CHAPTER TWO

FRAMING THE APPROACH FOR STATUTORY INTERPRETATION, COMPARATIVE STUDY AND STATUTORY DRAFTING

INTRODUCTION

In determining the means to structure an integrative statutory framework, three aspects were looked at, statutory interpretation, comparative study and statutory drafting. In the case of the state of statutory law in relation to biodiversity, this Chapter sets out the theory, approaches and means from which statutes are to be analysed both in Chapters Six and Seven. Much will be drawn from the prerequisites of what constitutes biodiversity and aspects related to conservation.

The literature review in this section does not question the validity of existing legal theories or existing state of jurisprudence, but focuses instead on the purpose of this thesis, which is to determine coverage over aspects related to biodiversity and biodiversity conservation in existing statutory framework, identify the gaps and determine options. Reiterated is the approach taken in executing research where this thesis is concerned, i.e. the mechanistic study of statutes rather than the state or merits of its application or compliance or enforcement. The focus here is on how much 'science' should be incorporated into law, i.e. by putting biodiversity into context, by understanding what is needed to conserve it, only then can we determine the scope and scale of regulatory coverage.

The proposed theoretical basis and approaches will then be employed in the profiling of existing statutory framework in Malaysia, in Chapter Six; and in Chapter Seven in structuring the review of the Environmental Protection and Biodiversity Conservation Act 1999 ("EPBCA 1999"). The matrix that is used to map statutes serves also as an analytical tool to determine gaps and options from which Chapter Eight will seek to address in looking at statutory construction.

The approach taken in the comparative study of a similar federated system of government that has adopted an integrative statutory approach to biodiversity conservation, in this case Australia and EPBCA 1999 is hinged on understanding rather than comparing.

2.1 THEORETICAL APPROACHES, SCOPE AND METHOD

As mentioned earlier, three areas are looked at, statutory interpretation, comparative study and statutory drafting.

2.1.1 Statutory interpretation and profiling of biodiversity conservation related laws in Malaysia

In reviewing the statutory landscape related to and for biodiversity conservation, it became clear that there is a need to limit the exercise to a confined point of departure. The law here would be limited to that contained in statutes, and will not include other sources of law. The review is an exercise to see the scope and scale of coverage, focusing on mandates to regulate and the bearing it has on biodiversity conservation. It will not project on the state of law in relation to biodiversity conservation as the premise of this research lies entrenched on the acceptances of statements contained in the National Biodiversity

Policy 1998, with respect to the state of law, is deemed to be true. It thus departs from the accepted truth to the study of a source of law that provides the basis for which the governance[1] of biodiversity would draw its legal basis from, particularly for those entrusted to govern it.

2.1.1.1 Adopted legal theory

Inspired by Hart's The Concept of Law[2], the fundamental question arises, if we accept that statutes are a source of law, what would then be the purpose of this source of law and how do we categorise and interpret it? Given the nexus for consideration is man and biodiversity, would there be a need to shift from 'traditional' law, particularly statutes, being confined to being a means to just govern the relationship between men, to statutes being designed to govern man, biodiversity and the relationship between man and biodiversity.

Three separate issues then arises, in that how does one use or craft an instrument of governance that provides the basis for rights (to man) over biodiversity, ascribing rights to biodiversity (on the assumption that biodiversity is an entity and has rights for example to simply exist) and categorising rights regarding the relationship arising between man and biodiversity. This is where the analysis of the Australian legislative approach to biodiversity conservation will provide clues as to how such rights are ascribed.

[1] The term governance here is taken to mean as 'control'.
[2] H.L.A. Hart, The Concept of Law, (2d ed.) (Clarendon Press, 1994).

It is this shift in premise of what a statute should encompass is what necessitates a profiling exercise of the statutory regime in Malaysia. If the NBP is to be understood correctly, than the present statutory regime is hampered by the sectoral approach taken in promulgating statutes whereby biodiversity is not taken as entity in itself, but the segments or parts that make the sum whole that has received the attention of law makers.

Chapter Three has shown that internationally, this has been brought about by the problem of 'catching up' with science. Prior to 1992, international treaties and conventions were taking on the sectoral approach, but in 1992, the shift occurred when it was understood that these sectors were actually part of a bigger term of biodiversity. How would one legislate over the 'web of life' then becomes a key question? It begets a better understanding of what is meant by biodiversity and the relationships arising in crafting instruments of law to facilitate its governance. The structure for such an instrument would then become of great importance, as it postulates the frame from which aspects related to biodiversity and its relationship with man can be accommodated.

Legal theories on how to approach the law, its understanding and epistemology are diverse. For the purposes of streamlining this study it would be prudent to begin with legal positivism, borrowing from Austin's standpoint that positive law is a state-centred image of law, and that statutes are instruments of governmental power, thus law is of human creation posited via a process of legislation[3], and citing Raz, can be treated as a factual question (what is law) answerable by observation rather than moral interpretation[4]. Finis[5]

[3] Morrison, W. Jurisprudence: From the Greeks to post-Modernism. Cavendish Publishing Limited, 1997. Pgs 4,5 and 231. See also fn 5.
[4] Ibid, at pg 6, citing Raz,J. The Authority of Law, Oxford Clarendon Press 1979.
[5] Finnis, J. On the Incoherence of Legal Positivism, in Patterson, D.(ed.) *Philosophy of Law and Legal Theory: An anthology,* Blackwell Publishing 2002.

echoes this by stating that legal positivism is in principle a modest proposal in that state law is or should be systematically studied as if it were a set of standards originated exclusively by conventions, commands or other social facts.

There have been a plethora of literature discounting legal positivism, particularly the doctrine of separability, whereby, aspects related to morality can be separated from law, i.e. law is still valid irrespective of the moral standpoint, or as put by Austin, 'the existence of law is one thing, its merit or demerit is another[6]. In addition, many have also argued that it has become muddled and intelligible, but the fundamental positivist stand that there is no necessary connection between law and morality still prevails[7].

This is essential to this Chapter, as it accepts statements therein contained in the NBP to be true, and that since it proposes to profile the statutory landscape related to biodiversity conservation, it could not take on questions of morality in the application of such statutes. The distinction here lies, with the adequacy of coverage of statutes related to biodiversity, either from the elements of biodiversity or processes pertinent to its conservation. Based on the factors that have been determined in Chapter Three as to what constitutes biodiversity and what the elements of conservation are, analysis will focus on statutory structure, purpose and coverage.

[6] Supra fn 3, citing Austin at pg 5.

[7] Supra fn 5, at pg 139.See also arguments put forward on the validity of legal positivism in Coleman J L & Shapiro S (eds), *Jurisprudence and Philosophy of Law*, Oxford University Press 2002; Patterson D (ed.) *Philosophy of Law and Legal Theory: An anthology*, Blackwell Publishing 2002; Patterson D (ed.), *A Companion to Philosophy of Law and Legal Theory*, Blackwell1996; Hart H L A, The Concept of Law (Second Edition),Oxford University Press, 1994; Coyle, S., *Positivism, Idealism and the Rule of Law*, OJLS 2006 26 (257); Greenberg, M., *How Facts Make Law*, Legal Theory 10 (2004) 157-198; and Patterson, D.M., Dworkin on the Semantics of Legal and Political Concepts, OJLS 2006 26 (545).

Thus the basis of interpretation will be honed to the structural aspects of the statute, taking on Raz (1996)[8] the crux of the matter is what is law and how it is to be interpreted is what links the theory of legal positivism, that law can be studied as it is posited and interpreted based on what is posited[9]. Biodiversity conservation here will be taken in context separate from issues relating to morality, i.e. the morality of and for biodiversity conservation; instead, we accept there is a need to conserve as there is bearing on the well being of humans and the planet as a whole, and scientific facts shall inform the law and shall become part of the determinate legal content[10].

2.1.1.2 Interpretive theory and approaches

Interpretation of the state of statutes here would focus on legal rights and duties, as informed by scientific findings. Interpretivism[11] puts forward, where practice of interpretation is concerned, a twofold task, i.e. formulate alternative hypotheses that are consistent with the facts being practised and indicate which among them provides better justification of facts in practice. Here meaning and significance of expressed words, its reasonable meaning which gives the most beneficial effect, taking into account its reason and logical consistency[12] becomes the key point of departure, read in context of what is meant by biodiversity conservation.

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[8] Raz, J., Intention in Interpretation, in George, R. P.,, The Autonomy of Law: Essays on Legal Positivism (Oxford: Clarendon Press, 1996) at pages 249-286.

[9] The author is keen on inclusive or soft positivism, that does not exclude values outright, but acknowledges them as being drivers that shape the law.

[10] Greenberg, M., How Facts Make Law, Legal Theory, 10 (2004) 157-198, at pg.162.

[11] Stravropoulos, N., Interpretivist Thories of Law, in Zalta, E. N. (ed.), The Standford Encyclopedia of Philosophy (Winter edition 2003) as can be accessed at http://plato.stanford.edu/archives/win2003/entries/law-interpretation, last accessed 2 April 2008. See also http://Isolum.typepad.com/legal_theory_lexicon/2004/04/legal_theory_le_3.html last accessed 2 April 2008.

[12] Kohler, J., Judicial Interpretation of enacted Law, in bruncken E and Register, L. B. (Trans.) Science of Legal Method: Select Essays by Various authors (New York: Augustus M Kelly Publishers 1969) at pages 187-195.

Here the main emphasis is on finding out the true sense of any form of words[13] therein a statute, looking to an extent at the intent of the legislator, particularly the communication of means, as it is accepted that words are but mediums of conveyance of intent and can have ambiguous or broad meanings[14]. The method employed will take off from originalism, whereby analysis is towards unearthing the intention of the statute drafters[15] taking into account the theory of dynamism[16] whereupon a nod is made towards the evolving nature and factors that impede on the statute, which in this case is science related to biodiversity conservation.

This is important, as Cross (1976) raises that in preparation of statutes, often legislators will draft in terms of general principles[17], which in this case would be the scientific understanding of the day, that is why inquiry (of statutes) here, the point of departure would be available scientific understanding today. Through a merger of originalism in light of dynamism, or as Graham (2002) proposes a unified theory of statutory interpretation[18], whereby both theories are applied as both are entrenched in the legislator's intent, the former at drafting and use of words, and the latter in the application or implementation of the statute[19], particularly in light of vagueness and ambiguity.

[13] Singh, G.P., Principles of Statutory Interpretation, 9th ed., (India: Wadhwa and Company Nagpur, 2004), see pg 2.
[14] Ibid at pg.4.
[15] Graham, R., A Unified Theory of Statutory Interpretation, Statute Law Review 1 (23) 2002, 91-134 at pg 92-97.
[16] Ibid page 103-106
[17] Cross, R. Statutory Interpretation (London: Butterworths, 1976)
[18] Supra fn 15, pg 115-133.
[19] Ibid pg 134

The approach here would be to focus on the purpose of the statute, or purposive approach which is the favoured approach here in Malaysia, as expounded by the Interpretation Act 1948 and 1967[20], section 17A:

> Section 17A. Regard to be had to the purpose of Act.
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

This approach have also been adopted in numerous judicial decisions, one in particular that articulates the point can be found in Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia [2003] 1 MLJ 1, where it was noted by the learned judges[21]:

> Additionally, we observe that the modern approach to statutory interpretation is purposive not literal. Indeed, the abandonment of the literal approach these days is evidenced by the speech of Lord Griffiths in *Pepper v Hart* [1993] 1 All ER 42. This is what his Lordship said at p 50 of the report:
>
> > The days have long passed when the courts adopted a strict constructionist view of interpretation, which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach, which seeks to give effect to the true purpose of legislation, and are prepared to look at much extraneous material that bears the background against which the legislation was enacted.

[20] Interpretation Act No. 23 of 1967
[21] Gopal Sri Ram, Abdul Kadir Sulaiman and Alauddin JJCA

This gives credence to the unified theory approach as at the end of the day it is the purpose of the legislation that serves the inquiry, which in this case statutes related to biodiversity conservation will be adjudged according to the elements and processes related to biodiversity conservation (this serves as the extraneous material) in order to better analyse and profile existing statutory framework.

2.1.2 Comparative Study

Kozyris, 1994 noted that comparative law not only provides alternative solutions to be used in legal reform but also provides better understanding of our existing law[22]. Comparative methods depending on the purpose for comparison vary, but lies entrenched in the reconstruction of a variety of (legal) text[23], the purpose of the exercise to glean a better understanding of another legal system and how it can contribute to a deconstruction or reconstruction of laws.

This section takes off on Zweigert and Kotz's (1998)[24] fuctionalist approach to comparative law, though not favoured by some as highlighted by Legrand (2003)[25] as being a "mechanistic theory, which says nothing about understanding"[26]. He further cautions that those who adopt this approach must be "prepared to discard the concrete contents of experiences and values and, ultimately, elide the concrete law"[27].

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[22] *Koyzris, P 1994. Comparative Law for the 21st Century: New Horizons and New Technologies. 69 Tul. L. Rev. 165. See also Clark, D.S.,* Nothing new in 2000? Comparative law in 1900 and today 75 Tul. L. Rev. 871 and

[23] Frankenberg, G., 2006. Comparing constitutions: Ideas, ideals, and ideology-toward a layered narrative, 4 Int'l J. Const. L. 439

[24] Zweigert, K. & Kotz, H, Introduction to Comparative Law (Tony Weir trans., 3d ed. Oxford Univeristy Press, 1998)

[25] Legrand, P., The Same and the Different, in Legrand, P. & Munday, R.(editors), Comparative Legal Studies: Traditions and Transitions (Cambridge University Press 2003), 240-313, at 292-294

[26] *Ibid* at pg 292.

[27] *Ibid* at pg 292

Chapter Seven, skims across the arguments underpinning the epistemology of comparative law, instead, focus is given to how best to adopt suitable comparative law methods, to better understand, in a similar 'legal family[28]' situation, a problem, here in this case biodiversity conservation and how it is addressed through statutory law. Crucial also is current thread of arguments that centres comparative law methods on aspects related to social needs and morality in respect of the law. In this case, the moralities related to biodiversity conservation will not be discussed, hence necessitating an approach that takes away the experiences and values as propounded by Legrand (2003).

Using the statutory aspects of biodiversity conservation as the departure point of comparison, this exercise takes off from the functionalism point of view, discounting socio-economic circumstances, concentrating instead on the statutory construction aspect, in that what is comparable is that which fulfils the same function[29]. It seeks to solve a theoretical problem[30], i.e. statutory construction and (types of) legislative approaches to biodiversity conservation.

The idea here is to find the connections between the legislative features and fundamental structures[31], and comparative law methods are used to glean options and recommendations[32]. The study of the Australian EPBCA 1999, helped flesh out aspects related to differences and convergence that was analysed[33] and considered in order to frame the proposed integrative framework in Chapter Eight.

[28] Legal family here being the "English Legal Family" from which laws in Australia and Malaysia took root from.
[29] *Supra fn* 24, at 34-5.
[30] See also Graziadei, M., The Functionalist Heritage, in Legrand, P. & Munday, R.(editors), Comparative Legal Studies: Traditions and Transitions (Cambridge University Press 2003), 100-127, at 103.
[31] Borrowing from Beever, A. & Rickett, C., Interpretive Legal Theory and the Academic Lawyer, Review of Waddams Dimensions of Private Law' (2005) 68 MLR 320–337.
[32] *Supra fn* 24, at 44-47.
[33] Siems, M.M., Legal Originality (2008) Oxford Journal of Legal Studies, Vol. 28, No. 1, pp. 147–164

2.1.3. Statutory Drafting

Statute drafting is an art in itself. As noted by Greenberg[34] who states, quoting Sir Russell, KC:

> It has always been axiomatic that legislation should be drafted with the ease and convenience of the reader in mind, and that what is convenient for the reader will depend upon the nature of the legislation. In the enduring and salutary words of Sir Alison Russell KC, "The draftsman should bear in mind that his Act is supposed to be read and understood by the plain man. In any case, he may be sure that if he finds he can express his meaning in simple words all is going well with his draft: while if he finds himself driven to complicated expressions composed of long words it is a sign that he is getting lost, and he should reconsider the form of the section".

Bates, 2000 further expounds:

> "The task of parliamentary counsel is to encapsulate policy within the legal framework and this requires them to facilitate communication of the intent of the legislature. This must be done through the use of precise language. The challenge to the drafter is that he or she must use words and words alone. The drafter cannot lend atmosphere to the legislation. He or she cannot use colourful language, or repetition to illustrate a point. Rather, his or her written words stand alone as monuments to

[34] Greenberg, D., 2006. The Nature of Legislative Intention and Its Implications for Legislative Drafting. Statute Law Review Vol. 27(1), 15–28 (see pg 26). He cites Sir A. Russell, *Legislative Drafting and Forms* (4th ed, UK: Butterworths, 1938) at p. 13.

> clarity of thinking—or carelessness. Written communication needs to be effected with greater care than oral communication. The drafter of any document needs to anticipate and take cognizance of the range of perspectives from which the readers of the legislation will emerge. For example, the drafter must ensure that the reader who is not prepared to take a reasonable view, or who is hostile towards the legislation, reaches the same conclusion as to the meaning of the legislation as the drafter had intended."[35]

Herein lays the challenge, 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 drafting[36]. 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 quagmire[37].

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.

[35] Bates, T. ST. J N., 2000. Differential Drafting. Statute Law Review 21(2), 57-69
[36] Lord Brightman, 2002. Drafting Quagmires. Statute Law Review, Vol 23, No. 1, pp 1-11. See pages 1-9.
[37] See above footnote.

- The litigious environment of legal practice.
- The desire to avoid ambiguity.[38]

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 expressed[39].

Basic consideration is that there is hierarchy of authority, normative texts particularly those creating rights and obligations[40], and the shift at present is to draft in plain language[41], which in itself raises much debate, as plain language need not necessarily be clear and concise[42]. There are also those who argue that even clarity isn't enough, the statute and the texts must give legal effect, and

> "law drafters need to know and understand what they are hoping to achieve when they write legislation. By following precedents for structure of the legislation will give some reassurance that proper laws will be achieved. The use of plain English or plain language will give clear statements."[43]

Thus Chapter Eight will rely on the four basic principles of drafting, i.e.:

[38] 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)
[39] Butt, P. 2002. Statute Law Review 23(1), 12-23
[40] See above fn. 8
[41] Turnbull, I. Qc 1997. Legislative Drafting in Plain Language and Statements of General Principle. Statute Law Review, Volume 18, Number 1, pp. 21-31, see pages 21-23, 24, 26
[42] Watson-Brown, A. 2009. Defining ' Plain English ' as an Aid to Legal Drafting Statute Law Review 30(2), 85 – 96
[43] See above fn.

i. Communicate the purpose, both on the aspects to be and of regulation, expressing the legal relationship[44].

ii. Clarify the legislative intent[45], i.e. is there a need to address a problem, clarify or redress an approach to a problem, etc.

iii. Determine the criteria[46] to establish and make rule, for instance does it comply with constitutional provisions, are the necessary mandates available, does it fit within the mandate and will it be coherent with other legislations; and

iv. Avoidance of semantic quagmire[47], i.e. avoid using convoluted language so as it obscures the meaning to those who need to grapple with it.

2.3 POINTS FOR CONSIDERATION

Based on the selected cited literature above[48] legal positivism allows inquiry into the interpretation of statutes to be made without having to take into the morality of statutes reviewed. This is crucial as it provided a more structured scope for the inquiry, focusing more on the statutory structure rather than the merits of application. The reliance on the unified theory of interpretation that gives credence to the purposive approach will be the key method in reviewing and profiling of statutes. This would also be the basis for the comparative study of the.

As stated above, a mechanistic study of a construction of a statute, rather than a critique, focusing on the 'how' shifting away from the 'why' and to an extent the merits in

[44] See Crabbe, V, 1994. Understanding Statutes. Cavendish Publishing. See pages 44-47.
[45] Dickerson, R, 1975. The Interpretation and Application of Statutes. Little, Brown and Company. See Chapter 8, pages 87-102.
[46] Salembier, J. P., 2003. Designing Regulatory Systems: A Template for Regulatory Rule Making – Part 1. Statute Law Review, Vol 24, No. 1, pp 1-37.
[47] Lord Brightman, 2002. Drafting Quagmires. Statute Law Review, Vol 23, No. 1, pp 1-11. See also Munday, R., 2008. The Bridge that Choked a Watercourse or Repetitive Dictionary Disorder. Statute Law Review, Vol 29, No. 1, pp 1-19.
[48] As can be seen in the bibliography, a host of literature were referred to mostly to inform on the state of law as it is, but key points on selected literature were the ones specifically cited.

implementation, is employed in understanding how the EPBC Act has been framed. To an extent, this is also an exercise of legal transplant[49], albeit of possible "borrowing" of options in the construction of a 'similar' statutory structure in Malaysia.

The twist is, functionalism has focused much on the relationship between law and society, but the thing is can it now be used to see the establishment of a link between law and nature? The assumption here is, it is society that drives the law, but the purpose of the law, in light of arguments for biodiversity, though couched in an anthropocentric slant, it does actually serve nature more than humanity, as it calls action to err on the side of caution in the face of scientific uncertainty. It is this shift from 'for humanity to for humanity and nature' is what makes the EPBC Act an interesting source of study.

Here emphasis is made again on the aforementioned need for hierarchy of authority, structuring of normative texts particularly those creating rights and obligations[50], and the shift towards drafting in plain language[51], taking into account the need to be clear and concise[52]. Also addressed is the need to ensure that the draft gives the necessary legal effect [53].

Looking at these three methods and approaches that can be adopted, the positivistic view, without going to the merits of the law per se, will help link the prerequisites of biodiversity conservation, i.e. the use of terms, the scientific aspects to be considered or incorporated as well as measures to be adopted and enforced to effect conservation.

[49] Supra *fn* 33, taking on his discussion on Watson, A. Legal Transplants. (Athens, Georgia: University of Georgia Press, 1993).
[50] See above fn. 8
[51] Turnbull, I. Qc 1997. Legislative Drafting in Plain Language and Statements of General Principle. Statute Law Review, Volume 18, Number 1, pp. 21-31, see pages 21-23, 24, 26
[52] Watson-Brown, A. 2009. Defining ' Plain English ' as an Aid to Legal Drafting Statute Law Review 30(2), 85 – 96
[53] See above fn.

How should biodiversity and its conservation be incorporated into a regulative framework? Have these aspects been 'covered' by existing statutes (interpretation), are there comparable statutory framework that is overarching in nature from which lessons can be drawn upon (comparative study)? How should an integrative statutory framework be framed (drafting prerequisites)?

Much will be invested in detailing out what is meant by biodiversity, conservation and biodiversity conservation (Chapters Three to Five) to help identify all the necessary keywords that will be used in determining the purpose and scope of statutes that can be linked to biodiversity conservation as a whole. Fundamentally, the keywords identified will be used to determine whether the Federal Constitution of Malaysia actually makes provisions for biodiversity conservation. Options transplanted from what was learnt from the EPBCA 1999 will be put together with the prerequisites of biodiversity conservation as a whole, and incorporated as best as possible to structure a framework that will help balance Federal and State interests in Malaysia.