

BOFAXE

A state obligation to allot land to minorities?

HOW DOMESTIC DEVELOPMENTS SHINE A NEW LIGHT ON ARTICLE 27 ICCPR

Land rights are an important, but underexplored aspect of international law. Although a general right to land has been discussed for several years and appears to slowly take shape (see Chapters 6 & 7 [here](#)), land rights are still mostly viewed through the lens of particular populations. Contrary to indigenous peoples, whose sacred connection to their ancestral lands is by now well recognized, the concept of minority land rights has so far been largely eschewed. Taking several recent land disputes surrounding ethnic and religious minorities on the Indian subcontinent as a starting point, this piece argues that a closer look at national developments and domestic case law, may provide the missing link between minorities and land to be transposed to the international plane, an undertaking which forms part of the author's PhD project.

The Indian Subcontinent has long been characterized by an ethnically and religiously diverse population, a product of its long and tumultuous history. Today, large numbers of ethnic and religious minorities remain in Bangladesh, India and Pakistan. In India, a secular republic as per its [Constitution's preamble \(p.1\)](#), land-related debates around inter-communal relations have been frequent over the last years, with criticism directed at policies of Prime Minister Narendra Modi's government vis-à-vis India's Muslim minority (see [here](#) for an opinion piece providing historical context). In August 2019, India revoked Jammu and Kashmir's special status, which had included restrictions on non-residents acquiring land in India's only Muslim-dominated territory (see [here](#)). And a decades-long dispute around land in the city of Ayodhya said to have once housed a temple at a sacred Hindu site, currently occupied by the remains of the 16th Century Mosque of Babur was only brought to a closure by India's Supreme Court in November 2019 (see [here](#)).

Most recently, in Pakistan, the [Islamabad High Court](#) rejected several petitions challenging the construction of a Hindu Temple Complex, including a community centre and a cremation site on a plot of land that the Capital Development Authority (CDA) had handed over to representatives of the Hindu minority. The CDA is a municipal service provider tasked, among others, with allocating land in Islamabad. The petitions took issue with different aspects of the project, some challenging the necessity for a Hindu community and religious complex in the city. The Court acknowledged the argument of legal counsel for the CDA that Islamabad's sector H-9/2 was designated to accommodate minority communities' needs. However, it also noted that the process was halted for the time being, since the Hindu allottees had not complied with several CDA rules on submission of a building plan.

Consequently, the Court refrained from addressing the most interesting issue for the purposes of this Bofax, namely whether final allotment of the land to the Hindu Community and funding for this purpose by the Pakistani Federal Government was lawful. What is more, considering the positive human rights obligations of states vis-à-vis minorities under the International Covenant on Civil and Political Rights Art. 27, the case invites reflection on a more wide-ranging question: More than it merely being lawful in individual cases, do states have an obligation to accord land rights to their ethnic, religious or linguistic minorities, for example by allocating land to construct places of worship or cultural and community centres?

Currently, community-oriented land rights on the international plane are derived either from a spiritual connection to certain lands (in the case of indigenous peoples) or from land being essential to sustain livelihoods (see the emerging rights of smallholder farmers as laid down in the [UN Peasants Declaration](#)). These criteria are not clear-cut or make for easily distinguishable categories; they can intertwine or tie in with other considerations. For example, members of underprivileged smallholder communities may suffer further marginalization as a result of their belonging to a particular indigenous or other ethnic or religious group (see [here](#) for a pertinent piece on Hindus in Bangladesh). But what about ethnic, linguistic, or religious minorities who do not fit recognized categories of land rights bearers? Admittedly, many minority groups may not hold the same ties to specific lands as indigenous peoples do, whose spiritual relationship derives from having dwelt there since "time immemorial" (see [here](#) for a critical piece on this "legal fiction"). Minorities may also not depend so much or not at all on lands to eke out and sustain a livelihood if they are not agriculturalists.

However, in states with population groups of various cultural, ethnic and religious backgrounds, land, even on a small scale, such as a city plot, may provide a haven for communities in which they can express their identity while remaining in their home country. Why else would Islamabad's Hindu Community ask for a temple to convene at in their city? Expressing religious convictions, preserving cultural traditions, and celebrating ethno-religious festivities is an important, sometimes defining part of one's identity. But ethno-cultural ties to other lands do not automatically give rise secessionist tendencies and trump the attachment people feel towards the states of which they are citizens. Those states, regions or cities are their home and they look to preserve some parts of their identity within them. Still, minority land rights remain largely absent from international law debates. They are not directly addressed in international treaties. The closest lead is Article 27 ICCPR, which aims to protect minority identities (see [General Comment No. 23](#) of the ICCPR's Human Rights Committee, HRC, at para. 9), but the HRC has so far only engaged with land claims brought by members of indigenous groups (see [here](#) for an overview of the HRC's approach towards protecting indigenous "culture as a way of life", at p. 370). Similarly, although international and regional jurisprudence have developed a corpus of indigenous land rights case law, they are mostly silent on minority land rights. (for an overview of land rights cases, see the [OHCHR's 2015 annotated compilation of case law](#)).

National developments show that minority land rights are a real issue. Whereas the Islamabad High Court, as mentioned previously, has so far refrained from pronouncing on the thorny question of potential positive obligations of the Pakistani state to provide land to its Hindu minority, in the [Mosque of Babur case](#), the Indian Supreme Court directed the Federal and the Uttar Pradesh State Government to work together to allot suitable land to the Muslim plaintiffs for the construction of a new Mosque to cater to the minority community (at para 805 (3)). Such minority land rights cases are not confined to the Indian Subcontinent. For example, in Bosnia and Herzegovina, the Human Rights Chamber accepted use rights of Muslims on State lands which had previously housed Mosques destroyed during the 1990s wars (see [here](#) for a summary, at p. 70) and in Greece, [after a presidential decree and parliamentary vote, Athens's first state-sanctioned mosque in 200 years is set to open shortly](#) to cater to the city's large Muslim community.

Given these developments that point towards increasing demands by minority populations for land concessions from their home states and courts' increasing involvement over disputes arising from this, national jurisprudence and its interplay with international law should receive more attention in fleshing out the, so far only broadly delineated, contours of Article 27 ICCPR with regard to land rights. An argument can be made that land rights protected by that norm should not be restricted to indigenous rights over territory, although this remains an important aspect. Land can just as well mean an ancestral indigenous territory as a city plot housing a religious site. Further exploring the relationship between minorities and land rights in the international legal framework would not run counter to established indigenous rights, but add an additional nuance to them and contribute to finding innovative ways in which international law can help to push the majority of states made up of culturally, linguistically and religiously heterogeneous populations towards meaningful engagement with their minorities. It is hoped that further engagement with domestic case law from around the world (expanding on for example the [detailed scholarly contribution](#) by Pentassuglia), understood as forming part of the sources of international law (see [here](#)), will help to unearth, clarify and enhance the current state of minority land rights on the international plane. Whether they can ultimately have an impact on the relations between states and their minority populations and, further, close the protection gap vis-à-vis minorities remains to be seen.