Presented by

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at

THE FOURTH SOUTH ASIA JUDICIAL ROUNDTABLE ON ENVIRONMENTAL JUSTICE

Rt. Hon. Lord Robert Carnwath, Fellow Panelists and Distinguished Guests. I thank you for extending to me this privilege to be amidst you and to share with you my thoughts on a theme that normally would be considered a preserve of economists, and environmental economists at that. I am not both. I am a student of environmental science who has immensely benefited about the interactions of science, economics, sociology, law and policy as I tentatively and occasionally approached the Courts as party-in-person, in public interest, and seeking resolution of conflicts in an inter-disciplinary framework.

When I was asked to share my thoughts on the theme: “Quantifying Environmental Damage, Ecosystem Services, Green Accounting and Natural Capital in Decision Making”, the question that jumped at me is if we can resolve the issues contained without first gaining a shared understanding of Environmental Justice - not one description, or definition, of Environmental Justice, has been found to be sufficient. So I looked into my own struggles in comprehending this term and at my own effort to conceptualise Environmental Justice that I shared in the 2004 “North America/South Asia Conversation on Environmental Justice”1. I now re-share this interpretation of Environmental Justice:

“A collective endeavour to peacefully secure equity and justice for all peoples, by actively engaging and addressing

- Gender Inequality
- Special Roles and Rights of Natural Resource Dependent Communities
- Depressed Communities

and engaging in a living process based on a low entropy lifestyle that has the deepest respect for all life forms and a naturally evolving planet.”

To make this idea of environmental justice reflective of our contemporary challenges and dilemmas, I acknowledge, amongst other things, that there is now an enhanced need of working together despite increasingly treacherous, and sadly gated and fenced and increasingly violent, national borders in order that we come to terms with the growing

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1 This conversation was organised in 2004 by Environmental Justice Initiative, Center for International Environmental Law and The Ford Foundation at Sariska, Rajasthan and aptly titled: “Building Bridges”. 
instability of planetary systems due to anthropogenically induced climate change. I submit that our times demand a politics of conciliation that acknowledges fully our common but differentiated responsibilities to sustain life as we know on this planet.

The great jurist and human rights activist, late Justice V. R. Krishna Iyer, articulated the critical importance of environmental justice in decision making, in a manner that only he could, at a workshop on “Judicial Enforcement of Environmental Law in Karnataka” in 2002, and I quote:

“The survival of Life needs an environment which sustains it and so it is that human rights make sense only where human life can flourish and this condition mandates the preservation of propitious environment. Our Founding Deed therefore lays great stress on environmental and ecological justice sans which flamboyant phrases about fundamental freedoms are glittering gibberish. If life is dear, environment too is dear and environmental justice is thus a foremost constitutional value”.

For Justice Iyer, we are, after all, only another species, and with not too much more of a Right to determine the terms of our engagement with the rest of species and planetary systems. We find this sentiment echoed and its inherent values articulated in a recent decision of the Hon’ble Supreme Court of India, wherein, Hon’ble Justice Mr. K. S. Radhakrishna, speaking for the Bench, stated:

“Environmental justice could be achieved only if we drift away from the principle of anthropocentric to ecocentric. Many of our principles like sustainable development, polluter-pays principle, inter-generational equity have their roots in anthropocentric principles. Anthropocentrism is always human interest focussed and non-human has only instrumental value to humans.

In other words, humans take precedence and human responsibilities to non-human based benefits to humans. Ecocentrism is nature centred where humans are part of nature and non-human has intrinsic value. In other words, human interest do not take automatic precedence and humans have obligations to non-humans independently of human interest. Ecocentrism is therefore life-centred, nature-centred where nature include both human and non-humans.”

All this considered, we are aware that the ways of the world today is increasingly being shaped by its perceived financial value as determined by markets and financial institutions. It is but natural then, that we would want to rationalise the cost of environmental damage, of ecosystem services, and assess as accurately as is possible the

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value on nature in our normative decision making. Globally, we find this problem in all its contentious and confounding forms while trying to arrive at methods to tackle climate change. Simply stated, it is not merely a case for agreeing what each one owes to clear the dinner bill, but how much each of us believe we will consume in future, what we will do to equitably foot the bill while ensuring no one is left hungry either because of lack of resources, active neglect or deliberate injustice. If at the Paris talks we come to terms with this vexatious issue, one does hope we will, then the world will well be on a path of peace and prosperity for all. We are far from that world, we know. And there is plenty of work to do.

In approaching the core idea of this theme, we cannot but rely upon the guidance offered by Professor Joseph L. Sax in his seminal paper on “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention”. In this paper, Prof. Sax he lists the restrictions imposed on governmental authority in determining public trust as follows:

“first, the property subject to the trust must not only be used for public purpose, but it must be held available for use by the general public; second, the property must not be sold, even for fair cash equivalent; and third, the property must be maintained for particular types of uses. The last claim is expressed in two ways. Either it is urged that the resource must be held available for certain traditional uses, such as navigation, recreation, or fishery, or it is said that the uses which are made of the property must be in some sense related to the natural uses peculiar to that resource.”

Can we quantify nature and its services?

To help us appreciate the nuances of Prof. Sax’s guidance in evaluating the value of nature, let me share with you the case of the ongoing struggles of the peoples of Challakere Taluk in the semi-arid Chitradurga district of Karnataka state in India. Here governmental authority has not necessarily followed the precautions advised by Prof. Sax, resulting, thus, in vestigial remains of Amrit Mahal Kavals – biodiversity rich grassland ecosystems – being diverted to a variety of military-industrial-nuclear-infrastructure purposes, without comprehending the fact that local communities have used and protected this habitat for centuries while also retaining its ecological productivity.

Amrit Mahal is a particular breed of indigenous cattle that was developed centuries ago by carefully selecting independent, strong, fiesty, and climate resilient characteristics from various breeds of indigenous cattle. This breed has been historically employed by armies to drag heavy weaponry over great distances, across mountains and arid plains of south India, as they could work even when there was little access to water and fodder. Tipu Sultan who valiantly died fighting the British in 1799, and his father Hyder Ali too, employed Amrit Mahal bulls with great success in their conquests and in resisting the
spread of the British.

To forage, Amrit Mahal cattle were sent out from the stables and would move from one grassland to the next. Thus, a network of pasture-lands were protected across hundreds of kilometres. Kavalgaras, basically comprising of a family to protect the Kaval (grazing land), were appointed to ensure that the first flush of green grass following the onset of monsoons was available to the Amrit Mahal cattle, and then allow other local breeds to graze.

When the British Empire took comprehensive control over the south Asia region, grassland ecosystems did not provide them too much value, in terms of timber, for instance. Thus, their laws termed these habitats, characteristic of arid and semi-arid regions, as “degraded”. Unmindful of what the British did, local communities continued to protect and utilise these Kavals, even though there was not much support from the State. The tradition continued with varying success and when India got independence, Karnataka region was known to have 4,70,000 acres of land as Amrit Mahal Kavals. In contrast, a 2014 report of the Government of Karnataka confirms that about 40,000 acres are left now, as much of the rest was diverted for industrial, infrastructure, farming and urban uses, by the post-colonial State while employing pre-colonial revenue laws, largely holding them “degraded” as they are not filled with trees!

During 2007-13, the Government of Karnataka secretively diverted 10,000 acres of the 15,000 acres of Amrit Mahal Kaval in Challakere, which communities had protected for centuries, for the military-industrial-nuclear-infrastructure complex: to test and manufacture weaponised drones, for nuclear enrichment, for building synchrotrons, spaces applications, etc. The allotments were unsuccessfully challenged by All India Kisan Sabha and others in the Karnataka High Court, and the Petitioners were penalised with a fine for coming in the way of national progress. The Supreme Court which heard an appeal, cancelled the fine, but upheld the allotments. Sagitaur, a private company, was allotted 1,000 acres of this Kaval land for constructing a “solar park” on an annual lease rent of Rs. 45,00,000/- (approx. USD 70,000/-), or at Rs. 4,500/- per year per acre (approx. USD 70/-). Many questions arise from this allotment. But that would not be useful for our discussion here. What could be useful though are the questions that were raised in a public interest petition before the Hon’ble National Green Tribunal (Southern Zone) by Environment Support Group, the organisation I work with, and I. In these petitions, we contested that the projects were not compliant with applicable environmental standards and norms, that there was a deliberate neglect on the part of the government in protecting grassland ecosystems as it was considered still in its colonial interpretation as “degraded”, that grasslands ought to be protected as though they were forests (per the Sec. 33 and Rule 33 of the Karnataka Forest Act), and that the State, when making such allotments, had comprehensively ignored and overlooked several policies and reports produced by the Planning Commission, several Ministries, and also those of the Parliament of India that advocated an urgent need to protect grassland ecosystems such as Amrit Mahal Kavals.
The Hon’ble Tribunal heard this matter for over a year and in its final and comprehensive decision issued on 27th August 2014 held that the lands in question could not be termed as forests. But it held that that the projects could move forward only if they could comply with applicable environmental norms and standards and secure necessary environmental clearances guided by the Doctrine of Sustainable Development. The Tribunal held that when regulatory agencies considered applications for clearances, they would “take strict note of the observations and comments made in this judgment regarding several environmental issues and concerns raised by the applicants and include verifiable and measurable “conditions” regarding the same to be complied in full, at all stages, by the project proponents” (emphasis supplied). It further directed the Ministry of Environment and Forests to reconsider and review the policy of blanket exemption from prior environmental clearance accorded to solar park projects on the claim they were environmentally benign, a policy Sagitaur claimed the benefit of. The Tribunal also held that “(a)part from being representative of fast vanishing terrestrial ecosystems, the Kavals are also known to be the abode of endangered fauna including Black Buck (Antelope cervicapra), Great Indian Bustard (Ardeotis nigirceps) and Lesser Florican (Sypheotides indicus), and directed the Government to hasten steps to ensure they did not go extinct.

Months later when information regarding compliance with directions of the Hon’ble Tribunal was sought for from various agencies, the requests were denied or ignored by agencies, thus necessitating appeals before the Central Information Commission. On 23rd October 2015, the Commission in its unprecedented decision held that matters of environmental compliance cannot be claimed as exempt from public review, claiming the shelter of Sec. 8 of Right to Information Act, 2005 and on grounds of national interest and security. The Commissioner recorded its strong displeasure over such tactics and directed agencies to provide the information sought in a month. The Commission also held that the Ministry should release information about the review of its policy exempting solar projects from the need for environmental review as directed by the Tribunal a year before.

Various interesting questions arise from the Tribunal’s decision. Substantive to our discussion are:

1) Whether the Doctrine of Sustainable Development is to be decided essentially in quantitative and anthropocentric terms, or if there is room for formulating decisions by considering the intrinsic value of the ecosystems based on the principle of “ecocentrism”?

2) What are the methods by which we arrive at a reasonable consensus on such

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5 A Special Leave Application was filed before the Hon’ble Supreme Court challenging a part of the Hon’ble Tribunal’s decision holding Amrit Mahal Kavals are not to be protected as though they were forests. The Supreme Court dismissed this Appeal confirming the order of the Hon’ble Tribunal on 31st July 2015.
difficult decisions, and if the innovation offered by the Tribunal of insisting that clearance conditions ought to be “verifiable and measurable” provides us with methods to determine development in conformance with the Principle of Intergenerational Equity, Polluter Principle, Precautionary Principle, etc.?

If we return to the Sagitaur example, in responding to the first question, we find that local communities are aghast that their Kaval grasslands have been forfeited for mere monetary value, and that too a pittance: $70/acre/year. They would like to know what should be the value of their grazing rights; access to water sources; the high carbon sequestration potential of grasslands, more than that of rainforests; the traditional knowledge associated with the grassland ecosystems; the medicinal and nutritive herbs that are found there; the downstream benefits of grazing – such as wool production and weaving of the unique “Challakere Kambli” (woollen blankets) indigenous to the region, as also the meat and milk production; the manuring of the grasslands by grazing cattle and the consequent sustenance of an unique biodiversity that provides an habitat for such critically endangered fauna as the Great Indian Bustard (less than 200 individuals found in India and Pakistan combined); not to speak of other threatened species; of access to ancient cultural sites; and of course the availability of the commons that supports a host of agrarian and artisanal activity that collectively supported about 300,000 people from 70 villages and an equal number of livestock before the Kavals were diverted?

There is a method to answer their questions, and this is contained in laws that mandate that local governments, the third tier of government accorded Constitutional status by the Constitutional 73rd and 74th Amendment (Panchayat Raj and Nagarpalika) Acts respectively, must have a fundamental role in shaping economic and social development, based on representative democratic processes, and keeping in view the natural resource base, demands of local communities and comprehending environmental conservation priorities. But rarely, if ever, has there been an affirmative determination, judicial and through the executive, of the fundamental nature of such bodies as District and Metropolitan Planning Committees in shaping developmental decisions. A rare exception is the decision of the Supreme Court in the Niyamgiri case7 upholding the statutory right of indigenous communities, per the Forest Rights Act, 2006, to decide if mining for bauxite can be allowed in their sacred and biodiversity and water rich thickly forested mountains. The communities comprehensively opposed mining. This deeply democratic experience is not meant to be experienced only when it is judicially enforced and is to be the norm for decision-making. In fact, Article 243ZD of the Constitution of India requires that all development must be an outcome of representative planning guided, as such, by Constitutionally empowered

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7 In Orissa Mining Corporation vs. Ministry of Environment and Forests, WP (Civil) NO. 180/2011 in Supreme Court of India, accessible at: http://supremecourtofindia.nic.in/outtoday/judgments/180.pdf
District/Metropolitan Development Plans. Intrinsic to such planning processes is the need for discussion and debate in determining the value of nature, even if in monetary terms. More importantly, such Constitutionally mandated processes demand that deciding the value of Nature cannot and should not be the preserve of the Executive, or Legislature, or even the Judiciary. The provision argues that deeply democratic experiences, guided by collaborative efforts of Panchayat and Nagarpalika institutions, organs of the State working most closely to the people, are fundamental to formulating developmental choices.

Unfortunately though, the larger experience of the peoples of India is typical of what has been endured by the indigenous, artisanal, pastoral and agrarian communities of the people of Challakere. Their right to determine their futures, whilst also comprehending the wider demands of national security or regional economic security, were denied by the State keeping the decisions to divert Kaval lands secret, including, especially, from the Panchayats. In this context, it would be appropriate to remind ourselves of what Article 10 of Rio Declaration states, and I quote:

“Principle 10

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

Thus, it may be said that any decision that does not provide opportunity and the time necessary to consider and comprehend various intricate relationships, knowledge systems, dependencies and demands with nature and natural resources; does not provide sufficient opportunity to determine how it has to be used by appreciating real and relative costs by its diversion to another purpose; and does not allow for a determination of the consequences - manageable and irreversible, are decisions that are essentially unintelligent, undemocratic, insufficient and could irreversibly damage environment and human rights of present and future generations. So, it is my humble submission that unless we embrace a highly textured and deeply democratic exercises in decision-making, we are more than likely to formulate decisions that may seem correct right now, but could result in a collective ordeal in time. As the Fukushima and several other disasters have proven, there is no certainty of enjoying the fruits of development when decisions are evolved in-transparently, expeditiously and without comprehending all known and perceivable risks.

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This brings us to the second question. It is my submission that if we are to rationally address and appreciate the cost of environmental damage, value of ecosystem services, and to assess as discursively as is possible the value of nature to guide our normative decision making, then to make such decisions “verifiable and measurable”, as has been advocated by the aforementioned decision of the National Green Tribunal, and submitting them to a larger democratic framework, are necessary safeguards. Only when we subordinate such decisions to deeply democratic processes, is it possible for us to appreciate all risks and benefits, and thus allow us to be guided by the intelligent reasoning and collective support essential to implement development projects; especially those that are mega and are thus entail high-risk of failure and damage. When such processes are sidestepped or ignored, we run the risk of suffering unimaginable consequences, as has been experienced tragically in Nepal (largely because so many buildings were not earthquake proof), as did people in Japan due to Fukushima disaster, and as is presently being experienced in Chennai and other parts of Tamilnadu where the blessings of much needed rain has instead resulted in devastation of lives and livelihoods, and widely disrupted economic and social activities. All this because of reckless urbanisation, industrialisation and infrastructure development, in an unending effort to sustain high economic gains in the short-term (with all its inherent disparities), and without being worried sufficiently of long-term implications.

In summary, I submit that to develop a process of discursively utilising our collective traditional and modern intelligence to ensure the Principle of Inter-generational Equity and Precautionary Principle are the pair of eyes with which we formulate every decision, is the only way forward if we submit to the only choice we have: to live within the limits imposed by nature.

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