
TOURISM VS. INDIGENOUS RIGHTS: A CRITICAL ANALYSIS OF LEGAL SAFEGUARDS IN INDIA

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ABSTRACT

Tourism has proved to be an important source of economic development towards India especially ecologically sensitive areas with unique cultures of people residing in these areas. Nevertheless, such growth in the tourism industry is usually associated with displacement, cultural commodification, and degradation of the environment negatively impacting such communities. The paper is a critical analysis of whether the legal protections are sufficient to defend against indigenous rights victimization when it comes to the development of tourism. It considers both the legislations including Forest Rights Act, 2006, the Panchayats (Extension to Scheduled Areas) Act, 1996, and the laws of the environment and the judicial interventions. The article relating to the insufficiency of conducting statutory protection as compared to its practical implementation is namely the absence of participation and meaningful consent of indigenous communities. It proposes more inclusive and rights-based approach to tourism governance including principles of Free, Prior, and Informed Consent. The paper concludes by giving some recommendations on how to ensure the law can be strengthened to develop with indigenous rights.

Keywords: Indigenous Rights, Legal Safeguards, Tourism Laws.

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Introduction

The growth in tourism in India has been unprecedented in recent decades and it has been able to add to the national income, generation of employment and development of the region.³ Almost all the most beautiful sightseeing sites like forest reserves, hill stations, and coast strips are usually occupied by the indigenous people. Such communities have distinct cultural identities, traditional knowledge systems, and symbiosis relationships with their natural environment.⁴ Their lands, livelihoods and even their cultural integrity have however continued to be threatened by the rapid growth in tourism.

The conflict between indigenous rights and tourism development is a significant legal and ethically problematic case. Although tourism is a good idea, it is observed to be a cause of displacement, marginalization, and exploitation of the indigenous people.⁵ Commercialization of culture, construction of infrastructure and environmental degradation all make them more vulnerable. Even with constitutional rights and various laws protecting their rights, indigenous people often experience difficulties in establishing their rights.⁶

The paper aims to critically evaluate how current legal mechanisms are effective in ensuring that indigenous people do not suffer the negative effects of tourism development. It dwells on the discrepancies between the legislation and the work, considers the reactions of the courts, and reveals the necessity of more active and involving a more participative legal method. The paper ultimately seeks to recommend changes that will enable tourism growth to conform to the principles of justice, sustainability and indigenous autonomy.

Main Body

Generally, the development of tourism in India has been crossing into the borders of the regions occupied by indigenous people, and the dynamics between the two are complicated by the need to balance between economic development and the preservation of traditional rights. The indigenous tribes also known as the Scheduled Tribes according to the Indian law,⁷ have over the years relied on the land, forests and the natural resources as a source of sustenance, cultural

³ Government of India, *Draft National Tourism Policy* (2022).

⁴ Ramachandra Guha, *The Unquiet Woods: Ecological Change and Peasant Resistance in the Himalaya* (OUP, 1989).

⁵ N.C. Saxena, "Tribal Displacement and Rehabilitation in India," *Economic and Political Weekly* (2007).

⁶ Centre for Policy Research, *Land Rights and Tribal Displacement in India Report* (2020).

⁷ Constitution of India, Fifth Schedule.

practices and identity. The development of the tourism industry in those regions has destroyed these relations, and it is a serious concern that the legal protection and implementation of laws can be done.

The Indian Constitution must be viewed as offering a basic framework on which the indigenous populations can be provided with protection with references to the Fifth and Sixth Schedules,⁸ which entitle massive tribal areas to autonomy and self-governance. These clauses are meant to protect the tribal interests by barring land transfer, but giving an administrative control of land that is sensitive to the local customs and traditions. Tourism developments however are working around these restrictions by administrative permits and land use redesignation, which undermine the purpose of the protective measures.

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 is one of the most important acts⁹ in this regard. This Act acknowledges the community forest rights and the rights of the communities that live on the forest over the land and the resources. It further requires that when considering the non-forest divergence of forest land such as tourism, then the consent of Gram Sabha is always required.¹⁰ Practically, indeed, this is often ignored or evaded. There have also been instances where consent is gotten without adequate information or through coercion which defeats the principle of informed participation.

In a similar fashion, the Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA)¹¹ lays stress on the aspect of decision making by the Gram Sabhas with regard to the land acquisition and development projects. It appreciates the issues of local self-government and local consent. Nonetheless, it is weakly implemented and in most cases the state authorities go round Gram Sabha approvals¹² to push through tourism projects. This is a continuation of an even larger trend of economic growth based on the indigenous rights.

Since this is an environmental law, the Environmental Protection Act, 1986,¹³ the Forest Conservation Act, 1980, and other environmental laws are also instrumental in controlling tourism activities. Large scale projects undertaken would need Environmental Impact

⁸Constitution of India, Sixth Schedule.

⁹Government of India, *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006*.

¹⁰Ministry of Tribal Affairs, *Forest Rights Act: Status Report (2023)*.

¹¹Government of India, *The Panchayats (Extension to Scheduled Areas) Act, 1996*.

¹²Patnaik, "PESA and Tribal Self-Governance in India," *ICIMOD Working Paper (2007)*.

¹³Government of India, *The Environment (Protection) Act, 1986*.

Assessments (EIAs), to assess their effects on the environment. Nonetheless, critics usually lament that EIAs tend to be shallow, non-transparent and not including the opinion of the indigenous people.¹⁴ This leads to the acceptance of projects without due consideration on the social and environmental impacts of such projects.

Courts have sometimes offered relief to indigenous people on the other side of tourism development. Indian courts have accepted the significance of safeguarding the tribal rights¹⁵ and have stressed the necessity of observation of statutory protection. In some instances, the courts have stalled the projects that have contravened the environmental standards or have not sought an appropriate consent. Nevertheless, judicial solutions tend to be reactive, but not proactive, and the marginalized groups do not always have access to justice, based on both financial and procedural factors.

The other problem is that local culture is commercialized by the process of tourism. Tourists usually see cultural practices, rituals, and traditions as tourist attractions, which consequently get commercialized and distorted.¹⁶ Although it can bring in income, it will help to destroy cultural authenticity and dignity. This issue is further enhanced by the fact that there are no legal mechanisms that can govern cultural exploitation. Cultural heritage and intellectual property legislation are still weak when dealing with the issues.

Among the worst impacts of tourism development are displacement. The indigenous communities are regularly moved to allow resorts and hotels and other infrastructures.¹⁷ Restitution and recompensation is usually inadequate as it does not consider the loss of life support, cultural attachments, and social circle. There are legal provisions on resettlement that are not well implemented and so the affected communities are exposed and marginalized.

To possibly overcome these issues, the notion of Free, Prior, and Informed Consent (FPIC), which is acknowledged by international law can be used. FPIC involves indigenous communities being sufficiently informed about the nature of the proposed projects, consulted in an intentional and meaningful way and permitted to either give or refuse consent. The Indian laws acknowledge or have some elements of FPIC like the Forest Rights Act and PESA but

¹⁴World Bank, *Indigenous Peoples and Development Projects* (2018).

¹⁵Ajit Menon & Kanchi Kohli, "Community Forest Rights and Governance in India," *Environmental Law Review* (2019).

¹⁶Amita Baviskar, *In the Belly of the River: Tribal Conflicts over Development in India* (OUP, 1995).

¹⁷Amnesty International, *Indigenous Peoples' Rights and Development Projects* (2017).

this principle is not explicitly acknowledged or uniformly implemented. The inclusion of FPIC into domestic law may entrench an involved community and have more equitable provisions.

Comparative lenses demonstrate that nations possessing high standards of law in place¹⁸ to protect the rights of indigenous persons like those who explicitly acknowledge the concept of FPIC are able to have more positive results in terms of balancing development and community interests.¹⁹ India can learn some of the lessons contained in such models and improve its criminal laws. This incurs involvement in improving institutional mechanisms, transparency, and accountability in decision-making process.

Civil society and non-governmental organization also play a key role in ensuring that the rights of the indigenous are advocated. These organizations usually work with communities to get acquainted with their legal rights, organize mass movements, and get judicial redress. Yet, they are not always successful in their attempts due to regulatory barriers and disinterest.

The existing gaps in the legal protection require address in the policy reforms. Among these are the reinforcement of the enforcement of the current laws, capacity building of the local ruling bodies, and even whether the development projects can be consistent with the rights and interests of indigenous people. Such reforms require transparent procedures, independent monitoring and mechanisms of redressing grievances.

Besides this, the paradigm of tourism development should also move towards the more inclusionary and community-based paradigms. Community based tourism has empowered the indigenous people as they participate in planning, management and benefits sharing²⁰. Such models should be honoured through legal frameworks that would offer incentives, technical support, and also recognizing ownership by the communities.

Education and awareness is also very crucial in the protection of indigenous rights. Communities should be empowered to understand their legal rights and have knowledge of their rights to be in a better position to demand its rights. Equally, more responsible tourism practices can be established through sensitizing the policy makers, developers and tourists into

¹⁸International Labour Organization, *ILO Convention No. 169 on Indigenous and Tribal Peoples* (1989).

¹⁹World Tourism Organization, *Sustainable Tourism and Indigenous Peoples Report* (2019).

²⁰Ashish Kothari & Neema Pathak, *Communities and Conservation: Natural Resource Management in South Asia* (Sage, 2005).

the dynamics of paying indigenous cultures and environment the necessary respect.

The equity question of a benefit-sharing also supports the injustices of tourism development. Even though the economic value created by tourism projects is quite high, there is a high skew in terms of the distribution of benefits. The indigenous communities tend to have only indirect benefits, including low wages or little access to the marketplace of the handicrafts, whereas the rest of the profit, as a whole, is membered by the outsourcing investors and operators. The current law cannot provide equal distribution of incomes or provide community ownership of tourism businesses. This does not only augment economic disparities but also destroys potential of tourism to contribute to inclusive development. It is in urgent need to institutionalize systems that will ensure equitable compensation, revenue sharing and long-term economic integration of the indigenous communities.

Besides this, the presence of customary laws as well as traditional governance system will have to be included in the legal system.²¹ The customary social practices and norms have been the means by which indigenous communities in India manage their resources and social connections. Formal legal institutions are not always well sensitive to local ecological conditions and cultural values, which these systems are. Nevertheless, the decision-making in relation to tourism is usually centrally located in the state agencies and little attention is paid to the customary governance structure. This does not only undermine traditional authority, but also makes inappropriate decisions, which are incongruent to community priorities. The control of governance mechanisms via incorporation of customary laws in formal processes to advance the legitimacy of governing such processes and its effectiveness may work to legitimize and maintain the success of the development activities in a given direction; i.e. a culturally sensitive and locally fitting development activities.

The other new issue is the online and media portrayal of indigenous people in tourism within the promotion process. As digital platforms become more popular, the indigenous cultures are finding their place in the form of online marketing campaigns, social media, and the traveling content. Although this makes it more visible, it also brings the consent, misrepresentation, and exploitation disparities. Images, rituals, and traditional knowledge get borrowed without authorization making sophisticated cultural identities involve commodified accounts. The Indian law systems do not yet have detailed provisions that will cover such kind of online

²¹Virginus Xaxa, *State, Society, and Tribes: Issues in Post-Colonial India* (Pearson, 2008).

exploitation. These dangers can be combated by enhancing intellectual property and the use of community-based participation in terms of consent to represent those cultures.

Local institutions of governance like Gram Sabhas have a critical role to play in mediating the linkage between indigenous rights and tourism. These institutions however are usually affected by issues like insufficiency of capacity, political meddling as well as inadequate funding. In order to have successful application of laws such as PESA, the Forest Rights Act, etc, there is the need to strengthen the independence and operations of Gram Sabhas. These bodies can be empowered through capacity-building exercises, legal-literacy training, and institutional encouragement so as to be empowered to exercise their needs more efficiently and be able to resist the influence exerted by outsiders.

Lastly, there exists the need to implement a rights-based attitude towards the management of tourism keeping the indigenous people to the core of policies making and implementation. Equity, participation, accountability and sustainability should be the guiding approach toward this approach. It involves changing the perspective that considered indigenous communities as the passive beneficiaries to the more active actors that actively have certain rights. Matters like community protocols and participatory impact assessments, which are in use in other countries, can help even enhance this framework.

Primarily, the challenge presented by the tourism growth will need a multidimensional approach that will be holistic and will incorporate legal, social, economic, and cultural factors. It is only in this way that India can guarantee that tourism development is not only a viable economic but also a socially just and environmentally friendly venture hence protecting the rights and dignity of the indigenous communities in India.

Conclusion

There has been an opportunity and challenge in the growth of tourism in India, especially on the part of the indigenous population whose lives and livelihood has been closely tied to their land and culture. Although tourism can be a force in economic development and cultural exchange, it has frequently had the effect of putting the same communities that it aims to highlight in a disadvantaged position. This paper has been a critical analysis of the legal provisions which are established to defend the rights of indigenous people and have identified that there are huge gaps between the purpose which is intended by the law and the actual

enforcement.

In order to create a balance between the development of tourism and the rights of indigenous people, a more inclusive and rights-based approach should be adopted. This involves the empowerment of the institutional structures, allowing authentic community involvement, and endorsing viable and community-based models of tourism. Legal reforms need to be accompanied by administrative accountability and heightened awareness of all the stakeholders.

To sum up, safeguarding of the native rights during the expansion of tourism is not just an obligation in the law, but it is also at the moral level. Just, sustainable approach towards tourism should appreciate and understand the dignity, autonomy and cultural integrity of indigenous people, which should not be compromised because of development.

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