

- ★ สิทธิตามรัฐธรรมนูญไม่ใช่ทุกสิทธิที่เป็นสิทธิมนุษยชน สมควรมีการศึกษาให้ชัดเจนว่าอะไรเป็นสิทธิในรัฐธรรมนูญที่มีสถานะเพียงสิทธิตามรัฐธรรมนูญ แต่ไม่ใช่สิทธิมนุษยชน
- ★ หากรัฐธรรมนูญยังไม่มีการบัญญัติคุ้มครองสิทธิที่เกี่ยวกับสิ่งแวดล้อม สมควรศึกษาแนวทางในการนำสิทธิมนุษยชนที่มีอยู่แล้วมาใช้ในการคุ้มครองสิ่งแวดล้อมในภาคปฏิบัติให้เป็นรูปธรรมยิ่งขึ้น รวมถึงการจัดทำแนวทางในการคุ้มครองสิทธิมนุษยชนที่เกี่ยวกับสิ่งแวดล้อมให้แก่พนักงานเจ้าหน้าที่เพื่อคุ้มครองสิทธิอย่างมีประสิทธิภาพ
- ★ ศึกษาความสัมพันธ์และเชื่อมโยงระหว่าง**สิทธิเชิงกลุ่ม**ทั้งหลาย เช่น สิทธิชุมชน สิทธิในการพัฒนา สิทธิในความสงบ กับสิทธิในสิ่งแวดล้อมว่ามีความจำเป็นต้องคุ้มครองสิ่งแวดล้อมโดยอาศัยสิทธิเชิงกลุ่มเช่นเดียวกับประเทศในทวีปแอฟริกาหรือไม่ และการคุ้มครองสิทธิเชิงกลุ่มเช่นนี้ในทางปฏิบัติสำหรับประเทศที่บัญญัติคุ้มครองสิทธิไว้ในรัฐธรรมนูญมีประสิทธิผลเป็นที่น่าพึงพอใจ หรือมีอุปสรรคประการใดหรือไม่
- ★ ศึกษาความสอดคล้องระหว่างสิทธิในสิ่งแวดล้อมกับกฎหมายสิ่งแวดล้อมของไทยเพื่อปรับปรุงกฎหมายให้มีความสอดคล้องกัน รวมทั้งแนวทางในการสร้างความร่วมมือระหว่างหน่วยงานบังคับใช้กฎหมายสิ่งแวดล้อมกับสำนักงานคณะกรรมการสิทธิมนุษยชนแห่งชาติเพื่อคุ้มครองสิ่งแวดล้อมให้มีประสิทธิภาพยิ่งขึ้น

## Executive Summary



### ◆ Background

At present, Thai society starts realizing on the significance of environmental protection. Groups of State officers, academia and environmental activists claim human rights as reference for supporting or pushing forward environmental protection. This is usually made as the following statements. - - Right to environment or Right to Good Environment is recognized as one type of human rights. Therefore, destruction or degradation of environment is one form of human rights violation. - - This reference, however, needs to be justified by a thorough study with academic explanation. National Human Rights Commission of Thailand (NHRC), as an institution having duties directly relating to human rights protection of the country, assigns the Law and Development Research Center (LDRC), Faculty of Law, Chulalongkorn University to conduct the study on this issue.

### ◆ Concept, Principles and Theories relating to Human Rights

Academically speaking, some rights are considered as “human rights” but some are not. Although there are still some academic debates between two schools of thought: natural law v.s. positivism, three fundamental qualifications of human rights is settled: universality, indivisibility and



interdependence. Since human rights are rights that cannot be separated from each other, the usage of one particular right has to consider any impacts on other rights. Similarly, violation one type of right might have impacts on the violation of other type of rights.

In addition, human rights can be historically divided into three generations: the first generation of human rights are civil rights and political rights; the second generation of human rights are social rights, economic rights and cultural rights; and the third generation of human rights are collective rights such as right to development, right to good environment, etc. It must be noted that the third generation of human rights are not yet accepted by scholars and practices of most countries.

Human rights can be classified into two groups: substantive rights which mean rights that have their own contents completely such as right to life, right to health, etc.; and procedural rights which mean rights that function as process and means leading to the protection of substantive rights such as right to information, right to participation in decision-making process, and right to access to justice.

## ◆ Human Rights and Environment

International documents in form of “soft law”, namely Stockholm Declaration and Rio Declaration which are documents having no legally binding for any State to comply with, play vital roles at the international human rights law forum in recommending principles or concepts on managing the relation between human and nature, building awareness on environmental protection, having influence on the development of right to environment in forms of substantive rights, procedural rights and rights of indigenous people, and finally causing the use of human rights as one mechanism in protecting environment at both international and regional levels.

Although most international documents in form of “hard law” relating to environmental protection adopt principles from the Stockholm Declaration and the Rio Declaration, none of them has contents recognizing the right to environment as one type of human rights except one particular document namely the African Charter on Human and Peoples’ Rights and its protocol: the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights. The Charter establishes the new kind of human rights called “right to good environment favorable to development”.

There are two different approaches in applying human rights with environment. The first one is by using the human rights, both substantive rights and procedural rights, which are already existed and guaranteed to apply with environmental problems from case to case. Limitation of this approach is that, as long as the problem does not yet directly create negative impacts on human, despite of devastating impacts on environment, mechanism on human rights cannot be applied because human rights belong to human, not nature. The second approach is by establishing the new category of human rights called the right to environment or the right to good / healthy / decent / favorable environment. Limitation of this approach is that the right to environment lacks the consistency as being human rights, since some developed countries in Europe and America disagree with the creation of the new type of human rights as the right to environment.

## ◆ Recognition of Right to Environment at International and Regional Levels

Recognition of the right to environment and enforcement of human rights for environmental protection under international law principles at the international level can be considered under three following categories:

- 1) International customs – The right to environment is not developed as international customs due to the lack one factor on common practices among countries.
- 2) General principles of law – There is no such principles in the area of human rights, therefore, at present, it is impossible to analyze the general principles of law for the right to environment.
- 3) International conventions – Among international documents on human rights relating to environment, there is no legally or non-legally binding document which recognizes that the right to environment is one type of human rights even though they accept that environmental protection unavoidably has connection with human rights. Among 23 international documents on environment relating to human rights, there is no document which clearly states that the right to environment maintains the status of human rights. Besides, among 5 non-legally binding documents, there is no document which states that the right to environment is human rights.

Acceptance in the right to environment and application of human rights with environmental protection under the principles of international law at the regional level can be considered according to three following regions:

- 1) Europe – Almost all documents on environment apply the procedural rights with the environmental protection. For the substantive rights, there is “right to live in good environment”



under Arhus Convention but that is not recognized as a new type of human rights since it borrows from Principle 1 of the 1972 Stockholm Declaration. The application of human rights is thus on the types that are already existed and accepted.

2) America – Regional document refers to ‘right to live in healthy environment” which is not independent human rights. Rather, it is the combination of right to life and right to health. Also, such recognition is limited only in a group of developing countries in the South America.

3) Africa – Regional Charter establishes “right to good environment” as a new type of human rights by using with right to development and applying with groups of people as collective rights.

### ◆ Right to Environment and Constitution

Many countries in the world prefer bringing the issues on human rights and environment to be guaranteed in constitutions. From experiences of the studied countries in three regions, it is found that there are four ways of stipulating the issues in the constitutions as follows:

- 1) Put it as substantive rights – This can be done through two types of rights: right to good environment or right to live in good environment.
- 2) Put it as procedural rights - This can be done through three types of rights: right to information, right to participate in decision-making process, and right to access to justice.
- 3) Put it as duties of people on protecting the environment.
- 4) Put it as duties of State on protecting the environment.

The result and guideline on how to support community right and the right to environment to be realized in Thai society under the international and country context, by stipulating the right to environment in the Thai Constitution, through the comparison between the old constitution and the new constitution, can be summarized as follows:

Old Constitution	New Constitution
<ul style="list-style-type: none"> <li>■ Substantive rights both the right to good environment and the right to live in good environment never been stipulated.</li> </ul>	<ul style="list-style-type: none"> <li>■ The rights that are already existed should be continued such as the community rights.</li> </ul>

Old Constitution	New Constitution
<ul style="list-style-type: none"> <li>Both the 1997 and 2007 Constitutions had written “community rights” but as the right to participate with the State in managing natural resources and environment which is the procedural rights, not the substantive rights.</li> </ul>	<ul style="list-style-type: none"> <li>Should have subordinate law written on definition of the community rights under the Constitution and on conditions for using such rights in the more environmentally friendly and sustainably in the Thai way,</li> </ul>
<ul style="list-style-type: none"> <li>The 2007 Constitution had recognized the rights of individuals but as the right to participate with the State and the community in managing natural resources and environment which is the procedural rights, not the substantive rights.</li> </ul>	<ul style="list-style-type: none"> <li>It is acceptable to write the right to environment or the right to live in good environment as new provisions in the Constitution with the condition that it should be linked to the community rights which are collective rights.</li> </ul>
<ul style="list-style-type: none"> <li>Both the 1997 and 2007 Constitutions had stipulated the procedural rights of all three forms: right to information, right to participate in decision-making process, and right to access to justice, to be applied for both environmental and non-environmental cases. Two specific measures for environmental cases only: right to information and right to participation in EIA process; and right of community to sue the governmental officers for protecting the community right.</li> </ul>	<ul style="list-style-type: none"> <li>Should stipulate the three types of procedural rights particularly for environmental case namely the right to information on environment, the right to participate in decision-making process on environmental matters, and the right to access to environmental justice.</li> </ul>
<ul style="list-style-type: none"> <li>Duties of people for protecting the environment had been stipulated.</li> </ul>	<ul style="list-style-type: none"> <li>Should stipulate clearly on the duties of people and the duties of State for protecting environment especially the duties of State should be written to have legal responsibility if the State fails to do its duties.</li> </ul>
<ul style="list-style-type: none"> <li>Duties of State for protecting the environment had been stipulated.</li> </ul>	



## ◆ Roles of Human Rights Institutions and Courts

International human rights institutions at regional level such as regional human rights courts or regional human rights commissions have substantial influence on the development of international law relating to human rights. It is found that in many cases new types of human rights are recognized thank to the practices of States at the regional level before being recognized at the international level subsequently. However, it needs to be very cautious in comparing the roles of the regional institutions with the Thai ones because of different authorities, context and management structure.

Thailand does not set up the human rights court. Therefore, filing the complaint on human rights violation must go to the courts that have jurisdictions on the case. The courts having cases on human rights violation in Thailand are varied depending on the legislations that authorize the cause of action. With no special court on human rights in Thailand, the human rights commission should have broader scope of authorities which means that the commission should have a quasi-judicial power and act as the human rights institution with power in make a decision/conflicts resolution on cases relating to human rights violation.

At present, the National Human Rights Commissions of Thailand has power in investigating and proposing measures to solve actions on violation of human rights under one condition which is the case must not be in the judicial process of the courts. In receiving the complaints on human rights violation, it is found from examples during the year 2013 – 2014 that most popular matters of the complaints are on the community rights violation, followed by violations on the right of land and the right of property subsequently. Other complaints include the violations on the right to housing, freedom of occupation, right to access to justice and right to information.

Constitutional Court has powers and duties in adjudicating and ruling constitutional cases concerning constitutionality of any law that is contrary or inconsistent with the Constitution. If any law have contents that violates human rights recognized by the Constitution, it is the power of the Constitutional Court to consider the case. At present, there are only two cases on this matter: the Constitutional Court Decision No. 3/2552 that Article 46 of the National Environmental Quality Act of 1992 is not contrary to Article 67 of the 2007 Constitution; and the Constitutional Court Decision No. 33/2554 that Article 6 of the National Park Act of 1996 does not violate human rights and has no problem about the contrariness to the Constitution.

The Administrative Court has powers and duties in adjudicating and ruling administrative cases concerning the lawfulness of rules and administrative orders including unlawful acts of administrative agency or State official. If any rules and administrative orders violate human rights recognized by the Constitution, it is the power of the Administrative Court. There are five cases on environmental violation: 1) Decision No. Or 415/2550 on asking for compensation from State organization due to

neglect of duty in controlling, storing and managing of radioactive waste; 2) Decision No. For 13/2552 on the lawfulness of rules ordered and approved by cabinet resolution for damage remedy from noise pollution at Suvarnabhumi Airport; 3) Decision No. Or 743/2555 on State organization neglects duty in rehabilitating the Clity creek and violates the right of community in getting benefits from natural resources according to the Constitution; 4) Decision No. Or 730-748/2557 on payment to recover the damage from wrongful act of officials in case of Mae Moh power plant generating pollution having impacts on the communities; and 5) Decision No. Or 749-764/2557 on the neglect of duty in functioning measures in the EIA study in case of Mae Moh coal mine.



Cases concerning compensation from wrongful act which violates human rights under tort law of the Civil and Commercial Code fall under the jurisdiction of the Court of Justice. There are two cases on environmental violation: 1) Decision No. 2147/2547 of Appeals Division 4 on asking for compensation on case of factories generates pollution causing Num Pong creek polluted having impacts on the communities; and 2) Decision No. 5818/2549 on the communities rights with prosecution on conserving the natural resources and environment around the Maya Bay area.

## ◆ Conclusion on the Relation between Human Rights and Environment

Considering the relation between human rights and environment, the right to environment can be classified into three levels as follows:

1) Right to live in a healthy environment – This is the narrow meaning of the right to environment. It is not full range of the right to good environment. Rather, it is the combination with the existing human rights such as the right to life and the right to health in protecting the environment. It is “individual rights”, not the collective rights. Claim against the State by using this right is usually claim through “negative rights” where the rights holders can claim only when their rights are challenged or when there are some damages happened to them. The rights holders can claim from the State to “protect” themselves from not being able to live in healthy environment.

2) Right to decent environment for peoples - This is the “positive rights” where the State must provide people with environment that is clean without pollution at the highest standard that the State can reach. By this way, the rights holders do not need to wait until they get damages from the violation of the rights. Only the State neglects providing the clean or good environment at the



highest standard can be regarded as violation of the rights holders already occurred. People can always claim against the State to protect the environment. Therefore, this type of rights is “collective rights”. It is noticeable that the right to clean or good environment is always used together with the right to development which is also one type of collective rights. It is regarded that protection of the right to good environment helps leading to efficiently respect and protect the right to development, which is suitable to less developed and developing countries willing to enhance the respect of the right to development. However, the right to good environment which is the positive right is still opposed by developed countries and not be accepted as human rights due to the lack of universality of being human rights.

3) Human rights and the environmental protection – Environmental protection is “pre-requisite” in order to make the human rights protection: the right to environment or neighboring rights of environmental protection such as the right to life and the right to health, to be more completed. Therefore, whether countries accept the right to environment as human rights or not, it is no more necessary to make the right to environment as human rights. Using the environmental protection for enhancing the human rights is the best way. Any country effectively protecting environment will automatically protect human rights.

4) Procedural rights for environmental protection is important mechanism – It is the existing rights which help reaching the environmental protection in addition to the substantive rights and are explicitly written in most international documents relating to environment. Therefore, in protecting the environment, the procedural rights should not be neglected by States. Thailand should be enact a law related to procedural rights at domestic level.

### ◆ Issues Directly Relevant to Building Common Scholarly Understanding for the Sake of Further Study in the Next Step

✦ Study on the way in writing the provisions on environmental protection in the constitution as the highest law of the land, since it is the pre-requisite for the State to do before protecting other types of human rights, and also because destruction of environment has impacts on many types of human rights. This should include study on enforcement of the right to environment in the countries that already guaranteed the right to environment through comparison between constitutions of various countries both developed and developing countries.

✦ Study on connection among new types of rights and the existing rights in the constitutions and other legislations for facilitating effective law enforcement. The lack of this connection can create not only difficulty for enforcing the new rights but also conflict among various rights.

✦ Follow up the development of right to environment to see whether it will be accepted as human rights in one day, particularly focus on the roles of the UN and the ICJ.

✦ Study on the differentiation between human rights and constitutional rights because not all types of constitutional rights will always be human rights.

✦ In case the Constitution does not stipulate the provisions on the right to environment, study should be done for how to apply the existing human rights for protecting environment more concretely. This should be accompanied by making the guidelines for protecting human rights relating to environment for officers and those who practice on this field so they can work more efficiently.

✦ Study on relation and connection among collective rights, such as the community right, the right to development, the right to peace and the right to environment, to see necessity to protect environment through the collective rights as practiced in African countries. The study should also explore practices of countries stipulating such rights in their constitutions, including satisfaction and obstacles.

✦ Study on the accordance between the right to environment and the Thai environmental law for improving the harmony of law on environmental protection, including approaches for making cooperation among governmental organizations enforcing the environmental law with the Office of the National Human Rights Commissions of Thailand for enhancing the more effective law enforcement on environmental law.

