

CHAPTER EIGHT

SHIFTING PARADIGMS: FRAMING AN INTEGRATIVE STATUTORY FRAMEWORK

INTRODUCTION

Earlier on, in Chapter 4, it was noted that the shift that Australia took towards consolidating their legislative position with regard to biodiversity was based on the concept of co-operative federalism¹. At the outset recognition must be given that the constituents of biodiversity, i.e. the terrestrial species, genetic material and ecosystems all in as far as the Constitution provides, as it sits on land or water as defined by the National Land Code 1965, is within the legislative purview of the State Legislature, unless it sits entirely within a Federal Territory. Unless a request is made to uniform or establish a statutory framework to assist two or more States, the position remains so.

In as far as transboundary terrestrial biological resources, the jury in this case is still out, except for matters and areas that have been regulated, e.g. forests and wildlife. As for marine biodiversity, the issue of jurisdiction becomes a little tricky as the administrative and legislative boundary in as far as States are concerned ends at the 3 nautical mile mark, and as far as Federal jurisdiction goes, it stretches right up to the exclusive economic zone. The problem arises when the biological resources happen to straddle both jurisdictions, particularly at different stages of their life, i.e. the ‘nursery’ rights up to the end of their existence. This is also true for internationally bound

¹ See Bates, G. 2003. Legal Perspectives. In Dovers, S. and River, S.W. (Eds) 2003. *Managing Australia's Environment*. Federation Press 2003. pgs.256-301, and the Australian National Strategy for Ecologically Sustainable Development; and Godden, L & Peel, J, *The Environmental Protection and Biodiversity Conservation act 1999: the dark sides of virtue*, (2007) *Mel. Law Rev.* 31.1.

migratory species, such as birds. Given these challenges then the approach to be adopted should be outlining measures to help conserve biodiversity as opposed to setting out jurisdictional and ownership type of legislative mandate.

This is where co-operative federalism sets in, as it is clear from the provisions of the Constitution that the strength of the Federal legislature lies in the regulation of processes as opposed to biodiversity or its resources per se. This being the case the need to outline the processes in relation to the resources becomes even more critical. This is where the law-science symbiosis comes in.

8.1 GETTING TO GRIPS WITH THE PREREQUISITES

Chapters 3 to 6 discussed and highlighted what constitutes biodiversity, its key threats, impacts and potential options i.e. measures that can be taken to enable better biodiversity conservation. A simplified rubric is set out here, putting into clusters the different threats, impacts and options that should be taken into account in framing an integrative statutory framework.

<u>Aspect</u>	<u>Threats</u>	<u>Potential Impacts</u>	<u>Potential options</u>
i. Species and ecosystems	<ul style="list-style-type: none"> • Land Development • Encroachment • Over-utilisation and Collections • Climate Change 	<ul style="list-style-type: none"> ▪ Loss of species ▪ Poor distribution of species ▪ Poor recovery rate ▪ Increased 	<ul style="list-style-type: none"> ▪ Introduce register and classification ▪ Make provisions for protection, prevention, preservation,

<u>Aspect</u>	<u>Threats</u>	<u>Potential Impacts</u>	<u>Potential options</u>
	<ul style="list-style-type: none"> • Discharge of contaminants, pollution and saline intrusion • Invasive alien species • Ineffective use of other key supporting resources e.g. water 	<p>vulnerability and upset of ecosystems processes and functions</p>	<p>rehabilitation, management, mitigation and recovery</p> <ul style="list-style-type: none"> ▪ Identify appropriate approaches to adopted and methods to be used, with provisions that are flexible enough to ‘play catch up’ through formal platforms of interactions, inclusivity and participation with science (including traditional knowledge and practices) as well as scientific discovery
ii. Genetic resources	<ul style="list-style-type: none"> ▪ Over and inefficient extraction 	<p>Economic loss and tradeoffs due to poor understanding</p>	<ul style="list-style-type: none"> ▪ Introduce measures to standardise access, control use

<u>Aspect</u>	<u>Threats</u>	<u>Potential Impacts</u>	<u>Potential options</u>
	<ul style="list-style-type: none"> ▪ Lack of understanding of proprietary rights ▪ Uncontrolled access ▪ Unclear or abuse of distribution of benefit 	<ul style="list-style-type: none"> and capitalisation of benefits that could spur conservation and protection of both resources and knowledge 	<ul style="list-style-type: none"> of knowledge and make provisions for recognition of proprietary rights as well as distribution of benefits

Drawing on from this, the point of integration for uniformity will rest on methods, approaches and practices rather than ownership or custodianship of biodiversity and its resources. The analogy would be the Federal government would act as ‘doctors’ for biodiversity; in instances where they have no ownership over the elements, components or constituents, but would provide expert services to ensure that it kept ‘healthy’ and developed ‘sustainably’.

We have also noted that the Federal legislature can straddle State legislative jurisdiction as the primary factors, using the ‘executive reach’ as provided in Articles 80, 93,94 and 95 of the Federal Constitution 1957 that will be hinged on the process rather than control, focusing on information, science, statistics, survey and planning. The only crux would be the coverage of the same to Sabah and Sarawak which has excluded land use planning from the purview of the Federal jurisdiction, but in so far as survey and the Federal government acting in its advisory role, Sabah and Sarawak

can be persuaded to acknowledge the mandate, as they did with the Geological Survey Act 1974, which does even cover aspects that can help control geological stability. The other aspect to be considered is that biodiversity should be treated as a national heritage, and the Federal government can serve as trustees who oversee the implementation of agreed goals and targets. The overarching statute could be structured to fit international commitments as evident in six biodiversity related MEAs that Malaysia is party to, to an extent borrowing one of the points of entry that Australia used to frame the EPBC. This would entail consensus as to what needs to be done and when it should be done, and the appropriate fora for the adoption for this would be the National Biodiversity Council that has membership from Federal and State government stakeholders.

The issue at hand would be should we leave the existing statutory regime in place, and enact instead a statute that fills in the gaps or should we now consolidate all existing statutes (both Federal and State) as in the case of Australia, which did to an extent, and instead structure a statute that stitches together processes rather than custodianship. The Federal Constitution is clear on the issue of jurisdiction, even when there is a lacuna, in that as far as resources are concerned jurisdiction would lie with where they are situated. But when the 'biological factor' is migratory and transboundary, this residual power then becomes greyer. Noted also are the provisions within the Federal Constitution that make room for Parliament to legislate on behalf of the state Government, but again, such an instrument is still open to amendment or repeal, which in turn would put a spanner in the wheels of intended uniformity. If we were to sidestep the issue of regulating as an 'owner or custodian' that what would be left is

the possibility of legislating aspects related to the processes in biodiversity conservation.

The National Biodiversity Policy 1998 too, when read seems to steer away from creating clear directions in respect of ‘ownership and custodianship’. Though it is now 12 years since its adoption the NBP, still clamours measures to be instituted for key areas in which the Federal Government can exercise its executive authority² namely, inquiries, surveys, statistics, research, the provision and maintenance of experimental and demonstration stations, the giving of advice and technical assistance to the Government of any State, and the provision of education and publicity and demonstration, all in which to seek to provide technical assistance to the State. Perhaps it can be read here that the Parliament can in the exercise of its executive powers over State matters, step in to provide assistance, and the mandate for such assistance would in fact require a ‘force’ of law.

This being the case then Parliament can promulgate a law that seeks to legislate the means by which ‘regulate’ the provision of such assistance and service, such as can be seen from the Geological Survey Act 1974, which draws its legislative strength from the Federal list and the executive powers provided for in Articles 93 and 94 of the Federal Constitution. It is by nature a ‘technical’ law, in that it sets out the premises by which officers of the Federation would carry out geological survey and deal with matters related to information in particular gathered by those other than appointed officers when prospecting and the like. Following this route then it is possible to draw up a statute that applies for whole Federation over aspects over which Parliament can

² See Articles 80, 93, 94 and 95 of the Federal Constitution of Malaysia.

legislate and Federal Government can exercise its executive power, which at the end of the day ties down to the processes and measures to effect biodiversity conservation.

The next step would be to determine the actual purpose of having a statute to effect biodiversity conservation. The NBP offers the national position that the present statutory regime is fragmented and sectoral. The reason perhaps is that the term biodiversity itself has not been properly determined, defined or contextualised, save that which is offered in the NBP, and lately that which has been adopted by the states of Sabah and Sarawak. This then leaves the term 'conservation' also not being addressed clearly. It is clear that the sciences that drive conservation and its processes are dynamic and the only constant within the field of conservation is perhaps change.

Conservation as a practice itself is ruled by the different disciplines that serve different aspects that make up biodiversity. In fact it can be said it covers the whole gamut of physical, natural, life and applied sciences, where even mathematics has a place. Thus the crux of the matter is, it will be difficult to legislate specifically over something that is dynamic and encompasses a wide range of disciplines. But, having said that, what we can legislate and regulate perhaps is over aspects that will facilitate the act of conservation, the laying down of scope, responsibilities, duties and 'general measures' that will have to be specifically regulated. Looking at the Australian EBPC, the structure of the statute serves to be one that enables rather than regulates strictly, it provides legislative provisions relating to obligations and duties and introduces provisions that will enable regulation of the execution of obligation and duties, and most interestingly introduces uniformity by way of standards and perimeters, pretty much like the Ministry of Health stipulating that human fever is measured based on

temperatures exceeding 37.5⁰C. This could perhaps be the departure point for cooperative federalism where biodiversity conservation is concerned in Malaysia.

8.2 PUTTING INTEGRATION INTO CONTEXT

Taking a leaf out of the Australian EPBC example, what is clear is that integration comes in the form of cooperative federalism, which in a simplest form serves a means by which Federal government in seeking to achieve a national objective over a national concerns, cooperates with the State government, to devise means by which the responsibility and means are shared to obtain a common objective³. Here it is clear that where biodiversity lies situate the jurisdiction it is within lays claim over it, but there are certain grey areas in relation to transboundary and migratory aspects, and issues related to ex situ resources. Given that if a particular biodiversity resource rests within a State, then the State should not be precluded to exercising its rights over it, as it has over forests and forests products.

The only Federal jurisdiction in place is wildlife, and trade in endangered species, even then it is shared concurrently with States. One aspect of biodiversity here is addressed and the other, trade is matter wholly within Parliamentary jurisdiction. If we were to list the Federal jurisdiction over matters related to biodiversity, it would include activities related to biodiversity both directly and indirectly, the former being international matters, fisheries, internal security (bio-warfare and bio-intelligence comes to mind), trade, commerce, industry, transport, finance, survey, education, federal works, tourism, medicine and health (biosafety), control of agricultural pests,

³ See *fn 1* and also, Painter, M. 1996. The Council of Australian Governments and Intergovernmental Relations: a Case for Cooperative Federalism. *Journal of Federalism* 26:2, pages 101-120; Galligan, B. 2002. Australian Federalism: A Prospective Assessment. *Journal of Federalism* 32:2, pages 147-166.

welfare of aborigines and professional bodies; and matters concurrently shared would include the protection of wild animals and wild birds, National Parks, animal husbandry, prevention of cruelty to animals, veterinary services, animal quarantine, town and country planning (except in the federal capital), public health, sanitation (excluding sanitation in the federal capital), prevention of diseases, drainage and irrigation, rehabilitation of mining land and land which has suffered soil erosion, fire safety measures and precautions, water supplies and services, preservation of heritage.

Studying the list carefully, it would seem what can be 'federalised' would be the means rather than the subject matter which if situated within the jurisdiction of particular state, best deemed as matters peripheral to the root word 'biodiversity' and help side step matters pertaining to land and water which would continue to lie with the States or specific Federal Territory concerned. Thus the point of integration would be the means to effect biodiversity conservation, and the statute will have to take cognisance of the existence of other statutes (both law and enactments) in place. What is missing is consistency and comprehensiveness of the use of terms related to biodiversity, the aspects related to conservation and uniformed standards, perimeters and measurements, in addition to techniques and instrumentation.

What the Federal government can offer as part of the cooperation is the means and ways to set standards, perimeters and measurement through research, surveys and the exercise of the same through its executive power to provide technical advice to state (the parallel example would be the Department of Environment Malaysia and Department of Mineral and Geosciences Malaysia) and the State governments can then adopt those standards in its exercise of control over biodiversity resources, thus

uniformity comes through the application i.e. the ‘how to’ rather than the rights or means to implement. The statute also will serve as the reference point whereby regulation can be developed to ensure the state, status and condition of biodiversity is protected and sustained to benefit both the environment and protect the functions and services rendered for human well being as well.

8.3 FRAMING AN OVERARCHING STATUTE

The challenge lays, if the statute is centred on ensuring that biodiversity conservation is carried out, then aspects of science will to an extent have to be included, but the present state of science itself is uncertain and dynamic. If we were to just fix what is available we run the risk of running into a structural quagmire, with issues of patchwork drafting⁴. In addition if we were to draft a new statute that is ‘science’ heavy then, words with special meaning must be defined so as to avoid a semantic quagmire⁵.

The issue at hand is whether to draft such a statute using plain language or to follow suit from the traditional methods of drafting which as Butt et al 2001, as quoted by Hunt 2002, would be driven by:

- Familiarity and habit, whereby the security that comes from adopting forms and words that have been used before and seen to be effective.
- Conservatism in the legal profession, allied to the common law tradition of precedent.
- The litigious environment of legal practice.

⁴ Lord Brightman, 2002. Drafting Quagmires. Statute Law Review, Vol 23, No. 1, pp 1-11. See pages 1-9.

⁵ See above footnote.

- The desire to avoid ambiguity.⁶

The basic fundamental of drafting requires that there is hierarchy of authority, normative texts particularly those creating rights and obligations, and texts that separate legislative measures from regulative measures. Plain language may not simplify concepts but simplify the ways which concepts are expressed⁷.

In framing the ideal outline or framework, there is a need to shift from traditional approaches to drafting of statutes, beginning with the foci, which will be conservation of biodiversity. The four key principles of drafting (see Chapter Two) have been taken into consideration, with an additional two factors thrown in, i.e.:

In addition to these principles, as this is a ‘science based’ statute, the other principle at hand would be:

- i. What is the state of the subject matter, and the availability of science and scientific data to guide regulation; and
- ii. Who benefits and what are the benefits?
- iii.


This leads to outlining the potential statutory framework:


<p>i. What is the problem that has called for the drafting of this statute?</p>	<p>⇒ Biodiversity Conservation, as stated in the NBP where the present statutory</p>	<p>⇒ The main objective of this statute would then to establish provisions and measures that would facilitate uniformity and standardisation of the</p>
--	--	---


⁶ Hunt, B., 2002. Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal? *Statute Law Review* 24(2), 112–124 see pg 118; quoting . P. Butt and R. Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge, 2001)


⁷ Butt, P. 2002. *Statute Law Review* 23(1), 12-23

regime is application of approaches
concerned is and methods to effect
fragmented. conservation

ii. What would be the preamble of the Statute?  The objective of the statute – to provide for the conservation of biodiversity and matters related or connected to it

iii. What would be the title?  The Biodiversity Conservation Act

iv. The interpretation section?  It would ‘spell’ out what is meant by biodiversity and set out the necessary use of terms for matters related to biodiversity and its conservation (all the processes involved).

v. What would be the sections?  It would be divided into eight parts:
Part 1: Application of the Act
Part 2: Sets out the use of terms and interpretations
Part 3: Addresses matters related to administration.
Here the recognition of jurisdiction over resources

and processes related to conservation would be spelt out, and the entity tasked with overseeing or implementing the Act would have its order of business stated in this Part.

Part 4: Sets out provisions relating to information, methods of gathering information (survey, statistics, census etc) and obligations related to the use and generation of the same.

Part 5: Outlines the key conservation purpose (here it would be most probably pegged to sustainability and heritage) processes, the rules and regulations attached as well as penalties, this would include provisions relating to identification, evaluation, assessment, approval, evaluation, cataloguing, categorisation, classification, delineation, demarcation (no gazette on the assumption the right to gazette may well rest with another authority), protection, preservation, reservation, conservation, monitoring, remediation, mitigation, rehabilitation and restoration, in addition to preparedness from impacts and hazards.

It would also prescribe the means and measures to be taken as well as penalties.

Part 6: Research, development, archiving and capacity building, including accreditation or review

of practitioners.

Part 7: Funds and Funding mechanisms

Part 8: Powers, Penalties and Offences

8.4 POINTS FOR CONSIDERATION

The crux of the matter is, drafting a statute that will take into consideration existing statutory regimes requires careful cross referencing of statements and texts. This statute could adopt the form as per the EPBA by strictly dividing Federal and State matters through the recognition on the outset of jurisdictional right for biodiversity situated within a particular jurisdiction.

The Federal government could adopt a comprehensive approach, where like the Town and Country Planning Development, they draw up national scale biodiversity conservation plans, suited to each jurisdictions priorities, concerns and conditions. What would actually be reflected in the statute would that the Federal government would assist in the preparation of such plans, the point of uniformity and integration would be approaches used to draw up the plans, and the reconciliation of plans at borders.

The provision of article 80 of the Federal Constitution 1957, and the existence of a National Biodiversity Council already provide a cooperative federalism platform to enable shared conservation and planning objectives. States can then draw up their specific conservation plans, which is to an extent linked to the National conservation plan. Critical too is the determination of protection measures and approaches to be

adopted, the statute could assign the responsibility, but like the National Land Code 1965, the forms and means are uniformed.

It is therefore possible to draw up an integrative statutory framework that integrates the means and measures related to processes rather than consolidate from the point of rights, custodianship and ownership. It would also provide means to enable uniformity particularly with regard to the use of terms, methods and application of science and techniques in practice, the law would serve to facilitate the regulation of a harmonised process towards achieving a common objective for biodiversity conservation.

As science itself is uncertain and dynamic, prescription of actions should be left to the authorities, and not embedded in the parent statute, though guided by a certain format or method. There is a necessity for such an integrative statutory instrument as it will allow for clarity as to what and how to classify and categorise in addition to characterise biodiversity. It will serve as the one stop 'document' an umbrella of sorts that will provide full listing of biodiversity including habitat and ecosystems to be conserved based on the level of protection required (following on from the appendices system that ranks in accordance to type, state and condition). This would also allow for better and informed decision making at the international levels.