

## **COMPROMISING FOREST ENVIRONMENT IN PENINSULAR MALAYSIA: THE RIGHTS OF PUBLIC TO ENVIRONMENTAL INFORMATION**

*Adzidah binti Yaakob<sup>i</sup> & Izawati Wook<sup>ii</sup>*

<sup>i</sup>Pensyarah Kanan Fakulti Syariah dan Undang-undang, Universiti Sains Islam Malaysia (USIM).

[adzidah@usim.edu.my](mailto:adzidah@usim.edu.my)

<sup>ii</sup>Pensyarah Kanan Fakulti Syariah dan Undang-undang, Universiti Sains Islam Malaysia (USIM).

[izawati@usim.edu.my](mailto:izawati@usim.edu.my)

### **Abstract**

*Well managed forests that ensure the conservation of resources are not only significant for the communities' dependant on forests but also for ecological service for the benefit of wider society. Nevertheless, in recent years the riches of nature particularly forest seems to be abandoned as a result of rapid and mixed development. This paper highlights the importance of the rights of public in Peninsular Malaysia to be involved with forest environmental information in any stages of environmental issues up to decision-making processes where the principle 10 of the Rio Declaration comes into discussion. With growing recognition of the rights of the indigenous peoples to land and forest resources, issues regarding the Orang Asli communities as an important stakeholder in forests are also discussed. Supported by contemporary issues and cases, even though public participation seems to be properly stated in the relevant legal content, regrettably in term of public participation in forest environment, this concept is seemed not favoured by those in authority because it is seen as a factor which may impede progress of the development project. This paper infers that the concept of public participation indeed seeks involvement of those potentially affected by or interested in a decision. Furthermore, it is now emerged as a concept which is considered as vital part of democratic governance to enhance accountability. Thus, as a matter of fact, environmental information is a mere report rather than to be disclosed to public.*

### **Introduction**

Percentage of forested area in Peninsular Malaysia is gradually decreasing because of tremendous increase of forest clearing activity due to mixed development for instances building up of industrial and agricultural area, residential area and also businesses complexes to meet the economic

demand and the increasing number of public. Nonetheless forest need to be conserved due to the benefit and advantages it could offer once in a lifetime. Proper and adequate planning pertaining to forest management by those in authority should be strictly adhered to so that forest could be sustained for future generation to benefit. Besides duty and obligation to manage forest environment by the authority, public indeed also has the role to conserve forest. Hence, public should be equipped with forest knowledge and environment so that public could be effectively participated and involved in forest matter and issue. This anticipation has been embedded in the Rio Declaration where the right of public to participate and involve in environmental matter is clearly stated under its Principle 10.

The increasing number of public can be clearly seen in the Population Census of 2010. The Census indicates that total number of public in Malaysia in 2010 has increased to 28.3 million from 23.3 million in 2000.<sup>1</sup> Wilayah Persekutuan Putrajaya, Selangor and Melaka are among the states in Peninsular Malaysia which have attained the highest growth rate of 17.8 percent, 2.7 percent and 2.6 percent while Terengganu, Perak and Perlis have the lowest growth rate which is from 1.4 percent to 1.2 percent.<sup>2</sup> Nevertheless population distribution by state shows that Selangor is the most populous with 5.46 million populations followed by Johor (3.35 million) whereas with a population of 72,413, Wilayah Persekutuan Putrajaya is the least occupied states in Peninsular Malaysia.<sup>3</sup> Regarding urbanisation, the Census stated that the urban population has tremendously increased which this is related to rapid development of Malaysia. The percentage of urban population has increased from 71 percent in 2010 from 62 percent in 2000.<sup>4</sup> Wilayah Persekutuan Kuala Lumpur and Wilayah Persekutuan Putrajaya both attained 100 percent in level of urbanisation whilst other states such as Selangor and Pulau Pinang each have 91.4 percent and 90.8 percent. The states with the lowest urbanisation level are Kelantan (42.4 percent), Pahang (50.5%) and Perlis (51.4%).<sup>5</sup>

Another group of public which is not stated under the Population Census of 2010 is the aborigines or known as *Orang Asli*. Nevertheless, the statistical data of *Orang Asli* could be found in the Basic Information Data of the *Jabatan Hal Ehwal Orang Asli*. According to the 2008 statistical data, there are 141,230 of *Orang Asli* settled in Peninsular Malaysia. In that

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<sup>1</sup> Department of Statistics, *Population Distribution and Basic Demographic Characteristics 2010*, (Putrajaya: Department of Statistics Malaysia, 2011) 1.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Id* at p 4.

<sup>5</sup> *Ibid.*

respective year, the State of Pahang is the most occupied among *Orang Asli* and the least occupied is the state of Kedah.<sup>6</sup> Most of the *Orang Asli* communities have direct interests in the forests being dependence on the forests for their livelihood compared to the other sections of public.

Thus, from the statistical data stated above, it can be derived that figures of public including *Orang Asli* is increasing in Peninsular Malaysia and their rights to forest is crucial as forest is however seen decreasing year by year. Indeed with the increasing number of public should majority of public express the issue, the issue perhaps could be smoothly resolved.

### **The Significance of Public Participation and the Right to Environmental Information**

During industrialization era, developed countries were strenuously engaged with development activities and projects in order to surge their state of economy. Most of the states had experienced remarkable changes in their progress of generating wealth and income. Thus, whilst boosting revenue for the state the result of environment condition was overturned. The environment condition including forest situation has been gradually worsened as a result of deficiency on policy in monitoring environmental affair. There was no such issue of public consultation as prerequisite to approval of certain project which was predicted to deteriorate environment and end up contributing to costly irreparable damages. Nevertheless, in recent years level of sensitivity especially towards environmental protection and information has tremendously increased in line with the globalisation and also evolution in information technology. Should this sensitivity is rightly channelled through relevant authority; environmental information would be publicly disseminated. Thus, this proves transparency and integrity of those in authority. Nevertheless, with the status of public to be involved in development project though internationally recognised but to what extent it is practised is arguable.

Participation according to Rifkin and Kangere<sup>7</sup> is “a complex and challenging approach to improving the lives of all people, but particularly the poor and disadvantaged.” In a study by Reinke and Robitaille, they highlighted that courts could identify the insufficiency of the Environmental Assessment (EA) when public involvement issues existed.<sup>8</sup> Further concept

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<sup>6</sup> Bahagian Perancangan dan Penyelidikan Jabatan Hal Ehwal Orang Asli Malaysia, Data Maklumat Asas Jabatan Hal Ehwal Orang Asli Tahun 2008.

<sup>7</sup> Rifkin, Susan B. and Kangere, M., *CBR A Participatory Strategy in Africa*, see <<http://www.asksourc.info/cbr-book/cbr03-pdf>> 30.1.2012.

<sup>8</sup> Reinke and Robitaille in Eccleston, C.H, *Effective Environmental Assessments How to Manage and Prepare NEPA EAs*.

of public participation in environmental matter is also a concern in the US government practice where a successful management of public involvement is an effective signal of the NEPA (National Environmental Policy Act) practice.<sup>9</sup> In implementing the NEPA, the burden to prepare the EA is on the project owner and he is responsible to find the person affected and interested of the project.<sup>10</sup> The issue of document of the EA does not reach the public or unintentionally omitted interested parties have always been an issue.<sup>11</sup> Azizan in his simple conclusion on public participation stated that “the definition of participation explains about the concept of democracy, human right and empowerment as a core of the definition.”<sup>12</sup> Azizan further associates the role of political system as a part and parcel of public participation process in ensuring the smooth flow of top-bottom executive decision in a planning process.<sup>13</sup>

Besides the above-mentioned concept on public participation, this public mechanism is also seen in local government rules and practices for instance in assessment of tax matter. In this tax assessment matter, if the local government wants to increase the assessment of tax for residence, the authority needs to consult public for any objection. If objection exists, the authority should hold and review the increment of tax based on the objection and not to easily increase the tax even though it has been objected by the public. In the health aspect, concept of social participation which is parallel with public participation has also been defined by the WHO (World Health Organisation) where social participation can exist in several different forms such as;<sup>14</sup>

- Informing people with balanced, objective information;
- Consulting, whereby the affected community provides feedback;
- Involving, or working directly with communities;

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<sup>9</sup> Eccleston, C.H, *Effective Environmental Assessments How to Manage and Prepare NEPA EAs* (CRC Press LLC: Florida, 2001) p 42.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> Azizan Marzuki, *A Review on Public Participation in Environmental Impact Assessment in Malaysia*, Theoretical and Empirical Researches in Urban Management, No.3(12)/August 2009, 30.1.2012 <<http://um.ase.ro/no12/10.pdf>>

<sup>13</sup> *Ibid.*

<sup>14</sup> World Health Organization, *Social determinants of health-Social participation*, 10 Feb. 2012, 2008 <[http://www.who.int/social\\_determinants/thecommission/countrywork/within/socialparticipation/en/index.html#>](http://www.who.int/social_determinants/thecommission/countrywork/within/socialparticipation/en/index.html#>)

- Collaborating by partnering with affected communities in each aspect of the decision including the development of alternatives identification of solutions; and
- Empowering, by ensuring that communities retain ultimate control over the key decisions that affect their wellbeing.

Therefore, from the above-mentioned concept of public participation it can be said that public does have platform to involve and participate but to what extent the public is allowed and welcomed to the planning process can be argued due to preceding experience of several cases and occasion.<sup>15</sup> Hence, it can be established that to upgrade or enhance the status of living of underprivileged people is not a laid-back undertaking because the positive outcome of it could only be achieved with the support of majority of people and indeed by those in authority.

### ***The Importance of Public Participation***

There are several reasons on the importance of public to involve and participate in any progress and development upon forest. First of all, public could not be treated as hindrance to development and also mere informant to illegal activity in forest where indeed public needs to be consulted where the impact of project upon forest may affect their quality of lives. Public would aware of environmental practices by the forest stakeholder and conservator. Public has also more and better knowledge pertaining to forest conservation especially *Orang Asli* who lives within forest area. Thus, the right to appreciate and benefit from forest is regarded as human rights which could not be compromised. This public's rights has already been underlined by the international convention<sup>16</sup> thus there is no reason why public should not be given opportunity to participate or involve in any decision-making upon forest project and activity. All in all, the relevant authority on forest should have clear policy and guideline regarding public participation based on international recognition so that public would be able to join and involve in any forest development and project.

The WHO has developed differences of the importance of public to participate during decision making process by local authority into two groups of arguments by citizen and professional where this may represent their reasons and contribute to benefits for individuals, communities, organisations and society as a whole. (Table 1)

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<sup>15</sup> Sungei Selangor Dam's Case, Jerai Quarry's case, Subang Jaya Municipal Council's case, Penang Hill case.

<sup>16</sup> Principle 10 of the Rio Declaration.

Table 1 Why participation process is important?

<p><b>Citizens’ and communities’ arguments:</b></p>	<p><b>Professionals’ argument:</b></p>
<ul style="list-style-type: none"> <li>• “We have right to say about decisions that affect our lives.”</li> <li>• “We know more about where we live and what we want and what is best for us than people working for big organisations.”</li> <li>• “We are fed up with politicians and civil servants asking us what we think and then not taking our views into account-we want to be actively involved and to have an influence.”</li> <li>• “We all have something to contribute – and our ideas and views are as valid as anyone else’s.”</li> </ul>	<ul style="list-style-type: none"> <li>• “Community participation can help us target resources more effectively and efficiently.”</li> <li>• “Involving people in planning and delivering services allows them to become more responsive to need and therefore increases uptake.”</li> <li>• “Community participation methods can help develop skills and build competencies and capacities within communities.”</li> <li>• “Involving communities in decision-making will lead to better decisions being made, which are more appropriate and more sustainable because they are owned by the people themselves.”</li> <li>• “Community participation is a way of extending the democratic process, of opening up governance and of redressing inequality in power.”</li> <li>• “Community participation offers new opportunities for creative thinking and innovative planning and development.”</li> </ul>

Source: World Health Organisation – 1999<sup>17</sup>

It is also established by WHO regarding community participation is that this community activity can develop and strengthened decision and services thus could uphold sustainability of programmes.<sup>18</sup> Thus, it is clear that the participation and involvement of public in decision making of planning process is considered crucial so that no person could be deprived of rights to having a quality of life.

### ***The Right to Environmental Information***

The right of public to be involved in activities which may give impact to environment was first propounded by the European Commission in its EIA Directive (85/337/EEC) in 1985.<sup>19</sup> The directive has been amended three times that is in 1997, 2003 and 2009 indicates the seriousness of the community in recognising public right to participate in environmental matter<sup>20</sup>. Throughout the amended provision, the right of public to participate in any projects has been improvised to the extent that public may be involved in the project's decision-making process. The list of project has also been added i.e. project related to transport, capture and storage of carbon dioxide (CO<sub>2</sub>).<sup>21</sup> The right of public to information specifically on environment has further been established in the Aarhus Convention where the European Community and its member states have approved it.<sup>22</sup> This particular convention was a result of the Rio Declaration 1992 which concerned with three "Access Principle".<sup>23</sup> The spirit of public participation in environmental matters is provided in its Principle 10 where it states that,<sup>24</sup>

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning

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<sup>17</sup> World Health Organisation, (1999), Community participation in local health and sustainable development: a working document on approaches and techniques, European Sustainable Development and Health Series:4, 1999, 10 Feb. 2012

<[www.health.vic.gov.au/localgov/downloads/who\\_book4.pdf](http://www.health.vic.gov.au/localgov/downloads/who_book4.pdf)>

<sup>18</sup> *Id.* at p 10.

<sup>19</sup> The right to information has been recognized by the UDHR and the ICCPR. Malaysia has neither signed nor ratified the ICCPR. See Article 19 and Centre and Independent Journalism, p 21.

<sup>20</sup> Directive 97/11/EC, Directive 2003/35/EC, Directive 2009/31/EC. See <http://ec.europa.eu/environment/eia/eia-legalcontext.htm>>

<sup>21</sup> European Commission Environment, Environmental Impact Assessment, 16.11.2011, 31.1.2012, <<http://ec.europa.eu/environment/eia/eia-legalcontext.htm>>

<sup>22</sup> Access to information, public participation and access to justice in environmental matters, 15.5.2008, 27.5.2008 <<http://europa.eu/scadplus/leg/en/lvb/128056.htm>>

<sup>23</sup> The three "Access principles" are: 1) the rights of all citizens to access information, 2) to participate 3) to access justice (redress and remedy). See Article 9 and Centre of Independent Journalism.

<sup>24</sup> Article 19 and Centre for Independent Journalism, A Haze of Secrecy Access to Environmental Information in Malaysia, (Kuala Lumpur: Article 19 and Centre for Independent Journalism, 2007) 28.

the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making.

Therefore, the Rio Declaration indeed provides platform for the government to give room and space for public to participate and the government's obligation to disclose any environmental information for public's knowledge and to be alerted to any hazardous impact or consequence is also inserted. Thus, the Rio Declaration has been earmarked for further international and national arrangement and treaty particularly on access to environmental information.

In Malaysia, the spirit of the Rio Declaration has been interpreted to embed provision of public participation under the Environmental Impact Assessment (EIA) guidelines where this instrument is under the surveillance of the Department of Environment Malaysia. The EIA is made obligatory to be prepared such as provided under section 34A(2) of the Environmental Quality Act (EQA) 1974 and only confine to large projects which are predicted to cause major impact to environment for instances waste management projects, dam project and also logging projects.<sup>25</sup> The EIA basically serves as an assessment to prescribed activities which may have significant environmental impact where among the requirements of the assessment which is to be fulfilled by related parties to development is public participation. However, the public would only be consulted in a detailed assessment and they are commonly from the NGOs, geologists, engineers, academics and also concerned individuals.<sup>26</sup> Public participation especially among *Orang Asli* in Peninsular Malaysia is always an issue. This aboriginal group of people is always being denied their rights to participate and involve in those development project which affected their area of living. Besides *Orang Asli*, public settles in the sub urban area always being neglected in the process of development project and their involvement is always considered as hindering the progress of the project.

Besides the concept of public participation established in the EIA, the concept is also provided under the Town and Country Planning Act (TCPA) where provision for public participation is stated under section 9, 10, 12A, 13, 14 and 15 of the Act. It concerns with the rules on the obligation of the authority to publicise the draft structure and draft local plan to public for them to participate in the process of the approval of both plans.

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<sup>25</sup> *Id* at p 55.

<sup>26</sup> *Id* at p 58.

## **Orang Asli in Peninsular Malaysia and Their Participation**

### ***Rights and Interests of the Orang Asli in Forests***

Most of the Orang Asli communities in Peninsular Malaysia use forest products and services to some degree. The extent of forest dependence of the communities depends generally on their settlement areas. Forest dwellers living within the forests are almost totally dependent on the forest for their subsistence and health. Majority of the Orang Asli live in the forest fringe. They depend on forest for large part of their income. Others in the communities who involve in smallholding plantation of rubber and oil palm, are no longer dependant on forest for the economic sustenance. But for these smallholders, forests serve as a buffer upon economic difficulties.<sup>27</sup>

Some forest components such as river water and fish provide the basic needs of some communities even if they are not strictly “forest-dwelling”. In addition to food and water, other critical essentials provided by the forest include fuel, fodder (for livestock), medicines and material (for building shelters). Local communities can be said to be “forest-dependent” when there are no readily available alternatives for these basic necessities.<sup>28</sup>

It is also known that there are many Orang Asli people who access the forests to collect variety of resources for them to earn cash income – the practice that the Orang Asli communities who live within or near forest fringe have been known to engage for centuries. From one perspective, the practice of selling forest produces, although legally beyond the permissibility of certain statutory laws, is generally considered as ‘close one eye’ policy by some officials of the authority. Taken from another perspective, in view of the indispensability of cash money for life sustenance, selling for cash income, is part of subsistence for these people.

Apart from the economic significance, forests and the territory are also culturally attached and part of what they considered vital for their identity as a group of people. Many Orang Asli groups regard the land or territory in the forest areas that they settle in as their traditional land that they inherit from their older generation - the place that they live to the exclusion of others. The land and the forests are considered as their

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<sup>27</sup> The information is based on short survey of literature and interview done by the second author. One informant is Colin Nicholas of Centre of Orang Asli Concern. Others are representative of Orang Asli and officials from certain public organisation.

<sup>28</sup> Lim Teck Wyn, 'Critical Review of the Forest-related Regulatory Framework and Its Implementation in Malaysia' in *Critical Review of Selected Forest-related Regulatory Initiatives: Applying a Rights Perspective* (Institute for Global Environmental Strategies, 2011) 51.

environment, territory and country for them.<sup>29</sup> Many groups may have moved, or relocated from the areas that they regard as their original territory, but the areas that they settle in at present are considered as their territory. Some communities also require the forest resources for maintaining their cultural traditions.

### ***Legal Recognition of the Rights and Interests of the Orang Asli to Forest***

The rights and interests of the indigenous peoples including the Orang Asli have been well established within the domestic law of the country. It is recognised under the common law that the rights and interests of States Authorities are subject to the existing rights and interests of indigenous communities including the Orang Asli. The title has origin in the traditional law and custom of the communities which also determine the nature and scope of the land rights and interest of the respective communities. The rights and interests are not confined to the use of the benefit of land but also to the title and ownership of the land itself.<sup>30</sup>

Pursuant to the recognition of rights and interests of the indigenous peoples, the responsibility for safeguarding indigenous and tribal peoples' rights lies with governments. This is inherent in the nature of relationship between the government and the aboriginal peoples in Peninsular Malaysia which has been described as of fiduciary in nature. Mohd Noor Ahmad J Sagong Tasi describes the basic content of fiduciary duty as 'a duty to protect the welfare of the aborigines including their land rights, and not to act in a manner inconsistent with those rights, and further to provide remedies where an infringement occurs. The court refers to *Mabo [No 2]* which proposes that consent of the titleholders is essential in action that infringes native title.

Many judges in other jurisdictions also forward the same view.<sup>31</sup> In Canadian law, it has been established that consultation is a major factor in determining whether an infringement is justifiable. In appropriate situation, the aboriginal interest must be accommodated even in cases where

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<sup>29</sup> Tijah, a Semai of Chang Lama, Perak told the second author that it is their 'nenggrik' ie state or country with a complete system of their own customary law.

<sup>30</sup> Sagong, adong, nor anak, madeli, andawan See, eg, *Sagong bin Tasi v Kerajaan Negeri Selangor* [2002] 2 MLJ 591 (Ahmad, Mohd Noor J); *Superintendent of Land & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677.

<sup>31</sup> See eg *Attorney General for Quebec v Attorney General for Canada* [1921] 1 AC 401; *Nireaha Tamaki v Baker* [1901] AC 561; *Amodu Tijani*; *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 161, 165; *R v Sparrow* [1990] 1 SCR 1075, 1119.

aboriginal rights are not yet established but asserted and supported by some evidence.<sup>32</sup>

In the context of fiduciary duty owed by the State to the aboriginal peoples, Toohey J defines the relationship as those that involves one actor with authority to exercise discretion that could affect the interests of another party. It is an undertaking to act on behalf of, and the power to detrimentally to affect, another.<sup>33</sup> Such relationship may arise as a result of an agreement, by statute, or it might also be assumed without the request of the other party.<sup>34</sup> For Toohey J, the nature of the government's obligation was as a constructive trustee.<sup>35</sup> A fiduciary must act for the benefit of the beneficiaries. It follows that the procedure for reaching a decision and the content of the decision must be informed by the duty. Although the duty does not limit the legislative powers of the authority, legislation that adversely affected native titleholders or established a process that ignored their interests breached the fiduciary obligation.<sup>36</sup> Toohey also considers that requirement to obtain free consent of the aboriginal communities ensues from the fiduciary obligation.

This articulation about the fiduciary relationship between the government and the indigenous peoples including the Orang Asli is important legal basis for the rights of participation by the Orang Asli in any project that affects their rights and interests.

At international level, the right of indigenous peoples to participation in decision making is affirmed. One of important instruments is the Declaration of the Rights of Indigenous Peoples (UNDRIP).<sup>37</sup> Malaysia voted in favour of the UNDRIP, both at the Human Rights Council and at the General Assembly with no reservations. This international instrument on one hand provides moral basis for the rights of participation of the indigenous peoples. On the other hand, certain rights of the

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<sup>32</sup> For detailed analysis, see Kent McNeil, 'Judicial Treatment of Indigenous Land Rights in the Common Law World' in Benjamin J. Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 257, 281, referring to M Morellato, *The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights*, February 2008, at [fngovernance.org/pdf/CrownDuty\\_MM\\_0208.pdf](http://fngovernance.org/pdf/CrownDuty_MM_0208.pdf)).

<sup>33</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, Toohey J, 33.

<sup>34</sup> *Id* at p 156.

<sup>35</sup> *Id*, at p 159.

<sup>36</sup> *Id* at p 160.

<sup>37</sup> Adopted by General Assembly Resolution 61/295 on 13 September 2007.

indigenous peoples have been argued to have crystallized into customary international law.<sup>38</sup>

### **The Amendment of the Selangor Forest Enactment**

The amendment to the Selangor Forest Enactment in 2011 has reflected new perspective on Malaysian legislation. In this amendment, public has the right to be consulted before excision of forest reserve. This initiative is considered as noble effort because public is always neglected in this type of decision making process whilst the public's quality of life much depends on forest and their lives would be affected if forest is decreasing in number.

The CEO of WWF Malaysia expressed his concern about this amendment where he said that:

The public has the right to know how forest resources are being managed as they are beneficiaries of the ecosystem services provided by our forests. Their contribution to the decision-making process is imperative as we are dependent on forests for our socio-economic, recreational, cultural and spiritual well-being and this is in line with the government's policy of putting people first.<sup>39</sup>

The state of Selangor is the first state to amend its Forestry Enactment where public inquiry is made compulsory before any forest reserve can be de-gazetted thus public is free to express their suggestion, opinion even criticism to the proposal of forest excision.<sup>40</sup>

### **Loss of the Green Lung**

Public's rights to be involved in planning decision has been jeopardized due to several reasons and this is showed in the following scenarios.

The residents of the Subang Jaya have objected to the draft plan approved by the Subang Jaya Municipal Council. The Municipal Council was believed to approve commercial projects on buffer zones. More than 200 residents had gathered to a briefing regarding Subang Jaya Draft Local Plan and all of them were unprepared with their objections because they

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<sup>38</sup> S James Anaya and Siegfried Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re Empowerment' (2007) 11 (3 October 2007) *Jurist Legal News and Research*, [11]; Siegfried Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' (1999) 12 *Harvard Human Rights Journal* 57; Melissa Castan, 'DRIP feed: the slow reconstruction of self-determination for Indigenous peoples' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Edgar Publishing Ltd, 2010) 492.

<sup>39</sup> Public Participation in Forest Management is the Way Forward, 17 June 2011, 1 Nov. 2011

<<http://www.wwf.org.my/?12722/Public-Participation-in-Forest-Management-is-the-Way-Forward>>

<sup>40</sup> Selangor passes two key reform bills, 18 May 2011, 1 Nov. 2011

<<http://www.malaysiakini.com/news/160311>>

were only expected to have a briefing. The residents have proposed to have a public hearing so that all of them could listen and raise the questions and objections pertaining to the draft local plan.<sup>41</sup>

Another scenario of public protest on destruction of green lung is the case of Penang Hill. In this case the Friends of Penang Hill was formed which was a collective effort by the NGOs and six other public interest groups and after several objections and discussion with the state government at the end succeeded to stop the proposed project by the developer which could cause environmental destruction.<sup>42</sup>

In the case of quarry in Jerai, Kedah, public objected to the quarry's operation which would cause environmental harm. *Sahabat Alam Malaysia* (the NGO) had assisted the public to bring the case to the court. This case has actually started in 1997 when the state government of Kedah assented to the structure plan for the district of Yan from 1995-2020 and the same was gazetted on 1 January 1998. Until then, the case which was reported in 2010<sup>43</sup> upheld the plaintiff's rights in maintaining the forest reserve area against the quarry operation which has adversely affected their lives. Thus after several stages of court's procedure, the learned judge in this case held that the defendant must be estopped by the principles of *res judicata* from once again raising the issue of *locus standi* in this matter. This shows that public rights are still protected under the law and in this particular case the Town and Country Planning Act. The judge clearly mentioned regarding this matter; 'Clearly then they come within the class of persons the structure plan seeks to protect those who have homes, orchards or padi field within the area, those whose source of water are the rivers running in the area for which the forest represents an important water catchment area.'

From the above-mentioned issues public is seen not to have accurate information and guideline as to the ways they could be involved and participate in such a process. Public also need assistance and guidance from experts and the NGO so that their issue could be efficiently handled. The public's concern is their objection and issue would be taken care of by the relevant authority.

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<sup>41</sup> Dass, Maria J., Residents lament loss of open space, 20 Feb. 2012  
<[http://www.malaysianbar.org.my/members\\_opinions\\_and\\_comments/](http://www.malaysianbar.org.my/members_opinions_and_comments/)>

<sup>42</sup> Ainul Jaria Maidin, *Access to Public Participation in the Land Planning and Environmental Decision Making Process in Malaysia*, 20.2.2012 <<http://www.ijhssnet.com>>

<sup>43</sup> Awang @ Harun bin Ismail & Ors v Kerajaan Negeri Kedah & Ors [2010] 4 MLJ 83.

## **Factors Impeding the Participation of Public in Forest Conservation in Peninsular Malaysia**

In upholding transparency and integrity, public participation is seen as a medium for public to express ideas, suggestion and criticism. However, this has been considered as hindering progress of project proponent. Public could not really participate because of the ambiguity in legal content such as provision contained under the EIA and also the absence of public participation provision under the very own forest act that is the National Forest Act 1984 and also its policy. Thus, this section discusses further factors which impede public participation in forest conservation in Peninsular Malaysia.

### ***The State and Local Government Approach***

The approach by the state and local government reflects good practice of administration and quality of management. Should the authority acts appropriately, there will be no much complaint received from public. The overlapping of jurisdiction by different government agencies also led to various issues where sometimes public is pinned in the middle.

Pertaining to environmental information management, the government authority is subjected to the Official Secrets Act 1972.<sup>44</sup> The public found sometimes it is hard to access and get the real information regarding environment which could affect their lives because of the restriction contained in the Act.

The relationship between federal and state government is also cause of concern where resources including forest as stated under the Federal Constitution is under state's jurisdiction<sup>45</sup> whereas federal government has jurisdiction pertaining to Environmental Sensitive Area (ESA) which is governed by the National Physical Plan. Thus this complicated relationship also sometimes contributes to the obscurity of the approach by the state and local government and this would affect public understanding on forest environment. Public consultation is also seen as factor which may impede or obstruct progress of the development project.<sup>46</sup>

### ***Level of Awareness and Attitude of Public***

In recent years, public awareness to environmental scenario has been increased compared to previous years. Public has started to question and

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<sup>44</sup> See note 24.

<sup>45</sup> Schedule 9, Second List of the Federal Constitution of Malaysia.

<sup>46</sup> Adzidah Yaakob, "Public Participation in Conservation of Forest Biodiversity: A Special Reference to Peninsular Malaysia", *Earth Conference 2008*, (Greece, 1-6 June 2008).

search for the truth and instead of relying on the official news in the government's media they has started to get the environmental information from internet sources where they can have unlimited sources of information.

In a study conducted by the Malaysian Science and Technology Information Centre (MASTIC) in 2002, there is a positive increment of public awareness in environmental knowledge. It is clear from the Table 2 below, public's knowledge pertaining to forest environment (question A) has been tremendously increased in just within two years that is from 18.8 per cent in 2000 to 54.3 per cent in 2002. This is a positive progress for environmental protection because if the public started to have high level of environmental awareness towards forest, thus there is hope for forest survival for more years.

Table 2 Understanding Environmental Terms and Concepts

No.	Question	Percentage answering correctly			
		2002	2000	1998	1996
A.	Acid rain damages the forest. (True)	54.3	18.8	15.3	9.2
B.	Hole in the ozone layer can cause skin cancer. (True)	57.4	19.1	15.9	9.6
C.	Sea level can decrease due to global warming. (False)	12.7	6.7	5.1	3.0
D.	The greenhouse effect can raise sea level. (True)	30.3	9.9	6.8	4.3
E.	The use of LPG by motor vehicles can	37.7	27.5	25.2	17.9

	reduce air pollution. (True)				
	Mean Percentage Correct	38.5	16.4	13.7	8.8

Source: MASTIC, 2003 in Sahabat Alam Malaysia, 2006.

Nevertheless, bad habit dies hard where they can be the person who does not want to comply with available environmental rules and regulation. This shows that their environmental awareness is still low where their reason of non-abiding the law is always about cutting the project operational cost.

### ***Participation Involving the Orang Asli Communities***

In relation to the participation involving the Orang Asli as forest dependant people, lack of knowledge and capacity creates unequal playing field in the discussion table. The indigenous communities need to deal with issues new to them including commercial land development, forestry and forest certification issues, and negotiation with timber companies and logging concessionaires. They generally do not have the technical expertise to address them. To give them the ability to engage meaningfully with these issues, education and capacity building of the indigenous communities is of utmost importance.<sup>47</sup>

Another factor is the technical complexity involved to conduct effective consultation and participation which the government is apparently reluctant to address. These complexities include the logistical difficulties of dealing with disparate communities living in remote and inaccessible areas; communication barriers caused by diverse cultures and languages and low rates of literacy; combined with conflicts of interest caused by the relative power and patronage of the timber and plantation proponents competing for the land.<sup>48</sup>

Furthermore, the dominance of political parties by the urban elite often acts to exclude forest dependent minorities from the law-making process. Safeguards which allow for the appointment of minorities as lawmakers are inadequate and forest-dependent groups continue to be

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<sup>47</sup> See note 45.

<sup>48</sup> See note 28 at p 62.

under-represented in Parliament and the various State Legislative Assemblies.<sup>49</sup>

### **Recommendation for Public Participation in Forest Conservation in Peninsular Malaysia**

Public participation is an accurate channel for public to voice or raise any doubt about activity or project in forest which may affect their lives. Despite several grounds of hindrances for public participation in forest conservation, the recommendation below hope to give some ideas and ways of which public can effectively involve or participate especially in decision-making process in forest environment.

#### ***The Approach by the State and Local Government***

The approach which has been practiced for years which is “top-bottom” approach where professional views and opinions are considered relevant but usually raised dissatisfaction among the public at large. The approach of “bottom-top” as being practiced by the local community groups is considered significant and capable to produce better decision-making process compared to current practice.<sup>50</sup>

The voice and opinion of public is vital to be taken into consideration especially by those in authority thus this shows the openness and transparency of the government in dealing with environmental issues which quality of public lives is the main concern of the issue.

#### ***Amendment of the National Forestry Act and its Policy***

The National Forestry Act and its policy have been designed to meet the aim of sustainable forest management. However, there is no provision relating to public participation in the decision-making process related to survival of forest. The only provision regarding public is forest for recreational forest and community forest which are referring more to forest education rather than to permit the public to be involved in forest planning and activity. In this regard, the state of Selangor should be praised for their effort in amending their forest enactment to include the right of public to be consulted by the authority before any reserved forest could be degazetted.

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<sup>49</sup> *Ibid.*

<sup>50</sup> Sahabat Alam Malaysia, *Malaysian Environment in Crisis*, (Sahabat Alam Malaysia: Penang, 2006) 193.

### ***Improvising Legal Provision***

The right of public to participate is rightly stated under the EIA however, public could only participate in the Detailed Assessment stage where the possibility of public to involve in this particular stage is limited. It is limited in a way that there is only small number of public with scientific and technical knowledge and background who could really comment and suggest for detrimental effect of the project to the environment where most of the public would only submit protest letter. This had happened in the case of Sungei Selangor Dam EIA Report where the Department of Environment (DOE) received more than 200 letters but out of 200 only 18 letters commented to scientific and technical consequences of the project to the environment whereas the remainder is the protest letter.<sup>51</sup>

The authority should come out with accessible document related to EIA process and the public should be given opportunity to be explained especially on the technical part of the Detailed Assessment Report. The document also must be reachable especially by those living in rural area where most of the forest project affected this remote community.

Besides the EIA process, the binding effect of local and structure plan under the National Physical Plan are also arguable. The plan has been beautifully drafted and implemented however there is no legal consequence of non-compliance of the plan. The plan is only serves as planning procedure where there is possibility of changes in planning.<sup>52</sup>

### ***Recognition of the Public's Rights to Environmental Information***

The right of access to environmental information has been widely accepted all around the world. Right to information should be respected especially by the state practices democracy system of governance. This right has been described by Justice Kate O' Regan, as "sunshine" which "helps society to hold government and various public officials accountable for their activities."<sup>53</sup> Thus, this opinion could also be applied and practiced by those state in order to ensure transparency and integrity among its public authorities.

The right to access to environmental information is embedded under Principle 10 of the 1992 Rio Declaration for Sustainable Development.<sup>54</sup> Thus, it is the obligation of the government to spread the significance to its

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<sup>51</sup> Kanniah, R., *Public Participation in the Environmental Impact Assessment Process in Malaysia*, [2000] 3 MLJ cxxxiv.

<sup>52</sup> Interview with Sahabat Alam Malaysia on 1 Oct. 2007.

<sup>53</sup> See note 24 at p 1. Justice O' Regan is a member of the South African Constitutional Court.

<sup>54</sup> *Id* at p 7.

citizens pertaining to this respective rights so that people are all aware and able to exercise the right accordingly.

Expression of frustration by communities towards local government's environmental authority has lately been displayed in mass media. Toxic and industrial waste disposal, emission of hazardous gasses from industry and factory, illegal logging, landslides, flooding and etcetera are always being the issue which affected quality of lives of the community living nearby.

In order to protect and defend the environment, several community groups have been set up as a result of lack of trust on local government's control and enforcement. This community group monitors and protect the environment from being destructed by illegal activity and industry.<sup>55</sup> There are community-based environmental activists in Peninsular Malaysia which have been working together with Sahabat Alam Malaysia. There are known as ASAS (*Angkatan Sahabat Alam Sekitar*/Friends of the Environment Movement).<sup>56</sup> This 'bottom-top' approach could easily reach public especially from rural area and low income group so that the environmental information is not only limited to the urban residence of high income group.<sup>57</sup>

Activities conducted by ASAS groups are as follows;<sup>58</sup>

- Conduct surveys and monitoring of environmental issues and solutions in their villages, local areas and towns;
- Record and attend to environmental-related complaints and ideas that may stem from the local community;
- Act on complaints including writing letters, having meetings and dialogues with relevant government agencies;
- Act as watchdogs by complaining to the government authorities about environmental violations and non-compliance with environmental laws;
- Conduct education and awareness raising activities for local communities including environmental campaigns such as waste recycling and reduction;

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<sup>55</sup> See note 59.

<sup>56</sup> *Id* at p 195. There are ASAS Kedah: Merbok and Kerpan, ASAS Pahang: Chini FELDA Scheme and Orang Asli, ASAS Perak: Sungei Siput, ASAS Seberang Perai and Penang.

<sup>57</sup> See note 59.

<sup>58</sup> *Id* at p 196.

- Issue press releases and conduct press conferences to make public environmental issues and problem in their neighbourhood;
- Work to secure cooperation to develop environmental strategies and solutions together with the Federal, state and local governments and relevant agencies.

From the above-mentioned activities conducted by this respective community group, other local community-based environmental activism should consider the same activities in order to have the best outcome in monitoring their environment. This respective community group is able to come out with such activities because they have past painful experiences of being victimised by the non-compliant project proponent and non-efficient of local government authority which led them to manage and administer their environment on their own.<sup>59</sup> Should the rights to environmental information has been exercised, there will be no such a painful experience.

Hence, recognition to the right to access to environmental information is significance to public who wishes to participate in planning process. This is because all this while public is being denied to involve in decision making process whilst the provision on public participation is already provided under the relevant law.

In the case involving the indigenous groups, respect for traditional governance and maintenance of their traditional structure is vital because many indigenous groups are governed by traditional laws.

## **Conclusion**

Thus, from the above-mentioned Census findings, it is clear that the state of Selangor has attained the highest growth rate and population and also among the highest level of urbanisation. The state of Selangor was in the crisis of water supply in 2014<sup>60</sup> because of the tremendous increment of residence and urbanisation and the crisis is predicted to recur if it is not systematically resolved by the state government. Therefore, the state government is expected to arrange better and extra infrastructure and facilities in order to facilitate and accommodate the raising number of population. In this aspect, proper planning and monitoring by the relevant authority especially related to forest must be made obligatory because forest and its resources are always being compromised on the ground of development and economic factor. Forested area was being cleared for the purpose of development and in this

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<sup>59</sup> *Id* at p 194.

<sup>60</sup>Chin: Anticipated 2014 water crisis may affect development project - Latest - New Straits Times <http://www.nst.com.my/latest/chin-anticipated-2014-water-crisis-may-affect-development-project-1.39847#ixzz1n0QLkC1D>

particular situation public consultation or participation is not prioritised by the authority on the ground that public consultation is seen as factor which may impede or obstruct progress of the development project.

The rights of public, in this particular study, forest conservation, have been jeopardized in term of real effects of the participation. The public participation nowadays seems to fulfil the procedural effect rather than the outcome of it. If this instrument is justly administered by the relevant authority our natural heritage could be sustained and preserved for existing and future generation to benefit. Indeed, public concerns with the their rights to participate and to be involved in planning process where at the same time they also have rights to access to environmental information which the lack of it would affect their quality lives. In relation to the Orang Asli communities as important stakeholders to forest resources, the legal recognition for their rights warrant for greater effective participation in any decision making that affect them.

Therefore, it can be said that public participation is indeed existed in the local law and policy and is indeed enshrined in the international arrangement for instance the Rio Declaration however; it seems that this concept is not in practice acknowledged. Thus it would only remain as instrumental due to defects in law and regulation, level of public awareness is quite low and public is also lack of expertise among them.<sup>61</sup> Public though need assistance by experts whilst they also need to equip with forest knowledge so that their participation could be more significance in ensuring the aim to sustain forest for more years could be realised.

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<sup>61</sup> See note 12 at p 126.

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