

Executive Summary

Objectives of the research on “Linkage between community rights and natural resources and environment under the Thai Constitution B. E. 2560: knowledge and guideline for acknowledging the community rights” are studying connection between the community rights and the natural resources and environment according to international obligation on human rights and regional good practices; analyzing and synthesizing principles relating to natural resources and environment as prescribed in the Constitution B.E. 2560 comparing to recent Constitutions; and proposing guideline for acknowledging the community rights in connection with the natural resources and environment under the Thai Constitution B. E. 2560 with participation of stakeholders. Such guideline will be used for promoting rights of person and community in managing, maintaining and exploiting the natural resources, environment and biological diversity in balanced and sustainable way, as mentioned in the Constitution B.E. 2560. The guideline will also help supporting the function of the Office of the National Human Right Commission of Thailand in investigating and monitoring human rights situation relevant to the issues on community rights and environment.

Researchers conduct literature review from various documents which enable obtaining the knowledge on community rights and the environment both in international law and domestic law. Such knowledge is used for developing guideline for acknowledging the community rights in connection with the natural resources and environment under the Thai Constitution B. E. 2560. Hearings are arranged extensively with participation of professionals, and representatives from governmental and non-governmental sectors.

Conclusion of the study can be summarized in 2 parts as follows :

Part 1: Knowledge on the community rights and the environment

The researchers study relevant documents and information relating to the community rights and the natural resources and environment from international law aspect and domestic law dimension.

1.1 Principles and concepts from international law aspect

1.1.1 Existence and status of “community rights” under international law

According to the international documents on human rights of which Thailand is member, definition or recognition of the community rights is not clearly stated. Under most legal binding documents, the word “community” is used to guarantee “rights of individuals” to participate in their communities or “freedom to participate” rather than the “rights of community” as independent rights separating from “rights of individuals”. However, under non-legally binding document on human rights, there is the recognition of “rights of indigenous peoples” as provided in the United Nations Declaration on the Rights of Indigenous Peoples. The recognition of such rights is considered as community rights which apply for specific group of people who are indigenous peoples only. Community rights for general group are not yet recognized and defined.

Additionally, among the four main international documents on environment, namely, the 1972 United Nations Conference on the Human Environment, the 1992 United Nations Conference on Environment and Development, the 2002 Johannesburg Declaration on Sustainable Development, and the 1992 Convention on Biological Diversity, none of them mentions “community rights” directly, but only states “communities”, “local communities” and “traditional indigenous communities”. These international documents on environment actually support all States to promote roles of traditional indigenous communities and local communities as one of sustainable mechanisms in protecting the natural resources and environment, by imposing “duties” on the communities to conserve the natural resources and environment in their locality, rather than acknowledging the “communities rights”. It does not, therefore, put more weight on “protecting rights of communities” than “protecting the environment”.

1.1.2 “Rights of community” differ from “rights of traditional indigenous peoples” and “rights of minorities”

Since the “rights of traditional indigenous peoples” and the “rights of minorities” are different from the “community rights”, they should not be interchangeably used. Understanding the dissimilar ways of recognizing such rights might be useful. Through the comparison, some appropriate methods can be borrowed to apply for protecting the community rights only if it does

not against the philosophy and principles of community rights, while those inappropriate ones must not be adopted.

It was found that five rights of the “traditional indigenous communities” under the United Nations Declaration on the Rights of Indigenous Peoples can be borrowed to apply with the “community rights” as follows: (1) Right to maintain and strengthen distinctive spiritual relationship with traditionally owned or occupied and used lands, territories, waters and coastal seas and other resources. (2) Right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. (3) Right to redress with just, fair and equitable compensation for the lands, territories and resources which they have traditionally owned or occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. (4) Right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. (5) Right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

Protection of the “rights of traditional indigenous communities” are more intense than that of the “rights of minorities” because the traditional indigenous communities have unique nature having an element of being owners of the lands and living on the land long before the majority of people who came later for occupying the territories. In contrast, the minorities are protected from the discrimination by the majority. The rights that the minorities need are the same as those that the majority has. Therefore, there is no need to borrow the minorities’ rights to apply with the community rights.

1.2 Principles and concepts under domestic law

From the domestic law dimension, the Constitution B.E. 2560 stipulates the rights of community in managing the natural resources and environment. Although there is no explicit connection with the international documents on “human rights”, the Constitution adopts key principles from the international documents on “environment”, by describing the sustainable development concept within such provisions as Article 43 paragraph 1, Article 56 paragraph 1,

Article 57 paragraph 1 (2), Article 65 paragraph 1, Article 72 paragraph 1 (1), Article 250 paragraph 1, and Article 257 paragraph 1 (1)

The Organic Act on the National Human Right Commission B.E. 2560 Article 4 defines the word “human rights” extensively as human dignity, rights, freedom, and equality of person and community which are recognized or protected by the Constitution, laws or agreements with Thailand as member party and having legal obligation for implementation accordingly. The expansion of the definition on “human rights” by such organic law to also cover “constitutional rights” enables the National Human Right Commission to investigate cases on wrongful acts against the “community rights”.

In designing the legal concept for establishing basic legal infrastructure relevant to the community rights and the management of natural resources and environment, the so-called “legal pluralism” must be introduced within the Thai legal system. Two main benefits of the legal pluralism can be explained as follows: 1) Building the bridge between two different poles of “school of thoughts” by applying them in the same legal system: one is State-power oriented, namely “legal positivism”, another one is community-based, namely “anthropological jurisprudence” and “sociological jurisprudence”. For decades, the Thai legal system has been under the influence of the legal positivism. In managing the natural resources and environment, laws thus mainly give power to State organizations, but does not open spaces for recognizing the “rights of community”. 2) Building linkage between different types of property regime in managing the natural resources within the same legal system, namely State property regime, private property regime and common property regime, especially the connection between the “State property regime” and the “common property regime”, by making the law stipulating an innovative pattern in managing the natural resources, called “co-management”, a mixed system of the two regimes with two actors: the State and the community. Such co-management has special character called “community-based co-management” where the community plays main role and the State have more supplemental role in supporting the community.

Part II: Guideline for acknowledging the community rights in connection with the natural resources and environment under the Thai Constitution B.E. 2560

The studied principles and concepts of both international law and domestic law help designing the “conceptual framework and key issues” which are used as basis for proposing the guideline for acknowledging the community rights in connection with the natural resources and environment under the Thai Constitution B.E. 2560. Hearings on the guideline were conducted by experts on various disciplines: law, public administration, judicial process, human rights and community right. In addition, meetings for opinions on the guideline were held for different groups of stakeholders, both representatives from government sector, namely the Constitutional Drafting Commission, the National Human Right Commission, the Court of Justice, the Administrative Court, the Constitutional Court, the Office of the Attorney-General, and the Office of the Ombudsman, and representatives from non-government sectors, namely companies or institutions with activities in preparing the EIA report, civil society from different regions, and scholars working on the issues relevant to this study.

Main content of the guideline for acknowledging the community rights in connection with the natural resources and environment under the Thai Constitution B.E. 2560 includes the following elements:

- (1) Guideline for exercising the rights of person and community under Article 43 of the Thai Constitution B.E. 2560.
- (2) Operation of the State’s duties for guaranteeing the rights of person and community according to Article 57 and 58, as well as monitoring and urging the State to perform under Article 51.
- (3) Roles of the National Human Right Commission in supporting and promoting the rights of person and community under (1) and (2), which are legislative promotion, protection of the community rights in practice, and knowledge building on the community rights for the Thai society.