

Class exercise for Thursday, 16 February

In groups of three or four, discuss (together!) the four fictitious cases described below. Take the perspective of the applicants in each case and ask: what legal arguments could you put forward as their counsel? What are the different sources and inferences behind your reasoning? Consider especially the provisions of the ICCPR and the 2007 Declaration on the Rights of Indigenous Peoples and, where relevant, the case law of the UN Human Rights Committee (or other UN treaty bodies) and the Inter-American Court of Human Rights. Discuss also where your legal arguments could be considered in terms of legal bodies.

Write down your considerations as concisely and formally as possible (imagine you are drafting memorials). Be thorough as well: if you find that the statement of facts is not conclusive, explain the legal implications that are attached to that. Submit your answers by email at the end of the exercise.

1. Since time immemorial, the Baxi people have lived in a relatively secluded territory with little contact to the outside world. In the 1980s, the provincial government starts expropriation, leasing parts of the territory to companies for gas exploration. Many Baxi people are evicted and, unable to continue their traditional livelihood activities, now rely on their families in other parts of the territory for subsistence; a minority has taken on menial jobs with the oil companies. After years of proceedings, the High Court rejects the collective claims made by the Baxi on the ground that the leases were lawful and that no irreparable harm had been done.
2. The Gopal are an indigenous people that lost their territory many decades ago. The members of the people are scattered throughout the country but come together every two years for a period of several weeks at the same ancient religious site, which is on private property, for ceremonies, festivities and collective decision-making. One year, the government leases a large area including the site to create a temporary campground for a big sporting event, thus making it impossible for the Gopal to hold their gathering. The Supreme Court, in the final instance, denies their collective claim arguing that the Gopal “do not, as such, constitute a people” and that the property owner (a Gopal) had lawfully rented out the area to the government.
3. A female nurse of the Anaya people puts forward a bid before the Elder Council to take charge of the nursing station in her village. In a close call of six votes to five, the Council rejects her application despite her qualifications on the grounds that this has traditionally been a male function as the station, “like any family, requires a father figure” amidst the nurses who are all female. Four of the five votes against the decision are made by the only women in the Council. The nurse seeks a remedy before domestic courts but sees her claim rejected in all instances of the judicial system including in the Supreme Court, which give deference to the Council.
4. A prodigy of the indigenous Raja people is awarded a scholarship to attend a boarding school (and later university) away from home. Having studied educational science, she finally decides to return to her hometown to work as a teacher. Confirming her fears, the school and local council block her plan arguing that her many years of absence from the community have cost her full membership, which is a prerequisite to be a teacher. While free to reside on the territory, she would have to live there for another 15 years to regain it. In the final instance, the Supreme Court quashes the decision of the indigenous institutions stating that the teacher is fully qualified and hence able to work anywhere in the country. The Raja people represented by the local council now want to make their case based on international human rights law.