

Legislative Measures Related to Community Rights in Thailand and ASEAN Countries

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Abstract

The objective of the research is to study the laws relating to community rights in Thailand and ASEAN countries, as well as the basic international principles of community rights, particularly concerning the problem of access to and search for biological resources and control over natural resources within local communities, and offer recommendations on how to improve the laws relating to community rights in Thailand in order to bring them in better compliance with the principles of ASEAN. The researchers have used the qualitative method to study the laws relating to community rights in Thailand and ASEAN countries. With reference to documents, handbooks, scientific articles and websites of respective authorities, they have analyzed the existing legislation comparing it with the legislation in ASEAN countries. As a result it has been found that the problem of the control over natural resources still exists, ASEAN still does not have principles of direct support of community rights, and each member country still has issues between governmental and community institutions because of imperfection of the law and incoordination in many legal provisions. Besides, opinions about the access to and sharing of the benefits from natural resources differ in terms of procedures and regulations relating to natural resources and environment.

Keywords: Legislative measures, Community rights, ASEAN countries

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I. Introduction

“Community Rights” first appeared clearly in “The Universal Declaration of Human Rights”. Human rights are the rights that everyone is entitled to on an equal basis just for the reason that the person is human. The rights are based on the human’s consideration of nature, thus, they are rights which occur naturally for a person. At the moment, we do not look at human rights as natural rights only, we also understand that they are largely a result from ideologies and concepts that we human have “constructed” ourselves under different conditions and contexts of each society. The evolution of making demand for community rights have been around for a very long time in various venues such as in case of native tribes who have come together to ask for their rights as citizens. This is considered an important starting point which galvanizes the world to come to realization of the importance of recognizing uniqueness of races and origins and has given rise to making demands for various other things related to community rights in other communities around the world.

As for Thailand, it can be said that the phrase “human rights” (in Thai: “สิทธิมนุษยชน”) was first coined by Professor Saneh Jamarick and several other scholars (Sriwipat, Parichart, 2005), with the intention to express the spirit and the intellect of communities and to also bring back attention to such matters. The early development of human rights in Thailand was usually about “local community rights”, strictly in the sense of the rights according to local custom, traditions, way of life and local culture as well as rules used in managing forests and their resources that the community has observed for a long time. As to be expected, the rights are only limited to how to manage the forests, natural resources or community natural resources only. It was only later that the meaning of the phrase was developed to have wider meaning by also including wider, more abstract meaning -- not limiting to only the rights to make use of the local forest and its resources only (Jamarick, Saneh, 2001). The new definition, therefore, also covers the areas of group rights or community rights or collective rights over community resources, be it land, water, forest, genetic resources, local intellects, etc. Such rights are considered natural rights and it is only righteous if all members within the community come together to look after and make use of the natural resources together.

And because local communities survive and can sustainably develop themselves to have the rights to deny any external infringement that may have negative impact on the natural resources and environment of the communities, they are enabled to exist with dignity and ability to manage the lives within the communities and have the right to deny any external invasion on the basis of collective consciousness of the communities, along with the rights to build relationships between men and the natural world. Communities, established as a result of relationship with natural resources, have always been in development. Therefore, community rights can be considered a process that still connects with local culture, local intellects, as well as culture, custom, and tradition. They can also be used as tools to solve various conflicts within the communities in managing natural resources and the environment surrounding the communities. Furthermore, community rights can help build up collective consciousness and collective ideology of the community in encouraging and creating a self-reliance way of life and raising collective

awareness of personal rights and political rights one is entitled to under democracy, including one's duties in protecting the environment and natural resources, local intellect, good culture and tradition.

After Thailand ratified the ASEAN CHARTER in the 13th ASEAN Summit on 20 November 2007 in Singapore, Thailand became part and a member of AEC or Asean Economic Community, which aims to foster effectiveness within the organization with a people-centered approach, in order to ultimately signify ASEAN progress and unity among the 10 member countries to the international communities. And in so doing, in 2015, all member states must drive forward internal policies to ensure that the multinational integration can be accomplished and will help all member states to achieve all goals and objectives as laid out in the ASEAN Charter.

This is why it is very important that the internal laws and regulations of all member states and the legal enforcement of such laws and regulations must not violate any existing obligations or commitments of the international laws. All member states shall be held accountable upon violation. No member state can cite their own law as the reason to deny commitment and accountability according to relevant international laws. This must be done in order to ensure that our legal institutions are in line with the human rights principles and frameworks of the global communities. And such are the very reasons why raising awareness and encouraging community rights according to the law are very important and should be prioritized. The author of this research, likewise, recognizes the importance of studying and comparing the related legal frameworks of community rights of the Thai laws and the laws of other ASEAN countries.

II. Research Objectives

- 1) To study the laws related to community rights in Thailand.
- 2) To study the laws related to community rights in other ASEAN countries.
- 3) To make useful recommendations in order to improve the laws related to community rights in Thailand to be functional and appropriate.

III. Research Methodology

This research uses qualitative research methodology through collecting information by making comparative study of the laws related to community rights in Thailand and in ASEAN countries. The information largely comes from related documents, books, academic journals and websites of relevant government agencies. The information obtained is then analyzed using logic and legal theories as well as enforced legal frameworks.

IV. Research Results

The results of this research are divided into two parts, including legal measures related to community rights in Thailand and legal measures related to community rights in ASEAN countries. The specific details are as follows.

Legal Measures Related to Community Rights in Thailand

The principle of community participation in the management of local natural resources has been drafted and passed into law and legally enforceable in practice. In addition, the principles of the people's participation and community rights were included for the first time in the Constitution of the Kingdom of Thailand B.E. 2540 and also later in the Constitution of the Kingdom of Thailand B.E. 2550. In the Constitution of the Kingdom of Thailand B.E. 2540, Article 46, it states "People who have collectively come together as an original local community should have the rights to protect or invigorate local traditions, local intellects, and the arts or culture of both local community and the country as well as to be able to participate in the management and making use of all natural resources and the environment sustainably and with balance, or as permitted by the law."

Article 56 "The rights of individuals to participate with their state and communities in enriching and maintaining and retrieving benefits from natural resources and biodiversity, and in protecting, enhancing, and maintaining environmental quality to allow for normal and continuous existence in an environment that will not cause danger to the individual's health and hygiene, safety and security or expected quality of life. All individuals should be entitled to such rights and relative legal protection, or as permitted by the law"

Undertaking projects or activities that may result in drastic impact on the quality of the environment must not be done, except in cases where the individual has conducted thorough studies and evaluation on the possible impacts on the environmental quality alongside independent organizations, which shall include representatives from private environmental agencies and representatives from academic institution(s) who are responsible for an environmental study and providing opinions and recommendations before such projects can be undertaken, or as permitted by the law.

The rights of individuals to pursue legal actions against government agencies, state enterprises, local government authorities, or other government agencies to enforce their roles as legislated in the first and second paragraphs should entitle the individuals to the protection of the law.

From both articles of the B.E. 2540 constitution, it can be concluded that the constitution authenticates two types of rights for original local communities, namely the right to preserve or invigorate local custom and traditions, local intellect, local and national arts or culture and the right to participate with the state and the communities in maintaining and making use of natural resources and biodiversity in ways that will not cause dangers to the people's health, hygiene, welfare or their quality of life.

In addition, there have been other legislations in the form of Acts such as the Environmental Quality Promotion and Preservation Act B.E. 2535, the Plant Varieties Protection Act B.E. 2542, the Thai Traditional Medicine Promotion and Protection Act B.E. 2542, etc.

Later, in the B.E. 2550 Constitution, Section 12 on Community Rights, the authentication of the principles of community rights has been laid out in Article 66: The rights to preserve or invigorate local intellects, and natural and environmental resources as follows.

“Individuals who together comprise a community, a local community, or a local original community shall be entitled to preserve or invigorate local custom and traditions, local intellects, and both local and national arts and traditions. They shall also be allowed to participate in the management, maintaining, and making use of natural resources and biodiversity sustainably and with great balance.”

And in Article 67: The right to preserve, maintain, and benefit from natural resources, it states as follows.

“The right of individuals to participate with the state and their communities in preserving, maintaining, retrieving benefits from natural resources and biodiversity and also in protecting, promoting and preserving environmental quality to ensure normal and continuous way of life in an environment that will not result in dangers to their health, hygiene, welfare, or quality of life. The individuals who exercise such right should be protected by the law as appropriate. ”

No project or any activity that may result in severe damages or impacts on the communities whether in terms of environmental quality, natural resources, or personal health and hygiene shall be undertaken, unless thorough studies and evaluations have been conducted on the likely effects on the quality of the environment and the health of the people within the community. Additionally, there should be public hearings held for the people and all parties and stakeholders. Independent organizations consisting of representatives from private health and environmental organizations and representatives from academic institutions who have conducted environmental studies or natural resource studies or public health studies shall also provide opinions before such project can be permitted.

The rights of communities to pursue legal actions against government agencies, state enterprises, local government authorities or other state agencies that are legal entities to enforce their roles according to these acts should warrant their protection under the law.”

Furthermore, the Constitution of the Kingdom of Thailand B.E. 2550 also has provisions in Section 5 regarding the Basic State Policy Approaches, specifically in Part 10: Policy Approaches for People Participation which specifies that the state must operate in line with the policies designed to encourage the people’s participation. The specific details are as follows.

1. Promote the people’s participation in determining policies and planning for economic and social development both at the national and local level.

2. Promote and encourage the people's participation in making political decisions, social and economic development plans as well as providing public services.
3. Promote and encourage the people's participation in investigating the use of public power at all levels in the form of professional organizations or various occupations in other forms.
4. Promote and provide support to enhance the general public political awareness and legislate provisions to allow for the citizens' political development fund to assist with public activities of the communities and provide support to groups of citizens who have come together as networks to be able to express their opinions and make recommendations about what the people in the area/communities require.
5. Promote and educate people on issues related to political development, the awareness and understanding of Democracy with the King as the Head of State (Constitutional Monarchy). This also includes encouraging people to be able to vote with righteousness and integrity.

Thailand has ratified the Convention on Biological Diversity : CBD by making "The Draft for Biological Diversity Safety from Modern Biological Technologies B.E...." and "The Regulation of Biological Diversity Preservation and Utilization Committee" on the criteria and methods in accessing biological resources and retrieving benefits from biological resources B.E. 2554 (Under the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity). In addition, there were also management plans with regard to community forests through the policy-making on natural resources and environmental management in the 7th Economic and Social Development Plan (B.E. 2535 – 2539) and making public announcement on water quality for consumption and for surface water, sea water, coastal waters, waste water from buildings and industrial facilities. In terms of air, there are measures implemented such as standards of air quality from sources like industrial facilities and vehicles or standards for noise level, quality and relevant measures of controls. There are also standards for toxic substances and measures of control. This also includes measures for the protection and preservation of natural resources announced through various laws and regulations, for example, the National Environmental Quality Promotion and Preservation Act B.E. 2535, the Promotion of National Cleanliness and Orderliness Act B.E. 2535, the Forestry Act B.E. 2484 with additional amendments B.E. 2485, the National Parks Act B.E. 2504 and the National Wildlife Conservation and Protection B.E. 2535.

Legal Measures Related to Community Rights in ASEAN

There is no clear principle laid out for community rights in ASEAN. However, there have been managements under the Convention on Biological Diversity : CBD. All ASEAN member countries expressed concerns about the preservation of biological diversity, as can be seen from the collective ratification of CBD and close collaboration in determining strategic plans for the management of biological diversity. And even if many

countries still use the same existing law, there have been attempts to draft new law and revise those existing law to be more in line with both the Cartagena Protocol and the Nagoya Protocol.

Many ASEAN member countries continue to face problems arising from limited budgets in trying to raise collective awareness and promoting the people's participation. This is why many countries still need both financial aid and technical assistance from international organizations. In some countries, the laws and regulations to promote and conserve biological diversity and safety from genetically modified products have been put in place.

The Philippines Prior to ratifying the Convention on Biological Diversity, the Philippines government issued Executive Order 247 (1993) for Prescribing Guidelines and Establishing a Regulatory Framework for the Prospecting of Biological and Genetic Resources, Their By-Products and Derivatives for Scientific and Commercial Purposes and for Other Purposes. The order came into effect in 1995. This law is considered the first law in the world on the issue of granting access and encouraging benefit-sharing with regard to natural resources (Medaglia et al, 2010: 31). In addition, there are many more related rules and regulations such as Executive Order 514 (2006) on National Biosafety Framework which directly responded to the Cartagena Protocol [Philippine First Regular National Report on Implementation of the Cartagena Protocol on Biosafety, 2007] and the Wildlife Act (2001) which directly responded to the Nagoya Protocol, specifically in that it permits individuals to take genetic resources from the forest to study and conduct research in order to develop for commercial use in the future. It is important to note, however, that all actions must be carried out while taking into account the culture and traditions of local communities and native tribes as well as the conditions for practice, bioprospecting fees, royalty payments, and up-front payments, or any other non-monetary benefits and penalties in case of violations. The most important thing is that the law of the Philippines allows civil society to actively participate in the investigation on the working and undertaking of those who make use of such resources and related government agencies as the entities responsible for authorizing such actions/projects.

Vietnam Vietnam has passed specific laws and regulations on biological diversity such as Regulation on Management of Biological Safety of GMOs, products and goods originating from GMOs (2005) Decision 79/2007/QD-TTg (Control over the sales and distribution of GMO products with risk evaluation, product labelling, research studies and community participation on biosafety issues) and Biodiversity Law 2008. The laws and regulations in place come into existence partly because the Vietnamese government wants to actively and continually promote investments and development in Biotechnology within the country. (Vietnam National Action Plan to 2020 for Implementation of Cartagena Protocol on Biosafety, 2004; and Vietnam First Regular National Report on the Implementation of Cartagena Protocol on Biosafety, 2007)

Malaysia The government of Malaysia has made "Guideline on the Release of Genetically Modified Organisms to the Environment" to be in line with the Cartagena Protocol on Biosafety. The government also issued the Biosafety Act 2007 in support of

the missions laid out in the Protocol on issues of LMOs and GMOs, especially in the aspect of product import and usage within the country. Currently, the government is considering the Bill on Access and Benefit Sharing. As for the local governments in areas with great biological diversity, they have taken necessary steps to control biological and genetic resource usage, as seen from Sarawak Biodiversity Center and Sabah Biodiversity Center. In any event, the central government agencies, such as the Department of Forestry will be responsible for issuing the permit/license to take and make use of the plants and other organisms from the forest. The main emphasis will be given to the use for academic purposes and research benefits. As for the procedures for granting access to such natural resources, this still largely depends on the laws and regulations of each Malaysian state (Malaysia First Regular National Report on Implementation of the Cartagena Protocol on Biosafety, 2007 and Medaglia et al, 2010:31).

Indonesia The government of Indonesia has moved forward with Biosafety Clearing-House. However, there are still some problems with translating the information into English. Furthermore, the capacity of their personnel is rather limited, so it is necessary that they must rely on technical assistance from international organizations. In any case, the existing laws and regulations in Indonesia do comply with the procedures as recommended in the Cartagena Protocol on Biosafety. However, there are still many laws and regulations that are still under improvement to comply more with the missions and objectives of the Protocol. This is especially the case for informing and controlling LMO product import [Indonesia First Regular National Report on the Implementation of the Cartagena Protocol on Biosafety, 2007] and the law called GR No.21/2005 (Biosafety of Genetically Engineered Products) to protect and preserve the environment and the health of the general public in accordance with the principle of Safety First.

Cambodia In the case of Cambodia, in operating in line with the Cartagena Protocol on Biosafety, the rules, regulations, and activities within the country on the preservation of biological diversity is rather limited even if Biosafety Clearing-House has been established. This is for various reasons: one of them being the fact that Cambodia has never really made any MOU with the international community on importing and exporting LMO products. Furthermore, as of the moment, there is no internal law regulating movement of LMO products. However, the government of Cambodia has made the National Biodiversity Strategy and Action Plan to promote the development of Biotechnology and protection of the environment within the country from the use of LMO products along with the National Law on Biodiversity 2008 (Cambodia First & Second Regular National Reports on Implementation of the Cartagena Protocol on Biosafety, 2007 & 2011).

Myanmar Currently, Myanmar is in the middle of the law making process to provide legal support to biosafety-related work operations such as in the Biosafety Framework (Myanmar First Regular National Report on Implementation of the Cartagena Protocol on Biosafety, 2008).

V. Discussion

Since Thailand became a member of the Convention of Biological Diversity, Thailand has issued and made improvements to existing laws and regulations to be more in line with the Convention. More specifically, the principles of granting access and benefit-sharing with regard to making use of genetic resources appear in many Thai laws and regulations. Each law and regulation is, however, still different in its essence, depending largely on the objectives of issuing the said laws and regulations. In short, the issues of the promotion and protection of biological diversity appear in both primary and secondary laws. As for other ASEAN countries that the author has studied, the first being the Philippines, after joining as a member with the Convention of Biological Diversity 1992, the government of the Philippines has issued laws and regulations granting access and encouraging benefit-sharing of natural resources. The laws have come into effect and existed in two separate laws, namely, Executive Order No. 247 which is used to regulate making use of biological resources by authorizing relevant government authorities to deliberate and grant permission in a decentralized manner. In other words, researchers can request for access to specific biological resources within the areas or original sources for biological resources by asking for permission directly to the government authorities in charge of that particular area. This manner of practice is in line with the principles of the convention which aims to encourage people and community participation in the management of natural resources that will, in turn, promote and support the rights of the communities and the rights of local citizens. In addition, a special committee called Inter Agency Committee on Biological and Genetic Resources has been established under the Department of Environmental and Natural Resources : DENR. The Department of Environmental and Natural Resources controls various departments and agencies to serve as central organizations and operate in line with Executive Order No. 247. The departments and agencies process and authorize requests for research studies. Those who wish to conduct research studies on natural and biological resources of the Philippines must submit an official request to the Biological and Genetic Resources Committee. The request/application must include details such as the objectives, sources of funding, duration of research studies or operations, list and the total amount of biological resources that need to be used. A copy of the application with all the specific details must be sent to community leaders or representatives of nearby communities. Once explicit consent is obtained from all related parties and stakeholders, the research team may then access and utilize the biological resources. As such, the relevant parties who have a say in allowing access and utilization of biological and genetic resources are local communities and local government officials. Once the access is granted, the applicant(s) must sign an agreement, which can be divided into two separate categories: Academic Research Agreement : ARA or Commercial Research Agreement : CRA.

In any event, the enforcement of Executive Order No. 247 still poses many problems. This ultimately results in how the Philippine government chooses to revise the laws and determines new regulations for granting access and allowing benefit-sharing with regards to biological resources under the 2001 Wildlife Resources Conservation and Protection Act.

The objectives of the 2001 Wildlife Resources Conservation and Protection Act include protecting and conserving wildlife and their natural habitats within the country with provisions and various regulation on the access and benefit-sharing of biological resources. The Department of Environmental and Natural Resources also revoked the rules and regulations under Executive Order No. 247.

Later, in B.E. 2547, the Philippine government made an official operational approach for all activities related to accessing biological resources. From that moment on, no matter whose authority on access to biological resources is under, the process for acquiring such access must strictly accord with the official operational approach. More specifically, all research studies, compilations and utilizations of biological resources must be done and achieved under relevant rules and regulations. Those who wish to pursue such research studies and access to the resources must notify relevant parties and stakeholders beforehand and must also make an agreement with local communities and all stakeholders and in the event that the applicants are foreign nationals, the agreement must also be made with relevant local government agencies.

VI. Conclusion and Suggestion

From the study on the legal measures related to community rights in Thailand and in ASEAN, on the issue of access to biological resources and rights of surrounding communities in the co-management of such natural and environmental resources, there are still some problems in the co-management of natural resources. The problems are usually in the form of problems between government agencies or government and private agencies, or private agencies and private agencies. These problems usually arise from errors and disparities in the law. For example, at the ASEAN community level, the issue of community rights and the plans for community rights are not clear. They are simply minor requirements, even if ASEAN has prepared the ASEAN Framework Agreement on accessing and sharing benefits arising from utilizing biological resources and genetic resources fairly and equitably. At present, however, there has not been any action or operation under the framework agreement. This is partly because many ASEAN countries disagree on the extent of granting access and sharing the benefits derived from making use of natural and biological resources. These countries include Malaysia, the Philippines and Indonesia which similarly place highest importance on sharing the various benefits derived from biological resources. At the same time, Singapore has already come up with policies to support the mechanisms for practical operation. As for Myanmar, Laos, Brunei, Vietnam, and Cambodia, the policy on such issues is not clearly specified, with appropriate legal measures and regulation still largely absent.

On the issue of the rules and regulations as well as other legal measures for the management of natural and environmental resources, ASEAN countries have been cooperating well. There are working committees on various issues as well as many international framework agreements established for the management of natural and environmental resources. Moreover, the intra-regional cooperation help ensures good operations. In each ASEAN country, there are special sets of rules and regulations issued to ensure fair and equitable management of natural resources and people participation in

such management in order to conserve and maintain all precious environmental resources sustainably and with balance.

As such, community rights are important rights that must be permitted and supported by the law to ensure good management of vital resources, both natural and man-made within one's community. And because people living in the communities are the individuals who know their community the best in terms of what should be done, what should occur, what to fix and what to restore -- these are things that people actually living in the community will know best. Thus, in many countries, local government authorities are usually responsible for making decisions on related policies in the management of vital natural and environmental resources within their area of responsibility. Such countries include the Philippines, Thailand, etc.

As for the community rights with regard to accessing and managing biological resources, from the case studies in Thailand and the Philippines, it appears that there are clearly defined laws, rules and regulations for the management of community natural and environmental resources. In these countries, all access can be granted once permission and explicit consent from relevant government organizations and surrounding communities have been obtained respectively. On a more formal note, the applicant must also sign an agreement to ensure that their work operations are in line with the original agreement. This also includes sharing all of the benefits that may arise from such research and studies. In its essence, the requirement is in line with the agreement laid out in the Convention for Biological Diversity.

In any case, conserving natural resources and the environment is something that shall be embraced by all people. The attempt will most likely be successful if all people within the same community collectively push forward and abide by the requirements as their cultural constitution. It should be a legitimate right of the people in a community to choose to live or not to live in a specific environment. This will give leverage to the people in such community to negotiate with state authorities and allow for co-management of natural resources. And in the long run, this will help solve the problems of excessive state dominance in both decision and policy making. It is also important to always remember that the management of resources must still be in harmony with the social and cultural context and historical context. This will help improve the strength and collaboration within the community and solve the problems of socio-economic disparities, which is one of the most important and decisive factors to bring about a fair and equitable society.

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