

Kerala Tourism (Conservation and Preservation of Areas) Act, 2005 A Critique

EQUATIONS
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The Kerala Tourism (Conservation and Preservation of Areas) Act 2005 declares certain areas of the state as Special Tourism Zones (STZs) and details the method of developing those areas. In this paper, we have critiqued the Act and the reasons why we believe the State Legislators, the State Planning Commission, members of Local Self Governing bodies and the Tourism Department should call for a renewed debate and amendment of the Act. Some of the concerns with the Act in its present state are: it renders the powers and mandate of Panchayati Raj Institutions and Urban Local Bodies obsolete by the seizure of power by the State, the functions and powers of the Tourism Conservation and Preservation Committee as constituted by the Act has immunity from democratic and judicial accountability, and most importantly the real danger of how the Act leaves communities choiceless once their area is declared as a Special Tourism Zone (STZ).

Kerala Tourism (Conservation and Preservation of Areas) Act, 2005 (herein after referred as the Act) was passed by the State of Kerala in February 2005. The name of the Act as well as its preamble clearly lay down that the Act is framed "...to make provisions for the conservation and preservation of tourist areas in the State and for matters connected therewith or incidental thereto". The Act declares certain Areas of the state as Special Tourism Zones (herein after referred as STZ) and lays down the ways and means of developing those areas for tourism exclusively.

Our Key Points of Concern are the Following:

- The Act usurps powers and mandate of Local Self Governing Institutions that have been bestowed on them by the 73rd and 74th Constitutional Amendments of the Constitution of India. The Tourism Conservation and Preservation Committee, its functions and powers as constituted and outlined by the Act, clearly bypass the Constitutional mandate and provisions of Kerala Panchayat Raj Act of 1994 and make them redundant in declared special tourism areas.
- It propagates the model of exclusive "tourism enclaves"- the process of converting tourist locations into exclusive 'islands' where tourism can flourish - thereby isolating tourists from the realities of the local environment, culture and economy - a model that is far from sustainable or beneficial to local communities.
- The Act substitutes the general Planning Process (the General Master Plan of any area formulated under the local Town and Country Planning Act) to favour tourism related development process that prioritizes and privileges tourism centric developments through Special Tourism Master Plans.

This Act, in principle, and in operational ways, aims to re establish the colonial praxis that State and not the people are competent to be seized with all matters. Given the history of decentralization and devolution of powers to local self governing bodies, this certainly seems a retrograde step

The Detailed Critique of the Act

Against the Constitutional Mandate Established by the 73rd and 74th Amendments:

Though the Preamble of the Act specifically lays down that the legislation is meant for the conservation and preservation of tourist areas in the State, it clearly accords itself overriding powers to declare most profitable zones for expansion of tourism in the State and in the process usurps constitutionally granted powers of panchayats

Ambiguous Definitions: May lead to less Transparency and Accountability in Processes

Section 3 of the Act outlines "The Government may, by notification in the Gazette declare any area, which have or likely to have the importance of tourism within the State as "Special Tourism Zone" for the conservation, preservation and integrated planned development of such area ". **The above definition is ambiguous and does not outline the connotations or circumscribe the definition of "any area"**. Whether " any area" means an administrative unit such as district, block, village Panchayat or it stands for a physical entity like a beach, coast, backwaters, forests, mountains, is not clear from this definition. This definition also does not spell out the nature of ownership (public/private/ community) of "any area". Moreover, the Act fails to lay down the process involved in declaring any area as STZ. Moreover, the Act fails to provide a clear definition of the term "special tourism zones" as stated in **Section 3**.

A quick review of the Act gives the idea that the Government has not applied its "all encumbrance right" to declare any area as STZ. It gives the idea that only those areas which have or are likely to have considerable tourism potential, shall be declared as STZ. However, looking into the present map of tourism destinations in Kerala and keeping in mind the policy of the Kerala Government to invest and expand tourism throughout the State, we realize that tourism destinations in Kerala are of high density and spread throughout the state. The ambiguity in the definition, as a result, instead of limiting the process can be used to facilitate the unhindered spread of tourism.

The Concept of STZ: Undemocratic and Anti-People

It must be noted that identifying specific areas/zones for intensive tourism development is not new. It was first introduced in the National Tourism Policy of 1992 through Special Tourism Areas (hereinafter referred as STAs). When the STA policy was proposed in 1992, some of the identified locations were Bekal (Kerala), Sindhudurg (Maharashtra), Diu, Kancheeपुरam and Mahabalipuram (both Tamil Nadu). This met with vigorous resistance from communities and the proposals did not make much headway. STZs, STAs and similar models promote "enclavisation", which in the context of tourism refers to the process of converting tourist locations into exclusive 'islands' where elite tourism can flourish - thereby detaching them from the local environment, culture and economy. These enclaves exploit local resources but give back little benefit to the local economy. Enclaves are also often viewed as safe investments, which would ensure a steady, continuous and reliable, flow of income from tourism through all seasons. The concept of enclavisation can also be interpreted to signify a creation of employment enclaves where tourism development provides certain kinds of employment to certain kinds of labour force, locking the local community out, without providing them a chance to benefit from the "zone". The "taking away" of the political and developmental role & powers of local authorities and privileging tourism is another fall out of such exclusive zones or areas. There is also a similar move in the establishment of Development Authorities in other states - in tourism intensive areas such as Hampi in Karnataka, Chilka Lake in Orissa, and Kevadia in Gujarat with broad sweeping and overriding powers.

The Composition of the Tourism Conservation and Preservation Committee: Centralisation of Power and Domination of Executives over the Locally Elected People's Representatives

The Act also gives provision for constituting Tourism Conservation and Preservation Committee (hereinafter referred as Committee), which has been entrusted to perform the functions pertaining to tourism planning, implementation of plans, evolving the new projects, enforcing the guidelines for the development of STZs, rendering appropriate advice to the local authorities and overall monitoring and regulation of the tourism development. The Section 4 of the Act outlines the composition of the Committee. As per the Act, the Committee shall consist of:

- Secretary to Government in charge of Tourism,
- Secretary to Government in charge of Local Self Government Department,
- Director, Department of Tourism,
- Director Department of Archaeology and
- Chief Town Planner.
- An expert in the field of environment, nominated by the Government
- An expert in the field of tourism, nominated by the Government

The Secretary to Government in charge of Tourism shall be the Chairman of the Committee and the Director, Department of Tourism shall be the Convener.

To facilitate conservation and preservation goals, as stated in the preamble of the Act, the Govt. provides for inclusion of two experts i.e., one environmental expert and one tourism expert in the Committee. Both these experts shall be nominated candidates of the government

The District Town Planner and President or Chairperson of the Local Authority shall be co-opted members with entitlement to participate and vote on matters prescribed- presumably those pertaining to the areas they are role holders in.

The Powers and Functions of the Committee: The Contradictions and Violations

A closer look at the powers and functions to be performed by the Committee² reflects the fact **that this Act is violating the spirit of 73rd and 74th Constitutional Amendment Act**. The **Article 243 G** and the **Article 243 W** of Indian Constitution, delegates the responsibility with respect to preparation of plans for economic development and social justice and implementation of schemes for economic development and social justice to Panchayats and Municipalities respectively. The Eleventh and Twelfth Schedule of the Constitution, outlines the matters to be devolved to Panchayats and Municipalities to enable them to function as institutions of self-government and perform

the functions pertaining to planning, implementation and collection of taxes. The Section 166, 172 and 173 of Kerala Panchayat Raj Act 1994 outlines the functions of Village Panchayat, Block Panchayat and District Panchayats, respectively which is in accordance with the Article 243 G and Eleventh Schedule of the Constitution. (Refer annexure 1 for details). The Tourism Conservation and Preservation Committee, with its functions and powers as constituted and outlined by the Act, clearly bypass the Constitutional mandate and provisions of Kerala Panchayat Raj Act of 1994.

Section 5 of the Act deals with the functions of the Committee. **Section 5(1)(i)** refers to **preparation of a sustainable Tourism Development Plan including guidelines to regulate the developmental activities in the STZs**. But the Act does not define the term 'developmental activities'. Developmental activity is a broad term and it is important to know what developmental activities would be regulated by the committee and how the developmental priorities of the people in those zones will get addressed. For example: The priority for the local people might be that of new hospitals or schools in the STZ. Will it be considered important by the Committee while deciding upon the developmental activities in the STZ region as its principle mandate seems to be derived from promoting tourism development. This may lead to conflict of interest. The Act does not lay down the possibilities and the modalities to deal with such conflicts or define checks and balances to ensure that one entity does not have overriding powers

Section 5(1)(iv) refers to ensuring proper and systematic programming by rendering appropriate advice to the local authorities **in regard to formulation of projects and determination of priorities in accordance with the Tourism Development Plan**. The provisions in the Act promotes centralising powers of decision making on issues such as control of natural resources like water and land (on which the tourism industry is highly dependent) coupled with the process of substituting and prioritising tourism development plans over the general development plans in any area that is identified to be having tourism potential. This is an issue of concern. **We believe that tourism development cannot override general planning processes. The Master Plan of any area formulated under the local Town and Country Planning Act) has the mandate of overall development of the area? The identity and raison de' être of a place cannot be tourism, communities cannot be converted to hosts, and tourism cannot be allowed to dictate the overall development process in any area. It can only be one of the factors in the development and economic process and it is not advisable or prudent for such an Act and its committees to be given such an overriding mandate and powers. The Act, in our opinion should restrict itself to facilitating tourism development and advising local bodies and communities on the same. Should a local community choose other options and not tourism, they should be free to exercise that choice. There is a real danger that this Act leaves communities choice less once the area is declared a special tourism zone.**

Section 5(1)(v) refers to directing the concerned local authority for taking action against any unauthorized construction or land development or encroachment or such other activities **inconsistent with or in violation of the Tourism Development Plan**. This once again re-establishes the objective of constituting and bestowing power on such Committee. The Plans constituted by them are bound to give tourism all importance over any other development concerns and demands of the local people in the zone. Thus, the question arises what would happen to unauthorized construction or land development or encroachment or such other activities which are considered to be illegal according to the local panchayats but have been regularized by the Committee on demand from the tourism industry?

According to **Section 5(2)** of the Act, the local authorities (i.e. the Panchayat Raj Institutions and Urban Local Bodies) shall act in accordance with the advice or direction given by the Committee in respect of any area comprised in a STZ, and shall intimate to the Committee such action as taken by it. We wonder then if the laws under which such Panchayat Raj Institutions and Urban Local Bodies were formed and delegated powers and functions become defunct in the STZ. This needs to be made explicit, and if so, then justified.

The Act, in the present model, can render the Panchayat Raj Institutions and Urban Local Bodies obsolete with the seizure of power by the State. According to many social scientists when the 73rd and 74th Amendment was effected, the blocs in developing and transferring power were huge and still exist. This was largely a transfer from executives (bureaucrats) to peoples representatives at the local level. Neo-liberal policies and pressures on "growth" are increasingly making the push for diluting democratic decentralization processes a clear tilt towards more centralized processes.

Section 5(3) refers that the Tourism Development Plan prepared by the Committee shall indicate **the manner in which the land within the STZ shall be used**, whether by carrying out development therein or by conservation or

such other matters as are likely to have any substantial influence on the development of area under the STZ. Land and the manner in which it will be used is a sensitive issue in a country in which a large proportion of the population is linked to land for livelihood either through ownership or indirect agrarian activity. In the declaration of an area (a declared STZ) that may run into thousands of square kilometres the desirability of land management and land use being primarily determined by tourism's needs is questionable. The rights of the people over land and natural resources as is being advocated by the government through various legislations like the Special Economic Zone Act, 2005 as we know has been severely contested not only in other parts of the country, but also in Kerala. We strongly urge a re-examination of this provision.

Section 5(4) says: Every Tourism Development Plan shall contain the following elements which are necessary for the integrated sustainable development of the area with major thrust on tourism development, namely: -

(i) Policy in relation to the **land use plan and allocation of land for tourism purposes;**

(iii) Strategies towards conserving and strengthening existing natural systems and enhancing the **visual qualities of the region**. The provision of visual qualities of a region – when used in the context of tourism promotion can have serious implications on the right of the poor (urban semi-urban and rural). Demolition of slums, forced displacement by uprooting of the poor from their homes and lands in the name of beautification and in the service of tourism promotion is not uncommon practice.

Section 6(vi) gives powers to the Committee to conduct or cause to be conducted such surveys and studies, as it may consider necessary, for the **sustainable development of Special Tourism Zones**. The Act quite often refers to sustainable development and sustainable tourism and sustainable tourism development. It however shies away from clearly defining these terms with its parameters. It is important that clear definition of sustainable development and sustainable tourism should be included in the Act, as in our opinion these are neither interchangeable, nor necessarily overlapping terms – and a lot depends on how the government chooses to define them.

Section 6 (vii) gives powers to the Committee to take such action as may be prescribed for the preservation of any land or building having any tourist importance and situated in a Special Tourism Zone. The status of such land/building if it belongs to a private party is not clear.- Also there needs to be clear distinction between heritage value and those that are considered important for tourism promotion – the term “any tourist importance ” is too general and subject to a wide range of interpretations and action.

Immunity from Democratic and Judicial Accountability:

Section 4(7) of the Act, provides that the Committee may sue and may be sued in the name of the Convener. This is a good inclusion and makes the Government more accountable to public for their actions. According to **Section 7 (1)** Any person aggrieved by an order passed by the Committee in exercise of its powers under section 6 may, within ninety days from the date of receipt of such order, file an appeal to the Government: However, the Act fails to define **who in the government will be responsible to respond to such grievances**. It also does not say anywhere in clear terms whether such orders passed by the government will have judicial immunity or it can be appealed against in a court of law.

It is important to mention that Section 8 of the Act reads that no suit, prosecution or other legal proceedings shall lie against the Committee or the appellate authority or any other officer in respect of anything which is in good faith done or intended to be done under this Ordinance or any rule made there under. The term ‘in good faith’ has not been qualified in the Act. One interpretation can be that thereby the Section bestows on the authorities unlimited, unrestricted, arbitrary and unwarranted power to act in the areas where the legislation is invoked. However, a rational legal interpretation reflects that the Section itself does not put any embargo on the people from initiating a case. Any act or direction given by the Committee is justifiable in the court of law which questions the very essence of whether the direction was given “in good faith” or not.

There lies a possibility that the Committee on getting sued can take the defence of “sovereign immunity”. In the light of the decisions of the Supreme Court on the issue, it would be worth to mention that the doctrine of sovereign immunity has no relevance in the present day. The court observed that no civilised system could permit an executive to play with the customary rights and practices of the people of that country and claim to be sovereign. To place the State above law is unjust and unfair to the citizen. In the modern sense, the distinction between sovereign and non-sovereign functions does not exist. There is a need to seriously re-consider recommendations of the Law Commission first Report for statutory recognition of the liability of the State as had been done in England through the Crown Proceedings Act, 1947 and in the USA through the Federal Torts Claims Act, 1946.

A serious concern as far as dispensation of justice is concerned is that with the expansion of the process of globalisation and liberalisation of economy in the country, economic reform and issues associated are often privileged – a trend evident in study a range of judicial decisions. In the light of such a trend, it is critical that legislation in clear terms protects the rights of the less powerful and disadvantaged

Conclusion and Recommendations:

Tourism is presented as growth engine for economic and social development. However experiences on the ground point to the fact that in tourism, industry is usually favoured and the needs and aspirations and benefits to local communities have been marginalized, including that of local bodies. Tourism also consumes/depends on variety of economic, social, physical resources, often in competition with local community needs. The tourism industry uses resources, which fall under jurisdiction of either Panchayat Raj Institutions or Urban Local Bodies. The Kerala Panchayat Raj Act as per the constitutional mandate ensures that planning, management, control and regulation over these resources and civic amenities are under appropriate levels of local governance. However, the Kerala Tourism (Conservation and Preservation of Areas) Act, 2005 fails to recognize this fact, by not mentioning the role of institutions of local self-governance in development of tourism in state of Kerala. Secondly, the Act completely bypasses the powers and functions of institutions of self-governance, as laid down by the Kerala Panchayat Raj Act.

The Act does not correspond to the philosophy of decentralization and participatory democracy, which is a basic feature of our constitution. In a way this Act is likely to create at best a parallel processes/ and presents a real danger of substituting already existing structures , powers and mandates of local self-governance in areas where STZ are declared.

In this regard, it is important to remember that the "Kerala Vision 2025" states that the participation of local self-government and NGOs are necessary to the process of tourism development in the State. The present Act is in complete disregard of this policy and is in clear violation of the statement made in the tourism policy of Kerala and 'Kerala Vision 2025³".

Though the name and the Preamble of the Act suggests that the Act is meant to provide for the conservation and preservation of tourist areas in the State for matters connected therewith or incidental thereto, reading between the lines reveals that the objective of conservation and preservation are not very prominent in the principal framework and duties and functions adduced to the bodies formed under the Act .For instance the measurement and regulation of negative impacts of tourism are not considered as a non-negotiable part of conservation and preservation duties

A sector like tourism, which needs to be localised and site-specific to ensure maximum benefit and least negative impacts, requires the consultative, regulatory and implementing powers to rest with local governing institutions and tourism cannot be prioritised over or override other developmental requirements of the area. The new mantras of development and growth run the risk of reversing a hard won battle of power to the people to decide their lives and their futures.

EQUATIONS calls upon that the State Legislators, the State Planning Commission, members of Local Self Governing bodies and the Tourism Department to pay due attention to these very critical issues highlighted in this document and call for a renewed debate and amendment of the Act before its rules are formulated.

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End Notes

1 An earlier critique of the Act prior to it being passed in 2005 was circulated then by EQUATIONS. This revised (updated) critique elaborates further some aspects of that critique and suggests strongly the need for revisiting the Act in the context of developments in Kerala and the rest of the country as well as the fact that draft rules are in the process of being framed.

2 Refer Section 5 and 6 of the Act.

3 Recently in the context of the formulation of Eleventh Five Year Plan (2007-2012), several sector-wise WORKING GROUPS (WG)/STEERING COMMITTEES (SC)/TASK FORCE (TF) have been set up by Planning Commission, to make recommendations on various policy matters. Tourism is one such sector. The WG Report has hailed the Kerala Tourism Act as a model and has recommended it to be replicated in all other states in the country