

MACQUARIE UNIVERSITY LAW SCHOOL

Environmental Protection and Community Rights

The Constitution, Mining and the Enforcement of Community Rights for People in Rural Thailand

Aschara Chinniyompanich

Thesis submitted in fulfilment of the requirements for the degree of Master of Research

Macquarie University Law School

Submitted on 13 January 2017

ENVIRONMENTAL PROTECTION AND COMMUNITY RIGHTS : THE CONSTITUTION, MINING AND THE ENFORCEMENT OF COMMUNITY RIGHTS FOR PEOPLE IN RURAL THAILAND

Table of Contents

1. Introduction	1
2. The Problem	7
3. Methods	9
3.1 Scope and Limitation	10
4. Community Rights and Sustainable Development in Mining	13
4.1 Community Rights as Collective Rights	17
4.1.1 Community Rights Acts	19
4.2 Mining and Sustainable Development	19
4.2.1 The Pros and Cons of Mining Activities	23
4.2.1.1 Social Impact	23
4.2.1.2 Environmental Impact	26
4.2.1.3 Case Study : Boliden Apirsa SL Zinc Mine, Spain	27
4.2.2 Governance and Mining	28
5. Community Rights and Mining in Thailand	29
5.1 Community Rights and Legal System in Thailand	30
5.2 Community Rights in Thailand's Constitution	32
5.2.1 The 1997 Constitution	32
5.2.2 The 2007 Constitution and the 2014 Interim Constitution	33
5.2.3 The 2016 Draft Constitution	35
5.3 Community Rights in Thai Laws	36
5.4 Mining in Thailand	38
5.4.1 Mining Legislation	39
5.4.2 Environmental Legislation	41
5.5 Case Studies	43
5.5.1 The Akara Gold Mine	43
5.5.2 The Rock Mine in Dongmafaai	46
6. Community Rights and Mining in Australia	48
6.1 Community Rights and Legal System in Australia	49
6.2 Community Rights in Australia's Constitution	52
6.3 Mining in Australia	55
6.3.1 Mining Legislation	56
6.3.2 Environmental Legislation	58

6.3.3 Community Engagement	60
6.4 Case Studies	61
6.4.1 The Argyle Diamond Mine	61
6.4.2 The Xstrata Coal Beltana Mine	64
7. Analysis	65
7.1 Closing the Gap	66
7.1.1 <i>Community Rights Act</i>	66
7.1.2 Improving Community Engagement in Thailand	68
7.1.3 Co-benefits	69
7.2 Environmental, Social and Cultural Protection	70
7.3 Industry and Sustainable Mining	71
8. Conclusion	72
BIBLIOGRAPHY	78
APPENDICES	
Appendix 1: Provisions of Community Rights in the <i>1997 Constitution</i>	90
Appendix 2: Provisions of Community Rights in the <i>2007 Constitution</i>	91
Appendix 3: Provisions of Community Rights in the <i>2016 Draft Constitution</i>	92
Appendix 4: Summary of Community Rights in Thailand's <i>Constitutions</i>	93

ABSTRACT

Since 1945 human rights have been included in state obligations and duties in the *Charter of United Nations* and other legal agreements. These instruments describe the need to respect, protect, and fulfil the rights of people of every nationality, place of residence, gender, ethnicity, colour, religion, language, or other status. Human rights have been further elaborated in the context of community or group rights as third generation rights. They are sometimes referred to as ‘solidarity rights’ and mentioned in many international contexts such as in the *Universal Declaration of Human Rights*, the *Rio Declaration*, the *Convention on Biological Diversity* and its *Nagoya Protocol*. This third generation of human rights includes rights to goods, such as development, peace, a healthy environment, communication, humanitarian assistance, and a share in the common heritage of mankind.

Community rights, pertaining to environmental protection have been included in the *Constitution of the Kingdom of Thailand* since 1997. However, cases have been reported of violations of the written law and the enforcement of community rights. These cases provide the evidence of a gap between the law and its enforcement. This study investigates this gap, particularly in relation to community rights and the mining of natural resources in rural localities in Thailand. Australian laws and practices provide the comparative context for this investigation, including some case studies. This study proposes ways of closing the gap between the Constitution and its enforcement that will aide Thailand’s future strengthening of community rights and environmental protection for rural people. These proposals include: a Community Rights Act, policies and additional inclusions in the current legislation.

I certify that this work has not been submitted for a higher degree to any other university or institution.

.....

Aschara Chinniyompanich

Signed by: Aschara Chinniyompanich

1. INTRODUCTION

The enforcement of community rights articulated in the Thai *Constitution* is ineffective. An investigation of the National Human Rights Commission of Thailand (NHRC) revealed that many government agencies have violated communities' rights in the process of granting mining concessions.¹ Therefore, the aim of this study is to identify the gap between the constitutional provisions for the community rights of local communities in Thailand's rural areas and the enactment of those provisions. Cases that are disadvantaging rural communities are of particular interest in terms of the impact of the environmental damage caused by mining and the unequal sharing of income derived from the exploitation of mineral resources. Enforcement measures and/or the lack of them are investigated in this study with a view to protecting the environment and rural communities' rights related to mining activities.

The term "Community"² is derived from the Old French *communauté*, rooted from the Latin *communitas*, and is a broad term for fellowship or organised society. In Sociology, there were approximately ninety-four various definitions of the term by the mid-1950s.³ However, Willis Sutton and Juri Kolaja noted that:

Community' is defined as a number of families residing in a relatively small area within which they have developed a more-or-less complete socio-cultural system imbued with a collective identity, by means of which they resolve problems that arise from the sharing of an area.⁴

There are different types of community which are defined using various criteria. Some communities are linked to a specific place, others are formed through space (e.g. internet community) and or culture (e.g. religious community). The theory of *Gemeinschaft* explains that in the ordinal or natural state there is a complete unity of human wills, therefore community life develops in permanent relation to a field and dwelling house.⁵ The definitions surrounding, what is a community, are controversial. This study is adopting the definition of

1 National Human Right Commission, *2014 Human Rights Evaluation Report and Annual Report 2014 of the National Human Rights Commission of Thailand* (Office of the National Human Right Commission, 2015) 98-99, 105 (in Thai).

2 David Studdert, *Conceptualising Community : Beyond the State and Individual* (Palgrave Macmillan, 2005) 27.

3 Peter Singer, Dan Callahan, and Ruth Chadwick, *Encyclopedia of Applied Ethics* (Elsevier Science, 2nd ed, 2012) 524.

4 Willis A Sutton and Jiri Kolaja, 'The Concept of Community' (1960) 25(2) *Rural Sociology* 197, 197.

5 Jose Harris (eds), *Tonnies : Community and Civil Society* (Cambridge University Press, 2001) 37.

“Community” as a social group in which members share interests and concerns from basic needs such as clean water, food, shelter, and a clean environment⁶ which is signified through its social will as concord, custom, and religion⁷ by exercising their collective rights. These rights also exist in a broader context where collective interests are sufficient to ground duties.⁸ This meaning is also adopted in the Thai *Constitution* when describing communities. A “Traditional Community” is further defined in the Constitution as a group of people who form a local community as their core base for living by employing management methods and conserving natural resources in a more balanced and sustainable way than in the past.⁹ This type of community’s rights is affirmed in the Thai *Constitution*.¹⁰

As James Nickel confirmed, human rights are fundamentally international moral and legal norms for protecting people from social, political, and legal abuses. They exist independently of such acceptance and may not effectively prevent these abuses until they are widely accepted and legally implemented at international and national levels.¹¹ In aspects of environmental law, Joseph Sax concluded, in the context of environmental rights, that there are three basic precepts to protecting the environment. There are, fully informed open decision-making based upon free choice, protection of all at a baseline reflecting respect for every member of the society, and a commitment not to impoverish the earth and narrow the possibility of the future.¹²

In 1948, the idea of basic human rights was entrenched in the adoption of the *Universal Declaration of Human Rights* (UDHR)¹³ in Paris by the United Nations General Assembly, and since then, human rights have been developed into three generations¹⁴ which

6 Ibid.

7 Ibid, 257.

8 Dwight Newman, *Community and Collective Rights, A Theoretical Framework for Rights held by Group* (Hart Publishing, 2011) 55.

9 Constituent Assembly of Thailand, *Intention of the Constitution of the Kingdom of Thailand B.E. 2007*, Secretarial of Parliament : Bangkok (2007) 59.

10 *Constitution of the Kingdom of Thailand B.E. 2540* (1997) (Thailand), 11 October 1997, s 46; *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), 24 August 2007, s 66.

11 James W Nickel, ‘The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification’ in Dinah L Shelton (eds), *Human Rights and the Environment Volume I* (Edward Elgar Publishing, 2011) 23.

12 Joseph L Sax, ‘The Search for Environmental Rights’ in Dinah L Shelton (eds), *Human Rights and the Environment Volume I* (Edward Elgar Publishing, 2011) 3, 3.

13 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A, UN Doc. A/810 (1948).

14 Karel Vasak, ‘A 30-year Struggle’ in Rene Caloz (eds), *UNESCO Courier* (Unesco, 1977) 29, 29.

were linked by the tripartite motto of the French Revolution.¹⁵ These three generations are cumulative, overlapping, interdependent and interpenetrating.¹⁶ The first of which is civil and political rights (*liberté*), the second is economic, social and cultural rights (*égalité*), and the third is the solidarity rights (*fraternité*).¹⁷ The third category is the most debated and lacks both legal and political recognition, as well as being at odds with the indivisibility of rights, since it is implicitly stated that some rights can exist without others.¹⁸ One of which is community rights which embrace six claimed rights: the right to political, economic, social and cultural self-determination; the right to economic and social development; the rights to participate in and benefit from the common heritage of mankind; the right to peace; the right to healthy and sustainable environment; and the right to humanitarian disaster.¹⁹ Therefore, community rights in an international context are presaged through international human rights legal instruments, such as; Article 1 and 47 of the *International Covenant on Civil and Political Rights* (ICCPR),²⁰ and Article 1 and 25 of the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR).²¹ These community rights in international context include, but are not limited to, the right to self-determination, the right to development, the right to clean and sustainable environment, and the right to peace.²² However, collective rights remain extremely controversial to the rest of the world²³ which they are challenge and complex which are demanded discussion.²⁴

-
- 15 P H Kooijmans, 'Human Rights – Universal Panacea? Some Reflection on the So-called Human Rights of the Third Generation' (1990) 37 *Netherlands International Law Review* 315, 315.
 - 16 Burns H Weston, 'Human Rights : Concept and Content' in Richard Pierre Claude and Burns H Weston (eds), *Human Rights in the World Community : Issues and Action* (University of Pennsylvania Press, 3rd ed, 2006) 17, 21.
 - 17 Ibid, 21.
 - 18 Ibid, 17, 21.
 - 19 Ibid, 22.
 - 20 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
 - 21 *International Covenant on Economic, Social, and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
 - 22 Richard Pierre Claude and Burns H Weston, 'Community or Solidarity Rights – Group Rights' in Richard Pierre Claude and Burns H Weston (eds), *Human Rights in the World Community : Issues and Action* (University of Pennsylvania Press, 3rd ed, 2006) 235, 235.
 - 23 Jolan Hsieh, *Collective Rights of Indigenous Peoples : Identity-Based Movement of Plain Indigenous in Taiwan* (Routledge, 2006) 43.
 - 24 Newman, above n 8, 10.

Community rights pertaining to environment are specifically mentioned in Principle 22 of the *Rio Declaration*²⁵ for the community's role in the sustainable protection of the environment, focusing on the importance of knowledge and traditional practices for environmental management and development. This Declaration also confirmed all governments' duty to recognise, support and facilitate the identity, culture and interests of communities and their effective participation in the achievement of sustainable development.

In addition, the *United Nations Convention on Biological Diversity* (CBD)²⁶ recognised community rights in term of indigenous and local communities who have close links to biological resources.²⁷ Moreover, in 2010, the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity* (NP)²⁸ mentioned community rights in term of stewardship of the environment. However, community rights in this study is limited to the right to political, economic, social, and cultural self-determination; the right to economic and social development; and the right to healthy and sustainable environment since these three claimed rights are directly relevant to mining activities and the environmental protection for local communities in rural areas of Thailand.

In Thailand, community rights have been firstly included in the *Constitution of the Kingdom of Thailand B.E. 2540*²⁹ (the 1997 Constitution)³⁰ since 1997. However, according

25 *1992 Rio Declaration on Environment and Development*, 14 June 1992, UN Doc. A/CONF.151/26 (1992), Principle 22 "Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development."

26 *United Nations Convention on Biological Diversity*, opened for signature 5 June 1992, 31 UNTS 818 (entered into force 29 December 1993).

27 *United Nations Convention on Biological Diversity*, opened for signature 5 June 1992, 31 UNTS 818 (entered into force 29 December 1993), Article 8 (J) "Each Contracting Party shall, as far as possible and as appropriate: Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices."

28 *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity* (Nagoya, 30 October 2010). For information on CBD COP10, See, CBD Secretariat, COP 10 (CBD, undated), available from <<http://www.cbd.int/cop10/>>; Earth Negotiations Bulletin, Tenth Meeting of the Conference of the Parties to the CBD: Summary Highlights of the Meeting (IISD, 2010), available from <<http://www.iisd.ca/biodiv/cop10/>>.

29 Thailand has adopted the Thai Solar Calendar, which is somewhat different from the Christian Calendar. Years are counted according to the Buddhist Era, which is 543 years greater than the Christian Calendar used in western countries.

to the Monitoring Report of the National Human Rights Commission,³¹ 904 claims of human rights violations have required monitoring actions in the period between 2012 and 2015. The highest number of claims requiring investigation related to community rights (266),³² these 266 cases were reported violations of the written law pertaining to the enforcement of community rights and environmental degradation.³³ These statistics reflect the need for enforcement of community rights as articulates in Thailand's *Constitution*.

Since Thailand is based on a civil legal system, the *Constitution* is the supreme law and its fundamental laws are codified. The National Assembly legislates Acts that concern important social and economic laws and these Acts grant each related government agency the authority to legislate royal proclamations, ministerial regulations, orders, notifications, royal decrees, and rules.³⁴ Therefore, although community rights are affirmed in the *Constitution*, the related government agencies do not necessarily recognise the protection of those rights and protect them in practice. Although the protection of human rights is confirmed to be a duty of the NHRC, its power is limited to examining and reporting the commission or omission of acts that violate human rights or fail to comply with the obligations in international treaties, and then propose remedial measures for the relevant agency to take action. In cases where the proposed measures appear not to have been taken, the NHRC must report it to the National Assembly for further action.³⁵

This study aims to identify the gap between the constitutional provisions for community rights for local community in Thailand's rural areas and their enactment. Of particular interest are the cases that are disadvantaging rural community in term of the impact of the environmental damage causes by mining and the inequitable sharing of income derived from the exploitation of mineral resources. This study investigates enforcement measures and/or lack of them, to protect environment and rural communities' rights relating to mining activities. Mary Kaidonis and Natalie Stoianoff confirmed that the "oil, mining and gas

30 *Constitution of the Kingdom of Thailand B.E. 2540* (1997) (Thailand), 11 October 1997, s 46, s 56.

31 National Human Rights Commission, *Statistics of Monitoring Report on the National Human Rights Commission's Examination Report of Human Rights Violation 2002 – 2015* (10 January 2017) <<http://www.nhrc.or.th/getattachment/f2a58b27-77cf-40d7-87ce-c24660bde97c/%E0%B9%80%E0%B8%A3%E0%B8%B7%E0%B9%88%E0%B8%AD%E0%B8%87%E0%B8%97%E0%B8%B5%E0%B9%88-1.aspx>> (in Thai).

32 Ibid, 1.

33 Ibid, 2.

34 Joe Leeds, 'Introduction to Legal System of the Kingdom of Thailand' November/December 2008, 1-2, Law for ASEAN by the Office of the Council of State of Thailand (1 January 2017) <<http://web.krisdika.go.th/asean/index.php/downloads/index/4>>.

35 *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), 24 August 2007, s 257.

sectors offer short-term economic benefits to both the companies and the developing countries in which they operate. However, the long-term environmental and social costs are borne by local communities and indigenous peoples outweigh the benefit accrued.”³⁶ These mine projects often displace local populations, exploit their natural resource base, and interfere with, or destroy, their livelihoods and culture, on which they may depend.³⁷ Local communities are often vulnerable for several reasons, including; the lack of knowledge or experience to defend their rights, poor education, limited access to resources,³⁸ and access to legal representation. The frequent neglect or repression of rural communities by national governments is a more pervasive structural problem.³⁹

The thesis discusses the problem and investigates it through legislation in Thailand. Case studies of a gold mine in Pichit, ‘*Mr. Suppawit Meema and 48 people V Akara Mining Ltd.*’⁴⁰ (hereinafter is called the *Akara Case*) and a rock mine in Nongbualampoo, ‘*Phupa-Pamai Forestry Conservation Club by Mr. Sompong Shinsaeng and 340 people*’⁴¹ (hereinafter is called the *Dongmafaai Case*) provide the evidences of the lack of enforcement of the constitutional provisions of community rights. Some comparative research describes community rights in international law and Australian laws, together with Australian case studies provide a more expansive consideration of the problem. The case studies illuminate how Australian legislation and legal measure respond to the challenges of community rights and the environment. Finally, the analysis and concluding chapters will inform and aide Thailand’s future enforcement of community rights for rural people. These include a proposed Community Rights Act and/or other related policies and additional inclusions in the current legislation.

36 Mary A Kaidonis and Natalie P Stoianoff, ‘Legislation, Citizen’s Rights, and the Self-determination of a Developing Country: A Papua New Guinean Case Study’ in Paddock L et al (eds), *Compliance and Enforcement in Environmental Law Toward More Effective Implementation* (Edward Elgar Publishing, 2011) 591, 591.

37 Daniel Magraw and Lauren Baker, ‘Globalization, Communities and Human Rights: Community-based Property Rights and Prior Informed Consent’ in Dinah L Shelton (eds), *Human Rights and the Environment Volume I* (Edward Elgar Publishing, 2011) 762, 762.

38 Ibid.

39 Ibid, 763.

40 National Human Rights Commission of Thailand’s Examination Report No. 67/2549, *Mr. Suppawit Meema and 48 people V Akara Mining Ltd.* (in Thai).

41 The National Human Rights Commission’s Decision Report No. 26/2548, *Phupa-Pamai Forestry Conservation Club by Mr. Sompong Shinsaeng and 340 people*’ (in Thai).

2. THE PROBLEM

Thailand's supreme law, its *Constitution* has recognised community rights pertaining to environmental protection under the *1997 Constitution*⁴² for almost two decades. Later versions of the *Constitution*: the *Constitution of the Kingdom of Thailand B.E. 2550* (the *2007 Constitution*),⁴³ the *Constitution of the Kingdom of Thailand (Interim) B.E. 2557* (the *2014 Interim Constitution*),⁴⁴ the *Draft Constitution of the Kingdom of Thailand B.E. 2558* (the *2015 Draft Constitution*),⁴⁵ and the *Draft Constitution of the Kingdom of Thailand B.E. 2559* (the *2016 Draft Constitution*)⁴⁶ continually confirmed protection of community rights in slightly different contexts.⁴⁷ In general, the *Constitution* affirms community rights, cultural rights, and environmental rights includes the rights to participate in the management, maintenance, preservation and exploitation of natural resources and the environment in a balanced and persistent fashion,⁴⁸ the right to participate in the preservation and exploitation of natural resources and biological diversity, the right to live in a healthy environment, and the right to access justice.⁴⁹

42 *Constitution of the Kingdom of Thailand B.E. 2540* (1997) (Thailand), 11 October 1997, s 46, s 56. See Appendix 1 for provisions of community rights in the *1997 Constitution*.

43 *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), 24 August 2007, s 66, s 67. See Appendix 2 for provisions of community rights in the *2007 Constitution*.

44 *Constitution of the Kingdom of Thailand (Interim) B.E. 2557* (2014) (Thailand), 22 July 2014, s 4; *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), 24 August 2007, s 66, s 67.

45 *Draft Constitution of the Kingdom of Thailand B.E. 2558* (2015) (Thailand), s 63, s 64. However, the draft constitution was turned down by the National Reform Council (NRC) on 6 September 2015 before it was sent to the referendum; Royal Thai Embassy, *Summary of the Briefing by Mr. Norachit Sinhaseni, Member and Spokesperson of the Constitution Drafting Commission to the Diplomatic Corps on the Drafting of the Constitution* (10 January 2017) available from

<<http://www.thaiembassy.org/bucharest/contents/files/news-20151022-155949-215002.pdf>>; Thomas Fuller, 'Thailand's Military Junta Rejects Draft Constitution', *The New York Times* (online), 6 September 2015 <http://www.nytimes.com/2015/09/07/world/asia/thai-draft-constitution-rejected-by-junta-backed-council.html?mid=tw-share&_r=1>; Shawn W. Crispin, 'What Thailand's Rejected Constitution Means', *The Diplomat* (online), 8 September 2015 <<http://thediplomat.com/2015/09/what-thailands-rejected-constitution-means>>.

46 *Draft Constitution of the Kingdom of Thailand B.E. 2559* (2016) (Thailand), s 41, s 43. See, Appendix 3 for provisions of community rights in the *2016 Draft Constitution*. This draft was approved by the referendum on 7 August 2016 but does not enter into force until endorsement of the King's signature; Ministry of Foreign Affairs of the Kingdom of Thailand, *Press Releases : Unofficial Result of Thailand's Draft Constitution Referendum on 7 August 2016* (10 January 2017) <<http://www.mfa.go.th/main/en/media-center/14/68996-Unofficial-Result-of-Thailand%E2%80%99s-Draft-Constitution.html>>.

47 See, Appendix 4 for summary of community rights in Thailand's *Constitutions*.

48 *Constitution of the Kingdom of Thailand B.E. 2540* (1997) (Thailand), 11 October 1997, s 46; *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), 24 August 2007, s 66.

49 *Constitution of the Kingdom of Thailand B.E. 2540* (1997) (Thailand), 11 October 1997, s 56; *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), 24 August 2007, s 67.

The enforcement of community rights are articulated through the *Constitution* is ineffective. The investigations of the National Human Rights Commission of Thailand (NHRC) revealed that many government agencies had violated communities' rights in the process of granting mining concessions,⁵⁰ thereby contravening laws such as the *Minerals Act B.E. 2510*⁵¹ (hereinafter is called the *1967 Minerals Act*), the *Enhancement and Conservation of the National Environmental Quality Act B.E. 2535*⁵² (hereinafter is called the *1992 NEQA Act*). Furthermore, community rights to information, participation, and access to justice have also been ignored.⁵³

Since there appears to be a lack of enforcement instruments in the *Constitution's* provisions through Acts or subordinated legislation, this critical legal gap becomes the focus of this study. This gap will be investigated through the research question of “*How can Thailand enforce community rights, as articulated in the Constitution, to protect the livelihoods of rural communities in the context of the exploitation of natural minerals?*” This problem will be illustrated by the *Akara Case* and the *Dongmafaai Case* which obviously provide evidences of the gap between the law and its enforcement of community rights. The study will examine relevant legislation and policies and determine how they are, or are not, enforced. Comparative Australian case studies will be included to add a depth of analysis surrounding the central research question.

50 National Human Right Commission, above n 1.

51 *Minerals Act B.E. 2510* (1967) (Thailand), 31 December 1967.

52 *Enhancement and Conservation of the National Environmental Quality Act B.E. 2535* (1992) (Thailand), 4 April 1992.

53 National Human Right Commission, *Final Report of the Second Set of National Human Rights Commission* (Office of the National Human Right Commission, 2015) 352-353 (in Thai); National Human Right Commission, above n 1; National Human Right Commission, *2013 Human Rights Evaluation Report and Annual Report 2013 of the National Human Rights Commission of Thailand* (Office of the National Human Right Commission, 2014) 63 (in Thai); National Human Right Commission, *2012 Human Rights Evaluation Report and Annual Report 2012 of the National Human Rights Commission of Thailand* (Office of the National Human Right Commission, 2013) 68-69 (in Thai); National Human Right Commission, *2010-2011 Human Rights Evaluation Report and Annual Report 2010-2011 of the National Human Rights Commission of Thailand* (Office of the National Human Right Commission, 2012) 46 (in Thai).

3. METHODS

This legal research project involves International, Human Rights, Environmental, Constitutional, and Comparative Law, together with the archetypal form of legislation.⁵⁴ Literature, including case studies from the disciplines of Sociology and Environmental Sciences will be drawn upon to support this investigation.

Besides primary sources of Thailand and Australia's legislation, relevant secondary sources, which are not the law, but discuss about the law⁵⁵ from textbooks, refereed journal articles, reports and others are examined. International, regional, and national legally-binding instruments will be identified, collated and evaluated in this analytical project. These sources of evidence will support the study's findings and conclusions that will contribute towards closing the legal gap between community rights provisions of the *Constitution* and the future enforcement of community rights in the context of mining activities and conflicts in Thailand.

Additionally, this legal research project will incorporate a comparative approach to Australian laws through the inclusion of some case studies that illustrate the application of community rights. Although, Geoffrey Samuel noted that Comparative Law orientates itself toward a presumption of similarity rather than difference,⁵⁶ Australia's laws, regulations, environmental practices, and community engagement regarding mining activities will assist this study by contributing different approaches.

There are several reasons for using the Australian legal framework for comparison. Australia is one of the world's leading mining economies,⁵⁷ but its prosperity based on the value of its mineral sector is in conflict with the economic poverty of the Aborigines.⁵⁸ According to the history of Australia's mining activities, it has always grappled with the protection of communities' rights, particularly those of the Aboriginal people. However, there is no general recognition of the internal laws or legal system of indigenous people in

54 Stefan Vogenauer, 'Source of Law and Legal Method in Comparative Law' in Mathias Reimann and Reihhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2008) 869, 892.

55 Bruce Bott, *Names and Coss' Effective Legal Research* (LexisNexis, 6th ed, 2015) 112.

56 Geoffrey Samuel, 'Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law?' in Mark Van Hoecke (eds), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011) 177, 180.

57 CRU Consulting, *Asia-Pacific Mining Sector Study : A Final Report Prepared for APEC Business Advisory Council (ABAC)* (CRU Reference number 410883 (London, 2014) 17.

58 Benedict Scamبارy, *My Country, Mine Country : Indigenous People, Mining and Development Contestation in Remote Australia* (ANU E Press, 2013) 1.

Australia, only some specific contexts of native title and land right legislation are confirmed.⁵⁹ Human rights are protected in different ways in Australia. It has no single document such as a *Bill of Rights* to protect human rights, unlike most similar liberal democracies.⁶⁰

While Thailand has confirmed human rights and community rights protection in its written *Constitution* but it does not officially recognise indigenous peoples⁶¹ according to its statement to the United Nations (UN),⁶² it is estimated that between 600 000 and 1.2 million indigenous people live in the forests, mountains, or coastal areas of Thailand, accounting for 1-2 per cent of the Thai population. 3429 hill tribe villages with 93 257 villagers have been recorded by the Department of Welfare and Social Development.⁶³

Recognition of community rights are affirmed in Thailand's *Constitution*, while Moreover, even though Thailand and Australia have different legal systems, Australia's common law system will provide another perspective of the protection of community rights to a developing country like Thailand in a different legal system of a developed country. Comparisons to Australian laws will be included in this study for setting out to describe how this new development fits in Thailand. While the focus on the unification of law across nation states provides one answer to the question of what the law could be, comparison with Australian law will present an analysis of the dynamics and principles of laws of Australia that will add depth and breadth to this study.

This research is based on the laws and materials available as of 10 January 2017.

3.1 SCOPE AND LIMITATION

The scope of the study involves an investigating of the existing legal gap between Thailand's *Constitution* and the enforcement of community rights pertaining to environmental

59 Richard Bartlett, 'The Status of Indigenous People in Australia' in Gabriel A Moens and Rodolphe Biffot (eds), *The Convergence of Legal Systems in the 21st Century : An Australian Approach* (CopyRight Publishing, 2002) 159, 166.

60 Australian Human Rights Commission, *How are Human Rights Protected in Australian Law?* (1 January 2017) < <https://www.humanrights.gov.au/how-are-human-rights-protected-australian-law>>.

61 *Thailand Government Statement: Hill-Tribe Welfare and Development*, UN Doc. E/CN.4/AC.2/1992/4 (1992).

62 Pawarit Lertdhamtewe, *The Reformation of Legal Regime for Intellectual Property Protection of Plant Varieties in Thailand*, (Ph.D Thesis, School of Law, Queen Mary and Westfield College, University of London, 2013) 147.

63 Catarina de Albuquerque, 'Report of the Special Rapporteur on the Human Right to Safe Drinking and Sanitation' Addendum – Mission to Thailand (1-2 February 2013) HRC, 24th session, 16 July 2013, A/HRC/24/44 Add.3 para 27, 8.

protection for local communities in rural Thailand. This is based on mining activities with the objective of sustainable development, as stated in Principle 22 of the *Rio Declaration*. Artisanal and Small-Scale Mining (ASM), which is defined as mining by individuals, groups, families or cooperatives with minimal or no mechanization,⁶⁴ is excluded from this study. Since this issue is enforced under the *Constitution*, it is not reported to the NHRC as a violation of community rights or a legal gap between the *Constitution* and its enforcement.

Although many rights are held and exercised by communities, this research is limited to those community rights pertaining to the environment in rural communities, their rights are based on cultivation and a traditional way of life, as stated in the *2007 Constitution*.⁶⁵ The *2007 Constitution* has been repealed,⁶⁶ the *2014 Interim Constitution*⁶⁷ confirmed in its Section 4 that the human rights stipulated in the *2007 Constitution* remain effective.⁶⁸ Therefore, the community rights examined in this study are based on the *2007 Constitution*.

Thailand can learn lessons from Australia, which has a long history of mining operations and the management of rights of communities in terms of the exploitation of mineral resources. However, these comparisons are limited by dissimilar legal systems operating in each country. Thailand is administered under civil law and Australia under common law. Nevertheless, the concept of community rights and enforcement in common law will shed some light on the development of the community rights in Thailand. Albeit the results of a comparative approach, which is mainly based on differences and similarities, tend to be erroneous if the comparison is not “like for like”. The criteria will be treated with caution in this study by building a side-by-side conceptual framework of the two legal systems. Comparative law does not rely on the interpretation of the law within a single legal

64 Thomas Hentschel, Felix Hruschka, Michael Priester, *Artisanal and Small-Scale Mining : Challenges and Opportunities* (IIED and WBCSD, 2003) 5.

65 *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), 24 August 2007, s 66, s 67.

66 *Announcement of the National Council for Peace and Order No. 11/2557* (2014) Subject: Revocation of the Constitution of the Kingdom of Thailand (Thailand) 26 May 2014 (in Thai).

67 *Constitution of the Kingdom of Thailand (Interim) B.E. 2557* (2014) (Thailand), 22 July 2014, s 4 “Subject to the provisions of this Constitution, human dignity, rights, liberties and equality previously enjoyed by the Thai people with the protection under Thailand’s constitutional convention of the democratic regime of government with the King as Head of State and Thailand’s existing international obligations shall be protected under this Constitution.” and *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), 24 August 2007, s 66, s 67.

68 Although the *2007 Constitution* has been repealed by the *2014 Interim Constitution*. The *2014 Interim Constitution* confirmed in Section 4 of the *2014 Interim Constitution* that the human rights stipulated in the *2007 Constitution* remain effective. Moreover, the *2016 Draft Constitution* was approved by a referendum on 7 August 2016 and in the process of imposing the King’s Royal Signature, hence, this *2016 Draft Constitution* does not enter into force during the time of this research.

system.⁶⁹ Attention will also be paid to other regulations, by laws, and so on, in order to overcome the limitation of the comparative method of somewhat neglecting other types of legislation, despite their significance, as argued by Stefan Vogenauer.⁷⁰

One of the balancing measures or criticisms that may arise from this study lies in the context of the economic benefits that Thailand and local communities may gain from the exploitation of mineral resources, such as employment, improved infrastructure, and opportunities for education. For example, in the case of the Akara's gold mine, the Administrative Court was advised that its income from selling gold was THB⁷¹ 7 061 000 000 (equivalent to AUD 266 452 830) during the period from July 2012 to 2013, and the annual concession fee paid to the Thai Government was THB 700 000 000 (equivalent to AUD 26 415 094). Additionally, the company contributed an annual sum of THB 27 000 000 (equivalent to AUD 1 018 868) to many local development funds and employed 825 local people.⁷²

This research acknowledges the importance of balancing the sustainable development pillars of economic growth, social justice, and environmental protection,⁷³ as well as community engagement and cultural identity since the recognition to Principle 4 of the *Rio Declaration*,⁷⁴ in which it is explained that "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." However, aspects of mining activities, such as economic development, the sustainability of the minerals industry, mine rehabilitation, mine decommissioning and closure, remedy on social and health impacts will be beyond the scope of this study due to its primary legal focus. The impact of mining on urban and peri-urban communities will also be excluded.

69 Jaakko Husa, 'Comparative Law, Legal Linguistics and Methodology of Legal Doctrine' in Mark Van Hoecke (eds), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011) 209, 209-210.

70 Vogenauer, above n 54, 892.

71 AUD1.00 is equivalent to Thai Baht / THB 26.50 (as of 10 January 2017)
< <http://www.xe.com/currencyconverter/convert/?Amount=1&From=AUD&To=THB>>.

72 Pitsanuloke Administrative Court, Black Case No. 228/2553, Red Case No. 163/2555, 'Miss Suekanya Theerachartdamrong V Minister of Industry and el., Akara Mining Ltd. (Cross-claimer)', 27 March 2012 (Thailand).

73 Australian Human Rights Commission, *Sustainable Development and Indigenous Rights* (13 April 2016) < <https://www.humanrights.gov.au/news/speeches/site-navigation-35>>.

74 UN General Assembly, *1992 Rio Declaration on Environment and Development*, 14 June 1992, 217 A (III), UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992).

4. COMMUNITY RIGHTS AND SUSTAINABLE DEVELOPMENT IN MINING

Apart from the fundamental human rights established in the UDHR, which should be universally protected, community rights are internationally preserved in the enforcing legal instruments of the UDHR, namely, the ICCPR⁷⁵ and the ICESCR.⁷⁶ The right to self-determination, the right to development, the right to a clean and sustainable environment, and the right to peace are confirmed in Articles 1 and 47 of the ICCPR⁷⁷ and Articles 1 and 25 of the ICESCR.⁷⁸ In addition, the *Rio Declaration*⁷⁹ and the CBD⁸⁰ especially affirm communities' right to environmental protection, and the right to stewardship of the environment is established in the NP.⁸¹

75 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 2200A (XXI), A/RES/2200.

76 UN General Assembly, *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 2200A (XXI), A/RES/2200.

77 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 2200A (XXI), A/RES/2200, Article 1 "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."; Article 47 "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."

78 UN General Assembly, *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 2200A (XXI), A/RES/2200, Article 1 "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."; Article 25 "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."

79 *1992 Rio Declaration on Environment and Development*, 14 June 1992, UN Doc. A/CONF.151/26 (1992) Principle 22 "Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development."

80 *United Nations Convention on Biological Diversity*, opened for signature 5 June 1992, 31 UNTS 818 (entered into force 29 December 1993).

81 *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity* (Nagoya, 30 October 2010). For information on CBD COP10, See, CBD Secretariat, COP 10 (CBD, undated), found at <<http://www.cbd.int/cop10/>>; Earth Negotiations Bulletin, Tenth Meeting of the Conference of the

Local communities in rural areas are the holders of the right to political, economic, social, and cultural self-determination, the right to economic and social development, and the right to a healthy environment, all of which are directly related to protecting them from mining activities in this study.

It is stated in the General Comment 12 on Article 1 of the ICCPR in 1984 that the right to self-determination is “of particular importance because its realisation is an essential condition for the effective guarantee and observance of individuals’ human rights and for the promotion and strengthening of those rights.”⁸² Therefore, self-determination is necessary for the respect of human rights.⁸³ It is a group right which can only be exercised by people⁸⁴ collectively.⁸⁵ In terms of indigenous people, it is confirmed that “indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁸⁶ Rhona Smith notes that this right has its accepted view that it is a rights exercised primary by the people living under colonial regimes⁸⁷ and indigenous peoples not only have the right to an existence, but their autonomy and land rights are also important for them to exercise their right to self-determination.⁸⁸

Without doubt, the right to self-determination is a group right, which can only be exercised by a people. While acknowledging that a “community” is not the same as a “people”, Rhona Smith also notes that, in terms of the rights in international law, including the right to self-determination, a people must be a) a group of individual human beings who enjoy some or all of the features of a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, or a common economic life; b) the group must consist of a certain number. It does not need to be large, but it must be more than a mere association of individuals within a State; c) the

Parties to the CBD: Summary Highlights of the Meeting (IISD, 2010), found at <<http://www.iisd.ca/biodiv/cop10/>>.

82 Rhona K M Smith, *Textbook on International Human Rights* (Oxford University Press, 4th ed, 2010) 276; Hurst Hannum, ‘The Right of Self-Determination in the Twenty-First Century’, in Richard Pierre Claude and Burns H Weston (eds), *Human Rights in the World Community : Issues and Action* (University of Pennsylvania Press, 3rd ed, 2006) 242.

83 Karel Vasak, *The International Dimensions of Human Rights* (Unesco, 1982) 5.

84 Smith, above n 82; Hurst Hannum, above n 82.

85 Vasak, above n 83.

86 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, UN Doc. A/RES/61/295 (2007), Article 3.

87 Smith, above n 82, 281.

88 Smith, above n 82; Hannum, above n 82, 348-351.

whole group must have the will to be identified as a people or be conscious of being a people, allowing for the fact that groups or some members of groups may not have the required will or consciousness, even though they share the foregoing characteristics, and d) the group must possibly have institutions or other means of expressing its common characteristics and desire for an identity.⁸⁹ Ian Brownlie also notes that “the reference to ‘nationalities’, ‘peoples’, ‘minorities’ and ‘indigenous populations’ involves essentially the same idea.”⁹⁰

In terms of the realisation of peoples’ right to self-determine their political status and pursue their economic, social, and cultural development,⁹¹ the right to economic and social development is confirmed in the *UN Declaration on the Right to Development*.⁹² This right confirms that all people are entitled to freely participate in, contribute to, and enjoy economic, social, cultural and political development. It also implies that they have the right to the full sovereignty of all their natural wealth and resources.⁹³ Human rights have also been used as both a legal tool and moral discursive strategy for protecting human health and well-being, since there is a close relationship between the quality of the human environment and the enjoyment of basic rights.⁹⁴ Since human life and health depend upon appropriate environmental conditions, there is obviously a connection between environmental degradation and human rights.⁹⁵ Efforts have been made to formulate environmental rights since the *Stockholm Declaration* in 1972, while parallel endeavours have also been made in the domestic context. Proposals have periodically been made for amendments to the federal

89 Smith, above n 82, 277.

90 Ian Brownlie, ‘The Rights of Peoples in Modern International Law’ in James Crawford (eds), *The Rights of Peoples* (Clarendon Press, 1998) 1, 5.

91 UN General Assembly, *United Nations Declaration on the Right to Development*, 4 December 1986, UN Doc. A/RES/41/128 (1986), Annex, Article 1.

92 UN General Assembly, *United Nations Declaration on the Right to Development*, 4 December 1986, UN Doc. A/RES/41/128 (1986). See also, United Nations Human Rights, *Development* (10 January 2017) < <http://www.ohchr.org/EN/Issues/Development/Pages/DevelopmentIndex.aspx>>; United Nations Human Rights, *The Right to Development at a Glance* (10 January 2017) < http://www.un.org/en/events/righttodevelopment/pdf/rtd_at_a_glance.pdf>; Russel Lawrence Barsh, ‘The Right to Development as a Human Right : Results of the Global Consultation’ (1991) 13 *Human Rights Quarterly* 322.

93 UN General Assembly, *United Nations Declaration on the Right to Development*, 4 December 1986, UN Doc. A/RES/41/128 (1986), Article 1; See also, Arjun Sengupta, ‘The Right to Development’ in in Richard Pierre Claude and Burns H Weston (eds), *Human Rights in the World Community : Issues and Action* (University of Pennsylvania Press, 3rd ed, 2006) 249.

94 Peter D Burdon, ‘Environmental Human Rights : A Constructive Critique’ in Anna Grear, Louis J Kotze (eds), *Research Handbooks on Human Rights and the Environment* (Edward Elgar Publishing, 2015) 61, 61.

95 Fatma Zohra Ksentini, *Final Report of the Special Rapporteur on Human Rights and the Environment*, 6 July 1994, UN Doc. E/CN.4/Sub.2/1994/9, para 161-234.

Constitution in the United States.⁹⁶ In the context of environmental protection, Pierre-Marie Dupuy and Jorge Vinuales suggest that this can be defined as a series of both individual and collective rights and duties.⁹⁷ The extension of human rights to the environment has two dominant forms, one of which is the right to a healthy environment, which is a substantive right.⁹⁸ The inclusion of this right within the international human rights law has been supported by a number of codification efforts undertaken by different UN bodies, particularly the Human Rights Council and its predecessor, the Human Rights Commission.⁹⁹ It is also attached to procedural rights,¹⁰⁰ and environmental procedural rights basically refer to three rights, namely, access to information, public participation, and access to justice, which are substantive rights that are well-recognised in international law. They were initially outlined in Principle 10 of the *Rio Declaration* and are specified in detail in the United Nations Economic Commission for Europe's *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*. These rights provide a practical and realistic way to promote environmental protection and achieve sustainable development.¹⁰¹ These rights provide a practical and realistic way to promote environmental protection and achieve sustainable development.¹⁰² The right to a healthy environment is well-recognised worldwide in 140 national constitutions by 2010 and the number of constitutions that include explicit references to this right is increasing.¹⁰³ In addition, environmental procedural rights are generally the result of rethinking the process of implementing and enforcing environmental governance norms.¹⁰⁴

96 Sax, above n 12.

97 Pierre-Marie Dupuy and Jorge E Vinuales, *International Environmental Law* (Cambridge University Press, 2015) 313.

98 Burdon, above n 94; Dupuy, above n 97, 312.

99 Dupuy, above n 97.

100 Burdon, above n 94.

101 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001).

102 Marianela Cedeno Bonilla et al, *Environmental Law in Developing Countries : Selected Issues Vol. II* (IUCN, 2004) 5.

103 Office of the High Commissioner for Human Rights, *Analytical Study on the Relationship between Human Rights and the Environment*, 16 December 2011, UN Doc. A/HRC/19/34, Para 30.

104 Bonilla, above n 102, 6.

4.1 COMMUNITY RIGHTS AS COLLECTIVE RIGHTS

Community rights in international law are derived from the UDHR in which “community” is mentioned three times¹⁰⁵ in Article 18, 27, and 29.¹⁰⁶ While Richard Pierre Claude and Burns Weston confirm that “community rights” are the third generation rights that are presaged in Article 28¹⁰⁷ and proclaim that “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized ...” They also add that these solidarity rights as collective rights appear to be six claimed rights that tend to be posited as collective rights that require a substantial degree of concerted effort from all social forces on a planetary scale. They are the right to goods that are collective in nature and the rights that are often more intelligibly borne by groups than by individuals; however, each of these rights also manifest an individual dimension.¹⁰⁸

Collective rights remain extremely controversial to the rest of the world.¹⁰⁹ It is also a sociological problem of what collective identity is and how it is constituted.¹¹⁰ Collective rights are challenge and complex which are demanded discussion.¹¹¹ From moral and philosophical perspectives of Michael Hartney, collective rights are “a collective entity that can have value independently of its contribution to the well-being of individual human beings”.¹¹² According to Miodrag Jovanovic, the concept of collective rights is clearly explained by the values of collectivism rather than those of individualism.¹¹³ He further adds

105 Daniel Fischlin and Martha Nandorfy, *The Community of Rights: The Rights of Community* (Oxford University Press, 2012) 11.

106 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A, UN Doc. A/810 (1948), Article 18 “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”; Article 27 (1) “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”; Article 29 (1) “Everyone has duties to the community in which alone the free and full development of his personality is possible.”

107 Weston, above 16, 17,22 ; Claude, above n 22.

108 Sengupta, above n 93, 254-255.

109 Hsieh, above n 23.

110 Phillip Schlesinger, ‘On National Identity : Some Conceptions and Misconceptions Criticized’ (1987) 26 *Social Science Information* 219, 236-237.

111 Newman, above n 8, 10.

112 Michael Hartney, ‘Some Confusions Concerning Collective Rights’ (1991) 4 *Canadian Journal of Law and Jurisprudence* 292, 297, cited in Miodrag Jovanovic, ‘Cultural Rights as Collective Rights’ in Andrzej Jakubowski (eds), *Cultural Rights as Collective Rights: An International Law Perspective* (Brill Nijhoff, 2016) 15, 20.

113 Miodrag Jovanovic, *Collective Rights – A Legal Theory* (Cambridge University Press, 2012), 44-54.

that the most important implication of this philosophical standpoint is that the individual rights of group members can sometimes be overridden by their collective rights.¹¹⁴

There are four main recurrent conceptual misunderstandings of collective rights, the first of which is based on confusing collective rights with the concept of jointly-exercised individual rights by interpreting a right as the defining criterion for the nature of the said right. A good example is the provision of the *2006 Constitution of Serbia*,¹¹⁵ in which it is asserted that individuals' rights can be exercised in any of three ways, namely, individually by the right-holder, individually through the right-holder's agent, or jointly by a group of individuals, such as in the case of the fundamental right to assemble, strike or associate freely.¹¹⁶ The second relates to confusing collective rights with the individual rights accorded to a particular sub-set of people, for example, everyone who fits a specific category, such as tax-payers, construction workers, military officers, etc. The third misunderstanding is based on arguing that the notion of collective rights is simply an accumulation of the individual rights of group members, which Douglas Sanders also describes as group rights,¹¹⁷ and the last relates to associating the concept of collective rights with the American litigation of class action.¹¹⁸

In summary, jurisprudence has traditionally operated with two types of right-holders, namely, natural and juristic persons, and the legal personality has been extended from human beings to other entities at certain periods; however, it is now conceptually possible to distinguish "genuine collectives" as a new type of right-holder. Rights are given to three categories of these collectives, namely, people, minorities and indigenous peoples, in public international law. Groups of natural persons share a pre-given, largely constituted social identity and the capacity for moral standing, while juristic persons share the need for recognition by public law; however, both groups possess sufficient distinctive features to be recognised as a jurisprudential concept in their own right.¹¹⁹

114 Jovanovic, above n 112.

115 *Constitution of the Republic of Serbia* (Serbia), Article 75, para 1 "Persons belonging to national minorities shall be guaranteed special individual or collective rights in addition to the rights guaranteed to all citizens by the Constitution. Individual rights shall be exercised individually and collective rights in community with others, in accordance with the Constitution, law and international treaties."

116 Jovanovic, above n 112, 21.

117 Douglas Sanders, 'Collective Rights' (1991) 13 *Human Rights Quarterly* 368, 391.

118 Jovanovic, above n 112, 20-24.

119 Ibid, 24.

4.1.1 COMMUNITY RIGHTS ACTS

The need for community rights law is increasingly being recognised globally in both public and private contexts. For example, there is a civil society movement in the USA to form state-wide “Community Rights Networks” and “National Community Rights Networks”.¹²⁰ A traditional public interest law firm has initiated the Community Environmental Legal Defence Fund (CELDF) to strengthen community rights and the rights of nature. The CELDF codified the “*Community Bill of Rights*”, which has been endorsed by nearly 200 communities.¹²¹

Community rights are affirmed in the Constitution of many countries; however, Liberia has further enforced the community rights presaged in its *Constitution* by enacting a *Community Rights Act*. Liberia’s national legislation for the recognition of community rights, an *Act to Establish the Community Rights Law of 2009 with Respect to Forest Lands*¹²² (the *Community Rights Act 2009*) was enacted in 2009. This Act ensured the sustainable use of forest land for future generations and their constitutional right to participation, right to natural resources, and right to development in its preamble. Liberian law affirms communities’ right to control the use, protection, management and development of forest resources. Additionally, it affirms the right to exploit and harvest timbers, the right to negotiate and enter into social contracts with concessionaires, the right to benefit from sharing timber on community forest land, and the right to manage forest resources in Section 3.1 of the *Community Rights Act 2009*. This national legal framework empowers local communities located in or near forest lands to access, manage, use and benefit from forest resources on those lands for sustenance and livelihood improvements as well as for community development.¹²³

4.2 MINING AND SUSTAINABLE DEVELOPMENT

Sustainable development is defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” This

120 Community Environmental Legal Defense Fund, *Community Rights* (30 December 2016) <<http://celdf.org/community-rights/>>.

121 Ibid.

122 *Community Rights Law with respect to Forest Lands* (2009) (Liberia), Part III of Title 23 of the Liberian Code of Laws Revised, available from Forest Development Authority, *Community Rights Law with respect to Forest Lands* (2009) (1 January 2017) <<http://www.fda.gov.lr/wp-content/uploads/2015/07/Community-Rights-Law-of-2009-with-Respect-to-Forest-Lands.pdf>>.

123 *Regulation to the Community Rights Law with respect to Forest Land* (2011) (Liberia), Preamble, available from Forest Development Authority, *Regulation to the Community Rights Law with respect to Forest Land* (2011) (1 January 2017) <http://www.fda.gov.lr/wp-content/uploads/2015/07/Community-Rights-Law-Regulations_Printed-Version.pdf>.

term is considered to have been coined in the 1987 *Brundtland Report*.¹²⁴ . In terms of mining activity and the principle of sustainable development, an industry code entitled the “*Berlin Guidelines*”,¹²⁵ was issued in 1991 as a result of a conference convened by the UN.¹²⁶ These guidelines set a standard for “sustainable mining activities, from exploration and procession to decommissioning and reclamation”¹²⁷ and a revision in 2002 produced an outcome of fifteen principles.¹²⁸ Subsequently, the Mining, Minerals and Sustainable Development (MMSD) Project¹²⁹ proposed a framework in its report entitled “*Breaking New Ground*”¹³⁰ for setting the guiding principles for each of the four dimensions of sustainable development, namely, economic, social, environmental, and governance.¹³¹ It is a good practice to apply these principles to decision-making surrounding mining activities, in an integrated manner.¹³²

Based on the result of the multi-stakeholder MMSD project, the International Council on Mining and Metals (ICMM) has established an ICMM Sustainable Development Framework (the *ICMM Principles*)¹³³ was developed in 2001 as it dedicated to improving the social and environmental performance of the mining and metals industry at the International Council on Mining and Metals (ICMM).¹³⁴ The *ICMM Principles* adopted the Brundtland

124 Philippe Sands, *Principles of International Environmental Law* (Cambridge, 2nd ed, 2003) 252.

125 Berlin Guidelines, ST/TCD/20 United Nations Environmental Guidelines for Mining Operations Compiled by United Nations Department of Economic and Social Affairs (UNDESA) and United Nations Environment Programme Industry and Environment (UNEP) as revised in 1999. Cited in Elizabeth Bastida, ‘*Integrating Sustainability into Legal Frameworks for Mining in Some Selected Latin American Countries*’ MMSD No. 120 (January 2002) 17.

126 George (Rock) Pring and Linda Siegele, ‘International Law and Mineral Resources Development’ in Elizabeth Bastida, Thomas W. Waelde, Janeth Warden-Fernandez (eds), *International and Comparative Mineral Law and Policy; Trends and Prospects* (Kluwer Law International, 2005) 136.

127 In the *Mining Journal* (20 September 1991) at 2; reprinted in (1992) 10 *Journal of Energy and Natural Resources Law*, 355, cited in Pring above n 126.

128 United Nations, *Berlin II Guidelines for Mining and Sustainable Development* (2002) (10 January 2017) <https://www.commddev.org/userfiles/files/903_file_Berlin_II_Guidelines.pdf>.

129 This is a research project looking at how the mining and minerals sector could contribute to the global transition to sustainable development. See, International Institute for Environment and Development, *Mining, Minerals and Sustainable Development Project (MMSD)* (1 January 2017) <<http://www.iied.org/mining-minerals-sustainable-development-mmsd>>.

130 This report is result of nearly two years of research, analysis, and consultation by the Mining Minerals and Sustainable Development (MMSD) Project at the International Institution for Environment and Development (IIED).

131 Mining, Minerals and Sustainable Development Project, *Breaking New Ground* (Earthscan, 2002) xvii.

132 Ibid, 24.

133 *ICMM SD Framework – Final Principles*, International Council on Mining and Metals, Document Ref: C 020/290503, Date 29 May 2003.

134 The ICMM comprises of 23 mining and metals companies and 34 regional ad commodities associations. See, International Council on Mining and Metals, *About Us* (1 January 2017) <<https://www.icmm.com/en-gb/about-us>>.

Commission's definition of sustainable development, namely that "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." In terms of the mining sector, these *ICMM Principles* aim to ensure that investment is financially profitable, technically appropriate, environmentally sound, and socially responsible.¹³⁵

With respect to local communities, mining and sustainable development can be achieved by strengthening the protection of community rights and people's access to a healthy environment, as stated in Principle 22 of the *Rio Declaration*, and the goal of sustainable development can be attained by integrating the benefits into the economy, environment, and society without reducing the potential of future generations to meet their needs. Mineral development can also benefit people at the local level.¹³⁶ Mineral activities also have a significant negative impact on the environment and managing them effectively entails dealing with unresolved issues, such as handling immense quantities of waste, developing ways to internalise the cost of acid drainage, and improving impact assessment and environmental management systems.¹³⁷ Therefore, community rights in mining activities are confirmed in the *Berlin Guidelines*,¹³⁸ the MMSD's *Breaking New Ground* report,¹³⁹ and principles 3 and 9 of the *ICMM Principles*,¹⁴⁰ in which it is stated that communities have the right to participate in all stages of mining activities, the right to a healthy environment, and the right to development.

In terms of mining projects, it is important to consider the impact of mining on the environment, health, and society in general. It is particularly critical and understands its effect on the communities and landscape in the areas surrounding the mining activity.¹⁴¹ Developing

135 *ICMM SD Framework – Final Principles*, International Council on Mining and Metals, Document Ref: C 020/290503, Date 29 May 2003, 1.

136 Mining, Minerals and Sustainable Development Project, above n 131.

137 Ibid.

138 *Berlin Guidelines*, Governments, mining companies and the minerals industries should as a minimum: Principles 5 "Ensure the participation of and dialogue with the affected community and other directly interested parties on the environmental and social aspects of all phases of mining activities and include the full participation of women and other marginalized groups."

139 Mining, Minerals and Sustainable Development Project, above 2 131, 24.

140 International Council on Mining and Metals, 'A Sustained Commitment to Improved Industry Performance' London 2008, 10-11 at <www.icmm.com/our-work/sustainable-development-framework>; *ICMM Principles*, Principle 3, "Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities.", Principle 9, "Contribute to the social, economic and institutional development of the communities in which we operate."

141 CRU Consulting, above n 57, 82.

and integrating practices that reduce the environmental impact of mining demonstrates how “mining can become more environmentally sustainable,” as stated by W J Rankin.¹⁴²

The concept of an environmental assessment has developed and become established in international law, and a wide range of international instruments contain a general obligation to make a prior environmental assessment of projects that may harm the environment.¹⁴³ An Environmental Impact Assessment (EIA) has become an established international and domestic legal technique for integrating environmental considerations into socio-economic development and decision-making processes.¹⁴⁴ An EIA is a systematic process of examining and evaluating the effect of a proposed project on the environment. It entails an assessment of possible alternatives to the proposal, the monitoring of predicted and actual impacts, and an audit to determine compliance with the conditions attached to the approval.¹⁴⁵ It should also identify alternatives and measures to mitigate those impacts.¹⁴⁶ In most countries, an EIA is required by the government before certain permits are issued; therefore, EIAs are usually associated with the exploration and design stages of mining projects and completed in parallel with the feasibility study.¹⁴⁷

A Social Impact Assessment (SIA)¹⁴⁸ is used to review the social effect of a certain project. It is an overarching framework that entails analysing, monitoring and managing the social consequences of development to evaluate all impacts on humans and on all the ways in which people and communities interact with their socio-cultural environment based on the *International Principles for Social Impact Assessment*.¹⁴⁹ When undertaking an SIA, there should always be an awareness of the diverse impacts on different groups in society, and the burden on vulnerable groups in the community should particularly be of prime concern.¹⁵⁰ Moreover, the assessment and management of community health, safety and well-being are increasingly considered to be part of the social responsibility of mining operators.

142 W J Rankin, *Minerals, Metal, and Sustainability : Meeting Future Material Needs*, (CSIRO, 2011) cited in Mining Facts, *How can Mining Become more Environmentally Sustainable?* (1 January 2017) <<http://www.miningfacts.org/Environment/How-can-mining-become-more-environmentally-sustainable/>>.

143 Sands, above n 124, 824.

144 Sands, above n 124, 799-800.

145 Garry Bates, *Environmental Law in Australia* (LexisNexis, 8th ed, 2013) 341.

146 Environmental Law Alliance Worldwide, *Guidebook for Evaluating Mining Project EIAs* (ELAW, 2010) 19.

147 CRU Consulting, above n 57, 82.

148 CRU Consulting, above n 57, 90.

149 Frank Vanclay, ‘SIA Principles : International Principles for Social Impact Assessment’ (2003) 21 *Impact Assessment and Project Appraisal* 5, 6-7.

150 Ibid.

A Health Impact Assessment (HIA) is a systematic approach to predicting and managing the potential positive and negative health effects of projects on local communities. It assesses both the direct impact on the physical health of the community and the indirect impact on health via health determinants. Since health determinants overlap with social and environmental elements, an HIA can either be undertaken as a standalone assessment or integrated with EIA and SIA.¹⁵¹

In addition to an EIA, SIA, and HIA, a monitoring process is strongly recommended in order to conduct sustainable mining. This is an important part of the implementation of the project, which serves three purposes, namely, ensuring that the required mitigation measures are being implemented, evaluating their effectiveness, and validating the accuracy of the models or projections used during the impact assessment process.¹⁵²

According to the *Principles of Environmental Impact Assessment Best Practice*¹⁵³ of the International Association for Impact Assessment, follow-up (monitoring) is part of the EIA process to ensure that the terms and conditions of the approval are being met, to monitor the impact of development and the effectiveness of mitigation measures, and to undertake an environmental audit and process evaluation to optimise the environmental management.¹⁵⁴ A good monitoring programme will provide sufficient information to measure the changes in the environment, society and health, and assess the effectiveness of the procedures used to mitigate adverse impacts. In other words, monitoring will verify the effects and effectiveness of the mitigation.¹⁵⁵ Moreover, monitoring reports should be published and made available to administrators, proponents, people affected by the project, and the public.¹⁵⁶

4.2.1 THE PROS AND CONS OF MINING ACTIVITIES

4.2.1.1 Social impact

The positive aspects of mining include its impact on the economy and the vital role it plays in the economic development of many countries. Mining has the potential to directly

151 CRU Consulting, above n 57, 82.

152 Environmental Law Alliance Worldwide, above n 146, 23.

153 International Association for Impact Assessment, *Principles of Environmental Impact Assessment Best Practice* (IAIA, 1999) (1 January 2017) <http://www.iaia.org/uploads/pdf/principlesEA_1.pdf>.

154 Ibid.

155 Arctic Environment Protection Strategy, *Guidelines for Environmental Impact Assessment (EIA) in the Arctic* (Finnish Ministry of Environment, 1997) 27.

156 Ibid, 29.

and indirectly shape economies by contributing to employment, government revenue, and can provide opportunities for economic growth and diversification.¹⁵⁷

The results of a study of the economic and social impacts of mining at the community level undertaken by the World Bank Mining Department¹⁵⁸ (WBMD) demonstrated that mining can bring substantial social and economic benefits to communities. Some of the positive aspects are the growth of local small- and micro-enterprises, the provision of supplies and related services to mining companies, and the diversification of local economic development and activities. Thus, mining can be both a direct and indirect source of income derived in the form of royalties and tax revenues for nations, states, provinces and communities at local levels.¹⁵⁹ However, while it offers short-term economic benefits to developing countries, the long-term environmental and social costs borne by local communities and indigenous peoples outweigh those benefits.¹⁶⁰

The positive impact of mining can be measured in terms of employment opportunities and the income generation.¹⁶¹ Based on the study by the WBMD, some countries showed significant gains in training and education from employment in large mining operations. Mining can be a powerful vehicle for the transfer of technologies and skills from developed countries to developing nations and remote regions of the world. In fact, many countries that have no history of mining can take advantage of new opportunities based on proactive interventions to jump-start their technological development.¹⁶²

The development of infrastructure is also an important benefit of mining operations, such as building roads to provide access to previously-inaccessible areas, especially remote areas where infrastructure rarely exists.¹⁶³ For example, the majority of the mines in Chile and Peru are located close to existing roads or ports. Therefore, the most important infrastructure expenditure is focused on the construction or upgrading of local roads, schools, and hospitals. In addition, some mining companies provide community infrastructure for people who live near the mine, such as housing, schools, hospitals and shopping centres.¹⁶⁴ This may offer

157 Mining Facts, *Economy Impact* (1 January 2017) <<http://www.miningfacts.org/Economy/>>.

158 World Bank Group's Mining Department, *Large Mines and Local Communities : Forging Partnerships, Building Sustainability* (International Finance Corporation, 2002) 1.

159 Ibid, 2.

160 Kaidonis, above n 36.

161 World Bank Group's Mining Department, above n 158, 6.

162 Ibid, 14.

163 Ibid, 6-7.

164 CRU Consulting, above n 57, 62.

secondary business and employment opportunities such as for retail businesses. Another example of community benefits of mining enterprises, involves a mining company in Bolivia. The local community and the mining company combined their funds to build a gas pipeline to the mine that was larger than the company needed. The extra capacity was used to provide electricity for local rural people.¹⁶⁵

The exportation of minerals can be a source of national income. A developing economy with a constant stream of exports will have strong foreign currency inflows, which can be used to build capital and promote the country's development.¹⁶⁶ Many countries and communities depend on mineral production as a source of income and means of development. The growing trade liberalisation and privatisation has resulted in much of the investment in mineral exploration and production being invested in developing and transition countries. Mining is important to fifty-one developing countries, accounting for 15-50 per cent of exports in thirty of them, 5-15 per cent of exports in a further 18, and is domestically important to the remaining three. Approximately 3.5 billion people live in these countries, 1.5 billion of whom are living on less than USD2 per day.¹⁶⁷ At a community level, people can receive compensation and substantial flows of revenue when a large mine is established and these revenue flows can transform their economic and social well-being. The types of payments and the ways they are used are keys to mining's ability to contribute to sustainable development at the community level.¹⁶⁸

In terms of the social impact, although this industry benefits society in many ways, converting wealth from natural resources into sustainable economic growth and development can present some challenges. Communities may not receive a share of the equity of mining operations in many countries due to low governmental capacity, lack of political will and/ or appropriate processes in position.¹⁶⁹

Another negative impact of mining is human displacement and forced resettlement. Besides losing their homes, communities may also lose their land, and thus their livelihood. Displaced communities are often found in areas without adequate resources or near the mine, where they may bear the brunt of the pollution and contamination that could have significant

165 World Bank Group's Mining Department, above n 158, 6-7.

166 CRU Consulting, above n 57, 64.

167 Mining, Minerals and Sustainable Development Project, above n 131, 17.

168 Ibid, 201.

169 Mining Facts, *Economy Impact* (1 January 2017) <<http://www.miningfacts.org/Economy/>>.

public health consequences.¹⁷⁰ Forced resettlement can be particularly disastrous for indigenous communities with strong cultural and spiritual ties to the lands of their ancestors.¹⁷¹ The migration of people into a mining area can have a profound impact on local communities, and disputes may arise over land and the sharing of benefits.¹⁷² For example, they may lose access to clean water to sustaining their livelihoods.¹⁷³

Mining projects can evoke violent social conflict if communities feel that they are being unfairly treated.¹⁷⁴ While it is clear that they should be compensated for the negative impacts of mining at a community level, such as loss of homes, land, or access to other sources of livelihood, there may be significant challenges related to delivering adequate compensation systems.¹⁷⁵ These challenges should be resolved as part of the development of the SIA that involves community consultation and negotiations.

4.2.1.2 Environmental impact

The price of wealth from mining can have a negative impact on the environment, including: water resources, air quality, climate change, noise and vibration, soil, flora and fauna.

Different types of mining processes have variable environmental impacts, for example open cut or closed cut (underground) mining. The water quality of the available water resources in the mining area is arguably one of the most significant factors.¹⁷⁶ While one of the serious and pervasive impacts on the environment of an activity such as gold mining, is acid drainage, including the failure of tailing storage facilities.¹⁷⁷ The key concern is whether the quality of surface and ground water is maintained at a human consumption standard and one adequate to support native aquatic life and terrestrial wildlife. Other serious issues include the leaking of contaminating toxic constituents, the erosion of soil and mine waste into surface water, and mine dewatering.¹⁷⁸

170 Environmental Law Alliance Worldwide, above n 146, 15.

171 Mining, Minerals and Sustainable Development Project, above n 131, 9.

172 Environmental Law Alliance Worldwide, above n 146, 15.

173 Ibid, 15-17.

174 Ibid, 15.

175 Mining, Minerals and Sustainable Development Project, above n 131, 201.

176 Environmental Law Alliance Worldwide, above n 146, 8.

177 Mining, Minerals and Sustainable Development Project, above n 131, 238, 240.

178 Environmental Law Alliance Worldwide, above n 146, 8-11.

Large-scale mining has the potential to produce air pollutants during production. Mining can result in air pollutants, or particulate matter, which enters the atmosphere, as a result of: excavations, blasting, transportation, wind erosion, fugitive dust, exhaust emissions from mobile sources, and gas emissions from the combustion of fuels in stationary and mobile sources, explosion, and mineral processing. This can affect human health, the environment, infrastructure, and the global warming.¹⁷⁹ Climate change can be exacerbated by large-scale mining activities altering global carbon in ways, such as: lost carbon dioxide uptake, carbon dioxide emitted by machines, and the processing of ore into metal.¹⁸⁰ Additionally, pollution from noise and vibration, particularly in large-scale open-pit mining operations, can have a negative impact on wildlife and nearby residents.¹⁸¹

In terms of contaminated soil, residential and agricultural activities can be affected by factors such as: windblown dust, chemical spills and residue polluting the environment.¹⁸² Additionally, the erosion of exposed soil can result in surface water and drainage channels.

Mining can detrimentally impact the environment and associated biota through the removal of vegetation and topsoil resulting in the displacement of habitat for native flora and fauna. Habitat fragmentation may occur when large areas of land are divided into smaller patches as some species that require large areas of forest can become extinct.¹⁸³ These challenges need to be addressed prior to the commencement of any mining activity and through the EIA process.

4.2.1.3 Case study: Boliden Apirsa SL Zinc Mine, Spain

Mining activity can have both positive and negative impacts on society and the local environment. An EIA, HIA, and SIA can be tools to mitigate the negative impact along with best practice. The impact of failing to observe best practice can be environmentally and socially disastrous, as demonstrated in the case of the Boliden Apirsa SL Zinc Mine, which is part of the Los Frailes mine in Southern Spain, 45 kilometres northwest of Seville, near the Doñana National Park. In April 1998, Boliden Apirsa halted production after the failure of one wall of the tailings storage facility, which led to the release of 4.5–5 million cubic metres of tailings into the Rio Agrio and the Rio Guadiamar. The flow reached the marsh lands on the eastern edge of the Doñana National Park, 60 kilometres to the south, where it was halted

179 Ibid, 12.

180 Ibid, 17-18.

181 Ibid, 13.

182 Ibid, 14.

183 Ibid, 13-14.

by a series of rapidly constructed dikes. The tailings, which had a pH of 2-4 and contained elevated levels of copper, lead, zinc, and iron, permeated more than 2000 hectares of farmland. The Spanish Government reported that the spill had caused a massive fish-kill and destroyed many aquatic species in the river system. There was no immediate effect on the Doñana National Park, although there was concern about the contamination of the aquifer that underlies the park and the subsequent impact on birds' life. It was estimated that the damage resulted in 5000 job losses in agriculture, fishing, tourism, and nature conservation and the cost of the clean-up operations, more than 16 billion pesetas (USD135.7 million). These, and other financial problems, forced the company to file for bankruptcy. Large tracts of the park would certainly have been destroyed if the national and regional environmental authorities had not taken quick action by constructing a dike to contain the spill.¹⁸⁴

4.2.2 GOVERNANCE AND MINING

Conflict in and around mining operations usually stems from poor governance, such as the incident described in the previous Spanish case study. Mining, as an industry, is challenged to:

- (i) mitigate its negative impacts in terms of environmental, socio-cultural, health and human development, governance, macro-economic management and corruption, as well as economic barriers to restructuring and real impacts on poverty reduction; and
- (ii) further improve and promote concepts and actions with the aim of industry-community co-participation in the process of establishing and operating the mine. The industry and government need to ensure that its benefits are reaped at local and national levels.

The contribution of mining to sustainable development can be considered in terms of: economic and technical viability, ecological sustainability and social and cultural equity, which will require governments, mining companies and local communities working together through the different stages of a mining project. In mining projects, the basic rights of the individuals and communities affected needs to be upheld and not violated. These include: the right to control and use land, the right to clean water, a safe environment, and livelihood, the right to be free from intimidation and violence, the right to be fairly compensated for loss,¹⁸⁵ and the right to protect the cultural heritage. This holistic governance approach is needed

184 Mining, Minerals and Sustainable Development Project, above n 131, 164.

185 Environmental Law Alliance Worldwide, above n 146, 15.

over the lifespan of the project, from the exploration phase to the mining operation, and post-mine closure that will require remediation of the site.¹⁸⁶

Moreover, in terms of human rights and transnational corporations and other business enterprises, the UN Human Rights Council endorsed the *Guiding Principles on Business and Human Rights* in its resolution 17/4 of the 16th June 2011.¹⁸⁷ These guidelines contain three pillars, namely, protect, respect and remedy, for States and companies to use to prevent or address any human rights abuses that may occur during the business operation. Corporations are responsible for respecting human rights and providing effective mechanisms for fielding and addressing grievances from those individuals and communities who may be affected by their operation. Although these principles are not compulsory for business entities, mining companies that practice good governance should implement them in their operation to avoid the abuse of human rights and damage to the business.¹⁸⁸

5. COMMUNITY RIGHTS AND MINING IN THAILAND

Communities in Thailand have had right to manage and administer their own local natural resources ever since Thailand was established as a nation more than 400 years ago. Although the Thai Government made an effort to centralise the administration of all natural resources, in practice, it only succeeded in managing a few of them, for instance, forests and minerals. The central authorities still allowed communities to have the freedom to manage their water resources and farming; the government did not interfere with the communities' tradition, culture, and way of living, possibly because the existing natural resources and culture were not perceived to have any economic value.¹⁸⁹

The real change in the management of Thailand's natural resources began in 1961 with the launch of the first National Social and Economic Development Plan, which was supported by the World Bank and the United States Government. This led to the initiation of plans for the development of agriculture, health, education, and natural resources, which were effective in centralising the government's authority in the respective fields. At the same time, the free

186 G Walser, 'Economic Impact of World Mining (IAEA-SM-362/7)' (Paper presented at the International Symposium on the Uranium Production Cycle and the Environment, Vienna, 2-6 October 2000) (IAEA, 2002) 86, 88-89.

187 United Nations Human Rights, *Guiding Principle on Business and Human Rights: Implementing the United Nations' Protect, Respect and Remedy' Framework* (HR/PUB/11/04 (UNHR, 2011) iv, 27.

188 The UN Working Group on Business and Human Rights, *The UN Guiding Principles on Business and Human Rights : An Introduction* (OHCHR, 2011) 1-4.

189 Witoon Lianchamroon, 'Community Rights and Farmers' Rights in Thailand' (1998) 36 *Biotechnology and Development Monitor* 9, 9-11.

market and private sector activities increased and the Thai Government ceased to own state companies and promoted privatisation instead. As a result, mining and logging companies were permitted to exploit forests and lands that had originally been managed by local communities.¹⁹⁰

The centralisation of natural resource management by the Thai Government increasingly caused disputes among society and communities. Concerns were especially raised when the government cooperated with private companies and permitted them to monopolise the use of forests and lands, for instance, logging in tropical forest or eucalyptus tree plantations. This practice was opposed by a movement of farmers and people in local communities, who had previously had the authority to manage their own natural resources. Their principal objective at the policy level was to convince the government to enact the (draft) *Community Forestry Act*, which would restore their right to manage their genetic resources.¹⁹¹ Although this has not yet been enacted, the debate during the process of drafting legislation educated Thai society about the role of communities in managing natural resources.¹⁹²

5.1 COMMUNITY RIGHTS AND LEGAL SYSTEM IN THAILAND

Thailand is a unitary state¹⁹³ with a civil law legal system that is strongly influenced by common law.¹⁹⁴ A strong British influence emerged toward the end of the nineteenth century, resulting in the evolution of commercial law based on English concepts. However, with the establishment of a Ministry of Justice in 1892,¹⁹⁵ the law reformers began to appreciate the merits of codification, no doubt because they had looked further into the confused state of the English statute book, and with this in mind, they turned to the Continental tradition. A Royal Commission on the codification of the law was appointed in 1897 under the chairmanship of the Minister of Justice, the Prince of Rajburi, with M Padoux as an advisor. The drafting committee responsible for the code noted that,

190 Ibid.

191 Verena Brenner et al, 'Thailand's Community Forest Bill: U-Turn or Roundabout in Forest Policy?' (1999) in SEFUT Working Papers Series (Working Group Socio-Economics of Forest Use in the Tropics and Subtropics at the University of Freiburg) 5-6.

192 Lianchamroon, above n 189.

193 *Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2004) (Thailand)*, s 1 "Thailand is one and indivisible Kingdom."

194 Frank C Darling, 'The Evolution of Law in Thailand' (1970) 32 (2) *Review of Politics* 197, 202-209.; Leeds, above n 34.

195 Court of Justice of Thailand, *History* (1 January 2017) <<http://www.coj.go.th/en/history.html>>.

the committee avoided indulging in the too-easy plan of copying any foreign code, perfect as it might be, and of transforming their provisions with slight alterations, into the Siamese legislation.¹⁹⁶

However, David Lyman adds that Thailand only belongs to the civil law system because of its codification. The contents of the codes are as varied as the major legal systems in the world, found in both common and civil law.¹⁹⁷ Although judicial precedent is not binding on lower courts, the Supreme Court of Justice is not bound to follow its own decisions, and lower courts are not bound to follow the precedents set by higher courts. However, in practice, the decisions of the Supreme Court of Justice do have significant influence on the Supreme Court of Justice itself, as well as on lower courts.¹⁹⁸

With regard to the sources of Thai law, the *Constitution* is the supreme law and provides for the powers of the King, the National Assembly, the Council of Ministers, the Courts, and Constitutional Organs, while the codified laws are Thailand's fundamental laws. The codified laws are the Civil and Commercial Code, the Penal Code, the Civil and Procedure Code, the Criminal Procedure Code, the Land Code, and the Revenue Code.¹⁹⁹ The National Assembly legislate Acts that concern important social and economic law. These Acts grant authority to each related government agency to legislate royal proclamations, ministerial regulations, orders, notifications, royal decrees, and rules.

Thailand confirmed the UDHR and the *Rio Declaration*. It is also a party to the ICCPR, the ICESCR, and the CBD.²⁰⁰ Its implementation of community rights form international law has been the required legislation of domestic law since then as Thailand adopted a system of dualism.²⁰¹ In a country with a dualist system, international law is

196 R H Hicking, 'The Legal System of Thailand' (1972) 2(8) *Hong Kong Law Journal* 8, 8-9.

197 See, David Lyman, "An Insight into the Functioning of the Thai Legal System", (Thai-American Business Magazine, Jan-Feb 1975). The following is a quotation from the said article: "*Most of the Thai lawyers of the time had been trained in England but they recognized the disadvantages of the Common Law system for their country. So Thailand picked the best of both systems and began the process of adapting them to the Thai situation. The result is that the penal law is Italian, Indian, French, and Japanese inspired; the Civil Law greatly influenced by French, German, and Swiss law; the Commercial Law primarily British; the Law of Evidence founded on an English model; the Civil and Criminal Procedure Codes being taken from their English and French counterparts; while the courts were organized along the lines of French courts of law. All of these Codes were also influenced by Thai customs and heritage of the period but were also quite democratic in tenor.*"

198 Leeds, above n 34.

199 Ibid.

200 Thailand ratified the *United Nations Convention on Biological Diversity* in 2003. See, Convention on Biodiversity, *List of Parties* (1 January 2017) <<https://www.cbd.int/information/parties.shtml>>.

201 *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), 24 August 2007, s 190.

effective on the international plane, which means that it only binds the state. Domestic law is another set of laws that governs the relationship between the state and citizens, and both sets of law operate independently. In order for international law to operate at the domestic level, there has to be a process to transform it into domestic law.²⁰² Therefore, the implementation of international obligations in any international legal instrument to which Thailand is a party required the legislation of subordinate laws. However, community rights have been confirmed in the Thailand's *Constitution* since 1997.

The protection of human rights are confirmed as a duty and power of the NHRC, its power is limited to examine and report on the commission or omission of acts which violate human rights or which do not comply with obligations under international treaties, then propose remedial measure to the related agency such acts for taking actions. In the case where it appears that no action has been taken as proposed, the NHRC shall report to the National Assembly for further action.

5.2 COMMUNITY RIGHTS IN THAILAND'S CONSTITUTION

5.2.1 THE 1997 CONSTITUTION

The prominent progress of community rights protection in Thailand can also be note in the *1997 Constitution*. This was the first time Thailand has confirmed community rights in the nation constitution. Different degrees of community rights protection were mentioned in Sections 46 and 56.²⁰³ The right to conserve and restore customs, traditional knowledge, art, and culture was granted to the traditional community to exercise this right collectively as right-holders.²⁰⁴ Also, the traditional community was given the right to manage and exploit natural resources and biological diversity and the right to healthy environment are affirmed as individual's right to participate with the state and community to exercise their right to natural resources and a healthy environment.²⁰⁵

Although community rights were affirmed in the *1997 Constitution*, there were two distinctive limitations that obstructed its effective enforcement; the right-holder issue²⁰⁶ and

202 Darling, above n 194; Leeds, above n 34.

203 *Constitution of the Kingdom of Thailand B.E. 2540 (1997)* (Thailand), 11 October 1997, s 46.

204 *Constitution of the Kingdom of Thailand B.E. 2540 (1997)* (Thailand), 11 October 1997, s 46.

205 *Constitution of the Kingdom of Thailand B.E. 2540 (1997)* (Thailand), 11 October 1997, s 56 para 1.

206 Natha Duangvichai, *Comparison Amendment between Constitution of the Kingdom of Thailand B.E. 2540 and B.E. 2550 with Summarised Reasons* (Secretariat of the House of Representatives, 2014) 47-48.

the phrase, “*as provided by law*”.²⁰⁷ The *1997 Constitution* confirmed and respected the rights of a “traditional community”²⁰⁸ to conserve or restore its customs, local knowledge, arts or culture²⁰⁹ and to persistently participate in the management, maintenance, preservation and exploitation of natural resources and the environment in a balanced fashion.²¹⁰

Another issue that was criticised is that the community rights protection was limited by the clause, “*as provided by law*”. It was argued that this provision should be omitted in the drafting process to protect the state’s ability to restrict the exercise of communities’ rights. However, the drafting committee argued that this clause should be retained in order to establish community participation and prevent the exercise of communities’ rights in bad faith.²¹¹ The committee found it to be an essential clause for the power of legislating Acts and subordinate laws;²¹² however, it caused problems in its legal interpretation. The Constitutional Court interpreted it to be contrary to the principle of self-execution. The court decisions found that the *Constitution* had confirmed communities’ rights, but the enforcement of those rights had not been fulfilled, since there was no subordinate law to protect communities’ rights from these constitutional provisions.²¹³ Therefore, attempts were made to have it deleted.²¹⁴

5.2.2 THE 2007 CONSTITUTION AND THE 2014 INTERIM CONSTITUTION

When the *1997 Constitution* was revoked as a result of a coup d’état on 19 September 2006, the *2007 Constitution* retained the recognition of community rights to a greater degree by categorising Part 12 of Community Rights in Chapter 3: Rights and Liberties of the Thai People, with two provisions in Sections 66 and 67.²¹⁵ Moreover, there was no “*as provided by law*” phrase in this *Constitution*, which caused many problems and arguments. Another significance change in this version was the right-holder of community rights. Apart from the

207 This cause appeared in s 46, s 56 para 1, 2, and 3 of the *Constitution of the Kingdom of Thailand B.E. 2540* (1997) (Thailand), 11 October 1997.

208 See, Constituent Assembly of Thailand, above n 9. “Traditional Community” is defined in the Constitution as a group of people who form a local community as their core base for living by employing management methods and conserving natural resources in a more balanced and sustainable way than in the past.

209 *Constitution of the Kingdom of Thailand B.E. 2540* (1997) (Thailand), 11 October 1997, s 46.

210 *Constitution of the Kingdom of Thailand B.E. 2540* (1997) (Thailand), 11 October 1997, s 46.

211 Montri Roopsuwan et al, *Intention of the Constitution* (Vinyuchon, 1999) 119-120.

212 Ibid.

213 The Constitutional Court’s Decision No. 59/2545; 62/254; 6/2546; 25/2547; 52-53/2547; 36/2548.

214 Minutes of Meeting of the Constituent Assembly of Thailand No. 26/2550 (Extra) 15 June 2007, 144-149, and Constituent Assembly of Thailand, above n 9, 60-61.

215 *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), 24 August 2007, s 66, s 67.

disappearance of the “*as provided by law*”, cultural right and right to manage and exploit of natural resources, environment, and biodiversity²¹⁶ extended the right-holders of community rights from traditional community²¹⁷ to be the community, local community, and traditional local community,²¹⁸ to exercise their rights, namely, the right to conserve and restore custom, traditional knowledge, art, and culture;²¹⁹ and the right to persistently “*participate*” in the management, maintenance, preservation and exploitation of natural resources, the environment, and biological diversity in a balanced fashion.²²⁰

The right to preserve and exploit natural resources and biological diversity and the right to a healthy environment, which were presaged in paragraph 1 Section 67, were affirmed as individuals’ right to participate with the state and the community to exercise their right to natural resources and a healthy environment.²²¹

The *2007 Constitution* was distinctive in terms of protection communities’ rights. It was confirmed²²² that the community was the right-holder of the collective right to sue the related government agencies for the violation of the right to healthy environment and for failure to conduct a public hearing and environmental and health impact assessment (EIA, EHIA) of any required development projects.²²³ This community right demonstrated the concept of the environment as the common property of people and communities, which the state has the obligation to maintain in good condition for people’s health.²²⁴

A political crisis in Thailand led to another coup d’état on 22 May 2014, which led to the revocation of the *2007 Constitution*.²²⁵ The *2014 Interim Constitution*²²⁶ was enforced until the *Draft Constitution* receives the national approval from the referendum, the King has

216 *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), 24 August 2007, s 66.

217 *Constitution of the Kingdom of Thailand B.E. 2540* (1997) (Thailand), 11 October 1997, s 46.

218 Secretariat of the House of Representatives, *Community Rights in the Constitution*, (Secretariat of the House of Representatives, 2012) 33.

219 *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), 24 August 2007, s 66.

220 *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), 24 August 2007, s 66.

221 *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), 24 August 2007, s 67 para 1 has duplicating provisions with *Constitution of the Kingdom of Thailand B.E. 2540* (1997) (Thailand), 11 October 1997, s 56 para 1.

222 *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), 24 August 2007, s 67 para 3.

223 *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), 24 August 2007, s 67 para 3.

224 Secretariat of the House of Representatives, above n 218, 37-38.

225 *Announcement of the National Council for Peace and Order No. 11/2557* (2014) Subject: Revocation of the Constitution of the Kingdom of Thailand (Thailand) 26 May 2014.

226 *Constitution of the Kingdom of Thailand (Interim) B.E. 2557* (2014) (Thailand).

imposed the Royal Signature, and it has been published in the Government Gazette for promulgation.²²⁷ Meanwhile, the provision of community rights in the *2007 Constitution* remains effective due to Section 4²²⁸ of this *2014 Interim Constitution*.

5.2.3 THE 2016 DRAFT CONSTITUTION

In term of the inclusion of community rights in the *2016 Draft Constitution* as Thailand's prospective Constitution, Thailand's Constitutional Drafting Committee (CDC) completed the first draft of the new *Constitution* on 17 April 2015²²⁹ with many provisions that benefit community rights and environmental protection, and there were further plans to develop a *Community Rights Act* by the Law Reform Commission of Thailand (LRCT).²³⁰ However, this controversial draft was rejected by the National Reform Council (NRC) on 6 September 2015. The new CDC launched the latest draft of *2016 Draft Constitution* on 29 January 2016, and community rights are affirmed in Sections 41 and 43.²³¹ This *2016 Draft Constitution* was approved by a referendum on 7 August 2016 and in the process of imposing the King's Royal Signature, therefore, this *2016 Draft Constitution* does not enter into force yet.

The protection of communities' rights in this prospective *Constitution* has slightly shifted from the previous *1997 Constitution* and the *2007 Constitution*. This *Constitution* has

227 *Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014)*, 22 July 2014, s 37 para 7 "In the referendum, an eligible voter must possess the same qualifications and must not be under any of the same prohibitions as the eligible voter in the latest general election prior to the entry into force of this Constitution. Subject to s 37/1, if the majority of votes in the referendum approves the Draft Constitution, the Prime Minister shall respectfully present the Draft Constitution to the King within thirty days as from the date the result of the referendum is announced and when the King has put the Royal Signature thereto, it shall be published in the Government Gazette for promulgation. The Prime Minister shall countersign the Royal Command."

228 *Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014)*, 22 July 2014, s 4 "Subject to the provisions of this Constitution, human dignity, rights, liberties and equality previously enjoyed by the Thai people with the protection under Thailand's constitutional convention of the democratic regime of government with the King as Head of State and Thailand's existing international obligations shall be protected under this Constitution."

229 *Draft Constitution of the Kingdom of Thailand B.E. 2558 (2015)* 22 August 2015, available from (1 May 2016)
<http://www.parliament.go.th/ewtcommittee/ewt/draftconstitution/ewt_dl_link.php?nid=633>.

230 *Law Reform Commission of Thailand*, Letter RE: Recommendation and Suggestion on Enacting the Law of Community Rights, No. LRCT 01/447, dated 24 March 2015 ATTN: Prime Minister; Letter No. LRCT 01/448, dated 24 March 2015 ATTN: President of the National Legislative Assembly; Letter No. 01/449, dated 24 March 2015 ATTN: Chairperson of the National Reform Council (Thailand).

231 *Draft Constitution of the Kingdom of Thailand B.E. 2559 (2016)* (Thailand), s 41, s 43.

affirmed communities' right to be informed and have access to public information,²³² cultural rights,²³³ right to manage, maintain and utilise natural resources, the environment, and biological diversity,²³⁴ and right to access to justice.²³⁵ However, these rights are limited to only signing and submitting a petition with recommendations to a state agency to undertake any act that will be beneficial to the people or the community or to omit any act that will affect the peaceful livelihood of the people or the community. Additional community rights to arrange a welfare system is newly introduced and affirmed, while communities' right to participate in environmental and health impact assessments was not affirmed in this *2016 Draft Constitution*. Moreover, the weakened protection of communities' rights by means of the clause “*as provided by law*”²³⁶ and “*prescribed by law*”²³⁷ is of great concern. Also, controversial is the restriction of individuals' liberty to form a community²³⁸ on the grounds of protecting the public interest and maintaining public order or the good morals of people.

5.3 COMMUNITY RIGHTS IN THAI LAWS

Thailand has no direct *Community Rights Act* in which its obligation to protect communities' rights is stated. Some community right protection of different issues is affirmed in many acts; for example, the *Plant Variety Protection Act B.E. 2542*²³⁹ provides local indigenous communities with the right to play a role in conserving, developing and improving plant generic resources,²⁴⁰ the *Protection of Geographical Indications Act B.E. 2546*²⁴¹ protects local communities' right to share the benefit of their geographical indications,²⁴² and

232 *Draft Constitution of the Kingdom of Thailand B.E. 2559* (2016) (Thailand), s 41.

233 *Draft Constitution of the Kingdom of Thailand B.E. 2559* (2016) (Thailand), s 43 (1).

234 *Draft Constitution of the Kingdom of Thailand B.E. 2559* (2016) (Thailand), s 43 (2).

235 *Draft Constitution of the Kingdom of Thailand B.E. 2559* (2016) (Thailand), s 43 (3).

236 *Draft Constitution of the Kingdom of Thailand B.E. 2559* (2016) (Thailand), s 41.

237 *Draft Constitution of the Kingdom of Thailand B.E. 2559* (2016) (Thailand), s 43.

238 *Draft Constitution of the Kingdom of Thailand B.E. 2559* (2016) (Thailand), s 42 para 2 “Restriction on the liberty under Paragraph One shall not be permitted, except by virtue of the provisions of the law enacted for the purpose of protecting public interest, maintaining public order or good morals of people, or preventing or eliminating barrier or monopoly.”

239 *Plant Variety Protection Act B.E. 2542* (1999) (Thailand).

240 *Plant Variety Protection Act B.E. 2542* (1999) (Thailand) s 44.

241 *Protection of Geographical Indications Act B.E. 2546* (2003) (Thailand).

242 Pawarit Lertdhamtewe, ‘The Protection of Geographical Indications in Thailand’ (2014) 17(3-4) *Journal of World Intellectual Property* 114, 114-128.

the *Community Organisation Council Act B.E. 2551*²⁴³ provides definition and classifies types of communities.²⁴⁴

The *Plant Variety Protection Act B.E. 2542* was enacted in 1999 to implement Article 8 (j) of the CBD²⁴⁵ by which parties to the Convention should respect communities' rights and the sharing of local communities' traditional knowledge for an equal share of benefits;²⁴⁶ however, the rights of local indigenous communities are not expressly mentioned in this Act.²⁴⁷ The use of the term, "local domestic plant variety"²⁴⁸ in the Act refers to its recognition of local indigenous communities' right to play a role in conserving, developing and improving generic plant resources by granting permission for them to register as a community²⁴⁹ in order to conserve and develop local domestic plant varieties. Interestingly, Pawarit Lertdhamtewe notes that the provisions that address the rights of farmers and local communities have no practical effect.²⁵⁰ It is uncertain whether this Act provides benefit to local communities since no local community has been able to register its local plant variety under this Act to date.²⁵¹ There are two obstacles to plant protection in this Act, namely, the requirement for plant varieties to be registered according to their distinctiveness, uniformity and stability, and problematic factors, such as cultural and traditional criteria.²⁵²

The *Protection of Geographical Indications Act B.E. 2546* was enacted in 2003 to fulfil Thailand's obligation to adopt the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement).²⁵³ This act permits local community producers to

243 *Community Organisation Council Act B.E. 2551* (2008) (Thailand).

244 *Community Organisation Council Act B.E. 2551* (2008) (Thailand) s 3.

245 *United Nations Convention on Biological Diversity*, opened for signature 5 June 1992, 31 UNTS 818 (entered into force 29 December 1993).

246 Korbkul Rayanakorn, *Development of Community Rights and Environmental Law Principles* (Social Research Institute of Chiang Mai University, 2006) 40-41.

247 Pawarit Lertdhamtewe, 'Protection of Plant Varieties in Thailand' (2014) 17(56) *Journal of World Intellectual Property* 142, 144.

248 *Plant Variety Protection Act B.E. 2542* (1999) (Thailand) s 43.

249 *Plant Variety Protection Act B.E. 2542* (1999) (Thailand) s 44.

250 Pawarit Lertdhamtewe, 'Recent Developments in Thailand's Plant Variety Protection Law' (2014) 9(9) *Journal of Intellectual Property Law and Practice* 715, 715.

251 Lertdhamtewe, above n 62, 84.

252 Ibid, 84-85.

253 *Agreement on Trade-Related Aspects of Intellectual Property Rights in Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, UNTS 229, entered into force 1 January 1995), and *Protection of Geographical Indications Act B.E. 2546* (2003) (Thailand), Note.

register a geographical indications product²⁵⁴ with the aim of facilitating the sharing of benefit and protecting the geographical indications producers in local communities.²⁵⁵

The latest act is the *Community Organisation Council Act B.E. 2551*, which provides community definitions and classification. There are three types of community, namely: community, local community, and traditional local community.²⁵⁶ The definition of “community” in this Act is specified by the same interests, benefits, and objectives, a “local community” is defined by using geographical areas, and a “traditional local community” is a local community that existed before the *1997 Constitution* was enforced.²⁵⁷

In terms of indigenous people, Thailand does not officially recognise either Aboriginal or indigenous peoples²⁵⁸ according to its statement to the UN.²⁵⁹ However, it is estimated that 600 000 to 1.2 million indigenous people live in the forests, mountains or sea coasts in Thailand, accounting for 1-2 percent of the Thai population. 3429 hill tribe villages with 93 257 villagers were recorded by the Department of Welfare and Social Development.²⁶⁰ This indicates that the protection of indigenous rights is invisible in Thailand.

In conclusion, Acts related to the protection of community rights are concerned with conserving generic resources, protecting communities’ property right to geographical indications products, and definitions and types of community, but they do not protect the community rights covered by the *2007 Constitution*.

5.4 MINING IN THAILAND

In Thailand, a number of mineral deposits have been found.²⁶¹ With only 547 active mines,²⁶² Thailand has limited mining of natural resources.²⁶³ According to the 2015 report,

254 *Protection of Geographical Indications Act B.E. 2546* (2003) (Thailand), s 7.

255 Lertdhamtewe, above n 142, 114, 117.

256 *Community Organisation Council Act B.E. 2551* (2008) (Thailand) s 3.

257 *Community Organisation Council Act B.E. 2551* (2008) (Thailand) s 3.

258 *Thailand Government Statement: Hill-Tribe Welfare and Development*, UN Doc. E/CN.4/AC.2/1992/4 (1992).

259 Lertdhamtewe, above n 62.

260 Albuquerque, above n 63.

261 Among which tin, tungsten, niobium, tantalum, lead, zinc, gold, iron and stibnite are the most important metallic minerals, while feldspar, clay minerals, fluorite, barite, potash and rock salt are the most important non-metallic minerals. Rocks and dimension stones are increasingly important as basic materials for industry and construction. See, Department of Mineral Resources, *Mineral Resources of Thailand* (30 December 2016)

<http://www.dmr.go.th/main.php?filename=Mineral_re2015__EN>.

the mineral products of Thailand have a total value of THB 63 488.5 Million.²⁶⁴ The mineral royalty of Thailand was THB 2911.2 Million in 2013.²⁶⁵ Additionally, the Ministry of Industry (MOI), which is the principle government agency that oversees the economy's mineral sector, promotes foreign investment in mining in Thailand.²⁶⁶

5.4.1 MINING LEGISLATION

The Department of Primary Industry and Mines (DPIM) in the MOI administers the *1967 Minerals Act*, issues mining regulations, and provides technical assistance to the metallurgical, mineral processing, and mining industries.²⁶⁷ In order to facilitate foreign investment, the DPIM has produced a handbook entitled “*Mining in Thailand: An Investment Guide*”²⁶⁸ in which the regulatory and legal framework for foreign investment in Thailand's mining industry and mineral business is outlined. Under Thai legislation, mineral exploration, mine production, and mineral transactions are administered by the *1967 Minerals Act*, and the *Mineral Royalty Rates Act B.E. 2509*²⁶⁹ and its related Ministerial Regulation. The DPIM is also responsible for regulating safety and pollution-control requirements in compliance with the *1967 Minerals Act*.

The essence of the *1967 Minerals Act* is as follows;²⁷⁰

1. The Act contains regulations on mineral exploration, mining, processing, the purchase or sale of minerals and the possession of minerals for the benefit of national economic development and stability, and exists for the purpose of the prevention and suppression of the illegal mining or illegal export of minerals.

262 Statistics Group, Information Technology and Communication Center, Department of Primary Industries and Mines, *Mineral Statistics of Thailand 2009-2010*, Statistic Report No. ICC 1/2557, (Department of Primary Industries and Mines, 2014) (1 January 2017) <<http://www7.dpim.go.th/stat/productpdf.php?product=%&pdcode=%&pdyear1=2015&pdyear2=2015>> 81.

263 CRU Consulting, above n 57, 45.

264 Statistics Group, Information Technology and Communication Center, Department of Primary Industries and Mines, above n 262.

265 Ibid, 108.

266 Department of Primary Industries and Mines, *Mining in Thailand: An Investment Guide* (Ministry of Industry, 2009) (1 January 2017) <http://www.dpim.go.th/en/media/003_mine.pdf> Preface.

267 CRU Consulting, above n 57, 45.

268 Department of Primary Industries and Mines, above n 266.

269 *Mineral Royalty Rates Act B.E. 2509* (1966) (Thailand).

270 Department of Primary Industries and Mines, above n 266, 11.

2. The qualifications of applicants, rules, procedures, and the conditions in the applications for mineral exploration contracts, mining concessions, and licences are stipulated in this Act, as well as the fact that an application for the renewal of such licences under this Act shall be prescribed in a Ministerial Regulation.
3. The provisions in the Act contain measures to protect public safety and health and to mitigate the impact on ecosystems or preserve the quality of the environment from any damage or nuisance to a person, property or environment that may have originated from mineral exploration, mining, mineral or metallurgical processing and underground brine drilling.
4. No person other than the holder of the licence can take over, occupy, destroy or deteriorate the land or resources within a prospecting area, mining area, or tailings storage area demarcated by the competent official.

Minerals belong to the state and no-one can explore for minerals or conduct mining activities without first obtaining a prospecting licence or mining lease.²⁷¹ There are three kinds of prospecting licences; a general prospecting licence, an exclusive prospecting licence, and a special prospecting licence. Prospectors who discover a commercial mineral deposit must apply for a mining lease to obtain the right to mine. The duration of a mining lease is not more than 25 years. Applicants for a mining lease must provide a map of the mining area, evidence of their financial capital and technological ability, a work plan, an Environmental Impact Assessment Report (EIA), and evidence of the acquisition of surface land rights.²⁷²

According to the *1967 Minerals Act*, mineral rights do not include the right to the surface land. Therefore, it is necessary for the applicant to acquire the right to use the surface land from the public or private owner, whatever the case may be, before applying for a mining lease. Negotiation with a private landowner is concluded by purchase or lease. The duration of a lease agreement may be up to 30 years and it must be registered with the Land Department. In cases where the land is owned by the government, a permit issued by the relevant government agency must be submitted along with the application for a mining lease before the lease can be granted.²⁷³ However, there are some reserved areas that have been declared closed to exploration/mining activities by cabinet resolutions. These include wildlife reserves, national parks, forests (conservation forests and economic forests) and areas

271 Chandler and Thong-Ek, *Thai Mining Legislation*, 2011, (1 January 2017) <<http://www2.ctlo.com/mediacenter/Publications/2011-03-29-ThaiMiningLegislation-02March2011325821.pdf>> 1.

272 Ibid, 3

273 Ibid, 3-4.

reserved for security purposes. The first three categories are administered by the Royal Forest Department, while the fourth is controlled by the Ministry of Defence. Developmental activities, including mining, are strictly prohibited in conservation forest areas, and restrictions apply to mining activities in economic forest areas. Only small, site-specific areas are available for mining in other areas in the country, which are classified as urban areas, water bodies and areas for settlement programmes. The programme to reclassify the country's forest areas will increase the total area of forest conservation and reduce the total area of economic forestry.

In summary, according to the *1967 Minerals Act*, applications for permission to conduct activities concerning minerals can be separated into six categories; 1) prospecting and exploration, 2) mining, 3) mineral procession and metallurgical processing, 4) mineral possession, transport, and royalty payments, 5) purchase, sale, and storage of minerals, and 6) the import and export of minerals. In terms of exploration and mining, no-one, even the landowner, has the right to conduct these activities without a permit being granted by the government. The state has full rights to mineral resources. The owner of the exploration and mining concession is not required to be the landowner. However, most mining companies tend to buy prospective mining land to avoid conflict since the landowner of the prospective mining land has no choice but selling the land at the price offered by the mining company.

5.4.2 ENVIRONMENTAL LEGISLATION

In addition to the requirements in the *1967 Minerals Act*, other petitions concerned with obtaining a mining concession are an EIA according to the *1992 NEQA Act*, the approval of the Local Administrative Organisation, an application for utilisation or residence in reserved forests (if any), an application for land use in a self-help settlement (if any), and an application for land use in an agricultural land reform area (if any).

Apart from Section 67 of the *2007 Constitution*, the EIA requirements and the authorities involved are described in Sections 46 to 51 of the *1992 NEQA Act*, which is the framework of Thailand's environmental law. The criteria applied to assess an EIA consist of four components, namely, physical environmental resources, biological environmental resources, human usage value and quality of life value. These components will be considered in four dimensions, namely, components of environmental and other values, significant environmental impact, environmental impact reduction and preventive measures, and environmental inspections and programmes. According to recent notifications from the Ministry of Natural Resources and Environment (MONRE), there are currently 36 types and

sizes of projects or activities for which the submission of EIA reports is required. In addition, the Environmental and Health Impact Assessment (EHIA) is another type of EIA report included in paragraph 2 of Section 67 of the 2007 *Constitution*. There are 11 types of projects or activities that may cause serious harm to communities for which these EHIA processes are required. Most mining activities require the processes of both the EIA and the EHIA.

Although the steps stipulated in the EIAs of Thailand are similar to those of most other countries that implement EIAs, the culture, tradition, people, and topology vary, causing differences in some EIA processes compared to the methodologies used in other countries.²⁷⁴ The requirements for public participation should follow the Office of Natural Resources and Environmental Policy and Planning: ONEP guidelines, and there must be at least two rounds of public participation (i.e., public hearings) for an EIA. The first should be scheduled at the beginning of the project to gather people's opinions of the draft proposal (both positive and negative impacts that may occur) and the scope of the study. The second should occur during the preparation of the draft EIA and mitigation measures. Comments and suggestions made at the second meeting are added to the EIA report.

The public participation process in the EHIA is slightly different than in the EIA process. There must be at least four public hearings at the scoping step, the EHIA preparation, the draft EHIA, and the decision-making. The first three hearings are held by the proponents of the project, but the last public hearing, which is at the decision-making stage, is organised by the authorising agency. Public participation may involve an attitude survey, consultation meeting, or other processes.²⁷⁵ The key objectives of public involvement are to ensure that the public understands the proposed project, to obtain public opinions to improve the positive impact and to prevent and/or mitigate any negative impact of the project. This regulation is a guideline for extensive public consultation in the undertaking of any state project, not any private project.²⁷⁶ However, according to NHRC reports, illegal public participation is the main cause of the violation of community rights.²⁷⁷

Moreover, these EIA and EHIA reports do not require approval before the government grants the concession. They are only required to be submitted with the request for the

274 Kultip Suwanteep, Takehiko Murayama, Shigeo Nishikizawa, 'Environmental impact assessment system in Thailand and its comparison with those in China and Japan' (2016) 58 *Environmental Impact Assessment Review* 1, 12-24.

275 *Rule of the Office of the Prime Minister on Public Consultation*, B.E. 2548 (2005) (Thailand).

276 *Rule of the Office of the Prime Minister on Public Consultation*, B.E. 2548 (2005) (Thailand).

277 National Human Rights Commission, above n 31.

concession. Therefore, there is a lack of effective enforcement to protect the community and its environment, since the EIA and EHIA approval is not a pre-condition to receive a mining concession. This problem is demonstrated in the study of the *Akara Case* and the *Dongmaifai Case* in the next section.

5.5 CASE STUDIES

The enforcement of community rights has failed according to the Working Report of the National Human Rights Commission (NHRC) for the period between 2002 and 2015.²⁷⁸ Communities' right to manage natural resources and the environment has been violated by various governmental and private projects that have failed to respect their rights as affirmed in Thailand's *Constitution*. Issues include: these communities are unable to access and receive related information, there is a lack of community participation, and they have insufficient and improper information to participate and make decisions. The *Constitution* lacks mandatory EIA and HIA processes. There is the gap between constitutional provisions and enforcement, including a centralisation policy system.²⁷⁹ These problems are all evident in the *Akara Case* and the *Dongmaifai Case*.

5.5.1 THE AKARA GOLD MINE

The case of the Akara Mine in Pichit Province provides evidence of the gap between the law and its enforcement of community rights. According to the NHRC's Examination Report No. 67/2549 *Mr. Suppawit Meema and 48 people V Akara Mining Ltd.*,²⁸⁰ on 31 March 2005, Mr. Suppawit and others made claim no. 160/2548 to the NHRC that "The concession request of Akara Mining Ltd. to extend the area will affect the community's way of life." and asked that the request be dismissed.²⁸¹

Contaminated water from the mining activities had affected the neighbouring rural communities, resulting in severe health problems and having a negative effect on farming and cultivation. Extending the area of mining would significantly violate the community's rights, since this area is home to a traditional local community, sustained by the natural resources and the environment. Villagers can farm rice two to three times a year, and have other careers

278 National Human Rights Commission, above n 31.; National Human Right Commission, above n 53.

279 Ibid.

280 Sunee Chairors (eds), 2006 *Annual Report of National Human Rights Commission of Thailand's Examination Report 2549* (National Human Rights Commission, 2008) 353-414.

281 Ibid, 353.

that provide a sound, peaceful way of life. The mining activity of Akara brought severe conflict to the community; for example, the Community Administrative Office had received funding of THB 44 175 462.97 from the concession, while the villages that had been marginalised and totally demolished did not receive any compensation.²⁸²

In 2006, the NHRC investigators found that the gold mining activity for the period of 2000 – 2020 violated local villagers' community rights by referring to the provisions in Sections 46 and 56 of the *1997 Constitution*, Articles 1 and 47 of the ICCPR, and Articles 1 and 25 of the ICESCR, which confirms the promotion and protection of communities' right to a healthy environment and people's right to a healthy life. The NHRC advised the DPIM to refuse the request for a 20-year-concession over an extended area within 60 days and to limit the future renewal of any concessions.²⁸³ The NHRC also advised Office of the Natural Resources and Environmental Policy and Planning to prepare to assign the mining area as an "Environmentally-protected Zone" within 180 days after the concession had expired. However, two years later, the authorities granted the 20-year concession to the mining company, over the extended area for the period 2008 - 2028, thereby disregarding the NHRC's advice.

After failing to secure community rights protection from the NHRC, the villagers filed an administrative case to the Pitsanuloke Administrative Court,²⁸⁴ asking for the concession to be revoked and the mining operation to cease. They filed this case against the Minister of Industry, Chief of the DPIM as the defendant, and Akara Mining Ltd. (the Company) as a cross-claimer. They also requested an emergency protection order with this claim to suspend the mining activities and mitigate the current air and noise pollution, and to stop mining activities that contaminated water and land which were vital for the villagers' health and life.²⁸⁵ However, the defendant and the Company argued that the suspension of mining activity would lead to major economic loss and there was no evidence to prove that the villagers' health problems were caused by the mining. The Administrative Court found that the damage to the community was insufficiently severe to merit the issue of emergency actions, and dismissed the request for emergency protection. On 27 March 2012, referring to

282 Ibid, 406-407.

283 Ibid, 414.

284 Pitsanuloke Administrative Court, Black Case No. 228/2553, Red Case No. 163/2555, '*Miss Suekanya Theerachartdamrong V Minister of Industry and el., Akara Mining Ltd. (Cross-claimer)*', 27 March 2012 (Thailand).

285 Pitsanuloke Administrative Court, Black Case No. 228/2553, Red Case No. 163/2555, '*Miss Suekanya Theerachartdamrong V Minister of Industry and el., Akara Mining Ltd. (Cross-claimer)*', 27 March 2012 (Thailand).

the 1992 NEQA Act, the Pitsanuloke Administrative Court found that the concession was illegal because of misinformation in the EIA report, however it still did not prohibit the mining operations. The Court found that it was not necessary to revoke the illegal concession, even though it was an illegal administrative order, referring to Section 42 paragraph 2 of the *Administrative Procedure Act*.²⁸⁶ However, the illegal issuing process was caused by the Company failing to follow the EHIA process in the community rights provision according to the *Constitution*.

When weighing the loss of the mining company, other benefits to villagers, and the nation's income from the concession compared to the damage to the community, the court found that, although the operation had contaminated land and water, it had not done so in a sufficient degree to cause severe adverse health which could not be remedied. The Company was ordered to review its HIA report and submit it for approval within a year or the concession would be revoked.²⁸⁷

This decision demonstrated the Administrative Court's lack of concern for community rights, as affirmed in the *Constitution*.

Unfortunately, according to the latest report issued on 19 March 2016, the villagers continue to face health and environmental damage from the gold mine with 41.83 per cent and 19.52 per cent of a sample of 1004 villagers found to have high levels of manganese, and arsenic respectively in their bodies. Additionally, 5.88 per cent of this sample has abnormally high levels of cyanide.²⁸⁸

On 10 May 2016, the Thai Government issued an initial closure announcement that the mine must cease operations by 31 December 2016.²⁸⁹ The DPIM additionally explained that this closure resolution had been jointly made by four ministries, the MOI, the Ministry of Public Health, the MONRE, and the Ministry of Science and Technology. This decision had been based on many investigations of continual complaints and conflicts in local communities. Although there was no absolute conclusive evidence that the mining activities

286 Pitsanuloke Administrative Court, Black Case No. 228/2553, Red Case No. 163/2555, '*Miss Suekanya Theerachartdamrong V Minister of Industry and el., Akara Mining Ltd. (Cross-claimer)*', 27 March 2012 (Thailand).

287 Pitsanuloke Administrative Court, Black Case No. 228/2553, Red Case No. 163/2555, '*Miss Suekanya Theerachartdamrong V Minister of Industry and el., Akara Mining Ltd. (Cross-claimer)*', 27 March 2012 (Thailand).

288 Editor, 'Test shows hundreds in mining area poisoned by heavy metals', *Prachatai* (online), 11 March 2016 <<http://prachatai.org/english/node/5930>>.

289 Kingsgate Consolidated Limited, *2016 Annual Report* (Kingsgate, 2016), 24.

were having a negative impact on the environment and human health, the decision was made taking in to account the public interest, social benefits, and resolving conflict in affected communities. Additionally, the previous announcements of the National Council for Peace and Order (NCPO) regarding the gold mine's social licence to operate in July and August 2014, which related to governing the operation and causing no pollution, informed the decision.²⁹⁰ The closure of this gold mine was reconfirmed by the announcement no. 72/2559²⁹¹ on 13 December 2016. This NCPO order was exercised under Section 44 of the *2014 Interim Constitution* to cease the operation of the gold mine from 1 January 2017 and to stop all issuance and the renewal of gold mine exploration or concession licences. The aim of this order was to tackle the conflict between local communities and the mining company, and the subsequent environmental and health problems.²⁹²

5.5.2 THE ROCK MINE IN DONGMAFAI

This case occurred in the Dongmafaï sub-district of Suwankuha District in Nongbualampoo Province,²⁹³ which is located in the north-eastern part of Thailand. The people in this community had actively protected themselves from a rock mining concession in an area of 280 000 square meters. Although they had opposed the concession request since 1993, they suspended their action because two of the village leaders had been assassinated and they had been informed that the concession request had been on hold.

However, in late 1994, the mining company had re-submitted its request and was granted a 10-year rock-mining concession starting in 2000. The villagers had struggled to obtain justice from many related government organisations, but their complaints had not been listened to. Then, in 2003, 340 villagers from the Dongmafaï community and the Phupa-Pamai Forestry Conservation Club took their case of the violation of community rights to the NHRC and also filed it to the Konkaen Administrative Court.²⁹⁴ They wanted to protect the community from this environmental harm, and since it was located in a forestry area and they

290 Royal Thai Government, *News of the Ministry of Industry : DPIM Announcement of Termination on Gold Mine Concession*, date 13 May 2016 (1 January 2017) < <https://goo.gl/cVIC6z>>.

291 *Announcement of the National Council for Peace and Order No. 72/2559* (2016) Subject: The Mitigation of the Impacts from Gold Mine Operation (Thailand), 13 December 2016 (in Thai).

292 Apinya Wipatayotin, Achara Ashayagachat and AP, 'S44 Order Forces Akara to Cease Operations', *Bangkok Post* (online), 1 January 2017 <<http://www.bangkokpost.com/news/general/1159589/s44-order-forces-akara-to-cease-operations>>.

293 The National Human Rights Commission's Decision Report No. 26/2548.

294 Konkaen Administrative Court, Black Case No. 218/2545, Red Case No. 325/2547, *Mr. Sompong Shinsaeng and 392 people V Minister of Industry (1st respondent) and Mr. Dusit Triwatsuwan (2nd respondent)*.

needed water resources and the community forest for their livelihood, they were granted land ownership for agricultural purposes under the government's project of land reform. This was also a 4000 year-old pre-historic cultural area with paintings in a Phaya Cave, which was a historical and cultural site. Therefore, not only would valuable natural resources and cultural heritage have been damaged, but also their quality of life and health conditions would most likely have been impacted by the pollution caused by rock explosions.

The investigation by the NHRC found that several related government agencies had violated their community rights in the mining concession processes, which contravened many laws, including the *1967 Minerals Act*, the *1964 National Reserved Forest Act*, and the *1992 NEQA Act*.²⁹⁵ Furthermore, it was found that the community's right to information, participation and access to justice had been ignored.²⁹⁶ Therefore, the Administrative Court issued an injunction to the mine owner to suspend operations on 14 January 2002, since there was no conclusive analysis of all the aspects, especially water resources and the historical and natural caves in the EIA.

In 2004, the Konkaen Administrative Court also made a decision in favour of the community that the mining concession should be revoked,²⁹⁷ since it was illegal according to Sections 4 and 54 of the *1967 Minerals Act* because it ignored the objection of 393 villagers and granted the concession provided that "there is no objection from the villagers."²⁹⁸ Moreover, the information in the EIA, which was provided by the private company employed by the rock mine company, was not accurate because it stated that there were no historical places within a 500-meter radius and no ancient and historical traces within a 2000-metre radius. This conflicted with the report from the 9th Regional Office of Fine Arts which noted that there was another pre-historic painting in Tiger Cave, which was located 450 meters from the mine. The information from the EIA also conflicted with the report from the 10th Regional Office of Environmental Protection.²⁹⁹

295 Sunee Chairios (eds), *2005 Annual Report of National Human Rights Commission of Thailand's Examination Report 2548* (National Human Rights Commission, 2006) 432-436.

296 Ibid, 432-433.

297 Konkaen Administrative Court, Black Case No. 218/2545, Red Case No. 325/2547, *Mr. Sompong Shinsaeng and 392 people V Minister of Industry (1st respondent) and Mr. Dusit Triwatsuwan (2nd respondent)*.

298 Chairios, above n 295, 430.

299 Konkaen Administrative Court, Black Case No. 218/2545, Red Case No. 325/2547, *Mr. Sompong Shinsaeng and 392 people V Minister of Industry (1st respondent) and Mr. Dusit Triwatsuwan (2nd respondent)*.

Unfortunately, on 27 March 2009, the Supreme Administrative Court reversed the judgment of the Konkaen Administrative Court.³⁰⁰ The Supreme Administrative Court found that only the 1st, 2nd, and 3rd plaintiffs who signed the complaint had a standing to sue, while the remaining 390 did not. Moreover, the objections of the 393 villagers were not acceptable, since they did not count as interested persons because they were not land owners. Since the land was a forestry area, the issue of a concession from the approval of the Forestry Department was found to be legal. Lastly, the claim of the 393 villagers that the noise and dust pollution caused by the rock-mining activities had a negative effect on the pre-historic paintings in the caves was found to be unacceptable. Therefore, the Supreme Administrative Court dismissed their claim and accepted the information in the EIA report.³⁰¹

Finding justice in the court procedure and from the NHRC was the last resort for these villagers to protect their rights. This case demonstrates that, although the NHRC found that the community's rights had been violated, when the victims brought the case to court by referring to the NHRC's decisions, the court determined the facts based on whether the government agencies involved had acted according to the related acts and other laws. Therefore, conflict between communities and government actions in terms of mineral concessions remains in many areas of Thailand. Other localities exemplifying these same issues are Loie, where gold is mined and Chaiyapoom and Udonthani, where potassium mines are located. Most mining concessions are in remote areas of Thailand and are constantly causing conflict. Therefore, Thailand can learn from other countries, such as Australia, which has a long history of mining.

6. COMMUNITY RIGHTS AND MINING IN AUSTRALIA

Australia is one of the world's leading mining economies,³⁰² but its prosperity based on the value of its mineral sector is in conflict with the economic poverty of the Aborigines.³⁰³ According to the history of Australia's mining activities, it has always grappled with the protection of communities' rights, particularly those of the Aboriginal people. This chapter

300 Supreme Administrative Court, Black Case No. OR 477/2547, Red Case No. OR 86/2552, *Mr. Sompong Shinsaeng and 392 people V Minister of Industry (1st respondent) and Mr. Dusit Triwatsuwan (2nd respondent)*.

301 Supreme Administrative Court, Black Case No. OR 477/2547, Red Case No. OR 86/2552, *Mr. Sompong Shinsaeng and 392 people V Minister of Industry (1st respondent) and Mr. Dusit Triwatsuwan (2nd respondent)*.

302 CRU Consulting, above n 57, 17.

303 Scambary, above n 58.

examines Australian laws and practices for setting out to describe how this new development fits in Thailand in terms of community rights in mining activities.

6.1 COMMUNITY RIGHTS AND LEGAL SYSTEM IN AUSTRALIA

The Australian Parliament passes laws at federal and state levels. These laws are developed from the English common law.³⁰⁴ According to the *Commonwealth of Australia Constitution Act* (the *Australian Constitution*),³⁰⁵ the power in Australia's federal system of government is distributed between the Federal government (the Commonwealth), six state governments, and ten territorial governments.³⁰⁶ The latter are directly subject to the law-making powers of the Commonwealth.³⁰⁷ However, the Australian Capital Territory (ACT) and the Northern Territory (NT) have extended their autonomy under a self-government arrangement³⁰⁸ to have their own Legislative Assembly.³⁰⁹

The Commonwealth Parliament has the power to pass laws related to a limited number of matters.³¹⁰ While matters related to the environment can be within the legislative power of the Commonwealth Parliament, it has no specific power to enact such legislation. The Commonwealth Parliament can expand its power over external affairs if they affect an international agreement³¹¹ and the State Parliament can expand the Commonwealth Parliament's legislative powers by referring subjects to the Commonwealth Parliament.³¹²

304 Ruth Bird, 'Legal Research and the Legal System in Australia' (2000) 28(1) *International Journal of Legal Information* 70, 70.

305 *Constitution of the Commonwealth of Australia*.

306 Bird, above n 304, iv.

307 Australian Government Solicitor, *Australia's Constitution with Overview and Notes by the Australian Government Solicitor* (Commonwealth of Australia, 7th ed, 2010) viii.

308 The Norfolk Island Legislation Amendment Bill 2015 passed the Australian Parliament on 14 May 2015 (Assented on 26 May 2015) abolishing self-government on Norfolk Island and transferring Norfolk Island into a council as part of New South Wales law. From 1 July 2016 Norfolk Island legislation will be transferred to New South Wales and subject to NSW legislation. See, Australian Government, Department of Infrastructure and Regional Development, *Norfolk Island Reform* (1 January 2017) <http://regional.gov.au/territories/norfolk_island/reforms>.

309 Bird, above n 304.

310 *Constitution of the Commonwealth of Australia* (Australia), s51, s52. The Commonwealth Parliament has the power to pass laws related to a limited number of matters for peace, order, and good government. The listed subjects include: defence; external affairs; interstate and international trade; taxation; foreign, trading and financial corporations; marriage and divorce; immigration; bankruptcy; and interstate industrial conciliation and arbitration.

311 Australian Government Solicitor, above n 307, vi.

312 *Commonwealth of Australia Constitution Act* (Australia), s 51 (xxxvii).

State's parliaments can pass laws on a wider range of subjects than the Commonwealth Parliament, since they have the power to enact a law on any subject related to each state, apart from customs, excise duty³¹³ and defence.³¹⁴ The *Australian Constitution* does not limit the matters on which the state parliament may enact laws.³¹⁵ However, according to the *Australian Constitution*,³¹⁶ valid Commonwealth law overrides state law on the division of defined Commonwealth powers and residual state powers.³¹⁷

Australia practices international law in system of dualism, similar to Thailand. When Australia ratifies a treaty, it is not directly and automatically enforced as part of Australian law. Its obligation under the treaty only becomes effective when Australia passes a domestic law to implement the treaty.³¹⁸ In the absence of such legislation, the treaty cannot impose obligations on individuals or create rights in the domestic law. However, unlike Thailand, since Australian law is based on a common law system, the courts will generally try to find a way of interpreting and applying Australian laws that are consistent with the treaties Australia has ratified, even if the domestic laws have not been enacted yet. Therefore, international law, including treaty law, has a legitimate and important influence on the development of the common law and may be used to interpret the statutes and in executive action.³¹⁹ Foreign precedent is also used for guidance in the drafting and interpretation of legislation and in legislative reform, however, Australian courts are not simply accepting these legal ideas. They accept and refer to the domestic law.³²⁰

Australia supports the UDHR and the *Rio Declaration*. International human rights treaties concerning the protection of community rights, such as the ICCPR, the ICESCR,³²¹

313 *Commonwealth of Australia Constitution Act* (Australia), s 90.

314 *Commonwealth of Australia Constitution Act* (Australia), s 114.

315 Australian Government Solicitor, above n 307, vi.

316 *Commonwealth of Australia Constitution Act* (Australia), s 109.

317 Bird, above n 304, 71.

318 Australian Human Rights Commission, '*Human Rights – What do I need to Know?*' (1 January 2017) <http://www.humanrights.gov.au/sites/default/files/content/letstalkaboutrights/HR_ACT.doc> 4.

319 Treaty Law Resources, *Australia International Treaty Making Information Kit* (1 January 2017) <<http://www.austlii.edu.au/au/other/dfat/reports/infokit.html#sect1>>.

320 Terry Hutchinson, *Researching and Writing in Law* (Lawbook Co, 3rd ed, 2010) 13.

321 Australia ratified *International Covenant on Economic, Social and Cultural Rights* in 1976, *International Covenant on Civil and Political Rights* in 1980. See, Australian Human Right Commission, above n 318.

and the CBD³²² have also been ratified based on an assessment by the Commonwealth. The Australian government determines whether the existing Commonwealth or State/Territory legislation is sufficient to implement the provisions of the Convention or whether particular treaty obligations can be progressively implemented without radically changing the existing laws.³²³ In the early 1970s, many legal professions and politicians, such as Geoffrey Sawer, a legal academic,³²⁴ Sir Robert Menzies, a former liberal Prime Minister,³²⁵ and Sir Owen Dixon, Chief Justice of the High Court,³²⁶ shared similar views. Namely, that Australia with its *Constitution* and common law system, guaranteed best practice of the human rights protection of individuals or groups.³²⁷ However, in 1982, the High Court of Australia made a decision in the *Koowarta* case,³²⁸ which was affirmed in the *Dams* case³²⁹ that the Commonwealth could legislate internally based on its power over external affairs, or outside its power under the *Australian Constitution*, if this was either to discharge a treaty obligation or was based on a “subject of international concern”. This highlighted the importance of Australia developing human rights legislation,³³⁰ including the protection of community rights. Therefore, there has been some progress in human rights legislation in the ACT, Vic, and proposal in the Qld

In context of collective rights, it is defined as “inextricable connected to individual rights, since collective rights have little meaning unless individual members of the community collectively benefit from them.”³³¹ These rights are claimed that “it was in the area of the community that indigenous peoples’ cultures find expression and therefore these rights are

322 Australia ratified the *United Nations Convention on Biological Diversity* in 1994. See, Convention on Biodiversity, *List of Parties* (1 January 2017) <<https://www.cbd.int/information/parties.shtml>>.

323 Treaty Law Resources, above n 319.

324 Geoffrey Sawer, ‘*Protection of Human Rights in Australia*’ in *Yearbook on Human Rights for 1946*, United Nations, Lake Success, New York, 1974, p 31, cited in Alice Erh-Soon Tay, ‘Human Rights for Australia: A Survey of Literature and Developments, and a Select and Annotated Bibliography of Recent Literature in Australia and Abroad’, (1986) Human Rights Commission Monograph Series No. 1 (Australia Government Publishing Service : Canberra) 8.

325 Sydney Morning Herald (14 March 1974), 6, cited in Tay, above n 324.

326 Sir Owen Dixon, ‘*Testing Pilate and Other Papers and Address*’ Law Book Company, Sydney 1975, 153, cited in Tay, , above n 324.

327 Tay, above n 324.

328 *Koowarta v. Bjelke-Peterson* (1982) 56 Australian Law Journal Reports 625; 39 Australian Law Report 417.

329 *Commonwealth v. Tasmania* (1983) 57 Australian Law Journal Reports 450; 46 Australian Law Report 417.

330 Tay, above n 324, 9.

331 ATSIC submission, p. S1693, cited in Parliament of the Commonwealth of Australia, *A Review of Australia’s Efforts to Promote and Protect Human Rights* (Australian Government Publishing Service, 1994) 115.

essential for indigenous peoples' identity as a distinct group.”³³² It is also noted that “the rights to self-determination, lands, and cultural integrity are fundamental to any community, but for Indigenous populations, these rights are inherently tied to the environment around them.”³³³ However, there is no general recognition of the internal laws or legal system of indigenous people in Australia, only some specific contexts of native title and land right legislation are confirmed.³³⁴

6.2 COMMUNITY RIGHTS IN AUSTRALIA'S CONSTITUTION

Australia has a federal system of government, whereby the Federal government has the overall legal responsibility for ensuring that human rights are protected because it is the Federal government that enters into international agreements to protect human rights. Meanwhile, the state governments are responsible for many areas that are relevant to human rights, for example, health, education, and land matters. The laws and actions of state and territorial governments can put Australia in breach of its human rights obligations. However, the Federal government can override state laws to protect against breaches of human rights.³³⁵

Human rights are protected in different ways in Australia. It has no single document such as a *Bill of Rights* to protect human rights, unlike most similar liberal democracies.³³⁶

Only a small handful of provisions that deal expressly with rights are included in the *Australian Constitution*,³³⁷ even though Australia played a significant role in the development of the UDHR through the effort of Dr HV Evatt.³³⁸ Apart from a few other rights that are

332 Parliament of the Commonwealth of Australia, above n 331.

333 Shawkat Alam, ‘Collective Indigenous Rights and the Environment’ in Shawkat Alam et al (eds), *Routledge Handbook of International Law* (Routledge, 2013) 585, 602.

334 Bartlett, above n 59.

335 Australian Human Rights Commission, above n 318, 5.

336 Australian Human Rights Commission, above n 60.

337 Rights that are protected in the Constitution include: the right to vote, the requirement that a compulsory acquisition of property by the Commonwealth must be on just terms, the right to a trial by jury for a federal indictable offence, the requirement that the Commonwealth must respect freedom of religion. It cannot make a law to establish a religion, impose a religious observance or prohibit the free exercise of any religion, the requirement that Australian law must not discriminate against a person because of their state of residence, the right to challenge decisions of the Commonwealth government in the High Court., and implied rights (not expressly stated in the Constitution), for example freedom of political communication, or the freedom to talk about our government so that we can participate effectively in elections in Australian Human Rights Commission, above n 318, 13; Cheryl Saunders, ‘*The Australian Constitution and our Rights*’, in Helen Sykes (ed) *Future Justice* (Sydney: Future Leaders 2010) 117.

338 Dr HV Evatt was President of the General Assembly of the United Nations when the UDHR was passed. See, Australian Human Rights Commission, above n 318, 9.

implied from the text and structure of the *Constitution*, Australia relies on institutional mechanisms for the protection of rights, namely, both the Commonwealth and the State parliaments and governments, and independent courts' application of common law principles.³³⁹ The *Australian Constitution* does not directly mention the protection of communities' rights.

Each of the six states in Australia³⁴⁰ has its own *Constitution* and the same divisions of legislature, executive, and judiciary as the federal government.³⁴¹ There are no constitutional provisions related to community rights or the recognition of the Aboriginal people in the *Constitution Act* 1934 (Tas) and the *Constitution Act* 1889 (WA). This recognition is only afforded in the *Constitution Acts* of New South Wales, Queensland, South Australia, and Victoria.

Since a "community" is defined in this study as a social group the members of which share common interests and concerns in terms of basic needs, such as clean water, food, shelter, and a clean environment,³⁴² the right to protection of communities of "Aboriginal people" is contained in Section 2 of the *Constitution Act* 1902 (NSW).³⁴³ The Parliament of NSW recognises the Aborigines as the first people and nation³⁴⁴ and the traditional custodians and occupants of the land in the state. They have a spiritual, social, cultural and economic relationship with their traditional lands and waters, and have made and continue to make a unique and lasting contribution to the identity of NSW.³⁴⁵ However, the *Constitution* also contains an "exclusionary provision" that the recognition of the Aboriginal people of NSW does not give any person any legal right or gives rise to any civil course of action, or affect the interpretation of this Act or any other law in force in NSW.³⁴⁶ The aim of this exclusionary provision is to avoid uncertainty around future legal actions and the interpretation or operation of the *Constitution* or other Acts. This means that the statement is

339 Saunders, above n 337.

340 Each of the six states in Australia, namely, New South Wales (NSW), Queensland (Qld), South Australia (SA), Tasmania (Tas), Victoria (Vic) and Western Australia (WA).

341 Australian Government, *State and Territory Government* (1 January 2017) <<http://www.australia.gov.au/about-government/how-government-works/state-and-territory-government>>.

342 Harris, above n 5.

343 *Constitution Amendment (Recognition of Aboriginal People) Act* 2010 (NSW) amended the *Constitution Act* 1902 (NSW).

344 *Constitution Act* 1902 (NSW), s 2 (1).

345 *Constitution Act* 1902 (NSW), s 2 (2)(a), (b).

346 *Constitution Act* 1902 (NSW), s 2 (3).

an enduring symbolic gesture of reconciliation between Aboriginal and non-Aboriginal people and does not create any legal liability on the part of the people or parliament of NSW.³⁴⁷

Similar to NSW, the *Constitution Act* 2001 (Qld)³⁴⁸ mentions the status of Aboriginal people³⁴⁹ and excludes any legal or interpretative consequences.³⁵⁰ The Qld Parliament recognises Aboriginal people as the state's first people and nation and respects their unique values, and cultures.³⁵¹ Although this recognition includes Torres Strait Islander people, it recognises their land rights to a different degree to NSW by stating that "we honour the Aboriginal peoples and Torres Strait Islander peoples, the First Australians, whose lands, winds and waters, we all now share ..."³⁵²

The *Constitution Act* 1934 (SA) recognises the Aboriginal people in Section 2³⁵³ in all aspects of their status, culture and identity, land rights, and it contains a similar exclusionary provision as the *Constitution Act* 1902 (NSW), but with a greater degree of recognition of their status as water owners. The SA Parliament also includes an apology to the Aboriginal people and acknowledges the injustice and dispossession of their traditional lands and waters they endured in the past.³⁵⁴

The Victoria (Vic) Parliament recognises the Aboriginal people as the original custodians of the land on which the Colony of Victoria was established.³⁵⁵ The *Constitution Act* 1975 (Vic)³⁵⁶ confirms their status, traditional culture and identity. Just as other states' Constitutions confirm the recognition of the Aboriginal people, it is clearly stated in the *Constitution* that the parliament does not intend to create any legal rights or give rise to any

347 New South Wales Aboriginal Land Council, *Constitutional Recognition of Aboriginal People* (1 January 2017) <<http://www.alc.org.au/newsroom/network-messages/constitutional-recognition-of-aboriginal-people.aspx>>

348 *Constitution Act* 2001 (Qld).

349 *Constitution Amendment Act* 2001 (Qld), Preamble.

350 *Constitution Act* 2001 (Qld), s 3A.

351 *Constitution Act* 2001 (Qld), Preamble (c).

352 *Constitution Act* 2001 (Qld), Preamble (c).

353 *Constitution (Recognition of Aboriginal Peoples) Amendment Act* 2012 (SA) inserted a new section 2 into the *Constitution Act* 1934 (SA).

354 *Constitution Act* 1934 (SA), s 2 (2)(c).

355 *Constitution (Recognition of Aboriginal People) Act* 2001 (Vic) amended *Constitution Act* 1975 (Vic), s 1A.

356 *Constitution Act* 1975 (Vic).

civil course of action.³⁵⁷ The provision of the *Constitution Act 1975* (Vic) does not make any substantive changes to the law.³⁵⁸

In terms of Australia's *Constitution*, the community rights of the Aboriginal people are provided for in some state *Constitutions*. These rights are currently not recognised in writing in the nation's *Constitution*, although there are many social movements to rectify this situation. Anne Twomey observes that this began with one great advantage in terms of the overwhelming good will of the Australian people, but the challenge is to match that goodwill with well-considered and moderate proposals in which the Australian people are confident and comfortable with supporting.³⁵⁹ Constitutional recognition remains an important educative tool.³⁶⁰ Moreover, Cheryl Saunders confirms that the third category of rights, collective rights, especially those related to the environment, is become increasingly important and positive action is urgently needed by the state.³⁶¹ Additionally, the most important issues for indigenous peoples are self-determination, autonomy, control of land and territories, and access to and veto power over resources³⁶² which are challenges in mining activities.

6.3 MINING IN AUSTRALIA

Australia is one of the world's leading mining economies.³⁶³ Its substantial resources based on pure mineral potential and mining friendly jurisdiction are very highly rated.³⁶⁴ By principal commodity target, based on the number of projects reported for each region, Australia became the top destination in terms of active exploration sites in 2015.³⁶⁵ All

357 *Constitution Act 1975* (Vic), s 1A (3).

358 Anne Twomey, *Re: Submission to the Joint Select Committee on Aboriginal Constitutional Recognition*, Letter to the Hon Michael Misichin MLC, Attorney-General and Minister of Commerce, Chair on Joint Select Committee on Aboriginal Constitutional Recognition, date 7 January 2015, 2.

359 Anne Twomey, 'A Revised Proposal for Indigenous Constitutional Recognition' (2014) 36(3) *Sydney Law Review* 381, 411.

360 Twomey, above n 358, 4.

361 Saunders, above n 337, 118.

362 Benedict Kingsbury, 'The Applicability of the International Legal Concept of "Indigenous Peoples" in Asia' in Joanne R Bauer and Daniel A Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999) 336, 346.

363 CRU Consulting, above n 57, 17.

364 *Ibid*, vi.

365 D R Willburn and N A Karl, 'Annual Review 2015 : Exploration Review' (2016) *Mining Engineering* 30, (1 January 2017) < <https://minerals.usgs.gov/minerals/mflow/exploration-2015.pdf> > 32.

Australian states and territories have identified mineral resources and established mineral industries with the exception of the Australian Capital Territory.³⁶⁶ However, according to data released by the Australia Bureau of Resources and Energy Economics (BREE), lower commodity prices affected the development of mineral projects in Australia throughout the second half of 2014 and into 2015. The number of Australian mining projects approved for development (committed) decreased from 44 in October 2014 to 39 in April 2015 and the number of uncommitted projects declined from 305 (April 2011) to 180 (April 2015).³⁶⁷ However, mining companies still comprise approximately one-third of the companies listed on the Australian Securities Exchange (ASX), amounting to approximately 20 per cent of the total market capitalisation.³⁶⁸

6.3.1 MINING LEGISLATION

The mining in each state and territory is governed by its respective government with its own set of mining laws and regulations,³⁶⁹ while the government department administering the mining laws in each state administers and establishes guidelines and policy statements related to state mining legislation.³⁷⁰ Local governments are established by state or territory legislation and they typically make and enforce regulations pertaining to building and development, town planning, local amenities, the environment, and land use within their local government areas.

All minerals in the ground are the reserve of the Crown, and vested in the government of the related state or territory.³⁷¹ Therefore, ownership of the minerals is not included in the granting of the freehold title to the land. For historical reasons, there are very small and isolated pockets of land in NSW and Tasmania where the owners of the surface rights have retained the ownership of the minerals on their land. However, all prospecting and mining for minerals in NSW, whether the land is privately or publicly owned, require authorisation.³⁷²

366 CRU Consulting, above n 57, 17.

367 Willburn, above n 365, 48.

368 Kym Livesley and Sally Weatherstone, 'Australia' in Michael Bourassa and John Turner (eds), *Mining in 31 Jurisdictions Worldwide* (Law Business Research, 2013) 26, 26.

369 CRU Consulting, above n 57, 17.

370 Livesley, above n 368.

371 Ibid.

372 *Mining Act 1992* (NSW).

Each state and the NT manages mining rights under its own legislation, which permits third parties to explore and mine minerals and then the ownership of the resources passes to the third party at the point of extraction. Miners may obtain rights to conduct mining activities on unreserved Crown land or on private land with the permission of the landowner. The specific mining rights differ slightly in each state or territory, but they are based on the three fundamental stages of the development of a mine. These are: initial exploration, further detailed exploration and assessment, and production. Holders of mining rights may also have ancillary rights that relate to those mining activities, such as access to public roads, access to water, and the right to establish crushing, sizing and grading facilities on the land surface.³⁷³ In terms of objections, most jurisdictions provide a period for objections after advertising and a recommendation to the Minister to grant or not grant the mining lease by an administrative magistrate, a so-called mining warden.³⁷⁴ For example, in Queensland, anyone can object to an application for a mining claim or mining lease associated with an environmental authority application. Objections to mining leases and mining claims must be lodged with the Department of Natural Resources and Mines (DNRM). Objections to an application for a mine must first be submitted to the environmental authority during a public notification process to the Department of Environment and Heritage Protection (EHP). The EHP will notify the objectors of its decision, and if they disagree with this draft decision, they may further their objection by completing an objection notice, which will be referred to the Land Court to be heard with all other objections. The Land Court simultaneously hears all the objections to the mining claim or lease and the associated environmental authority. It hears objections to the granting of a mining claim or lease under the *Mineral Resources Act* 1989 (Qld)³⁷⁵ and under the *Environmental Protection Act* 1994 (Qld),³⁷⁶ an application or amended application for environmental authority issues for mining projects.³⁷⁷ A wide range of information is made available by the respective state and territory government departments responsible for the administration of mineral exploration and production titles. Such information is commonly stored in a searchable format online. Available information often includes open file company data, company drill-core results, current and historic exploration tenement information and geophysical and geochemical data. Closed file data is also provided

373 Livesley, above n 368, 26-33.

374 International Comparative Legal Guides, 'Australia : Mining Law 2017' (15 June 2017) <<https://iclg.com/practice-areas/mining-law/mining-law-2017/australia>>.

375 *Mineral Resources Act* 1989 (Qld).

376 *Environmental Protection Act* 1994 (Qld).

377 Queensland Courts, 'Objecting to Mining Projects' (15 June 2017) <<http://www.courts.qld.gov.au/courts/land-court/land-disputes/objecting-to-mining-projects>>.

to the government departments, where it is kept confidential for a period of time. Holders of exploration and mining titles are required to file various reports in a digital format.³⁷⁸

Mining rights may also be acquired by entering into a contractual arrangement with their holder. The right to access the surface is regulated both by legislation and by a private contract with landowners. Holders of mining rights will generally be obliged to pay rent and royalties, comply with work programmes, rehabilitate the mine, and submit the required reports. Royalties are levied by state and territorial governments and in most cases, royalties are payable on a percentage of the value or a flat rate per unit basis.³⁷⁹ Private royalties may be payable, for instance, in circumstances where the mining rights have been transferred between private parties subject to the payment of an ongoing private royalty.

6.3.2 ENVIRONMENTAL LEGISLATION

Each state and territory has a detailed legislative and regulatory regime devoted to environmental conservation, assessment, planning and land use. The environmental aspects of the mining industry are generally administered by the relevant state and territory environmental protection agency, the resource department and local government. Most mining tenements will only be granted after the relevant state department has assessed the environmental and social impacts of any proposed or potential mining activity,³⁸⁰ including Commonwealth laws such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)³⁸¹ (the *EPBCA*). The *EPBCA* initiated an important mechanism to achieve sustainable ecological development by protecting the environment by focusing on the protection of nine matters that are significant to the national environment, namely, world heritage properties, national heritage places, wetlands of international importance (listed under the Ramsar Convention), listed threatened species and ecological communities, migratory species protected by international agreements, Commonwealth marine areas, the Great Barrier Reef Marine Park, nuclear actions (including uranium mines), and water resources related to the development of coal seam gas and large coal mining developments.³⁸² The *EPBCA* provides a planning regime for obtaining consent for a project if it affects certain

378 Livesley, above n 368, 34.

379 CRU Consulting, above n 57, 17.

380 Livesley, above n 368, 37.

381 *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

382 Australian Government, Department of the Environment, *Matters of National Environmental Significance : Significant Impact Guidelines 1.1 Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth of Australia, 2013) 2.

Commonwealth land or threatened species. Commonwealth laws will also apply to mining activities that will have an impact on Commonwealth lands or national matters, for example, national heritage-listed land.

Many Australian mining companies also adhere to international standards such as ISO 14001 for Environmental Management Systems.³⁸³ The Commonwealth Department of Resources, Energy and Tourism has published guidelines on the *Best Practice of Environmental Management in Mining* and *A Guide to Leading Practice for Sustainable Development in Mining*.³⁸⁴ The mining company will prepare a proposal for mining operations, along with the potential environmental and social impacts and how they will be managed. The relevant government departments will then decide whether the project is environmentally significant and the extent of environmental assessment necessary (if at all) before approving the proposal. Assessment may involve public environmental reports, EIA, community consultation and public inquiries. If public consultation is needed, the time taken will increase, with some projects taking several years for the necessary permits to be obtained.

Mining is generally restricted within national parks, wilderness protection areas and areas reserved for the preservation of tourism or heritage. Areas subject to native title or Aboriginal cultural heritage are also specially regulated.

The decision of the High Court of Australia in *Mabo and Others v The State of Queensland (No. 2)*³⁸⁵ in 1992 recognised that the concept of an Aboriginal native title to land had survived the Crown's acquisition of sovereignty. Native title is the term given to the collection of rights held by certain Aborigines to use land according to their traditional customs, laws and beliefs. Following this decision, the *Native Title Act 1993* (Cth) or the *NTA* and complementary state and territory Native Title Legislation was implemented.³⁸⁶ Mineral tenements granted after 23 December 1996 are permissible future acts under the terms of the *NTA* and are subject to the future act regime. Under this regime, the relevant parties must be appropriately notified and the "right to negotiate" process must be complied with before the proposed future act, which has the potential to affect the native title, can proceed. If an act is performed that affects the native title rights, such as the granting of a mineral tenement, it

383 Livesley, above n 368.

384 Australian Centre for Sustainable Mining Practice, *A Guide to Leading Practice Sustainable Development in Mining* (Australian Government, 2011) (1 January 2017)
<<https://www.industry.gov.au/resource/Documents/LPSDP/guideLPSD.pdf>>

385 *Mabo (No 2)* (1992) 175 CLR 1; 107 ALR 1 ('*Mabo*').

386 Bartlett, above n 59, 164.

may be invalid without compliance with the provisions of the *NTA*. The *NTA* requires that, in a right to negotiate process, the applicant applying for the grant and the state (or territory) must negotiate in good faith with the registered applicant for a native title in an attempt to determine whether or not the relevant permit or licence may be granted, and if so, the conditions on which it should be granted.³⁸⁷

Additionally, the Commonwealth, states and NT have implemented Aboriginal heritage-protection legislation, with the aim of protecting any places, objects and folklore that are of particular significance to the Aborigines, in accordance with Aboriginal traditions. This recognition of their cultural rights are shining in the land rights, such as *Aboriginal Land Trust Act 1966* (SA),³⁸⁸ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth),³⁸⁹ *Pitjantjatjara Land Rights Act 1981* (SA).³⁹⁰ The protection of their cultural right with respect to sites of traditional significance and to Aboriginal relics is provided in the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).³⁹¹ It is unlawful to prospect or mine on lands in Australia on which Aboriginal objects or Aboriginal places are situated, unless authorised by legislation, authority, permit, lease, licence, or otherwise approved by the applicable state government department or the Commonwealth Government.

6.3.3 COMMUNITY ENGAGEMENT

Since the states and territories are responsible for minerals located in their respective jurisdictions, they are responsible for determining how mining activities may be undertaken, including laws mandating community engagement, with the exception of Victoria. There, the relevant mining legislation imposes a duty on exploration and mining licence-holders to consult with the community during all phases of the project.³⁹² They must also prepare community engagement plans and community consultation is required in connection with securing environmental or planning approval. The *EPBCA* also contains a public consultation process where federal approval can be sought.

387 Livesley, above n 368, 29.

388 *Aboriginal Land Trust Act 1966* (SA).

389 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

390 *Pitjantjatjara Land Rights Act 1981* (SA).

391 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). See, Bartlett, above n 59, 175.

392 Mining, Minerals and Sustainable Development Project, above n 131, 169.

The community consultation requirements (apart from Victoria) are usually only triggered if a mining development requires an EIA.³⁹³ As part of the EIA procedure, a proponent must usually consult with the community. This not only includes local landholders and councils, but also local community groups. Then, if it is considered to be important, terms mandating a community consultation will be included in the environmental permit granted to operate the mine. All operational mines in NSW are required to establish a community consultative committee, the purpose of which is to provide a forum for open discussion between representatives of the mine, the council and other stakeholders and provide input on the land use at the mine's closure.³⁹⁴

6.4 CASE STUDIES

The case studies of the Argyle Diamond Mine serve to illustrate the role of community engagement in the protection of community rights by means of mutual consultation between the mining company and local communities. This process, along with the principle of “to support sustainable community activities” can protect the culture, livelihood and environment of the Aborigine people. Moreover, the Xstrata Coal Beltana Mine was a good example of addressing communities' concerns about the environmental impact of mining and obtaining and maintaining a social licence to operate from local communities and other stakeholders. Thailand can learn from these two cases since, although Australia has similar problems to Thailand, the policies and legal measures of the two countries are different. These differences can guide Thailand to fill the gap between the contents of the *Constitution* and their enforcement.

6.4.1 THE ARGYLE DIAMOND MINE

This case study illustrates the role of community engagement after the project had been operating for 20 years, although such engagement is always recommended in the early stages of a project. The Rio Tinto's Argyle project is a diamond mine in Western Australia, which is located in an area that has major spiritual significance for traditional landowners.³⁹⁵ This mine is located at Barramundi Gap, a site of cultural significance to both Miriung and Gija women, and adjacent to Devil Devil Springs, a significant men's cultural site.

393 Ibid, 224.

394 Ibid.

395 CRU Consulting, above n 57, 93.

A more formal relationship between the company and landowners was established in 2001 after two decades of operation. An open dialogue began when mine personnel made a point of listening to the traditional owners and apologising for past mistakes.³⁹⁶ Although this process of cooling down occurred in a period of rapidly evolving community expectations of the control of the exploration and mining access to land, it was developed from the reflection in *Mabo v Queensland (No 2)*³⁹⁷ and the Wik High Court decision³⁹⁸ and Native Title legislation, which affirmed the pre-existing common law rights of the Aboriginal people.³⁹⁹

At the time of the discovery, exploration teams encountered opposition from local and other Aboriginal people, but eventually an agreement to mine was signed with a group of traditional owners, despite the fact that the mine would necessitate the destruction of a significant ceremonial site at Barramundi Gap. This so-called Glen Hills Agreement attracted adverse reactions for different reasons from the wider group of traditional owners, other Aboriginal groups, and the WA State government. The nature of the agreement and the destruction of the site at Barramundi Gap distressed the Aboriginal groups, while the government was concerned that an agreement, outside the statutory requirement, had been reached with an Aboriginal group.⁴⁰⁰

In the early 1980s, the company's links with local communities, most notably Warmun, Mandangala and Doon Doon communities, strengthened and the Argyle "Good Neighbour Agreement" became the vehicle for a number of largely unilateral programmes aimed at improving the circumstances of local Aborigines.⁴⁰¹ However, the residual resentment of this dispute lingered as a result of "unfinished business" between the company and the traditional owners.⁴⁰² It continued over the following decade until mining approval

396 Ibid.

397 *Mabo (No 2)* (1992) 175 CLR 1; 107 ALR 1 ('*Mabo*')

398 *Wik Peoples v Queensland* (1996) 141 ALR 129

399 Bruce Harvey and Simon Nish, 'Rio Tinto and Indigenous Community Agreement Making in Australia' (2005) 23 *Journal of Energy and Natural Resources* 499, 499.

400 Ciaran O'Faircheallaigh, 'Social Justice, Aboriginal Leadership and Mineral Development in Australia' in Richard Gregory Johnson III (eds), *A Twenty-first Century Approach to Teaching Social Justice : Educating for Both Advocacy and Action* (Peter Lang, 2009) 216-219.

401 Richard Howitt, 'Recognition, Respect and Reconciliation – Changing Relations between Aborigines and Mining Interests in Australia' in Howitt Richard (eds), *Rethinking Resource Management. Justice, Sustainability and Indigenous Peoples*, (Routledge, 2000), cited in Bruce Harvey and David Brereton, 'Emerging Models of Community Engagement in the Australian Minerals Industry', paper presented at the International Conference on Engaging Communities, 14-17 August 2005, Brisbane: an initiative of the United Nations and the Queensland Government (1 January 2017) <<http://www.csr.m.uq.edu.au/docs/ICEC.pdf>> 8.

402 Harvey, above n 401, 9.

was granted under state legislation, which led to even greater antipathy. Rio Tinto decided to reassess its Aboriginal land access and community relations approach and initiated a ‘mutual consultation’, reviewed its “Good Neighbour Agreement”, and implemented a new agreement.⁴⁰³

Members of the communities were taken on site tours, including the underground mine. A number of visual aids were used to explain the impact of the mining activity on the surrounding area, and translators of five traditional owner languages were used to ensure that everyone could follow and participate in the negotiations. In this reciprocal process, the landowners provided the company with information about their customs and performed ceremonies to ensure that the mining operation could be conducted safely and free from interruption by ancestral spirits.⁴⁰⁴ The Mirriuwung, Gidga, Malignin and Wallar traditional owners, Argyle and the Kimberley Land Council, signed the Argyle Participation Agreement (APA) in September 2004. The Agreement was registered as an Indigenous Land Use Agreement (ILUA) under the *NTA* in 2005. The APA represents a comprehensive and legally constituted form of consultation and agreement and is the most advanced in Australia to date.⁴⁰⁵

The APA formally establishes a shared vision for regional development, including traditional owners’ ceremonial responsibilities associated with the mining lease area and their approval for the mining to proceed underground if it is commercially feasible. Traditional owners’ benefits, to be governed through community-controlled trust structures, provide for current and post-mine programmes in health, education and culture, amongst other components. The agreement is also supported by eight management plans⁴⁰⁶ for the on-going consultation and participation of traditional owners in non-operational mining businesses, including increasing local employment in the project to comply with the philosophy of the company “to support sustainable community activities”.⁴⁰⁷ According to Kim Doohan, Marcia

403 Harvey, above n 401, 9-10.

404 CRU Consulting, above n 57, 93.

405 Harvey, above n 401, 11-12.

406 The management plans cover: 1) Aboriginal site protection and heritage clearance work; 2) training and employment programs for greater direct Aboriginal participation in the mine; 3) cross cultural training for all mine employees and contractors; 4) traditional owner access to non operational areas of the mine lease; 5) once a year traditional owner land management inspection of country and water; 6) traditional owner participation in planning eventual closure and decommissioning options; 7) business development opportunities associated with the mine; and 8) provision of specific attention, with its own management plan, to Devil Devil Springs, a heritage site of prime importance that has been affected by mine activities.

407 Harvey, above n 401, 12.

Langton and Odette Mazel, “the ILUA for the Argyle Mine is one of a growing number of agreements that has set new standards in formalising relationships between resources companies and local indigenous groups in Australia under the terms of the *Native Title Act* 1993 (Cth)”.⁴⁰⁸

6.4.2 The XSTRATA COAL BELTANA MINE

This case study is an example of addressing community concerns about the environmental impact of mining and obtaining and maintaining a social licence to operate from local communities and other stakeholders.⁴⁰⁹ Not only was an EIA undertaken in this large developmental project, but this was also an SIA was given formal consideration. This Xstrata project provided the company and the local community with mutual benefits by addressing local concerns about the predicted impact of mining on the environment.

The Xstrata’s Bulga Coal Mine has operated in the Hunter Valley, a famous vineyard in New South Wales, since the mid-1990s. The company applied for an underground coal exploration licence covering 40 commercial vineyards adjacent to Wollombi Brook, a significant second-order stream in the area. Two hundred local residents with strong concerns about the impact of underground mining on viticulture and water resources attended a public meeting, after which the company established a specific team and a community consultation committee to address those concerns.

The outcome of the consultation was that both parties agreed to the construction of a simulated vineyard over the existing South Bulga underground mine, to assess the impact of subsidence on the vineyard infrastructure, to be informed of the results of both the exploration programme and the viticulture trials through field days and newsletters. The company also guaranteed to undertake a more detailed impact assessment for each property and publish its private property management strategies in its booklets. Following the approval, the booklets were utilised as part of the subsidence management plan and this led to a comprehensive consultation programme being developed for the ongoing management of the project.⁴¹⁰

408 Kim Doohan, Marcia Langton and Odette Mazel, ‘From Paternalism to Partnership: The Good Neighbour Agreement and the Argyle Diamond Mine Indigenous Land Use Agreement in Western Australia’, in Marcia Langton and Judy Longbottom (eds), *Community Future, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom* (Routledge, 2012) ch 13.

409 Australian Government, Department of Industry Tourism and Resources, *Leading Practice Sustainable Development Program for the Mining Industry*, (Community Engagement and Development, 2006) 14-16.

410 Ibid, 17.

This implementation of an EIA and SIA in Australia's first mining operation under a vineyard led to the development of a world-class vineyard monitoring programme, the positive benefits of which were a well-coordinated community consultative programme, the close involvement of the affected landowners and the commitment of the mining company. The project was achieved by the formation of an exploration community liaison committee, ongoing comprehensive consultation, the formation of a technical review committee to oversee the results of monitoring the vineyard, an enhanced community relationship, and the acquisition of project approvals in a timely manner.⁴¹¹

The success of this project was confirmed by David O'Brien, Group Manager of the Environment and Community, Xstrata Coal NSW, when he stated that "By taking the time to listen to local landowners and address their individual concerns, we were able to work together throughout the various staged of the projects to achieve a positive result for both the mine and the community."⁴¹²

However, alternative views reveal that open cut coal mines have been expanding deeper in to the densely settled agricultural landscapes in the area. Despite the significant wealth that mining has brought, those residing in proximity to mines and coal-fired power stations in the Hunter Valley have expressed their concerns over a long period, surrounding the deleterious impacts of mining on health, rural livelihoods and the environment. A further community concern is the contribution of coal- fired power to global warming.⁴¹³

7. ANALYSIS

Most mines are located in rural areas where communities have resided over long periods of time. These places are the localities where their cultural heritage is situated and from where they derive their livelihoods. Often mining activities are established in rural localities in developing countries, such as Thailand, where people may not have the education and tools to protect their rights. Thus, their rights may be easily violated by mining activities, mining companies, governments, and sometimes, local authorities. Legislation and practices Thailand and Australia is compared in this study to respond to the research question: "*How can Thailand enforce community rights, as articulated in the Constitution, to protect the*

411 Ibid, 15-16.

412 Ibid, 16.

413 Linda Connor, Sonia Freeman and Nick Higginbotham, 'Not Just a Coalmine: Shifting Grounds of Community Opposition to Coal Mining in Southeastern Australia' (2009) 74(4) *ETHNOS* 490, 492-493.

livelihoods of rural communities in the context of the exploitation of natural minerals?” The following analysis will propose how Thailand’s legal frameworks and practices could be improved to protect rural communities and the environment in the context of future mining activities.

7.1 CLOSING THE GAP

The following analysis identifies and discusses future actions to close the gap between Thailand’s *Constitution* intents to protect community rights and the enactment of this intent.

7.1.1 COMMUNITY RIGHTS ACT

The tripartite typology to respect, protect, and fulfil human rights obligations is the duty of states according to the traditional human rights doctrines⁴¹⁴ and it is sometimes broadened to include a fourth obligation, namely, to “promote”.⁴¹⁵ These responsibilities of states can be extended to protect community rights, since they are the third generation of human rights. According to Laura Westra, it is an imperative to protect the rights of communities and collectives who have common traditions and land-based groups whose rights are most at risk.⁴¹⁶

Based on the analogy of the states’ obligation framework of respect, Thailand has an obligation to refrain from interfering with or curtailing the enjoyment of community rights. The obligation to protect requires Thailand to protect its rural communities from the violation of their rights. The obligation to fulfil demands that Thailand facilitates the enjoyment of community rights. According to the UNHR report,⁴¹⁷ it is estimated that 600 000 to 1.2 million indigenous people live in the forests, mountains or sea coasts in Thailand, accounting for 1-2 per cent of the Thai population. Of these, there are 3429 hill tribe villages with 93 257 villagers.⁴¹⁸ The size of this sector of the population reinforces the need to strengthen the

414 Jernej Letnar Cernic ‘State Obligations Concerning Indigenous Peoples’ Rights to Their Ancestral Lands: Lex Imperfecta?’ (2013) 28(4) *American University International Law Review* 1130, 1148. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.

415 *Social and Economic Rights Action Centre (SERAC) v Nigeria*, para 44 (*Ogoniland Case*), cited in Dinah Shelton (eds), *The Oxford Handbook of International Human Rights Law* (Oxford, 2013) 566.

416 Laura Westra, *Human Rights: The Commons and the Collective* (UBC Press, 2011) 2.

417 Albuquerque, above n 63.

418 Ibid.

protection of indigenous rights in Thailand and for the state to meet its obligations to respect, protect, and fulfil indigenous rights.

Apart from the written law, an examination of Thailand's obligations in practice reveals that Thailand fails to respect, protect, and fulfil rural communities' rights. According to an investigation by the NHRC, the enforcement of community rights, as articulated in the *Constitution*, is ineffective, since many government agencies have been found to violate communities rights in the process of granting mining concessions.⁴¹⁹ Furthermore, when the affected communities have brought the case to court, judgment has been made on the grounds of whether or not the government had issued the concession according to the law. The NHRC found that community rights had been abused in both the *Akara Case* and the *Dongmaifai Case*, when the Administrative Court found that the concessions had been legally issued based on the *1967 Minerals Act*. Thus demonstrating that the protection of community rights in the *Constitution* needs to be enforced and implemented in the Acts.

Based on the dualism of Thailand and Australia, the state's obligation to implement international treaties requires legislation from parliament. Hence, the state's responsibility in relation to human rights in international legal instruments requires the development and enactment of Acts, even though these countries have signed or ratified the relevant treaties.

When examining the Australian context in which community rights are protected without any provision in the *Australia Constitution*, it was found that social movements and common law's, such as in the *Mabo Case*, have drawn legislation from the *NTA* to protect the rights of indigenous peoples and their communities. This specific protection stems from federal legislation, which is extended to state legislation. This is different from Thailand, where the Acts referred to in previous court decisions have no power. According to the concept of the supremacy of the *Constitution*, Thailand, with its civil legal system, is required to utilise Acts or subordinate laws rooted in the *Constitution*. Both Australia and Thailand do not recognise indigenous people,⁴²⁰ however, Australia has paid attention to the native title and land rights legislation⁴²¹ which does not appear in Thai law. While recognising that Australia has many challenges pertaining to the rights of indigenous people, Thailand can learn from the *NTA* and Australia's indigenous rights protection in many states. Although there is nothing in the *Constitution* to protect the unrecognised indigenous peoples in

419 National Human Right Commission, above n 1.

420 Bartlett, above n 59; Albuquerque, above n 63.

421 Bartlett, above n 59.

Thailand, classifying them as “traditional local communities” will extend the fulfilment of the state’s obligation according to Section 66 of the *2007 Constitution*. Moreover, the protection of local community right should be focused in aspects of self-determination, autonomy, control of land and territories, and access to and veto power over resources⁴²² which are indigenous’ issues.

To improve its obligations, Thailand can benefit from Liberia, where the *Act to Establish the Community Rights Law of 2009 with Respect to Forest Lands* has been enacted in the Liberian Constitution to confirm the protection of communities’ rights. Thailand could adapt this model to enact a *Community Rights Act*. The scope of such a future Act should be broadened to include the protection of the rights of rural communities in the context of mining activities in their localities. The UNHR Rapporteur, noted that “the implementation of such an act, if adopted, will be key, and its implementation should include awareness-raising among indigenous peoples on the law and on their rights, overcoming the language barrier so that they fully understand their rights.”⁴²³

7.1.2 IMPROVING COMMUNITY ENGAGEMENT IN THAILAND

It is evident from Thailand’s case studies and legislation that community engagement processes, starting from the exploration stage, require significant improvement. Generally mining processes are undertaken by the government and the mining company, since natural resources are within the sovereignty of Thai government. While most owners of land that contains mineral resources are approached to sell it, they are often not advised of the prospective mining project. The mining concession, or the so-called legal licence, to operate is negotiated between the government and the company, and the local communities consent is not usually part of these negotiations. However, the lack of a social licence to operate can have a negative effect on the company’s business operations, such as the enforced closure in the *Akara Case* after the community had protested against the mine for more than fifteen years.

Therefore, the use of community engagement in Australia to inspire the improvement in Thailand, can be a measure to aid the protection the of community rights of rural people in Thailand. The related authorities in Thailand could consider the addition of a social licence to operate when granting a concession. The evidence of the need for a social licence has been

422 Kingsbury, above n 362.

423 Albuquerque, above n 63, para 28.

described in the NHRC Report⁴²⁴ that notes many government agencies have violated communities' rights in the process of granting mining concessions.

The exploration and mining licence-holders will benefit by working in partnership with communities during all phases of the project. Similar to Australia, they should prepare community engagement plans and consult the community when seeking environmental or planning approval. The EIA processes in Australia usually require proponents to consult the community. This not only includes local landholders and councils, but also local community groups. Then, if it is considered to be important, terms mandating community consultation will be included in the environmental permit granted to operate the mine. All operational mines in NSW are required to establish a community consultative committee for the purpose of providing a forum for open discussions between representatives of the mine, the council and other stakeholders. This consultation process extends past the life of the mining activity and involves providing input on site remediation, including land use once the mine has closed,⁴²⁵ as in the case of the Xstrata Coal Beltana Mine.

7.1.3 CO-BENEFITS

There are numerous cases in Thailand in which the local people do not own the land where mining activity is occurring. They may hold the tenure to the right to use the land, however tenure is weak and easily violated by the mining companies and government agencies. If the protected land areas are publicly owned, the government can issue a concession without consulting the owner of the tenured land. Although they have the right to use and occupy the land for many years, they have no right to oppose the legal licence to mine it. Therefore, Australian laws such as the *NTA* and its *ILUA* can provide a model for Thailand to adapt to strengthen local communities rights of land tenure.

In terms of an equitable sharing the benefits of mining, or co-benefits, communities in Thailand do not receive any share of the royalty fee companies pay to the government. Thus, the national and company wealth is funded by community loss. Although some mining companies pay tax to the local authorities and voluntarily contribute some money to the local environmental protection fund, the affected communities do not receive appropriate compensation because this tax and funding contributions are managed by government

424 National Human Right Commission, above n 1.

425 Mining, Minerals and Sustainable Development Project, above n 131, 224.

agencies. Therefore, the mining rights may also be acquired by entering into a contractual arrangement with their holder, as in the Australian model in the Argyle Diamond Case.

In Australia, the legal rights regarding access to land is regulated both by legislation and by a private contract with the landowner. Holders of mining rights will generally be obliged to pay rent and royalties, comply with work programmes, rehabilitate the mine site, and submit the required reports. Royalties are levied by state and territorial governments and are payable in most cases on a percentage of the value or a flat rate per unit basis.⁴²⁶ Private royalties may also be payable, for instance, in circumstances where the mining rights have been transferred between private parties subject to the payment of an ongoing private royalty. Basing practices on an adaptation of this model will assist Thailand's future establishment of a system of co-benefits, where the economic growth of rural communities can propose from mining activities.

7.2 ENVIRONMENTAL, SOCIAL AND CULTURAL PROTECTION

Community rights pertaining to the environment are specifically mentioned in Principle 22 of the *Rio Declaration*.⁴²⁷ The community's role in sustainable environmental protection focuses on the importance of knowledge and traditional practices in the management and development of the environment. This Declaration also confirms all governments' duties to recognise, support and facilitate the identity, culture and interests of communities and their effective participation in the achievement of sustainable development.

The *2007 Constitution* also affirms community rights to participate in the EIA and HIA processes. However, it is evident from the sample two case studies of Thailand, discussed in this research, that the enforcement of the EIA and HIA is ineffective. Some mining projects in Thailand, such the Akara mine, have commenced operations without the approval of the HIA and the SIA.

The EIA and the SIA were formally considered in the Australian case study of the Xstrata Coal Betana Mine. This project provided the company and the local community with mutual benefits by addressing local concerns about the predicted impact of mining on the

426 CRU Consulting, above n 57, 17.

427 *1992 Rio Declaration on Environment and Development*, 14 June 1992, UN Doc. A/CONF.151/26 (1992), Principle 22 "Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development."

environment. Two hundred local residents with strong concerns about the impact of underground mining on viticulture and water resources attended a public meeting, after which the company established a specific team and a community consultation committee to address their concerns.

Each state and territory in Australia has a detailed legislative and regulatory regime devoted to environmental conservation, assessment, planning, monitoring, reporting and land use. The environmental aspects of the mining industry are generally administered by the relevant state and territorial environmental protection agency, the resource department and the local government. Most mining tenements are only granted after the relevant state department has assessed the environmental and social impacts of any proposed or potential mining activity, including Commonwealth laws such as the *EPBCA*. Therefore, Thailand would benefit from adapting the requirements of the EIA, HIA, and SIA from Australia to implement best practice in Thailand's mining context. The processes of developing and implementing these assessments are integral to protecting the rights of rural communities.

7.3 INDUSTRY AND SUSTAINABLE MINING

Community rights in mining activities are confirmed in the *Berlin Guidelines*, the MMSD's *Breaking New Ground* report, and Principles 3 and 9 of the *ICMM Principles*, in which it is stated that communities have the right to participate in all stages of mining activities, the right to a healthy environment, and the right to development. Moreover, in terms of human rights and transnational corporations and other business enterprises, the UN Human Rights Council endorsed the *Guiding Principles on Business and Human Rights* in its resolution 17/4 of the 16th June 2011 and added the state's obligation for "remedy" to these Guiding Principles.⁴²⁸ However, these principles and reports are compulsory to business entities.

The Thai Government would benefit from introducing policies that require the mining industry to practice the *Guiding Principles on Business and Human Rights* to promote the sustainable development of mining practices. This action will assist in the protections of community rights and encourage industry- community partnerships.

428 United Nations Human Rights, above n 187.

8. CONCLUSION

Community or group rights are third-generation human rights in the international context of “solidarity rights”. They include the right to development, peace, a healthy environment, communication, humanitarian assistance, and a share in the common heritage of mankind. Community rights pertaining to environmental protection have been included in the *Constitution of the Kingdom of Thailand* since 1997. However, there have been reports of the violation of the written law and enforcement of community rights, which illustrates the gap between the law and its enforcement. This study was based on an investigation of this gap, particularly in relation to the community rights of rural people in Thailand and the mining of natural resources. Australian law and practice provided a comparative context for this research based on its long history and the importance of mining activities to the nation, as well as the protection of communities’ rights, particularly those of the Aboriginal peoples. Methods have been proposed to close the gap between the Thai Constitution and its enforcement and these are expected to strengthen future community rights and environmental protection for rural people in the context of mining activities.

In this study a “community” is defined as a social group with shared interests and concerns based on fundamental needs. The law to protect the benefits of communities and the environment needs to be effectively enforced. Environmental rights, which are the basic precepts to protecting nature, should be implemented at a national level. Communities’ right to the environment is specifically mentioned in Principle 22 of the *Rio Declaration*, which relates to communities’ role in the sustainable protection of the environment with a focus on the importance of knowledge and traditional practices for the management and development of the environment. This Declaration also confirms the duty of all governments to recognise, support and facilitate the identity, culture and interests of communities and foster their participation in the achievement of sustainable development.

In terms of local communities, mining and sustainable development can be achieved by strengthening the protection of communities’ rights and people’s access to a healthy environment, as stated in Principle 22 of the *Rio Declaration*, and the goal of sustainable development can be attained by integrating the benefits in the economy, environment, and society without reducing the potential to meet the needs of future generations. While mineral development can benefit people at the local level, it can also have a significantly negative impact on the environment; therefore, managing it effectively entails resolving hitherto unresolved issues. Communities’ rights in mining activities are confirmed in the *Berlin Guidelines*, the MMSD’s *Breaking New Ground* report, and numbers 3 and 9 of the *ICMM*

Principles, in which it is stated that communities have the right to participate in all stages of mining activities, the right to a healthy environment, and the right to development.

Cases where rural communities are disadvantaged by the impact of the environmental damage caused by mining and the inequitable sharing of income derived from exploiting mineral resources are of particular interest. Local communities bear long-term environmental and social costs, which outweigh the benefits accrued by indigenous peoples; meanwhile, there are short-term economic benefits for both companies and developing countries. These mining projects often displace local populations, exploit their natural resource base, and interfere with, or destroy, their livelihoods and culture, on which they may depend. Local communities are often vulnerable for several reasons, including the lack of knowledge or experience to defend their rights, poor education, limited access to resources, and no access to legal representation. However, the frequent neglect or repression of rural communities by national governments is a more pervasive structural problem.

The *Constitution* generally affirms communities' rights, cultural rights, and environmental rights, including the right to participate in the management, maintenance, preservation and exploitation of natural resources and the environment in a balanced and persistent fashion, the right to participate in the preservation and exploitation of natural resources and biological diversity, the right to live in a healthy environment, and the right to access justice. However, the enforcement of community rights articulated in the *Constitution* is ineffective in practice.

Thailand has no direct *Community Rights Act* which contains its obligation to protect communities' rights. Some communities' right to the protection of different issues is affirmed in many acts; for example, the *Plant Variety Protection Act B.E. 2542* provides local indigenous communities with the right to play a role in conserving, developing and improving plant generic resources, the *Protection of Geographical Indications Act B.E. 2546* gives local communities the right to share the benefit of geographical indications, and the *Community Organisation Council Act B.E. 2551* defines and classifies the types of communities. These Acts related to the protection of community rights are concerned with conserving generic resources, protecting communities' right to property and geographical indication products, and defining the types of community, but they do not protect the community rights that are covered by the *2007 Constitution*.

In terms of communities' rights and mining activities, the enforcement of communities' rights has failed according to the Working Report of the National Human

Rights Commission (NHRC) for the period between 2002 and 2015. Communities' right to manage natural resources and the environment has been violated by various governmental and private projects that have failed to respect the rights affirmed in the Thai *Constitution*. Issues include the fact that communities are unable to access and receive related information, lack community participation, and have insufficient appropriate information to participate and make decisions. The *Constitution* lacks mandatory EIA and HIA processes and there is a gap between constitutional provisions and enforcement, including a centralised policy system. These problems were all evident in the *Akara Case* and the *Dongmafai Case*.

It is evident from Australian laws and practices that human rights are protected in different ways in Australia, where there is no single document such as a *Bill of Rights* to protect human rights, unlike most similar liberal democracies. Apart from a few other rights that are implied in the text and structure of the *Constitution*, Australia relies on institutional mechanisms for the protection of rights, namely, the Commonwealth and State parliaments and governments, and the application of common law principles by independent courts. The *Australian Constitution* does not directly mention the protection of communities' rights.

In terms of Australia's *Constitution*, the community rights of the Aboriginal people are provided for in some state *Constitutions*, but they are not currently recognised in writing in the nation's *Constitution*.

As for mining legislation in Australia, mining in each state and territory is governed by its respective government with its own set of mining laws and regulations, while the related government department in each state administers the mining laws and establishes guidelines and policy statements related to state mining legislation. Local governments are established by state or territory legislation and they typically make and enforce regulations pertaining to building and development, town planning, local amenities, the environment, and land use within their local government areas.

Apart from very small isolated pockets of land in New South Wales and Tasmania, where the owners of the surface rights have retained the ownership of the minerals on their land, all minerals in the ground are the reserve of the Crown and are vested in the government of the related state or territory, similar to the Thai government's concept of the sovereignty of natural resources. Therefore, the ownership of the minerals is not included in the granting of the freehold title to the land; however, there are differences in sharing the concession fee. In Thailand, the mining concession fee is fully paid to the government, while the concession fee is given to the land owners in Australia.

Each state in Australia and the NT manages mining rights under its own legislation, which permits third parties to explore and mine minerals. Subsequently, the ownership of the resources passes to the third party at the point of extraction. Miners may obtain the right to conduct mining activities on unreserved Crown land or on private land with the permission of the landowner, whereas land owners in Thailand have no right to benefit from any mining activities. They can only choose to sell the land to the mining company. However, most mining companies try to disclose information of prospective mining activities to avoid protests and an increase in the land price.

In Australia, a wide range of information is made available by the respective state and territorial government departments responsible for administering the mineral exploration and production titles. This information is commonly stored in a searchable online format. The available information often includes open file company data, company drill-core results, current and historic exploration tenement information, and geophysical and geochemical data. Mining rights may also be acquired by entering into a contractual arrangement with the holder. The right to access the surface is regulated by both legislation and a private contract with landowners. Holders of mining rights are generally obliged to pay rent and royalties, comply with work programmes, rehabilitate the mine, and submit the required reports. Royalties are levied by state and territorial governments, and in most cases, they are payable on a percentage of the value or a flat rate per unit basis. For example, private royalties may be payable in a situation where the mining rights have been transferred between private parties subject to the payment of an ongoing private royalty.

In addition, each state and territory in Australia has a detailed legislative and regulatory regime devoted to environmental conservation, assessment, planning and land use. The environmental aspects of the mining industry are generally administered by the relevant environmental protection agency of each state and territory, the resource department and the local government. Most mining tenements will only be granted after the relevant state department has assessed the environmental and social impact of any proposed or potential mining activity. Moreover, many Australian mining companies also adhere to international standards, such as ISO 14001 for Environmental Management Systems and the guidelines of the Commonwealth Department of Resources, Energy and Tourism on the *Best Practice of Environmental Management in Mining* and the guide to the *Leading Practice for Sustainable Development in Mining*. The mining company will prepare a proposal for mining operations, which illustrates the potential environmental and social impacts and how they will be managed. The relevant government departments will then decide whether the project is environmentally significant and the extent of the environmental assessment (if one is

necessary) before approving the proposal. The assessment may involve public environmental reports, EIA, community consultation and public inquiries. If a public consultation is needed, the time taken will increase, with some projects taking several years to obtain the necessary permits. These practices are illustrated in the Australian case of Xstrata.

The aspect of community engagement is highlighted in the case study of the Australian Argyle diamond mine. Most states and territories in Australia are responsible for the minerals located in their respective jurisdictions and are also responsible for determining how mining activities may be undertaken, including the laws mandating community engagement. Therefore, the relevant mining legislation imposes a duty on exploration and mining licence-holders to consult with the community during all phases of the project. They must also prepare community engagement plans, and community consultation is required in order to secure environmental or planning approval.

This practice is not enforced in Thailand. Although an environmental and health impact assessment is required, the DPIM does not pay great attention to it, as evidenced in both the *Akara Case* and the *Dongmafaai Case*. Furthermore, the requirement of a social impact assessment is not shown in any of Thailand's laws concerning mining activities.

This research acknowledges the importance of balancing the sustainable development pillars of economic growth, social justice, and environmental protection, as well as community engagement and cultural identity based on the recognition of Principle 4 of the *Rio Declaration*, in which it is explained that "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." Therefore, the proposed future actions are as follows;

1. The development, adoption and enactment of a *Community Rights Act* for Thailand. The Act will include recognition of the rights of rural and indigenous people as a traditional local community right. The Act will be informed by Liberia's *Act to Establish the Community Rights Law of 2009 with Respect to Forest Lands* and Australia's *NTA*.
2. The improvement of education and community engagement in Thailand's rural communities to ensure they are aware of their rights pertaining to mining activities.
3. The development of a legal framework for prior informed consent, land rights, and equal benefit-sharing with local communities located around mining projects.

4. A review and strengthening of the enforcement of amended EIA and HIA processes in Thailand's laws, including legislating to enforce the SIA in the process of granting mining concessions in Thailand. Included in this review process will be the enforcement of independent measuring, evaluating and regular reporting of mining activities and impacts. These reports will be provided in open and accessible formats, available to local communities, industry and government agencies.
5. Working in partnership with mining companies to improve their practices according to international mining guidelines and principles. These include the *Guiding Principles on Business and Human Rights*, the *Berlin Guidelines*, the *ICMM Principles*, and promoting the adoption of a rights-based approach in the mining industry to achieve sustainable development.

These actions are required to fulfil the intent of Thailand's *Constitution* to protect and enforce the rights of communities. In the case of this research, the proposed actions aim to protect the livelihoods of rural communities and environments in the context of mining activities and meeting the objectives of sustainable development. A further investigation and development of each of these actions is required in future research. Some of the challenges for a future study involves analysis of the constitutional provisions in the latest *Constitution*, which is in the process of being endorsed with the King's royal signature, and will enter in to force with the *2016 Draft Constitution*. Furthermore, the development of the *Community Rights Act* and the strengthening of environmental practices, regarding the EIA, HIA, and SIA, education, communication, consultation, participation, monitoring and reporting systems in Thailand, are integral to closing the gap between Thailand's *Constitution* and its enforcement. The closing of this gap is critical to achieve a balance between the sustainable extraction of mineral resources, ensuring that rural communities and landscapes, situated in mining localities are the beneficiaries, and not the victims of this industry.

BIBLIOGRAPHY

A. BOOKS, ARTICLES, REPORTS

Alam, Shawkat, 'Collective Indigenous Rights and the Environment' in Shawkat Alam et al (eds), *Routledge Handbook of International Law* (Routledge, 2013) 585

Albuquerque, Catarina de, *Report of the Special Rapporteur on the Human Right to Safe Drinking and Sanitation Addendum – Mission to Thailand* (1-2 February 2013) HRC, 24th session, 16 July 2013, A/HRC/24/44 Add.3

Australian Centre for Sustainable Mining Practice, *A Guide to Leading Practice Sustainable Development in Mining* (Australian Government, 2011) (1 January 2017) <<https://www.industry.gov.au/resource/Documents/LPSDP/guideLPSD.pdf>>

Australian Government, Department of the Environment, *Matters of National Environmental Significance : Significant Impact Guidelines 1.1 Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth of Australia, 2013)

Australian Government, Department of Industry Tourism and Resources, *Leading Practice Sustainable Development Program for the Mining Industry*, (Community Engagement and Development, 2006)

Australian Government Solicitor, *Australia's Constitution with Overview and Notes by the Australian Government Solicitor* (Commonwealth of Australia, 7th ed, 2010)

Bastida, Elizabeth, 'Integrating Sustainability into Legal Frameworks for Mining in Some Selected Latin American Countries' MMSD No. 120 (MMSD, 2002)

Bates, Garry, *Environmental Law in Australia* (LexisNexis, 8th ed, 2013)

Barsh, Russel Lawrence, 'The Right to Development as a Human Right : Results of the Global Consultation' (1991) 13 *Human Rights Quarterly* 322

Bartlett, Richard, 'The Status of Indigenous People in Australia' in Gabriel A Moens and Rodolphe Biffot (eds), *The Convergence of Legal Systems in the 21st Century : An Australian Approach* (CopyRight Publishing, 2002) 159

Bird, Ruth, 'Legal Research and the Legal System in Australia' (2000) 28(1) *International Journal of Legal Information* 70

Bonilla, Marianela Cedeno et al, *Environmental Law in Developing Countries : Selected Issues Vol.II* (IUCN, 2004)

Bott, Bruce, *Names and Coss' Effective Legal Research* (LexisNexis, 6th ed, 2015)

Brenner, Verena et al, 'Thailand's Community Forest Bill: U-Turn or Roundabout in Forest Policy?' (1999) in SEFUT Working Papers Series (Working Group Socio-Economics of Forest Use in the Tropics and Subtropics at the University of Freiburg)

Brownlie, Ian, 'The Rights of Peoples in Modern International Law' in James Crawford (eds), *The Rights of Peoples* (Clarendon Press, 1998) 1

- Burdon, Peter D, 'Environmental Human Rights : A Constructive Critique' in Anna Grear, Louis J Kotze (eds), *Research Handbooks on Human Rights and the Environment* (Edward Elgar Publishing, 2015) 61
- Cernic, Jernej Letnar 'State Obligations Concerning Indigenous Peoples' Rights to Their Ancestral Lands: Lex Imperfecta?' (2013) 28(4) *American University International Law Review* 1130
- Chairos, Sunee (eds), 2005 *Annual Report of National Human Rights Commission of Thailand's Examination Report 2548* (National Human Rights Commission, 2006)
- Chairos, Sunee (eds), 2006 *Annual Report of National Human Rights Commission of Thailand's Examination Report 2549* (National Human Rights Commission, 2008)
- Claude, Richard Pierre and Burns H Weston, 'Community or Solidarity Rights – Group Rights' in Richard Pierre Claude and Burns H Weston (eds), *Human Rights in the World Community : Issues and Action* (University of Pennsylvania Press, 3rd ed, 2006) 235
- Connor, Linda, Sonia Freeman and Nick Higginbotham, 'Not Just a Coalmine: Shifting Grounds of Community Opposition to Coal Mining in Southeastern Australia' (2009) 74(4) *ETHNOS* 490
- Constituent Assembly of Thailand, *Intention of the Constitution of the Kingdom of Thailand B.E 2007* (Secretariat of Parliament, 2007)
- CRU Consulting, *Asia-Pacific Mining Sector Study : A Final Report Prepared for APEC Business Advisory Council (ABAC)* CRU Reference number 410883 (London, 2014)
- Darling, Frank C, 'The Evolution of Law in Thailand' (1970) 32 (2) *Review of Politics* 197
- Department of Primary Industries and Mines, *Mining in Thailand: An Investment Guide* (Ministry of Industry, 2009) (1January 2017)
< http://www.dpim.go.th/en/media/003_mine.pdf>
- Dooan, Kim, Marcia Langton and Odette Mazel, 'From Paternalism to Partnership: The Good Neighbour Agreement and the Argyle Diamond Mine Indigenous Land Use Agreement in Western Australia', in Marcia Langton and Judy Longbottom (eds), *Community Future, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom* (Routledge, 2012) ch 13.
- Duangvichai, Natha, *Comparison Amendment between Constitution of the Kingdom of Thailand B.E. 2540 and B.E. 2550 with Summarised Reasons* (Secretariat of the House of Representatives, 2014)
- Dupuy, Pierre-Marie and Jorge E Vinuales, *International Environmental Law* (Cambridge University Press, 2015)
- Environmental Law Alliance Worldwide, *Guidebook for Evaluating Mining Project EIAs* (ELAW, 2010)
- Fischlin, Daniel and Martha Nandorfy, *The Community of Rights: The Rights of Community* (Oxford University Press, 2012)

- Hannum, Hurst, 'The Right of Self-Determination in the Twenty-First Century', in Richard Pierre Claude and Burns H Weston (eds), *Human Rights in the World Community : Issues and Action* (University of Pennsylvania Press, 3rd ed, 2006) 242
- Harris, Jose (eds), *Tonnies : Community and Civil Society* (Cambridge University Press, 2001)
- Hartney, Michael, 'Some Confusions Concerning Collective Rights' (1991) 4 *Canadian Journal of Law and Jurisprudence* 292
- Harvey, Bruce and David Brereton, 'Emerging Models of Community Engagement in the Australian Minerals Industry', paper presented at the International Conference on Engaging Communities, 14-17 August 2005, Brisbane: an initiative of the United Nations and the Queensland Government (1 January 2017) <<http://www.csr.m.uq.edu.au/docs/ICEC.pdf>>
- Harvey, Bruce and Simon Nish, 'Rio Tinto and Indigenous Community Agreement Making in Australia' (2005) 23 *Journal of Energy and Natural Resources* 499
- Hentschel, Thomas, Felix Hruschka and Michael Priester, *Artisanal and Small-Scale Mining : Challenges and Opportunities* (IIED and WBCSD, 2003)
- Hicking, R H, 'The Legal System of Thailand' (1972) 2(8) *Hong Kong Law Journal* 8
- Howitt, Richard, 'Recognition, Respect and Reconciliation – Changing Relations between Aborigines and Mining Interests in Australia' in Howitt Richard (eds), *Rethinking Resource Management. Justice, Sustainability and Indigenous Peoples*, (Routledge, 2000)
- Hsieh, Jolan, *Collective Rights of Indigenous Peoples : Identity-Based Movement of Plain Indigenous in Taiwan* (Routledge, 2006)
- Husa, Jaakko, 'Comparative Law, Legal Linguistics and Methodology of Legal Doctrine' in Mark Van Hoecke (eds), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011) 209
- Hutchinson, Terry, *Researching and Writing in Law* (Lawbook Co, 3rd ed, 2010)
- Jovanovic, Miodrag, *Collective Rights – A Legal Theory* (Cambridge University Press, 2012)
- Jovanovic, Miodrag, 'Cultural Rights as Collective Rights' in Andrzej Jakubowski (eds), *Cultural Rights as Collective Rights: An International Law Perspective* (Brill Nijhoff, 2016) 15
- Kaidonis, Mary A and Natalie P Stoianoff, 'Legislation, Citizen's Rights, and the Self-determination of a Developing Country: A Papua New Guinean Case Study' in Paddock L. et al (eds), *Compliance and Enforcement in Environmental Law Toward More Effective Implementation* (Edward Elgar Publishing, 2011) 591
- Kingsbury, Benedict, 'The Applicability of the International Legal Concept of "Indigenous Peoples" in Asia' in Joanne R Bauer and Daniel A Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999) 336
- Kingsgate Consolidated Limited, *2016 Annual Report* (Kingsgate, 2016)

- Kooijmans, P H, 'Human Rights – Universal Panacea? Some Reflection on the So-called Human Rights of the Third Generation' (1990) 37 *Netherlands International Law Review* 315
- Ksentini, Fatma Zohra, *Final Report of the Special Rapporteur on Human Rights and the Environment*, 6 July 1994, UN Doc. E/CN.4/Sub.2/1994/9
- Leeds, Joe, 'Introduction to Legal System of the Kingdom of Thailand' November/December 2008, Law for ASEAN by the Office of the Council of State of Thailand (1 January 2017) <<http://web.krisdika.go.th/asean/index.php/downloads/index/4>>
- Lertdhamtewe, Pawarit, 'Protection of Plant Varieties in Thailand' (2014) 17(56) *Journal of World Intellectual Property* 142
- Lertdhamtewe, Pawarit, 'Recent Developments in Thailand's Plant Variety Protection Law' (2014) 9(9) *Journal of Intellectual Property Law and Practice* 715
- Lertdhamtewe, Pawarit, 'The Protection of Geographical Indications in Thailand' (2014) 17(3-4) *Journal of World Intellectual Property* 114
- Lertdhamtewe, Pawarit, *The Reformation of Legal Regime for Intellectual Property Protection of Plant Varieties in Thailand*, (Ph.D Thesis, School of Law, Queen Mary and Westfield College, University of London, 2013)
- Lianchamroon, Witoon, 'Community Rights and Farmers' Rights in Thailand' (1998) 36 *Biotechnology and Development Monitor* 9
- Livesley, Kym and Sally Weatherstone, 'Australia' in Michael Bourassa and John Turner (eds), *Mining in 31 Jurisdictions Worldwide* (Law Business Research, 2013) 26
- Magraw, Daniel and Lauren Baker, 'Globalization, Communities and Human Rights: Community-based Property Rights and Prior Informed Consent' in Dinah L. Shelton (eds), *Human Rights and the Environment Volume I* (Edward Elgar Publishing, 2011) 762
- Mikkelsen, Cacillie, *The Indigenous World 2012* (International Work Group for Indigenous Affairs, 2012)
- Mining, Minerals and Sustainable Development Project, *Breaking New Ground* (Earthscan, 2002)
- Montri Roopsuwan et al, *Intention of the Constitution* (Vinyuchon, 1999)
- National Human Right Commission, *Final Report of the Second Set of National Human Rights Commission* (Office of the National Human Right Commission, 2015)
- National Human Right Commission, *2010-2011 Human Rights Evaluation Report and Annual Report 2010-2011 of the National Human Rights Commission of Thailand* (Office of the National Human Right Commission, 2012)
- National Human Right Commission, *2012 Human Rights Evaluation Report and Annual Report 2012 of the National Human Rights Commission of Thailand* (Office of the National Human Right Commission, 2013)

- National Human Right Commission, *2013 Human Rights Evaluation Report and Annual Report 2013 of the National Human Rights Commission of Thailand* (Office of the National Human Right Commission, 2014)
- National Human Right Commission, *2014 Human Rights Evaluation Report and Annual Report 2014 of the National Human Rights Commission of Thailand* (Office of the National Human Right Commission, 2015)
- Newman, Dwight, *Community and Collective Rights, A Theoretical Framework for Rights held by Group* (Hart Publishing, 2011)
- Nickel, James W, 'The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification' in Dinah L. Shelton (eds), *Human Rights and the Environment Volume I* (Edward Elgar Publishing, 2011) 23
- O'Faircheallaigh, Ciaran, 'Social Justice, Aboriginal Leadership and Mineral Development in Australia' in Richard Gregory Johnson III (eds), *A Twenty-first Century Approach to Teaching Social Justice : Educating for Both Advocacy and Action* (Peter Lang, 2009) 216.
- Office of the High Commissioner for Human Rights, *Analytical Study on the Relationship between Human Rights and the Environment*, 16 December 2011, UN Doc. A/HRC/19/34
- Office of the National Human Rights Commission of Thailand, *Performance Report of the 2nd National Human Rights Commission* (National Human Rights Commission, 2015)
- Parliament of the Commonwealth of Australia, *A Review of Australia's Efforts to Promote and Protect Human Rights* (Australian Government Publishing Service, 1994)
- Pring, George (Rock) and Linda Siegele, 'International Law and Mineral Resources Development' in Elizabeth Bastida, Thomas W. Waelde, Janeth Warden-Fernandez (eds), *International and Comparative Mineral Law and Policy; Trends and Prospects* (Kluwer Law International, 2005) 136
- Rayanakorn, Korbkul, *Development of Community Rights and Environmental Law Principles* (Social Research Institute of Chiang Mai University, 2006)
- Sanders, Douglas, 'Collective Rights' (1991) 13 *Human Rights Quarterly* 368
- Samu, Mihály, 'The Collective Rights of the Minorities and their Quality as Constituent of the State', in Kálmán Kulscar and Denis Szabo (eds), *Dual Images – Multiculturalism on Two Sides of the Atlantic* (The Royal Society of Canada and Institute for Political Science of the Hungarian Academy of Sciences, 1996) 180
- Samuel, Geoffrey, 'Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law?' in Mark Van Hoecke (eds), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011) 177
- Sands, Philippe, *Principles of International Environmental Law* (Cambridge, 2nd ed, 2003)
- Saunders, Cheryl, 'The Australian Constitution and our Rights', in Helen Sykes (eds), *Future Justice* (Future Leaders, 2010) 117
- Sax, Joseph L, 'The Search for Environmental Rights' in Dinah L. Shelton (eds), *Human Rights and the Environment Volume I* (Edward Elgar Publishing, 2011) 3

- Scambray, Benedict, *My Country, Mine Country : Indigenous People, Mining and Development Contestation in Remote Australia* (ANU E Press, 2013)
- Schlesinger, Phillip, 'On National Identity : Some Conceptions and Misconceptions Criticized' (1987) 26 *Social Science Information* 219
- Secretariat of the House of Representatives, *Community Rights in the Constitution*, (Secretariat of the House of Representatives, 2012)
- Sengupta, Arjun, 'The Right to Development' in in Richard Pierre Claude and Burns H Weston (eds), *Human Rights in the World Community : Issues and Action* (University of Pennsylvania Press, 3rd ed, 2006) 249
- Singer, Peter, Dan Callahan and Ruth Chadwick, *Encyclopedia of Applied Ethics* (Elsevier Science, 2nd ed, 2012)
- Smith, Rhona K M, *Textbook on International Human Rights* (Oxford University Press, 4th ed, 2010)
- Studdert, David, *Conceptualising Community : Beyond the State and Individual* (Palgrave Macmillan, 2005)
- Sutton, Willis A, and Jiri Kolaja, 'The Concept of Community' (1960) 25(2) *Rural Sociology* 197
- Suwanteep, Kultip, Takehiko Murayama and Shigeo Nishikizawa, 'Environmental impact assessment system in Thailand and its comparison with those in China and Japan' (2016) 58 *Environmental Impact Assessment Review* 1
- Tay, Alice Erh-Soon, 'Human Rights for Australia: A Survey of Literature and Developments, and a Select and Annotated Bibliography of Recent Literature in Australia and Abroad', (1986) Human Rights Commission Monograph Series No. 1 (Australia Government Publishing Service : Canberra)
- Twomey, Anne, 'A Revised Proposal for Indigenous Constitutional Recognition' (2014) 36(3) *Sydney Law Review* 381
- UN Working Group on Business and Human Rights, the, *The UN Guiding Principles on Business and Human Rights : An Introduction* (OHCHR, 2011)
- Vancly, Frank, 'SIA Principles : International Principles for Social Impact Assessment' (2003) 21 *Impact Assessment and Project Appraisal* 5
- Vasak, Karel 'A 30-year Struggle' in Rene Caloz (eds), *UNESCO Courier* (Unesco, 1977) 29
- Vasak, Karel, *The International Dimensions of Human Rights* (Unesco, 1982)
- Vogenauer, Stefan, 'Source of Law and Legal Method in Comparative Law' in Mathias Reimann and Reihhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2008) 869

Walser, G, 'Economic Impact of World Mining (IAEA-SM-362/7)' (Paper presented at the International Symposium on the Uranium Production Cycle and the Environment, Vienna, 2-6 October 2000) (IAEA, 2002) 86

Westra, Laura, *Human Rights: The Commons and the Collective* (UBC Press, 2011)

Weston, Burns H, 'Human Rights : Concept and Content' in Richard Pierre Claude and Burns H Weston (eds), *Human Rights in the World Community : Issues and Action* (University of Pennsylvania Press, 3rd ed, 2006) 17

Willburn, D.R and N.A. Karl, 'Annual Review 2015 : Exploration Review' (2016) *Mining Engineering* 30 (1 January 2017) < <https://minerals.usgs.gov/minerals/mflow/exploration-2015.pdf>>.

World Bank Group's Mining Department, *Large Mines and Local Communities : Forging Partnerships, Building Sustainability* (International Finance Corporation, 2002)

B. CASES

Commonwealth v. Tasmania (1983) 57 Australian Law Journal Reports 450; 46 Australian Law Report 417

Koowarta v. Bjelke-Peterson (1982) 56 Australian Law Journal Reports 625; 39 Australian Law Report 417

Mabo (No 2) (1992) 175 CLR 1; 107 ALR 1 ('*Mabo*')

Mr. Sompong Shinsaeng and 392 people V Minister of Industry (1st respondent) and Mr. Dusit Triwatsuwan (2nd respondent), Konkaen Administrative Court, Black Case No. 218/2545, Red Case No. 325/2547

Mr. Sompong Shinsaeng and 392 people V Minister of Industry (1st respondent) and Mr. Dusit Triwatsuwan (2nd respondent), Supreme Administrative Court, Black Case No. OR 477/2547, Red Case No. OR 86/2552

Miss Suekanya Theerachartdamrong V Minister of Industry and el., Akara Mining Ltd. (Cross-claimer), 27 March 2012 (Thailand) Pitsanuloke Administrative Court, Black Case No. 228/2553, Red Case No. 163/2555

Mr. Suppawit Meema and 48 people V Akara Mining Ltd. (Thailand) National Human Rights Commission of Thailand's Examination Report No. 67/2549

Phupa-Pamai Forestry Conservation Club by Mr. Sompong Shinsaeng and 340 people (Thailand) National Human Rights Commission's Decision Report No. 26/2548

Social and Economic Rights Action Centre (SERAC) v Nigeria, para 44 (*Ogoniland Case*), cited in Dinah Shelton (eds), *The Oxford Handbook of International Human Rights Law* (Oxford, 2013)

Wik Peoples v Queensland (1996) 141 ALR 129

C. LEGISLATION

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

Aboriginal Land Trust Act 1966 (SA)

Announcement of the National Council for Peace and Order No. 11/2557 (2014) Subject: Revocation of the Constitution of the Kingdom of Thailand (Thailand)

Announcement of the National Council for Peace and Order No. 72/2559 (2016) Subject: The Mitigation of the Impacts from Gold Mine Operation (Thailand)

Community Organisation Council Act B.E. 2551 (2008) (Thailand)

Community Rights Law with respect to Forest Lands (2009) (Liberia)

Constitution Act 1902 (NSW)

Constitution Act 1934 (SA)

Constitution Act 1975 (Vic)

Constitution Act 2001 (Qld)

Constitution Amendment Act 2001 (Qld)

Constitution (Recognition of Aboriginal People) Act 2001 (Vic) amended Constitution Act 1975 (Vic)

Constitution Amendment (Recognition of Aboriginal People) Act 2010 (NSW) amended the Constitution Act 1902 (NSW)

Constitution (Recognition of Aboriginal Peoples) Amendment Act 2012 (SA) inserted a new section 2 into the Constitution Act 1934 (SA)

Constitution of the Commonwealth of Australia (Australia)

Constitution of the Kingdom of Thailand B.E. 2540 (1997) (Thailand)

Constitution of the Kingdom of Thailand B.E. 2550 (2007) (Thailand)

Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) (Thailand)

Constitution of the Republic of Serbia (Serbia)

(Draft) Constitution of the Kingdom of Thailand B.E. 2558 (2015) (Thailand)

(Draft) Constitution of the Kingdom of Thailand B.E. 2559 (2016) (Thailand)

Enhancement and Conservation of the National Environmental Quality Act B.E. 2535 (1992) (Thailand)

Environmental Protection Act 1994 (Qld)

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Mineral Resources Act 1989 (Qld)

Minerals Act B.E. 2510 (1967) (Thailand)

Mineral Royalty Rates Act B.E. 2509 (1966) (Thailand)

Mining Act 1992 (NSW)

Native Title Act 1993 (Cth)

Pitjantjatjara Land Rights Act 1981 (SA)

Plant Variety Protection Act B.E. 2542 (1999) (Thailand)

Protection of Geographical Indications Act B.E. 2546 (2003) (Thailand)

Regulation to the Community Rights Law with respect to Forest Land (2011) (Liberia)

Rule of the Office of the Prime Minister on Public Consultation, B.E. 2548 (2005) (Thailand)

D. TREATIES

Agreement on Trade-Related Aspects of Intellectual Property Rights in Marrakesh Agreement Establishing the World Trade Organisation, opened for signature 15 April 1994, UNTS 229, entered into force 1 January 1995)

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001)

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

International Covenant on Economic, Social, and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)

Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity (Nagoya, 30 October 2010)

United Nations Convention on Biological Diversity, opened for signature 5 June 1992, 31 UNTS 818 (entered into force 29 December 1993)

United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, UN Doc. A/RES/61/295, annex (2007)

United Nations Declaration on the Right to Development, 4 December 1986, UN Doc. A/RES/41/128 (1986)

Universal Declaration of Human Rights, 10 December 1948, 217 A, UN Doc. A/810 (1948)

1992 *Rio Declaration on Environment and Development*, 14 June 1992, UN Doc. A/CONF.151/26 (1992)

E. OTHERS

Australian Government, *State and Territory Government* (1 January 2017)

<<http://www.australia.gov.au/about-government/how-government-works/state-and-territory-government>>

Australian Government, Department of Infrastructure and Regional Development, *Norfolk Island Reform* (1 January 2017) <http://regional.gov.au/territories/norfolk_island/reforms>

Australian Human Rights Commission, *How are Human Rights Protected in Australian Law?* (1 January 2017) <<https://www.humanrights.gov.au/how-are-human-rights-protected-australian-law>>

Australian Human Rights Commission, *Human Rights – What do I need to Know?* (1 January 2017) <http://www.humanrights.gov.au/sites/default/files/content/letstalkaboutrights/HR_AC_T.doc>

Australian Human Rights Commission, *Sustainable Development and Indigenous Rights* (13 April 2016) <<https://www.humanrights.gov.au/news/speeches/site-navigation-35>>

Australia International Treaty Making Information Kit (18 August 2016)

<<http://www.austlii.edu.au/au/other/dfat/reports/infokit.html#sect1>>

Berlin Guidelines, ST/TCD/20 United Nations Environmental Guidelines for Mining Operations Compiled by United Nations Department of Economic and Social Affairs (UNDESA) and United Nations Environment Programme Industry and Environment (UNEP)

Chandler and Thong-Ek, *Thai Mining Legislation*, 2011 (1 January 2017)

<<http://www2.ctlo.com/mediacenter/Publications/2011-03-29-ThaiMiningLegislation-02March2011325821.pdf>>

Community Environmental Legal Defense Fund, *Community Rights* (30 December 2016)

<<http://celdf.org/community-rights/>>

Convention on Biodiversity, *List of Parties* (1 January 2017)

<<https://www.cbd.int/information/parties.shtml>>.

Court of Justice of Thailand, *History* (1 January 2017) <<http://www.coj.go.th/en/history.html>>

Crispin, Shawn W., 'What Thailand's Rejected Constitution Means', *The Diplomat* (online), 8 September 2015 <<http://thediplomat.com/2015/09/what-thailands-rejected-constitution-means>>

Editor, 'Test shows hundreds in mining area poisoned by heavy metals', *Prachathai* (online), 11 March 2016 <<http://prachatai.org/english/node/5930>>

Fuller, Thomas, 'Thailand's Military Junta Rejects Draft Constitution', *The New York Times* (online), 6 September 2015 <http://www.nytimes.com/2015/09/07/world/asia/thai-draft-constitution-rejected-by-junta-backed-council.html?mid=tw-share&_r=1>

International Association for Impact Assessment, *Principles of Environmental Impact Assessment Best Practice* (IAIA, 1999) (1 January 2017) <http://www.iaia.org/uploads/pdf/principlesEA_1.pdf>

International Comparative Legal Guides, ‘*Australia : Mining Law 2017*’ (15 June 2017) <<https://iclg.com/practice-areas/mining-law/mining-law-2017/australia>>

International Institute for Environment and Development, *Mining, Minerals and Sustainable Development Project (MMSD)* (1 January 2017) <<http://www.ied.org/mining-minerals-sustainable-development-mmsd>>

Law Reform Commission of Thailand, *Letter RE: Recommendation and Suggestion on Enacting the Law of Community Rights*, No. LRCT 01/447, dated 24 March 2015 ATTN: Prime Minister; Letter No. LRCT 01/448, dated 24 March 2015 ATTN: President of the National Legislative Assembly; Letter No. 01/449, dated 24 March 2015 ATTN: Chairperson of the National Reform Council (Thailand)

Mining Facts, *Economy Impact* (1 January 2017) <<http://www.miningfacts.org/Economy/>>

Mining Facts, *How can Mining Become more Environmentally Sustainable?* (1 January 2017) <<http://www.miningfacts.org/Environment/How-can-mining-become-more-environmentally-sustainable/>>

Ministry of Foreign Affairs of the Kingdom of Thailand, *Press Releases : Unofficial Result of Thailand’s Draft Constitution Referendum on 7 August 2016* (10 January 2017) <<http://www.mfa.go.th/main/en/media-center/14/68996-Unofficial-Result-of-Thailand%E2%80%99s-Draft-Constitution.html>>

Minutes of Meeting of the Constituent Assembly of Thailand No. 26/2550 (Extra) 15 June 2007, 144-149

National Human Rights Commission, *Statistics of Monitoring Report on the National Human Rights Commission’s Examination Report of Human Rights Violation 2002 – 2015* (10 January 2017) <<http://www.nhrc.or.th/getattachment/f2a58b27-77cf-40d7-87ce-c24660bde97c/%E0%B9%80%E0%B8%A3%E0%B8%B7%E0%B9%88%E0%B8%AD%E0%B8%87%E0%B8%97%E0%B8%B5%E0%B9%88-1.aspx>> (in Thai)

New South Wales Aboriginal Land Council, *Constitutional Recognition of Aboriginal People* (1 January 2017) <<http://www.alc.org.au/newsroom/network-messages/constitutional-recognition-of-aboriginal-people.aspx>>

Queensland Courts, ‘*Objecting to Mining Projects*’ (15 June 2017) <<http://www.courts.qld.gov.au/courts/land-court/land-disputes/objecting-to-mining-projects>>

Royal Thai Embassy, *Summary of the Briefing by Mr. Norachit Sinhaseni, Member and Spokesperson of the Constitution Drafting Commission to the Diplomatic Corps on the Drafting of the Constitution* (10 January 2017) <<http://www.thaiembassy.org/bucharest/contents/files/news-20151022-155949-215002.pdf>>

Royal Thai Government, *News of the Ministry of Industry : DPIM Announcement of Termination on Gold Mine Concession*, date 13 May 2016 (1 January 2017) <<https://goo.gl/cVIC6Z>>

Statistics Group, Information Technology and Communication Center, Department of Primary Industries and Mines, *Mineral Statistics of Thailand 2009-2010*, Statistic Report No. ICC 1/2557, (Department of Primary Industries and Mines, 2014) (1 January 2017) <<http://www7.dpim.go.th/stat/productpdf.php?product=%&pdcode=%&pdyear1=2015&pdyear2=2015>>

Thailand Government Statement: Hill-Tribe Welfare and Development, UN Doc. E/CN.4/AC.2/1992/4 (1992)

Treaty Law Resources, *Australia International Treaty Making Information Kit* (1 January 2017) <<http://www.austlii.edu.au/au/other/dfat/reports/infokit.html#sect1>>

Twomey, Anne, *Re: Submission to the Joint Select Committee on Aboriginal Constitutional Recognition*, Letter to the Hon Michael Misichin MLC, Attorney-General and Minister of Commerce, Chair on Joint Select Committee on Aboriginal Constitutional Recognition, date 7 January 2015

United Nations, *Berlin II Guidelines for Mining and Sustainable Development*, (2002) (10 January 2017) <https://www.commdev.org/userfiles/files/903_file_Berlin_II_Guidelines.pdf>

United Nations Human Rights, *Guiding Principle on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, HR/PUB/11/04 (UNHR, 2011)

United Nations Human Rights, , *The Right to Development at a Glance* (10 January 2017) <http://www.un.org/en/events/righttodevelopment/pdf/rtd_at_a_glance.pdf>

Wipatayotin, Apinya, Achara Ashayagachat and AP, 'S44 Order Forces Akara to Cease Operations', *Bangkok Post* (online), (1 January 2017) <<http://www.bangkokpost.com/news/general/1159589/s44-order-forces-akara-to-cease-operations>>

Appendix 1

Provisions of Community Rights in the 1997 Constitution⁴²⁹

Chapter III Rights and Liberties of the Thai People

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 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.

429 Unofficial translation of *Constitution of the Kingdom of Thailand B.E. 2540* (1997) (Thailand), available from Asian Legal Information Institute (10 January 2017)

<<http://www.asianlii.org/th/legis/const/1997/1.html>>.

Appendix 2

Provisions of Community Rights in the 2007 Constitution⁴³⁰

Part 12

Community Rights

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.

430 Unofficial translation of *Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand), available from Asian Legal Information Institute (10 January 2017)

<<http://www.asianlii.org/th/legis/const/2007/1.html>>.

Appendix 3

Provisions of Community Rights in the 2016 Draft Constitution⁴³¹

Chapter 3 Rights and Liberties of the Thai People

Section 41 A person and a community shall enjoy the right;

- (1) to be informed of and have access to public information or news in possession of State agencies as provided by law,
- (2) to submit a petition to a State agency and be informed of the result of its consideration without delay,
- (3) to bring an action against a State agency holding it liable for an act or omission of an act as committed by its government official, official and employee.

Section 42 A person shall enjoy the liberty to unite and form an association, a co-operative, a union, an organization, a community, or any other group.

Restriction on the liberty under Paragraph One shall not be permitted, except by virtue of the provisions of the law enacted for the purpose of protecting public interest, maintaining public order or good morals of people, or preventing or eliminating barrier or monopoly.

Section 43 A person and a community shall enjoy the right;

- (1) to conserve, restore, or promote wisdom, art, culture, tradition and custom of good value in the locality and the nation,
- (2) to manage, maintain and utilize natural resources, environment, and biodiversity in a balanced and sustainable manner according to the procedure prescribed by law.
- (3) to sign and submit a petition with recommendations to a State agency to undertake any act which will be beneficial to the people or the community or to omit any act which will affect peaceful livelihood of the people or the community, and to be informed of the result of its consideration without delay. In this regard, such State agency shall, with participation of the concerned people, consider the recommendations according to the procedure prescribed by law.
- (4) to arrange for a community welfare system.

The rights of the person and the community under Paragraph One shall include the right to engage with local administration organizations or the State in the undertaking of the actions.

431 Unofficial translation of *Draft Constitution of the Kingdom of Thailand B.E. 2558 (2016) (Thailand)*, available from United Nations : Thailand, *Draft Constitution of the Kingdom of Thailand 2016 – Unofficial English Translation* (10 January 2017)

<http://www.un.or.th/wp-content/uploads/2016/06/2016_Thailand-Draft-Constitution_EnglishTranslation_Full_Formatted_vFina....pdf>.

Appendix 4

Summary of Community Rights in Thailand's *Constitutions*

1. Right to conserve and restore custom, traditional knowledge, art, and culture

Constitution	Section	Right holders (in provisions)	Rights
The 1997 Constitution	46	Traditional community	Collective Rights
The 2007 Constitution	66	Community	Collective Rights
		Local community	
		Traditional local community	
The 2016 Draft Constitution	43 (1)	Person	Individual Rights
		Community	Collective Rights

2. Right to the management, maintenance, preservation and exploitation of natural resources and the environment

Constitution	Section	Right holders (in provisions)	Rights
The 1997 Constitution	46	Traditional community (<i>participate in</i>)	Collective Rights
The 2007 Constitution	66	Community (<i>participate in</i>)	Collective Rights
		Local community (<i>participate in</i>)	
		Traditional local community (<i>participate in</i>)	
The 2016 Draft Constitution	43 (2)	Person	Individual Rights
		Community	Collective Rights

3. Right to a healthy environment (the substantive environmental right)

Constitution	Section	Right holders (in provisions)	Rights
The 1997 Constitution	56	Person	Individual Rights
The 2007 Constitution	67	Person	Individual Rights
The 2016 Draft Constitution	N/A	N/A	N/A

4. Right to access to justice (the procedural environmental right)

Constitution	Section	Right holders (in provisions)	Rights
The 1997 Constitution	56 para 3	Person	Individual Rights
The 2007 Constitution	67 para 3	Community to	Collective Rights
The 2016 Draft Constitution	41 (3)	Person	Individual Rights
		Community	Collective Rights

5. Right to access to environmental information (the procedural environmental right)

Constitution	Section	Right holders (in provisions)	Rights
The 1997 Constitution	N/A	N/A	N/A
The 2007 Constitution	N/A	N/A	N/A
The 2016 Draft Constitution	41 (1)	Person	Individual Rights
		Community	Collective Rights

6. Right to public participation in environmental decision-making (the procedural environmental right)

Constitution	Section	Right holders (in provisions)	Rights
The 1997 Constitution	N/A	N/A	N/A
The 2007 Constitution	N/A	N/A	N/A
The 2016 Draft Constitution	41(2), 43(3)	Person	Individual Rights
		Community	Collective Rights

7. Right to arrange for a community welfare system

Constitution	Section	Right holders (in provisions)	Rights
The 1997 Constitution	N/A	N/A	N/A
The 2007 Constitution	N/A	N/A	N/A
The 2016 Draft Constitution	43 (4)	Person	Individual Rights
		Community	Collective Rights