

BOFAXE

Land and Identity

ON INDIA'S REVOCATION OF JAMMU & KASHMIR'S SPECIAL CONSTITUTIONAL STATUS

— “[There will be chaos if our identity is compromised](#)”. This statement by Mehbooba Mufti, former Chief Minister of the Indian State of Jammu and Kashmir (J&K), shows that the long-simmering conflict over the region ([see also Bofax Nr. 517E “Trading Blows”](#)) has once again reached boiling point. This Bofax focuses on the interplay of land and minority identity in Kashmir, juxtaposing it with the current ascendancy of land rights in international law. It argues that the use of land rights to preserve distinct cultures and identities invites further reflection on land as a matter of international law.

Following the 1947 partition of India, the former princely State of Kashmir was divided after Indo-Pakistani skirmishes for control. A UN-backed referendum for Kashmiris to decide on independence or on joining India/Pakistan was never held, and, given the geopolitical realities, external self-determination for Kashmiris remains elusive. Today, Pakistan is holding on to northern and western Kashmir, whereas India administers J&K, the largest and most populous area of the region.

J&K remains India's only Muslim majority state and the preservation of culture and identity has long been considered particularly important to its inhabitants in a country whose population is overwhelmingly Hindu. Accordingly, the [Constitution of India](#), through its Article 370 and various Constitutional Application Orders long provided J&K with the power to legislate on its internal affairs. It further conferred upon “permanent residents” a number of privileges, while placing restrictions on non-Kashmiris, including a controversial restriction on acquiring land or settling in J&K, set to protect Kashmiri identity and keep demographics at a stable level within the state.

This longstanding status quo is now set to change: Early on 5 August 2019, Indian Interior Minister Amit Shah announced an [order](#) by Indian President Ram Nath Kovind to revoke the special status of J&K, superseding a [1954 presidential order](#). That order, through the introduction of a new constitutional norm (Article 35A), first, authorized the State of J&K, to legally define permanent residents: citizens of India who were State subjects or had resided in J&K for 10 years before 14 May 1954 (Article 6, [J&K State Constitution](#)). Secondly, Article 35A (b)(i-iv) set out restrictions on non-state residents, including those on acquiring land and settling in the state (ii-iii).

Many fear that in revoking the 1954 order, the Indian government under Prime Minister Narendra Modi will seek to gradually undermine the ethno-religious makeup of J&K through large-scale influx and settlement of Hindu groups. The government, which views the land controversy as a domestic issue, argues that revoking restrictions on land and property would in the near future boost investment and development and combat injustices the previous restrictions had incurred (see [here](#) for details).

Far from a purely domestic issue, land has in the last decades gained traction as a matter of international law. It is now increasingly seen as underlying a number of human rights, particular regarding vulnerable populations. Hence, the special attachment of indigenous peoples to their ancestral lands, which derives from a view of the land as both a spiritual home and a generator of an adequate standard of living is now recognized and indigenous peoples have participatory rights in deciding how their lands are to be used.

Conversely, attachments to land and land rights are usually not recognized with regard to (sub state) minorities as States are reluctant towards unwittingly encouraging secessionist tendencies. The essential international norm on minorities, Article 27 [ICCPR](#), protects the rights of individuals as part of ethnic, religious and linguistic minorities to preserve their distinct cultures and identities. The case of Kashmir demonstrates the importance and potential of granting and restricting land rights in this regard. At the same time, it highlights the difficulty of balancing legitimate aspirations to preserve identities with calls for diversity and equality in a multiethnic and multicultural society. The use of land rights in preserving identities, for example through the granting of state land for community settlements, places of worship or cultural centers, may be considered as a compromise between states' often lukewarm efforts at protecting minority identities under Article 27 ICCPR and minority claims for secession and disbandment of ties with their current home states.