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CHAPTER 8

Improving forest governance in Malaysia

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Abstract: The Malaysian government has a long-stated commitment to keeping half of the nation's land under sustainable forest management. Over the years, increasing safeguards have been put in place to implement this commitment. However, two significant governance challenges remain: ensuring adequate scrutiny over decisions to change land status, and providing a legal basis for community forestry. This chapter reviews these issues as they apply in Malaysia, with a focus on the National Forestry Act 1984, which has been adopted by the states of Peninsular Malaysia and the federal territories. The requirement for states to hold public hearings prior to excision of forest reserves, as championed by the state of Selangor in 2011, is found to be inadequate. In addition, it is recommended that state legislative assemblies be given power to review executive decisions in this regard. We find that the Malaysian forestry policy is welcoming to community forestry; however, statutory provisions are inadequate, which leads to inconsistent application. The chapter reviews the legal basis for community forestry in the state of Selangor, looking at cases in Kota Damansara, Shah Alam, and North Selangor. The chapter concludes by highlighting medium- and long-term changes that are needed to allow the existing legislation.

INTRODUCTION

In the pursuit of global sustainable development goals, ensuring the resilience of life on land requires a robust forest governance framework, one that ensures that forest area increases and respects the views of local communities (Roka 2019). However, many countries lack an explicit legal basis for empowering communities to influence forest management decisions made by the government. Community influence is fundamental to forest governance. This is because a clear legal basis for communities to influence forest management would ensure that decisions are made transparently and accountably. Recognising this, there are efforts in several countries to strengthen the basis for community-based forest management (Roka 2019).

Malaysia is one country whose extensive forest estate has officially been managed almost exclusively by the executive arm of government (T. Lim 2011, 2022; J. Lim 2021). In 2016, Malaysia was still mostly forested (Figure 1). However, this forest is mostly in Sabah and Sarawak (Figure 2), with most of the forest in Peninsular Malaysia having been cleared (here only about 40% of the land is forested). Most forests are classified as "permanent reserved forest" (referred to as "forest reserves" in this paper), with the land having been officially placed within a network of forest reserves, under the jurisdiction of the state forestry departments. In the Peninsula, the legal basis for community forestry is being explored by both the forestry department and by civil society. In recent years, there have been several government projects to involve local communities in forestry activities and, likewise, the public has been seeking a bigger role in forest management.

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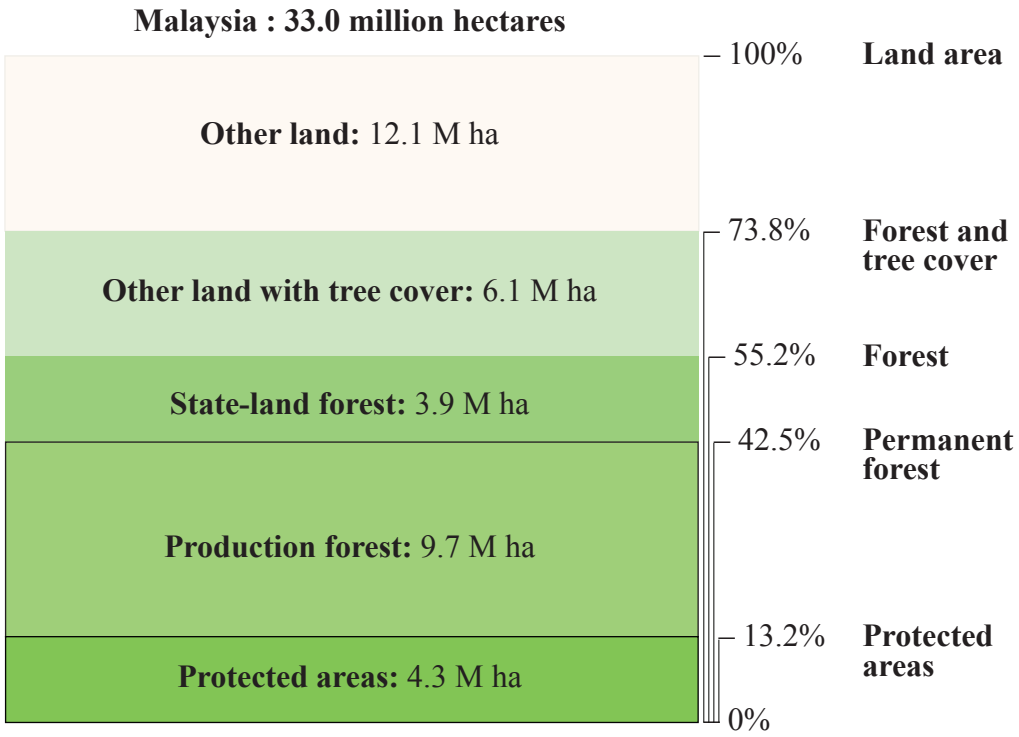

Figure 1. Forest land-use zoning in Malaysia (2016).

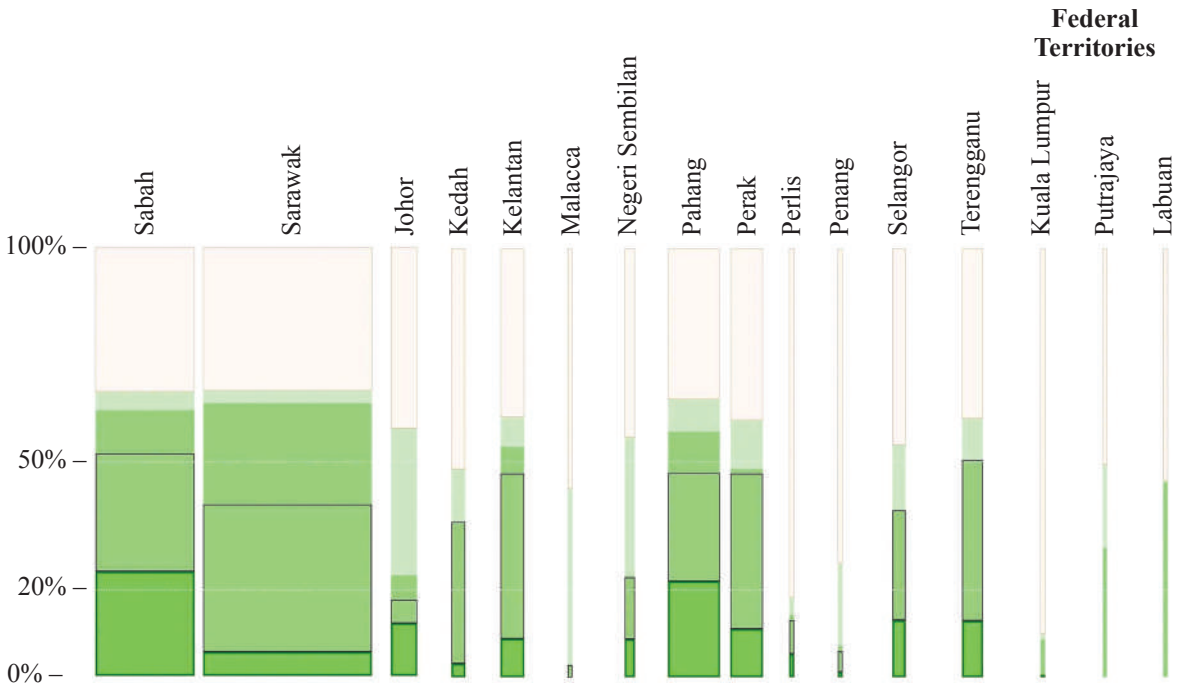

Figure 2. State land-use zoning in Malaysia (2016).

Both the government and the public have been working towards the establishment of community forests. Three cases in Selangor illustrate the challenges to implementing community forestry: two cases involving suburban forests in the outskirts of the Greater Kuala Lumpur conurbation (centred on the Klang Valley), while the other involves a rural community adjacent to a peat-swamp forest in the north of Selangor.

The first case involved a community that succeeded in convincing the government to protect a 322-ha area as the Kota Damansara Community Forest (Shaharuddin *et al.* 2012; Vaz and Lim 2012; Nath and Magendran 2020). In 2016, inspired by this success, a second group of residents of the neighbouring city of Shah Alam registered the Shah Alam Community Forest Society to conserve an area of 406 hectares within the Bukit Cherakah Forest Reserve. The third group was facilitated by Global Environment Centre (GEC), a non-governmental organisation that has worked with the Selangor Forestry Department since 2008, to rehabilitate the Raja Musa forest reserve (Alam *et al.* 2021).

Despite a somewhat sympathetic state government and active civil society, communities in Selangor still face uncertainties regarding the legal basis for them to manage their respective forest areas. In Kota Damansara, no institutional arrangements for co-management have been formalised between the state government and the CBOs (Nath and Magendran 2020). In Shah Alam, the government announced its decision to excise the community forest area for housing development (J. Lim 2021). While GEC has signed a memorandum of understanding with the state, the local community has no clear role in decision-making related to the forest (Alam *et al.* 2021). It is in this context that there is a need to review forest governance in Malaysia generally, and to discuss what options would be most suitable in the cases mentioned in Selangor specifically.

METHODOLOGY

Approach

The approach uses a broad definition of "community forestry" that has been adopted internationally: "any situation which intimately involves local people in a forestry activity" (FAO 1991). On this basis, a review was undertaken of the relevant provisions of (i) customary law; (ii) statutory law; (iii) judgements of the courts; and (iv) policy. The review of customary law focused on the traditions of the Orang Asli (aboriginal peoples). The review of statutory law looked at the Federal Constitution and at statutes enacted from 1984 to 2020. These included federal legislation, state legislation, and state subsidiary legislation (focusing on the state of Selangor). The review of court judgements included a review of cases that had been brought to court and subsequently settled out of court. Finally, the policy review focused on the provisions of the Malaysia Forest Policy (KeTSA 2021) that may guide future amendments to the law with regards to community-based forest management. The initial findings of the literature review were confirmed via informal interviews with key stakeholders.

Study area

Malaysia's forests span its 13 states and three federal territories, comprising over 8,800 plant species in 16 forest types (seven elevation-dependent and nine edaphic forest types). The dominant trees are dipterocarps, whose canopy rises 45 m above the forest floor, with emergents over 80 m. Forest management is controlled by the individual states. In Peninsular Malaysia, forest policy is coordinated by the Forestry Department Peninsular Malaysia (FDPM), which is headquartered in Kuala Lumpur. The implementation of forestry activities is carried out by the individual state forestry departments, which have operational autonomy under their respective state governments.

Selangor is a state on the west coast of Peninsular Malaysia. It is the most populous and developed state of Malaysia and is centred on Malaysia's primary urban conurbation (which includes the federal territories of Kuala Lumpur and Putrajaya as enclaves). Despite this development, Selangor has maintained about 30% of its land under forest cover, with 791,084 ha classified as forest reserves. Much of this forest is classified as protection forest and, since 2010, there has been a moratorium on commercial timber harvesting within these permanent forest reserves that are still classified as production forests (Alam *et al.* 2021).

RESULTS

Customary law

Customs and traditions of local communities (known as *adat* in Malay) related to forest management provide one aspect of the legal basis for community forestry in Malaysia (Lim 2011). This is because Malaysia's Federal Constitution has a broad definition of "Law" which in addition to written law, also includes "any custom or usage having the force of law in the Federation or any part thereof" [Article 160 (2)]. On this basis, it is important to examine the customs of the local and/or indigenous people as they relate to forest management.

For thousands of years, the indigenous communities of Malaysia have been involved in several forestry activities, including tree felling, harvesting non-timber forest produce, and facilitating the propagation of various species of beneficial plants. The specific customs vary somewhat according to the sub-ethnic group but one widespread and important agroforestry custom includes a swiddening system known as *selai*. This involves clearing a small patch of forest and planting it with rice for one harvest. The *selai* system was traditionally integrated with a *dusun* (orchard) system which involved planting a forest garden with fruit trees such as durian (*Durio* spp.). The *selai-dusun* system has recently been recognised to be a form of agroforestry, categorised as "forest-garden agroforestry", comprising 75% big trees, 20% starch crops, and 5% leaf vegetables and medicinal plants (Keat *et al.* 2018). The starch crops from customary agroforestry are not restricted to rice growing in clearings, but also include sago palms and root crops such as yams. The root crops are customarily managed through a form of "paracultivation" practised by foraging communities (Endicott and Endicott 2008). Indigenous Peoples also practise similar "sub-lethal" customs in the harvest of non-timber forest products such as agarwood (*Aquilaria* spp.) (Yamada 1995; Lim and Awang Anak 2010). The colonial and post-colonial authorities have criticised customary systems as being destructive, inefficient and uncontrolled "slashing and burning" (Subramaniam and Endicott 2020), but recent studies have shown that in fact, customary swiddening systems are "ecologically appropriate, culturally suitable, and under certain circumstances the best means for preserving biodiversity" (Fox 2000).

The extent to which of these customary forest management practices have "the force of law" varies from community to community. The customs have generally not been codified and there is variation in the extent to which they have been recognised by the courts. It is important to recognise that under customary law, the concept of land ownership as understood in English law does not exist (Subramaniam and Endicott 2020). Instead of land ownership, customary law recognises a community's ancestral territories ('*wilayah adat*' or '*tanah saka*') that are usually delimited on the basis of natural river catchment divides (Harper 1997). Thus, the paradigm for community-based forest management under customary law is quite different from that provided for by the statutes (which is the subject of the following section).

Statutory law

Since the 19th century, the colonial governments utilised land laws to create forest reserves and to control forestry activities. The first legislation specific to forestry was passed in 1907, when the Federated Malay States (including Selangor) passed state forestry enactments (e.g., the Selangor Forest Enactment 1907). In 1914, these state enactments were consolidated via the passing of the FMS Forest Enactment (Subramaniam and Endicott 2020). This legislation was subsequently revised in 1918 (F.M.S. En. 34/1918) and again in 1934 (F.M.S. Cap. 153/1934).

Today, the key statutory law governing forest management in Malaysia is the federal *National Forestry Act 1984* (Laws of Malaysia Act 313), an Act to promote uniformity of the laws of the States of Malaysia with respect to forest management. Under the Federal Constitution, forestry became a state matter, with the Act coming into force once it was adopted by the respective state governments. For example, in Selangor, the relevant enactment is the *National Forestry Act (Adoption) Enactment 1985* (Sel. En. 5/1985).

Since 1984, the federal law and the respective state enactments have been amended several times. In Selangor, the state enactment has been amended four times:

i. The first amendment (Sel. En. 2/1994) took into account amendments of the federal Act (*National Forestry (Amendment) Act 1993* (Act A864));
ii. The second amendment (Sel. En. 5/2005) was to include provisions related to State Parks;
iii. The third amendment (*National Forestry Act (Adoption) (Amendment) Enactment 2011*) added the requirement that a public inquiry be held prior to excision of forest reserves. The *National Forestry (Amendment) Act 2022* incorporated this requirement and it came into force in the federal territories in 2025. However, most states have yet to adopt this amendment.
iv. The fourth amendment (Sel. En. A55/2018) included provisions related to the *International Trade In Endangered Species Act 2008* (Act 686) and enhanced penalties.

The *National Forestry Act 1984* ('the 1984 Act') empowers the state to create subsidiary legislation in the form of state forestry rules. There have been several such rules formulated. Of particular importance to communities in Selangor are the rules that were drafted to facilitate the implementation of the 2011 amendment requiring public inquiries, the *National Forestry Act (Adoption) Enactment 1985, Public Inquiry (Selangor) Rules 2014* (Sel. P.U. 1/2014). This was amended via the *Public Inquiry (Selangor) (Amendment) Rules 2020* (Sel. P.U. 16/2020).

Provisions related to forest reserve excision

The law requires that decisions regarding the status of forest reserves be published in the respective government *Gazette* (the official channel of publication of government decisions). The *Gazette* is thus a key link between the government and the public. Unfortunately, for peninsular states, the *Gazette* is behind a steep paywall, requiring members of the public to purchase thousand-ringgit annual subscriptions. By the time the public is aware of *Gazette* notifications regarding forest reserve excisions, it is often too late to challenge the decision. This is because the courts require that applications for judicial review be filed within three months of the decision being made. The Federal Court recently held that it was too late to challenge a forest excision that took place in 2000, despite the *Gazette* notification only being published in 2022. [a]

[a] In the Federal Court of Malaysia, Civil Appeal No.: 01(i)-28-09/2024(B), between Damien Thaman Divean and Lim Teck Wyn and Majlis Eksekutif Negeri Selangor Darul Ehsan and four others. Coram: Abu Bakar Jais, PCA, Rhodzariah Bujang, FCJ, and Lee Swee Seng, FCJ.

Provisions related to community forestry

Under the colonial forest enactments, the authorities had the power to admit the rights of local people inside forest reserves (Harper 1997). Prior to 1984, the creation of new forest reserves required listing the rights of local communities inside these reserves. For example, in 1909, the Selangor government declared the creation of the Bukit Cherakah Forest Reserve (Notification No. 278 published in the Selangor Government Gazette dated May 21, 1909). This notification recognised the public right-of-way over a path through the forest and conceded several privileges to local "*Sakais*". The term "*Sakai*" referred to the Orang Asli sub-group living in and around the reserve and is now known as the "*Temuan*" (Shazlin Adila 2001). The specific rights and privileges listed in the notification were as follows:

i. Sakais living in or within three miles distance of the reserved forest may make clearings in that portion described in schedule II hereto [920 acres];
ii. Sakais living in or within three miles distance of the reserved forest may collect forest produce for their own use and hunt, shoot and fish within the reserve;
iii. Right of way over the path from Bukit Raja to Sungei Buloh.

However, the admitting of such special rights caused administrative difficulties for the forestry departments (Harper 1997; Subramaniam and Endicott 2020). These difficulties meant that the state governments became inclined to extinguish such rights and to cease conceding any special privileges to local communities inside forest reserves. With this aim in mind, the 1984 Act did not contain any clauses to allow the government to continue to admit special rights within forest reserves. On the contrary, the new legislation declared that such rights would cease after coming into force of the Act.

The 1984 Act criminalised entry into forest reserves without the permission of the forestry department. One exception is provided by Section 45 of Act, which states that: "The State Authority may, by notification in the *Gazette*, declare any permanent reserved forest or part thereof to be an open forest or a closed forest, and until a permanent reserved forest or part thereof has been so declared to be an open forest it shall be deemed to be a closed forest." Section 46 of the Enactment states that, in declaring a permanent reserved forest as "open forest", "the State Authority shall give due consideration to the necessity of protecting the forest and the environment and to the recreational and other needs of the public".

The 1984 Act also provided for the recreational and other needs of the public via a system that allows forest reserves or parts of forest reserves to be classified according to a particular functional class. The 1984 Act provided 11 such functional classes, including class (h) "amenity forest", for recreational purposes. In addition, some states (including Selangor) have added a 12th class to allow for forest reserves to be classified as State Parks.

In practice, a total of 74 areas inside forest reserves in Peninsular Malaysia have been designated as recreational areas that provide opportunities for the public to engage in outdoor recreation, including picnicking, camping, hiking, and swimming. The forestry department refers to such areas as *Taman Eko Rimba* (forest eco-parks). Incidentally, the formal designation of the Kota Damansara Community Forest is the Kota Damansara Permanent Reserved Forest (or "*Hutan Simpan Kekal Kota Damansara*"). The forestry department has taken the administrative decision to name the forest as "*Taman Eko Rimba Kota Damansara*". However this name has yet to be accepted by the community (Chan 2019).

In some states (including Selangor), eco-parks have been formally classified as amenity forest, while eco-parks in other states have no formal status or have alternatively been declared to be "open forest" (KATS 2019). Note that a forest reserve that has been

classified as amenity forest or state park forest still requires a permit to enter, unless it has also been declared to be an open forest. While the extent of eco-parks is small (2335 ha) (Kumari 1995), a much larger area has been declared as state park forest, such as the 93,002-hectare Selangor State Park (KATS 2019). No compilation of the total area declared as open forest is available.

Court Judgements

Judgements

The common law principle of the existence of *lex non scripta* (unwritten law) provides for the recognition of uncodified customs. In Peninsular Malaysia, there have been numerous court judgements that have upheld this principle with regard to adat rights to land. These judgements date back to the 19th-century case of *Sahrip v Mitchell* (Lim 2011). In particular, in the case of *Adong bin Kuwau*, the courts have held that Orang Asli have rights inside forests that are above and beyond the rights that have been explicitly recognised by the state; and in the case of *Mohamad Bin Nohing* the courts held that these rights can persist even in areas that the government has reserved for other purposes (Wook 2017).

Consent orders

Court judgements have also led to consent orders that have recognised the rights of local communities to continue to occupy and carry out activities within forest reserves. There are two particular examples, the cases of Pos Balar (*Hanan Anjang*) & Pos Belatim (*Mohamad Bin Nohing*) (SAM and JKOASM 2016; Vun ca. 2018; Kamal and Lim 2019). In the former case, the state of Kelantan and the Temiar Orang Asli of Pos Balar reached a consent agreement in 2017. This agreement effectively acknowledged the rights of the community to play an active role in the management of parts of the Sungai Betis and Sungai Perias forest reserves. The agreement explicitly admitted that the Temiar community of Pos Balar had the following rights:

i. the rights to hunting, fishing and foraging in the forest reserve surrounding their villages;
ii. for their cultivated lands to be recognised as 'aboriginal areas';
iii. that the state will issue no permits for outsiders to carry out logging in these areas;
iv. 28 key areas are to be protected, including 23 areas to be gazetted as water catchment areas (Vun ca. 2018).

Policy

The policy for forest management in Malaysia is set by the National Land Council, which has approved a *Malaysia Forestry Policy* (MFP) (KeTSA 2021). The MFP recognises the rights of local communities to own, use, and manage their areas and resources. The MFP, unlike Malaysia's earlier forest policies, recognises the potential to involve local communities in forest management, including social forestry and agroforestry (Lim and Harrison 2021). The MFP also spells out the importance of forests in providing resources for shelter, food, domestic use, firewood, and cultural and religious heritage. The MFP also includes an action plan to identify areas inside forest reserves that are of importance to rural communities, and to resolve any conflict arising from production forestry activities. The MFP also mentions the scope for urban forestry, including reforestation and tree planting programmes.

DISCUSSION

The most democratic avenue for forest management in Malaysia is found in the state of Sabah where the state legislative assembly is empowered to decide the fate of all forest reserves [*Forests (Constitution of Forest Reserves and Amendment) Enactment 1984* (En. No. 4 of 1984)]. It has been suggested that in addition to public hearings, all states in Malaysia should also empower their state legislative assemblies to control forest reserves

(T. Lim 2021). In particular, the state forestry enactments should provide that any decision to excise a forest reserve "shall be laid before the Dewan Undangan Negeri for approval". Then, forest excisions would not come into force unless and until the excision has been approved by the state assembly. This would enable the peoples' representatives to overrule the executive when necessary, such as in the face of significant public outcry.

In addition to empowering the public by this step, there is much scope for practising community forestry within Malaysia's existing forest governance framework. The legal basis for community-based forest management can, however, be strengthened by ensuring that the provisions of statutory law are brought on par with the more robust provisions of customary law, court judgements, and the Malaysia forest policy. Such legislative changes cannot be expected to take place overnight and thus, it would be most realistic to make recommendations for improving community forestry on three time horizons: short, medium, and long term. Short-term measures should include dialogue and full implementation of existing statutory provisions, while in the medium term the state can carry out minor legislative amendments. Long-term measures should include the approval of state forestry rules governing community forestry. These steps are best illustrated by reference to the three Selangor cases mentioned in the Background section: Shah Alam, Kota Damansara, and North Selangor Peat Swamp.

In the short term, the state should convene informal and regular discussions with the communities concerned. For example, in the case of the proposed Shah Alam Community Forest (Lim 2021), the state government (via the state forestry department) can convene informal discussions with the Shah Alam Community Forest Society and discuss the extent to which its proposals can be incorporated into the state forest management plan. In Shah Alam, Kota Damansara, and North Selangor, the state should consider declaring appropriate portions of the forest reserves to be "open forest", in accordance with the provisions of section 45 of the National Forestry Act 1984. In both Shah Alam and North Selangor, the state should also consider classifying portions of the forest according to one of the twelve existing functional classes, particularly as amenity forests. This step would empower the public to continue to use the land for public recreation and would not impose any administrative burden on the state government.

In the medium term, the state should consider developing rules for the co-management of amenity forests and community forests. The development of such rules should be carried out in consultation with relevant NGOs and community-based organisations. It is fortunate that extensive work to this effect has already been carried out by groups such as the Kota Damansara Community Forest Society (Vaz and Lim 2012). Proposals specifying the institutional arrangements for the appropriate management of the community forest have also been developed, suggesting that a multi-stakeholder co-management committee be established (Nath and Magendran 2020).

CONCLUSION

In conclusion, there is an extensive, multi-faceted, and long-standing basis for public participation and community forestry in Malaysia. However, due to deficiencies in statutory law in this regard, the implementation of community forestry is often applied in an *ad hoc* and inconsistent manner. This scenario means that the public receives mixed messages on whether they are welcome to play a role in forest management. The case of Selangor illustrates that political will to improve governance needs to be implemented via legislation. Such legislation is best developed in a phased approach, with broad provisions being put in place first, while details regarding management provisions being developed over the longer term via a consultative approach involving representatives of civil society and the communities concerned.

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