the Habitation of the Indigenous Peoples of the Russian Federation by the Economic Activities of Organizations of All Forms of Ownership, as Well as by Individuals, SPS "ConsultantPlus"] (Jun. 4, 2021), available at http://www.consultant.ru/document/cons_doc_LAW_362663/.

of indigenous small-numbered peoples stands out. Their legal status is characterized by systemic regulation in federal legislation and in the legislation of the constituent entities of the Russian Federation, while the position of other ethnic minorities is regulated fragmentarily. In India, a national minority is any “non-majority,” which is considered any community that differs from the majority of the nation on the basis of religious, social (caste), linguistic, ethnic and other factors. However, the implementation and interpretation of the provisions of the Constitution of India indicates that the status of national minorities is addressed only to religious and linguistic minorities. In these two countries, positive discrimination is possible only if the community is officially recognized as a national minority by competent state authorities (not every minority is a minority in the legal sense of the word). In Brazil, the approach is different: those who identify themselves in this capacity are recognized as national minorities, while the criterion of size is not considered as legally significant. National minorities in this state are “traditional” communities. Their composition is diverse, but they are all non-dominant, socially vulnerable social groups. These are minorities in the sense referred to by F. Capotorti.¹⁰⁴

However, there is commonality between approaches, in all states, the concept of a national minority in the process of law enforcement is reduced to one (Brazil, Russia) or two (India) minorities whose integration into modern industrial (post-industrial) relations is associated with additional risks. In this sense, the very fact of the existence of these minorities objectively complicates the processes of modernizing the national economy.

Ensuring and protecting the rights of national minorities in all three states is the responsibility of both federal and regional authorities; the rule of “two laws” is in effect. Along with federal legislation, the laws of the constituent entities of the federations provide additional opportunities to ensure the rights of national minorities. At the same time, in Russia, the constitutionalization of the rights of aboriginal ethnic groups was largely due to constituent entities of the Russian Federation prioritizing legal regulation. Institutions of aboriginal law have been established at the level of constituent entities of the Russian Federation, however, they have not developed at the federal level (ethnological expertise, commissioners for the rights of indigenous peoples, etc.).

The legal mechanisms for the constitutionalization of national minorities’ rights in the analyzed BRICS countries are diverse. India has accumulated a large base of judicial precedents on the issues of national minorities, which is consistent with the specifics of its legal system. Brazil adopts a public (federal) administration approach using the tools of delegative democracy. It recognizes the importance of FPIC, even though implementation of this principle is often formal. In Russia, a huge number

¹⁰⁴ Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* 114 (1979).

of normative legal acts, both federal and regional, have been adopted, regulating the issues of indigenous communities (but not other national minorities), initiating codification of legislation on indigenous peoples. In Russia, the constitutionalization of national minorities' rights are a complex system of representation of indigenous minorities. Significant regional variability differentiates this system, but the process of unification of such institutions is already noticeable. Among the various forms of representation, the following forms are most popular: assemblies (public parliamentary representation), authorized representation under the regional legislative authorities and community representation under executive authorities of constituent entities of the Russian Federation and heads of municipalities. At the federal level of government, only community councils represent indigenous and other ethnic minorities. Non-indigenous ethnic minorities are significantly less involved in the exercise of the powers of public authorities at all levels. In Brazil, the participation of national minorities in public decision-making is ensured through quotas of their presence in government and institutions. For India, education has become a priority area for involving national minorities in national processes. Summarizing the results of our study, we should note that the unity of approaches for ensuring national minorities' rights in the BRICS member-states is impossible through the adaptation of general legal criteria of such minorities or constitutional law institutes. It is necessary to provide a common understanding of the purpose of constitutionalization of national minorities' rights, which is the preservation of the identity of such minorities in the process of their gradual involvement in modern economic structures and national processes. Measures for the achievement of this purpose, in our mind, could prevent threats to the economic and social disintegration of their territories, as well as strengthen the national unity of BRICS member-states.

References

- Faraz M. & Raza A. *Minority Educational Institutions and the Supreme Court after the T.M.A. Pai Judgment*, 1 *Int. Res. J. Soc. Leg. Stud.* 58 (2016). <https://doi.org/10.2139/ssrn.2788855>
- Gladun E. & Zakharova O.V. *Traditional Environmental Values as the Frameworks for Environmental Legislation in Russia*, 23(1) *Ethics Pol'y Environ.* 37 (2020). <https://doi.org/10.1080/21550085.2020.1746004>
- Gladun E. *Sustainable Development of the Russian Arctic: Legal Implications*, 12(2) *NISP. J. Public Adm. Pol'y* 29 (2019). <https://doi.org/10.2478/nispa-2019-0013>
- Ivanov D. & Levina M. *Prospects of International Legal Cooperation of States Under U.N. Auspices in Developing a Treaty on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, 8(1) *BRICS L.J.* 135 (2021). <https://doi.org/10.21684/2412-2343-2021-8-1-135-161>
- Kashyap S.C. *The Framing of India's Constitution – A Study* (4th ed. 2004).

Paixao S. et al. *Modeling Indigenous Tribes' Land Rights with ISO 19152 LADM: A Case from Brazil*, 49 Land Use Policy 587 (2015). <https://doi.org/10.1016/j.landusepol.2014.12.001>

Rahman F. *Education, Minorities and Constitution of India*, 1(1) *Jamia L.J.* 46 (2016). <https://doi.org/10.1177/0094582X0202900104>

Sales S. *Historical Roots of the "Whitening" of Brazil*, 29(1) *Lat. Am. Perspect.* 61 (2002).

Sica M. *Politics and Religion in India: Minorities*, 19(1) *Transit. Stud. Rev.* 131 (2012). <https://doi.org/10.1007/s11300-012-0224-8>

Skidmore T.E. *Black into White: Race and Nationality in Brazilian Thought* (1974).

Supreme But Not Infallible: Essays in Honour of the Supreme Court of India (Rajeev Dhavan et al. eds., 2020).

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