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: กรณีศึกษาคดีบ้านแม่อมกิ จังหวัดตาก ประเทศไทย



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ลิขสิทธิ์ของจุฬาลงกรณ์มหาวิทยาลัย

THE POSSIBILITY OF JUDICIAL RECOGNITION
ON COMMUNITY RIGHTS CONCEPTS
: A CASE STUDY OF BAN MAE OM KI IN TAK PROVINCE, THAILAND



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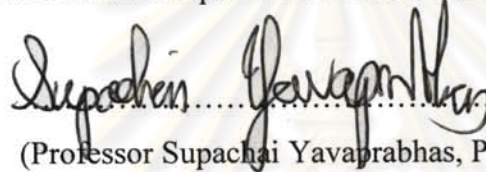
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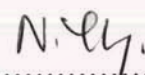
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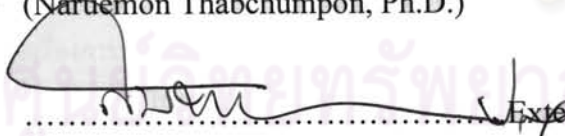
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โสธรสินี สุภานุสร : ความเป็นไปได้ของกระบวนการยุติธรรมในการรับรองสิทธิชุมชน: กรณีศึกษาคดีบ้านแม่อมกิ จังหวัดตาก ประเทศไทย (THE POSSIBILITY OF JUDICIAL RECOGNITION ON COMMUNITY RIGHTS CONCEPTS: A CASE STUDY OF BAN MAE OM KI IN TAK PROVINCE, THAILAND) อ.ที่ปรึกษาวิทยานิพนธ์หลัก: อ.ดร.นฤมล ทับจุมพล, 106 หน้า.

การศึกษาในครั้งนี้มุ่งศึกษาความเป็นไปได้ของกระบวนการยุติธรรมในการรับรองสิทธิชุมชน เริ่มต้นจากการศึกษาเรื่องสิทธิชุมชนภายใต้กรอบสิทธิมนุษยชนนานาชาติและตามรัฐธรรมนูญราชอาณาจักรไทย รวมถึงศึกษาปัจจัยที่ส่งผลต่อการเกิดความเป็นไปได้บนฐานของสิทธิชุมชน และวิถีชีวิต ที่ส่งผลต่อชุมชนและประสบการณ์การยอมรับสิทธิดังกล่าว

แนวคิดเรื่องสิทธิชุมชนได้รับการยอมรับตามกรอบรัฐธรรมนูญ ฉบับปี 2540 และ 2550 รวมไปถึงการรับรองในระดับกฎหมายระหว่างประเทศ อย่างไรก็ตาม กฎหมายภายในประเทศยังไม่การบัญญัติ หรือรับรองเรื่องสิทธิชุมชนดังกล่าว จากข้อกั้งขานี้เอง ส่งผลให้ศาลเป็นผู้ที่มีความสำคัญในการวินิจฉัยคดีที่ซึ่งเหมาะสมตามบริบทของสิทธิชุมชน

การวิจัยมุ่งศึกษาในคดีแม่อมกิโดยค้นพบว่า การนำแนวคิดเรื่องสิทธิชุมชน ในการใช้สิทธิของชุมชนจัดการทรัพยากรธรรมชาติด้วยตัวเองตามที่รับรองไว้ในรัฐธรรมนูญและกรอบสิทธิมนุษยชนระดับสากลไม่สามารถยอมรับในกระบวนการยุติธรรมเนื่องจากระดับผู้ปฏิบัติการ หรือ ผู้บังคับใช้กฎหมายตั้งแต่เจ้าพนักงานป่าไม้ ตำรวจ และพนักงานอัยการมิได้นำแนวคิดดังกล่าวมาปรับใช้ หากแต่ยึดเอากฎหมาย พ.ร.บ.ป่าไม้เป็นหลักในการกำหนดโทษกับผู้ที่ทำผิดฐานบุกรุกทรัพยากรป่าไม้ โดยขาดการมองมิติทางสังคมวัฒนธรรมและวิถีชีวิตที่ปฏิบัติสืบต่อกันมาเป็นเวลาอันยาวนาน แม้หัวหน้าพนักงานสอบสวนหรือนายอำเภอขณะนั้นจะให้เหตุผลในเรื่องวิถีชีวิตก็ตาม แต่คดีก็ยังถูกนำขึ้นฟ้องศาลและชาวบ้านถูกตัดสินจำคุก อย่างไรก็ตามด้วยความร่วมมือของภาคประชาชนทำให้เกิดความช่วยเหลือในด้านกฎหมายและต่อสู้คดี สามารถนำหลักฐาน เหตุผลต่างๆที่สนับสนุนแนวคิดเรื่องสิทธิชุมชนและระบบไร่หมุนเวียนมาอธิบายต่อศาลจนเกิดเป็นการเคลื่อนบรรทัดฐานใหม่ของการตัดสินคดีความเรื่องกรณีสิทธิในการจัดการทรัพยากรธรรมชาติตามวิถีชีวิตที่มีมายาวนานได้

กรณีศึกษานี้ถือเป็นหนึ่งในการพัฒนาบุคคลโดยอธิบายผ่านกรอบ Human Right-Based Approach to Development (HRBAD) ผ่านการเสริมอำนาจให้ภาคประชาชนได้ดำเนินการแสดงออกด้วยเหตุผลทางสิทธิมนุษยชนอันมีพลังผ่านการต่อสู้คดีความอันส่งผลต่อการปรับกระบวนการทัศน์ของรัฐในการที่จะปกป้องสิทธิของประชาชน เพื่อรักษาสมดุลย์ของอำนาจกับอิทธิพลทางกฎหมายที่ละเมิดต่อสิทธิของคนตามกรอบของ Critical Legal Study (CLS)

สาขาวิชา การพัฒนาระหว่างประเทศ
ปีการศึกษา 2553

ลายมือชื่อนิติกรโสธรสินี สุภานุสร.....
ลายมือชื่อ อ.ที่ปรึกษาวิทยานิพนธ์หลัก N. N. N.

5281022724: MAJOR: INTERNATIONAL DEVELOPMENT STUDIES
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SOTHONSINEE SUPANUSORN: THE POSSIBILITY OF JUDICIAL
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 STUDY OF BAN MAE OM KI IN TAK PROVINCE, THAILAND.
 THESIS ASVISOR: NARUEMON THABCHUMPON, PH.D., 106 pp.

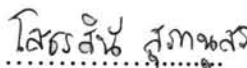
This study aims to examine the possibility of judicial recognition on community rights concepts. First, the study examines the concept of community rights as recognized under international human rights law and constitution of Thailand. Second, the study attempts to examine conditions of recognition community rights perspectives and the way of life of the affected communities and their experience of getting legal recognition of their rights.

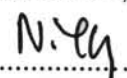
The concept of community rights is recognized under the 1997 and 2007 Constitution of Thailand. It has also been recognized by the international human rights legal framework. However the laws in Thailand still do not recognize community rights. In this scenario, the judges have played an important role while adjudicating cases before them that pertains to community rights.

In this context, the research aims to study the case of Ban Mae Om Ki where two villagers were arrested under the charge of 'encroachment over forest land' while they were preparing the land for swidden farming or shifting cultivation. Although only two individuals were arrested, the arrest was significant for the entire community. The exercise of self-management of natural resources by the community, though guaranteed under international human rights law and the constitution, is unacceptable at the level of law enforcement. The officers of the forest department, the police and the prosecutors do not recognize this system of management and apply the law on forests on all people and arrest them for violating the law. However, cooperation of civil society networks and legal assistance helps the arrested persons to present evidence before the court that explains swidden farming and supports the concept of community rights. In this way, new judicial principles are formulated.

This is a one case of human development as explained under the framework of Human Right-Based Approach to Development (RBA). The process of empowering the villager and cooperation inside community network helps in recognition of human rights. It shows how litigation and judiciary can help in shifting paradigm shifting of the state in order to protect the rights of citizens. For the purpose of balancing the state power influence by law which is violated people rights under Critical legal study (CLS) concept.

Field of Study: International
 Development Studies
 Academic year 2010

Student's signature 

Advisor's signature..... 

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This thesis is the product of the combination of many different experiences, observations, studies and learning from many people I have met in my life. All of these elements taken together led me to believe that this is a topic of worthy research. Here I would like to acknowledge the support of a few of those people.

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ศูนย์วิทยทรัพยากร
จุฬาลงกรณ์มหาวิทยาลัย

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ABBREVIATIONS

CBD	-	Convention on Biological Diversity
CDO	-	Chief District Officer
CLS	-	Critical Legal Study
DDHRE	-	Draft Declaration of Principle on Human Rights and the Environment
DRIP	-	UN Declaration of Rights to Agriculture, Declaration on the Rights of Indigenous Peoples
ICCPR	-	UN International Covenant on Civil and Political Rights
ICESCE	-	UN International Covenant on Economic, Social and Cultural rights
ILO	-	Convention concerning Indigenous and Tribal Peoples in Independent Countries
ITPER	-	International Treaty on Plant Genetic Resources for Food and Agriculture
NGO	-	Non-Governmental Organization
RBA	-	Right-Based approach to development
RFD	-	The Royal Forest Department

CHAPTER I

INTRODUCTION

1.1 Introduction

It is common for the indigenous or the poor people to get arrested ever since the forest laws have been enacted. They are blamed by the society and the state for causing deforestation, global warming and other problems relating to destruction of environment such as floods, landslides etc.

The calendar of the cultivation system of the indigenous people is based on weather and season. It is during February – May, they prepare the land for cultivation. And it is mostly during this period that they are arrested by the forest authorities for encroaching upon forest land and causing its destruction. In most cases they do not get the opportunity to defend themselves before the courts of law. They are often forced to give confession and admit their guilt. The court applies the laws strictly and imposes a punishment of imprisonment or fine or sometimes both.

The case of the old Karen lady from Mae Hong Son is an example of strict implementation of the law on the poor people. In 2005 (B.E.2548), the court held her guilty for encroachment and punished her with two years imprisonment. In another case, a middle aged lady from Lomsak district was sued by the Department of National Parks, Wildlife and Plant conservation in the civil court. The Department asked the lady to pay a very high amount of compensation for causing global warming. In another case, an 80 year old man and a 32 year old lady from Tha Song Yang were arrested for encroaching upon forest land. The provincial court held both of them to be guilty without giving any substantial opportunity to the two accused to defend themselves. The appeals court ordered a fresh trial in this case because of the irregularities in the trial procedure. In February 2010, the researcher observed the hearing process of this case in the provincial court of Mae Sod. Many Karen villagers had come to observe the case as well. They were worried about their rights to cultivate the land according to their traditional practice. They had come with the hope that the two defendants would get some relief from the court as all of them

were in the same situation as the two accused and just as vulnerable to getting arrested by the authorities.

Can these people hope to get justice from the court?

This thesis aims to address these questions about how ethnic minority people such as the Karen-Thai who depend on the forests for their life and livelihood can overcome the problems imposed by the law. It examines the human development approach and specifically looks at ‘the possibility of judicial recognition of community rights concepts’. It presents cases where indigenous people were not able to defend their rights in the court and analyzes the other conditions which have a bearing on the success of litigation on community rights issues.

1.2 Background of the study

Thailand has seen remarkable progress in development in the last decade. However this progress has not benefitted everyone equally. Rather, this present model of development has resulted in the further exclusion and marginalization of certain groups, such as the communities living in close connection with the forests.

In historic times it was the local communities who had control over the management of natural resources. The role of the King and the Court was limited to the collection of revenue or taxes and they did not interfere with the way the communities managed their resources. The communities made their own rules and regulations about managing these resources based upon their traditions and customary beliefs.

However, this changed with the nation building process that was introduced during the reign of King Chulalongkorn (RamaV). Under this process, the central State started assuming more and more powers through expansion of the territorial boundaries and construction of one unified identity by promoting one religion (Buddhism), one language (Thai) and one set of cultural practices. Thus one culture,

the form and practice of which was determined centrally by Siam, was superimposed on the existing diversity of local cultures.

This nation building process was formalized through different laws and policies after the adoption of the first constitution in 1932(B.E.2475). In 1961(B.E.2504), the General Sarit Thanarat government introduced the 'National Economic Development Plan', under which the State assumed control over the management of natural resources by promulgating different laws and policies. The State transformed the forest land into 'property' and made it open for the private sector to utilize the resources through creating 'private property rights' in forest resources. The Second National Economic and Social Development Plan introduced by the government of General Prem Tinsulanonda focused on export led growth which caused immense destruction of natural resources. Nature became an object of state interventions for bringing in modernization and for the purpose of 'nation building' (Pinkeaw, 2005:51). Furthermore, the State adopted the North American policy towards forest resources and declared forests as objects that had to be conserved and protected. Thus the 'capitalization of natural resources' became integral to the development paradigm (Pinkeaw, 2005:52) and the process completely ignored the people who had been living within forests since generations.

This shift from localized control over natural resources to central control led to many important socio-economic and cultural changes. For example, under the 1964 (B.E.2507)Forest Reserve Act, land had either to be classified as 'public' or 'privately owned'. The State was also empowered to classify any area as 'forest reserve' and anyone found in a forest reserve area was considered to be violating the law, either as a poacher or an encroacher (Anek, 1993:11). This had an impact on the social, economic, political, cultural lives of the people whose livelihoods were dependent upon land, forest and water resources, resources that provided income, cultural roots and traditional knowledge. These conflicts in land use widened the gaps between the urban and rural areas and the people started protesting about the unfairness in the system of granting and recognizing property rights (Supawadee, 2003:4).

In 1995(B.E.2530), out of the 334 demonstrations held by people, 137 were related to land and forest conflicts (Prapart, 1998:38).The judiciary was another arena through which the parties tried to stake their control over these resources. The State used the law to evict the people living inside the forests by arresting them under the existing laws. As per a report of a seminar on the issue of “Poor court cases: Accessing to fairness in judicial system” held on 9th April, 2010 (Sanya Dharmasakti Institute of Democracy et al., 2010) in northern Thailand, there are 76 cases relating to land and forest issues pending before the courts. These are in the nature of criminal case affecting 285 local people. 14 of these cases related to land and forest issues faced by the people in north east of Thailand. Some of these are criminal cases involving charges of trespassing and encroachment, while some are civil cases relating to destruction of the environment. In the south, especially in Suratthani, Trang, Phattalung and Krabi provinces, there are 41 criminal and civil cases affecting 100 people pending before the courts. Thus as per the documentation of this network, there are a total of 131 cases affecting around 500 people.

The judiciary is the institution which protects the rights of the people. How has the judiciary dealt with some of these cases that come before it for adjudication? This research studies the possibility of judicial recognition on community rights concepts. The principle of community rights has been recognized under the 2007 constitution and Thailand has ratified International human rights treaties that recognize the rights of the people over management of natural resources. In the stage of policy implementation, the state should recognize the rights of local people in managing community’s natural resources. The research would study the extent to which the judiciary been able to recognize and protect the rights of the community to manage natural resources by analyzing the impact of the laws on the rights and lives of the people and the judicial response to violations of rights. The research will also look into other factors that influence judicial decisions on the rights of community to manage natural resources.

1.3 Statement of Problem

The Thai state's policy on forests and land use has created conflicts between the different stakeholders such as the government and local people, private sector and local people etc. In 1985, the Royal Forest Department (RFD) proposed the Forest Master Plan, which declared 82 million rai as 'conservation forest', while 42 million rai was dedicated for commercial forestry to solve the problem of deforestation. The policy also indicated that all people living inside the conservation forest area had to be evicted as they were considered to be a threat to the 'conservation' of forests. Yet at the same time, there are many examples where communities have been living in harmony with nature for years and have their own systems of conserving and managing forest resources. Of the total community forest area, 225,849 hectare(ha) are traditional community forests, while 51,160 hectare(ha) are degraded forests land that has been replanted by the community (Naruemon, undate).

However the state has completely ignored the community's role in managing forest resources and assumed monopoly over natural resources (Prapart et al., 2006). The state undertook the task of demarcation of preservation areas without doing any kind of survey of the communities living inside these areas. Thus the law and policy instead of recognizing the rights of the communities makes them criminals and punishes them for living according to their traditional way of life. Such a state policy works towards creating insecurities in the lives of the people, threatening their basic rights to life and livelihood and their ability to access basic needs such as that of food and education. This also results in their gradual marginalization in the development process. The impact that such a policy can have on the lives of the people can be illustrated through the case of Nang Kamjai Chaithong from Phattalung province in southern Thailand. The authorities managing the KaoPoo-KaoYaa national park filed a civil case against Nang Kamjai for trespassing and causing global warming. The prosecutor imposed a fine of 1,672,740 baht on her (Thaireform website, 2009).

“I have been growing rubber trees, fruits, local vegetables since a long time to support myself and my family. If I am charged with encroachment and evicted from the land, I will have nowhere to live, my child will not be able to get education as I do not have any other source of income.”

Nang Kamjai Chaithong, 14th December, 2009

(Thaireform website, 2009)

On the other hand the concept of community rights over management of natural resources has demonstrated that such a notion is more suitable for ecological and cultural management and for promoting sustainable development (Prapart et al., 2006). However under the existing legal framework in Thailand it is difficult to give recognition to the principle of community rights in Thailand.

The concept of community rights has found recognition in the 1997 and 2007 Constitution of Thailand. Other laws and policies should also recognize this right guaranteed in the Constitution. Thailand has ratified a number of international human rights treaties and accepted to respect, promote and protect the rights guaranteed in them. However the present issues concern just not community rights, but also the right of citizens to participate in decision making and the concept of human development. The right of citizens to participate in decisions that affect their lives is an important human right and these rights are linked to the concept of human development that is based on the notion of human dignity. The human development approach as developed by United Nation Development Programme (UNDP) puts emphasis on enlarging people's choices and building human capabilities, enabling them to: live a long and healthy life, have access to knowledge, have a decent standard of living and participate in the life of their community and the decisions that affect their lives. The important issues that are considered in human development are participation of the people, freedom to engage with governance, and enjoyment of

civil, political, economic, social and cultural rights. In addition human development also lays stress on sustainability of existing resources.

In the absence of any specific law on community rights or the right of the communities to participate in decision making over the use of forest resources, the judiciary has to use the existing framework to adjudicate the cases before it. In most cases, the Courts have applied the law strictly and found the accused persons guilty of encroaching over State property. However there are some cases, in which the Court has given recognition to 'human dignity' and used its power of judicial review to consider the arguments of the lawyers defending the accused persons to give recognition to the rights of the people.

In the case of Pang Deang Village at Chiang Dao district, Chiangmai province, the indigenous hill tribe people were living in forest before it was announced as a preservation area. The villagers were accused of encroaching over forest land and were arrested under the forest laws. Human rights lawyers, academics, people organizations and students advocated for justice. They referred to Article 66 and 67 of the Thailand 2007 constitution which recognized rights of the community to access and utilize natural resources and Article 6 which states that the provisions of any law, rule or regulation, which are contrary to or inconsistent with this Constitution, shall be unenforceable. Moreover, they referred to the principle of human rights and stated that the unlawful arrest had violated the 'human dignity' of the persons. After a long struggle, the villagers in Pang Daeng were able to get some recognition of their claims from the judiciary. However, the Court in its judgment did not make any reference to the concept of community rights. Rather they based their decision on other reasons. The court stated that the defendants had violated the forest laws. But since they had made a confession the court considered their case with some leniency and imposed a suspended imprisonment of one year. In this case the civil society supported the litigation process through their campaign on human rights issues connected with the case.

There is a gap in research done in the field of international development studies as to how the judicial process has a link with human rights and development.

Specifically, there has not been much study on the issue of community rights and legal struggles of the communities in Tak province of Thailand.

Thus this research would analyze the possibility of judicial recognition on community rights concepts: A case study of Ban Mae Om Ki in Tak province, Thailand. Thailand has ratified international human rights treaties and the principle of community rights over natural resource management is recognized under the 2007(B.E.2550) Thai Constitution. The objectives of the research are first, to examine the rights of local community in managing natural resources as recognized under the 2007(B.E.2550) Constitution and international human rights treaties and second, to critically examine the possibility of judicial process in recognition of the community rights in managing natural resources.

The research will be conducted during July - September 2010(B.E.2553), through documentary and field work research method. The documentary research will analyse the scope and nature of community rights that are recognized under international human rights treaties and 2007(B.E.2550) Constitution of Thailand. It will also study the laws relating to forests and the enforcement of these laws. Through analysis of three cases, the researcher will try to understand how the judiciary has been interpreting the law relating to community rights.

The field work research will focus on the case where the defendants have won recognition of their community rights. The research site is located in Tak province, in Northern Thailand. The research will explore the different factors that helped in getting recognition of the rights through interviewing the different stakeholders, such as community network; defendants, lawyers, local NGOs, community leader, academic researcher and government network; prosecutors, forest officer, sheriff and police.

1.4 Research Question

To what extent is the concept of community rights, as recognized in the 1997 and 2007 Thai Constitution under International Human Rights principles, applied by the judicial process?

1.5 Research Objectives

- To examine the rights of local community in managing natural resources promulgating in the 2007 Constitution and international human rights treaties.
- To critically examine the possibility of recognition of community rights in managing natural resources by the judicial process.

1.6 Hypothesis

The possibility of the judiciary to support legal implementation of community rights to manage natural resources will depend upon legal conditions and social conditions.

1.7 Research Methods

Two key research methods will be used in this study, in order to answer the research questions, and ensure that research objectives are met. The research methods include documentary research as textual analysis of the legal verdicts and field work research which is a qualitative method.

Documentary Research

Documentary Research will examine the argument of the local communities to manage regarding their rights to manage natural resources as recognized in international human rights treaties, constitution of Thailand, customary laws and community regulation with regard to forest management. The research will also cover the specific laws on preservation area to understand how law as a public policy has been interpreted and used by authorities.

Moreover, this research will use Critical Legal Studies Theory to analyze the judgments and laws. It will help to consider the window of opportunity opened up by the 2007 Constitution for the local communities to manage natural resource under discourse of community rights. The research will study three kinds of court decisions to examine the impact of international, national and specific laws in regarding to

community rights to manage natural resources and explore how the judiciary has given recognition to community rights and analyze their implementation process of concurrence.

The criteria of cases for selection are; first, the cases relate to the enforcement of forest laws and second, the defendants are poor or indigenous people who live in close connection with the forest resources.

Brief information of three cases

First is Mae Hong Son case in which the court strictly interpreted the specific laws on preservation area without giving recognition to the aspect of community rights. The case happened in Mae Youm Sai forest preserve, in Mae Sareang district. An aged woman of the community was looking for small insects for cooking. The officer came in and arrested her without informing her of the charges. The accused person had to confess to the charge of encroachment and was given a prison sentence of two years.

Second is Lomsak case in which the defendant was accused of violating the forest laws. In this case apart from the criminal case, the authorities filed a civil case against the defendant as well, for causing environmental degradation. Under this case, the state asked the defendants to pay a fine of 129,732.28 baht together with interest 7.5 % per year (97,654 baht). However the Court in its decision asked the defendants to pay a fine of only 32,078.28 baht, which is much less than the amount requested by the state.

Third is Tak case where the court supported the community and gave decision based on evidence of the right of the people to manage natural resources. This is a criminal case in which two people were arrested for doing farming in the preservation area. The lawyer defending the accused used the principle of community rights to argue that the two accused had rights to manage natural resources and do farming over the land. The Judge accepted the arguments of the lawyer and acquitted the accused of all charges. Thus the judge recognized the rights of the people.

Field work research

Out of the three court cases selected for textual analysis, the researcher has selected one of the cases in which the defendants have strategically tried to defend the concept of community rights. According to research site selection, this study will focus on only one field site in which the court recognized the rights of local people to manage natural resources, a landmark case in the field of community rights.

The study will conduct in-depth interview of people representing the state and the defendants. The key informant of the research is shown in the table 1.1. The researcher will also attempt to conduct interview with the judge of the case.

Table 1.1 List of key informants for field work research

Community Network	Government Network
Defendants	Prosecutors
Lawyers	Forest Officer
Local NGOs	Sheriff
Community Leader	Police
Academic Researcher	Etc.

The primary information of the case shows that in the Ban Mae Om Ki case there is a possibility of getting recognition of community rights under the judicial process. Thus the research will conduct non-participatory observation in Mae Om Ki village where research area is. The research will study how the community network has worked during the period of struggle. The key elements involved in their resistance include ethnicity, way of life, traditional role, occupation, customary laws, and community relationships and knowledge of natural resources management.

*Time frame***Table 1.2 Time frame of the thesis**

Period	Task
July, 2010	Documentary Research on -International Human Rights Treaties -National Thailand Constitution -Specific Laws in Preservation Area
September , 2010	Fieldwork -Community Information -Interview Community Network -Interview Community Network (continue) -Interview Government Network
October-November , 2010	Writing Process
December, 2010	Revise Thesis Draft
January, 2010	Thesis submission

Limitation of the Study

There are certain limitations in the research. First the research is based on only three case studies that are understood to represent the three categories of cases – non recognition of rights, moderate recognition, and recognition of rights. Second, the research time frame was short and thus the researcher was not able to do in depth study of the community's way of life. Thus information for the research has been gathered through interviewing people from the community. Third, in order to respect the ethics of the judiciary, the names of the prosecutors and judges have been withheld.

1.8 Research site selection

In order to focus on a case where the community action network has been successful in getting recognition of their rights, the research will select the Tak case to show how the country's judicial process has been able to recognize the rights of local people in managing community's natural resources, though the existing laws and polices do not recognize these rights. The research will examine the decisions of the judge to understand the reasons given by the judge and the factors involved which helped the people to gain protection of their rights. Moreover, Tak is a province that is close to the border of Burma. A refugee camp is also located in the province and the judicial decision may have an impact on cross border issues such as migration and Salawin timber issues.

Community Research Site's Profile, Mae Om Ki village located is in northern Thailand, Mae War Luang sub-district, Tha Song Yang district, Tak province. The village closes by Thai – Burmese border. Local people are Karens (Sakor Karen) who have been living in this area more than 300 years. Their occupations include paddy framing, collection of forestry products and working as wage laborers. In the past, the main occupation was rotation framing and collect of forest products. Their way of life is linked to their culture and their system of land and forest management. Most people in the Karen community in Mae Om Ki believe in the spirits of the dead and respect their customary rules. Though some of the people have adopted Buddhism or Christianity, yet they continue to believe in spirits and their traditions and customs.

The Tak case is in the nature of a criminal case in which two people were arrested for doing farming in the preservation area. The lawyer defending the accused argued used the principle of community rights to argue that the two accused had rights to manage natural resources and do farming over the land. The Judge accepted the arguments of the lawyer and acquitted the accused of all charges. Thus the judge recognized the rights of the people.

1.9 Significance of Research

These research aims to contribute to the knowledge gap in international development studies as to how community network can challenge violation of rights and struggle for recognition of their rights and interests. It also aims to contribute to the understanding of rights of the community to manage natural resources in the context of international human rights treaties and the 2007 constitution of Thailand.

This research is intended to benefit students and academics who are interested in the issue of human rights and community rights to manage natural resources. It supports community movements in which local people and civil society groups try to defend the case and protect the rights of the local community. Moreover, it would provide the recommendations for policy reform and examine the inconsistency of the law and constitution on natural resources management. Lastly it would also give recommendations as to how the judiciary can be more active in promoting and protecting human rights by integration human rights principles while resolving conflicts.



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CHAPTER II

LITERATURE REVIEW

This chapter presents the theoretical and conceptual framework for this study. First, it presents the concept of community rights as recognized in international human rights law and in Thai context. Second, it examines the concept of rights based approach to development (RBA) and its relevance in policy implementation. Third, it examines the theory of critical legal studies (CLS) and its relevance in examining court decisions and laws on natural resources management.

2.1 Community rights concept

The concept of community rights in this study will be examined as per principles recognized under international human rights law and under 1997 and 2007 Constitution in Thailand. The constitution is the highest law in the country and is meant to shape the state's public policy on people's rights in natural resource management. The state is also under an obligation to create systems and structures in the form of law and policy that respect and protect community rights as recognized in the constitution and international conventions and treaties.

2.1.1 The recognition of community rights in International level

Karel in a speech in 1977 said that the process of recognition of community rights at the international level can be divided into three periods. In the first period, it focused on freedom and rights of the individuals to be free from arbitrary actions of the state. Second was a period of equal rights that urged the government to have policies that compensated the disadvantaged or minority groups. Third was the period of fraternity or solidarity when all states pledged to protect human rights at the global, national and community level (Unesco Courier, 1997).

After Cold War in 1990s, there was a new ideological movement which asked for human rights as collective rights, along with the old notion of rights as individual rights. They established a new trend of rights that created concept of protecting the rights of original communities and ethnic minority groups. This was affirmed in the

Rio World Summit on the Environment and Development in 1992 that stated that status of indigenous people or indigenous populations should be recognized in the sense of a community in the 21st century. Then in 1993, the United Nations announced the UN International Year for the World's Indigenous Peoples that encouraged the indigenous peoples to claim their rights. At the same year, the Vienna Declaration and Programme of Action recognized the right of self-determination of peoples.

The recognition of community rights in international level can be analyzed through case studies from other countries. This section will give the example of rights movement on community management of natural resources.

In Canada, Supreme Court recognized that local communities have traditional rights over land. This right included the establishment of a political community. The collective right was traditionally inherited and if any action of the state violated the rights of the communities, it had to pay damages and compensation to the communities.¹

In Malaysia, the traditional rights or rights of local people are recognized in the constitution for certain groups such as Malaysians or Bhumibud, Orang Asli and indigenous peoples in Sabar and Sarah. Ambulatory indigenous peoples can claim their rights under customary law for living in the forests and using forest products as they have been doing since the time of their ancestors.

Community rights have become a key issue that needs to be addressed as part of environmental, economic and social policies. The concept of community rights to manage environment and culture has helped to understand the meaning of sustainable development and its relation to environment, biological and cultural diversities (Prapart et al., 2006: 6).

Under the body of international law which is composed of international declarations, conventions and treaties, there are seven international agreements that

¹ Primary source, anonymous name and undated, Gather and synthesize the theories of sociology and anthropology on the diversity of Legal Pluralism and Anthropology of Law and Ethnology in a foreign country: 34-35.

significantly refer to the principle of community rights in natural resources management:

- i) UN International Covenant on Civil and Political Rights-ICCPR 1976.
- ii) UN International Covenant on Economic, Social and Cultural rights -ICESCR 1976.
- iii) Convention concerning Indigenous and Tribal Peoples in Independent Countries-ILO 1989.
- iv) Convention on Biological Diversity-CBD 1992 Article 8J.
- v) International Treaty on Plant Genetic Resources for Food and Agriculture -ITPER 1993.
- vi) Draft Declaration of Principle on Human Rights and the Environment -DDHRE 1994.
- vii) UN Declaration of Rights to Agriculture, Declaration on the Rights of Indigenous Peoples -DRIP 2007.

Some of the common features that are recognized in these international agreements are presented in the table below.

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Table 2.1 Community rights and relevant International Declarations, Conventions and Treaties

No.	Issue of community rights to natural resources management	Relevant International declarations, conventions and treaties
1	Rights to self-autonomy in development, economic, social and political spheres	ICCPR, ICESCR, ILO-169, DRIP
2	Rights to manage resources, right to livelihood and common social benefit	CBD Article 8J, DRIP
3	Community rights to management of biodiversity, use of biological resources and sharing benefits of such resources	CBD Article 8J
4	Rights to cultural and local wisdom and development	ICCPR, ILO169, DRIP
5	Rights to maintain practices, customs and agreements made by the community	ICCPR, ILO-169, DRIP
6	Rights to non-discrimination etc.	ICCPR, ILO-169, DRIP
7	Rights to information	ICCPR

These community rights regulate the relationship between states and communities in light of people's sovereignty and their rights. The State has the obligation to protect as well as promote people's rights and to make greater social understanding about the complex diversities (Prapart et al., 2006:7).

This approach to community rights has been gaining recognition since World War I, II and Cold War. It is an important principle for protecting the rights of local people or local tribes to counterbalance with the emerging state authority to manage resources.

2.1.2 The recognition of community rights in Thai context

2.1.2.1 Meaning of community rights in Thailand

Many scholars have explained that the concept of community rights relate to issues of power and legitimacy of people's group to manage and use natural resources according to their customs and traditional way of life. Supawadee had complied community rights definition from many scholars by these follows;

Anand Ganjanapan said that community rights are not about right of property or ownership over the resources such as land. The resources or land still remains to be state property but the powers and duties of taking care of that resource should be responsibility of the community. In such a case, the community will be able to regulate the resources and also protect it.

Community Rights is the power relations between the state, capital, and communities and is based on the idea of identity of people in the society. The identity has different dimensions and is complex reflecting the dynamics of social condition. This identity is reflected through the collective rights, the right to use natural resources and also the ability of the people to adapt to the ever-changing context. The collective rights reflect shared values of the community and the local social capital in terms of wisdom of customary regulations.

Community Rights often refers to rights of two types:

i) Collective rights, meaning the rights of the public, to manage and control access to local resources such as different types of irrigation systems, sacred forest rituals, community forest protection area, cemetery of the village, framing area, and temple etc.

ii) Usufruct rights, meaning the rights that arise from action. These rights focus on basic activities. Users will not be able to retain the right forever because it will expire when its usage is stopped. Thus usufruct rights are not held by a group or individual but its possession is in circulation all the.

Churchkrit Kwanpoj argued that the community right is the right of management. The source of such rights is not state power but traditions and the states have an obligation to give recognition to these traditions through enacting legislations. The state has to guarantee the right of the community to maintain their way of life and culture.

Yos Santasombad defined community rights in the traditional sense as the rights of the community over its resources. It emphasized on use of resources for benefit of public and common good. Communities had the power to adopt regulations for sustainable use of resources and for ensuring social justice. Although all members of the community had the right to use common resources, but such right was not absolute and was to be determined in consideration of sustainability of the resources.

Lertchai Sirichai concluded that the meaning of community rights is the process of giving meaning to the traditional knowledge and practices that the communities had developed to manage and conserve the natural resources and ecosystem.

Krisada Boonchai defined community rights as recognition of social rules or institutionalization of the people's share in resource management. Community refers to the social networks of people with shared culture, living in a single ecosystem, using shared resources, or taking part in similar economic activities. 'Community' in this sense may include more than one group of people.

The agreement or rules of the community to manage resources may be written according to modern management model or may be in the form of traditional rules that are present in the cultural and spiritual consciousness of the people.

So it may be concluded that community rights means to give legitimacy to the way of life of the "community" and its economic, social, cultural, political relations. It means to protect the interests and dignity of the community.

2.1.2.2 Community rights in Thai Constitution 1997 and 2007

Community rights have been recognized as basic rights in both 1997 and 2007 constitutions. In addition, the concept of self sufficiency economy encourages communities to have system of natural resources management without depending on state authority.² This section will examine community rights as recognized in the 1997 and 2007 Constitution of Thailand. The following are the details of some sections from the 1997 Constitution and 2007 Constitution that are relevant to the issues of community rights.

1997 Constitution

“**Section 46** Persons so assembling as to be a traditional community shall have the right to conserve or restore their customs, local knowledge, arts or good culture of their community and of the nation and participate in the management, maintenance, preservation and exploitation of natural resources and the environment in a balanced fashion and persistently as provided by law.”

“**Section 56** The right of a person to give to the State and communities participation in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and preservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to his or her health and sanitary condition, welfare or quality of life, shall be protected, as provided by law.

Any project or activity which may seriously affect the quality of the environment shall not be permitted, unless its impacts on the quality of the environment have been studied and evaluated and opinions of an independent organisation, consisting of representatives from private environmental organisations and from higher education institutions

² Primary source, anonymous name and undated, Gather and synthesize the theories of sociology and anthropology on the diversity of Legal Pluralism and Anthropology of Law and Ethnology in a foreign country: 39-40.

providing studies in the environmental field, have been obtained prior to the operation of such project or activity, as provided by law.”

The right of a person to sue a State agency, State enterprise, local government organisation or other State authority to perform the duties as provided by law under paragraph one and paragraph two shall be protected.

“Section 59 A person shall have the right to receive information, explanation and reason from a State agency, State enterprise or local government organisation before permission is given for the operation of any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning him or her or a local community and shall have the right to express his or her opinions on such matters in accordance with the public hearing procedure, as provided by law.

2007 Constitution

“Section 66 Persons assembling as to be a community, local community or traditional local community shall have the right to conserve or restore their customs, local wisdom, arts or good culture of their community and of the nation and participate in the management, maintenance and exploitation of natural resources, the environment and biological diversity in a balanced and sustainable fashion.”

“Section 67 The right of a person to participate with State and communities in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and conservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to his health and sanitary condition, welfare or quality of life, shall be protected appropriately.

Any project or activity which may seriously affect the quality of the environment, natural resources and biological diversity shall not be permitted, unless its impacts on the quality of the environment and on health of the people in the communities have been studied and evaluated and consultation with the public and interested parties have been organised, and opinions of an independent organisation, consisting of representatives from private environmental and health organisations and from higher education institutions providing studies in the field of environment, natural resources or health, have been obtained prior to the operation of such project or activity.

The right of a community to sue a government agency, State agency, State enterprise, local government organisation or other State authority which is a juristic person to perform the duties under this section shall be protected.”

The difference between the two constitutions is in the phrase “as provided by law”. In the 1997 Constitution, emphasis is placed on the existing law to give enforcement to the right recognized in the constitution. This phrase, ‘as provided by law’ is not present in the 2007 constitution implying that the constitutional right can be enforced by itself. Thus, the rights guaranteed in the 2007 Constitution allows the people to claim their rights to manage resources notwithstanding existing laws relating to forests that deny recognition of these rights.

According to the current constitution which recognizes community rights, there are three main issues that need to be considered with respect to rights of the community to manage natural resources;

Firstly, rights of a traditional community or original community to follow, conserve, restore traditions and customs. The community has ability to live in the area and do any activities that promote their traditions and customs.

Secondly, rights of people to access and manage resources. A community is recognized as a group of people living together in an area or a group of people

working together on a common issue. Such a group has the collective right to use resources or property for the benefit of the community (property rights).

Thirdly, the ideology of community rights, contain rights to maintain and improve the quality of life, participate in the management of natural resources both for their preservation as well as for the benefit of biodiversity. In addition with rights to participate in promotion and protection of environment, it also includes rights to protect the quality of community life. Moreover, the communities have rights to public hearings relating to state government development projects or other development projects to ensure that such projects do not have a detrimental impact on the quality of environment or life of the community.

2.2 Human Right-Based Approach to Development (RBA) in policy implementation

RBA is a concept aiming to empower local people to exercise their voice and influence processes of changes and social transformation. It also focuses on the obligation of the states to promote and protect people's rights. In terms of RBA to development, the research will analyze practical implications on natural resources management policy and will examine conflicts between values and legal systems. The concept of RBA to development is used to examine the policies of the government and analyze whether they adhere to the principles of human rights or not and identifies the "factors and difficulties" that affect the compliance of human rights obligations. This concept supports local people to claim their rights in managing natural resources.

Andreassen explains that rights based approach was adopted in 1990 to respond to the failures of the process of globalization to resolve fundamental problems of subsistence and security, social injustice, political oppression and high levels of poverty, marginalization and social exclusion.

A rights-based approach to development lays stress on the fact that participatory and democratic governance and rule of law are needed to assure

fundamental rights and freedoms to subsistence, participation and security (Andreassen:28). In addition, enforcement of human rights is accepted to be the overarching goal of development. The states have the responsibility to create systems and structures by enactment of laws and policies to respect, protect and fulfill human rights and thus secure capabilities and freedoms of people. RBA also stresses that development policies and programs should make people active subjects of development by social, political and legal empowerment. Such empowerment includes empowerment of the people to claim their rights. In particular, development interventions should draw attention to vulnerable groups and should be based on the principle of non-discrimination and social justice.

Goodhart analyses that the objective of rights-based approach is to promote realization of human rights by integrating the principles of participation, empowerment and equality in all processes related to development (Goodhart, 2009:167). The concept of RBA is important as it ‘empowers’ the weak and vulnerable, protecting them from abuse of their rights to life of dignity and freedom,” (Goodhart, 2009:165).

The main principles of RBA are; (i) equality and non-discrimination, (ii) true participation, and (iii) indivisibility and interdependence of all human rights. Also it contains obligations; (i) to respect, protect and fulfill, (ii) to achieve progressive realization subject to maximum available resources, non-retrogression and immediate realization of core minimum standards and (iii) to implement international human rights norms and standards (Goodhart, 2009:170).

John Samuel defined RBA as a tool for enhancing social change and transformation. The state’s political and moral responsibility is to guarantee all human rights to all human beings; particularly the rights to live with dignity. Thus people have a right to claim their rights from the state to ensure equitable social change and distributive justice. The citizens are the owners of the state. Therefore, the state should be transparent and accountable to citizens and defend human rights. People-centered development would mobilize people and civil society against societal violations of human rights. Thus RBA to development strives to fulfill the gap of

inequality and emphasizes a bottom-up approach rather than a top-down approach stressing on people's participation in every stage of policy making and implementation (Samuel: 2).

This study focuses on these fundamental principles of RBA that provides the accountability tools for ensuring that the state respects the rights of people. Moreover, the study will also focus on the active citizens who act as catalysts in this process of claiming recognition of rights. As this study aims to focus on rights of local people to manage natural resources based on the principles of community rights, the key elements of the research analysis would be;

i) **State accountability on forest policy in policy implementation stage.** The state, through its laws and policies, should respect, protect and fulfill the rights of its citizens as guaranteed under its Constitution and international human rights laws.

ii) **Empowerment and participation of people in exercising their voice and influencing decisions that affect their lives.** In the area of governance, RBA focuses attention on the institutional arrangements that recognize the voice and participation of people in decision making relating to all matters that affect their lives (Goodhart, 2009:171-172).

Policy implementation is the process of application of the policy by the government's administrative machinery. This stage is loosely defined as what happens after a bill becomes a law. It consist of those players, organizations, procedures, techniques and target groups that are involved in carrying the policy (Howlett and Ramesh, 2003 refer Hill and Hupe 2002).

The courts are involved significantly in implementation while dealing with crimes, interpretation of statues and administrative rules and decisions in cases brought before them (Howlett and Ramesh, 2003). Civil societies as interest groups influence policy implementation by directly participating and monitoring government agencies to ensure the proper implementation of a policy.

The rules of the administration, the chief executive, the congressional system of supervision, the courts, other administrative agencies, civil society, political parties, communications media and, the private sector are all actors that can affect the behavior of agencies implementing public policies.

The control techniques authorized for their implementation are an important component of public policies. Compliance and noncompliance to policies are usually determined by how agencies can effectively implement control techniques, may it be coercive and non-coercive.

2.3 The Critical Legal Study (CLS) in examining the judicial process on natural resources management policy.

During the period of Post-Modernism in 1970s, there was growth of a new perspective of law, called the Critical Legal Studies (CLS). CLS proposes that the law is entirely political (law is politics) and is closely influenced by environmental factors such as power structures within the legal system. It further states that law is used by the powerful to further their interests.

Though the liberal legal theory states that law is neutral, CLS believes that society is characterized by inequality and oppression and law plays a role in perpetuating and promoting the status quo. CLS tries to de-mystify the law by showing how it works towards perpetuating social alienation and advocates for radical changes in law and in the structure of the society itself. It tries to use law as a tool for achieving institutional reconstruction (Unger, Roberto M. 1986). Such reconstruction would require major changes in law, particularly with regard to understanding of rights. CLS therefore seeks to reform the law and society in such a way as to liberate and empower every individual (Unger, Roberto M. 1986)".

In Thailand, the judiciary is based upon 'legal positivism'. Legal positivism insists that law is neutral, scientific, and free from political considerations (Kamonwan, 2009:135).

The aim of this study is to use CLS to analyze the laws that govern natural resources to show that they are influenced by political considerations and the purpose

of these laws is not to protect the rights of the people living in close connection with natural resources. It will look at two aspects;

i) People's rights are violated by law; CLS concludes that law is used as an instrument of oppression of the poor people. Law is not separate from politics and use of power and sometimes law is used by a group of people to dominate over the less privileged in society (Adelman, 2006).

ii) People's opinion is influenced by law; CLS defines law as a discourse which is created to support a capitalist society. People accept the legal ideology and the authority of law without questioning. This acceptance is used a tool by the elite capitalist class to further their own interests as the society is made to believe that rule of the law is essential and that law treats everybody as equal (Kamonwan, 2009:140).

iii) Court verdict and the judgment depend on law and public policy; CLS emphasizes that a judge while deciding a case is influenced by considerations other than the strict letter of the law such as traditions, culture, race, ethnicity and gender.

Thus CLS attempts to bring social reforms by understanding the power relations behind a given law and by empowering the people to claim their rights. CLS theory helps in criticizing the existing laws and public policy on natural resource management. In the Thai context, CLS gives the analytical tools to understand the purpose and objectives of the different laws relating to natural resource management, the way in which such laws victimize the poor and marginalized and creates the space for the people to challenge these laws and struggle for their reform.

2.4 Conceptual Framework

Conflicts relating to management of natural resources such as forests have been occurring because of existing state laws and policies on land and land use. Under this framework of laws and policies, the government announced preservation areas without any consideration of the people living and cultivating inside the forests at the

time of making such policy. Plans such as National Social Economic Plans, laws relating to forests and preservation areas were used by the State to enforce its model of development with regard to management of natural resources. Under these laws, the local people became illegal and encroachers over State land. The police or the forest officers used their legal powers to arrest the persons on charges of encroachment. Consequently these cases are brought before the judicial courts, and the court has to make a decision whether the person is guilty of the charge of encroachment.

The hypothesis of this research is that ‘the possibility of the judiciary to support legal implementation of community rights to manage natural resources will depend upon legal conditions and social conditions’. Thus the conceptual framework for this study is based on conditions that influence the judiciary while deciding a case. These conditions are studied under two categories - ‘legal conditions’ and ‘Social conditions’.

The first category, ‘legal conditions’, include international laws, constitution and specific law on forest and land resources management. International laws refer to the different human rights laws that have been ratified by Thailand and other declarations, guidelines and conventions developed by the UN system. International law related to community rights concept has already been mentioned in section 2.1.1. The second condition is the national constitution which is the source of the rights guaranteed to the people of Thailand. This study focuses on the rights to fair trial and community rights to access and use natural resources. Third condition relates to specific laws which regulate forest areas including national parks and reserved forests. The details of the specific laws will be provided in Chapter Three. The study will critically examine these conditions to analyze the impact of the implementation of the laws on the poor and indigenous people and the response of the judiciary and the judicial process. This study will also examine the impact of these legal conditions on the recognition of rights of the community to manage natural resources.

‘Social conditions’ includes civil society action, community’s regulations and academic scholars or researchers. The first condition, civil society action, refers to the role played by civil society groups in supporting litigations in court. The role played

by the civil society groups has an impact on the adjudication of the case. The second condition refers to the regulations developed by the community that helps to develop the profile of the community. This condition also influences the thinking of the court while it is considering a case relating to community rights. Third is the role of academic scholars or researchers in giving expert evidence. These components of social conditions increases the possibilities of the judicial process to recognize the rights of people to access and manage natural resources under the concepts of community rights.

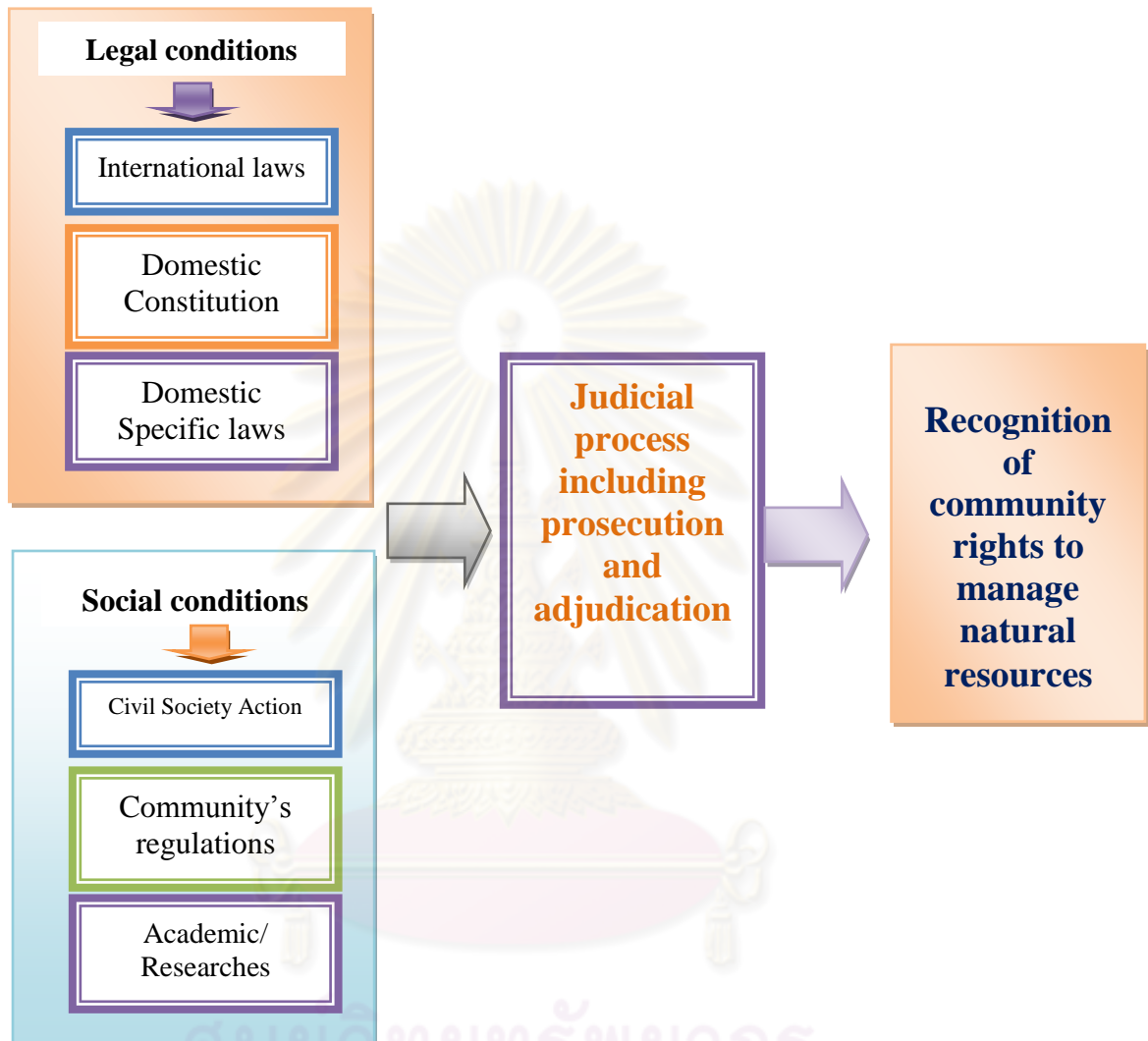
In conclusion, this conceptual framework is a map of the main framework of the research, the relevant actors, the relevant theory and principle, the context of conflicts relating to management of natural resources, human rights violations and judicial activism in protecting people's rights so as to ensure rights based approach to development.

Figure 2.1 will show the elastration of the conceptual framework.



ศูนย์วิทยทรัพยากร
จุฬาลงกรณ์มหาวิทยาลัย

Figure 2.1 Conceptual framework



CHAPTER III

THE CIRCUMSTANCES OF LEGAL CONSTRAINT IN IMPLEMENTING THE COMMUNITY RIGHTS CONCEPTS

In the structure of judicial process the legal framework is implemented strictly by state authorities. Especially in the case which relevant to forest and land in preservation area, they always impose the law precisely without giving consideration to the context of the defendants. This chapter will explain the Thai legal framework on natural resources management by presenting the laws and regulations on forest preservation area. This chapter will also examine the way in which law and policy is implemented through the judicial process through analysis of some court decisions. This chapter also criticizes existing recognition of community rights concept in judicial process. In conclusion it analyses whether international human rights law and the constitution is taken into consideration by the Thai judicial process while adjudicating cases on community rights.

3.1 Thai relevant laws and policy on forest natural resources management

The Thai government announced the “National Forest Policy” in 1985 (B.E.2528). The policy determined that 40% of the country had to be forest area. 15 % of forest land was to be developed as conservation area while 25 % of forests were to be commercial forests. This policy is recognized under the National Economic Development Plan No.7 (1991-1996). The definition of “Forestry conservation” means National Park and Wild Animal Reservation Act 1992 (BE.2535) and announcements relating to watershed protection area promulgated on 14 January 1975 and 13 July 1977 (B.E.2520). The main forest law that is relevant to the issues of land conservation and which affect the people are: Forest Act 1941; National Park Act 1961; Amendments of the Act for the Preservation and Protection of Wildlife 1992; and the National and Forest Reserve Act 1964. There are also other laws and policies such as: the Land Code 1954; the National Reserved Forest Act 1964 (B.E. 2507) and three Cabinet resolutions Date 17th, 22nd and 29th April 1997 (Kalpalata and Pornpen, 2008:16). Moreover it will cover the Cabinet resolutions 30th June 1998 (B.E.2541)

which support people to continue live in the forest or cultivate or utilize forest land. This section explains each law that is relevant to the issues of people's right to manage natural resources.

3.1.1 The Forest Act, 1941 (B.E. 2484)

The Royal Forest Department was established in 1896 with the objective of managing the logging of teak between state and the buyer who were mostly British subjects. State ownership over forest land that began with the establishment of the Royal Forest Department was strengthened by the enactment of the Forest Act in 1941. The purpose of the Act was to control and manage logging and collection of forest produce. Section 4 of the Act defined forests as land which was not acquired by any person under the Land Code (DATE). Under Part 5 of the Act, all forest produce was brought under State control. Forest produce could be collected only after obtaining license and payment of royalty. Section 54 of the Act prohibited any person from constructing, reclaiming, burning forest or doing anything to destroy forest or possess forest. Penalty for violating Section 54 of the Act attracts a fine extending from fifty thousand baht up to one hundred thousand baht and possible imprisonment between two and fifteen years (Kalpalata and Pornpen, 2008: 13).

One of the consequences of this law is that it defines "Forest" as the land which no individual can own legally. In other words, the land over which there is no private property right comes under the authority of the government. Such land also includes forest land that has been cultivated before but has been left fallow for a period as is the practice of people in slash and burn agriculture. Many areas that were defined as "forest" included the land where people lived in villages that had not been surveyed or documented before. As per this law, the people who lived inside the forest had no legal titles meaning that they were there illegally.

3.1.2 National Park Act, 1961 (B.E.2504)

The Minister of Agriculture and Cooperatives is charged with the execution of the National Park Act and is required to appoint competent officials and issue Ministerial Regulations for the implementation of the Act. With regard to the determination of land to be designated as National Park, section 6 of the Act states “When it is deemed appropriate to determine any area of land, the natural feature of which is of interest, to be maintained with a view to preserving it for the benefit of public education and amenity, the Government shall have the power to do so by a Royal Decree with a map annexed thereto showing the boundary lines of the determined area. The determined area shall be called the ‘National Park’.”

The land to be determined as national park must not be owned or legally possessed by any person other than a public body. As per Section 16 of the Act, within the boundaries of the National Park, no person is allowed to do the following: i) Occupy or possess land including build in, or clear or burn the forest; ii) Collect or take out natural forest produce or take any action that endangers such natural resources; iii) Take out wildlife or do any act that endangers wild life; iv) Take any action that changes the course of waterways or causes them damage; vi) Take in cattle or allow them to enter; vii) Carry on any activity of benefit without permission from the competent authorities; viii) Take in or out any vehicle without written permission from the competent authorities (Kalpalata and Pornpen, 2008:13)

According to section 16 of the Act, the competent authority has the power to order any person to cease any activities which is not allowed in the national park area, and also have the power to arrest and prosecute that person.

3.1.3 National Reserved Forest Act, 1964 (B.E. 2507)

The National Reserved Forest Act aims to promote forested areas for ‘public education’ and ‘pleasure’ where the forested areas were not designated for the purpose ‘conserving’ or ‘protecting’ the natural resources. Section 6 gave authority to the government to declare by a ministerial regulation, if it considered appropriate, any

forest to be ‘national reserved forest’ so as to conserve the forest condition, timber, forest produce and other natural resources (Kalpalata and Pornpen, 2008:14). In section 14, within the national reserved forest area people are not allowed to possess land, make any construction, destroy or burn forest, do logging, collection forest product or any other act which harms or decays the condition of the national reserved forest.

This Act did not require the actual survey of the land that was to be declared as a National Reserved Forest area and thus ignored the reality that there were people living inside these forest areas. The process of policy making under this Act lacked local peoples’ participation. The Act created many problems for local people who had been living in the areas before the Act was announced and who were subsequently accused of causing destruction of the forests.

3.1.4 Wildlife Preservation and Protection Act 1992 (B.E. 2535)

The National Wildlife Preservation and Protection Committee under the Minister of Agriculture is given authority to determine areas for conservation of wildlife and to list the species that are to be protected. The different provisions of the Act make it unlawful to do any act that destroys or endangers wildlife and their habitat. Thus under section 37 and 38, no persons can enter, possess or occupy sanctuaries.

3.1.5 State Regulations in supporting people to live in the forest

Many laws passed regarding forests in Thailand increase the degree of state property and reduce local peoples’ traditional rights. However, after many policies created conflicts over the issue of land and using natural resources, the state announced resolutions to try and resolve some of the problems.

The first relevant law is the Land Code 1954. For people who were living in the forest as on 30th November 1954, Section 5 provides the opportunity to claim legal

title over such land and to obtain a user certificate. The claim was required to be presented to the government within 180 days of the promulgation of the Act (Kalpalata and Pornpen, 2008:15). The National Reserved Forest Act mentions in section 11 that claims for compensation by a person for land or rights to utilize the land must be submitted by written request to the District Office within 90 days. If not, it would be assumed that the person would not claim their rights. In section 12, a person whose claim was recognized by the committee would be entitled to monetary compensation by the Committee. Section 16 explains the circumstances under which people could apply for permission to who live on the land or utilize the reservation area for between 5-30 years and how to apply for permission.

Moreover, a Cabinet Resolution issued on 29th April 1997 gave some recognition to the people who had been living in the forest area for a long time. This cabinet resolution established a sub-committee to investigate the details of cases and then make recommendations regarding the declaration of Forest Land or National Park for people to live in, which means that the rights of people who were living in the forest area would be recognized.

However, in 1998 many parts of the forest in northern Thailand was engulfed by fire and the Deputy Agricultural Minister publicly blamed the hill tribe and their 'slash and burn' cultivation practices as the cause of the fire. Therefore, on 30th June 1998, a Cabinet Resolution cancelled the earlier Resolution of April 1997 and determined that the people should not be allowed to live in the forests and would have to be relocated. The 1998 Cabinet Resolution provided authority to the Agricultural Minister to survey land usage in the forests and designate watershed and conservation areas that people would have to move out from. The Agricultural Minister did not do field survey to verify the mapping but just used army maps that were constructed in 1952 (Kalpalata and Pornpen, 2008:16). Even if the people had lived in the forest area since many years, they were still required to be evicted if the Agricultural Minister designated that they were living in a watershed and conservation area.

The main features of the June 30th 1998 Cabinet Resolution on land use is as follows;

- Communities settled before the date of establishment of a protected area shall be allowed to remain but the communities which settled in ecologically sensitive zoned or critical area shall be moved to suitable area.
- Communities settled after the date of establishment as a protected area shall be moved to suitable area.
- To ensure that the implementation will be fair and ecologically appropriate the designation of sensitive areas in each site will be done with the full involvement of all local communities concerned in conjunction with academics and forest officers.
- However, while the communities could not move to the suitable areas, they should stay in the existing areas without expanded in harmony with natural resources.

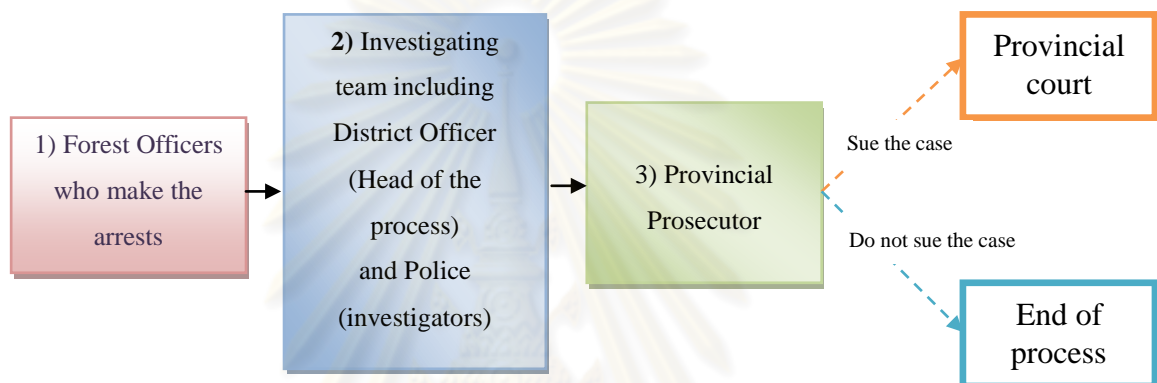
3.2 Forest laws and policies enforcement in judicial process

This section discusses how the forest laws and policies influence the working of the Thai government officers, such as the forest officers, the police investigators, Chief District Officer who is the head of the investigating team and the Courts and Department of Corrections or district prosecutor. This section focuses on the law enforcement process before the case reaches the court for trial. This research has been carried out by interviewing relevant government officer and relevant documents.

The pre-trial process is described in figure 3.1. The case starts with the forest officer who has the power to arrest the offenders under the laws relating to forests. Second is a set of investigator team including the chief district officer and police officers. Third, is a provincial prosecutor who screens the case and takes the decision about whether or not the case should be filed in the court.

This study would like to use the case study of Ban Mae Om Ki to understand the judicial process in practice. Thus in this section it will elaborate the forest laws and policies enforcement in judicial process based on the story of Ban Mae Om Ki case.

Figure 3.1 Law Enforcement Machinery in forest cases



1) Forest Officers who make the arrests

The main duty of Forestry Department is to protect forests, manage forest land, and manage community forest, promote reforestation and grant permissions for usage of forest resources. In the case of Ban Mae Om Ki, one of the major responsibilities of the forest officers was to patrol and control deforestation activities in the preservation area. In order to discharge their responsibilities, the forest officers have to work in cooperation with others such as Forest Protection Officer, Patrol Officer, Director of Protection and Suspension under the Department of Forest Resource Management in Tak province. At the time they were patrolling the area, they came across people cultivating land in the Tha Song Yang National reserve forest area in Tak province. The officers found the people working on land in the National Forest Reserve Area that had not been brought under cultivation before. They found traces of burning dry branches. They also found that some big trees had been logged.

The Minister of Agriculture had issued a regulation under the National Reserved Forest Act 1964(B.E.2507), announcing that Tha Song Yang forest in Tha Song Yang sub-district had been declared to be a National Reserved Forest. This announcement had been made to the people living in the area surrounding the district office and the house of the headman of the sub-district. The forest officers arrested the people on the basis of this regulation. The officers explained the reason of their arrest as, 'If people had already been using the land at the time of the ministerial regulation declaring the national reserved forest act, then the people should have continued to cultivate the same land and not encroach upon new forest land. If anybody breaks the law, the officers have the authority to arrest them and bring them before the courts of law'. Referring to the Mae Om Ki case, the forest officers were of the opinion that the villagers by cultivating new forest land had encroached upon reserved forest area and were liable to be arrested as per the law.

A Cabinet Resolution on 30th June 1998(B.E.2541) had been issued to solve the issue of ownership of land with respect to people living inside forest areas. Under the cabinet resolution villagers were given the permission to use the land which was being cultivated by them at the time of the issue of the resolution, on the condition that they would not encroach upon new area of forests. In addition, forestry authorities explained that the disputed area was a natural water source and hence was a conservation area under the Cabinet Resolution of March 15, 1992 (B.E.2535) and March 18, 1992 (B.E.2535). Under the law and policy no person can be allowed to engage in any activity in a conservation area.

The officers followed the provisions of the law and policy strictly and determined that the villagers had violated the law and thus arrested them.

2) Investigator team

The role of the investigating team is to conduct an enquiry into the facts of the incident. The investigating team consists of police officers and administrative officers. In cases relating to forests, the forest officers after arresting a person, has to hand over the arrested person to the police, who then start their investigation into the incident. The police have to promptly report the incident to the Chief District Officer who is

supposed to lead the investigation team. During the process of investigation, the police may ask questions from the forest officers to gather more information about the incident leading to the arrest of the accused. After the police and administrative officers have finished gathering evidence, they have to present their case report to the Chief District Officer (CDO) who gives his opinion on whether the case should be brought before the courts of law or not. The case file is then sent to the office of the prosecutor for further proceedings.

In case of Ban Mae Om Ki, both the offenders confessed to the charges levied against them. The police together with the accused persons and the forest officials involved in the arrest visited the incident area to gather evidence. During the process of gathering evidence, the accused were asked to 're-enact' the incident while the police took photographs.

In his opinion on the Ban Mae Om Ki, the CDO stated that as per the ministerial regulation, 90% of Tha Song Yang district has been demarcated either as National Reserved Forest or National Park. However people had been living on that land for generations before the area was declared to be protected area. The CDO further observed that the way of life of the community was very closely linked with forests and the community also understood the need for conservation of forest resources and they managed the forest resources accordingly. The CDO was of the opinion, that there was no need to proceed with the case against the accused in the courts of law.

3) Mae Sod Prosecutor

The Provincial Prosecutor or state lawyer have obligation to consider the evidence which comes from the investigating officer. The prosecutor takes his decision based on the case file and very rarely seeks for more information with respect to a case. The case files contain the evidence, allegations, and facts of the incident, the names of the accused persons and the relevant laws and ministerial regulations. If the prosecutor finds that the accused persons have violated the law, they will proceed with the case in courts of law. Otherwise they would dismiss the case.

The prosecutor plays an important role in the judicial process. It is the prosecutor who prepares the documents for filing the case before the court and arranges for witnesses to give evidence before the court to show that the accused person is actually guilty and to protect the interests of the state.

In case of Mae Om Ki case, the dispute was about illegal forestry. Prosecutor applied the provisions of the Forest Act and National Reserved Forest to show that the actions of the accused resulted in the encroachment over reserved forest land. The prosecutor did not take into consideration other facts which showed that the accused together with other people in the community have been living on that land for years before the area was declared to be a protected forest area. The prosecutor also did not examine the shifting system of cultivation practiced by the community under which the community rotates their cultivation land periodically.

3.3 The impact of legal framework on natural resources management in judicial process decision: analysis through court verdicts

Before the research examines the impact of legal framework on natural resources management in judicial process decision, there is a need to understand the role of the court and the way the court functions while adjudicating a case.

The judges or the Court while deciding a case have to be neutral and impartial. The Court has to listen to both parties and come to its decision. In criminal cases, a person is presumed to be innocent until proven guilty. The court will review all the relevant laws, weigh the evidence presented before it and then give its decision. In cases relating to natural resources management, the courts relies on the following framework: 'Since resources are scarce and at the same time there is a high demand for the resources, the power to manage the resources rests with the state authority. However due consideration have to be given to the interests of the community as well'. Thus the court will consider relevant laws as well as the principles of social justice and human rights.

The forest officers have used their powers to arrest persons who have violated the laws. Though the law is enforced against individuals, such legal action has an impact on the entire community of which the individual is a part. This section studies the impact of laws enforcement on the individual and the community through case studies of Mae Hong Son case and Lom Sak case.

3.3.1 Mae Hong Son case³

Mrs. Norda Romsaingam and 7 members of her community were preparing the land for farming by burning the dry branches and preparing the soil for planting seeds. On 4th April 2004, while she was preparing the land together with others, the forest officers arrested her for violating the provisions of the Forest National Reserve Act, 1964 as under a ministerial regulation Mae Yuam forest area was declared to be a reserved area. The other persons from her community managed to escape and so were not arrested. The charges imposed on Mrs. Norda were; encroachment over forest land and causing destruction of 500 rai of forest land. The state also imposed damages of 7.5 million baht on her for causing global warming through destruction of forest land.

During the time of her arrest the officers asked Mrs. Norda to act like she was cutting grass and collecting wood chips and photographed her doing these actions. As she belongs to the Karen ethnic group, Mrs. Norda did not understand Thai language well and there was no interpreter during the time of arrest. Thus she did not properly understand the circumstances of her arrest. Further, Mrs. Norda confessed to the charges against her as she was advised that a confession would reduce her punishment. Mrs. Norda is an old lady who is not strong enough to defend herself against all the allegations.

³ Court verdict Case Black No.462/2547, Case Red No.60/2548, Mae Sareang Provincial Court, March 10th, 2005 and Court verdict Case Black No.1251/2548, Case Red No.2004/2548, Court of Appeal Region 5 Court, October 10th, 2005

The court examined the evidence against the defendant and based upon her confession, held her to be guilty of encroachment under Section 14, Section 31(2) of the National Forest Reserve Act 1964. The Court sentenced her to 3 years imprisonment.

This case demonstrates how the authorities can use their power and the legal framework to impose ‘trumped up’ charges on the people. The people ordinarily do not have the capacity to defend the charges against them. Also the people are afraid of state power and are not able to question wrongful practices such as making the accused pose for photographs and presentation of such manufactured evidence before the court to prove their allegations.

In this case, the court strictly applied the law to the facts and came to its decision. There were no other elements present that could help the court in arriving at a different decision. The authorities blamed the Karen ethnic group for causing forest degradation through their cultivation system. The accused did not have the opportunity to defend herself and refute such allegations. The process of trial only focused on the confession she had made with the hope that it would reduce the punishment. The court did not consider the issue of community rights as it was not presented before it by the parties involved. The court based its judgment on the existing forest laws.

3.3.2 Lomsak case⁴

In this case, in May 2005, the National Park, Wildlife and Plant Conservation Department accused Mrs. Khanthong Pimsena of encroaching upon approximately 3 Rai and 3 Ngan of land in Phu Pha Daeng wildlife sanctuary and causing its

⁴ Court verdict Case Black No. Sor Wor.107/2550, Case Red No.768/2551, Region 6 Court of Appeal, December 17th April, 2008

Court verdict Case Black No.673/2552, Case Red No.789/2552, Lomsak Provincial Court, 30th December, 2005

destruction. The authorities filed both criminal and civil cases against her in the courts of justice. The authorities accused her of violating provisions of the Wildlife Preservation and Protection Act 1992, the Forest Act 1941. The Criminal Court of 1st Instance held that she was not guilty of encroachment as the boundaries of the wild life sanctuary were not clear and thus it could not be determined whether she had encroached upon State land or not.

Despite the fact of the first court of justice had decided that she was not guilty, the Court of Appeal, Region 6 reversed that decision. The Appeal court states that under the Cabinet Resolution of 30th June 1998, the defendant did encroach upon the preservation area. Moreover she did not have any document of land ownership. The defendant explained that the land was owned by her father in law. She and her husband had been using the land and had paid taxes on the land till her husband died. She had stopped using that land after her husband's death and had resumed cultivation only in 2005(B.E.2548). In 2003 (B.E.2546), the State authorities did a land survey and the boundary demarcating the wild life sanctuary passed through her land. The defendants and the villagers submitted a petition to the State that the Preservation and Protection area encroached upon their land and that they should be allowed to continue with cultivation of their land.

The court of appeal region 6 considered the documentary evidence presented by the prosecutor. They reversed the decision of the Court of First Instance and held the defendant to be guilty under the Wildlife Preservation and Protection Act 1992 (B.E. 2535) and Forest Act 1941(B.E.2484). The court imposed a punishment of 6 months imprisonment and a fine of 3,000 baht. However the defendant brought useful evidence before the court for consideration and the court reduced the punishment to 4 months imprisonment and a fine of 2000 baht. The court further suspended the imprisonment for 2 years and ordered the eviction of the people who occupied the land under dispute.

Mrs.Khanthong had to face not only the criminal case, but the forest authorities also filed a civil case against her. The authorities used the Enhancement and Conservation of National Environment Quality 1992 (B.E.2535) Act and alleged

that Mrs. Kanthong had caused deforestation, soil degradation, environmental destruction and global warming by causing the temperatures to rise. Based on this the authorities imposed damages on her of 97,654 baht plus interest of 7.5 percent, the total amount being 129,732.28 baht. In her defense, Mrs. Khanthong said that she had not encroached upon the preservation area and that the boundaries of the preservation area were not very clear. She also stressed that under the Cabinet Resolution of 30 June 1998 (B.E.2541) she had permission to use the land and that she had been cultivating and living on it since many years.

However the civil court of the 1st instance decided in the favor of the authorities and directed Mrs. Khanthong to pay the damages. Mrs. Khanthong appealed against the decision.

The Court of Appeal upon consideration of the case observed that the land under dispute, 'Pa Sak Sai' watershed area in Lomsak district had been declared as a Wildlife Sanctuary in 1999 (B.E.2542). The defendant, Mrs. Khanthong, did not have the land title deeds under the Land Act. The court refused to accept the explanation of Mrs. Khanthong that she did not know that her land was part of a Wildlife Sanctuary as the demarcation boundaries of the wildlife sanctuary were not clear. The Court accepted the fact that the forest department had imposed the damages because they had the public duty to protect and preserve wildlife and forest resources and not because they wanted to earn profit because of acts of deforestation of the people. Thus the Court in principle accepted the imposition of damages on the defendant.

However the Court did not agree on the severity of the deforestation caused by the defendant. The Court observed that the forest department needed to do a holistic research over a long period of time in order to understand the impact of dry forest destruction on the environment. Thus it did not agree with the amount of damages imposed on the defendant. Instead the Court ordered the defendant to pay an amount of 45,000 Thai baht at an interest rate of 7.5 percent per year.

In relation to the criminal case, the Court of 1st Instance considered the evidence presented by the defendant but the Court of Appeal reversed the judgment. The Court applied the laws strictly and did not give consideration to the facts

presented by the defendant. They placed more emphasis on the documentary evidence presented before the court rather than considering the real facts or the narrative of the defendant.

The civil case showed that the court is able to appreciate the difficulties faced by the people who are alleged to have 'encroached' upon forest land to some extent. The Court rejected the claim for damages by the authorities which in effect put considerable blame on the people for causing global warming and environmental destruction through their cultivation practices. Instead the Court recalculated the amount of compensation which was substantially lower than the amount claimed by the authorities.

Thus though the Court accepted that Mrs. Khanthong had encroached upon forest land, it did not agree with the view of the authorities that the cultivation done by Mrs. Khanthong was responsible for the destruction of environment and rise in temperatures. This is a significant issue as the authorities use these kinds of arguments to delegitimize the cultivation practices of communities living inside the forests.

In this case the State Attorney by filing a civil case against the defendants blamed the defendants for causing global warming through their actions which resulted in deforestation. The defendant is a poor farmer who is involved in subsistence farming. During the hearing process in the court, the defendant had a chance to present evidence against the allegation of causing global warming. The Court while holding that the defendant should not have engaged in cultivation of land which was part of reserved forest area, refused to accept the arguments of the forest department that the actions of the defendants had resulted in global warming and destruction of the environment. Thus the court reduced the penalties imposed on the defendant. The fact that the court did not accept the theory of the forest department that the cultivation practices of the Karen ethnic group caused global warming, could be used as a precedent for deciding cases of similar nature.

However in these cases, the Court based its decision on the relevant laws and did not consider the issue of community rights or the rights of the people to use the land for their life and livelihood.

Table 3.1 Summarizing details of court cases

Case/Issues	Mae Hong Son case	Lomsak case
Day of the incident.	Between late March to 4 April 2004 (B.E.2547).	May 13, 2005 (B.E.2548).
Type of cases / charges.	Type: Criminal case Charges: Encroachment of land in the national forest reserve area and its destruction by clearing and logging trees and burning branches.	Type: Criminal case and Civil lawsuits Charges: Encroachment of 38 Rai 3 and 3 ngan of forest land in the Wildlife Sanctuary Phu Pha Daeng for utilization such as logging, burning, and clearing tree stumps.
Relevant laws under the charges	Sections 4,6,8,9,14,31,35 of the National Reserved Forest Act, 1964	- Section 38, 54 (1) of the Wildlife Preservation and Protection Act, 1992 - Sections 54(1) and 72(3) of the Forest Act, 1941
Damaged area and calculation of damages by the state.	500 Rai, compensation equivalent 7.5 million baht	3 Rai and 3 Ngan, compensation equivalent 97,654 baht.
Situation	Villagers prepare disputed farm area for cultivation.	The boundaries of the preservation forest area are not very clear. Because of this reason the accused was not aware that the land she was using was part of protected area.
Plaintiff	Mae Sa Riang Provincial Prosecutor	Department of National Parks, Wildlife and Plant Conservation
Defendant	Mrs. Norda Romsaingam She belongs to the Karen ethnic group that cannot speak Thai language.	Mrs. Khanthong Pimsena.

Case/Issues	Mae Hong Son case	Lomsak case
Court of First Instance or Provincial Court	The court observed that the plaintiffs were doing their duty under the law while arresting the accused and there was no reason to conclude that they wanted to harass the accused by creating incriminating evidence. The court concluded that the defendant was guilty and sentenced her to 3 years imprisonment.	Court held not guilty
Judgment of the Court of Appeal	Confirmation of the judgment	Reversal of judgment
Community rights' recognition	No	No

In 1998 (B.E.2541) another case of community rights was brought before the judicial process.

Mr.Mongkol Rakyingsraserd, of Karen ethnicity was arrested under forest laws in Mae Win sub-district, Mae Wang district in Chiangmai province. The defendant did not understand Thai language explicitly. He could understand and speak Thai to some extent but was not able to read and write in Thai. He was not aware of the laws under which he was arrested. He also did not understand the charges filed by the prosecutor against him. His lawyer tried to defend him by referring to the Section 46 of the 1997 Constitution of Thailand. The lawyer argued that the trees that he was accused to have cut down was part of the 'community forest' and the nephew of the accused had sought permission from the community to cut the trees. The accused was acting as per their traditional way of life and the trees that had been cut down were to be used to build a new house for his family (Pichet and Nilubol, 2004:13-15).

The case went to the Chiangmai provincial court. The judge held the accused to be guilty under forest laws. The court did not give any consideration to the aspect of community rights presented by the lawyer.

To examine the recognition of community rights concepts within the judicial process, this chapter analyses the difficulties of interpretation by examining the different case studies, Mr. Mongkol(1998) and Mrs. Norda and Mrs. Khanthong (2005). The community rights concept is still not recognized because of the obstacles presented by the structure of legal system and perspective of relevant authorities.

3.4 Existing recognition of community rights concept in judicial process

The problem of human rights violations in local community as a result of state policies has existed since a long time. There is a conflict between the way of life of the people and the laws and policies of the Thai State relating to forests. Under these laws and policies much of the forest area has been demarcated as ‘protected forest area’ without giving recognition to the interests of the people and communities who were living in the area. As a result, when these laws and policies came into force, the people living in the area became illegal and could be arrested for encroaching upon protected forest areas under the control of the state.

Section 4 (1) of the Forest Act, 1941 defines forest as, ‘land which is not yet occupied by anyone according to the Land Act’. Section 4 of the National Forest Reserves Act 1964 defines forest as ‘surface of land in general including mountains, creeks, swamps, canals, basins, waterways, lakes, islands, and seashores which are not yet occupied by anyone according to the land Act’ (Sayamol, 2005:79). Thus under the Forest Act, the state assumed control over all land which were not legally certified (Nor Sor Sam and Nor Sor Sam Kor) under the Land Act. In addition the state also demarcated national parks, national forest reserves, wildlife sanctuaries and permanent forest areas. These definitions created conflict between state and the traditional system of rotational farming by the communities, a conflict that continues till date (Anan, 2004:161). As a consequence of these laws and policies, a large number of local communities were evicted from their farmlands and dwelling areas (Sayamol, 2005:79-80).

The laws and policy of the state with regard to forests have always been influenced by the idea that the local communities are the cause of deforestation. In the decade of 1950, state linked the problem of opium production with deforestation. The state blamed the high land communities of clearing forests for growing opium. The Forest Act 1941(B.E.2484),The Preservation and Protection Act 1960 (B.E.2503), Wildlife Act 1961 (B.E.2504) and National Forest Reserves Act 1964 (B.E.2507) were also based on the same thinking that people living inside the forests were the main cause of its destruction and so cannot be allowed to live within the forest preservation area. Forests were promoted as a natural resource which had to be preserved for promotion of biological diversity (Sayamol, 2005:82-83).

Thus under the laws and policies the state assumed control over natural resources. Under these laws, the state also had the power to grant permissions for the use of forest resources. Under the state machinery, the Royal Forest Department (RFD) was given full administrative control over forest and natural resources. The Director General of RFD with approval of the Minister or through Ministerial Regulations has the power to grant permissions for the use of forest resources. The Director General could grant such permission for activities that promoted education and research and economic growth and industrial development such as mining, and commercial plantations (Sayamol, 2005:97-102). Thus under the laws, the people and the communities were prohibited from living in the conservation area. At the same time, the state granted permissions to commercial interests for the exploitation of forest resources.

Furthermore under the Thai laws and policies, land can either be owned by the 'state' or by 'private individuals'. There is no recognition of 'community rights' over land. Communities and their traditional ways of cultivation such as shifting cultivation have no recognition under the legal framework. This has created dissatisfaction amongst the people and local communities. Due to fears of arrest and eviction the people were not able continue with their traditional practice of shifting cultivation which increases their life insecurities (Anan, 2004: 61).

Researchers have studied the impact of government policies on the life and livelihood of the hill tribe people. The researchers found out that hill tribe communities have their own customs about taking care of the forest resources. These customs, developed by their ancestors, have been passed on from generation to generation. This system of land management is deeply linked to their way of life and it strongly influences the identity of the community, the relationship of equality amongst the people in the community, food security of the community and the sustainability of the eco-system (Anan, 2004:162).

The formal legal framework in Thailand does not recognize this system of land management. Instead when the formal law is enforced, it creates many problems for the people living in the forests who have to face barriers at different levels in order to get justice.

3.5 The role of International Human rights and Constitution in protecting community rights within Thai domestic legal system

This section examines whether the judicial system gives consideration to the rights guaranteed under international human rights law and the national constitution while considering cases where people are arrested under the forest laws for encroaching upon forest land and causing its destruction.

The direct application of international human rights law within the domestic legal system in a country depends upon the nature of the domestic legal system. In countries which have a 'monist' system, once a human rights treaty is ratified by the State, it automatically becomes part of the domestic law of the State. International law thus becomes self- executing. The notion that underlies monism is that international law and domestic law are one and the same. Argentina follows the monist doctrine (Circle of Rights, 2000:419).

In contrast some states follow 'dualist' system under which the international law and domestic law are considered to be separate. International law thus has to be incorporated through legislation before it is applied in the domestic arena. Thailand follows the dualist system (Circle of Rights, 2000:419). Thus in Thailand, human

rights treaties ratified by the Thai state are not automatically implemented within the legal system.

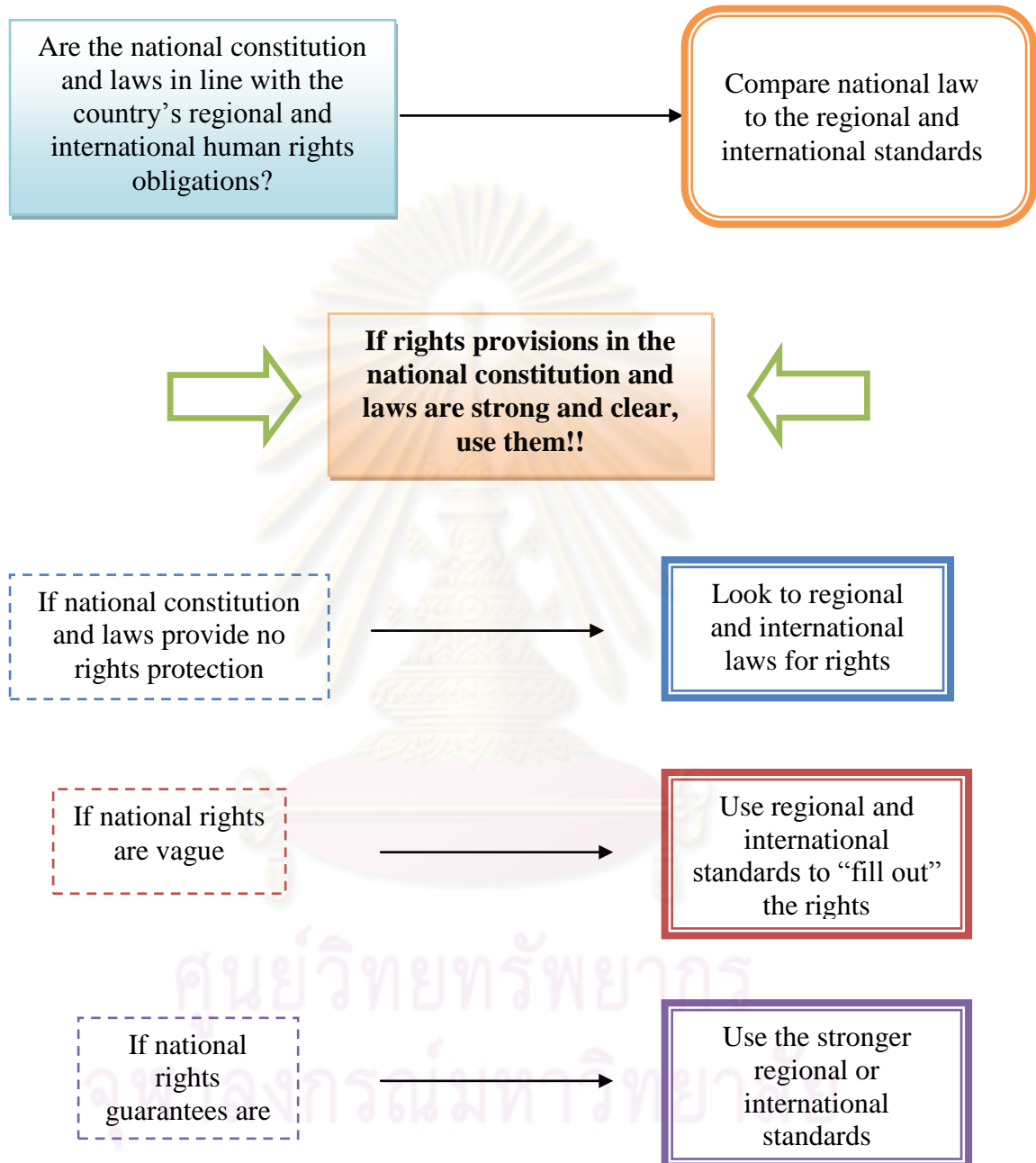
Section 6 of the 2007 Constitution of Thailand, states that, ‘the Constitution is the supreme law of State. The provisions of any laws, rule or regulation, which are contrary to or inconsistent with this Constitution, shall be unenforceable’. The Constitution of Thailand guarantees the basic human rights of people. However, in practice the lower judiciary does not review existing laws against the rights guaranteed in the Constitution.

In this context, human rights lawyers and civil society groups are playing an important role in trying to institutionalize human rights law within the legal system. Section 4 of the 2007 Constitution states that, ‘the human dignity, right, liberty and equality of the people shall be protected’. Human rights lawyers and civil society groups are trying to ensure that this constitutional guarantee is respected.

Despite the fact that Thailand’s legal system is ‘dualist’, yet there are other ways in which international human rights law can be used within the domestic system to strengthen rights protection. In case if the rights guaranteed in the national constitution are vague or not clear in its content, then it is possible to use international human rights law to interpret the rights and give them meaning. For example, the rights with respect to indigenous peoples right to land guaranteed in ILO Convention 169 can be used to elaborate on the meaning of ‘community rights’ guaranteed in the Constitution.

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Figure 3.2 Enforcing human right



Human rights lawyers and civil society are important actors in the struggle for getting recognition of rights. The next chapter elaborates on how these actors played a role in getting recognition of 'community rights' of the people of Ban Mae Om Ki, Tak province, Thailand.

CHAPTER IV

THE POSSIBILITY OF RECOGNITION ON COMMUNITY RIGHTS CONCEPTS IN JUDICIAL PROCESS : A CASE STUDY OF BAN MAE OM KI LITIGATIONS

This chapter will critically examine the possibility of judicial process involved in getting recognition of community rights. In order to analyze the extent to which the concept of community rights is recognised by the judicial process, the chapter first, critically examines the conditions of the possibility of recognition on community rights concept by judicial decisions. Second, examine community rights in practice through the case of Ban Mae Om Ki that elaborate story of legal case and community profile. Third, it examines the role of civil society action in facilitating people's access to justice. Fourth, through the lens of critical legal studies and concept of rights based approach to development, it analyses the possibility of the judicial process that enables recognition of people's rights to natural resources management. Fifth, in the concluding section, it critically examines the extent to which community rights are recognized in the judicial process and the dynamics involved.

4.1 Conditions of the possibility of recognition on community rights concepts

According to the hypothesis of the study the possibility of the judiciary to support legal implementation of community rights to manage natural resources will depend upon legal conditions and social conditions. This section will provide explanation of legal conditions and social conditions. It will also elaborate on factors and actors that are involved in playing a role of judicial process. This study will focus only in the case that is relevant to the issues of community rights.

Legal conditions have three components such as international human rights laws, domestic Constitution and domestic specific laws.

First is, international human rights laws that guarantee rights of the people – both individual and community rights as mentioned in Chapter II. Human rights

lawyers use international human rights law to strengthen their arguments before the court. Although Thailand is dualist system but human rights lawyers with support from civil society make use of the standards developed under international human rights law to seek protections from violation of rights.

Human rights lawyers are also trying to strengthen the rights guaranteed in the Constitution. Under the Constitution of Thailand 2007(B.E.2550), section 66 and 67 guarantees community rights. However under the established judicial practice in Thailand, it is only the Constitutional Court which reviews laws against constitutional principles. The lower judiciary does not consider arguments based on constitutional guarantees. Lawyers also do not often cite constitutional sections in their pleadings before the court. However, human rights lawyers are trying to bring in changes by arguing their cases based on the constitutional guarantees.

Third are the specific national laws and regulations on forest issues. The relevant actors are the forest officers, police and prosecutor who implement these laws. The human rights lawyers and civil society groups, who are aware that the implementation of the laws results in violations of rights of the people, try to use the constitutional guarantees to challenge the application of the laws.

‘Social conditions’ consists of three elements; first is civil society action in terms of ‘participation, empowerment and cooperation’. Participation refers to the participation and involvement of community leaders, community members, accused person, local NGOs and human rights lawyers in preparing their case and presenting evidence before the court. Empowerment refers to the empowerment of villagers or the community members by making them aware of their rights and increasing their capacity to defend their rights. Participation and empowerment encourage people in exercising their voice and influencing decisions that affect their lives. Cooperation means refers to the cooperation of all civil society actors in terms of helping the defendants fight the legal battle.

The second element, community’s regulations, refer to the rights of the traditional community to follow, conserve, restore traditions and customs, rights of people to access and manage resources, rights to improve the quality of life and

promotion and protection of environment. The element of community's regulation refers to the legitimacy of the community to continue their life according to their traditional values in the land under dispute. This condition will play an important role during the process of hearing before the court. Moreover, it will be important for their own community to reflect on how they can further strengthen the community's system of managing resources.

The third condition refers to academic scholar and researchers. This element refers to the research done to support the community rights concept and presenting it as evidence brought before the court.

In terms of other condition that supports a case are the local administrative institutions and persons such as the Chief District Officer. They can play a role of witness and bring evidence before the court.

In table 4.1 will summarize legal conditions and table 4.2 will be showing social and other conditions that influence the factors and actors of possibility of recognition on community rights concepts.

Table 4.1 Legal conditions influence Factors and Actors of the possibility of recognition on community rights concepts

Legal Conditions	Factors	Role of Factor play in judicial process	Actors
International Human rights laws	Principle of Rights -Individual -Community	Thailand is dualist system but international human rights law can be used to strengthen arguments presented before the court.	Human rights lawyers Thailand is dualist system but human rights lawyers with support from civil society are using international law and standards to interpret the rights guaranteed in the constitution.

Legal Conditions	Factors	Role of Factor play in judicial process	Actors
Domestic Constitution	Principle of Rights -Individual -Community	Traditionally the lower judiciary in Thailand does not review laws and regulations against the rights guaranteed in the constitution.	Human rights lawyers Human rights lawyers with support from Civil Society are bringing issues of interpretation of constitution rights before the provincial courts as well.
Domestic Laws			
1) Specific laws	- Forest Act 1941 - National Park Act 1961 -Amendments of the Act for the Preservation and Protection of Wildlife 1992 -The National and Forest Reserve Act 1964. -The Land Code 1954; -The National Reserved Forest Act 1964	Under 2007 constitution all laws should be in accordance to the constitution and rights guaranteed in the constitution. (section 6)	- Forest Officer - Police - Prosecutor They interpret laws base of offence. - Human rights lawyers Human rights lawyers with support from civil society are trying to ensure that the existing laws do not violate rights guaranteed in the constitution.
2)The Cabinet Resolution	30 th June, 1998 (B.E.2541)	Evidence brought before the court	- Prosecutor - Human rights lawyers

Table 4.2 Social conditions and Other condition influence Factors and Actors of the possibility of recognition on community rights concepts

Social Conditions	Factors	Role of Factors play in judicial process	Actors
Civil Society Action	-Participation -Empowerment -Cooperation	-Prepare the evidence brought before the court -Cooperate in helping accused persons -Being observer during hearing process	-Human rights lawyers -Defendants -Community members -Local NGOs -Village Headman -Community leader
Community's regulation	Legitimacy of community to continue their life in area of incident according to Community Rights element	Evidence brought before the court	- Community members - Local NGO
Academic scholar/ Research	Research that support the concept of community rights	Evidence brought before the court	Academic scholar/ Researcher
Other Condition	Factors	Role play in judicial process	Actors
Local Administrative organization	-Ensure right's of the local people to use forest land because of their history and livelihoods	Evidence brought before the court and Witness	Chief District Officer (CDO)

4.2 Community litigations base on community rights concepts

In order to understand the possibility of judicial recognition of community rights, the researcher will focus on the case study of Ban Mae Om Ki case, in which the community's rights to manage natural resources was given some recognition. The next section will elaborate on civil society network which had an impact on the process of judicial review. To examine the condition that supports the possibility of judicial recognition community rights concept.

4.2.1 Tha Song Yang case or Ban Mae Om Ki case⁵

Mrs. Nor Hae Mui Wiangwicha (age 39 years) and Mr. Di Pae Poh (age 80 years) are part of the Thai – Karen ethnic group living in Ban Mae Om Ki, Mae Wa Luang sub-district, Tha Song Yang district in Tak province. They were arrested on 10th April, 2008 (B.E.2551) on charges of encroaching upon forest land and clearing and burning forest land in Tha Song Yang forest area that is demarcated as a conservation area. Mrs. Nor Hae Mui and Mr. Di Pae Poh were charged under the provisions of the National Reserved Forest Act 1994, Forest Act 1941 and the criminal code. Damages of 1,963,500 baht were imposed on Mrs. Nor Hae Mui for causing damage to 13-1-08 rai of land, and an amount of 3,181,500 baht was imposed on Mr. Di Par Poh as damages for causing destruction to 21-0-89 Rai of land.

At the time of arrest, Mrs. Nor Hae Mui and Mr Di Par Poh were preparing their land to grow rice and chili crops and the authorities recovered a big knife and a gas lighter from them as evidence to show that they were causing destruction of forest. Chief District Officer together with other officers investigated the area. The Chief District Officer recommended that the two accused should not be prosecuted under law as the Ministerial Regulations dated 30th June, 1998(B.E.2541) had already given permission to the people who were cultivating land for their livelihood to

⁵ Court verdict Case Black No.1770/2541, Case Red No.1737/2551, Mae Sod Provincial Court, October 10th, 2008 and Court verdict Case Black No.SW.138/2551, Case Red No.440/2552, Court of Appeal Region 6 Court, March10th, 2009

continue doing so. Moreover the Chief District Officer pointed out that the disputed area of land had been declared as a village before it was declared as a national forest reserve area. However the provincial prosecutor decided to bring the case for trial before the court.

The Criminal Court of 1st Instance held both accused guilty of the charges imposed on them, sentenced them to one year of imprisonment and ordered them to pay the damages. However, in the proceedings before the Court of 1st Instance, no interpreter was provided to the two accused, though the accused could not understand the Thai language properly.

As the right to an interpreter is part of the right to fair trial, the lawyers representing the accused appealed against the decision of the criminal court. The Court of Appeal held that since no interpreter was provided to the accused as required under the criminal procedure code, the trial of the accused was not conducted according to the correct procedure. Thus the Court of Appeal ordered a fresh trial.

During the fresh trial the authorities explained that the ministerial regulation issued on 2nd November, 1983(B.E.2526) declared the Tha Song Yang Forest in Tha Song Yang sub-district as a national forest reserve. Though Mae Wa Luang was separated from Tha Song Yang sub-district on 10th April, 2008 (B.E 2551), yet the ministerial regulation indicated that Mae Wa Luang sub-district was part of forest reserves as well. The authorities further said that on April 10, 2010, (B.E.2553) the forest officers found a group of people collecting branches and twigs from the new forest area, collecting them together and burning them. When the forest officers tried to arrest them, most of the people escaped and they managed to arrest only Mrs.Nor Hae Mui and Mr.Di Pae Poh.

In their defense, the accused explained before the court – as to how they have been using the land for cultivation and living since many years before. They also brought to the notice of the court, the fact that others were continuing to cultivate the land surrounding the disputed area without any interference from the authorities.

While giving its decision the court observed that the evidence presented by the prosecutor was not very substantial and was unreliable. Since the accused belonged to the Karen ethnicity, they did not understand or speak the Thai language. It also observed that the accused had been cultivating the land for many years before it was declared to be national reserve forest. And because of these reasons, the court found that the accused had no 'intention' to encroach upon national forest reserve area. The court dismissed the case against the accused.

In this court case, the court seems to show some recognition of the community rights of the people. The finding of 'lack of intent' by the Court reflects that the court has some understanding of the circumstances of the struggles faced by the people living inside forests and protected areas. The court after considering the elaborate evidence presented by the accused accepted that 'Swidden farming or Shifting cultivation' was part of the way of life of the people. In this case, the court looked beyond the existing laws that were sought to be implemented by the state authorities. The court gave consideration to the reality of the people's lives and their traditional ways of cultivation and living that was presented as evidence by the accused.

As elaborated in chapter II, the concept of community rights has three components. First, rights of traditional communities or original communities to continue practicing their way of life as according to their customs and traditions. The second component which is related to the first element is right of the communities to access and manage natural resources as part of common property resources. The third component is the rights of the communities to maintain and promote their quality of life, participate in decision making and benefits in the use of these common resources for ensuring their food security and sufficiency.

To examine the community rights as guaranteed under the 2007 Constitution and international human rights treaties, the researcher has chosen the same area of research site which has been examined in greater detail in Chapter IV. This community experienced a legal dispute over natural resources and the Court has given a landmark judgment which has implications for the recognition of community rights

in Thailand. Thus the researcher seeks to understand the concept of community rights from the perspective of the community.

Thus, next section will analysis of the community rights in practice by focusing on the case of Ban Mae Om Ki, a Karen community located in Northern part of Thailand. It will give a general overview of Ban Mae Om Ki in terms of its location, population, history, local wisdom, culture and occupation. It will also present in brief the local knowledge of the community through the systems it has developed for the management of natural resources.

4.2.2 General overview of Ban Mae Om Ki

Ban Mae Om Ki is a small village located in Mae Wa Hlounng sub-district. This village is under the administration of Tha Song Yang district in Tak province. The village is situated 675 kilometers away from North West of Bangkok. This village covers an area of 42.46 square kilometers.

The people living in Ma Om Ki village are of Thai-Karen ethnicity. There are 249 families, consisting of 624 people, of which 315 are men while 309 are women. The primary occupation in this village is agriculture and the main crops grown are rice and chilies. There are five families who have their own means of living such as grocery stores and restaurants. Ban Mae Om Ki earns a total of 145,000 baht per year from the rice fields and 184,000 baht per year from other crops. Each family has average income around 25,000 baht per year (Sub-district administrative, 2009).

The local wisdom present in the community can be divided under five categories. First is health care. There are traditional doctors who have knowledge about herbal medicine. Beliefs and superstitions are also used to cure people of their illness. Second is arts and culture as there are many people who have expertise on traditional music and instruments. Third is carpentry and smithery and people with these skills assists the other villagers by providing them with the equipment needed for cultivation. Fourth, there is expertise on local rice propagation and techniques of

agricultural development. Fifth, there is knowledge on food preservation such as vegetables, meat and forest products.

In Ban Mae Om Ki area, there are two schools; Mae Om Ki School and Mae Om Ki School: branch of Mae Pang Tha. There is the Mae Om Ki Catholic Church and a Buddhist monastery. The sub-district administrative office of Mae Wa Hloun is located in Ban Mae Om Ki as well. There are tourist attractions such as Mae Om Ki Cave and Boo Ra Na Pra Pah water fall.

Figure 4.1 Location of Tha Song Yang District in Tak province

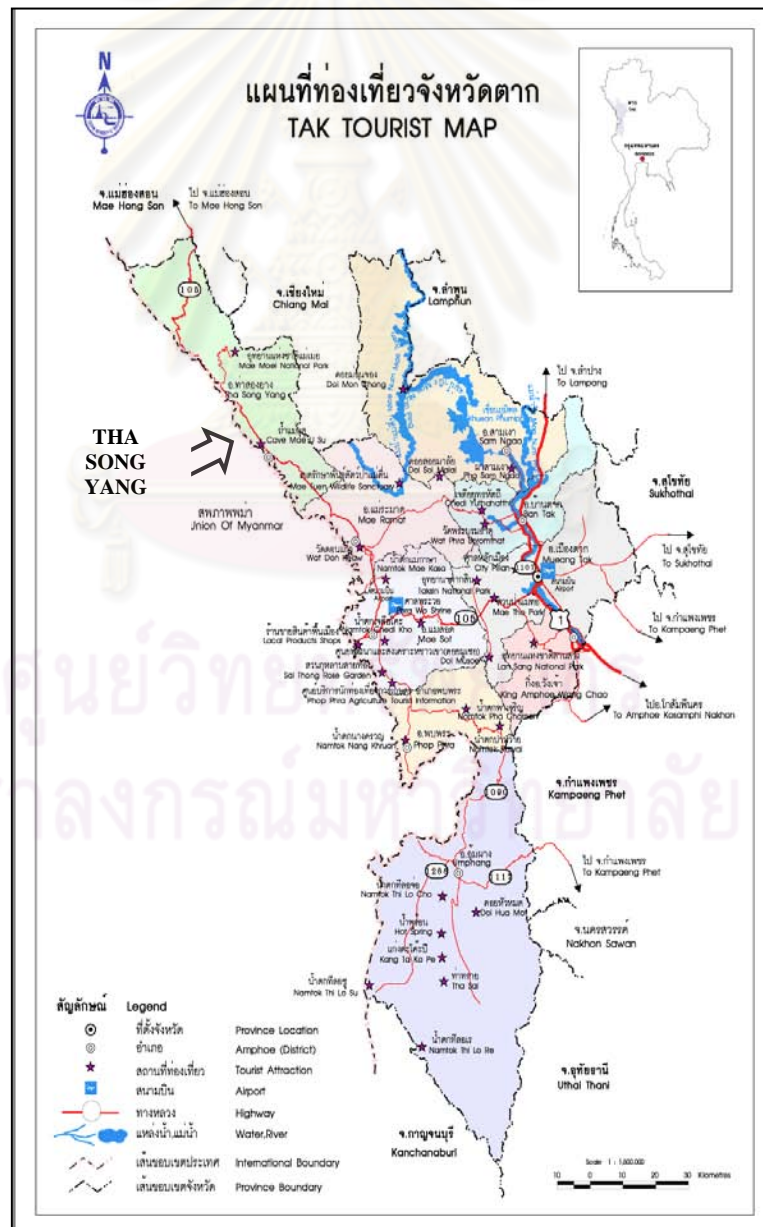
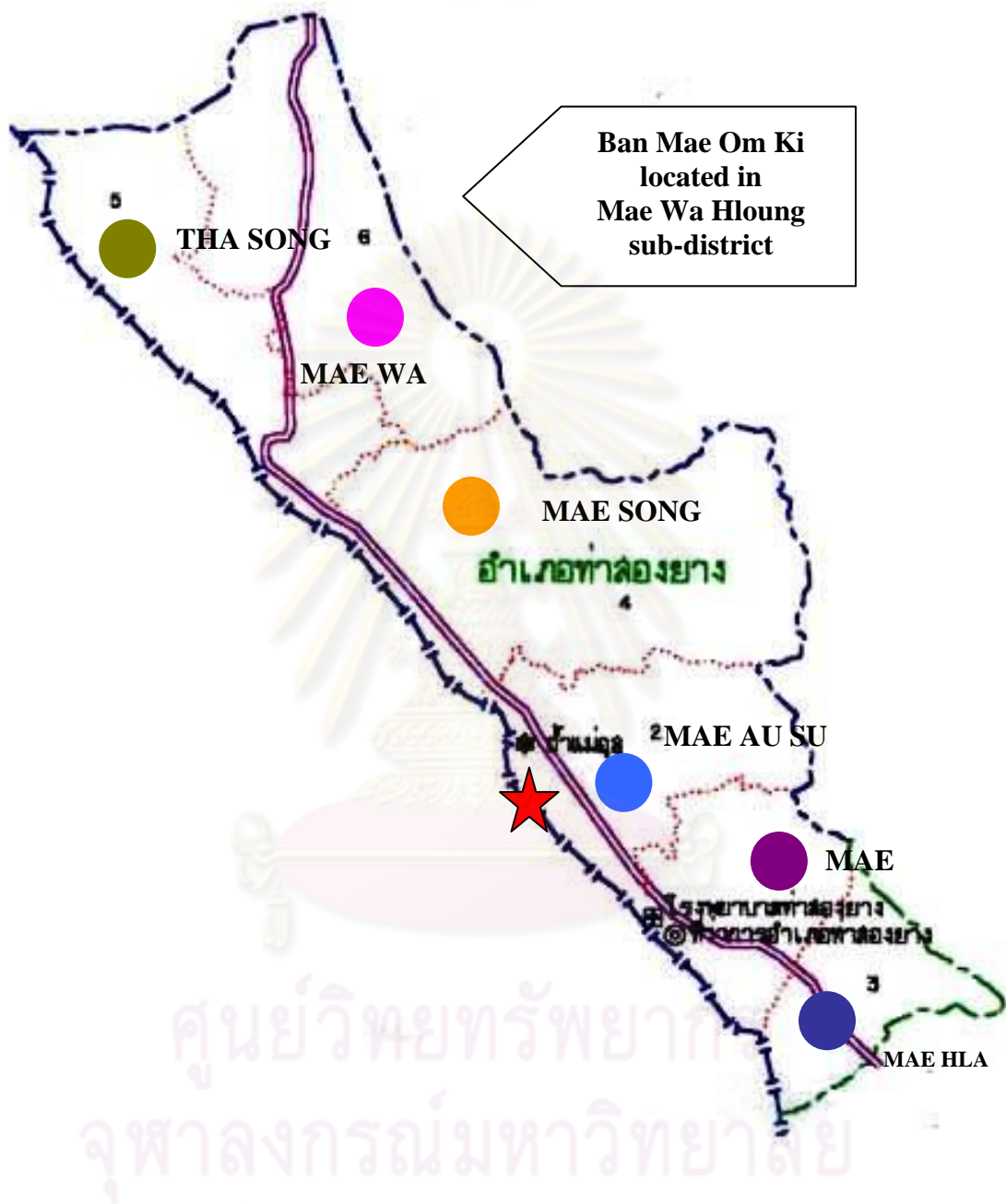


Figure 4.2 Location of Ban Mae Om Ki in Tha Song Yang District



4.2.3 Traditional local community: History of Ban Mae Om Ki

According to Pathi Somyot, a senior community leader, Ban Mae Om Ki has existed for more than 300 years. From the remains of pagodas and pottery found in the area, it can be presumed that Ban Mae Om Ki was first occupied by the Lau ethnic group. After the Lau migrated to another place, Karen ethnic group occupied the area. The senior people of Mae Om Ki community could not state their place of origin as the community has often moved from place to place. The move depends on natural resources such as water, forest products and firewood that support their cultivation. Moreover, their belief system and traditional way of life are significantly related to their shifting behavior as well. While choosing an area for shifting, they choose a place within three kilometers of their current village, so that they are able to easily walk to the new location.

As learnt from interviews with senior people in the community, the community has moved 12 times in the past and there have been five community leaders or spiritual leaders, also called the Kao Pea. The history of shifting pattern of Mae Om Ki community started with the movement of their ancestors to Mae Pae Key area. This village comprised of a small group of Karen people until 1923(B.E 2466). According to Phi Ni, a 96 years old lady, she was born in Ban Mae Pa Key and lived there till she was 10 years old. After that Toh Cher, a community leader, took 23 families from Ban Mae Pae Key to Ban Mae Om Ki. They spent 2 years there, from 1923-1925(B.E. 2466-2468) and then the entire community moved to Ban Pee Hik La where they stayed for 4 years from 1925-1929(B.E 2468-2472). After that they shifted to Ban Nowe Kao Pae and stayed there till 1934(B.E.2472-2477). In this period, Toh Cher leader passed away at the age of 90. Do Kwa, a new community leader, took up the responsibility to take care of the community members. They spent 4-5 years in Ban Pee Hik La. Twenty three families still live in the same place. In 1934, 20 families shifted from Ban Nor Kao Pae to a new area was named Ban Yah Sao Kla. Some years later, the whole village including three families in Ban Pee Hik La moved to Ban Kluer Ya Poo in 1942-1944 (B.E 2485-2487). After 2 years the Second World War happened. Japanese troops traveled from Thailand to Burma and India by passing the village of Karen group. Members of the community were afraid of the troops as

they arrested the villagers to work for them as slaves. Most of the villagers fled from the area while some moved back to the old area. Some of the villagers moved to Ban Mae Om Ki in the next two years 1944-1948(B.E. 2487-2491). The community leader in this time was named Wa Hair. In 1949 (B.E.2492), they moved from Ban Mae Om Ki to Ban Nor Ko Pae again. After that they moved to Ban Ka Na Por during 1949-1952(B.E. 2492-2495). They spent 3 years in Ban Ka Na Por and moved to establish new village in the name of Ban Kor Poo in 1952-1956 (B.E.2495-2499). They spent 4 years in Ban Kor Poo and then moved to Ban Thi Nui Kao. After seven to ten years, they moved back to Ban Mae Om Ki again in 1963(B.E.2506). Thirty families and 85 villagers settled down in this area and the community has continued to live here till now.

In 1963(B.E.2506), under the system of local administration, Wa Hair was appointed as the first village headman. He received 70 baht per month as salary.



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Table 4.3 Timeline: Movement of the community and the community leaders.

No.	Name of village	Period of moving	Community's leader name
1	Ban Mae Pae Kee	...- 1923 (... - 2456 B.E.)	Toh Cher
2	Ban Mae Om Ki	1923 – 1925 (2466 - 2468 B.E.)	Toh Cher
3	Ban Pee Hik La	1925 – 1929 (2468 - 2472 B.E.)	Toh Cher
4	Ban Nor Kao Pea	1929 – 1934 (2472 - 2477 B.E.)	Doh Kwa
5	Ban Ya Chor Ko La	1934 – 1942 (2477 - 2485 B.E.)	Doh Kwa
6	Ban Kler Ter Poo	1942 – 1944 (2485 - 2487 B.E.)	Doh Kwa
7	Ban Mae Om Ki	1944 – 1948 (2487 - 2491 B.E.)	Wa Hair
8	Ban Nor Kao Pea	1949 – 1949 (2492 - 2492 B.E.)	Wa Hair
9	Ban Ka Na Per	1952 – 1952 (2492 - 2495 B.E.)	Wa Hair
10	Ban Kor Hor Poo	1952 – 1956 (2495 - 2499 B.E.)	Wa Hair
11	Ban Thi Nue Kao	1956 – 1963 (2499 - 2506 B.E.)	Wa Hair
12	Ban Mae Om Ki	1963 – 1972 (2506 - 2515 B.E.)	Wa Hair
13	Ban Mae Om Ki	1973 – 1981 (2516 - 2524 B.E.)	Ban
14	Ban Mae Om Ki	1981(3 months)	Kae Doi
15	Ban Mae Om Ki	1982 – 1995 (2525 - 2538 B.E.)	Somyot Rakpaochaodoi
16	Ban Mae Om Ki	1995 – 2008 (2538 - 2551 B.E.)	Pirach Pirojvirun
17	Ban Mae Om Ki	2008 - now	Chatchai Pirojvirun

Figure 4.3 Ban Mae Om Ki



4.2.4 Local knowledge and natural resources management in Ban Mae Om Ki

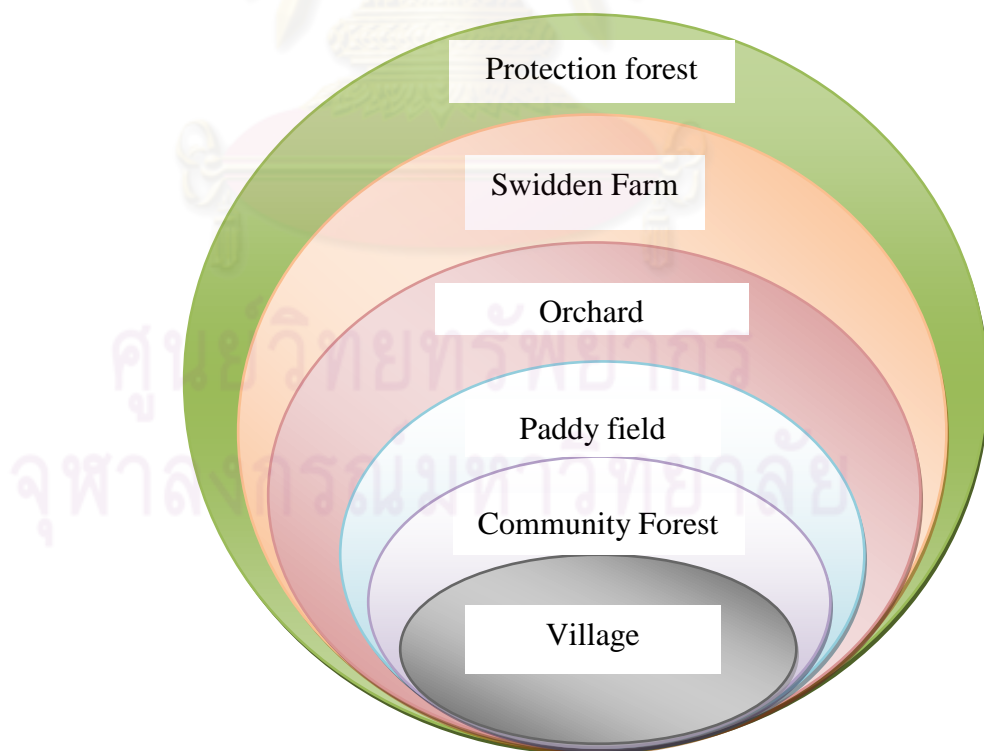
Prohibitions, operations, knowledge and wisdom are indicators of a system of management of natural resources (Praseard, 2006: 50). The system of management of natural resources of the Karen ethnic group is based on their traditional beliefs. Beliefs of Karen people are based on natural elements such as soil, water and forest. All these elements are interconnected. The quality of soil is enhanced by the water that comes from the forests. The soil, water and forest are the means of production of the villagers. They believe that spirits live in these elements such as the spirit of the land, water, forest, fire, cultivation and watershed and people believe in the power of these spirits (Choochat, 2003: 63). This section will explain Ban Mae Om Ki community's natural resources management system which is related to their customary rules. It will elaborate how the villagers protect the forests. It will also describe how the villager use land under the system of shifting cultivation.

4.2.4.1 Natural resources management system

This study examines how the Karen ethnic group's use of land and forest resources is linked with their way of life. It presents the system for management of natural resources developed by the Karen group as per their belief and customary rules.

The community area can be divided into the village or the area of living, community forest, paddy fields, orchards, swidden farm and protected forest. These areas are divided from each other by mountain ridges and river basins. The community members know the boundaries of each specific area. This kind of management system is a legacy of their ancestors. According to Praseard (2003), the land management system can be explained by the following diagram.

Figure 4.4 Diagram of community's land management system



Village area is a dwelling place where the villagers live. This place provides a space for relaxing, resting, sleeping, and cooking. Furthermore, inside the village area vegetables and fruits are also cultivated for the consumption of the people. This area of living had to be created by cutting down some trees for clearing the space and for building the houses.

Community forest area is a place that is used for ceremonies and worship activities. One of the beliefs practiced by the Karen is placing a baby's umbilical cord into a bamboo cylinder and tying it to the branch of a big tree. Karen people believe that a baby's soul will live in that tree. If the tree is cut, baby's soul will disappear and the baby will fall sick. This area is only used for collecting firewood, for feeding the chickens raised by the villagers and as a playground of the children.

The area of the paddy or rice fields is chosen near creeks so that it is easier to irrigate. Before irrigation, the spiritual leader and community members perform a ceremony call Leang Pea Fai that involves offering sacrifices to a weir spirit. During the period of rice growing, they offer another sacrifice to the rice soul. Both these ceremonies show the desire of the communities to sustain their livelihood resources.

Orchard area is called Hua Rai Plai Na and is used for growing fruits such as banana, papaya, jack-fruit and mango. Some families also use this area to grow chilies, eggplant and potato.

Swidden farm or shifting cultivation is called Rai Mun wain. This is a very important area for the Karen's way of production. In this area, they grow rice and vegetables of diverse types. They divide the land in several plots and do farming in the round of cultivation. Detail of swidden farm will cover in topic 4.2.4.2

Preservation forest is a strictly protected area. Most of preservation forests are rainforest, forest above farm, funeral forest, water-absorbing forest, spring-water forest, the forest for hanging an umbilical cord and a source of water. They do not allow people to use this area except for activities that do not destroy nature such as collecting herbs, vegetables and hunting.

All this division of land management is controlled by the villagers. The Karen people pay respect to the forest with ceremonies depending on their belief, way of life and legacy of ancestors. Government does not have any role in these community operations.

The physical map of Ban Mae Om Ki, as shown by figure 4.5 and 4.6 shows the forest utilization area. The figure elaborates how the community is using the land and forest resources.



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Figure 4.5 Ban Mae Om Ki Physical Map

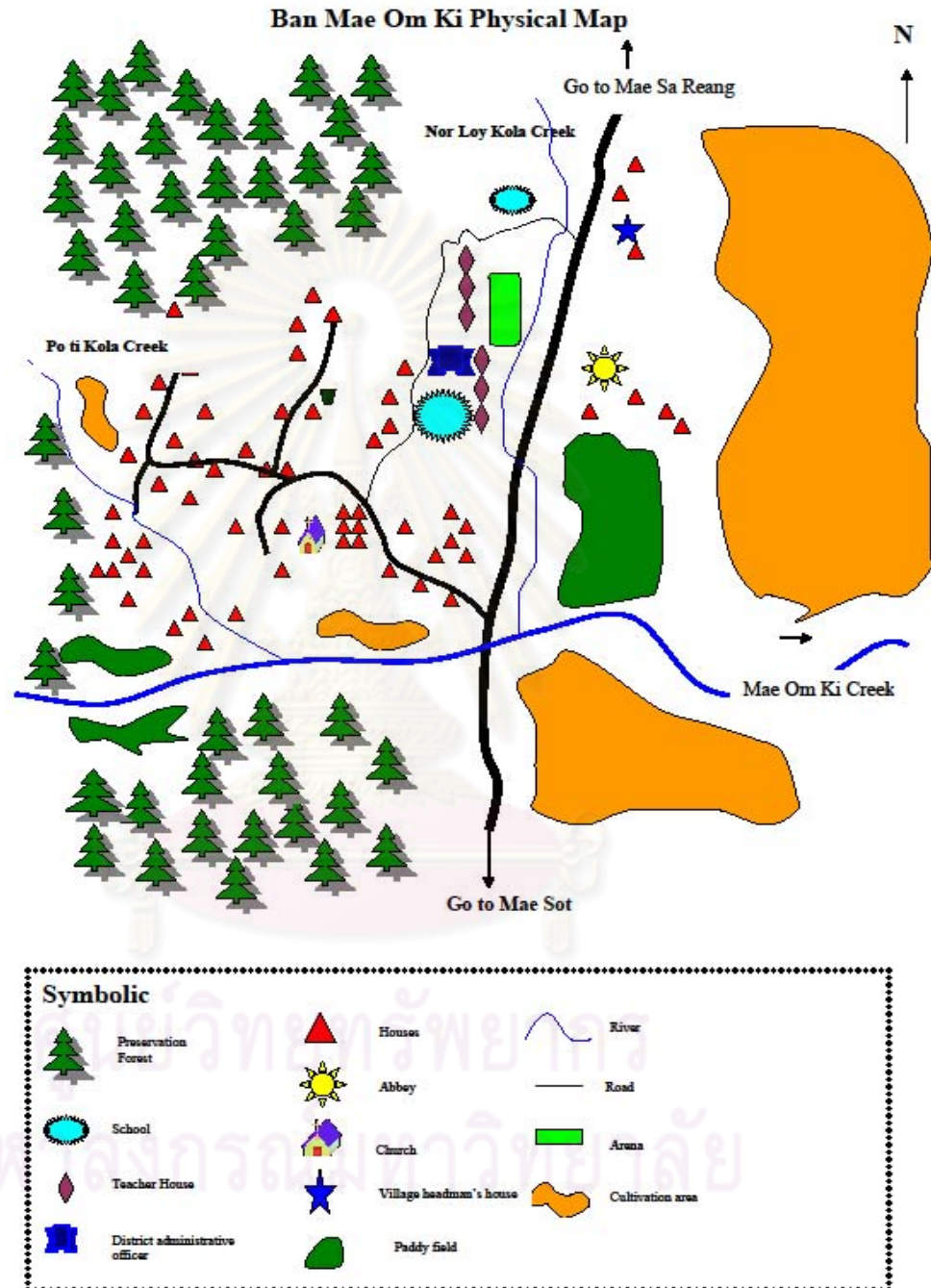
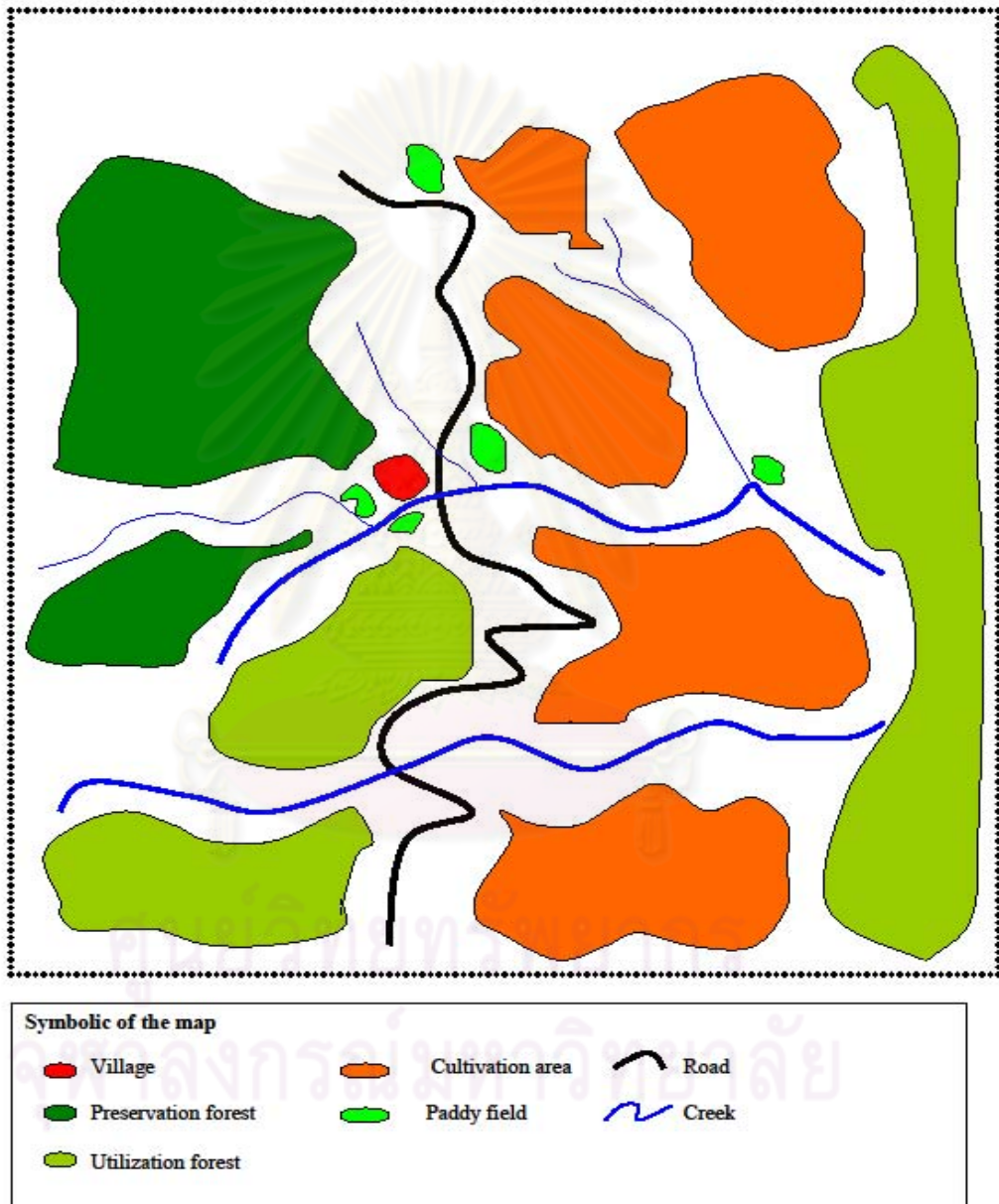


Figure 4.6 Forest utilization areas



4.2.4.2 Shifting Cultivation

Shifting cultivation or swidden farming is the major farming system found in the uplands of mainland Southeast Asia. This system of cultivation has been in practice for centuries. Cycle of swidden farming starts in the dry season with the burning of trees in a patch of forest to grow crops and ends with the abandoning of the land when the soil loses its fertility. Sometimes this kind of cultivation is called slash and burn agriculture giving a negative meaning to the system. This section will describe shifting cultivation which is related to Ban Mae Om Ki and Karen ethnic community's way of life.

Shifting cultivation is viewed negatively by those who do not have an in-depth understanding of the cultivation system. Society considers this practice to be the cause of deforestation. In fact, this kind of agriculture respects natural resources and is based upon the wisdom of people who live in close connection with nature. Shifting cultivation is one way in which community rights as recognized in section 66 and 67 of 2007 constitution is practiced in reality.

The principle of shifting cultivation or swidden farming or Ri Mun Wain (Thai language) focuses on growing 40-50 varieties of rice in upland area. In addition other crops such as chilies, eggplant, pumpkin, calabash gourd, sesame, green beans, black beans, bitter melon etc. are also grown.

Land used for shifting cultivation is occupied by the whole community but divided into plots for each family. It means that all the land belongs to the community but each family will have rights over the produce in their plots. They have clear boundaries of the cultivation area. When Karen ethnic group choose the land to cultivate, they select the land from Rai Lao (Thai language) or area left after reforestation. The area for Rai Lao is known by members of community and is passed on from generation to generation. The cultivation cycles is maintained for a period of 3-10 years depends on the limitations of each community. In Ban Mae Om Ki, the cycle has been reduced from 10 years to 3-5 years because of population growth and state policy in protection area. The Forest Act is implemented by the State strictly so the villagers cannot continue with the same way of cultivation in that area. Moreover,

state encourages people to promote permanent agriculture and provides limited space for them to practice their traditional way of cultivation.

As learnt from interviews with the villagers, traditional wisdom is used to select the cultivation area. Before they select the land, they cut down 2-3 trees that are not of big size. Then they will stay overnight in that area. If they have bad dreams or any bad event happens, they would not use that land. This is based on their belief that there is a spirit which takes care of the natural resources. If humans want to use the land, they need to ask permission from the spirit and request the spirit to move out from the land temporarily.

After they have selected the land for cultivation, they start to cut down trees. Normally the period of land preparation phase or slash step is in the month of February. When the trees are cut, the trunk of one meter length is left so as to ensure that the tree will again grow in the future. Big trees are not cut and only small branches are lopped off to burn when they are dry. In March, the community members help to burn the selected land.

The important step of swidden farming is burning as it is difficult to control the fire. Typically the burning starts in April. The villagers help each other to take care of burning process; they only do it on the day there is a nice wind and proper dry wood. In one day, the burning process is carried out only in one plot, because if the fire spreads out of the boundary, it will affect the production cycle and life cycle of the next swidden crops.

Next step is the planting; they use a small spade for making a small hole in the soil, for planting the grains. The reason of using spades is to make sure that the cultivation does not cause soil damage. This way prevents the erosion of the top soil. During this phase, the community members help each other to plant the grains as each family does not have enough labor to do all these work. Helping neighbors in the planting process gives evidence of the close relationship between the people in the community. After the planning, it is time to take care of the rice fields and take out the weeds. During harvest time, the community members help each other again by contributing their labor.

Ban Mae Om Ki has had to adjust its shifting cultivation system. There is pressure from the government to stop swidden farming and change to the permanent system of cultivation. There is also less land available for swidden farming because of the laws governing forests and protected areas. All these restrictions on their way of life is leading to other problems. For example, a family in Ban Mae Om Ki had to sell its land to a person from another village at 4,000 baht per rai because of debt and restrictions on the use of the land. Despite these conflicts, the community is able to carry on with its cultivation system as the relations within the community is strong and the members of the community are willing to carry on with this system of management of natural resources (Anan et al., 2004:11).

The next table describes the community calendar of the cultivation activities and the corresponding ceremonies.



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Table 4.4 Community calendar

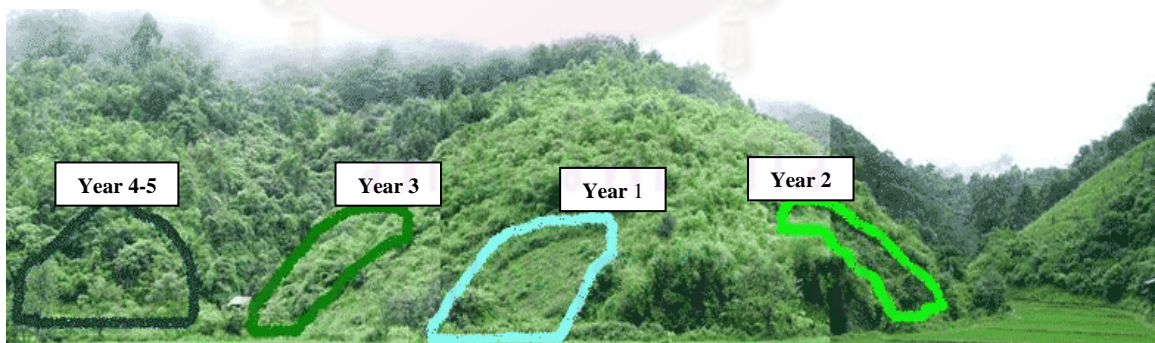
Activities/Month	Traditional ceremony	Cultivation activities
January	New year Wrist-binding ceremony	Grow soybean, Collect firewood, Weave, Raise cow and buffalo
February	New rice pounding	Land preparation phases, Weave, Making roof from big leaves called Bi Tong Tueng
March	Offer rice to the monk	Clear forest, Collecting forest products, Raise cow and buffalo, Weave
April	Song Kran Buddhist ordination	Burn cleared plots, Raise cow and buffalo, Weave, Soybean cropping
May	Leang Pea Fai or offer sacrifices to a weir spirit	Plant swidden rice and vegetable
June	Wrist-binding ceremony before planting paddy	Plant paddy
July	Buddhist lent Wrist-binding ceremony for tools of cultivation	Plant paddy
August	Offer sticky rice to the monk Mother's day	Worship spirits of land, Bamboo shoot marinating
September	The end of Buddhist lent	Tend paddy and swidden
October		Harvest swidden
November	Loy Kra Thong	Harvest paddy
December	Plant garlic	

Finally, shifting cultivation promotes food security of the community. Around 50 different crops can be grown under this kind of farming. Also the community can collect forest produce from the land that is left for cultivation in the next cycle or rai lao as shown in figure 4.9

Figure 4.7 and 4.8 Natural resources ceremony during cultivation



Figure 4.9 Rai Lao or recovery land for next cultivation



Reference: Sustainable Agriculture Foundation (Thailand)

Figure 4.10 Swidden farming field



Figure 4.11 Paddy field



4.2.5 Rights of Ban Mae Om Ki to manage natural resources

Ban Mae Om Ki is a good case study for elaborating on the concept of community rights.

First of all, Ban Mae Om Ki has a history that is remembered and documented. The community has migrated from place to place while practicing their shifting pattern of cultivation. However while shifting they move only within a distance of 3 kilometers from the current village.

Ban Mae Om Ki has a developed system of management of natural resources. It has rules, institutional mechanisms and organizations to manage the resources. It is based on traditions, values, ideology and wisdom which the villagers have maintained from generation to generation. Karen ethnic group have their own traditions which clearly define their way of living and cultivating. The community is located in watershed area and has created rules to manage and utilize the land. Moreover, they have established institutions within the community to implement and enforce the rules and regulations set up by it.

Each family has the right to access the community land. The area of land that can be used by each family is determined by the area of land that was used by their ancestors. At another level, there are rules that determine the division of land between members of each family. These rules are common to the different areas of the community land such as protection forest, swidden farm, orchards, paddy fields, community forests, and the village (Anan et al., 2004:15). The community grows only that much as is needed for consumption of the family. The excess produce is either given to the neighbors or sold in the market. This system of cultivation helps to support food security of the villagers as they can be self sufficient. According to Karen ethnic group in Ban Mae Om Ki, the people respect natural resources and use only that much as is necessary for their survival. In this way the environment is protected and resources are not over exploited.

In support of this system of community rights in practice, many scholars have argued that the common property system in Thailand is different from the nature of

ownership over land in the western countries. In the west, the legal system recognizes two kinds of ownership; state property and private property which can be purchased and sold (Pinkaw, 2001: 202). In contrast local resource management regimes are a structure of rights and duties characterized by the relationship of individuals to the particular natural resource. Institutional arrangements are continuously established, defined and redefined in order to determine and modify the scope and nature of the property regime. Local common property regimes, for example, represent property for the group of users and co-owners. In a common property regime, individual community members have use rights and duties to a common resource, such as forest and water (Pinkaw, 2001: 202).

The northern Thai concept of 'community rights' is presented as a crystallization of local principles and practices. The local common property regimes have marked the boundaries of acceptable use of resources and also established the link between human beings and territoriality, including collective ownership and possession (Yos, 2003: 129-130). The village systems are based on local customs recognized by ancient laws.

However, state laws and local customary practices have increasingly come into conflict since mid-twentieth century when the Thai government adopted the concept of private and state ownership and centralized management from the West (Pinkaw, 2001, p. 202). The need for recognition of community rights emerged when outsiders, usually in the form of the colonizing companies or state forces, invaded local territories and tried to take away rights, thus devaluing culture and, at times, threatening the very existence of the people (Santasombat,2003,p.129-130).

As Pinkaw said, slash and burn agriculture or shifting cultivation has been a target of state conservation model. Thailand does not grant legal recognition to territorial customary rights that existed before state legislation (Pinkaw, 2001: 202). Yet the communities need recognition of their rights so that they can control their destiny and access to resources.

The non recognition of community rights by the government causes insecurity in land tenure which creates conflict between individual and individual, individual

and community, kinship and kinship, community and community, community and network, and community versus the state. However, attempts are being made by the community to negotiate with the state so that they can preserve rotational agricultural system that is ecological and environment friendly (Anan et al., 2004:15).

This chapter describes how the community practices its traditional way of cultivation. The state authorities do not recognize these traditional practices and enforce the existing laws against the people. The judiciary has the power to adjudicate such conflicts between the rights of the people and law enforcement authorities. The next chapter describes how the judiciary has performed its role as protector of the rights guaranteed in the constitution and the dynamics that help the judiciary to perform this role successfully.

4.3 Civil society action in the Ban Mae Om Ki court case

Civil society networks played an important role in empowering the people in the case of Ban Mae Om Ki to struggle for the recognition of their rights.

In the case of Mae Om Ki it was found that rights to fair trial of the defendants had been violated. The right to fair trial is an important right that enables the accused to seek justice from the courts. Even before a trial commences in a court of law, the accused/defendants have the right to legal assistance in case they are not able to arrange for a lawyer of their own. Again when the trial begins in the court of law, the Court has to provide the accused/defendant with a lawyer in case the accused is not able to arrange for a lawyer to defend the case against him/her.

In the Ban Mae Om Ki case, during the first trial, even though the accused/defendants did not have any lawyer, the Court did not provide them with one as required under law. Also, though the accused did not understand the Thai language properly, interpretation was not provided for them according to due procedure. As a result the accused did not understand anything regarding the court proceedings involving them and were not able to prepare an adequate defense. For example, during the first trial, the court asked the accused what they were doing in the land at

the time of arrest. The accused answered that they were doing 'swidden farming'. The answer in such form and manner clearly implied that the accused had violated the law. It is true that the accused were engaged in swidden farming at the time of arrest – but there were other facts surrounding this fact such as the fact that the accused had been living in that area for a long time before the declaration of national forest reserves. The court did not enquire into these facts and pronounced the accused person to be guilty as charged. It was also found that the accused were asked to sign on pre-recorded confession statements. The accused were asked to sign though the statement was not read out to them.

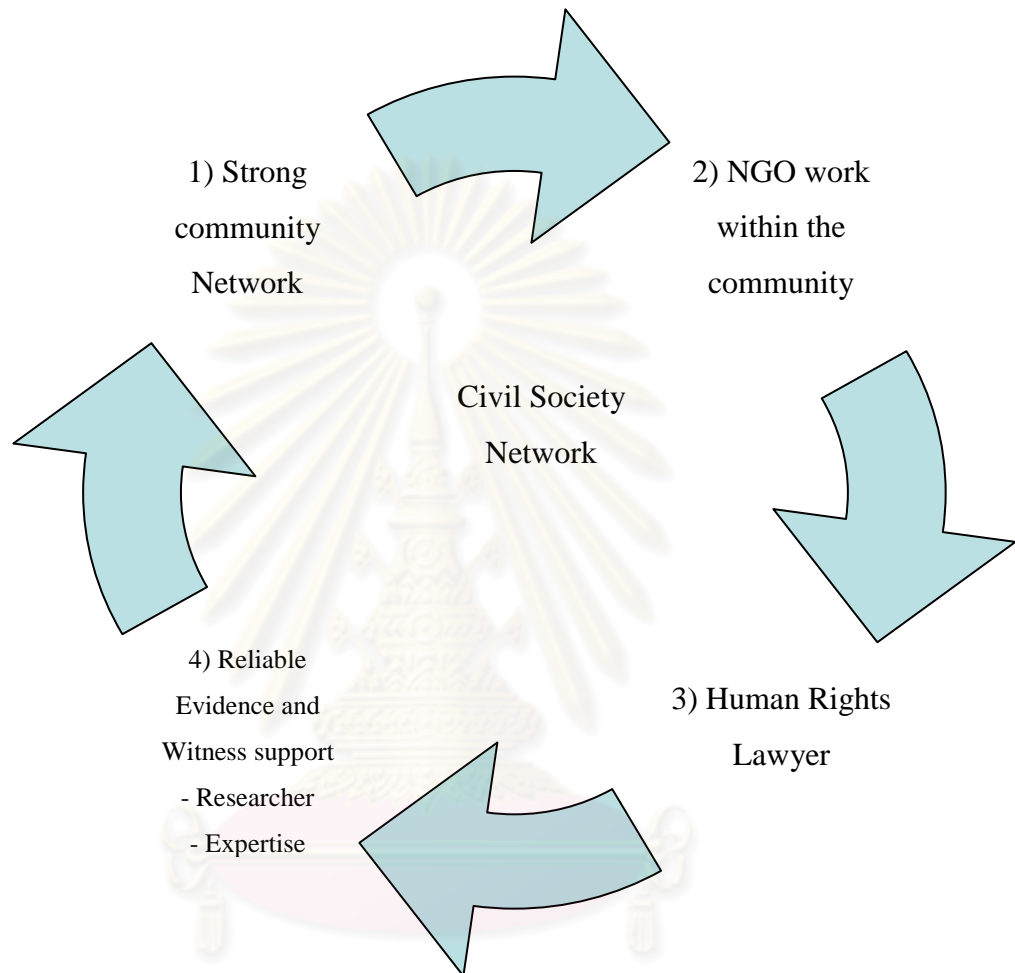
Hence, in this case it can be concluded that the pre-trial rights of the defendants were violated as they were not provided with any legal assistance to defend them before the court.

When the accused appealed against the decision of the court on the grounds that the right to fair trial had been violated, the appeal court ordered a fresh trial. The fact that the second trial produced different results from that of the first trial indicates the importance of the right to fair trial.

During the first trial of the Ban Mae Om Ki case, several violations of rights guaranteed in Constitution and human rights treaties were found to have taken place. This attracted the attention of civil society organizations who offered assistance to the villagers defending the case. The case was then adopted as a 'strategic case' in the struggle for the recognition of community rights over management of natural resources. This section looks at how the community worked together with the civil society to prepare their case and evidence to be presented before the court during the second trial.

The civil society network is presented in figure 4.2. The civil society network play important role in collecting evidence to present the case of both the defendants. The key actors of this network were the community, non-government organizations working with the community, human rights lawyers and experts.

Figure 4.12 Civil Society Network



The key actors of the network are described in detail in the following section.

1) Strong community Network

The presence of a strong community network can be attributed to several factors such as history of the community, the strong ties amongst the people in the community, the system of natural resource management of the community, and the belief system and way of life of the community. These factors gave strength to the community to get involved with the litigation process before the court.

Ban Mae Om Ki community has a long history and they have continued with their traditional system of natural resource management that includes swidden farming or shifting cultivation system. When the members of the community were arrested, the community extended full help and co-operation to the accused. This was the first time when members of the community were arrested and the community fully supported the struggle of the accused as all members of the community were vulnerable to arrests since they did cultivation in the same area.

2) NGO work within the community

The non government organizations (NGO) which work inside the community are the Child Development Center and Community, Rehabilitation and Development Association of the Salween River. They have been working with the community since 1996 (B.E.2539). At the beginning, their work focused on empowerment of people for conservation of natural resources. The activities undertaken by them included creation of understanding about the concept of community forest, natural resource management. They also tried to spread awareness about the impact of the declaration of national parks and reserved forests on the lives of the people living inside the forests areas.

NGOs play an important role in enabling the communities to negotiate with government officers and also to work in collaboration with them. Through different programs organized by NGOs, the government officers get an opportunity to learn about the way of life of the community and the systems of natural resource management practiced by them. NGOs also play a significant role in enabling the community to contact with human rights lawyers.

The reasons why the Child Development Center and Community, Rehabilitation and Development Association of the Salween River helped the villagers to litigate the case are following: the defendants are poor and do not have education so they do not know how to protect their rights; the swidden farming or shifting cultivation is their way of life and is the source of their food security; both of defendants had no intention to encroach forest land since they had been cultivating the land for many generations; and the last important reason is that the NGO would like

to protect the people's right to natural resource management as guaranteed under the Thailand constitution and international human rights framework.

3) Human Rights Lawyers

The role of the lawyer is to help clients by explaining the facts to the court. The process begins with researching and understanding the context of the case. They have to assess whether any right of the defendants have been violated or not. They have to do fact finding, investigation and analyze the information collected in a human rights perspective. The lawyers also have to present the information to the court in a way so that it is easy to understand the principles and issues involved.

The human rights lawyers base their work on human rights norms and standards, understanding of the legal and social context and fact finding to gather reliable and credible evidence. One of the objectives of their work is to bring about a change in the laws and policies of the government that do not respect and protect the rights of the marginalized and vulnerable sections of the society.

In the Ban Mae Om Ki civil society organizations contacted the human rights lawyers on behalf of the accused persons and the community. The general process of work related to human rights lawyering begins with fact finding into "what, when, where, why and how". This involves interviewing all sources of information such as the community, the victim, the officers involved and other relevant experts. The lawyers then assess the information, identify the violations and develop their strategy for addressing the issues involved. In a strategic case such as Ban Mae Om Ki which has implications for the rights of the community, the human rights lawyers have to close collaboration with the victims and the community at every stage of the process.

Overview of human rights element in Ban Mae Om Ki case:

- a. Ban Mae Om Ki case is a leading case or benchmark case relating to natural resource management. It was a strategic case in which the community supported the accused to fight for the recognition of their rights to the land which they had been cultivating for generations. The process of litigation helped in empowerment of the community. In most

cases people accused of encroaching upon forest land do not have the courage to fight their case in the court and make their voices heard by presenting their side of the story before the court.

- b. This case helped to build a network consisting of human rights lawyers, local community organizations NGO, academics and government agencies to deliberate on the issue of community rights to natural resource management.
- c. This is a strategic case that can set a precedent for future cases.

4) Reliable Evidences and Witness support

The role of witness is an important part in proving the credibility of evidence presented before the court. In Ban Mae Om Ki, witness played a major role, including researchers and experts of forest management.

4.1) Researcher

The lawyers representing the case of Ban Mae Om Ki worked closely with a researcher from the Faculty of Social Sciences, Chiangmai University. The role of the researcher was to provide more information about the practice of swidden farming by the Karen ethnic group. The system of swidden farming is related to the concept of community rights. The researcher helped to present facts from academic work (Swidden Agriculture: Status and Change, A collaborative research between Faculty of Social Sciences, CMU, Faculty of Forestry, Kasetsart University, NGOs, and local people), as well as visual documentation such as VCD on swidden agriculture before the court during oral hearings in the court room.

The researcher helped to highlight that conflict between forestry officials and villagers living in the National Reserved Forest in the North of Thailand were common and that in many areas people were protesting because of arrests. The research also helped to identify the fact that many communities had been using the land for years before the area was declared to be reserved and protected area. Most of the communities belong to the Karen ethnicity and have been living in that area for

more than 400 years. The swidden farming practiced by them is ‘subsistence agriculture’ and they grow only that much rice and other crops as is needed by them for their own consumption. Under swidden farming, people cultivate land on the hill, around 400-500 meters above the sea level. They cultivate one plot of land for one year, and for the next year they cultivate another plot, returning to the first plot after a couple of years. The people do not clear or log big trees for swidden farming. Usually the people get arrested during the time they prepare the land for cultivation by burning the dry branches on the soil. The forest officers consider these actions to be illegal.

This result of research was applied to villager’s understanding of their rights to do swidden farming. Moreover, it also helped to provide some understanding to the government officers about the cultivation practices of the local people. The forest officials had discussions with the community and both parties acknowledge the land area of the village and the community agreed not to encroach upon new forest land.

4.2) Forest expertise

An expert testimony in Ban Mae Om Ki case was that of an academician specializing in study of forests. He also gave evidence before the court and explained the cultivation patterns and the way of life of the Karen community and civil society movement for recognition of community rights. He also gave evidence that no process of land verification had been carried out following the Cabinet Resolution of June 30, 1998 (B.E.2541) and it could be assumed that the villagers did not have any information about the declaration of the reserved forest area. .

Testimony of academics and experts helps to provide credible evidence to explain the reasons as to why the villagers were cultivating the disputed land.

Table 4.5 The movement of civil society activities in the litigation of Ban Mae Om Ki case.

No.	Date/Month/Year	Activities
1	April 12, 2008 (B.E.2551)	<ul style="list-style-type: none"> ▪ The villagers from Ban Mae Om Ki went to the Child Development Center and Community, Rehabilitation and Development Association of the Salween River to ask assistance in terms of solution. ▪ Center staff assist in fact finding of the case
2	April 25, 2008 (B.E.2551)	<ul style="list-style-type: none"> ▪ Organizing first seminar on the issue of understanding the case between sub- district administration, villager, the Child Development Center and Community, Rehabilitation and Development Association of the Salween River, Provincial Resources Department. ▪ Writing a letter of complaint to Provincial governor, Sheriff and The National Human Rights Commission.
3	May, 2008 (B.E.2551) May 29, 2008 (B.E.2551)	<ul style="list-style-type: none"> ▪ Investigator Officials have to renew monitor and surveying areas ▪ Organizing second seminar on issues ; <ol style="list-style-type: none"> 1) Fact, incident and context of the case 2) Understanding of swidden farming or shifting cultivation. 3) Conflict resolutions 4) Create an agreement with government agencies (Memorandum of Understanding)

No.	Date/Month/Year	Activities
4	May, 2008 (B.E.2551)	<ul style="list-style-type: none"> ▪ Organizing Networking seminar to build up the understanding about the root courses of Ban Mae Om Ki case. On the issues of; <ol style="list-style-type: none"> 1) Topography of the incident and evidences of the case 2) Court procedures 3) Planning to litigate the case 4) Community rights principle
5	April-May, 2008 (B.E.2551)	<ul style="list-style-type: none"> ▪ Baddish donation activity to raise fund for litigation process.
6	June 16, 2008 (B.E.2551)	Office of National Environment Broad, Law council of Thailand has notified a letter to assist the case by asking the Lum Mam Ngow community forest network and accused elaborate detail and fact of the case.
7	June 27, 2008 (B.E.2551)	The National Human Rights Commission responds the complaints letter and does the process of investigation by official authorities.
8	July 5, 2008 (B.E.2551)	The community leaders have notified a letter of fact and incident and send to Tha Song Yang district sheriff, Tak province. The objective of the letter was asking to not sue the case.
9	July 4, 2008 (B.E.2551)	<ul style="list-style-type: none"> ▪ Organizing second seminar on issues ; <ol style="list-style-type: none"> 1) Conflict resolutions 2) Create an agreement with government agencies (Memorandum of Understanding)

No.	Date/Month/Year	Activities
10	August 5, 2008 (B.E.2551)	Ban Mae Om Ki community members wrote the letter included fact and information of accused to Mae Sod prosecutor. The letter asked consideration from prosecutor to not sue the case like opinion of the Tha Song Yang Sheriff.
11	September 1, 2008 (B.E.2551)	Mae Sod prosecutor send both defendants to sue the case at Mae Sod provincial court. At the same day, the court judge the case by put Mr.Di Pae Poh in prison 1 year and 3 month and Mrs.Nor Hae Mui in prison 1 year.
12	September 8, 2008 (B.E.2551)	The village headman, president of sub-district administration and sub-district administration committee obtain the release on bail.

4.4 Conclusion: The possibility of judicial process in recognition of community rights concepts.

Despite the fact that the principle of community rights has been recognized in the 1997 and 2007 constitution but the state authorities still use the forest laws and policies on protected forest area to regulate and control the people living in the forest. Criminal cases involving charges of encroaching upon forest preservation area are often filed by the authorities as there is no recognition of the concept of community rights.

The possibility in the judicial process in recognize community rights concept not be happen when the judiciary strictly implements the forest laws without giving any consideration the community and its system of management of forest resources. In such case the judiciary does not taken into consideration the context of the people's lives – the history of community, their way of life and customary laws.

However, the judicial process is considered possibility when the court, as in the Ban Mae Om Ki case, gives consideration to the concept of community rights and the practice of Karen way of life and shifting cultivation as evidence. This possibility shown by the Court was possible because of the evidence that was produced before the court to show that the defendants had rights to live and use the forests. The community with the help of network of villagers, local NGOs, human rights lawyers, researchers and expert evidence presented their version of story before the Court. Before the court they presented information about the history of the community, their way of life, beliefs and traditions which was integrally linked with their way of livelihood such as the practice of shifting cultivation. They also stated that their practice of shifting cultivation also aimed to protect and conserve natural resources.

On the basis of such evidence the Court used the principles as recognized in the Constitution and international human rights law and stated that the people were not guilty of encroaching upon forest land. Thus though the court did not directly state that the people had rights to control and manage natural resources, by refusing to declare them illegal under the forest laws, it recognized that the people did not have intention to commit any wrong.

The court also applied the Cabinet resolution June 30th, 1998(B.E.2541) to the case. This cabinet resolution declared that the people who were living in preservation area before forest laws regulate will have rights to continue using their ancestor land for the purpose of cultivation after registering themselves with the state administration.

Ban Mae Om Ki case is the first case where the accused were able to present their version of the case and seek recognition of their community rights. Even though there is still no recognition of community rights under law, yet, the fact that the Court decided that the accused had 'no intention' to encroach upon the land and thus could not be held guilty, can help in seeking justice in many other similar cases. The court considers the legal and social condition combine with other condition that Human rights lawyer with support by civil society present.

In conclusion, the possibility of judicial recognition exists when the court is able to go beyond the law and examine the context of people's lives while adjudicating the case before it. In case of Ban Mae Om ki, it was possible because of the actions of the community network which helped to bring the alternative narratives of the people before the notice of the court. The decision of the court can become the basis for discussions on reforms that are needed in existing laws so that they are in conformity with the right guaranteed in the 2007 constitution and international human rights treaties.



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CHAPTER V ANALYSIS AND CONCLUSION

5.1 Analysis of research finding

The 10th Social and Economic Development Plan of Thailand puts emphasis on human development, a knowledge based society and creation of strong communities to enhance the security of the country. These goals imply the necessity of promoting and protecting the human rights of the people as human development puts emphasis on the capabilities of the people to enjoy their fundamental rights on the basis of the principles of equality and non discrimination. In a constitutional democracy, the courts have a responsibility to ensure that the laws and policies of the state are in line with the rights guaranteed under the constitution and the international human rights treaties ratified by the state.

Through this study the researcher has tried to present the conflict between the development policy relating to the protection of natural resources and the rights of the people living in close connection with these resources. Does the development policy of the state include the concerns of the people whose lives are affected by such policy? The researcher has tried to examine this question by focusing on three judicial decisions on issues relating to community rights and tried to examine the possibility that enable the judiciary to grant protection to the rights of the people. The research questions for this study were; to what extent is the concept of community rights, as recognized in the 1997 and 2007 Thai Constitution and international human rights principles, applied by the judicial process? The hypothesis of the research is that the possibility of the judiciary to support legal implementation of community rights to manage natural resources will depend upon legal conditions and social conditions.

The key research methods used were documentary research and field work research. This study has certain limitations. The time period of study was not enough to study the way of life of the community in detail. The researcher also had to respect ethics relating to judiciary and thus could not disclose the names of judges. Therefore, this study has focused only one case that has had a significant impact on recognition

of community rights and more specifically on the local community's right to manage natural resources.

The study examined the basic concept of community rights as recognized under the 1997 and 2007 Constitution. The study used the theories of rights based approach and critical legal studies to analyze the existing laws and policy on natural resource management and the impact of such policies on the community rights of the people.

In order to understand how 'community rights' is practiced by the people, the research focused on the case study of Ban Mae Om Ki. The case study helped to understand the link between the community's way of life and forest resources, the importance of the community's access to these resources for guaranteeing their food security and other basic rights and the systems that the community has developed to conserve and use the forest resources.

Furthermore, this study examined the possibility of the judicial process in protecting community rights through the judicial decision on three cases. The researcher examined the case of Ban Mae Om Ki in detail to highlight the different factors which facilitate the judiciary in considering the issues of community rights while adjudicating a case before it.

The analysis revealed that there is inconsistency between laws and public policies and the human rights of the people guaranteed in the constitution. The laws and policies on forest natural resources management are not in conformity with the community rights guaranteed in the constitution. The constitution is the supreme law of the country and all laws and policies should respect the fundamental rights guaranteed therein. This is a core principle of constitutionalism. Yet laws and policies that violate constitutional rights continue to be enforced in Thailand.

The following two tables show the existing inconsistencies in laws and fundamental rights in Thailand. There are two kinds of rights that are relevant to this study and the table separates these two kinds as first, rights enjoyed by individuals and second, rights enjoyed by the community as a collective.

Table 5.1 is ‘Comparison of fundamental community rights and relevant laws in this study’. This table describes the different elements of community rights as recognized in the constitution and international human rights laws and treaties. The table also depicts whether the existing national laws recognize these rights. Also the community has its own customary rules and regulations relating to the management of natural resources.

In table 5.2 presents the ‘Comparison of fundamental individual rights and relevant laws in this study’. These fundamental rights refer to the rights that are inherent in every human person. In this study emphasis is placed on rights to equality, right to self determination, right to practice ones culture and religion, freedom of movement and rights to fair trial. Table 5.2 illustrates whether these rights are recognized under the constitution of Thailand and the different laws.

Judicial position in both the tables refers to the interpretation of the court with regard to the different rights.



ศูนย์วิทยทรัพยากร
จุฬาลงกรณ์มหาวิทยาลัย

Table 5.1 Comparison of fundamental of community rights and relevant laws in this study

Community rights	International legal framework	Public laws Thailand 2007 Constitution	Specific laws	Judicial position	Community's regulation
Rights to self-determination of the community with respect to managing its customs, natural resources and development	ICCPR,ICESCR, ILO-169,DRIP	Section 30-38	-(*)	-	Traditions and customs developed and practiced by the community
Rights to manage resources, for purposes of livelihood and common social benefit	CBD Article 8J, DRIP	Section 66-67	-(*)	-	Local knowledge, Oral literature, Poems and songs Natural resources management system, Community's land management, Shifting Cultivation , Community calendar (more information in chapter 3)
Community rights to management of biodiversity, use of such biological resources and sharing of the benefits arising from it.	CBD Article 8J	Section 66-67	-(*)	-	Local knowledge, Oral literature, Poems and songs Natural resources management system, Community's land management, Shifting Cultivation , Community calendar (more information in chapter 3)
Rights to practice culture and their traditional way of life	ICCPR, ILO169,DRIP	Section 66-67	-(*)	-	Local knowledge, Oral literature, Poems and songs Natural resources management system, Community's land management, Shifting Cultivation , Community calendar (more information in chapter 3)
Rights to maintaining regulations, customs and internal and external agreements made by the community	ICCPR, ILO-169, DRIP	Section 66-67	-(*)	-	Natural resources management system, Community's land management, Shifting Cultivation , Community calendar (more information in chapter 3)
Rights to non-discrimination on the basis of ethnicity	ICCPR, ILO-169, DRIP	Section 66-67	-(*)	-	Local knowledge, Oral literature, Poems and songs Natural resources management system, Community's land management, Shifting Cultivation , Community calendar (more information in chapter 3)
Rights to information	ICCPR	Section 56-57	-(*)	-	Local knowledge, Oral literature, Poems and songs Community meeting and ceremony events

Remark (*) The five forest laws not recognized community rights but they announced this following issues;

- "Forest" as the land which no individual can own legally

- Under these laws, the people who live inside the forest had no legal titles meaning that they were there illegally

- No person is allowed to i) Occupy or possess land including build in, or clear or burn the forest: i) Occupy or possess land including build in, or clear or burn the forest; ii) Collect or take out natural forest produce or take any action that endangers such natural resources; iii) Take out wildlife or do any act that endangers wild life; iv) Take any action that changes the course of waterways or causes them damage; vi)Take in cattle or allow them to enter; vii)Carry on any activity of benefit without permission from the competent authorities viii)Take in or out any vehicle without written permission from the competent authorities - No one can enter, possess or occupy sanctuaries

Table 5.2 Comparison of fundamental of individual rights and relevant laws in this study

Individual rights	International laws	Public laws Thailand 2007 Constitution	Specific laws	Court Regulation	Community regulation
Rights in equality	UDHR, article1, 16(1)	Section 30	-(*)	-	-
Rights to self determination	ICCPR,1	Section 28	-(*)	-	-
Freedom of Thought, Conscience and Religion	UDHR, 18 ICCPR, 18 ACHPR, 8	Section 34	-(*)	-	-
Freedom of Movement and Residence	UDHR, 13 ICCPR, 12 ACHPR, 12				
Rights to fair trail	UDHR, 8, 10,11 ICCPR, 2(3),9(4), 14, 15, 26 CERD, 6 CRC, 39 CAT, 14(1) ACHPR, 3, 7	Section 39-40	-(*)	-	-

Remark (*) The five forest laws not recognized community rights but they announced this following issues;

- “Forest” as the land which no individual can own legally
- Under these laws, the people who live inside the forest had no legal titles meaning that they were there illegally
- No person is allowed to i) Occupy or possess land including build in, or clear or burn the forest: i) Occupy or possess land including build in, or clear or burn the forest; ii) Collect or take out natural forest produce or take any action that endangers such natural resources; iii) Take out wildlife or do any act that endangers wild life; iv) Take any action that changes the course of waterways or causes them damage; vi)Take in cattle or allow them to enter; vii)Carry on any activity of benefit without permission from the competent authorities viii)Take in or out any vehicle without written permission from the competent authorities
- No one can enter, possess or occupy sanctuaries

5.2 Legal perspectives versus Development Perspectives

This section will provide two main arguments which relate to the potentiality of the judicial process in recognition of rights of the people, but at the level of individual rights and community rights. First is from the legal point of view which elaborates on the inconsistencies in law. The impact of the legal system creates gaps between the laws and the people on whom the laws are enforced. If the persons who interpret laws are concerned about the rights of the people, then social justice will prevail in society. In contrast, if they strictly apply the laws and policies then it might result in injustice. Second perspective, is the development point of view that presents 'human center development' of those who are the poor or indigenous or marginalized in society. The strategy of empowering these groups to challenge the current paradigm of development and claim their rights will be one way of promoting alternative development.

Under the legal arguments, as the tables clearly show, there are inconsistencies between the rights guaranteed under the constitution and the existing laws. As mentioned in the first chapter, these inconsistencies have increased the conflict between the communities and the state. More and more people are being arrested by the authorities on charges of encroachment over forest land. The judiciary is entrusted with the responsibility for adjudicating these conflicts – where on one hand there is the issue of violation of human rights, and on the other hand there are existing laws that protect the interests of the state in managing forest resources of the country.

In majority of these cases where there is a conflict between the interests of the state and the rights of the communities to manage forests resources according to their customs and traditions, the interests of the state have prevailed over the rights of the communities. In these cases, the court has adopted a strict approach in performing its duty. It has applied the existing law to the facts of the case and arrived at its decision.

However there have been some cases in recent times where the courts have recognized rights of the people and negated the interests of the state in regulating forest

resources. The Ban Mae Om Ki are some such examples. In these cases, the court went beyond the law and analyzed the conflict in the light of context of the people and the rights enjoyed by them. By adopting such an approach the court found the people 'not guilty' of the charges of encroachment imposed on them. This change in approach of the judiciary was possible because of the action of civil society networks which empowered the community to present their narratives about community history, community way of life, their regulations about management of forest resources, as evidence before the court. The activism of judiciary shows that the court not only strictly interprets domestic specific laws but also considers social condition.

This activism shown by the judiciary is important as it helps in creating new norms and standards for the society. This is all the more significant when state is not able to bring in reforms in existing laws that violate rights of a minority group of people through its political processes. The court by refusing to apply existing laws because their enforcement results in violation of rights of the people sends a strong message to the state to reform the existing laws in order to avoid a situation where the written law and policy lose its sanctity. It also creates a legitimate space for the people and civil society movement to initiate campaigns for law and policy reform.

Anan (2010) has elaborated on this concept of Legal Pluralism in the monthly dialogue of anthropologist under the topic of 'Culture Pluralism' in December, 2010. He observes that the case of Ban Mae Om Ki in Tak province reflects the concept of 'Legal Pluralism' which means that the court uses more than one law to decide on a case before it. The court not gives consideration to the laws promulgated by the state but also considers the customary laws of the communities. Anan has observed;

“Thailand also has some examples such as the recent case in Tak province that concerned a group of indigenous people. The circumstance of the case involved Karen people who while practicing the swidden way of cultivation were arrested and brought before the judicial process. Normally in such kind of cases, the court always decides against the

people and imposes penalties on them. However in this case, the court was able to give relief to the people by being pluralist in its approach.

In this case, the people presented evidence before the court about shifting cultivation or swidden farming. The evidence showed that shifting cultivation was part of the culture and way of life of the Karen ethnic group. This practice of cultivation enabled the Karen group to provide for their food security. Since the community did not have enough resources to buy fertilizers, the community after cultivating the land for a few years left it fallow and moved to another plot of land for cultivation. This fallow period allowed the land to regain its soil fertility. Thus the court in this case not only considered relevant laws but also looked into the social context of the people case.” (Matichon online, 18th December , 2010)

In conclusion of legal perspective, the existing law and implementation of those laws do not protect the rights guaranteed in the current Constitution. In CLS theory it is recognized that people’s rights are violated by law; people’s opinion is influenced by law especially State authorities and judicial process; Court verdict and the judgment depend on law and public policy. According to the case studies presented in chapter III, there are some windows of opportunity presented by the rights guaranteed in the Constitution for the people to claim their rights.

However in Thailand the practice of constitutionalism is still to be established. The lower judiciary gives more importance to the specific laws rather than the rights guaranteed in the constitution. One reason for this is that since 1932, when the first constitution was adopted, 18 new constitutions have been adopted. Thus the tradition of constitutional review is not yet well developed. Therefore human rights lawyers and civil society have an important role in institutionalizing human rights law and rights perspective.

In the development perspective, civil society also has an important role in advocating for a human centered development approach. The human centered development provides people opportunity to get recognition of their rights. According to RBA, the people should, at the first step, be able influence the decision making of the state at the time of formulation of forest policy. The state, through its laws and policies, should respect, protect and fulfill the rights of its citizens as guaranteed under its Constitution and international human rights laws. The people have to be empowered so that they can participate in exercising their voice and influencing decisions that affect their lives. In the case of Ban Mae Om Ki, the civil society played an important role in terms of participation, cooperation and empowerment. The community member cooperated with local NGO to do community profile and explain it as according to community rights guaranteed in 2007 Constitution to prove that their community has rights to manage natural resources. Human rights lawyers prepared evidences and explained the process of the case to the defendants, community leaders, community members and local NGO.

Thus it means that the participation and cooperation process involves active citizenship and more awareness about their rights, duties and responsibilities. The activities of 'Human Rights Lawyer Association' that included organizing trainings on human rights and community rights created space for information sharing among community members and human rights lawyer team. Moreover, trial observation activity that involved community members going to attend the hearing process lead to empowerment of the defendants.

This case also presents the aspect of alternative development that is demanded by the people. The people emphasize on their community way of living and demand for their rights to continue to practice such livelihood practices. The people present their rules and regulations of managing the natural resource of forests and ask the state to recognize these rules and regulations developed by the community. Through such court cases, they also ask for the recognition of their system of management of natural resources. The

decision of the judiciary is important as it can help in creating new norms and standards which could be used by the people as a tool for negotiating reforms in the laws and policies enacted by the state.

5.3 Recommendations

There is inconsistency between the laws in Thailand and rights of the communities to manage natural resources. There is an urgent need for reflection by the judiciary as to how it can interpret the existing laws relating to forests in consonance with the rights guaranteed in the Constitution.

The state and civil society needs to work together to create more understanding about the concept of community rights. State in this case includes the judiciary, prosecutors, court officers and administrative bodies. Civil society refers to villagers, NGOs, community organization, lawyers etc. There are gaps in understanding the concepts of community rights which increases the conflict between the communities and the state. The term “right” has often been misinterpreted to mean “ownership right” by Thai forest officers. This is one of the reasons why they strongly oppose any law on community forestry proposed by the civil society.

Prayoung Doklummyai had made this observation in “Public Forum program” Thai PBS Chanel, broadcasted on 11th December, 2010.

“If the state only adds the phrase ‘in accordance with community rights recognized in 2007 Constitution’, the practice of enforcement of the forest laws will change. The authorities will be able to apply the forest law without violating the rights guaranteed in constitution. Moreover, the judiciary will also be able to apply the standards of community rights while considering cases before it.”

This reform in laws and regulations should be considered to be reforms in public policy and should follow the same process. The drafting process should follow the policy cycle as required under public policy and should be a participatory initiative of the people and state. The cycle of policy formulation should involve development of the idea, formulation of relevant issues, discussion on the relevant issues and developing the framework for developing the issues. The policy should be formulated on the basis of a 'bottoms-up approach' and thus start with discussions on the existing problems faced by the communities depending on forest resources for their life and livelihood. Thus the state should just not follow the economic model of development but also take into account the principles of human development. Development plans and policies should put the people in the center and take their human security into account.

Before initiating such reforms the state should enhance the understanding of all relevant stakeholders about the existing practices of community management of natural resources and the different ways in which the interests of the state in protecting natural resources can be balanced with the rights of the communities to manage resources as per their customs. Thus the Forest Act 1941(B.E.2484), the National Park Act 1961(B.E.2504), the Wildlife Preservation and Protection Act1992 (B.E.2535), should be amended to create room for joint forest management by state agencies and local people.

For overall policy reforming, the State should development plans and policies should put the people in the center and take their human security into account. To ensure the rights of the people guaranteed in the Constitution and its can apply through process of people center development rather than industry lead development.

Civil society should develop awareness about the concept of community rights and empower the people to seek their rights. Therefore civil society should be produce approach strategy rather than solved the problem when got arrested. The civil society has to empower the people with information and knowledge so that they are able to participate in the policy making in a meaningful way. When communities are empowered, they can also actively struggle in seeking enforcement of their rights. As the

case of Ban Mae Om Ki showed, active citizenship was an important factor that affects the possibility of the judicial process.

At the level of state, the authorities should apply the human centered development approach while implementing laws and policies. They should not apply the law blindly without considering the context of the people.

In the court level, the judge should consider not only implementation of specific laws. They should also consider the case in the light of rights guaranteed in the Constitution. Moreover, the court should apply both legal and social conditions to consider the case. The court should play a role in creating space for justice and legitimacy for the way of life of the peoples and their communities. The court has to adopt legal pluralism and give recognition to values, rather than strictly emphasizing on the written law.

The model of Ban Mae Om Ki litigation can be a case study for other case that face similar problem on natural resources management. However, the court will play important role to consider the evidence from civil society side. If the court is not open to this kind of legal pluralism, the gap between law and development on one hand and social justice on the other will widen. UNDP (United Nations Development Programme) has stated that 'Good Governance' approach of the state involves creating an enabling environment within which the people can influence the direction and conduct of their governing institutions by including nine components; participation, rule of law, transparency, responsiveness, consensus of orientation, equality, effectiveness & efficiency and strategic vision (Pichat and Nilubon, 2004:42).

The possibility of judicial recognition of community rights concepts depends on the extent to which the court is able to consider other belief systems and social factors while interpreting the existing law. In reality, most of the judges look at the principles of law and consider if the given facts violate the principles or not. However in some cases, the courts look at the facts of a case in a holistic manner and consider whether the laws

are relevant to the given facts or not. Thus in the case of Ban Mae Om Ki, the court considered the fact on the occupation of the land more holistically that included examination of the history of the people, their way of life, their relationship to the land, their way of managing the land and forest resources as a community and the rules of using the forest resources as developed by them. And thereafter it found that the community had no intention of encroaching upon the forest land as alleged. In finding that the people had ‘no intention’, the court also gave recognition to the community’s way of life and the system developed by them for management of the forest resources. The court gave respect to the knowledge and practices of the community – a respect that is absent under the present framework of laws.

Human rights approach to development demands that the main objective all laws, policies and programs should be to fulfill human rights and strengthen the capacity of the people to exercise their rights. The Court through its decision in Ban Mae Om Ki exposed the fact that the existing laws and policies on forests have some serious gaps as they do not recognize the role played by communities in managing forest resources. In order to solve this issue and ensure that the benefits of development reaches to all people, the State has to address this gap.

The state has to have a strategic vision – and realize that people living in close connection with forests can have an important role in protecting such natural resources. And the state has to give recognition to the indigenous systems developed by such communities for management of such resources. Only then, can the goals of a human centered approach to development be achieved.

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ศูนย์วิทยทรัพยากร
จุฬาลงกรณ์มหาวิทยาลัย



APPENDIX

ศูนย์วิทยทรัพยากร
จุฬาลงกรณ์มหาวิทยาลัย

Appendix A: List of interviewees

Individual interviews

_____	Chief Judge, Lomsak Provincial court,(3August 2010)
_____	Judge, Lomsak Provincial court,(3August 2010)
_____	Chief Judge, Mae Sod Provincial court,(11August 2010)
_____	Judge, Mae Sod Provincial court,(11August 2010)
_____	Police Investigator, Mae Tan Police station, (20August 2010)
Chaleamcahi Kanmungmee	Human Rights lawyer, Center for the Protection and Restoration of local community rights, (25August 2010)
Janjira Junpaew	Human Rights lawyer, Director of Human Rights lawyer association,(18 August 2010)
Laofang Bandittheardsakul	Human Rights lawyer, member of Human Rights lawyer association and staff of Child Development Center and Community (20 August 2010)
Napaporn Songprang	Human Rights lawyer, Center for the Protection and Restoration of local community rights, (17 August 2010)
Pinkaew Luangaramsi,Ph.D.	Professor of Chiangmai University and researcher, (15August 2010)
Pongsak Issariyawinyu	Provincial prosecutor,(16August 2010)
Poonsuk Poonsukcharean	Human Rights lawyer, Human Rights lawyer association, (18 August 2010)

- Sathan Cheewawichaipong Child Development Center and Community, Rehabilitation and Development Association of the Salween River to ask assistance in terms of solution. Staff, (19 July 2010)
- Somsak Rangpern Director of Forest Resources Management 4, Tak province, (11 August 2010)
- Sumitchai Hatthasarn Human Rights lawyer, Director of Center for the Protection and Restoration of local community rights, (17 August 2010)

Group discussion

Ban Mae Om Ki community leaders and members, (19 July, 2010)

- Chatchai Pirojvirun Current village headman
- Di Pae Poh Defendant
- Nor Hae Mui Wanwicha Defendant
- Pirach Pirojvirun Ex-village Headman
- Somyot Rakpaochaodoi Ex-village Headman
- Apichat Kongkob Interpreter (Thai-Karen)

BIOGRAPHY

Sothonsinee Supanusorn was born in 1982. She obtained a Bachelor of Art degree in Interdisciplinary study of social science in Mekong Basin Studies major from Thammasat University in 2005. After she graduated, she worked with Bangkok Forum (NGO), youth and volunteer network coordinator. In 2007, she worked with Assumption University, secretary to chief of academic officer. At the same year she joined Au Pair program and spent one year in USA. In 2009, she got a chance to work in the position of program coordinator with Asian Institute for Human Right (NGO) and decided to study in MAIDS, Chulalongkorn University.



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