CHAPTER NINE

BIODIVERSITY CONSERVATION AND THE OPTION FOR AN INTEGRATIVE STATUTORY FRAMEWORK: CONCLUDING REMARKS AND RECOMMENDATIONS

INTRODUCTION

The research began with a hypothesis that it is possible to promulgate an integrative statutory framework for biodiversity conservation. This is so because the Federal Constitution makes provisions for federalisation of State legislative matters. However, promulgation of an integrative statutory framework is only effective and useful if it is actually adopted and enforced *in toto*. It did not question the assumption therein contained in the National Biodiversity Policy 1998, which stated that it is the sectoral nature of biodiversity related laws and the complex Federal-State relationship that has hampered biodiversity conservation, and that a uniformed statute would resolve issues plaguing biodiversity conservation.

What is also clear is that the Federal Constitution makes no reference to the term biodiversity or environment for that matter, but makes provisions for the promulgation of national development plans for determined development areas to effect conservation or exploitation of natural resources. The term 'natural resources' is however not defined in the Federal Constitution.

What is clear is that land, forests and water (in as far as it is confined within the particular State boundary) is the purview of the State legislative, but wildlife, with the exception of Sabah and Sarawak, sits in the Concurrent legislative list, whilst riverine turtles sits within the State's list. It thus follows, that in as far as dealings and control

over biodiversity, if it is identified clearly in the Wildlife Protection Act 1972 or the International Trade of Endangered Species Act 2008, then provisions of Article 77 of the Federal Constitution kicks in, whereby the State Legislature can legislate over matters in respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, which is not a matter in respect of which Parliament has power to make laws.

Thus biodiversity, supported by the fact that the land and water in which it occupies and depends upon is within the State legislative purview (save and except Federal Territories), thus the control and custodianship of the same would then rest with the State Legislature. This is evident in Sabah and Sarawak who have gone on to enact biodiversity related enactments to enable them to regulate the same. There are however points by which the Federal government can through Parliament 'intervene' and legislate on behalf or for States, articles 71, 73 and 76 are testament to the same with the National Forestry Act 1984 and International Trade of Endangered Species 2008 being examples of Federal Parliament enacting statutes on matters that are technically within State purview. The only other point to note is that where laws are enacted by virtues of provisions in Article 76, it requires adoption by law of the State Legislature, and upon that it shall be deemed as State law and not a federal law, and it can be subjected to amendment or repeal.

It would seem that the easiest option would be to opt for provisions in Article 76 to enact an integrative statutory framework, but upon reading through the Federal Constitution, it seems apparent that this is not the only route for integration. What is worth noting is that the Federal list actually makes provisions for matters that supports biodiversity conservation, and it would also seem that the Federal List actually seeks

to provide assistance and services to aid better 'control' of matters within the State List. Examples include surveys, inquiries and research that sit within Parliamentary purview, which is essential to aid better understanding of the state, status, condition and options in relation to biodiversity. Thus integration can be also take on the existing Federal legislative provisions, focusing instead away from controlling or custodianship of biodiversity, leaning towards facilitating cooperation and uniformity through means and measures which would them forge the symbiotic relationship between science and law.

9.1 SUMMARY OF KEY POINTS

The research revealed six underlying key points that require consideration before a statutory framework and point of integration of the same can be developed. Framing an integrative statutory framework requires that the purpose and benefits be clearly spelt out, parties clearly identified with roles and responsibilities, and to an extent accountabilities clearly outlined. Crucial to all this is a clear understanding and clarified use of terms as well as terminology to all things related to biodiversity and its conservation.

9.1.1. Importance of Biodiversity

The research has shown that without a doubt biodiversity is crucial to our socio-economic and environmental well being. Policies adopted have shown that there is a need to ensure that our biodiversity should be treated not only as a driver for socio-economic development, as it has served as one of the key catalysts for the nation's growth, but also as part of our heritage which 'defines' us (through our connection via the observation of our beliefs, cultures and traditions). The policies have also indicated that we have an obligation to pass on this 'heritage' to future generations,

thus ensuring that the utilisation of biological resources, habitats and ecosystems must be done in a sustainable manner.

Apart from its contribution to socio-economic development and growth, biodiversity serves as an important life support to environmental integrity and maintenance of ecological cycles as well as stability of the geo-physical environment. The ecosystems services it provides helps maintain the quality, quantity and availability as well as adaptability of the environment, which includes the provisioning of clean water, healthy biological resources as well as facilitating catchment services of water storage and filtration etc.

Given the importance of biodiversity there is then a need to actually determine the state, condition, status and its adaptability to risks, threats and negative impacts. This requires scientific inputs and rigorous data, as well as structure measures, processes and procedures to identify, measure, classify, categorise and characterise the resources both individually and collectively, in addition to determining the state, trends and adaptability of habitats and ecosystems, which require determination of threshold and vulnerability state. A strong and consolidated data base and methods for data collection and provisioning would facilitate better conservation, being it planning, monitoring, rehabilitation, remediation, regeneration etc. What is crucial to consider is that there is a need for a clear detailing of the importance of biodiversity to man and his 'needs' and biodiversity itself to nature and natural cycles and processes to allow it to ensure its integrity from identifiable harm from nature itself and antecedent impacts of anthropogenic activities. Noted that law cannot be used to 'control' nature, but the law can accommodate the consideration of inputs as to the 'natural conditions' to

minimise risks, threats and impacts of natural processes, hazards and disasters both to and from the resource or habitat or ecosystems.

9.1.2. Key Elements in Biodiversity Conservation

Determining what constitutes conservation was not easy as it is dependent of the subject matter being conserved, as the processes, procedures and methods differ in accordance to type, location, state, condition, endemicity, population size and distribution in addition to being dependent on external influencing factors. An example would be conservation means, measures and practice would differ for a wild animal in the wild as opposed to that in a reserve or zoo. There are different approaches depending on genus and types as well. There are however salient processes that thread through conservation processes, such as:

- Data and Information – type in addition to collection and provisioning methods
- Scientific rigour – clear methods, approaches and practices for different biodiversity component types
- Uniformity in the use of terms and nomenclature
- Structured processes in conservation, such as identification, characterisation, classification, categorisation, measurement, monitoring, evaluation, assessment and analysis.

Key in conservation is clarification and detailing of the different processes entailed in the conservation of species, genetic resources, habitats and ecosystems for fauna, flora and microorganisms. Given that science itself is dynamic and uncertain, measures should be institute to allow for structuring and factoring of scientific inputs in the implementation of measures associated with the act of conserving. Law, in as far as

biodiversity conservation goes, would have to be pliable enough to allow for the changes in science, its theories, methods, approaches and practice, in addition to making room to allow for changes in technical and technological applications in conservation.

9.1.3. Key Biodiversity Conservation Issues to be Addressed

Scientific rigour is the key to effective measures for biodiversity conservation. It helps detail amongst others:

- what we have;
- what state it is in;
- what can be done with it;
- what the thresholds are; and
- what measures to be taken to sustain it.

Attached to this is the need to clarify parties responsible to ensure that conservation is carried out, anthropogenic and non-anthropogenic stakes and stakeholdings protected and ensured. Roles and responsibilities based on the subject matter at hand (whether it is about species or habitats for example), scale (size, distribution and location of the species or even habitat or ecosystems location, condition for example) and levels (given the federated system in operation in Malaysia) required detailed profiling, with gaps and options clearly identified. In a nutshell, there is a need to profile the why, who, what, how, when and where.

9.1.4. Biodiversity and the Federal Constitution

As stated in the Introduction section above, the term biodiversity is not to be found in the Federal Constitution which gives rise the point that in the event of a lacunae, the residual powers of the State legislature would kick in. In as far as the control and

custodianship of biodiversity, it would be difficult to contest that it does not inherit the 'powers' vested as per land and water, unless it sits wholly within a federated territory. The grey area then creeps in relation to transboundary aspects of biodiversity, for example matters related to migration and migratory patterns as well as impacts or risks to or from the resource or ecosystem.

Traditional options for uniformity under Article 76 too are open to amendment or repeal at State Legislature level, which could render 'dis-uniformity'. The alternative would be to review the legislative powers of Parliament, and focus instead on aspects that can facilitate better biodiversity conservation, such as scientific, technical and technological aspects; information and intelligence; standards and measures; practice; heritage; and external affairs (see Chapter 6). Ideally the law should lead towards prioritising biodiversity conservation as a national concern rather and the Federal government through cooperative federalism structure a partnership akin to a patient – doctor relationship.

9.1.5. Biodiversity and its 'Legislative Needs': Mainstreaming Biodiversity Conservation Science in a Statutory Framework

The law is a useful tool to effect the conservation of biodiversity as it can provide for measures to ensure that it carried out (from the what needs to be done to who needs to do it), regulate the very measures set out (from the process and procedures to be adopted and the actual implementation of the processes and procedures) and enforces obligations (to either act or not act). The most crucial role the law can play is it will actually consolidate the terms and use of terms to ensure that there will be uniformity it what is meant as biodiversity, its components and related aspects. It will also facilitate the establishment of mechanisms to coordinate action based on clearly set

out mandates, roles to be played, responsibilities and aspects related to accountability of action and inaction both by those tasked to carry out measures or abstain from action. Conservation processes and procedures can be pegged to provisions that empower authorities designated to rule and regulate them. Provisions to mainstream scientific inputs and advice can also be put into place to ensure that 'enforcement' of provisions are based on science and informed decision making.

9.1.6. Cooperative Federalism and Mandates

A unifying and integrative statutory framework for biodiversity conservation should consider the sharing of roles and responsibilities, adopting a cooperative federalism structure that spells out clearly the mandates of both levels of government, given that branches of the Federal government are often represented at the States. This way also, like the structure adopted by the EPBC in Australia, the Federal government can concentrate on national goals, targets and concerns, both at the international from, be it in performing global or regional international commitments and obligations, addressing neighbouring concerns or transboundary aspects of biodiversity conservation (between two or more States, between States and neighbouring countries) or ensuring that practice, processes and procedures are uniformed and funding mechanisms structured, maintaining at all sovereignty of States (or Federal Territory as the case may be) adhere to a set of processes and procedures as well as uniformed standards so as to ensure that biodiversity conservation is effected in a concerted manner rather than fragmented. Mindful of such sovereignty, and the need to respect State settings, conditions, capacities, capabilities and development, the best role the law can play is to facilitate the science to help ensure that thresholds are not crossed to the detriment of biodiversity. In short, the law will allow States (in as far as the biodiversity being wholly confined in its boundaries) control and manage the

resources but guided by universal measures and methods (i.e. processes and procedures), again like the standards adopted by the medical fraternity in monitoring human health and addressing the antecedent concerns. The closest statutory example would be the Environmental Quality Act 1974, which like biodiversity, the term environment has 'no home' in the Federal Constitution.

9.2. CONCLUDING REMARKS

The development of an integrative statutory framework is actually dependent of the purpose and necessity to integrate. What the research has shown is that there are different laws with different purposes, scope and objectives related to biodiversity, that it becomes difficult to ascertain whether there is a unifying trend for biodiversity conservation. What, through the purposive approach to statutory interpretation, the profile developed in Table 6.4 in Chapter 6, has shown that based in the literature review of what should be included when framing a law to cover aspects related to biodiversity conservation, there are gaps and overlaps in certain areas. There is no congruent agreement nationally as to what is the terms biodiversity actually means in the legal sense, save the contextualisation in the National Biodiversity Policy 1998, which can then be used as inference by the judiciary, but until it is legally framed, it is open to abuse. The profiling did not seek to determine the effectiveness of every single statute related to aspects of biodiversity, it sought to determine coverage. In a way it did prove that the 'allegation' in the National Biodiversity Policy 1998, in as far as coverage is concerned, that there is fragmentation and the gaps, coverage wise, of the existing legal regime indicates that not all aspects related to biodiversity conservation is actually being addressed.

What is crucial to note here that the creation of an integrative framework takes on the assumption that it would be repeal or supersede existing statutory regimes. The balance is how to develop a framework that facilitates inclusion and promote complimentarity. The lessons learnt from the EPBA 1999 promulgation, is that it took a series of detailed consultation between Federal and State as well as spelling out of the shared role and responsibilities. Only then did the EPBA 1999 'take off', delicately acknowledging the 'power' balance between the Commonwealth, Territory and States, couching the sharing as cooperative federalism. As the structure of the Australian Federal Constitution is almost similar to the Malaysian Federal Constitution, the option and shift is a viable one. Bioregional Plans become the anchor by which processes and procedures are 'translated', implemented and monitored. Components that make up biodiversity are clearly listed and 'scheduled' encompassing fauna and flora as well as habitats and ecosystems.

The EPBCA 1999 is akin to the Malaysian National Land Code, with uniformed processes and procedures that facilitates easier monitoring of state, status and condition, as well as establish the chain of custody of resource in its utilisation, so as to enable determination of responsibilities and obligations, to effectively ensure action in the event of non-action, non-performance or breach of obligation. It is effectively a statute that facilitates administration at the Federal level and management at the State level. Taking on from the EPBCA 1999, the possibility of framing an integrative framework becomes a viable option for Malaysia. The integrative statute for biodiversity conservation would have segments within to allow the Federal Government fulfil its international commitments and obligations, through its monitoring processes and scientific 'investment', whilst the State can continue to

manage and control its resources as long as it does not cross the threshold that would render detriment to the resource or habitat or ecosystem.

Drafting the statute would then take on the existing legislative powers of the Federal government as detailed in Tables 6.1 and 6.2 in Chapter 6 and administrative provisions can then be built in, with mechanisms for scientific input, participation of key stakeholders who affect and are affected by biodiversity conservation. 'Scienc-ing' up the law, would make it easier to monitor, implementation wise, and objectives can be made measurable as there processes and procedures to capture what is being done or not done.

This research has shown that yes, it is possible to create an integrated statutory framework, and the best option to ensure uniformity is to depart from the provisions within the Federal and concurrent list of the Ninth Schedule. The statute will not wrest the legislative right of the State to control biodiversity but will provide instead the means for it to ensure better and effective control. It is to an extent a tool box for both Federal and State to draw upon. The proposed statute would weave the processes that will serve to integrate both legislative and executive reach of the Federal and State governments.

As the Federal Constitution 1957 already provides for the means for cooperative federalism, the statute itself will serve to facilitate cooperation between both legislative jurisdictions, in addition to introducing an umbrella that will capture that which has been left out but provide additional coverage for that which is 'covered' by existing statutory mandates through strengthening of procedures.